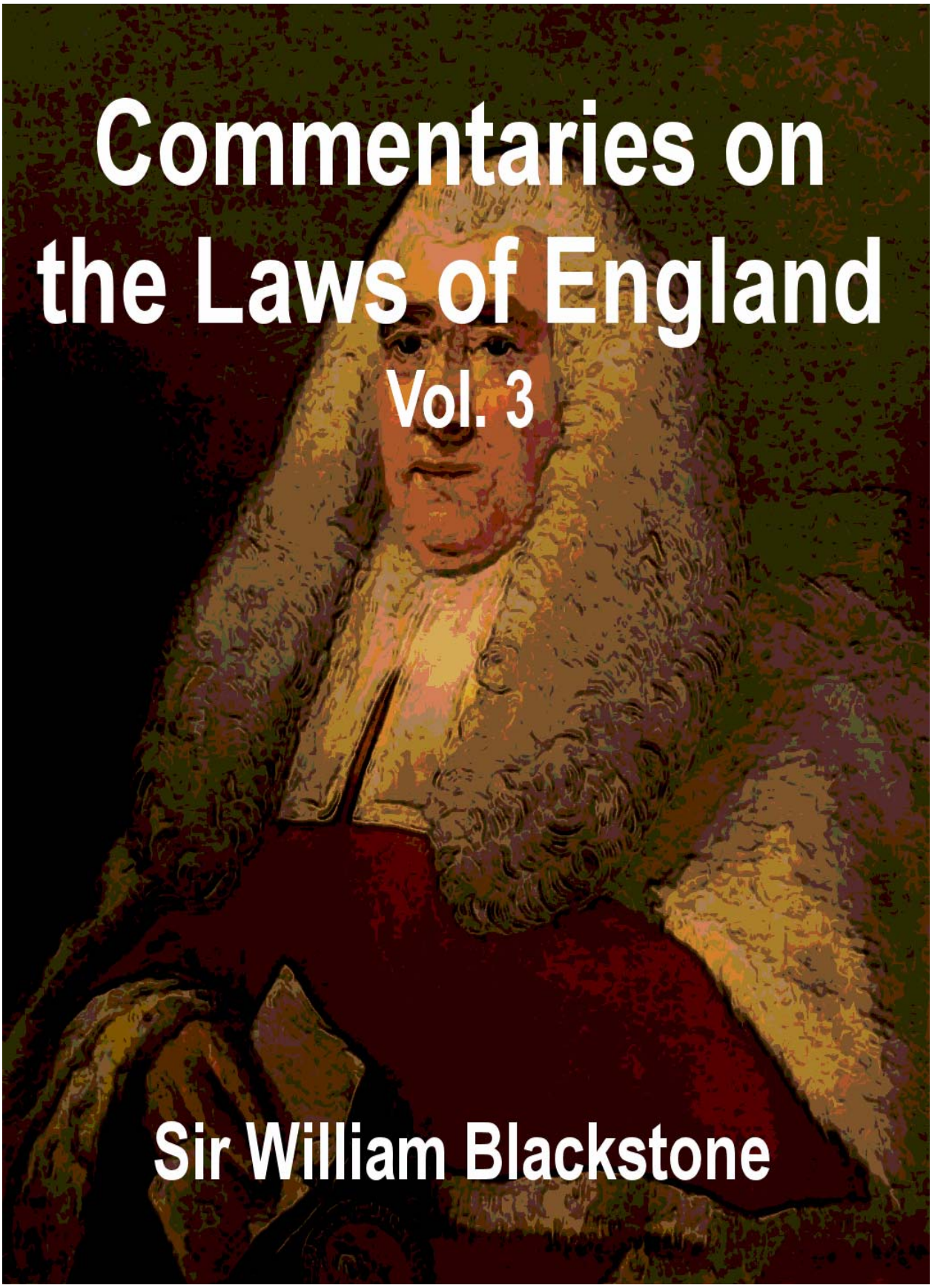
Commentaries on
the Laws of England
Vol. 3
Sir William Blackstone

COMMENTARIES ON THE LAWS OF ENGLAND

BOOK THE THIRD (1768)

WILLIAM BLACKSTONE, Esq.

Based on the first edition, together with the most material corrections and additions in the second edition.

Translation of greek, latin, italian and french quotations (with some modifications) by J. W. Jones, Esq. (1823)

Footnotes have been converted to chapter end notes.
Spelling has been modernized.

This electronic edition
© Copyright 2003, 2005 Lonang Institute
www.lonang.com

Table of Contents

BOOK 3: Private Wrongs

Chap. 1: Of the Redress of Private Wrongs by the Mere Act of Parties 2
Chap. 2: Of Redress by the Mere Operation of Law 12
Chap. 3: Of Courts in General 14
Chap. 4: Of the Public Courts of Common Law and Equity 19
Chap. 5: Of Courts Ecclesiastical, Military and Maritime 38
Chap. 6: Of Courts of a Special Jurisdiction 44
Chap. 7: Of the Cognizance of Private Wrongs 54
Chap. 8: Of Wrongs and Their Remedies, Respecting the Rights of Persons 72
Chap. 9: Of Injuries to Personal Property 90
Chap. 10: Of Injuries to Real Property, and First of Dispossession, or Ouster 104
Chap. 11: Of Dispossession, or Ouster, of Chattels Real 123
Chap. 12: Of Trespass 129
Chap. 13: Of Nuisance 134
Chap. 14: Of Waste 139
Chap. 15: Of Subtraction 143
Chap. 16: Of Disturbance 147
Chap. 17: Of Injuries Proceeding From, or Affecting, The Crown 158
Chap. 18: Of the Pursuit of Remedies by Action; and, First, of the Original Writ 167
Chap. 19: Of Process 173
Chap. 20: Of Pleading 181
Chap. 21: Of Issue and Demurrer 194
Chap. 22: Of the Several Species of Trial 200
Chap. 23: Of the Trial by Jury 215
Chap. 24: Of Judgments, and Its Incidents 236
Chap. 25: Of Proceedings, In the Nature of Appeals 245
Chap. 26: Of Execution 251
Chap. 27: Of Proceedings in the Courts of Equity 259
Appendix I: Proceedings on a Writ of Right Patent 277
Appendix II: Proceedings on an Action of Trespass in Ejectment 281
Appendix III: Proceedings on an Action of Debt, in the Court of Common Pleas 286

BOOK 3:
Private Wrongs

CHAPTER 1

Of the Redress of Private Wrongs by the Mere Act of the Parties

AT the opening of these commentaries[1] municipal law was in general defined to be, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."[2] From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned[3] the distribution of these collections into two general heads; under the former of which we have already considered the rights that were defined and established, and under the latter are now to consider the wrongs that are forbidden and redressed, by the laws of England.

IN the prosecution of the first of these inquiries, we distinguished rights into two sorts: first, such as concern or are annexed to the persons of men, and are then called *jura personarum*, or the rights of persons; which, together with the means of acquiring and losing them, composed the first book of these commentaries: and, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called *jura rerum*, or the rights of things; and these, with the means of transferring them from man to man, were the subject of the second book. I am now therefore to proceed to the consideration of wrongs; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that, before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is *jus* [right] being necessarily prior to what may be termed *injuria* [injury], and the definition of *fas* [lawful] precedent to that of *nefas* [unlawful].

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

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 volume will be to consider the redress of private wrongs, by suit or action in courts. But as some injuries are of such a nature, that they furnish or 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 cooperating with the act of law.

© Copyright 2003, 2005 Lonang Institute

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 defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray.[4] 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-defense therefore as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defense and prevention; for then the defender would himself become an aggressor.

II. RECAPTION or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one has 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 of find them; so ti be not in a riotous manner, or attended with a breach of the peace.[5] 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, 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 individual 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 reception 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;[6] but must have recourse to an action at law.

III. AS reception 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

© Copyright 2003, 2005 Lonang Institute

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 does 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.[7] 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.[8] 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.[9] 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 nonpayment 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.

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

1. AND, first, it is necessary to premise, that a distress,[10] *districtio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury, for which a distress may be taken is that of nonpayment of rent. It was observed in a former volume[11] that distresses were incident by the common law to every rent-service, and by particular reservation to rent-charges also; but not to rent-seck, till the statute 4 Geo. II. c. 28. extended the same remedy to all rents alike, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court,[12] or other certain personal service,[13] the lord may distrain, of common right. 3. For amercements in a court-leet a distress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant it.[14] 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds damage-feasant; that is, doing him hurt or damage, by treading down his grass, or the like; in which case the owner of the soil may distrain them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament, (as for assessments

© Copyright 2003, 2005 Lonang Institute

made by commissioners of sewers,[15] or for the relief of the poor[16]) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distresses[17] are partly analogous to the ancient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fieri facias* [cause to be made], of which hereafter.

2. SECONDLY; as to the things which may be distrained, or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distrained, unless particularly protected or exempted. Instead therefore of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions.[18] And, 1. As every thing which is distrained is presumed to be the property of the wrongdoer, it will follow that such things, wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and all animals *ferae naturae* [wild nature]) cannot be distrained. Yet if deer (which are *ferae naturae*) are kept in a private enclosure for the purpose of sale or profit, this so far changes their nature by reducing them to a kind of stock or merchandise, that they may be distrained for rent.[19] 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress; as an ax with which a man is cutting wood, or a horse while a man is riding him. But horses, drawing a cart, may (cart and all) be distrained for rent-arrere; and also if a horse, though a man be riding him, be taken damage-feasant, or trespassing in another's grounds, the horse notwithstanding his rider may be distrained and led away to the pound.[20] 3. Valuable things in the way of trade shall not be liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the tenant or a stranger, are distrainable by him for rent: for otherwise a door would be opened to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant, if by the tenant's default the chattels are distrained, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken; It they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrere by the landlord.[21] So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence.[22] But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them, till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have laid down and rose up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice, whither his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them:[23] for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the ax of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plow, *averia carucae*, and sheep, are privileged from distresses at common law;[24] while goods or other sort of

© Copyright 2003, 2005 Lonang Institute

beats, which Bracton calls *catalla otiosa* [chattels not privileged] may be distrained. But, as beasts of the plow may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions.[25] And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress.[26] 5. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained: for which reason milk, fruit, and the like, cannot be distrained; a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. & M. c. 5. corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained as well as other chattels. 6. Lastly, things fixed to the freehold may not be distrained; as caldrons, windows, doors, and chimneypieces: for they favor of the realty. For this reason also corn growing could not be distrained; till the statute 11 Geo. II. c. 19. empowered landlords to distrain corn, grass or other products of the earth, and to cut and gather them when ripe.

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

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

IN the first place then, all distresses must be made by day, unless in the case of damage-feasant; an exception being there allowed, lest the beasts should escape before they are taken.[27] And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now[28] he may distrain within six months after the determination of such lease whereon rent is due. If the lessor does not find sufficient distress on the premises, formerly he could resort no where else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But now[29] the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* [good faith] sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for

© Copyright 2003, 2005 Lonang Institute

that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door:[30] and now[31] he may, by the assistance of the peace officer of the parish, break open in the day time any place, locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that goods are concealed therein.

WHERE a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time, and part at another.[32] But if he distrains for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy.[33]

DISTRESSES must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As if[34] the landlord distrains two oxen for twelvepence rent; the taking of both is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distrained one of them. But for homage, fealty, or suit, as also for parliamentary wages, it is said that no distress can be excessive.[35] For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law.[36]

WHEN the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be rescued by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue.[37] But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law.[38]

A POUND (*parcus*, which signifies any enclosure) is either pound-overt, that is, open overhead; or pound-covert, that is, close. By the statute 1 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19. which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound *pro hac vice* [for this time], for securing of such distress. If a live distress, of animals, be impounded in a common pound-overt, the owner must take notice of it at his peril; but if in any special pound-overt, so constituted for this particular purpose, the distrainor must give notice to the owner: and, in both these cases, the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if they be put in a pound-covert, as in a stable or the like, the landlord or distrainor must feed and sustain them.[39] A distress of household-goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainor must answer for the consequences.

WHEN impounded, the goods were formerly, as was before observed, only in the nature of satisfaction; and upon this account it has been held,[40] that the distrainor is not at liberty to work or

© Copyright 2003, 2005 Lonang Institute

use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction, or contests the right of distraining, by replevying the chattels. To replevy (*replegiare*, that is, to take back the pledge) is, when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and if that be determined against him, to return the cattle or goods once more into the hands of the distrainor. This is called a replevin, or which more will be said hereafter. At present I shall only observe, that, as a distress is at common law only in nature of a security for the rent or damages done, a replevin answers the same end to the distrainor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

THIS kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to him, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law.[41] And for an amercement imposed at a court-leet, the lord may also sell the distress:[42] partly because, being the king's court of record, its process partakes of the royal prerogative;[43] but principally because it is in the nature of an execution to levy a legal debt. And, so in the several statute-distresses, before-mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament,[44] in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself. And, by this means, a full and entire satisfaction may now be had for rent in *arrerre*, by the mere act of the party himself, *viz.* by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.

BEFORE I quit this article, I must observe, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for, if any one irregularity was committed, it vitiated the whole, and made the distrainors trespassers *ab initio* [from the beginning].[45] But now by the statute 11 Geo. II. c. 19. it is provided, that, for any unlawful act done, the whole shall not be unlawful, or the parties trespassers *ab initio*; but that the party grieved shall only have an action for the real damage sustained; and not even that, if tender of amends is made before any action is brought.

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,[46] lies only in *prender*, and not in *render*) the lords may seize the identical thing itself, but cannot distrain any other chattel for it.[47] 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

© Copyright 2003, 2005 Lonang Institute

could be brought.

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

I. ACCORD is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action.[48] By several late statutes, particularly 11 Geo. II. c. 19. in case of irregularity in the method of distraining; and 24 Geo. II. c. 24. in case of mistakes committed by justices of the peace; even tender of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

II. ARBITRATION is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire, (imperator) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice.[49] But the right of real property cannot thus pass by a mere award:[50] which subtlety in point of form (for it is now reduced to nothing else) had its rise from feudal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of lands; and it will be a breach of the arbitration-bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named.[51] And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, and which still depend upon the rules of the common law: enacting, by statute 9 & 10 W. III. c. 15. that all merchants and others, who desire to end any controversy, (for which there is no other remedy but by personal action or suit in equity) may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record: and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to such rules and orders as are issued by the courts themselves.

© Copyright 2003, 2005 Lonang Institute

NOTES

1. Introd. § 2.

2. *Sanctio justa, jubens honesta, et prohibens contraria* [a rule of civil conduct, commanding right, and prohibiting wrong]. Cic. 11 Philipp. 12, Bract. l. I. c. 3.

3. Book I. ch. 1.

4. 2 Roll. Abr. 546. 1 Hawk. P. C. c. 131.

5. 3 Inst. 134. Hal. Anal. § 46.

6. 2 Roll. Rep. 55, 56. 208. 2 Roll Abr. 565, 566.

7. 5 Rep. 101. 9 Rep. 55.

8. Salk. 459.

9. Cro. Car. 184.

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

11. Book II. ch. 3.

12. Bro. Abr. tit. distress. 15.

13. Co. Litt. 46.

14. Brownl. 36.

15. Stat. 7 Ann. c. 10.

16. Stat. 43 Eliz. c. 2.

17. 4 Burr. 589.

18. Co. Litt. 47.

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

20. 1 Sid. 440.

21. Cro. Eliz. 549.

22. Co. Litt. 47.

23. Lutw. 1580.

24. Stat. 51 Hen. III. St. 4. *De districtione scaccaria* [of Exchequer distraint].

25. 4 Burr 589.

26. Ibid. 588.

27. Co. Litt. 142.

28. Stat. 8 Ann. c. 14.

29. Stat. 8 Ann. c. 14. 11 Geo. II. c. 19.

30. Co. Litt. 161. Comberb. 17.

31. Stat. 11 Geo. II. c. 19.

© Copyright 2003, 2005 Lonang Institute

32. 2 Lutw. 1532.
33. Cro. Eliz. 13. Stat. 17. Car. II. c. 7. 4 Burr. 590.
34. 2 Inst. 107.
35. Bro. Abr. 5. assize. 291. prerogative. 98.
36. 1 Ventr. 104. Fitzgibb. 85. 4 Burr. 590.
37. Co. Litt. 160, 161.
38. Ibid. 47.
39. Co. Litt. 47.
40. Cro. Jac. 148.
41. Bro. Abr. t. distress. 71.
42. 8 Rep. 41.
43. Bro. Ibid. 12 Mod. 330.
44. 2 W. & M. c. 5. 8 Ann. c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.
45. 1 Ventr. 37.
46. Cop. § 25.
47. Cro. Eliz. 590. Cro. car. 260.
48. 9 Rep. 79.
49. Brownl. 55. 1 Freem. 410.
50. 1 Roll. Abr. 242. Lord Raym. 115.
51. Append. No. III. § 6.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 2

Of Redress by the Mere Operation of Law

THE remedies for private wrongs, which are effected by the mere operation of 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 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.[1] This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being 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 has 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 should prove insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion.[2] Nor shall an executor of his own wrong be in any case permitted to retain.[3]

II. REMITTER is where he, who has the true property or *jus proprietatis* in lands but is out of possession thereof and has no right to enter without recovering possession in an action, has 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.[4] The right of entry, which he has gained by a bad title, shall be *ipso facto* [for that reason] 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.[5] 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.[6] For he has hereby gained a new right of possession, to which the law immediately annexes his ancient right of propriety.

© Copyright 2003, 2005 Lonang Institute

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.[7] 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,[8] 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 has 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 does 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,[9] the benignity of the law is such, as when, to preserve the principles and grounds of law, it deprives a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit.* [What is without remedy, is thereby strengthened, if free from fault.] But there shall be no remitter to a right, for which the party has no remedy by action:[10] as if the issue in trial be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate tail:[11] 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 could not by any action have recovered his ancient estate, he shall not recover it by remitter.

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

NOTES

1. 1 Roll. Abr. 922. Plowd. 543.
2. Viner. Abr. t. Executors. D. 2.
3. 5 Rep. 30.
4. Litt. § 659.
5. Co. Litt. 358. Cro. Jac. 489.
6. Finch. L. 194. Litt. § 683.
7. Co. Litt. 348. 350.
8. § 661.
9. Elem. c. 9.
10. Co. Litt. 349.
11. Moor. 115. 1 And. 286.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 3
Of Courts in General

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 cooperate; 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,[1] 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 ma retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover of 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 neighbors 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 an action against himself: the two cases wherein they happen being such, wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

IN all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever 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 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.[2] 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.[3] For whether created by act of parliament, letters patent, or prescription, (the only methods of erecting a new court of judicature[4]) the kings consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in

© Copyright 2003, 2005 Lonang Institute

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 has 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.[5] 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,[6] and therefore no other court has authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record.[7] 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 40 s; nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.[8]

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 officers 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.[9] 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[10]) unless by special license under the king's letters patent.[11] This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person;[12] for he has not discretion to enable him to appoint a proper substitute: and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest.[13] 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*." [" Although formerly it had been the custom for no one to act in the name of another; yet, as this was attended with great inconvenience, men began to

© Copyright 2003, 2005 Lonang Institute

carry on law-suits by proctors."][14] so with us, upon the same principle of convenience, it is now permitted in general, by diverse ancient statutes, whereof the first is statute West. 2. c. 10. that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster-hall; and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practice in the court of common pleas; nor *vice versa*. To practice in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II. c. 46. 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 Hen. 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[15] have laid them under farther 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;[16] and are in our old books styled apprentices, *apprenticii ad legem* [apprentices to the law], being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue,[17] they might be called to the state and degree of sergeants, or *servientes ad legem* [sergeants at law]. How ancient and honorable this state and degree is, the form, splendor, and profits attending it, have been so fully displayed by many learned writers,[18] that they need not be here enlarged on. I shall only observe, that sergeants at law are bound by a solemn oath[19] to do their duty to their clients: and that by custom[20] 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 puisnè 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* [mark of honor], without either patent or fee;[21] 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.[22] 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:[23] but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject.[24] A custom has of late years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honor with that mark of distinction: whereby they are entitled to such rank and pre-audience[25]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[26]) 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

© Copyright 2003, 2005 Lonang Institute

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 defense of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependants 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,[27] 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 counselor cannot demand without doing wrong to his reputation:[28] as is also laid down with regard to advocates in the civil law,[29] whose honorarium was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80£ of English money.[30] And, in order to encourage due freedom of speech in the lawful defense of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honorable professions) it has been held 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.[31] 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.[32]

NOTES

1. ch. 1.
2. Co. Litt. 58.
3. See book 1. ch. 7.
4. Co. Litt. 260.
5. Ibid.
6. Finch. L. 231.
7. Salk. 200. 12 Mod. 388.
8. 2 Inst. 311.
9. Pope Boniface VIII, in 6 Decretal. l. 3. t. 16. § 3. speaks of "*procuratoribus, qui in aliquibus partibus attornati nuncupantur*" ["proctors, who are in some places called attorneys"].
10. Stiernhook de jure Goth. l. t. c. 6.
11. F. N. B. 25.
12. Ibid. 27.
13. Bro. Abr. t. idiot. I.
14. Inst. 4. tit. 10.
15. 3 Jac I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 22 Geo. II. c. 46. 23 Geo. II. c. 26.
16. See vol. introd. § 1.

© Copyright 2003, 2005 Lonang Institute

17. de LL. c. 50.

18. Fortesc. ibid. 10 Rep. pref. Dugdal. Orig. Turid. To which may be added a tract by the late sergeant Wynne, printed in 1765, entitled, “observations touching the antiquity and dignity of the degree of sergeant at law.”

19. 2 Inst. 214.

20. fortefe. c. 50.

21. See his letters. 256.

22. See his life by Roger North. 37.

23. Cod. 2. 9. 1.

24. Cod. 2. 7. 13.

25. Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practitioners. 1. The king's premier sergeant, (so constituted by special patent.) 2. The king's ancient sergeant, or the eldest among the king's sergeants. 3. The king's advocate general. 4. The king's attorney general. 5. The king's solicitor general. 6. The king's sergeants. 7. The king's counsel, with the queen's attorney and solicitor. 8. Sergeants at law. 9. The recorder of London. 10. Advocates of the civil law. 11. Barristers. In the court of exchequer two of the most experienced barristers, called the post-man and the tub-man, (from the places in which they sit) have also a precedence in motions.

26. Seld. tit. hon. 1. 6. 7.

27. Davis pref. 22. 1. Chan. Rep. 38.

28. Davis. 23.

29. Ff. 11. 6. 1.

30. Tac. ann. l. 11.

31. Cro. Jac. 90.

32. Raym. 376.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 4

Of the Public Courts of Common Law and Equity

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

THE policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbors and friends. These little courts however communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards; and that which was established in the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of twelve judges.[1] Peru, according to Garcilasso de Vega (an historian descended from the ancient Incas of that country) was divided into small districts containing ten families each, all registered, and under one magistrate; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class or fifty families; and two of these last composed another called a hundred. Ten hundreds constituted the largest division, consisting of a thousand families, and each division had its separate judge or magistrate, with a proper degree of subordination.[2] In like manner we read of Moses; that, finding the sole administration of justice too heavy for him, he “chose able men out of all Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens: and they judged the people at all seasons; the hard causes they brought unto Moses, but every small matter they judged themselves.”[3] These inferior courts, at least the name and form of them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and as there is besides a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (among others) it has happened that these petty tribunals have fallen into decay, and almost into oblivion: whether for the better or the worse, may be matter of some speculation; when we consider on the one hand the increase of expense and delay, and on the other the more upright and impartial decision, that follow from this change of jurisdiction.

THE order I shall observe in discoursing on these several courts, constituted for the redress of civil

© Copyright 2003, 2005 Lonang Institute

injuries, (for with those of a jurisdiction merely criminal I shall not at present concern myself) will be by beginning with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

I. THE lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of *piepoudre, curia pedis pulverzati* [dusty-foot court]: so called from the dusty feet of the suitors; or according to Sir Edward Coke,[4] because justice is there done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered in the gate of the city,[5] that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer[6] is much more ingenious and satisfactory; it being derived, according to him, from *pied puldreaux* a pedlar, in old french, and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market, of which the steward of him, who owns or has the toll of the market, is the judge. It was instituted to administer justice for all injuries done in that very fair or market, and not in any preceding one. So that the injury must be done complained of, heard, and determined, within the compass of one and the same day. The court has cognizance of all matters that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of an action arose there.[7] From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster.[8] The reason of its institution seems to have been, to do justice expeditiously among the variety of persons, that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve its process, or execute its judgements, on both or perhaps either of the parties; and therefore, unless this court had been erected, the complaint must necessarily have resorted even in the first instance to some superior judicature.

II. THE court-baron is a court incident to every manor in the kingdom, and was held by the steward within the said manor. This court-baron is of two natures:[9] the one is customary court, of which we formerly spoke,[10] appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only The other, of which we now speak, is a court of common law, and it is the court of the barons, by which name the freeholders were sometimes anciently called; for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, *viz.* the freeholders' court, was composed of the lords tenants, who were the pares of each other, and were bond by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to forty shillings.[11] Which is the same sum, or three marks, that bounded the jurisdiction of the ancient Gothic courts in their lowest instance, or *fierding-courts*, so called because four were instituted within every superior district or hundred.[12] But the proceedings on a writ of right may be removed into the county court by a precept from the sheriff called a *tolt*,[13] "*quia tollit atque eximit causam e curia baronum* [because it removes the cause from the court baron].[14] And the proceedings in all other actions may be removed into the superior courts by the king's writs of pone,[15] or *accedas ad curiam* [come to the court], according to the nature of the suit.[16] After judgment given, a writ also

© Copyright 2003, 2005 Lonang Institute

of false judgment[17] lies to the courts at Westminster to rehear and review the cause, and not a writ of error; for this is not a court of record: and therefore in all these writs of removal, the first direction given is to cause the plaint to be recorded, *recordari facias loquelam* [cause the plaint to be recorded].

III. A HUNDRED court is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges and the steward the registrar, as in the case of a court baron, It is likewise no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction.[18] This is said by Sir Edward Coke to have been derived out of the county court for the case of the people, that they might have justice done to them at their own doors, without any charge or loss of time:[19] but its institution was probably coeval with that of hundreds themselves, which were formerly observed[20] to have been introduced though not invented by Alfred, being derived from the polity of the ancient Germans. The *centeni*, we may remember were the principal inhabitants of district composed of different villages, originally in number an hundred, but afterwards only called by that name;[21] and who probably gave the same denomination to the district out of which they were chosen. Caesar speaks positively of the judicial power exercised in their hundred-courts and courts-baron. "*Principes regionum, atque pagorum*," (which we may fairly construe, the lords of hundred and manors) *inter suos jus dicunt, controversiasque minuunt*" ["declare the law among dependents, and abate controversies"].[22] And Tacitus, who had examined their constitution till more attentively, informs us not only of the authority of the lords, but of that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt*."[23] ["Lords are chosen in their councils who administer justice through towns and districts. The jury for each hundred are from the people, having both council and authority."] This hundred-court was denominated *haereda* in the Gothic constitution.[24] But this court, as causes are equally liable to removal from hence, as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

IV. THE county court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings.[25] Over some of which causes these inferior courts have, by the express words of the statute of Gloucester,[26] a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and *bona fide* amount to 40 s: which affidavit is now unaccountably disued,[27] except in the court of exchequer. The statute also 43 Eliz. c. 6. which giver the judges in all personal actions, where the jury assess less damages than 40 s, a power to certify the same and abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclinable to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a *justicies*; which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county court, as might otherwise be had at Westminster.[28] The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the

© Copyright 2003, 2005 Lonang Institute

county court, (which Spelman calls *forum plebeiae justitiae et theatrum comitivae potestatis* [justice court for the people and theater of the county's power][29]) is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu*, or, in full county court. By the statute 2 Edw. VI. c. 25. no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the ancient usage, as appears from the laws of king Edward the elder:[30] "*praepositus*" (that is, the sheriff) "*ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito; litesque singulas dirimito.*" ["Let the sheriff hold a full assembly of the people about once a month: declare the law to every one; and severally determine suits."] In those times the county court was a court of great dignity and splendor, the bishop and the ealdorman (or earl) with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical causes.[31] But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's, as proceedings are removable from hence into the king's superior courts, by writ of pone or recordare,[32] in the same manner as from hundred-courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.

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

V. The court of common pleas, or, as it is frequently termed in law, the court of common bench.

BY the ancient Saxon constitution there was only one superior court of justice in the kingdom: and that had cognizance both of civil and spiritual causes; *viz.* the *wittena-gemote*, or general council, which assembled annually or oftener, wherever the king kept his Easter, Christmas, or Whitsontide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counselors to the crown. He therefore established a constant court in his own shall, thence called by Bracton[33] and other ancient authors *aula regia* or *aula regis* [king's bench]. This court was composed of the king's great officers of the state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal [marshal], who chiefly presided in matters of honor and of arms; determining according to the law military and the law of nations. Besides these there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court

© Copyright 2003, 2005 Lonang Institute

of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar or *capitalis justiciarius totius Angliae* [chief justice of all England]; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people and dangerous to the government which employed him.[34]

THIS great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of Magna Carta, and enacts "that *communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*." ["Let not the common pleas follow the king's court, but be held in some fixed place."] This certain place was established in Westminster-hall, the place where the *aula regis* originally sat when the king resided in that city; and there it has ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighborhood; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who labored to extirpate and destroy it.[35] This precedent was soon after copied by king Philip the fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king, wherever he went, and in which he himself used frequently to decide the causes that were there depending: but all were then referred to the sole cognizance of the parliament and its learned judges.[36] And thus also in 1495 the emperor Maximilian I fixed the imperial chamber (which before always traveled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire.[37]

THE *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of king Henry III. And, in farther pursuance of this example, the other several office of the chief justiciar were under Edward the first (who new-modeled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trail of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king's revenue; and the court of king's bench retaining

© Copyright 2003, 2005 Lonang Institute

all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas of suits are regularly divided into two sorts; pleas of the crown, which comprehend all crimes and misdemeanors, wherein the king (on behalf of the public) is the plaintiff; and common pleas, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king's bench; the latter of the court of common pleas. Which is a court of record, and is styled by Sir Edward Coke[38] the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man are likewise here determined; though in some of them the king's bench has also a concurrent authority.

THE judges of this court are at present[39] four in number, one chief and three *puisnè* [younger] justices, created by the king's letters patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal or mixed and compounded of both. These it takes cognizance of, as well originally, as upon removal from the inferior courts before-mentioned. But a writ of error, in the nature of an appeal, lies from this court into the court of king's bench.

VI. THE court of king's bench (so called because the king used formerly to sit there in person,[40] the style of the court still being *coram ipso rege* [before the king himself]) is the supreme court of common law in the kingdom, consisting of a chief justice and three *puisnè* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the king himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered[41] to, determine any cause or motion, but by the mouth of his judges, to whom he has committed his whole judicial authority.[42]

THIS court (which as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's court wherever it goes; for which reason all process issuing out of this court in the king's name is returnable "*ubicunque fuerimus in Anglia*" ["wherever we are in England"]. It has indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown; but might remove with the king to York or Exeter, if he thought proper to command it. And we find that, after Edward I had conquered Scotland, it actually sat at Roxburgh.[43] And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are "*capitales, generales, perpetui, et majores; a latere regis residentes; qui omnium aliorum corrigere tenentur injurias et errores*."[44] ["Chief, general, perpetual, and elder; accompanying the king, who are appointed to redress the injuries and correct the errors of all others."] And it is moreover especially provided in the *articuli super cartas* [articles upon the charters][45] that the king's chancellor, and the justices of his bench shall follow him, so that he may have at all times near unto him some that be learned in the laws.

THE jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific

© Copyright 2003, 2005 Lonang Institute

remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider: that will be more properly discussed in the ensuing volume. But on the plea-side, or civil branch, it has an original jurisdiction and cognizance of all trespasses, and other injuries, alleged to be committed *vi et armis* [by force and arms]: which, being a breach of the peace, favor of a criminal nature although the action is brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king, as well as damages to the injured party.[46] This court might likewise, upon the division of the *aula regia*, have originally held plea of any other civil action whatsoever, (excepting actions real, which are new very seldom in use) provided the defendant was an officer of the court; or in the custody of the marshal, or prison-keeper, of this court, for a breach of the peace or any other offense.[47] In process of time, by a fiction, this court began to hold plea of all personal actions whatsoever, and has continued to do so for ages:[48] it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the marshal of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshal's custody, the defendant is not at liberty to dispute.[49] And these fictions of law, though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.[50] So true is it, that *in fictione juris semper subsistit aequitas* [all legal fictions are founded in equity].[51] In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which after a determination in another, might ultimately be brought before it on a writ of error.

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

VII. THE court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of law and a court of equity also. It is a very ancient court of record, set up by William the conqueror,[52] as a part of the *aula regia*,[53] though regulated and reduced to its present order by king Edward I;[54] and intended principally to order the revenues of the crown, and to recover the king's debts and duties.[55] It is called the exchequer, *scaccharium*, from the checked cloth, resembling a chess-board, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manages the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

© Copyright 2003, 2005 Lonang Institute

THE court of equity is held in the exchequer chamber before the lord treasurer, the chancellor of the exchequer, the chief baron, and three puisnè ones. These Mr. Selden conjectures[56]to have anciently been made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name: which conjecture receives great strength from Bracton's explanation of magna charta, c. 14. which directs that the earls and barons be amerced by their peers; that is, says he, by the barons of the exchequer.[57] The primary and original business of this court is to call the king's debtors to account by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offenses are in open derogation of the *jura regalia* [royal rights] of his crown; and the exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia* [royal revenue]. But, as by fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors, and farmers, and all accountants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity, that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

THIS gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accountants, and is exercised by the barons only the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus*: in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant has done him the injury or damage complained of; *quo minus sufficiens existit*, by which he is the less able, to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland,[58] to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the *articuli super cartas*[59] it is enacted, that no common pleas be thenceforth held in the exchequer, contrary to the form of the great charter. But now by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accountant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against another upon a bare suggestion that he is the kings accountant; but whether he is so, or not, is never controverted. In this court, on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes; in-which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the chancery has of late years obtained a large share in this business.

AN appeal from the equity side of this court lies immediately to the house of peers; but from the common law side, in pursuance of the statute 31 Edw. III. c. 12. a writ of error must be first brought

© Copyright 2003, 2005 Lonang Institute

into the court of exchequer chamber. And from their determination there lies, in the dernier resort, a writ of error to the house of lords.

VIII. THE high court of chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the lord chancellor or *cancellarius*; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters patents when granted contrary to law, which is the highest point of his jurisdiction.[60] But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors; where originally it seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charter, letters, and such other public instruments of the crown, as were authenticated in the most solemn manner; and therefore, when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper, (whose authority by statute 5 Eliz. c. 18. is declared to be exactly the same) is with us at this day created by the mere delivery of the king's great seal into his custody:[61] whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior in point of precedency to every temporal lord.[62] He is privy counselor by his office, and, according to lord chancellor Ellensmere,[63] prolocutor of the house of lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were them capable of an office so conversant in writings) and presiding over the royal chapel,[64] he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of 20£ per annum in the king's books. He is the general guardian of all infants, idiots, and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery: wherein, as in the exchequer, there are two distinct tribunals; the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

THE ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* [show cause] to repeal and cancel the king's letters patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit* [showing of right], traverses of offices, and the like; when the king has been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right.[65] On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party.[66] It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary,[67] and of dower,[68] where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by

© Copyright 2003, 2005 Lonang Institute

the king and claimed by a stranger against the grantee of the crown;[69] and of executions on statutes, or recognizances in nature thereof by the statute 23 Hen. VIII. c. 6.[70]But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* [by his own hand] into the court of king's bench, where it shall be tired by the country, and judgment shall be there given thereon.[71] And, when judgment is given in chancery, upon demurrer or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the court of king's bench:[72] though so little is usually done on the common law side of the court, that I have met with no traces of any writ of error[73]being actually brought, since the fourteenth year of queen Elizabeth, A. B. 1572.

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

BUT the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not a present known, nor seems to have ever been known, in any other country at any time:[74] and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans;[75] the *jus praetorium*, or discretion of the praetor, being distinct from the *leges* or standing laws:[76] but the power of both centered in one and the same magistrate, who was equally entrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton[77]as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and treating particularly of courts and their several jurisdictions) is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy council, (from whence also arose the jurisdiction of the court of requests,[78] which was virtually abolished by the statute 16 Car. I. c. 10.) and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia*,[79] but also after its dissolution, in the reign of king Edward I,[80] if not that of Henry II.[81]

© Copyright 2003, 2005 Lonang Institute

IN these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, it is provided by statute Westm. 2. 13. Edw. I. c. 24. that "whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and 'requiring like remedy no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law[82]lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass on the case, to be met with in the register, whereby the suitor had ready relief according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case.[83] Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity;[84] except that of obtaining a discovery by the oath of the defendant.

BUT when, about the end of the reign of king Edward III, uses of land were introduced,[85] and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established;[86] and John Waltham, who was bishop of Salisbury and chancellor to king Richard II, by a strained interpretation of the above-mentioned statute of Westm. 2. devised the writ of *subpoena*, returnable in the court of chancery only, to make the feoffee to uses accountable to his *cestuy que use*: which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is by statute 17 Ric. II. c. 6. directed to give damages to the parties unjustly aggrieved. But as the clergy, so early as the reign of king Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro laesione fidei* [for breach of faith], as a spiritual offense against conscience, in case of nonpayment of debts or any breach of civil contracts;[87] till checked by the constitutions of Clarendon,[88] which declared that "*placita de debitis, quae fide interposita debentur, vel absque interpositione fidei, sint in justicia regis*" ["let those pleas of debts, which are due with or without the interposition of a trust, be in the king's jurisdiction"]: therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued to grasp at the same authority as before, in suits *pro laesione fidei*, so late as the fifteenth century,[89] till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls,[90] that in the reigns of Henry IV and V the commons were repeatedly urgent to have the writ of subpoena entirely suppressed, as being a novelty devised by the subtlety of chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23. whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV' time, the process by bill and subpoena was become the daily practice of the court.[91]

© Copyright 2003, 2005 Lonang Institute

BUT this did not extend very far: for in the ancient treatise, entitled *diversite des courtes*,[92] supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by subpoena in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to king Edward III in 1372 and 1373,[93] to the promotion of Sir Thomas More by king Henry III in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers,[94] or churchmen,[95] according as the convenience of the times and the disposition of the prince required, til sergeant Puckering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was entrusted to Dr Williams, then dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to lord Ellesmere, when chancellor.[96]

IN the time of lord Ellesmere (A. D. 1616.) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *praemunire* [forewarning], by questioning in a court of equity a judgment in the court of king's bench, obtained by gross fraud and imposition.[97] This matter, being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favor of the courts of equity,[98] that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong) he chose rather to decide the question by referring it to the plenitude of his royal prerogative.[99] Sir Edward Coke submitted to the decision,[100] and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part[101]) and his controlling the commissioners of sewers,[102] were the open and avowed causes,[103] first of his suspension, and soon after of his removal, from his office.

LORD Bacon, who succeeded lord Ellesmere, reduced the practice of the court into a more regular system; but dit not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I, little to improve upon his plan: and even after the restoratin the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years and afterwards to the earl of Shafsbury, who had never practiced at all. Sir Heneage Finch, who succeeded in 1673 and became afterwards earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarafsments raised by the narrow and technical notions which then prevalied in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, cooperated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and

© Copyright 2003, 2005 Lonang Institute

jurisdiction upon wide and rational foundtions; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

FROM this court of equity in chancery, as from the other superior courts, an appeal lies to the house of peers. But there are these differences between appeals from a court of equity, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon noting but only a definitive judgment. 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the curt below to rectify its own decree.

IX. THE next court that I shall mention is one that has 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 upon writs of error from the common law side of the court of exchequer. And to that end it consists of the lord treasurer, the lord chancellor, and 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 begum 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.[104]

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

X. THE house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law, committed by the courts below. To this authority they succeeded of course, upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations. The law reposing an entire confidence in the honor and conscience of the noble persons who compose this important assembly, that they will make themselves masters of those questions upon which they undertake to decide; since upon their decision all property must finally depend.

HITHERTO may also be referred the tribunal established by statute 14 Edw. III. c. 5. consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and to give directions for remedying these inconveniences in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during the intermission or recess of parliament; for the statute farther directs, that if the difficulty

© Copyright 2003, 2005 Lonang Institute

be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the next parliament, who shall finally determine the same.

XI. 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* [unless before].

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 only London and Middlesex, where courts of *nisi prius* are held in and after every term, before the chief or other judge of the several superior courts) 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 [circuit judge], *justitiarii in itinere* [itinerant judges]; who were appointed by the great council of the realm, A. D. 1176, 22 Hen. II,[105] with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof: and they made their circuit round the kingdom once in seven years for the purpose of trying causes.[106] They were afterwards directed by Magna Carta, c. 12. to be sent into every county once a year to take or try certain actions then called recognition or assizes; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The present justices of assize and *nisi prius* are derived from the statute Westm. 2. 13. Edw. I. c. 30. explained by several other acts, particularly the statute 14 Edw. III. c. 16. and must be two of the king's justices of the one bench or the other, or the chief baron of the exchequer, or the king's sergeants sworn. They usually make their circuits in the respective vacations after Hilary and Trinity terms; assizes being allowed to be taken in the holy time of lent by consent[107] of the bishops at the king's request, as expressed in statute Westm. 1. 3. Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licenses to the justices of assize to administer oaths in holy times: for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance.[108] The prudent jealousy of our ancestors ordained[109] that no man of law should be judge of assize in his own country: and a similar prohibition is found in the civil law;[110] which has carried this principle so far, that it is equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connection.[111]

THE judges upon their circuits sit by virtue of five several authorities. 1. The commission of the peace. 2. A commission of *oyer* and *terminer* [hear and determine]. 3. A commission of general jail-delivery. The consideration of all which belongs properly to the subsequent book of these commentaries. But the fourth commission is,

4. A commission of assize, directed to the judges and clerk of assize, to take assizes; that is, to take the verdict of a peculiar species of jury called an assize and summoned for the trial of landed disputes, of which hereafter. The other authority is, 5. That of *nisi prius*, which as a consequence of the commission of assize,[112] being annexed to the office of those justices by the statute of Westm. 2. 13 Edw. I. c. 30. And it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of Westminster-hall are by the course of the courts appointed to be there tried, on a day fixed in some Easter or Michaelmas term, by a jury returned from the county, wherein

© Copyright 2003, 2005 Lonang Institute

the cause of action arises; but with this proviso, *nisi prius justitiarii ad assisas capiendas venerint*; unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas terms, and there dispose of the cause; which saves much expense and trouble, both to the parties, the jury, and the witnesses.

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

NOTES

1. Mod. Un. Hist. xxxviii. 469.
2. Ibid. xxxix. 14.
3. Exod. c. 18.
4. 4 Inst. 272.
5. Ruth. c. 4.
6. Barrington's observat. on the stat. 337.

© Copyright 2003, 2005 Lonang Institute

7. Stat. 17 Edw. IV. c. 2.

8. Cro. Eliz. 773.

9. Co. Litt. 58.

10. Book II. ch. 6. and ch. 22.

11. Finch. 248.

12. Stiernhook *de jure* Goth. l. 1. c. 2.

13. F. N. B. 3. 4. See append. No. § 2.

14. 3 Rep. Pref.

15. See append. No. I. § 3.

16. F. N. B. 4. 70. Finch. L. 444. 445.

17. F. N. B. 18.

18. Finch. l. 248. 4. Inst. 267.

19. 2 Inst. 71.

20. Vol. I. introd. § 4.

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

22. de bell. Gall. l. 6. c. 22.

23. de morib. German. c. 13.

24. Stiernhook, l. 1. c. 2.

25. 4 Inst. 266.

26. 6 Edw. I.c. 8.

27. 2 Inst. 391.

28. Finch. 318. F. N. B. 152.

29. Gloss. v. cemitatas.

30. c. 11.

31. LL. Eadgari. c. 5.

32. F. N. B. 70. Finch. 445.

33. L. 3. tr. I. c.

34. Spelm. Gl. 331, 2, 3. Gilb. Hist. C. P. introd. 17.

35. See vol. I. introd. § I.

36. Mod. Un. Hist. xxiii. 396.

37. Ibid. xxix. 467.

38. 4 Inst. 99.

© Copyright 2003, 2005 Lonang Institute

39. King James I, during part of his reign, appointed five judges in every court, for the benefit of a casting voice in case of a difference in opinion, and that the circuits might at all times be fully supplied with judge of the superior courts. And, in subsequent reigns, upon the permanent indisposition of a judge, a fifth has been sometimes appointed. Raym. 475.

40. 4 Inst. 73.

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

42. 4 Inst. 71.

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

44. l. 3. c. 10.

45. 28 Edw. I. c. 5.

46. Finch. L. 198.

47. 4 Inst. 71.

48. Ibid. 72.

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

50. 3 Rep. 30. 2 Roll. Rep. 502.

51. 11 Rep. 61. Co. Litt. 150.

52. Lamb. Archeiox. 24.

53. Madox. Hist. Exch. 109.

54. Spelm. Guil. I. in cod. leg. qut. vet apud Wilkins.

55. 4 Inst. 103-116.

56. Tit. hon. 2. 5. 16.

57. l. 3. tr. 2. c. 1. § 3.

58. 10 Edw. I. c. 11.

59. 28 Edw. I. c. 4.

60. 4 Inst. 88.

61. Lamb. Archeion. 65. 1 Roll. Abr. 385.

62. Stat. 31. Hen. VIII. c. 10.

63. of the office of lord chancellor. edit. 1651.

64. Madox. Mist. of exch 43.

65. 4 Rep. 64.

66. 4 Inst. 80.

© Copyright 2003, 2005 Lonang Institute

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

68. Bro. Abr. tit. dower. 66. Moor. 565.

69. Bro. Abr. t. dismes. 10.

70. 2 Roll. Abr. 469.

71. Cro. Jac. 12.

72. Ycarbook, 18 Edw. III. 25. 17 Aff. 24. 29 Aff. 47. Dyer. 315. 1 Roll. Rep. 287. 4 Inst. 80.

73. The opinion of lord keeper North in 1682 (1 Vern. 131. 1 Equ. Cas. abr. 129.) that no such writ of error lay, and that an injunction might be issued against. it, seems not to have been well considered.

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

75. Thus too the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law (Lord Kayms. h flor. lawtracts, I. 325. 330. princ of equity 44.)

76. Thus Cicero; "*jam illis promisses non esse standum, quis non videt, quae coactus quis metu et deceptus aolo premiserit? quae quidem plerumque jure praetorio liberantur, nonnulla legibus.*" ["To whom is it not evident that promises made through fear or fraud are of no validity? some of which are dissolved at the discretion of the judge, and some by the laws."] Office. l. 1.

77. l. 2. c. 7. fol. 23.

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

79. *Nemo ad regem appllet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severeum fit, alleviatio deinde quaeratur apud regem*. [No one may appeal to the king in any suit, unless he cannot obtain justice at home. If the decision be too severe, then a mitigation of it may be prayed from the king.] LL. Edg. c. 2.

80. Lambard. Archeion. 59.

81. Joannes Sarisburiensis (who died A. D. 1182, 26 Hen. II.) speaking of the chancellor's office in the verses prefixed to his polycraticon, has these lines; *Hic est, qui leges regni cancellat iniquas, Et mandata pii principis aequa facit*. [It is he who cancels the unequitable laws of the kingdom, and executes the just mandates of a righteous prince]

82. A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

83. Lamb. Archeion. 61.

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

85. See book II. ch. 20.

86. Spelm Gloss. 106. 1. Lev. 242.

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

88. 10 Hen. II. c. 15.

89. Yearb. 2 Hec. IV. 10. 38. Hen. VI. 29.

© Copyright 2003, 2005 Lonang Institute

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

91. Rot. parl. 14 Edw. IV. No. 33. (not 14 Edw. III. as cited 1 Roll. Abr. 370, etc.)

92. tit. chancery. fol. 296. Raftell's edit. A. D. 1534.

93. Spelm. Gloss. III. Dugd. chron Ser. 50.

94. Wriothesly, St John, and Hatton.

95. Goodrick, Gardiner, and Heath.

96. Biogr. Brit. 4278.

97. Bacon's works. IV. 611, 612. 632.

98. Whitelocke of parl. ii. 390. 1. Chan. Rep. append. 11.

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

100. See the entry in the council book, 26 July, 1616. (biogr. Brit. 1390.)

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

102. See that article in chap. 6.

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

104. 4 Inst. 119. 4 Bulstr. 146.

105. Seld. Tan. l. 2. §. 5. Spelm. Cod. 329.

106. Co. Litt. 293.

107. It would have been strange to have denied this consent, if, as Whitelocke imagines (on parl. ii. 260.) the hint of our justices of assize was taken from Samuel's going an annual circuit to judge Israel. 2 Sam vii. 16.

108. Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Parker's ecclesiastical hist. 209.

109. Stat. 4. Edw. III. c. 2. 8 Ric. II. c. 2. 33 Hen. VIII. c. 24.

110. Ff. 1. 22. 3.

111. c. 9. 29. 4.

112. Salk. 454.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 5

Of Courts Ecclesiastical, Military, and Maritime

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

I. BEFORE I descend to consider particular ecclesiastical courts, I must first of all in general premise, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the rights of the church were ascertained and asserted at the same time and by the same judges as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to sit together in the county court, and had there the cognizance of all causes as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the law judges in temporal.[1] This union of power was very advantageous to them both: the presence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures.

BUT so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons and all ecclesiastical causes should be solely and entirely subject to ecclesiastical jurisdiction only: which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi*" ["priests are to be honored by kings, not judged"];[2] and places an emphatic reliance on a fabulous tale which it tells of the emperor Constantine; that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burned in their presence, dismissing them with this valediction; "*ite, et inter vos causas vestras discutite, quia dignum non est ut non judicemus Deos*."[3] ["Go and discuss your causes among yourselves, for it is not fit that we should judge Gods."]

IT was not however till after the Norman conquest, that this doctrine was received in England; when William I, (whose title was warmly espoused by the monasteries which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy and planted in the best preferments of the English church,) was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of king Edward abounding with the spirit of Saxon liberty, is not altogether certain. But the latter, if not the cause, was undoubted the consequence, of this separation: for the Saxon laws were soon overborne by the

© Copyright 2003, 2005 Lonang Institute

Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the conqueror;[4] which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law.[5]

KING Henry the first, at his accession, among other restorations of the laws of king Edward the confessor, revived this of the union of the civil and ecclesiastical courts.[6] Which was, according to Sir Edward Coke,[7] after the great heat of the conquest was past, only a restitution of the ancient law of England. This however was ill relished by the popish clergy, who, under the guidance of that arrogant prelate archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates; and therefore in their synod at Westminster, 3 Hen. I. they ordained that no bishop should attend the discussion of temporal causes;[8] which soon dissolved this newly effected union. And when, upon the death of king Henry the first, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction.[9] And as it was about this time that the contest and emulation began between the laws of England and those of Rome,[10] the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable; which probably would else have been effected at the general reformation of the church.

IN briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts Christian, *(curiae Christianitatis)* I shall begin with the lowest, and so ascend gradually to the supreme court of appeal.[11]

1. THE archdeacon's court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence however by statute 24 Hen. VIII. c. 12. there lies an appeal to that of the bishop.

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

3. THE court of arches is a court of appeal, belonging to the archbishop of each province; whereof the judge is called the dean of the arches; because he anciently held his court in the church of St. Mary *le bow* (*sancta Maria de arcubus*) though all the principal spiritual courts are now held at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last mentioned office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him there lies an appeal to the king in chancery (that is, to a court of delegates appointed

© Copyright 2003, 2005 Lonang Institute

under the king's great seal) by statute 25 Hen. VIII. c. 19. as supreme head of the English church, in the place of the bishop of Rome, who formerly exercised this jurisdiction; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

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

5. THE prerogative court is established for the trial of all testamentary causes, where the deceased has left *bona notabilia* [valuable goods] within two different dioceses. In which case the probate of wills belongs, as we have formerly seen,[12] to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the arch-bishop, called the judge of the prerogative court; from whom an appeal lies by statute 25 Hen. VIII. c. 19. to the king in chancery, instead of the pope as formerly.

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

6. THE great court of appeal in all ecclesiastical causes, *viz.* the court of delegates, *judices delegati*, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the before-mentioned statute of Henry VIII. This commission is usually filled with lords spiritual and temporal, judges of the courts at Westminster, and doctors for the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honor of the crown, and the independence of the whole realm: and were first introduced in very turbulent times in the sixteenth year of king Stephen (A. D. 1151.) at the same period (Sir Henry Spelman observes) that the civil and canon laws were first imported into England.[13] But, in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by arch-bishop Becket and other zealots of the holy see, expressly declare,[14] that appeals in causes ecclesiastical ought to lie, from the arch-deacon to the diocesan; from the diocesan too the arch-bishop of the province; and from the arch-bishop to the king; and are not to proceed any farther without special license from the crown. But the unhappy advantage that was given in the reigns of king John, and his son Henry the third, to the encroaching power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length rivetted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off, till the grand rupture happened in the reign of Henry the eighth; when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the

© Copyright 2003, 2005 Lonang Institute

crown, to which it originally belonged: so that the statute 25 Hen. VIII. was but declaratory of the ancient law of the realm.[15] But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but by the statute 24 Hen. VIII. c. 12. to all the bishops of the realm, assembled in the upper house of convocation.

7. A COMMISSION of review is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 25 Hen. VIII. before cited declare the sentence of the delegates definitive; because the pope as supreme head by the canon law used to grant such commission of review; and such authority, as the pope heretofore exerted, is now annexed to the crown[16] by statutes 26 Hen. VIII. c. 1. and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand *ex debito justitiae* [as due to justice]; but merely a matter a matter of favor, and which therefore is often denied.

THESE are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be courts of record: no more than was another much more formidable jurisdiction, but now deservedly annihilated *viz.* the court of the king's high commission in causes ecclesiastical. This court was erected and united to the regal power[17] by virtue of the statute 1 Eliz. c. 1. instead of a larger jurisdiction which had before been exercised under the popes authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offenses, contempts, and enormities. Under the shelter of which very general words, means were found in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers, of fining and imprisoning; which they exerted much beyond the degree of the offense itself, and frequently over offenses by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. I. c. 11. And the weak and illegal attempt that was made to revive it, during the reign of king James the second, served only to hasten that infatuated prince's ruin.

II. NEXT, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of chivalry, formerly held before the lord high constable and earl marshal of England jointly; but since the attainder of Stafford duke of Buckingham under Henry VIII, and the consequent extinguishment of the office of lord high constable, it has usually with respect to civil matters been held before the earl marshal only.[18] This court by statute 13 Ric. II. c. 2. has cognizance of contracts and other matters touching deeds of arms, and war, as well out of the realm as within it. And from its sentences an appeal lies immediately to the king in person.[19] This court was in great reputation in the times of pure chivalry, and afterwards during our connections with the continent, by the territories which our princes held in France; but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record.[20]

III. THE maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty, and its courts of appeal. The court of admiralty is held before the lord high admiral of England, or his deputy, who is called the judge of the court. According to Sir Henry Spelman,[21] and Lambard,[22] it was first of all erected by king Edward the third. Its proceedings are according to the method of

© Copyright 2003, 2005 Lonang Institute

the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery, as may be collected from statute 25 Hen. VIII. c. 19. which directs the appeal from the arch-bishop's courts to be determined by persons named in the king's commission, “like as in case of appeal from the admiral-court.” But this is also expressly declared by statute 8 Eliz. c. 5. which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

APPEALS from the vice-admiralty courts in America, and our other plantations and settlements, may be brought before the courts of admiralty in England, as being a branch of the admiral's jurisdiction, though they may also be brought before the king in council. But in case of prize vessels, taken in time of war, in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lies to certain commissioners of appeals consisting chiefly of the privy council, and not to judges delegates. And this by virtue of diverse treaties with foreign nations; by which particular courts are established in all the maritime countries of Europe for the decision of this question, whether lawful prize or not: for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it. The original court, to which this question is permitted in England, is the court of admiralty; and the court of appeal is in effect the king's privy council, the members of which are, in consequence of treaties, commissioned under the great seal of this purpose. In 1748, for the more speedy determination of appeals, the judges of the courts of Westminster-hall, though not privy counselors, were added to the commission then in being. But doubts being conceived concerning the validity of that commission, on account of such addition, the same was confirmed by statute 22 Geo. II. c. 3. with a proviso, that no sentence given under it should be valid, unless a majority of the commissioners present were actually privy counselors. But this did not, I apprehend, extend to any future commissions: and such an addition became indeed wholly unnecessary in the course of the war which commenced in 1756; since, during the whole of that war, the commission of appeals was regularly attended and all its decisions conducted by a judge, whose masterly acquaintance with the law of nations was known and revered by every state in Europe.[23]

NOTES

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

2. Decret. caus. 11. qu. 1. c. 41.

3. Ibid.

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

5. *Nullus episcopus vel archidiaconus de legibus episcopolibus amplius in hundret placita teneant, nec causam quae ad reglmen animarum pertinet ad judicium secularium hominum adducant: sed quicunque secondum episcopales leges de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa sua respondeat; et non secondum hundret, sed secundam canones et episcopales leges, rectum Deo et episcopo suo faciat.* [No bishop or archdeacon shall longer hold pleas in the hundred court that are to be decided by episcopal laws, nor bring any cause which relates to spiritual matters for the judgment of secular persons; but whoever shall be sued according to the episcopal laws, for any cause or offence, shall come to the place chosen and appointed by the bishop for that purpose,

© Copyright 2003, 2005 Lonang Institute

and there make his own defense; to the end that right may be done to God and his bishop, according to the canon and episcopal laws, and not those of the hundred.]

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

7. 2 Inst. 70.

8. *Ne episcopi saecularium placitorum officium suscipiant.* [Let no bishop take charge of secular pleas.] Spelm. Cod. 301.

9. Ibid. 310.

10. See vol. I. introd. § 1.

11. For farther particulars see Burn's ecclesiastical law, Wood's institute of the common law, and Oughton's *ordo judiciorum*.

12. Book II. ch. 32.

13. Cod. vet. leg. 315.

14. chap. 8.

15. 4 Inst. 341.

16. Ibid.

17. 4 Inst. 324.

18. 1 Lev. 230. Show Parl. Cas. 60.

19. 4 Inst. 125.

20. 7 Mod. 127.

21. Gloss 13.

22. Arciden. 41.

23. See the sentiments of the president Montesquieu, and M. Vattel (a subject of the king of Prussia) on the answer transmitted by the English court to his Prussian majesty's *Exposition des motifs etc.* A. D. 1753. (Montesquieu's letters. 5 Mar. 1753. Vattel's droit de gent. L. 2. c. 7. § 84.)

© Copyright 2003, 2005 Lonang Institute

CHAPTER 6

Of Courts of a Special Jurisdiction

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

I. THE forest courts, instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or venison, to the vert or greenswerd, and to the covert in which such deer are lodged. These are the courts of attachments, of regard, of sweinmote, and of justice-seat. 1. The court of attachments, wood-mote, or forty days court, is to be held before the verderors of the forest once in every forty days;[1] and is instituted to inquire into all offenders against vert and venison:[2] who may be attached by their bodies, if taken with the mainour (or *mainoeuvre*, *a manu*) that is, in the very act of killing venison or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done;[3] else they must be attached by their goods. And in this forty days court the foresters or keepers are to bring in their attachments, or presentments de viridi et venatione; and the verderors are to receive the same, and to enroll them, and to certify them under their seals to the court of justice-seat, or sweinmote:[4] for this court can only inquire of, but not convict offenders. 2. The court of regard, or survey of dogs, is to be held every third year for the lawing or expeditation of mastiffs, which is done by cutting off the claws of the foreseet, to prevent them from running after deer.[5] No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defense of a man's house.[6] 3. The court of swinmote is to be held before the verderors, as judges, by the steward of the sweinmote thrice in every year,[7] the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-oneratione forestariorum, et aliorum ministrorum forestae; et de eorum oppressionibus populo regis illatis*" ["concerning the impositions of the foresters, and other officers of the forest; and their oppression on the king's people"]: and, secondly, to receive and try presentments certified from the court of attachments against offenses in vert and venison.[8] And this court may not only inquire, but convict also,[9] which conviction shall be certified to the court of justice-seat, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy; to hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever therein arising.[10] It may also proceed to try presentments in the inferior courts of the forests, and to give judgment upon convictions of the sweinmote. And the chief justice may therefore after presentment made or indictment found, but not before,[11] issue his warrant to the officers of the forest to apprehend the offenders. It may be held every third year; and forty days notice ought to be given of its sitting. This court may fine and imprison for offenses within the forest,[12] it being a court of record: and therefore a writ of error lies from hence to the court of king's bench, to rectify and redress any mal-administrations of justice;[13] or the chief justice in eyre may adjourn any matter of law into the court of king's bench.[14] These justices in eyre were instituted by king Henry II, A. D. 1184;[15] and their courts were formerly very regularly held: but the last court of justice seat of any

© Copyright 2003, 2005 Lonang Institute

note was that held in the reign of Charles I, before the earl of Holland; the rigorous proceedings at which are reported by Sir William Jones. After the restoration another was held, *pro forma* [in form] only, before the earl of Oxford;[16] but since the era of the revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.

II. A SECOND species of private courts, is that of commissioners of sewers. This is a temporary tribunal, erected by virtue of a commission under the great seal; which formerly used to be granted *pro re nata* [for the occasion] at the pleasure of the crown,[17] but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute 23 Hen. VIII. c. 5. Their jurisdiction is to overlook the repairs of sea banks and sea walls; and the cleansing of rivers, public streams, ditches and other conduits, whereby any waters are carried off: and is confined to such county, or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts;[18] and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh,[19] or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary: and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5. sell his freehold lands (and by the 7 Ann. c. 10. his copyhold also) in order to pay such scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings.[20] And yet in the reign of king James I, (8 Nov. 1616.) the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those proceedings.[21] The pretense for which arbitrary measures was no other than the tyrant's plea,[22] of the necessity of unlimited powers in works of evident utility to the public, “the supreme reason above all reasons, which is the salvation of the king's lands and people.” But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court of king's bench.[23]

III. The court of policies of assurance, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12. which recites the immemorial usage of policies of assurance, “by means whereof it comes to pass, upon the loss or perishing of any ship, there follows not the undoing of any man, but the loss lights rather easily upon many than heavily upon few, and rather upon them that adventure not, than upon those that do adventure; whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely: and that heretofore such assurers had used to stand so justly and precisely upon their credits, as few or no controversies had arisen thereupon; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London; as men by reason of their experience fittest to understand and speedily decide those causes:” but that of late years diverse persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer: it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of

© Copyright 2003, 2005 Lonang Institute

the civil law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister, are thereby and by the statute 13 & 14 Car. II. c. 23. empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandise,[24] and to suits brought by the assured only and not by the insurers,[25] no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final: though it is to be wished, that some of the parliamentary powers invested in these commissioners, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom,[26] could at present be adopted by the courts of Westminster-hall, without requiring the consent of parties.

IV. THE court of the *marshalsea*, and the palace court at Westminster, though two distinct courts, are frequently confounded together. The former was originally held before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, that they might not be drawn into other courts, and thereby the king lose their service.[27] It was formerly held in, though not a part of, the *aula regis*;[28] and, when that was subdivided, remained a distinct jurisdiction: holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service (in which case the inquest shall be taken by a jury of the country) and of all debts, contracts and covenants, where both of the contracting parties belong to the royal household; and then the inquest shall be composed of men of the household only.[29] By the statute of 13 Ric. II. St. 1. c. 3. (in affirmance of the common law[30]) the verge of the court in this respect extends for twelve miles round the king's place of residence.[31] And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the king's bench, but only to parliament,[32] till the statute of 5 Edw. III. c. 2. and 10 Edw. III. St. 2. c. 3. which allowed such writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses, so that by the removal of the household, actions were frequently discontinued,[33] and doubts having arisen as to the extent of its jurisdiction,[34] king Charles I in the sixth year of his reign by his letters patent erected a new court of record, called the *curia palatu* or palace court, to be held before the steward of the household and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty's palace at Whitehall.[35] The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark: and writ of error lies from thence to the court of king's bench. But, if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king's bench or common pleas by a writ of *habeas corpus cum causa* [have the body with the cause]: and the inferior business of the court has of late years been much reduced, by the new courts of conscience erected in the environs of London; in consideration of which the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 Geo. II. c. 27.

V. A FIFTH species of private courts of a limited, though extensive, jurisdiction are those of the principality of Wales; which upon its thorough reduction, and the settling of its polity in the reign of Henry the eighth,[36] were erected all over the country; principally by the statute 34 & 35 Hen. VIII. c. 26. though much had before been done, and the way prepared by the statute of Wales, 12 Edw.

© Copyright 2003, 2005 Lonang Institute

I. and other statutes. By the statute of Henry the eighth before-mentioned, courts-baron, hundred, and county courts are there established as in England. A sessions is also to be held twice in every year in each county, by judges appointed by the king, to be called the great sessions of Wales: in which all pleas of real and personal actions shall be held, with the same form of process and in as ample a manner as in the court of common pleas at Westminster: and writs of error shall lie from judgments therein (it being a court of record) to the court of king's bench at Westminster. But the ordinary original writs or process of the king's courts at Westminster do not run into the principality of Wales;[37] though process of execution does:[38] as do also all prerogative writs, as writs of *certiorari*, *mandamus*, and the like.[39] And even in causes between subject and subject, to prevent injustice through family factions and prejudices, it is held lawful (in causes of freehold at least, if not in all others) to bring an action in the English courts, and try the same in the next English county adjoining to that part of Wales where the cause arises.[40]

VI. THE court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy or his deputy, concerning all matters of equity relating to lands held of the king in right of the duchy of Lancaster:[41] which is a thing very distinct from the county palatine, and comprises much territory which lies at a vast distance from it; as particularly a very large district within the city of Westminster. The proceedings in this court are the same as on the equity side in the courts of exchequer and chancery;[42] so that it seems not to be a court of record: and indeed it has been held that those courts have a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes.[43]

VII. ANOTHER species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity,[44] are those which appertain to the counties palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely.[45] In all these, as in the principality of Wales, the king's ordinary writs, issuing under the great seal out of chancery, do not run; that is, they are of no force. For, as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But, when the privileges of these counties palatine and franchises were abridged by statute 27 Hen. VIII. c. 24. it was also enacted, that all writs and process should be made in the king's name, but should be *teste*'d or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which are now annexed to the crown, and the two latter under the government of their several bishops. And the judges of assize, who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof; and not by the usual commission under the great seal of England. Hither also may be referred the courts of the cinque ports, or five most important havens, as they formerly were esteemed, in the kingdom; *viz.* Dover, Sandwich, Romney, Hastings, and Hythe; to which Winchelsey and Rye have been since added: which have also similar franchises in many respects[46] with the counties palatine, and particularly an exclusive jurisdiction (before the mayor and jurats [aldermen] of the ports) in which exclusive jurisdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the *cinque ports*, in his court of Shepway; and from the court of Shepway to the king's bench.[47] And so

© Copyright 2003, 2005 Lonang Institute

too a writ of error lies from all the other jurisdictions to the same supreme court of jurisdiction,[48] as an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of *habeas corpus* [have the body], prohibition, *certiorari* [notice given], and *mandamus* [we command]) may issue for the same reason to all these exempt jurisdictions;[49] because the privilege, that the king's writ runs not must be intended between party and party, for there can be no such privilege against the king.[50]

VIII. THE stannary courts in Devonshire and Cornwall for the administration of justice among the tinners therein, are also courts of record, but of the same private and exclusive nature. They are held before the lord warden and his substitutes, in virtue of a privilege granted to the workers in the tinmines there, to sue and be sued only in their own courts, that they may not be drawn from their business which is highly profitable to the public, by attending their lawsuits in other courts.[51] The privileges of the tinners are confirmed by a charter, 33 Edw. I. and fully expounded by a private statute, 50 Edw. III. which[52] has since been explained by a public act, 16 Car. I. c. 15. What relates to our present purpose is only this: that all tinners and laborers in and about the stannaries shall, during the time of their working therein *bona fide*, be privileged from suits in other courts, and be only impleaded in the stannary courts in all matters, excepting pleas of land, life, and member. No writ of error lies from hence to any court in Westminster-hall; as was agreed by all the judges[53] in 4 Jac. I. But an appeal lies from the steward of the court to the under-warden; and from him to the lord-warden; and thence to the privy council of the prince of Wales, as duke of Cornwall,[54] when he has had livery or investiture of the same.[55] And from thence the appeal lies to the king himself, in the last resort.[56]

IX. THE several courts within the city of London,[57] and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also of the same private and limited species. It would exceed the design and compass of our present inquiries, if I were to enter into a particular detail of these, and to examine the nature and extent of their several jurisdictions. It may in general be sufficient to say; that they arose originally from the favor of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred-courts, and the like, were established; for the conveyance of the inhabitants, that they might prosecute their suits, and receive justice at home: that, for the most part, the courts at Westminster-hall have a concurrent jurisdiction with these, or else a superintendence over them:[58] and that the proceedings, in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.

BUT there is one species of courts, constituted by act of parliament, in the city of London and other trading and populous districts, which in its proceedings so varies from the course of the common law, that it may deserve a more particular consideration. I mean the courts of requests, or court of conscience, for the recovery of small debts. The first of these was established in London, so early as the reign of Henry the eighth, by an act of their common council; which however was certainly insufficient for that purpose and illegal, till confirmed by statute 3 Jac. I. c. 15. which has since been explained and amended by statute 14 Geo. II. c. 10. The constitution is this: two aldermen, and four commoners, sit twice a week to hear all causes of debt not exceeding the value of forty shillings; which they examine in a summary way, by the oath of the parties or other witnesses, and make such

© Copyright 2003, 2005 Lonang Institute

order therein as is consonant to equity and good conscience. The time and expense of obtaining this summary redress are very inconsiderable, which make it a great benefit to trade; and thereupon diverse trading towns and other districts have, within these few years last past, obtained acts of parliament, for establishing in them courts of conscience upon nearly the same plan. The first of which was that for Southwark by statute 22 Geo. II. c. 47. which has since been followed by very many others.[59]

THE anxious desire, that has been shown to obtain these several acts, proves clearly that the nation in general is truly sensible of the great inconvenience, arising from the disuse of the ancient county and hundred-courts; wherein causes of this small value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared, that the general remedy which of late has been principally applied to this inconvenience, (the erecting these new jurisdictions) may itself be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished, that the proceedings in the county and hundred-courts could again be revived, without burdening the freeholders with too frequent and tedious attendances, but at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party have of transferring at pleasure their suits to the courts at Westminster! And we may with satisfaction observe, that this experiment has been actually tried, and has succeeded in the populous county of Middlesex; which might serve as an example for others. For by statute 23 Geo. II. c. 33. it is enacted, 1. That a special county court shall be held, at least once a month in every hundred of the county of Middlesex, by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes, not exceeding the value of forty shillings, the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process anciently used; and shall make such order therein as they shall judge agreeable to conscience. 4. That no plaints shall be removed out of this court, by any process whatsoever; but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex, for a debt or contract, upon the trial whereof the jury shall find less than 40 *s.* damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless upon some special circumstances, to be certified by the judge who tried it. 6. Lastly, a table of very moderate fees is prescribed and set down in the act. Which are not to be exceeded upon any account whatsoever. This is a plan entirely agreeable to the constitution and genius of the nation: calculated to prevent a multitude of vexatious actions in the superior courts, and at the same time to give honest creditors an opportunity of recovering small sums; which now they are frequently deterred from by the expense of a suit at law: a plan which, in short, wants only to be generally known, in order to its universal reception.

X. THERE is yet another species of private courts, which I must not pass over in silence: *viz.* the chancellor's courts in the two universities of England. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, where a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold

© Copyright 2003, 2005 Lonang Institute

is concerned. And these by the university charter they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion: which has generally led them to carry on their process in a course much conformed to the civil law, for reasons sufficiently explained in a former volume.[60]

THESE privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the emperor Frederick, A. D. 1158.[61] But as to England in particular, the oldest charter that I have seen, containing this grant to the university of Oxford was 28 Hen. III. A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to king Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore in the reign of queen Elizabeth an act of parliament was obtained,[62] confirming all the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz. by name. Which blessed act, as Sir Edward Coke entitles it,[63] established this high privilege without any doubt or opposition:[64] or, as Sir Matthew Hale[65] very fully expresses the sense of the common law and the operation of the act of parliament, "although king Henry the eighth, 14 A. R. *sui* [himself], granted to the university a liberal charter, to proceed according to the use of the university; *viz.* by a course much conformed to the civil law; yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties is privileged."

THIS privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final, at least by the statute of the university,[66] according to the rule of the civil law.[67] But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in chancery.

I HAVE now gone through the several species of private, or special courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs; and must, in the close of all, make one general observation from Sir Edward Coke:[68] that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever taken strictly, and cannot be extended farther that the express letter of their privileges will most explicitly warrant.

© Copyright 2003, 2005 Lonang Institute

NOTES

1. Cart. de forest. 9 Hen. III. c. 8.
2. 4 Inst. 289.
3. Carth. 79.
4. Cart. de forest. c. 16.
5. Ibid. c. 6.
6. 3 Inst. 308.
7. Cart de forest. c. 8.
8. Stat. 34 Edw. I. c. 1.
9. 4 Inst. 289.
10. 4 Inst. 291.
11. Stat. 1 Edw. III. c. 8. 7 Ric. II. c. 4.
12. 4 Inst. 313.
13. Ibid. 297.
14. Ibid. 295.
15. Hoveder.
16. North's life of lord Guilford. 45.
17. F. N. B. 115.
18. 1 Sid. 145.
19. Romney-marsh in the county of Kent, a tract containing 24000 acres, is governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry the third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)
20. Cro. Jac. 336.
21. Moor. 825, 826. See pag. 54.
22. Milt. parad. Lost. iv. 393.
23. 1 Ventr. 66. Salk. 146.
24. Styl. 166.
25. 1 Show. 396.
26. Stat. 13 & 14 Car. II. c. 22. § 3 & 4.
27. 1 Bulstr. 211.
28. Flet. l. 2. c. 2.
29. Artic. sup. cart. 28 Edw. I. c. 3. Stat. 5 Edw. III. c. 2. 10 Edw. III. St. 2. c. 2.
30. 2 Inst. 548.
31. By the ancient Saxon constitution, the *pax regia*, or privilege or the king's palace, extended from his palace gate to the

© Copyright 2003, 2005 Lonang Institute

distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley corns; as appears from a fragment of the *textus Rossensis* cited in Dr. Hickes's dissertat. epistol. 114.

32. 1 Bulstr. 211. 10 Rep. 79.

33. F. N. B. 241. 2 Inst. 548.

34. 1 Bulstr. 208.

35. 1 Sid. 180. Salk. 439.

36. See vol. I. introd. § 4.

37. 2 Roll. Rep. 141.

38. 2 Bulstr. 156. 2 Saund. 193. Raym. 206.

39. Cro. Jac. 484.

40. Vaugh. 413. Hardr. 66.

41. Hob. 77. 2 Lev. 24.

42. 4 Inst. 206.

43. 1 Chan. Rep. 55. Toth. 145. Hardr. 171.

44. 4 Inst. 213. Finch. R. 452.

45. see vol. I. introd. § 4.

46. 1 Sid. 166.

47. Jenk. 71. Dyversyte des courts. t. bank le roy. 1 Sid. 356.

48. Bro. Abr. t. error. 74. 101. Davis 62. 4 Inst. 38. 214. 218.

49. 1 Sid. 92.

50. Cro. Jac. 543.

51. 4 Inst. 232.

52. See this at length in 4 Inst. 232.

53. 4 Inst. 231.

54. Ibid. 230.

55. 3 Bulstr. 183.

56. Doderidge hist. of Cornw. 94.

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

58. Salk. 144. 263.

59. As for W*estminster*, and the *Tower-Hamlets;* 23 Geo. II. *Lincoln;* 24 Geo. II. *Brimingham, St. Albans, Liverpool,* and *Canserbury;* 25 Geo. II. *Sheffield;* 29 Geo. II. *Brixten,* and *Yarmouth;* 31 Geo. II. *High Peak, Derbyshire;* 33 Geo. II. *Bradford, Melksham,* and *Whorlfdown;* 3 Geo. III. *Dancaster and Kirkby in Kendal;* 4 Geo. III. and certain hundreds in *Kent* and *Wiles;* 5 Geo. III.

© Copyright 2003, 2005 Lonang Institute

60. Vol. I. introd. § 1.
61. cod. 4. tit. 13.
62. 13 Eliz. c. 29.
63. 4 Inst. 227.
64. Jenk. Cent. 2. pl. 88. Cent. 3. pl. 33. Hardr. 504. Godbolt. 201.
65. Hist. C. L. 33.
66. Tit. 21. § 19.
67. Cod. 7. 70. 1.
68. 2 Inst. 548.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 7

Of The Cognizance of Private Wrongs

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

THE authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated: which will confine our present inquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order, in which I shall pursue this inquiry, will be by showing; 1. What actions may be brought, or what injuries remedied, in the ecclesiastical courts. 2. What in the military. 3. What in the maritime. And 4. What in the courts of common law.

AND, with regard to the three first of these particulars, I must beg leave not so much to consider what has at any time been claimed or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law allows and permits to be so. For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws) as they subsist and are admitted in England, not by any right of their own,[1] but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not therefore what the pandects of Justinian, or the decretals of Gregory have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus: curious perhaps for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kind of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestates' chattels: and perhaps we may, in our turn, prohibit them from interfering in some controversies, which on the continent may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them; and in some cases punish their judges.[2]

HAVING premised this general caution, I proceed now to consider.

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

© Copyright 2003, 2005 Lonang Institute

1. PECUNIARY causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

THE principal of these is the subtraction or withholding of tithes from the parson or vicar, whether the former be a clergyman or a lay appropriator.[3] But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the right of tithes unless between spiritual persons;[4] but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed.[5] By the statute or rather writ[6] of *circumspecte agatis* [act circumspectly],[7] it is declared that the court Christian shall not be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas* [if the rector sue his parishioners for oblations and tithes due and accustomed]: so that if any dispute arises whether such tithes be due and accustomed, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fact, whether or no the tithes allowed to be due be really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; *viz.* the recovery of the tithes, or their equivalent. By testaments 2 & 3 Edw. VI. c. 13. it is enacted, that if any person shall carry off his praedial tithes (*viz.* of corn, hay, or the like) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; such offender shall pay double the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. by a former clause of the same statute, the treble value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the double value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the ancient law; to which the suit for the double value is superadded by the statute. But as no suit law in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a treble forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other.[8] However it now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, modus, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges: for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical, judge; without the verdict of a jury. But a more summary method than either of recovering small tithes under the value of 40 *s.* is given by statute 7 & 8 W. III. c. 6. by complaint to two justices of the peace: and, by another statute of the same year,[9] the same remedy is extended to all tithes withheld by Quakers under the value of ten pounds.

ANOTHER pecuniary injury, cognizable in the spiritual courts, is the non-payment of other ecclesiastical dues to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of surplice-fees, for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual payment. Besides which all offerings, oblations, and obventions, not exceeding the value of 40 *s.* may be recovered in a summary way, before two justices of the peace.[10] But care must be taken that these are real and not imaginary dues;

© Copyright 2003, 2005 Lonang Institute

for, if they be contrary to the common law, a prohibition will issue out of the temporal courts to stop all suits concerning them. As where a fee was demanded by the minister of the parish for the baptism of a child, which was administered in another place;[11] this, however authorized by the canon, is contrary to common right: for of common right no fee is due to the minister even for performing such branches of his duty, and it can only be supported by a special custom;[12] but no custom can support the demand of a fee without performing them at all.

FOR fees also, settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein: but not if the right of the fees is at all disputable; for then it must be decided at the common law.[13] It is also said, that if a curate be licensed, and his salary appointed by the bishop, and he be not paid, the curate has a remedy in the ecclesiastical court:[14] but, if he be not licensed, or has no such salary appointed, or has made a special agreement with the rector, he must sue for a satisfaction at common law;[15] either by proving such special agreement, or else by leaving it to a jury to give damages upon a *quantum meruit* [amount deserved], that is, in consideration of what he reasonably deserved in proportion to the service performed.

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

SPOLIATIONS in an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so taken. This injury, when the *jus patronatus* or right of advowson does not come in debate, is cognizable in the spiritual court: as if a patron first presents A to a benefice, who is instituted and inducted thereto; and then, upon pretense of a vacancy, the same patron presents B to the same living, and he also obtains institution and induction. Now if A disputes the fact of the vacancy, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were, or were not, vacant; upon which the validity of the second clerk's pretensions must depend.[16] But if the right of patronage comes at all into dispute, as if one patron presented A, and another patron presented B, there the ecclesiastical court has no cognizance, provided the tithes sued for amount to a fourth part of the value of the living, but may be prohibited at the instance of the patron by the king's writ of *indicavit* [he showed].[17] So also if a clerk, without any color of title, ejects another from his parsonage, this injury must be redressed in the temporal courts: for it depends upon no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy) but is merely a civil injury.

For dilapidations, which are a kind of ecclesiastical waste, either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay; an action also lies, either in the spiritual court by the canon law, or in the courts of common law:[18] and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors. By statute 13 Eliz. c. 10. if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of is predecessor. And by statute 14 Eliz. c. 11. all money recovered for dilapidations shall within two

© Copyright 2003, 2005 Lonang Institute www.lonang.com

years be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

AS to the neglect of reparations of the church, church-yard, and the like, the spiritual court has undoubted cognizance thereof;[19] and a suit may be brought therein for non-payment of a rate made by the church-wardens for that purpose, and these are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted, in the ecclesiastical courts.

2. MATRIMONIAL causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriage in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance.[20] But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriage were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humor or interest of the reigning pontiff: besides a thousand nice and difficult scruples, with which the clergy of those ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unraveled by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These causes indeed, partly from the nature of the injuries complained of, and partly from the clerical method of treating them,[21] soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage, as the parties themselves, when both of them living, might have done.[22]

OF matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. 2. Another species of matrimonial causes was when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but his branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 Geo II. c. 33. which enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiae* [in the face of the church], for or because of any contract of matrimony whatsoever. 3. The suit for restitution of conjugal rights is also another species of matrimonial causes: which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason;

© Copyright 2003, 2005 Lonang Institute www.lonang.com

in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. Divorces also, of which and their several distinctions we treated at large in a former volume,[23] are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising ex post facto, that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro* [from bed and board]. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted in *fraudem legis* [unlawfully], and decrees not only a separation from bed and board, but *a vinculo matrimonii* [from matrimonial bonds] itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro*; which is the suit for alimony, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living.

3. TESTAMENTARY causes are the only remaining species, belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature,[24] may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed (as was in some degree observed in a former volume[25]) they were originally cognizable in the king's courts of common law, *viz.* the county courts;[26] and afterwards transferred to the jurisdiction of the church by the favor of the crown, as a natural consequence of granting to the bishops the administration of intestates effects.

THIS spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in popish) countries all matters testamentary are of the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favor and indulgence of the municipal law, and as it should seem by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts "*de consuetudine Angliae, et super consensu regio et suorum procerum in talibus ab antiquo concesso*."[27] ["By the custom of England, and the consent of the king and his nobles anciently granted in such cases."] The same was, about a century before, very openly professed in a canon of archbishop Stratford, *viz.* that administration of intestates goods was "*ab olim*" ["formerly"] granted to the ordinary, "*consensu regio et magnatum regni Angliae*" ["by command of the king and peers of the kingdom of England"].[28] The constitutions of cardinal Othobon also testify, that this provision "*olim a praelatis cum approbatione regis et baronum dicitur emanasse*" ["emanated formerly from the prelates with the approbation of the king and barons"].[29]And arch-bishop Parker,[30] in queen Elizabeth's time, affirms in express words, that originally in matters testamentary "*non ullam habebant episcopi authoritatem, praeter eam quam a rege acceptam referebant. Jus testamenta probandi non habebant: administrationis potestatem cuique delegare non poterant*."

© Copyright 2003, 2005 Lonang Institute

["The bishops had no other authority than what they received from the king. They had not the right of proving wills; neither could they grant the power of administration."]

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer; and Lindewode[31] very fairly confesses, "*cujus regis temporibus hoc ordinatum sit, non reperio*." ["I do not find in what king's reign this was ordained."] We find it indeed frequently asserted in our common law books, that it is but of late years that the church has had the probate of wills.[32] But this must only be understood to mean, that it had not always had this prerogative: for certainly it is of very high antiquity. Lindewode, we have seen, declares that it was "*ab antiquo*" ["of antiquity"]; Stratford, in the reign of king Edward III, mentions it as "*ab olim ordinatum*" ["ordained formerly"]; and cardinal Othobon, in the 52 Hen. III. speaks of it as an ancient tradition. Bracton holds it for clear law in the same reign of Henry III, that matters testamentary belonged to the spiritual court.[33] And, yet earlier, the disposition of intestates' goods "*per visum ecclesiae*" ["under church direction"] was one of the articles confirmed to the prelates by king John's Magna Carta.[34] Matthew Paris also informs us, that king Richard I ordained in Normandy, "*quod distributio rerum quae in testamento relinquuntur autoritate ecclesiae fiet*." ["That a distribution of things which are left by will are made by church authority."] And even this ordinance, of king Richard, was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom: for in the reign of his father Henry II Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud in curia Christianitatis audiri debet et terminari*."[35] ["If any thing be averred against a will, that plea should be heard and determined in the spiritual court."] And the Scots book called *regiam majestatem* agrees verbatim with Glanvil in this point.[36]

It appears that the foreign clergy were pretty early ambitious of this branch of power: but their attempts to assume it on the continent were effectually curbed by the edict of the emperor Justin,[37] which restrained the insinuation or probate of testaments (as formerly) to the office of the magister census: for which the emperor subjoins this reason; "*absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint ostendere disceptationum esse forensium*." ["For it is absurd, nay more, it is disgraceful for clergymen to wish to display their skill in forensic disputes."] But afterwards by the canon law[38] it was allowed, that the bishop might compel by ecclesiastical censures the performance of the bequest to pious uses. And therefore, that being considered as a cause *quae secundum canones et episcopales leges ad regimen animarum pertinuit* [which belonged, according to the canon and episcopal laws, to spiritual matters], it fell within the jurisdiction of the spiritual courts by the express words of the charter of king William I, which separated those courts from the temporal. And afterwards, when king Henry I by his coronation-charter directed, that the goods of an intestate should be divided for the good of his soul,[39] this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This therefore, we may probably conjecture, was the era referred to by Stratford and Othobon, when the king by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And accordingly in king Stephen's charter it is provided, that the goods of an intestate ecclesiastic shall be distributed *pro salute animae ejus, ecclesiae consilio* [for the good of his soul, by church direction];[40] which latter words are equivalent to *per visum ecclesiae* [by church direction] in the great charter of king John before-mentioned. And the Danes and Swedes (who received the rudiments of Christianity and ecclesiastical discipline from England about the beginning of the

© Copyright 2003, 2005 Lonang Institute

twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies.[41]

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

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

IT must (in the first place) be acknowledged, to the honor of the spiritual courts, that though they continue to this day to decide many questions which are properly of temporal cognizance, yet justice is in general so ably and impartially administered in those tribunals, (especially of the superior kind) and the boundaries of their power are now so well known and established, that no material inconvenience at present arises from this jurisdiction still continuing in the ancient channel. And, should an alteration be attempted, great confusion would probably arise, in overturning long established forms, and new-modeling a course of proceedings that has now prevailed for seven centuries.

THE establishment of the civil law process in all the ecclesiastical courts was indeed a masterpiece of papal discernment, as it made a coalition impracticable between them and the national tribunals, without manifest inconvenience and hazard. And this consideration had undoubtedly its weight in causing this measure to be adopted, though many other causes concurred. The time when the pandects of Justinian were discovered afresh and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastical, and the consequent dissensions between the clergy and the laity of England, have formerly[42] been spoken to at large. I shall only now remark upon those collections, that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of

© Copyright 2003, 2005 Lonang Institute

Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were molded on the pattern of the temporal, so the canon law process was formed on the model of the civil law: the prelates embracing with the utmost ardor a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury (that bulwark of Gothic liberty) and which placed an arbitrary power of decision in the breast of a single man.

THE proceedings in the ecclesiastical courts are therefore regulated according to he practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modeled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be never so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles of sound policy the ecclesiastical process ought in every state to conform;[43] (as if they require two witnesses to prove a fact, where one will suffice at common law) in such cases a prohibition will be awarded against them.[44] But, under these restrictions, their ordinary course of proceeding is; first, by citation, to call the party injuring before them. Then by libel, *libellus*, a little book, or by articles drawn out in a formal allegation, to set forth the complainant's ground of complaint. To this succeeds the defendant's answer upon oath; when, if he denies or extenuates the charge, they proceed to proofs by witnesses examined, and their depositions taken down in writing, by an officer of the court. If he defendant has any circumstances to offer in his defense, he must also propound them in what is called his defensive allegation, to which he is entitled in his turn to the plaintiff's answer upon oath, and may from thence proceed to proofs as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago overruled in the court of chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and asserted the doctrines of judicial as well as civil liberty) continued till the middle of the last century to be upheld by the spiritual courts; when the legislature was obliged to interpose, to teach them a lesson of similar moderation. By the statute of 13 Car. II. c. 12. it is enacted, that it shall not be lawful for any bishop, or ecclesiastical judge, to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse, or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge; who takes information by hearing advocates on both sides, and thereupon forms his interlocutory decree or definitive sentence at his own discretion: from which there generally lies an appeal, in the several stages mentioned in a former chapter;[45] though, if the same be not appealed from in fifteen days, it is final, by the statute 25 Hen. VIII. c. 19.

BUT the point in which these jurisdictions are the most defective, is that of enforcing their sentences when pronounced; for which they have no other process, but that of excommunication: which is described[46] to be twofold; the less, and the greater excommunication. The less is an ecclesiastical censure, excluding the party from the participation of the sacraments: the greater proceeds farther, and excludes him not only from these but also from the company of all Christians. But, if the judge

© Copyright 2003, 2005 Lonang Institute

of any spiritual court excommunicates a man for a cause of which he has not the legal cognizance, the party may have an action against him at common law, and he is also liable to be indicted at the suit of the king.[47]

HEAVY as the penalty of excommunication is, considered in a serious light, there are, notwithstanding, many obstinate or profligate men, who would despise the *brutum fulmen* [full force] of mere ecclesiastical censures, especially when pronounced by a petty surrogate in the country, for railing or contumelious words, for non-payment of fees, or costs, or for other trivial cause. The common law therefore compassionately steps in to their aid, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Caesar,[48] whoever were interdicted by the Druids from their sacrifices, "*in numero impiorum ac sceleratorum habentur: ab iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant: neque iis petentibus jus redditur, neque honos ullus communicatur*." ["Are reckoned among the impious and wicked: all shun them, fly their approach, and avoid all communication with them, lest they receive some injury from the contagion: neither is justice rendered to them when they seek it, nor is any honor conferred on them."] And so with us by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is *probus et legalis homo* [a true and lawful man]. He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him.[49] Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificate, a *significavit* [he signified]; or from its effect a writ *de excommunicato capiendo* [for taking the excommunicated]: and the sheriff shall thereupon take the offender, and imprison him in the county jail, till he is reconciled to the church, and such reconciliation certified by the bishop; upon which another writ, *de excommunicato deliberando* [for liberating the excommunicated], issues out of chancery to deliver and release him.[50] This process seems founded on the charter of separation (so often referred to) of William the conqueror. "*Si aliquis per superbiam elatus ad justitiam episcopalem venire noluerit, vocetur semel, secundo, et tertio: quod si nec sic ad emendationem venerit, excommunicetur; et, si opus fuerit, ad hoc vindicandum fortitudo et justitia regis sive vicecomitis adhibeatur*." ["If any one, elated with pride, come not to the episcopal court, let him be summoned three times, and if he attend not then its due correction, let him be excommunicated; and, if necessary, let the power and justice of the king, or sheriff, be exerted to punish his contempt."] And in case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes of 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. which enact, that upon complaint of any contempt or misbehavior to the ecclesiastical judge by the defendant in any suit for tithes, any privy counselor or any two justices of the peace (or in case of disobedience to a definitive sentence, any two justices of the peace) may commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give due obedience to the process and sentence of the court. These timely aids, which the common and statute law have lent to the ecclesiastical jurisdiction, may serve to refute that groundless notion which some are too apt to entertain, that the courts of Westminster-hall are at open variance with those at doctors' commons. It is true that they are sometimes obliged to use a parental authority, in correcting the excesses of these of these inferior courts, and keeping them within their legal bounds; but, on the other hand, they afford them a

© Copyright 2003, 2005 Lonang Institute

parental assistance, in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from the contempt, which for want of sufficient compulsive powers would otherwise be sure to attend it.

II. I AM next to consider the injuries cognizable in the court military, or court of chivalry. The jurisdiction of which is declared by statute 13 Ric. II. c. 2. to be this; "that it has cognizance of contracts touching deeds of arms and of war, out of the realm, and also of things which tough war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court has no jurisdiction: which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster-hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

THE words, "other usages and customs," support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honor; and 2. To keep up the distinction of degrees and quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points; the redressing injuries of honor, and correcting encroachments in matters of coat-armor, precedency, and other distinctions of families.

AS a court of honor, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere. Such, for instance, as calling a man coward, or giving him the lye; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at Westminster: and yet they are such injuries as will prompt every man of spirit to demand some honorable amends, which by the ancient law of the land was appointed to be given in the court of chivalry.[51] But modern resolutions have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein.[52] And it has always been most clearly held,[53] that as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages; inasmuch as the quantity and determination thereof is ever of common law cognizance. And therefore this court of chivalry can at most order reparation in point of honor; as, to compel the defendant *mendacium sibi ipsi imponer*e, or to take the lie that he has given upon himself, or to make such other submission as the laws of honor may require.[54] Neither can this court, as to the point of reparation in honor, hold plea of any such word, or thing, wherein they party is relievable by the courts of the common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

AS to the other point of its civil jurisdiction, the redressing of encroachments and usurpations in matters of heraldry and coat-armor; it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, etc; and also rights of place or precedence, where the king's patent or act of parliament (which cannot be overruled by this court) have not already determined it.

© Copyright 2003, 2005 Lonang Institute

THE proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat.[55] But as it cannot imprison, not being a court of record, and as by the resolution of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshaling of coat-armor, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds, who consider it only as a matter of lucre and not of justice: whereby such falsity and confusion has crept into their records, (which ought to be the standing evidence of families, descents, and coat-armor) that, though formerly some credit has been paid to their testimony, now even their common seal will not be received as evidence in any court of justice in the kingdom.[56] But their original visitation-books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees.[57] And it is much to be wished, that this practice of visitations at certain periods were revived; for the failure of inquisitions post mortem, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, for the recovery of an estate or succession to a title of honor, more difficult than that of an ancient. This will be indeed remedied for the future, with respect to claims of peerage, by a late standing order[58] of the house of lords: directing the heralds to take exact accounts and their respective descendants; and that an exact pedigree of each peer and his family shall, on the day of his first admission, be delivered to the house by garter, the principal king at arms. But the general inconvenience, affecting more private successions, still continues without a remedy.

III. INJURIES cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries. These courts have jurisdiction and power to try and determine all maritime causes, or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county.[59] For the statute 13 Ric. II. c. 5. directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c. 3. declares that the court of the admiral has no manner of cognizance of any contract, or of any other thing, done within the body of any county, either by land or by water; nor of any wreck of the sea; for that must be cast on land before it becomes a wreck.[60] But it is otherwise of things *flotsam*, *jetsam*, and *liga*n; for over them the admiral has jurisdiction, as they are in and upon the sea.[61] If part of any contract, or other cause of action, does arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular.[62] Therefore though pure maritime a acquisitions, which are earned and become due on the high seas, as seamen's wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land;[63] yet, in general if there be a contract made in England and to be executed upon the seas, as a charterparty or covenant that a ship shall fail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like; these kind of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law.[64] And indeed it has been farther held, that the admiralty court cannot hold plea of any contract under seal.[65]

© Copyright 2003, 2005 Lonang Institute

AND also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall.[66] This the civilians exclaim against loudly, as inequitable and absurd; and Sir Thomas Ridley[67] has very gravely proved it to be impossible, for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging as before, that the locality of such contracts is not at all essential to the merits of them: and that learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law: that a son killed in battle is supposed to live forever for the benefit of his parent;[68] and that, by the fiction of *postliminium* and the *lex cornelia* [the Cornelian law], captives, when freed from bondage, were held to have never been prisoners,[69] and such as died in captivity were supposed to have died in their own country.[70]

WHERE the admiral's court has not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that does not alter nor take away the exclusive jurisdiction of the common law.[71] And so, *vice versa*, if it has jurisdiction of the original, it has also jurisdiction of all consequential questions, though properly determinable at common law.[72] Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea may be brought in the court of admiralty, the admiral having an original jurisdiction over beacons.[73] In case of prizes also in time of war, between our own nation and another, or between two other nations, which are taken at sea, and brought into our ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.[74]

THE proceedings of the courts of admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon; and they likewise adopt and make use of other laws, as occasion requires; such as the Rhodian law, and the laws of Oleron.[75] For the law of England, as has frequently been observed, does not acknowledged or pay any deference to the civil law considered as such; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws: the whole being corrected, altered, and amended by acts of parliament and common usage; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the crown and people. The first process in these courts is frequently by arrest of the defendant's person;[76] and they also take recognizances or stipulation of certain fidejussors [sureties] in the nature of bail,[77] and in case of default may imprison both them and their principal.[78] They may also fine and imprison for a contempt in the face of the court.[79] And all this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive;[80] though opposite to the usual doctrines of the common law: these being no courts of record, because in general their process in much conformed to that of the civil law.[81]

IV. I AM next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every

© Copyright 2003, 2005 Lonang Institute

injury its proper redress. The definition and explication of these numerous injuries, and their respective legal remedies, will employ our attention for many subsequent chapters. But, before we conclude the present, I shall just mention two species of injuries, which will properly fall now within our immediate consideration; and which are, either when justice is delayed by an inferior court that has proper cognizance of the cause; or, when such inferior court takes upon itself to examine a cause and decide the merits without any legal authority.

1. THE first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo* [proceeding], or of *mandamus* [we command]. A writ of *procedendo ad judicium* [proceeding to judgment], issues out of the court of chancery, where judges of any court do delay the parties; for that they will not give judgment, either on the one side or on the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and, upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the king's bench or common pleas.[82]

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 to an office; but it issues in all cases where the party has a right to have anything done, and has no other specific means of compelling its performance. A *mandamus* therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature whether spiritual or temporal; to academical degrees; to the use of a meeting-house; etc: it lies for the production, inspection, or delivery, of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening 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;[83] to the spiritual courts to grant an administration, to swear a church-warden, 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 too 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

© Copyright 2003, 2005 Lonang Institute

is directed, returns or signifies an insufficient reason, then thee 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 farther on the *mandamus*. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a peremptory *mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.

2. THE other injury, which is that of encroachment of jurisdiction, or calling one coram non judice, to answer in a court that has no legal cognizance of the cause, is also grievance, for which the common law has provided a remedy by the writ of prohibition.

A PROHIBITION is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases, out of the court of chancery,[84] common pleas,[85] or exchequer;[86] directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises;[87] to the county courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings:[88] or it may be directed to the courts Christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes,[89] or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according too the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety, which no wise government can or ought to endure, and which is therefore a ground of prohibition. And, if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it;[90] and an action will lie against them, to repair the party injured in damages.

SO long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it; even from the time of the constitutions of Clarendon made in opposition to the claims of arch-bishop Becket in 10 Hen. II, to the exhibition of certain articles of complaint to the king by arch-bishop Bancroft in 3 Jac. I. on

© Copyright 2003, 2005 Lonang Institute

behalf of the ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster-hall,[91] much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. A short summary of the latter is as follows. The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn *ad aliud examen* [to another examination], by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition, or fiction, that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of law, for granting the prohibition, yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court; a prohibition ought to go, because that court has no authority to try it: but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may appear to the prohibition, and take a declaration, (which must always pursue the suggestion) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation. The writ of consultation may also be, and is frequently, granted by the court without any action brought; when, after a prohibition issued, upon more mature consideration the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction.

NOTES

1. See Vol. I. introd. § 1.
2. Hal. Hist. C. L. c. 2.
3. Stat. 32 Hen. VIII. c. 7.
4. 2 Roll. Abr. 309, 310. Bro. Abr. t. jurisdiction. 83.
5. 2 Inst. 364. 489, 490.
6. See Barrington's observ. 120.

© Copyright 2003, 2005 Lonang Institute

7. 13 Edw. I. St. 4.

8. 2 Inst. 250. c. 34.

9. c. 34.

10. Stat. 7 & 8 W. III. c. 6.

11. Salk. 332.

12. Ibid. 334. Lord Raym. 450. 1558. Fitzg. 55.

13. 1 Ventr. 165.

14. 1 Burn. eccl. law. 438.

15. 1 Freem. 70.

16. F. N. B. 36.

17. *Circumspecte agatis*; 13 Edw. I. St. 4. Artic. Cleri. 9. Edw.II. c. 2. F. N. B. 45.

18. Cart. 224. 3 Lev. 268.

19. *Circumspecte agatis*; 13 Edw. I. St. 4. 5 Rep. 66.

20. Warb. alliance. 173.

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

22. 2 Inst. 614.

23. Book I. ch. 15.

24. Warburt. alliance. 173.

25. Book II. ch. 32.

26. Hickes Disser. Epistola. pag. 8. 58.

27. Provincial. L. 3. t. 13. fol. 176.

28. Ibid. l. 3. t. 38. fol. 263.

29. cap. 23.

30. See 9 Rep. 38.

31. fol. 263.

32. Fitz. Abr. tit. testament. pl. 4. 2. Roll. Abr. 217. 9 Rep. 37. Vaugh. 207.

33. l. 5. *de exceptionibus*. c. 10.

34. cap. 27. edit. Oxon.

35. l. 7. c. 8.

36. l. 2. c. 38.

37. Cod. 1. 3. 41.

38. Deeretal. 3. 26. 17. Gilb. Rep. 204, 205.

39. *Si quis baronum seu hominum meorum)_pecuniam suam non dederit vel dare disposuerit, uxor sua, sive liberi, aut*

© Copyright 2003, 2005 Lonang Institute

parentes et legitimi homines ejus, eam proanima ejus dividant sicut eis melius visum fuerit. [If any one of my barons or vassals shall not have disposed of his wealth, or directed the disposal of it, let his wife, children, or parents and proper persons divide it, for the good of his soul, as shall seem best to them.] (Text Roffens. c. 34. p. 51.)

40. Lord Lyttelt. Hen. II. vol. 1. 536. Hearne ad Gul. Neubr. 711.
41. Stiernhook, de jure Sueon l. 3. c. 8.
42. Vol. I. introd. § 1.
43. Warb. alliance. 179.
44. 2 Roll. Abr. 300, 302.
45. chap. 5.
46. Co. Litt. 133.
47. 2 Inst. 623.
48. de bello Gall. l. 6.
49. Litt. § 201.
50. F. N. B. 62.
51. Year book, 37 Hen. VI. 21. Selden of duels, c. 10. Hal. Hist. C. L. 37.
52. Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.
53. Hal. Hist. C. L. 37.
54. 1 Roll. Abr. 128.
55. Co. Litt. 261.
56. 2 Roll. Abr. 686. 2 Jon. 224.
57. Comb. 63.
58. 11 May. 1767.
59. Co. Litt. 260. Hob. 79.
60. See book I. ch. 8.
61. t Rep. 106.
62. Co. Litt. 261.
63. 1 Ventr. 146.
64. Hob. 12. Hal Hist. C. L. 35.
65. Hob. 212.
66. 4 Inst. 134.
67. View of the civil law, b. 3. p. 1. § 3.
68. Inst. 1. tit. 25.
69. Ff. 49. 13. 12. § 6.
70. Ff. 49. 15. 18.

© Copyright 2003, 2005 Lonang Institute

71. Comb. 462.
72. 13 Rep. 53. 2 Lev. 25. Hardr. 183.
73. 1 Siid. 158.
74. 2 Show. 232. Comb. 474.
75. Hale. Hist. C. L. 36. Co. Litt. 11.
76. Clerke prax. Cur. adm. § 13.
77. Ibid. § 11. 1 Roll. Abr. 531. Raym. 78. Lord Raym. 1286.
78. 1 Roll. Abr. 531. Godb. 193. 260.
79. 1 Ventr. 1.
80. 1 Keb. 552.
81. Bro. Abr. t. error. 177.
82. F. N. B. 153, 154. 240.
83. Raym. 214.
84. 1 P. Wms. 476.
85. Hob. 15.
86. Palmer. 523.
87. Lord Rayn. 1408.
88. Finch. L. 451.
89. Cro. Eliz. 666. Hob. 188.
90. F. N. B. 40.
91. 2 Inst. 601-618.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 8

Of Wrongs, And Their Remedies, Respecting The Rights of Persons

THE former chapters of this part of our commentaries having been employed in describing the several methods of redressing private wrongs, either by the mere act of the parties, or the mere operation of law; and in treating of the nature and several species of courts; together with the cognizance of wrongs or injuries by private or special tribunals, and the public ecclesiastical, military, and maritime jurisdictions of this kingdom: I come now to consider at large, and in a more particular manner, the respective remedies in the public and general courts of common law for injuries or private wrongs of any denomination whatsoever, no exclusively appropriated to any of the former tribunals. And herein I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.

First then, as to the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury. And, in treating of these, I shall at present confine myself to such wrongs as may be committed in the mutual intercourse between subject and subject; which the king as the fountain of justice is officially bound too redress in the ordinary forms of law: reserving such injuries or encroachments as may occur between the crown and the subject, to be distinctly considered hereafter; as the remedy in such cases is generally of a peculiar and eccentric nature.

NOW, as all wrong may be considered as merely a privation of right, the one natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, breach of contract, etc: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury;[1] though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself) are a diversity of suits and actions, which are defined by the mirrour[2] to be "the lawful demand of one's right:" or as Bracton and Fleta express it, in the words of Justinian,[3] *jus prosequendi in judicio quod alicui debetur* [the right of prosecuting to judgment which everyone is due].

THE Romans introduced, pretty early, set forms for actions and suits in their law, after the example of the Greeks, and made it a rule that each injury should be redressed by its proper remedy only. *"Actiones,"* say the pandects, "*compositae sunt, quibus inter se homines disceptarent, quas actiones ne populus prout vellet institueret, certas solemnesque esse voluerunt.*"[4] ["Forms of process were settled, by which men might argue their differences, which forms were established and made certain, that the people might not at pleasure institute their own modes of proceeding."] The forms of these actions were originally preserved in the books of the pontifical college, as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people.[5] The concealment was ridiculous: but the establishment of some standard was undoubtedly necessary, to fix the true state of question of right; lest in a long and arbitrary process

© Copyright 2003, 2005 Lonang Institute

it might be shifted continually, and be at length no longer discernible. Or, as Cicero expresses it,[6] "*sunt jura, sunt formulae, de omnibus rebus constitutae, ne quis aut in genere injuriae, aut in ratione actionis, errare possit. Expressae enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicae a praetore formulae, ad quas privata lis accommodatur*." ["There are rights, there are forms appointed. for all things, lest any one should mistake either the kind of injury or the mode of redress. For public forms are composed by the praetor from every species of loss, trouble, inconvenience, calamity, and injury, for the accommodation of private suits."] And in the same manner our Bracton, speaking of the original writs upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament.[7] And all the modern legislators of Europe have found it expedient from the same reasons to fall into the same or a similar method. 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*."[8] ["Personal actions which are commenced against him who by contract, or through the commission of some offence, is bound to give or surrender something."] 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,[9] feudal 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 has the inheritance, in remainder or reversion, against the tenant for life, who has 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,[10] which is a personal recompense; and so both, being joined together, denominate it a mixed action.

UNDER these three heads may every species of remedy by suit or action in the courts of common law be comprised. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed therefore now to enumerate the several kinds, and to inquire into the respective natures, of all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property; recounting at the same time the respective remedies, which are furnished by the law for every infraction of right. But I must first beg leave to premise, that all civil injuries are of two kinds, the one without force or violence, as slander or breach of contract; the other coupled

© Copyright 2003, 2005 Lonang Institute

with force and violence, as batteries, or false imprisonment.[11] Which latter species favor something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king, as well as private satisfaction to the party injured.[12] And this distinction of private wrongs, into injuries with and without force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method, that was pursued with regard to the distribution of rights: for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of wrongs, must correspond and tally with the former positive system, of rights. As therefore we divided[13] all rights into those of persons, and those of things, so we must make the same general distribution of injuries into such as affect the rights of persons, and such as affect the rights of property.

THE rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property: so that the wrongs or injuries affecting them must consequently be of a correspondent nature.

I. AS to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. WITH regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries.

2, 3. THE two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed, 1. By threats and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury; but, to complete the wrong, there must be both of them together.[14] The remedy for this is in pecuniary damages, to be recovered by action of trespass *vi et armis* [by force and arms],[15] this being an inchoate, though not an absolute, violence. 2. By assault; which is an attempt or offer to beat another, without touching him: as if one lists up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him; this is an assault, *insultus*, which Finch[16]describes to be “an unlawful setting upon one's person.” This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of trespass *vi et armis*; wherein he shall recover damages as a compensation for the injury. 3. By battery; which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. And therefore upon a similar principle the Cornelian law *de injuriis* [of injuries] prohibited *pulsation* [touching] as well as *verberation* [beating]; distinguishing verberation, which was accompanied with pain, from pulsation which was attended with none.[17] But battery is, in some cases, justifiable or lawful; as where one who has authority, a parent or master, gives

© Copyright 2003, 2005 Lonang Institute

moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defense: for if one strikes me first, or even only assaults me, I may strike in my own defense; and, if sued for it, may plead *son assault demesne* [his own assault], or that it was the plaintiff's own original assault that occasioned it. So likewise in defense of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away.[18] Thus too in the exercise of an office, as that of church-warden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation[19] And, if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the unlawful beating of another; for which the remedy is, as for assault, by action of trespass *vi et armis*: wherein the jury will give adequate damages. 4. By mayhem or wounding; which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defense against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth,[20] and also some others.[21] But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law; as they can be of no use in fighting. The same remedial action of trespass *vi et armis* lies also to recover damages for this injury; an injury, which (when wilful) no motive can justify, but necessary self-preservation. If the ear be cut off, treble damages is given by statute 37 Hen. VIII. c. 6. though this is not mayhem at common law. And here I must observe, that for these three last injuries, assault, battery, and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly prosecuted: the one at the suit of the crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages.

4. INJURIES, affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine;[22] by the exercise of a noisome trade, which infects the air in his neighborhood;[23] or by the neglect or unskillful management of his physician, surgeon, or apothecary. For it has been solemnly resolved,[24] that *mala praxis* [bad practice] is a great misdemeanor and offense at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law,[25] neglect or want of skill in physicians and surgeons "*culpae adnumerantur; veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit.*" ["They are reckoned faults, as if a medical man neglect his patient, perform an amputation unskillfully, or administer medicine unadvisedly."] There are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of trespass, upon the case. This action, of trespass, or transgression, on the case, is an universal remedy, given for all personal wrongs and injuries without force; so called, because the plaintiff's whole case or cause of complaint is set forth at length in the original writ.[26] For though in general there are methods prescribed and forms of action previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises which could not be foreseen and provided for in the ordinary course of justice, the

© Copyright 2003, 2005 Lonang Institute

party injured is allowed, both by common law and the statute of Westm. 2. c. 24. to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance.[27] For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action;[28] and therefore, wherever a new injury is done, a new method of remedy must be pursued.[29] And it is a settled distinction,[30] that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*: but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act.

5. LASTLY; injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words tending to his damage and derogation. As if a man, maliciously and falsely, utter any slander or false tale of another: which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man has poisoned another, or is perjured;[31] or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave.[32] Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum* [slander of the nobles], are held to be still more heinous;[33] and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed by an action on the case founded on many ancient statutes;[34] as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man.[35] It is said, that formerly no actions were brought for words, unless the slander was such, as (if true) would endanger the life of the object of it.[36] But, too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before-mentioned, that may endanger a man in law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust, an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me, for saying he was a bastard, *per quod* [for which] he lost the presentation to such a living.[37] In like manner to slander another man's title, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who has land by descent, a bastard) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land.[38] But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects, will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court;[39] unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call man rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before-mentioned, are not actionable: neither

© Copyright 2003, 2005 Lonang Institute

are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will: for, in both these cases, they are not maliciously spoken, which is part of the definition of slander.[40] Neither (as was formerly hinted[41]) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander.[42] Also if the defendant be able to justify, and prove the words to be true, no action will lie,[43] even though special damage has ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria* [damage without injury]; and where there is no injury, the law gives no remedy. And this is agreeable to the reasoning of the civil law:[44] "*eum, qui nocentem infamat, non est aequum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit*." ["It is not just and right that he who exposes the faults of a guilty person should be condemned on that account; for it is proper and expedient that the offences of the guilty should be known."]

A SECOND way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous[45] light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment and another by action. The former for the public offense; for every libel has a tendency to break the peace, or provoke others to break it: which offense is the same whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification.[46] But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and show that the plaintiff has received no injury at all.[47] What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon: but as to signs or pictures, it seems necessary always to show, by proper innuendo's and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear, that such libel by picture was understood to be leveled at the plaintiff, or that it was attended with any actionable consequences.

A THIRD way of destroying or injuring a man's reputation is, by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this however the law has given a very adequate remedy in damages, either by an action of conspiracy,[48] which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution.[49] In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon.[50] For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But an action for a malicious prosecution may be founded on such an indictment whereon no acquittal can be; as if it be rejected by the grand jury, or be coram non judice, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded.[51]

© Copyright 2003, 2005 Lonang Institute

However, any probable cause for preferring it is sufficient to justify the defendant.

II. WE are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

TO constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.[52] Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment;[53] or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of wagoners for misbehavior in the public service, or the apprehending of wagoners for misbehavior in the public highways.[54] False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday;[55] or in a place privileged from arrests, as in the verge of the king's court. This is the injury. Let us next see the remedy: which is of two sorts; the one removing the injury, the other making satisfaction for it.

THE means of removing the actual injury of false imprisonment, are fourfold. 1. By writ of mainprize. 2. By writ *de odio et atia*. 3. by writ *de homine replegiando*. 4. By writ of *habeas corpus*.

1. THE writ of mainprize, *manucaptio*, is a writ directed to the sheriff, (either generally, when any man is imprisoned for a bailable offense, and bail has been refused; or specially, when the offense or cause of commitment is not properly bailable below) commanding him to take sureties for the prisoner's appearance, usually called mainpernors, and to set him at large.[56] Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day: bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charge whatsoever.[57]

2. THE writ *de odio et atia* [of hatred and ill-will] was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and, if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. This writ, according to Bracton,[58] ought not to be denied to any man; it being expressly ordered to be made out *gratis*, without any denial, by Magna Carta, c. 26. and statute Westm. 2. 13 Edw. I. c. 29. But the statute of Gloucester, 6 Edw. I. c. 9. restrained it in the case of killing by misadventure or self-defense, and the statute 28 Edw. III. c. 9. abolished it in all cases whatsoever: but as the statute 42 Edw. III. c. 1. repealed all statutes then in being, contrary to the great charter, Sir Edward

© Copyright 2003, 2005 Lonang Institute

Coke is of opinion[59] that the writ *de otio et atia* was thereby revived.

3. THE writ *de homine replegiando* [of replevying a man][60] lies to replevy a man out of prison, or out of the custody of any private person, (in the same manner that chattels taken in distress may be replevied, of which in the next chapter) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And, if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned [removed], *elongatus*; upon which a process issues (called a *capias in withernam* [take in reprisal]) to imprison the defendant himself, without bail or mainprize,[61] till he produces the party. But this writ is guarded with so many exceptions,[62] that it is not an effectual remedy in numerous instances, especially where the crown is concerned. The incapacity therefore of these three remedies to give complete relief in every case has almost entirely antiquated them, and has caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

4. THE writ of *habeas corpus* [have the body], 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. Such is the *habeas corpus ad respondendum* [have the body to answer], when a man has a course of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the courts above.[63] Such is that *ad satisfaciendum* [to satisfy], when a prisoner has had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.[64] Such also are those *ad prosequendum, testificandum, deliberandum, deliberandum, &c.* [to prosecute, testify, deliberate, etc.]; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly the common writ *ad faciendum et recipiendum* [to do and receive], which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa* [have the body with the cause]) to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court;[65] and it instantly supersedes all proceedings in the court below. But, in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13. that no *habeas corpus* shall issue to remove any prisoner out of any jail, unless signed by some judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court by writ of *procedendo* [proceeding] or otherwise, shall ever afterwards be again removed: and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an expedient[66]having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the course of the court the *habeas corpus* removed both actions together) it is therefore enacted by statute 12 Geo. I. c. 29. that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater

© Copyright 2003, 2005 Lonang Institute

amount.

BUT the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum* [have the body to answer]; 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.[67] 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,[68] 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,[69] 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;[70] unless the term should intervene, and then it may be returned in court.[71] Indeed, if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court, a *habeas corpus ad subjiciendum* might also have been awarded from thence:[72] and, if the cause of imprisonment were palpably illegal, they might have discharged him;[73] but, if he were committed for any criminal mater, they could only have remanded him, or taken bail for his appearance in the court of king's bench;[74] which occasioned the common pleas to discountenance such applications. It has also been said, and by very respectable authorities,[75] 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[76], and therefore his lordship refused it.

IN the court of king's bench it was, and is still, necessary to apply for it by motion to the court,[77] as in the case of all other prerogative writs (*certiorari* [notice given], prohibition, *mandamus* [we command], 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,[78] “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 has 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.[79] So that, if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity or other prudential reasons, might obtain a temporary enlargement by suing out an *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. 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.[80] On the other hand, if a probable ground be shown, that the party is imprisoned without just cause,[81] and therefore has a right to be delivered, the writ of *habeas corpus* is then a writ of right, which “may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other.”[82]

IN a former part of these commentaries[83] we expatiated at large on the personal liberty of the subject. It was shown to be a natural inherent right, which could not be surrendered or forfeited unless by

© Copyright 2003, 2005 Lonang Institute

the commission of some great and atrocious crime, nor ought 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 or usurping princes, yet established on the firmest basis by the provisions of Magna Carta, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consist 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 induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

AND yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedent (and those perhaps misunderstood) determined[84] that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the petition of right, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment; the chief justice, Sir Nicholas Hyde, at the same time declaring,[85] that "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years.[86]

THESE pitiful evasions gave rise to the statute 16 Car. I. c. 10. §. 8. whereby it was 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 pretense whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench or common pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner, Yet still in the case of Jenks, before alluded to,[87] who in 1676 was committed by the king in council for a turbulent speech at Guildhall,[88] 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

© Copyright 2003, 2005 Lonang Institute

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 minister, 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[89] of the kingdom; and by consequence has also in subsequent times reduced the method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

THE statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them.[90] 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessory thereto before the fact, or 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. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner of his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act) shall for the first offense forfeit 100£ and for the second offense 200£ to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offense on penalty of 500£. 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* [hear and determine], be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offense: but that no person, after the assizes shall be opened for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500£. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offense in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisors, aiders, and assistants shall forfeit to the party grieved a sum not less than 500£ to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *praemunire* [forewarning]; and shall be

© Copyright 2003, 2005 Lonang Institute

incapable of the king's pardon.

THIS is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents[91] and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any alias or pluries; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions[92] of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

THE satisfactory remedy for this injury of false imprisonment, is by an action of trespass, *vi et armis*, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or *vi et armis*, liable to pay a fine to the king for the violation of the public peace.

III. WITH regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right; yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the rights of things; and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the enjoyment, as well as to the rights, of property. And therefore I shall here conclude the head of injuries affecting the absolute rights of individuals.

WE are next to contemplate those which affect their relative rights; or such as are incident to persons considered as members of society, and connected to each other by various ties and relations: and, in particular, such injuries as may be done to persons under the four following relations; husband and wife, parent and child, guardian and ward, master and servant.

I. INJURIES that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. 1. As to the first sort, abduction or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of ravishment, or action of trespass *vi et armis, de uxore rapta et abducta* [for ravishment and abduction of his wife].[93] This action lay at the common law; and thereby the husband shall recover, not the possession[94] of his wife, but damages for taking her away: and by statute Westm. 1. 3 Edw. I. c. 13. the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action:[95] and the husband is also entitled to recover damages in an action

© Copyright 2003, 2005 Lonang Institute

on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.[96] The old law was so strict in this point, that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned:[97] but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.[98] 2. Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives a satisfaction to the husband for it by an action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances;[99] as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious. 3. The third injury is that of beating a man's wife or otherwise ill using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action upon the case for this ill-usage, *per quod consortium amisit* [by which he lost his wife], in which he shall recover a satisfaction in damages.[100]

II. INJURIES that may be offered to a person considered in the relation of a parent were likewise of two kinds; 1. Abduction, or taking his children away; and 2. Marrying his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded: for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury, for which a civil action will lie. As to the other, of abduction or taking away the children from the father, that is also a matter of doubt whether it be a civil injury, or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir: some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away any of the children, for that the parent has an interest in them all, to provide for their education.[101] If therefore before the abolition of these tenures it was an injury to the father to take away the rest of his children, as well as his heir, (as I am inclined to think it was) it still remains an injury, and is remediable by a writ of ravishment, or, action of trespass *vi et armis, de filio, vel filia, rapto vel abducto* [for the ravishment or abduction of the son or daughter];[102] in the same manner as the husband may have it, on account of the abduction of his wife.

III. OF a similar nature to the last is the relation of guardian and ward; and the like actions mutatis mutandis, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him.[103] And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always[104] and is still entitled to an action of ravishment, if his ward or pupil be taken from him: but then he must account to his pupil for the damages which he so recovers.[105] And, as guardian in

© Copyright 2003, 2005 Lonang Institute

socage was also entitled at common law to a writ of right of ward, *de custodia terrae et haeredis* [for the custody of land and heir], in order to recover the possession and custody of the infant,[106] so I apprehend that he is still entitled to sue out this antiquated writ. But a more speedy and summary method of redressing all complaints relative to wards and guardians has of late obtained, by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction, of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24. that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants.[107]

IV. To the relation between master and servant, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other, beating or confining him in such a manner that he is not able to perform his work. As to the first; the retaining another person's servant during the time he has agreed to serve his present master; this, as it is an ungentlemanlike, so it is also an illegal act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case: and he may also have an action against the servant for the non-performance of his agreement.[108] But, if the new master were not apprized of the former contract, no action lies against him,[109] unless he refuse to restore the servant upon demand. The other point of injury, is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; *viz.* the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass, *vi et armis*; in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* [by which he lost his service]:[110] and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill treated their servants.[111]

WE may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior has no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she has no separate interest in any thing during her coverture. The child has no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an appeal, and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and, if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

© Copyright 2003, 2005 Lonang Institute

NOTES

1. See book II. ch. 29.

2. c. 2. § 1.

3. Inst. 4. 6. pr.

4. Ff. 1. 2. 2. § 6.

5. Cio. Pro Muraena. § 11. de orat. L. 1. c. 41.

6. Pro Qu. Roscio. § 8.

7. *Sunt quaedam brevia formata super certis casibus de cursu, et de communi consilio totius regni approbata et concessa, quae quidem nullatenus mutari poterint absque consensu et voluntate eorum.* [There are some writs formed on certain cases, granted and approved by the common council of the kingdom, which can in no wise be changed without its will and consent.] (l. 5. *de exceptionibus.* c. 17. § 2.)

8. Inst. 4. 6. 15.

9. c. 2. § 6.

10. 6 Edw I. C. 5.

11. Finch. L. 184.

12. Finch. L. 198. Jenk. Cent. 185.

13. See book I. Ch. 1.

14. Finch. L. 202.

15. Registr. 104. 27 Aff. 11. 7 Edw IV. 24.

16. Finch. L. 202.

17. Ff. 47. 10. 5.

18. Finch. L. 203.

19. 1 Sid. 301.

20. Finch. L. 204.

21. 1 Hawk. P. C. 111.

22. 1 Roll. Abr. 90.

23. 9 Rep. 57. Hutt. 135.

24. Lord Raym. 214.

25. Inst 4. 3. 6 & 7.

26. For example: "*Rex vicecomiti salutem. Si A fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B, quod sit coram justitiariis nostris apud Westmonasterium in octabis sancti Michaelis, ostensurus quare cum idem B ad dextrum oculum ipsius A casualiter laesum bene et competenter curandum apud S. pro quadam pecuniae summa prae manibus soluta assumpsisset, idem B curam suam circa oculum praedictum tam negligenter et improvide apposuit, quod idem A defectu ipsius B visum oculi praedicti totaliter amisit, ad damnum ipsius A viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Tesle meipso apud Westmonasterium &c.*" ["The king to the sheriff sends greeting. If A. give you security that he will prosecute his claim, then put B. by gage and safe pledges to appear before our justices at Westminster on the octave of St. Michael, to show cause why, when the same B. had at S. undertaken, for a certain sum of money paid beforehand, well and completely to cure the right eye of the said A. accidentally hurt, the same B. attended to

© Copyright 2003, 2005 Lonang Institute

the said eye so negligently and carelessly, that the same A., by the default of the same B., totally lost the sight of the said eye, to the damage of the said A. (as he says) of twenty pounds. And have you there the names of the pledges and this writ. Witness myself at Westminster, etc."] (Registr. Brev. 105.)

27. See pag 51.
28. 1 Salk. 20. 6 Mod. 54.
29. Cro. Jac. 478.
30. 11 Mod. 180. Lord Raym. 1402. Stra. 635.
31. Finch. L. 185.
32. Ibid. 186.
33. 1 Ventr. 60.
34. Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. II. c. 11.
35. Lord Raym. 1369.
36. 2 Vent. 28.
37. 4 Rep. 17. 1 Lev. 248.
38. Cro. Jac. 213. Cro. Eliz. 197.
39. Noy. 64. 1 Freem. 277.
40. Finch. L. 186. 1 Lev. 82. Cro. Jac. 91.
41. pag. 29.
42. Dyer. 285. Cro. Jac. 90.
43. 4 Rep. 13.
44. Ff. 47. 10. 18.
45. 2 Show. 314. 11 Mod. 99.
46. 5 Rep. 125.
47. 11 Mod. 99.
48. Finch. L. 605.
49. F. N. B. 116.
50. Carth, 421. Lord Raym. 253.
51. 10 Mod. 219. Stra. 691.
52. 2 Inst. 589.
53. Ibid. 46.
54. Stat 7 Geo. III. c. 42.
55. Stat. 29 Car. II. c. 7.
56. F. N. B. 250. 1 Hal. P. C. 141. Coke on bail and mainpr. Ch. 10.
57. Co. ibid. ch. 3.

© Copyright 2003, 2005 Lonang Institute

58. l. 3. tr. 2. c. 8.

59. 2 Inst. 43. 55. 315.

60. F. N. B. 66.

61. Raym. 474.

62. *Nisi captus est per speciale praeceptum nostrum, vel capitalis justitiarii nostri, vel pro morte hominus, vel pro foresta nostra, vel pro aliquo alio retto, quare secundum consuetudinem Angliae non sint replegiabilis.* [Unless he be taken by our special command, or by that of our chief justice, for the death of a man, for a breach of the forest laws, or any other offence for which, according to the custom of England, he may not be repleviable.] (Registr. 77.)

63. 2 Mod. 198.

64. 2 Lilly prac. Reg. 4.

65. 2 Mod. 306.

66. Bohun instit. Legal. 85. edit. 1708.

67. St. Trials. viii. 142.

68. The *pluries habeas corpus* directed to Berwick in 43 Eliz. (cited 4 Burr. 836.) was *teste*'d *die Jovis prox' post quinden' sancti Martini* [the Thursday next after the quindena of St. Martin]. It appears, by referring to the dominical letter of that year, that this quindena (Nov. 25.) happened that year on a Saturday. The Thursday after was therefore the 30th of November, two days after the expiration of the term.

69. Cro. Jac. 543.

70. 4 Burr. 856.

71. Ibid. 460. 542. 606.

72. 2 Inst. 55. 4 Inst. 293. 2 Hal. P. C. 144. 2 Ventr. 22.

73. Vaugh. 155.

74. Carter. 221. 2 Jon. 13.

75. 4 Inst. 182. 2 Hal. P. C. 147.

76. Lord Nott. MSS Rep. July 1676.

77. 2 Mod. 306. 1 Lev. 1.

78. Bushell's case. 2 Jon. 13.

79. Cro. Jac. 543.

80. 3 Bulstr. 27.

81. 2 Inst. 615.

82. Com. journ. 1 Apr. 1628.

83. Book I. ch. 1.

84. State Tr. Vii. 136.

85. Ibid. 240.

86. " *Etiam judicum tunc primarius, nisi illud saceremus, rescripti illius forensis, qui libertatis personalis omnimodae vindex legitimus est fere solus, usum omnimodum palam pronuntiavit (sui semper similis) nobis perpetuo in posterum denegandum. Quod, ul odiosissimum juris prodigium, scientioribus hic universis censitum.*" ["Then also the chief justice (always the same)

© Copyright 2003, 2005 Lonang Institute

openly declared, that unless we could do it (find sureties for good behavior) the use of this forensic rescript, which is almost the only lawful protection of every kind of personal liberty, would ever after be denied us. Which was considered by all the lawyers present as a most odious and monstrous declaration."] (Vindic. Mar. claus. Edit. A.D.1653.)

87. pag. 132.

88. State Trials. Vii. 471.

89. See book I. ch. 1.

90. These two clauses seem to be transposed, and should properly be placed after the following provisions.

91. 4 Burr. 856.

92. See Vol. I. pag. 136.

93. F. N. B. 89.

94. 2 Inst. 434.

95. Ibid.

96. Law of *nisi prius*. 74.

97. Bro. Abr. t. trespass. 213.

98. Ibid. 207. 440.

99. Law of *nisi prius*. 26.

100. Cro. Jac. 501. 538.

101. Cro. Eliz. 770.

102. F. N. B. 90.

103. Ibid. 139.

104. Ibid.

105. Hale on F. N. B. 139.

106. F. N. B. Ibid.

107. 2 P. Wms. 108.

108. F. N. B. 167.

109. Ibid. Winch. 51.

110. 9 Rep. 113. 10 Rep. 130.

111. Pott. Antiqu. B. 1. c. 26.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 9

Of Injuries to Personal Property

IN the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

AND here again we must follow our former division[1] of property into personal and real: personal, which consists in goods, money, and all other moveable chattels, and things thereunto incident; a property, which may attend a man's person wherever he goes, and from thence receives its denomination: and real property, which consists of such things as are permanent, fixed, and immoveable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

FIRST then we are to consider the injuries that may be offered to the rights of personal property; and, of these, first the rights of personal property in possession, and then those that are in action only.[2]

I. THE rights of personal property in possession are liable to two species of injuries: the amotion [removal] or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful.

1. AND first of an unlawful taking. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows as a necessary consequence, that when I once have gained a rightful possession of any goods or chattels, either by fraud or force dispossesses me of them is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simpleminded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

THE wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin: an institution, which the mirror[3] ascribes to Glanvil, chief justice to king Henry the second. This obtains only in one instance of an unlawful taking, that of a wrongful distress; and this and the action of detinue (of which I shall presently say more) are almost the only actions, in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them

© Copyright 2003, 2005 Lonang Institute

in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that "*lex neminem cogit ad vana, seu impossibilia*" ["the law compels no one to do things which are either useless or impossible"], it therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages. But in the case of a distress, the goods are from the first taking in the custody of the law, and not merely in that of the distrainor; and therefore they may not only be identified, but also restored to the first possessor, without any material change in their condition. And, being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a *rescous*, for which the distrainor has a remedy in damages, either by writ of *rescous*,[4] in case they were going to the pound, or by writ *de parco fracto*, or pound-breach,[5] in case they were actually impounded. He may also at his option bring an action on the case for this injury: and shall therein, if the distress were taken for rent, recover treble damages.[6] The term, *rescous*, is likewise applied to the forcible delivery so a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of *rescous*:[7] or, if the sheriff makes a return of such *rescous* to the court out of which the process issued, the rescuer will be punished by attachment.[8]

AN action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause: being a re-delivery of the pledge,[9] or thing taken in distress, to the owner; upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him.[10] And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias* [cause to be replevied];[11] which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county-court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage.[12] For which reason the statute of Marlbridge[13] directs, that (without suing a writ out of the chancery) the sheriff, immediately upon complaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is farther provided by statute 1 P. & M. c. 12. that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application therefore, either to the sheriff, or one of his said deputies, security is to be given, in pursuance of the statute of Westm. 2. 13 Edw. I. c. 2. 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and, 2. That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo* [pledges to have the return]. Besides these pledges, which are merely discretionary in the sheriff, the statute 11 Geo. II. c. 19. requires that the officer, granting a replevin on a distress for rent, shall take a bond with two sureties in a sum of double the value of the goods distrained; which bond shall be assigned to the avowant of person making cognizance, on request made to the sheriff; and, if forfeited, may be sued in the name of the assignee. And certainly, as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon; unless the distrainor claims a property in the goods so taken. For if, by

© Copyright 2003, 2005 Lonang Institute

this method of distress, the distrainor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal remitter.[14] If therefore the distrainor claims any such property, the party replevying must sue out a writ *de proprietate probanda* [for proving ownership], in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted.[15] And if it be found to be in the distrainor, the sheriff can proceed no farther; but must return the claim of property to the court of king's bench or common pleas, to be the farther prosecuted, if thought advisable, and there finally determined.[16]

BUT if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainor; then the sheriff is to replevy the goods (making use of even force, if the distrainor makes resistance[17]) in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are eloigned, *elongata*, carried to a distance, to places to him unknown: and thereupon the party replevying shall have a writ of *capias in withernam* [take in reprisal], or *in vetito namio*; a term which signifies a second or reciprocal distress,[18] in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods, of the distrainor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner.[19] So that here is now distress against distress; one being taken to answer the other, by way of reprisal,[20] and as a punishment for the illegal behavior of the original distrainor. For which reason goods taken in *withernam* cannot be replevied, till the original distress is forth-coming.[21]

BUT, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may.[22] But either party may remove it to the superior courts; the plaintiff at pleasure, the defendant upon reasonable cause:[23] and also if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther;[24] so that it is usual to carry it up in the first instance to the courts of Westminster-hall. Upon this action brought, the distrainor, who is now the defendant, makes avowry; that is, he avows taking the distress in his own right, or the right of his wife;[25] and sets forth the season of it, as for rent arrere, damage done, or other cause: or else, if he justifies in another's right, as his bailiff or servant, he is said to make cognizance; that is, he acknowledges the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain: and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff; *viz.* that the distress was wrongfully taken; he has already got his goods back into his own possession, and shall keep them, and moreover recover damages.[26] But if the defendant prevails, and obtains judgment that the distress was legal, then he shall have a writ *de retorno habendo*, whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody; to be sold, or otherwise disposed of, as if no replevin had been made. Or, in case of rent-arrere, he may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear: and, if the distress be insufficient, he may take a farther distress or distresses:[27] but otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have writ of recaption,[28] and recover damages for the defendant's contempt of the process of the law.

© Copyright 2003, 2005 Lonang Institute

IN like manner, other remedies for other unlawful taking of a man's goods consist only in recovering a satisfaction in damages. As if a man take the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury; which, though it does not amount to felony unless it be done *animo furandi* [with intent to steal], is nevertheless a transgression, for which an action of trespass *vi et armis* [by force and arms] will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or, if committed without force, the party may, at his choice have another remedy in damages by action of *trover* and *conversion*, of which I shall presently say more.

2. DEPRIVATION of possession may also be by an unjust detainer of another's goods, though the original taking was lawful. As if I distrain another's cattle damage-feasant, and he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of replevin against me to recover them:[29] in which he shall recover damages only for the detention and not for the caption, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue* [to detain].[30] In this action, of detinue, it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like: for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary:[31] 1. That the defendant came lawfully by the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. But there is one disadvantage which attends this action; *viz.* that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath,[32] and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of trover.

THIS action, of trover and conversion, was in its original an action of trespass upon the case, for recovery of damages against such person as had found another's goods, and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods,[33] gave it so considerable an advantage over the action of detinue, that by a fiction of law actions of trover were at length permitted to be brought against any man, who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion: for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown:[34] and therefore he must not convert them to his own use, which the law presumes him to do, if he refuses to restore them to the owner; for which reason such refusal alone is, *prima facie*, sufficient evidence of a conversion.[35] The fact of the finding, or trover, is therefore now totally immaterial: for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and, if he proves that the goods are his property, and that

© Copyright 2003, 2005 Lonang Institute

the defendant had them in his possession, it is sufficient. But a conversion must be fully proved: and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of detinue or replevin.

As to the damage that may be offered to things personal, while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes: by action of trespass wi et armis, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant.[36] And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequence, if he knows of such evil habit.[37]

II. HITHERTO of injuries affecting the right of things personal, in possession. We are next to consider those which regard things in action only; or such rights as are founded on, and arise from contracts; the nature and several divisions of which were explained in the preceding volume.[38] The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now endeavor to reduce them into a narrow compass, by here making only a twofold division of contracts; *viz.* contracts express, and contracts implied; and considering the injuries that arise from the violation of each, and their respective remedies.

EXPRESS contracts include three distinct species, debts, covenants, and promises.

1. THE legal acceptation of debt is, a sum of money due by certain and express agreement. As, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and unalterable, and does not depend upon any after-calculation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of debt,[39] to compel the performance of the contract and recover the specific sum due.[40] This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me;[41] for this is also a determinate contract: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal: wherein the sum due is clearly and precisely expressed: for in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of waging his law, or purging himself of the debt the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring

© Copyright 2003, 2005 Lonang Institute

an action of debt for 30£ I am not at liberty to prove a debt of 20£ and recover a verdict thereon;[42] any more than if I bring an action of detinue for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit* [debt undertaken], which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit* [undertaking], and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if any debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto* [for so much], and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, being indebted to me in 30£ undertook or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum.

THE form of the writ of debt is sometimes in the *debet* and *detinet* [owes and detains], and sometimes in the *detinet* only: that is, the writ states, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the *debet* as well as *detinet*, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, as by the obligee against the obligor, the landlord against the tenant, etc. But, if it be brought by or against an executor for a duty due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only.[43] So also if the action be for goods, for corn, or an horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I have personally contracted, is properly considered as my debt. And indeed a writ of debt in the *detinet* only, is neither more nor less than a mere writ of *detinue*: it might therefore perhaps be more easy (instead of distinguishing between the *debet* and *detinet*, and the *detinet* only, in an action of debt) to say at once that in the one case an action of debt may be had, in the other an action of detinue.

2. A COVENANT also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by writ of covenant;[44] which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant) or show good cause to the contrary: and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

THERE is one species of covenant, of a different nature from the rest; and that is a covenant real, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature.[45] For this the remedy is by a special writ of covenant, for a specific performance of the contract,

© Copyright 2003, 2005 Lonang Institute

concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the *deforciant*, to keep the covenant made between the plaintiff and him concerning the identical lands in question: and upon this process it is that fines of land are usually levied at common law;[46] the plaintiff, or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And, for the end of this supposed difference, the fine or *finalis concordia* [final agreement] is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And moreover, as leases for years were formerly considered only as contracts[47]or covenants for the enjoyment of the rents and profits, and not as the conveyance of any real interest in the land, the ancient remedy for the lessee, if ejected, was by writ of covenant against the lessor, to recover the term (if in being) and damages, in case the ouster was committed by the lessor himself; or, if the term was expired, or the ouster was committed by a stranger, then to recover damages only.[48]

3. A PROMISE is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same. If therefore it be to do any explicit act, it is an express contract, as much as any covenant; and the breach of it is an equal injury. The remedy indeed is not exactly the same: since instead of an action of covenant, there only lies an action upon the case, for what is called the *assumpsit* or undertaking of the defendant; the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. As if a builder promises, undertakes, or assumes to Caius, that he will build and cover his house within a time limited, and fails to do it; Caius has an action on the case against the builder, for this breach of his express promise, undertaking, or *assumpsit*; and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case before-mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit*; and the payee at common law, or by custom and act of parliament the endorsee,[49] may recover the value of the note in damages, if it remains unpaid. Some agreements indeed, though never so expressly made, are deemed of so important a nature, that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which, the statute of frauds and perjuries, 29 Car. II. c. 3. enacts, that in the five following cases no verbal promise shall be sufficient no ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And, lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.

FROM these express contracts the transition is easy to those that are only implied by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answerable to such persons, as suffer

© Copyright 2003, 2005 Lonang Institute

by his non-performance.

OF this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and has virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he has beforehand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he has once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment,[50] and shall not be put upon the proof of the original cause of action; but upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant has contracted a debt, and is bound to pay it. This method seems to have been invented, when real actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III. c. 17.) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one.

ON the same principle it is, (of an implied original contract to submit to the rules of the community, whereof we are members) that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding[51]) immediately create a debt in the eye of the law: and such forfeiture or amercement, if unpaid, work an injury to the party or parties entitled to receive it; for which the remedy is by action of debt.[52]

THE same reason may with equal justice be applied to all penal statues, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party grieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester[53] (explained and enforced by several subsequent statutes[54]) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for, if they take him, they stand excused. But otherwise the party robbed is entitled to prosecute them, by a special action on the case, for damages equivalent to his loss. And of the same nature is the action given by statute 9 Geo. I. c. 22. commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offenses enumerated and made felony by that act. But, more usually, these forfeitures created by statute are given at large, to any common

© Copyright 2003, 2005 Lonang Institute

informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general.[55] Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*." ["Who prosecutes this suit as well for the king, etc. as for himself."] If the king therefore himself commences this suit, he shall have the whole forfeiture.[56] But if any one has begun a *qui tam*, or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws; 4 Hen. VII. c. 20. which enacts, that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide*. A provision, that seems borrowed from the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him.[57]

A SECOND class, of implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsit*s; which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man has engaged to perform what his duty or justice requires. Thus,

1. IF I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labor deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an *assumpsit* on a *quantum meruit* [amount merited].

2. THERE is also an implied *assumpsit* on a *quantum valebat* [amount it is worth], which is very similar to the former; being only where one takes up goods or wares of a tradesman, without expressly agreeing for the price. There the law concludes, that both parties did intentionally agree, that the real value of the goods should be paid; and an action on the case may be brought accordingly, if the vendee refuses to pay that value.

3. A THIRD species of implied *assumpsits* is when one has had and received money of another's, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* [by equity and right] he ought to

© Copyright 2003, 2005 Lonang Institute

refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation.[58]

4. WHERE a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*.[59]

5. LIKEWISE, fifthly, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, *insimul computassent*, (which gives name to this species of *assumpsit*) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of account, *de computo*;[60] commanding the defendant to render a just account to the plaintiff, or show the court good cause to the contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law,[61] lay only against the parties themselves, and not their executors; because matters of account rested solely in their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Ann. c. 16. which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied *assumpsit* to pay the balance.

6. THE last class of contracts, implied by reason and construction of law, arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of mis-feasance; as, if the sheriff does not execute a writ sent to him, or if he willfully makes a false return thereof; in both these cases the party aggrieved shall have an action on the case, for damages to be assessed by a jury.[62] If a sheriff or jailer suffers a prisoner, who is taken upon mesne process (that is, during the pendency of a suit) to escape, he is liable to an action on the case.[63] But if after judgment, a jailer or a sheriff permits a debtor to escape, who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand: which doctrine is grounded[64] on the equity of the statutes of Westm. 2. 13 Edw. I. c. 11. and 1 Ric. II. c. 12. An advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case, for a reparation to their injured client.[65] There is also in law always an implied contract with a common inn-keeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods

© Copyright 2003, 2005 Lonang Institute

he carries; with a common farrier, that he shoes a horse well, without laming him; with a common tailor, or other workman, that he performs his business in a workmanlike manner: in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking.[66] But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but in order to charge him with damages, a special agreement is required. Also if an inn-keeper, or other victualer, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler.[67] If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest.[68] In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise, an action on the case lies against him to exact damages for this deceit. In contracts for provisions it is always implied that they are wholesome; and, if they be not, the same remedy may be had. Also if he, that sells any thing, does upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury to good faith, for which an action on the case will lie to recover damages.[69] The warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty:[70] for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro* [in the future]: as, that a horse is sound at the buying of him; not that he will be sound two years hence. But if the vendor knew the goods to be unsound, and has used any art to disguise them,[71] or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it.[72] Also if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it has been held that an action on the case lies, to recover damages for this imposition.[73]

BESIDES the special action on the case, there is also a peculiar remedy, entitled an action of deceit,[74] to give damages in some particular cases of fraud; and principally where one man does any thing in the name of another, by which he is deceived or injured;[75] as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs: or where one suffers a fraudulent recovery of land or chattels to the prejudice of him that has right. It also lies in the cases of warranty before-mentioned,[76] and the other injuries committed contrary to good faith and honesty. But the action on the case, in nature of deceit, is more usually brought upon these occasions.

THUS much for the non-performance of contracts express or implied; which includes every possible injury to what is by far the most considerable species of personal property; *viz.* that which consists in action merely, and not in possession. Which finishes our inquiries into such wrongs as may be

© Copyright 2003, 2005 Lonang Institute www.lonang.com

offered to personal property, with their several remedies by suit or action.

NOTES

1. See book II. ch. 2.
2. Ibid. ch. 25.
3. c. 2.§ 6.
4. F. N. B. 101.
5. Ibid. 100.
6. Stat. 2 W. & M. Seff. 1. c. 5.
7. 6 Mod. 211.
8. Cro. Jac. 419. Salk. 586.
9. See pag. 13.
10. Co. Litt. 145.
11. F. N. B. 68.
12. 2 Inst. 139.
13. 52 Hen. III. c. 21
14. See pag. 19.
15. Finch. L. 316.
16. Co. Litt. 145. Finch. L. 450.
17. Inst. 193.
18. Smith's commonw. b.3.c.10. 2Inst. 141.
19. F. N. B. 69. 73.
20. In the old northern languages the word *withernam* is used as equivalent to reprisals. (Stiernhook, de jure Sueon. l. 1. c. 10)
21. Raym. 475. The substance of this rule composed the terms of that famous question, with which Sir Thomas More (when a student on his travels) is said to have puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in any science: *in omni scibili, et de quolibet ente*. Upon which Mr. More sent him this question, "*utrum averia carucae, capta in vetito namio, sint irreplegibilia*;" whether beasts of the plow, taken in *withernam*, are incapable of being replevied. (Hoddefd. c. 5.)
22. 2 Inst. 139.
23. F. N. B. 69. 70.
24. Finch. L. 317.
25. 2 Saund. 195.
26. F. N. B. 69.
27. Stat. 17 Car. II. c. 7.

© Copyright 2003, 2005 Lonang Institute

28. F. N. B. 71.
29. F. N. B. 69.
30. Ibid. 138.
31. Co. Litt. 286.
32. Ibid. 295.
33. Salk. 654.
34. See book. I. ch. 8. book II. ch. 1. & 26.
35. 10 Rep. 56.
36. Noy's Max. c. 44.
37. Con. Car 254. 487.
38. See book II. ch. 30.
39. F. N. B. 119.
40. See appendix, No. III. § N.
41. 4 Rep. 94.
42. Dyer. 219.
43. F. N. B. 119.
44. F. N. B. 145.
45. lial. On F. N. B. 146.
46. See book II. ch. 21.
47. Ibid. ch. 9.
48. Ero. Abr. t. covenant. 33. F. N. B. 145.
49. See book II. ch. 30.
50. 1 Rool. Abr. 600, 601.
51. Law of *nisi prius.* 155.
52. 5 Rep. 64. Hob. 279.
53. 13 Iidw. J. c. 1.
54. 27Eliz. c. 13. 29Car. II. c.7. 8Geo. II. c. 16. 22 Geo. II. c. 24.
55. See book II. ch. 29.
56. 2 Hawk. P. C. 268.
57. Ff. 47. 15. 3.
58. 4 Burr. 1012.
59. Carth. 446. 2 Keb. 99.
60. F. N. B. 116.

© Copyright 2003, 2005 Lonang Institute

61. Co. Litt. 90.
62. Moor. 431. 11 Rep. 99.
63. Cro. Eliz. 625. Comb. 69.
64. Bro. Abr. t. parliament. 19. 2 Inst. 382.
65. Finch. L. 188.
66. 11 Rep. 54. 1 Saund. 324.
67. 1 Ventr. 333.
68. 10 Rep. 56.
69. F. N. B. 94.
70. Finch. L. 189.
71. 2 Roll. Rep. 5.
72. Finch. L. 189.
73. Salk. 611.
74. F. N. B. 95.
75. Law of *nisi prius.* 29.
76. F. N. B. 98.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 10

Of Injuries to Real Property, And First of Dispossession, or Ouster, of The Freehold

I COME now to consider such injuries as affect that species of property which the laws of England have denominated real; as being of a more substantial and permanent nature than those transitory rights of which personal chattels are the object.

REAL injuries then, or injuries affecting real rights, are principally six; 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

OUSTER, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy; in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession may either be of the freehold, or of chattels real. Ouster of the freehold is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disseizin; 4. Discontinuance; 5. Deforcement. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. AND, first, an abatement is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold: this entry of him is called an abatement, and he himself is denominated an abator.[1] It is to be observed that this expression, of abating, which is derived from the French and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book:[2] and in a like sense it is used in statute Westm. 1. 3 Edw. I. c. 17. where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down, and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter: here it is taken figuratively, and signifies the overthrow or defeating of such writ, by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression, to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of stranger.

THIS abatement of a freehold is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this however agreeable to natural justice, considering man merely as an individual, is diametrically opposite to the law of society, and particularly the law of England: which, for the preservation of public peace, has prohibited as far as possible all acquisitions by mere occupancy; and has directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his devisee; or, on default of such appointment, in such of his next relations as the law has selected and pointed out as his natural representative or heir. Every entry therefore of a mere stranger, by way of intervention between the ancestor and heir or person next entitled, which keeps the heir or devisee out of possession, is one of the highest injuries to the rights of real property.

© Copyright 2003, 2005 Lonang Institute

2. THE second species of injury by ouster, or amotion of possession from the freehold, is by intrusion: which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dies seized of certain lands and tenements, and a stranger enters thereon, after such death of the tenant, and before any entry of him in remainder or reversion.[3] This entry and interposition of the stranger differ from an abatement in this; that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example; if A dies seized of lands in fee-simple, and, before the entry of B his heir, C enters thereon, this is an abatement; but if A be tenant for life, with remainder to B in fee-simple, and, after the death of A, C enters, this is an intrusion. Also if A be tenant for life on lease from B, or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B; and after the death of A, C enters and keeps B out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

3. THE third species of injury by ouster, or privation of the freehold, is by disseizin. Disseizin is a wrongful putting out of him that is seized of the freehold.[4] The two former species of injury were by a wrongful entry where the possession was vacant; but this is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in law; this is an ouster from a freehold in deed. This may be effected either in corporeal inheritances, or incorporeal. Disseizin, of things corporeal, as of houses, land, etc, must be by entry and actual dispossession of the freehold;[5] as if a man enters either by force or fraud into the house of another, and turns, or at least keeps, him and his servants out of possession. Disseizin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession, nor dispossession: but is depends on their respective natures, and various kinds; being in general nothing more than a disturbance of the owner in the means of coming at, or enjoying them. With regard to freehold rent in particular, our ancient law-books[6] mentioned five methods of working a disseizin thereof: 1. By enclosure; where the tenant so encloses the house or land, that the lord cannot come to distrain thereon, or demand it: 2. By *forestaller*, or lying in wait; when the tenant besets the way with force and arms, or by menaces of bodily hurt affrights the lessor from coming: 3. By *rescous*; that is, either by violently retaking a distress taken, or by preventing the lord with force and arms from taking any at all: 4. By replevin; when the tenant replevies the distress at such time when his rent is really due: 5. By denial; which is when the rent being lawfully demanded is not paid. All, or any of these circumstances work a disseizin of rent: that is, they wrongfully put the owner out of the only possession, of which the subject-matter is capable, namely, the receipt of it. And all these disseizins, of hereditaments incorporeal, are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseized.[7] Otherwise, as there can be no actual dispossession, he cannot be compulsively disseized of any incorporeal hereditament.

AND so too, even in corporeal hereditaments, a man may frequently suppose himself to be disseized, when he is not so in fact, for the sake of entitling himself to the more easy and commodious remedy of an assize of *novel disseizin*, (which will be explained in the sequel of this chapter) instead of being driven to the more tedious process of a writ of entry.[8] The true injury of compulsive disseizin

© Copyright 2003, 2005 Lonang Institute

seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feudal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seizin or investiture, seems to have been anciently necessary. But when in process of time the feudal form of alienations wore off, and the lord was no longer the instrument of giving actual seizin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disseizin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the sole disseizor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseizor himself; but required a legal process against his heir or alienee. And when the remedy by assize was introduced under Henry II, to redress such disseizins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be disseized, merely for the sake of the remedy.

THESE three species of injury, abatement, intrusion, and disseizin, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. SUCH is, fourthly, the injury of discontinuance; which happens when he who has an estate-tail, makes a larger estate of the land than by law he is entitled to do:[9] in which case the estate is good, so far as his power extends who made it, but no farther. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that by the common law extends no farther than to make a lease for his own life: here the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discontinued. For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the lands so alienated. Also, by the common law, the alienation of an husband who was seized in the right of his wife, worked a discontinuance of the wife's estate: till the statute 32 Hen. VIII. c. 28. provided, that no act by the husband alone should work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question. Formerly also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance.[10] But this is now quite antiquated by the disabling statutes of 1 Eliz. c. 19. and 13 Eliz. c. 10. which declare all such alienations absolutely void *ab initio*, and therefore at present no discontinuance can be thereby occasioned.

5. THE fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now unlawful, is that by deforcement. And this, in its most extensive sense, is *nomen generalissimum* [most general name]; being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person have a right.[11] So that this includes as well an abatement, an intrusion, a disseizin, or a discontinuance, as any other species of wrong whatsoever, whereby he that has right to the freehold is kept out of possession. But, as

© Copyright 2003, 2005 Lonang Institute

contradistinguished from the former, it is only such a detainer of the freehold, from him that has the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seigniory, and lands escheat to him *propter defectum sanguinis* [through failure of issue], but the seizin of the lands is withheld from him: here the injury is not abatement, for the right vests not in the lord as heir or devisee; nor is it intrusion, for it vests not in him in remainder or reversion; nor is it disseizin, for the lord was never seized; nor does it at all bear the nature of any species of discontinuance; but, being neither of these four, it is therefore a deforcement.[12] If a man marries a woman, and during the coverture is seized of lands, and alienes, and dies; is disseized, and dies; or dies in possession; and the alienee, disseizor, or heir, enters on the tenements and does not assign the widow her dower; this is also a deforcement to the widow, by withholding lands to which she has a right.[13] In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestui que vie*; and the lessee or any stranger, who was at the expiration of the term in possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement.[14] Deforcements may also arise upon the breach of a condition in law: as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when thereupon required, but continues to hold the lands: this is such a fraud on the man's part, that the law will not allow it to divest the woman's right; though it does divest the possession, and thereby becomes a deforcement.[15] Deforcements may also be grounded on the disability of the party deforced: as if an infant, or his ancestors being within age, do make an alienation of his lands, and the alienee enters and keeps possession; now, as the alienation is voidable, this possession as against the infant is wrongful, and therefore a deforcement.[16] The same happens, when one of nonsane memory alienes his lands or tenements, and the alienee enters and holds possession, this is also a deforcement.[17] Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other: as where the ancestor dies seized of an estate in fee-simple; which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a deforcement.[18] Deforcement may also be grounded on the non-performance of a covenant real: as if a man, seized of lands, covenants to convey them to another, and neglects or refuses so to do, but continues possession against him; this possession, being wrongful, is a deforcement.[19] And hence, in levying a fine of lands, the person, against whom the fictitious action is brought upon a supposed breach of covenant, is called the deforciant. Thus, lastly, keeping a man by any means out of a freehold office is a deforcement: and, indeed, from all these instances it fully appears, that whatever injury, (withholding the possession of a freehold) is not included under one of the four former heads, is comprised under this of deforcement.

THE several species and degrees of injury by ouster being thus ascertained and defined, the next consideration is the remedy: which is, universally, the restitution or delivery of possession to the right owner; and, in some cases, damages also for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

I. THE first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book,[20] of entry by the legal owner, when another person, who has no right, has previously taken possession of lands or tenements. In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of

© Copyright 2003, 2005 Lonang Institute

ownership is equivalent to a feudal investiture by the lord:[21] or he may enter on any part of it in the same county, declaring it to be in the name of the whole:[22] but if it lies in different counties he must make different entries; for the notoriety of such entry or claim to the pares or freeholders of Westmorland, is not any notoriety to the *pares* or freeholders of Sussex. Also if there be two disseizors, the party disseized must make his entry on both; or if one disseizor has conveyed the lands with livery to two distinct feoffees, entry must be made both:[23] for as their seizin is distinct, so also must be the act which divests that seizin. If the claimant be deterred from entering by menaces or bodily fear, he may make claim, as near to the estate as he can, with the like forms and solemnities: which claim is in force for a year and a day only.[24] And therefore this claim, if it be repeated once in the space of every year and day, (which is called continual claim) has the same effect with, and in all respects amounts to, a legal entry.[25] Such an entry gives a man seizin,[26] or puts him into immediate possession that has right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.

THIS remedy by entry takes place in three only of the five species of ouster, *viz.* abatement, intrusion, and disseizin:[27] for, as in these the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who has right. But, upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant.

ON the other hand, in case of abatement, intrusion, or disseizin, where entries are generally lawful, this right of entry may be tolled, that is, taken away, by descent. Descents, which take away entries,[28] are when any one, seized by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seizin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be divested, till the claimant has proved a better right. Secondly, because the heir may not suddenly know the true state of his title: and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of a formal action against the heir.[29] Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seized. And, lastly, it is agreeable to the dictates of reason and the general principles of law.

FOR, in every complete title[30] to lands, there are two things necessary; the possession or seizin, and the right or property therein:[31] or, as it is expressed in Fleta, the *juris et seisinae conjunctio* [conjunction of right and possession].[32] Now, if the possession be severed from the property, if A has the *jus proprietatis* [right of property], and B by some unlawful means has gained possession of lands, this is an injury to A; for which the law gives a remedy, by putting him in possession, but does it by different means according to the circumstances of the case. Thus, as B, who was himself the wrongdoer, and has obtained the possession by either fraud or force, has only a bare or naked

© Copyright 2003, 2005 Lonang Institute

possession, without any shadow of right; A therefore, who has both the right of property and the right of possession, may put an end to his title at once, b the summary method of entry. But, if B the wrongdoer dies seized of the lands, then B's heir advances one step farther towards a good title: he has not only a bare possession, but also an apparent *jus possessionis*, or right of possession. For the law presumes, that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shown: and therefore the mere entry of A is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.

SO that in general it appears, that no man can recover possession by mere entry on lands, which another has by descent. Yet this rule has some exceptions;[33] wherein those reasons cease, upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or laches in the claimant, and therefore no descent shall bar, or take away his entry.[34] And this title, of taking away entries by descent, is still farther narrowed by the statute 32 Hen. VIII. c. 33. which enacts, that if any person disseizes or turns another out of possession, no descent to the heir of the disseizor shall take away the entry of him that has right to the land, unless the disseizor had peaceable possession five years next after the disseizin. But the statute extends not to any feoffee or donee of the disseizor, mediate or immediate:[35] because such a one by the genuine feudal constitutions always came into the tenure solemnly and with the lord's concurrence, by actual of seizin or open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c.16. that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. And by statute 4&5; Ann. c.16. no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

UPON an ouster, by the discontinuance of tenant in tail, we have fain that no remedy by mere entry is allowed; but that, when tenant in tail alienes the entailed, this takes away the entry of the issue in tail, and drives him to his action at law recover the possession.[36] For, as in the former cases the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong; and therefore, after five years peaceable possession, and descent cast, will not suffer the possession of the heir to be disturbed by mere without action; so here, the law will not suppose the discontinuor to have alienated the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alienee, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, has not only a bare possession, but also an apparent right of possession; which is not allowed to be divested by the mere entry of the claimant, but continues in force till a better right be shown, and recognized by a legal determination. And something also perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such alienations to be voidable only not absolutely void.

IN case of deforcements also, where the deforciant had originally a lawful possession of the land, but now detains it wrongfully, he still continues to have the presumptive *prima facie* evidence of right; that is, possession lawfully gained. Which possession shall be overturned by the mere entry of another; but only by demandant's showing a better right in course of law.

© Copyright 2003, 2005 Lonang Institute

THIS remedy by entry must be pursued, according to statute 5 Ric. II. St. 1.c.8. in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor in statu quo: the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI. C.9. upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out: and in such case, or if any alienation be made to defraud the possessor of his right, (which is declared to be absolutely void) the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavor to keep possession *manu forti* [with a strong hand], after three years peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c.11.

II. THUS far of remedies, where the tenant or occupier of the land has gained only a mere possession, and no apparent shadow of right. Next follow or occupier is advanced one step nearer to perfection; so that he has in him not only a bare possession, which may be destroyed by entry, but also an apparent right of possession, which cannot be removed but course of law: in the process of which must be shown, that though he has at present possession and therefore has the presumptive right, yet there is a right of possession, superior to his, residing in him who brings the action.

THESE remedies are either by a writ of entry, or an assize: which are actions merely possessory; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims, They meddle not with the right of property; only restoring the demandant to that state or situation, in which he was (or by law ought been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal, he may afterwards exert it, not withstanding a recovery had against him in these possessory actions. Only the law will not suffer to be his own judge, and either take or maintain possession of the lands, until he has recovered them by legal means:[37] rather presuming the right to have accompanied the ancient seizin, than to reside in one who had no such evidence in his favor.

1. THE first of these possessory remedies is by writ of entry; which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession.[38] The writ is directed to the sheriff, requiring him to “command the tenant of the land that he render (in Latin, *praecipe quod reddat*) to the demandant the premises in question, which he claims to be his right and inheritance; and into which, as he says, the said tenant has not entry but by a disseizin, intrusion, or the like, made to the said demandant, within the time limited by law, or that upon refusal he do appear in court on such a day, to show wherefore he has not done it.”[39] This is the original process, the *praecipe*, upon which all the rest of the suit is grounded; and from hence it appears, that what is required of the tenant is in the alternative, either to deliver seizin of the lands, or to show cause why he will not. Which cause may be either a denial of the fact of having entered by such means as are suggested, or a justification of his entry by reason of title in himself, or those under whom he makes claim: and hereupon the possession of the land is awarded to him who produces the clearest right to possess it.

© Copyright 2003, 2005 Lonang Institute

IN our ancient books we find frequent mention of the degrees, within which writs of entry are brought. If they be brought against the party himself who did the wrong, then they only charge the tenant himself with the injury; "*non habuit ingressum nisi per intrusionem quam ipse fecit*." ["He had no entry but by the intrusion which he himself made."] But if the intruder, disseizor, or the like, has made any alienation of the land to a third person, or it has descended to his heir, hat circumstance must be alleged in the writ, for the defect of his possessory title, whether arising from his own wrong or that of those under whom he claims, must be set forth. One such alienation or descent makes the first[40] degree, which is called the *per*, because then the form of a writ of entry is this; that the tenant had no right of entry, but by the original wrondgdoer, who alienated the land, or from whom it decended, to him: "*non habuit ingressum, nisi per Guilielmum, qui se in illud intrusit, et illud tenenti dimisit.*"[41] ["He had no entry but through William who intruded himself on it, and demised it to the tenant."] A second alienation or descent makes an other degree called the *per* and *cui*; because the form of a writ of entry, in that case, is, that the tenant had no title to enter, but by or under a prior alienee, to whom the intruder demised it; "*non habuit ingressum, nisi per Ricardum, cui Guilielmus illud dimisit, qui se in illud intrusit*."[42] ["He had no entry but through Richard, to whom William, who had intruded on the land, demised it."] These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, that is, two alienations or descents were past, there lay no writ of entry at the common law. For, as it was provided, for the quietness of men's inheritances, that no one, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but was driven to his writ of entry to gain possession; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this possessory action; but was driven to his writ of right, a long and final remedy, to punish his neglect on not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and quieting of all controversies.[43] But by the statute of Marlbridge 52 Hen. III. c.30. it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant: stating it in this manner; that the tenant had no legal entry unless after, or subsequent to, the ouster or injury done by the original dispossessor; "*non habuit ingressum nisi post intrusionem quam Guilielmus in illud fecit*" ["he had no entrance but after the intrusion which William made on it"]; and rightly concluding, that if the original title was wrongful all claims derived from thence must participate of the same wrong. Upon the latter of these writs it is (the writ of entry *sur disseizin* in the *post*) that the form of our common recoveries of landed estates is usually grounded; which, we may remember, were observed in the preceding volume[44] to be fictitious actions, brought against the tenant of the freehold (usually called the tenant to the *praecipe*, or writ of entry) in which by collusion the demandant recovers the land.

THIS remedial instrument, of writ of entry, is applicable to all the case of ouster before-mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. Such is that deforcement of dower, by not assigning any dower to the widow within the time limited by law; for which she has her remedy by a writ of dower, *unde nihil habet* [whereby she has nothing].[45] But if she be deforced of part only of her dower, she cannot then say that *nihil habet* [she has nothing]; and therefore she may have recourse to another action, by writ of right of dower: which is a more

© Copyright 2003, 2005 Lonang Institute

general remedy, extending either to part or the whole; and is (with regard to her claim) of the same nature as the grand writ of right, whereof we shall presently speak, is with regard to claims in fee-simple.[46] But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner. It were therefore endless to recount all the several divisions of writs of entry, which the different circumstances of the respective demandants may require, and which are furnished by the laws of England:[47] being plainly and clearly chalked out in that most ancient and highly venerable collection of legal forms, the *registrum omnium brevium* [register of all writs], or register of such writs as are suable out of the king's court, upon which Fitzherbert's *natura brevium* is a comment; and in which every man who is injured will be sure to find a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitable provision of the statute Westm.2. 13.Edw. I.c.24. for framing new writs when wanted,[48] is almost rendered useless by the very great perfection of the ancient forms. And indeed I know not whether it is a greater credit to our law, to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.

IN the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of entry;[49] which was then usually brought in the county court. And it is to be observed, that the proceedings in these actions were not then so tedious, when the courts were held, and process issued every three weeks, as after the conquest, when all causes were drawn into the king's courts, and process issued from term to term; which was found exceeding dilatory, being at least four times as flow as the other, And hence a new remedy was invented in many cases, to do justice to the people and to determine the possession, in the proper counties, and yet by the king's judges. This was the remedy by assize, of which we next to speak.

2. THE writ of assize is said to have been invented by Glanvil, chief justice to Henry the second;[50] and, if so, it seems to owe its introduction to the parliament held at Northampton, in the twenty-second year of that prince's reign: when justices in eyre were appointed to go round the kingdom in order to take these assizes; and the assizes themselves (particularly those of *mort d' ancestor* [death of ancestor] and *novel disseisin* [new disseizin]) were clearly pointed out and described.[51] As a writ of entry is a real action, which disproves the title of the tenant, by showing the unlawful commencement of his possession; so an assize is a real action, which proves the title of the demandant, merely by showing his, or his ancestor's so totally alike, that a judgment or recovery in one is a bar against the other: so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them.[52] The word, assize, is derived by Sir Edward Coke[53] from the Latin *assideo*, to sit together; and it signifies, originally, the jury who try the cause, and sit together for that purpose. By a figure it is now made to signify the court or jurisdiction, which summons this jury together by a commission of assize, or *ad assisas capiendas*; and hence the judicial assemblies held by the king's commission in every county, s well to take these writs of assize, as to try causes at *nisi prius* [unless before], are termed in common speech the assizes. By another somewhat for recovering possession of lands: for the reason, says Littleton,[54] why such writs at the beginning were called assizes, was, for that in these writs the sheriff is ordered to summon a jury, or assize; which is not expressed in any other original writ.[55]

© Copyright 2003, 2005 Lonang Institute

THIS remedy, by writ of assize, is only applicable to two species of injury by ouster, *viz.* abatement, and a recent or *novel disseizin*. If the abatement happened upon the death[56] of the nephew or niece, the remedy is by an assize of *mort d' ancestor*, or the death of one's ancestor: and the general purport of this writ is to direct the sheriff to summon a jury or assize, to view the land in question, and to recognize whether such ancestor were seized thereof on the day of his death, and whether the demandant be the next heir. And, in a short time after, the judges usually come down by the king's commission to take the recognition of assize: when, if these points are found in the affirmative, the law immediately transfers the possession from the tenant to the demandant. If the abatement happened on the death of one's grandfather or grandmother, then an assize of *mort d' ancestor* no longer lies, but a writ of *ayle*, or *de avo* [from the grandfather]; if on the death of the great grandfather or great grandmother, then a writ of *besayle*, or *de proavo* [from the great-grandfather]; but if it mounts one degree higher, to the *tresayle* or grandfather's grandfather, or if the abatement happened upon the death of any collateral relation, other than those before-mentioned, the writ is called a writ of *cosinage*, or *de consanguineo*.[57] And the same points shall be inquired of in all these actions ancestrel, as in an assize of *mort d' ancestor*; they being of the very same nature:[58] though they differ in this point of form, that these ancestrel writs (like all other writs of *praecipe*) the assize asserts nothing directly, but only prays an inquiry whether those points be so.[59] There is also another ancestrel writ, denominated a *nuper obiit* [he lately died], to establish an equal division of the land in question, where on the death of an ancestor, who has several heirs, one enters and holds the others out of possession.[60] But a man is not allowed to have any of these possessory actions for an abatement consequent on the death of any collateral relation, beyond the fourth degree;[61] though in the lineal ascent he may proceed *ad infinitum* [without end].[62] For the law will not pay any regard to the possession of a collateral relation, so very distant as hardly to be any at all.

IT was always held to be law,[63] that where lands were devisable in a man's last will by the custom of the place, there an assize of *mort d' ancestor* did not lie. For, where lands were so devisable, the right of possession could never be determined by a process, which inquired only of these two points, the seizin of the ancestor, and the heirship of the demandant. And hence it might be reasonable to conclude, that when the statute of wills, 32 Hen. VIII. c.1. made all socage lands devisable, an assize of *mort d' ancestor* no longer could be brought of lands held in socage;[64] and that now, since the statue 12 Car. II.c.24. which converts all tenures, a few only excepted, into free and common socage, it should follow, that no assize of *mort d' ancestor* can be brought of any lands in the kingdom; but in case of abatements, recourse must be properly had to the more ancient writs of entry.

AN assize of novel (or recent) disseizin is an action of the same nature with the assize of *mort d' ancestor* before-mentioned, in that herein the demandant's possession must be shown. But it differs considerably in other points: particularly in that it recites a complaint by the demandant of the disseizin committed, in terms of direct averment; whereupon the sheriff is commanded to reseize the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assize; (which since the introduction of giving damages, as well as the possession, is now omitted[65]) and in the mean time to summon a jury to view the premises, and make recognition of the assize before the justices.[66] And, if, upon the trial, the demandant can prove, first, a title; next, his actual seizin in consequence thereof; and, lastly, his disseizin by the present tenant; he shall have judgment to recover his seizin, and damages for the injury sustained.

© Copyright 2003, 2005 Lonang Institute

THE process of assizes in general is called, by statute Westm.2.13.Edw. I.c.24. *festinum remedium* [speedy remedy], in comparison of that by writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions are subject.[67] Costs and damages were annexed to these possessory actions by the statute of Gloucester, 6 Edw. I. c.1. before which the tenant in possession was allowed to retain the intermediate profits of the land, to enable him to perform the feudal burdens incident thereunto. And, to prevent frequent and vexatious disseizins, it is enacted by the statue of Merton, 20 Hen. III. c.3. that if a person disseized recover seizin of the land again by assize of *novel disseisin*, and be again disseized of the same tenements by the same disseizor, he shall have a writ of re-disseizin; and, if he recover therein, the re-disseizor shall be imprisoned; and, by the statute of Marlbridge, 52 Hen.III.c.8. shall also pay a fine to the king: to which the statute Westm. 2. 13. Edw. I. c.26. has superadded double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assize of *mort d' ancestor*, or other jury, or any judgment of the court, if the party be afterwards disseized by the same person against whom judgment was obtained, he shall have a writ of post- disseizin against him; which subject the post-disseizor to the same penalties as a re-disseizor. The reason of all which, as given by Sir Edward Coke,[68] is because such proceeding is a contempt of the king's court, and in despite of the law; or, as Bracton more fully expresses it,[69] "*talis qui ita convictus fuerit, dupliciter delinquit contra regem: quia facit disseisinam et roberiam contra pacem suam; et etiam ausu temerario irrita facita ea, quae in curia domini regis rite acta sunt: et propter duplex delictum merito sustinere debet poenam duplicatam.*" ["He who is so convicted offends doubly against the king; first, because he makes a disseizin and robbery against his peace; and secondly, by a rash undertaking sets at defiance the just decisions of the king's court: and for this double offense he deserves a double punishment."]

IN all these possessory actions there is a time of limitation settled; beyond which no man shall avail himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For if he be negligent for a long and unreasonable time the law refuses afterwards to lend him any assistance, to recover the possession formerly; both to punish his neglect, (*nam leges vigilantibus, non dormientibus, subveniunt* [for the laws aid the vigilant, not the careless]) and also because it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherwise he would sooner have been sued. This time of limitation by the statute of Merton, 20 Hen.III.c.8. and Westm.1. 3 Edw. I. c. 39. was successively dated from particular eras, *viz.* from the return of king John from Ireland, and from the coronation, etc, of king Henry the third. But this date of limitation continued so long unaltered, that it became indeed no limitation at all, it being above three hundred years from Henry the third's coronation to the year 1540, when the present statute of limitations[70] was made. This, instead of limiting actions from the date of a particular event, as before, which in process of years grew absurd, took another and more direct course, which might endure forever; by limiting a certain period, as fifty years for lands, and the like period[71] for customary or prescriptive rents, suits, and services (fro there is no time of limitation upon rents reserved by deed[72]) and enacting that no person should bring any possessory action, to recover possession thereof merely upon the seizin, or dispossession, of his ancestors, beyond such certain period. And all writs, grounded upon the possession of the demandant himself, are directed to be sued out within thirty years after the disseizin complained of; for if it be an older date, it can with no propriety he called a fresh, recent, or *novel disseizin*: which name Sir Edward Coke informs us was originally given to this proceeding, because the disseizin must have been since the last eyre or circuit of the justices, which happened once in seven years, otherwise the action was gone.[73] And

© Copyright 2003, 2005 Lonang Institute

we may observe,[74] that the limitation, prescribed by Henry the second at the first institution of the assize of *novel disseizin*, was from his own return into England after the peace made between him and the young king his son; which was but the year before.

WHAT has been observed may throw some light on the doctrine of remitter, which we spoke of in the second chapter of this book;[75] and which, we may remember, was, where one who has a right to lands, but is out of possession, has afterwards the freehold cast upon him by some subsequent defective title, and enters by virtue of that title. In this case the law remits him to his ancient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence, and by virtue, thereof: and this, because he cannot possibly obtain judgment at law to be restored to his prior right, since he is himself the tenant of the land, and therefore has nobody against whom to bring his action. This determination of the law might seem superfluous to an hasty observer; who perhaps would imagine, that since the has now both the right and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by showing that defect in a writ of entry; and then he must have been driven to his writ of right, to recover his just inheritance: which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The law therefore remits him to his prior title puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter he would have had *jus, et seisinam* [right and seizin], separate; a good right, but a bad possession: now, by the remitter, he has the most perfect of all titles, *juris et seizinae conjunctionem* [the conjunction of right and seizin].

III. By these several possessory remedies the right of possession may be restored to him, that is unjustly deprived thereof. But the right of possession (though it carries with it a strong presumption) is not always conclusive evidence of the right of property, which may still subsist in another man. For, as one man may have the possession, and another the right of possession, which is recovered by these possessory actions; so one man may have the right of possession, and cannot therefore be evicted by any possessory action, and another may have the right of property, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.

THIS happens principally in four cases: 1. Upon discontinuance by the alienation of tenant in tail: whereby he, who had the right of possession, has remainder or reversion, shall not be allowed to recover by virtue of that possession, which the tenant has so voluntarily transferred. 2. In case of judgment given against either party by his own default; or, 3. Upon trial of the merits, in any possessory action: for such judgment, if obtained by him who has not the true ownership, is held to be a species of deforcement; which however binds the right of possession, and suffers it not be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statue of limitations before-mentioned: for an undisturbed possession for fifty years, ought not to be divested by any thing, but very clear proof of the absolute right of propriety. In these four case the law applies the remedial instrument of either the writ of right itself, or such other writs, as are said to be of the same nature.

© Copyright 2003, 2005 Lonang Institute

1. AND first, upon an alienation by tenant in tail, whereby the etate-tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of *formedon*, (*secundum formam doni* [according to the form of the gift]) which is in the nature of a writ of right,[76] and is the highest action that tenant in tail can have.[77] For he cannot have an absolute writ of right, which is confined only to such as claim in fee-simple: and for that reason this writ of *formedon* was granted him by the statute *de donis* or Westm.2 13 Edw. I.c.1. which is therefore emphatically called his writ of right.[78] This writ is distinguished into three species; a *formedon* in the descender, in the remainder, and in the reverter. A writ of *formedon* in the descender lies, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseized of them, and dies; in this case the heir in tail shall have this writ of *formedon* in the descender, to recover these lands, so given in tail, against him who is then the actual tenant of the freehold.[79] In which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir secondum formam doni. A *formedon* in the remainder lies, where a man gives lands to another for life or in tail, with remainder to a third person in tail or in fee; and he who has the particular estate dies, without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession.[80] In this case the remainder-man shall have his writ of *formedon* in the remainder, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statue de donis; but is founded upon the equity of the statute, and upon this maxim in law, that if any one has a right to the land, he ought also to have an action to recover it. A *formedon* in the reverter lies, where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body the reversion falls in upon the donor, his heris, or assigns: in such case the reversioner shall have this writ to revoer the lands, wherein he shall suggest the gift, his own title to the reversion minutely derved from the donor, and the failure of issue upon which his reversion takes place.[81] This lay at common law, before the statue de donis, if the donee aliened before he had performed the condition of the gift, by having issue, and afterwards died without any.[82] The time of limitation in a *formedon* by statute 21 Jac. I. c. 16. is twenty years; within which space of time after his title accrues the demandant must bring his action, or else is forever barred.

2. IN the second case; if the owners of a partucular estae, as for life, in dower, by the curtesy, or in fee-tail, are barred of the right of possession by a recovery had against them, through their default or non-appearance in a possessory action, they were absolutely without any remedy at the common law; as a writ of right does not lie for any but such as claim to be tenants of the fee-simple. Therefore the statute Westm. 2. 13 Edw. I. c. 4. gives a new writ for such persons, after their lands have been so recovered against them by default, called a *quod ei deforceat* [that he deforced him]; which, though not strictly a writ of right, so far partakes of the nature of one, as that it will restore the right to him, who has been thus unwarily deforced by his own default.[83] But in case the recovery were not had by his own default, but upon defense in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is, that common recovery (on a writ of entry in the *post*) had, not by default of the tenant himself, but (after his defense made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail.[84]

3,4. THIRDLY, in case the right of possession be barred by a recovery upon the merits in a possessory action, or, lastly, by the stute of limitations, a claimant in fee-simple may have a mere

© Copyright 2003, 2005 Lonang Institute

writ of right; which is in its nature the highest writ in the law,[85] and lies only an estate in fee-simple, and not for him who has a less estate. This writ lies concurrently with all other real actions, in which an estate of fee-simple may be recovered; and it also lies after them, being as it were an appeal to the mere right, when judgment has been had as to the possession in an inferior possessory action.[86] But though a writ of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such case; as more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and their illegal ouster, in one of the possessory actions. But in case the right of possession be lost length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title, And, after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may e pleaded in bar of any other claim or demand.[87]

THE pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are also other writs which are said to be in the nature of a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ so right: but in some of them the fee-simple is not demandant; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of right of dower, of *formedon*, etc: and the others will hereafter be taken notice of, under their proper divisions. Nor is the mere writ of right alone, or always, applicable to very case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple dies without heir, whereby an escheat accrues, the lord shall have a writ of escheat,[88] which is in the nature of a writ of right.[89] And if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right *de rationabili parte* [the reasonable part]:[90] which may be grounded on the seizin of the ancestor at any time during his life; whereas in a *nuper obiit* (which is a possessory remedy[91]) he must be seized at the time of his death. But, waving these and other minute distinctions, let us now return to the general writ of right.

THIS writ ought to be first brought in the court-baron[92] of the lord, of whom the lands are held; and then it is open or patent: but if he holds no court, or has waived his right, *remisit curiam suam*, it may be brought in the king's courts by writ of *praecipe* originally;[93] and then it is a writ of right close,[94] being directed to the sheriff and not the lord.[95] Also, when one of the king's immediate tenants *in capite* [in chief] is deforced, his writ of right is called a writ of *praecipe in capite* (the improper use of which, as well as of the former *praecipe, quia dominus remisit curiam* [because the lord has waived his court], so as to oust the lord of his jurisdiction, is restrained by Magna Carta[96]) and, being directed to the sheriff and originally returnable in the king's court, is also a writ of right close.[97] There is likewise a little writ of right close, *secundum consuetudinem manerii* [according to the custom of the manor], which lies for the king's tenants in ancient demesne,[98] and others of a similar nature,[99] to try the right of their lands and tenements in the court of the lord exclusively.[100] But the writ of right patent itself may also at any time be removed into the county court, by writ of tolt,[101] and from thence into the king's courts, by writ of *pone* [put][102] or *recordari facias* [cause to be recorded], at the suggestion of either party that there is a delay or defect of justice.[103]

IN the progress of this action,[104] the demandant must allege some seizin of the lands tenements in

© Copyright 2003, 2005 Lonang Institute

himself, or else in some person under whom he claims, and then derive the right from the person so seized to himself; to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them; which puts the demandant upon the proof of his title: in which if he fails, or if the tenant can show a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is superior to the tenant's he shall recover the land against the tenant and his heirs forever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time. For by the ancient law no seizin could be alleged by the demandant, but from the time of Henry the first;[105] by the statute of Merton, 20 Hen. III. c. 8. from the time of Henry the second; by the statute of westm. 1. 3 Edw. I. c. 39. from the time of Richard the first; and now, by statute 32 Hen. VIII. c. 2. seizin in a writ of right shall be within sixty years. So that the possession of lands in fee-simple uninterruptedly, for threescore years, is at present a sufficient title against all the world; and cannot be impeached by any dormant claim whatsoever.

I HAVE now gone through the several species of injury by ouster or dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts, which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so absolutely antiquated as to be out of force, though they are certainly out of use: there being, it must be owned, but a very few instances for more than a century past of prosecuting any real action for land by writ of entry, assize, *formedon*, writ of right, or otherwise. The forms are indeed preserved in the practice of common recoveries: but they are forms, and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried upon actions of ejectment, or trespass.

NOTES

1. Finch. L. 195.
2. page 5.
3. Co. Litt. 277. F. N. B. 203, 204.
4. Co. Litt. 277.
5. Co. Litt. 181.
6. Finch. L. 165, 166. Litt. § 237, etc.
7. Litt. § 588, 589.
8. Hengh. parv. c. 7. 4 Burr. 110.
9. Finch. L. 190.
10. F. N. B. 194.
11. Co. Litt. 277.

© Copyright 2003, 2005 Lonang Institute

12. F. N. B. 143.

13. Ibid. 8. 147.

14. Finch. L. 263. F. N. B. 201. 205, 6, 7.

15. F. N. B. 205.

16. Finch. L. 264. F. N. B. 192.

17. Finch. ibid. F. N. B. 202.

18. Finch. L. 293, 294. F. N. B. 197.

19. F. N. B. 146.

20. See pag. 5.

21. See book II. ch. 14. pag. 209.

22. Litt. § 417.

23. Co. Litt. 252.

24. Litt. § 422.

25. Ibid. § 419. 423.

26. Co. Litt. 15.

27. Ibid. 237.

28. Litt. § 385)413.

29. Co. Litt. 237.

30. See book II. ch. 13.

31. Mirror. c. 2. § 27.

32. l. 3. c. 15. § 5.

33. See the particular cases mentioned by Littleton, b. 3. ch. 6. the principles of which are well explained in Gilbert's law of tenures.

34. Co. Litt. 246.

35. Ibid. 256.

36. Co. Litt.325.

37. Mirr.c.4.§24.

38. Finch.L.261.

39. See Vol. II. append. No.V.§ 1.

40. Finch. L.262. Booth indeed (of real actions.172.) makes the first degree to consist in the original wrong done, the second in the *per*, and the third in the *per* and *cui*. But the difference is immaterial.

41. Booth.181.

42. Finch. L.263. F. N.B. 203, 204.

43. 2 Inst. 153.

© Copyright 2003, 2005 Lonang Institute

44. Book II. ch.21.

45. F.V.B.147.

46. Ibid. 16.

47. See Britton. c.114. fol. 264. The most usual were, 1. The writs of entry *sur disseisin* and of intrusion: (F.N.B.191.203.) which are brought to remedy either of those species of ouster. 2. The writs of *dum suit infra aetatem* [while he was under age], and *dum suit non compos mentis* [while he was of unsound mind]: (Ibid. 192. 202.) which lie for a person of full age, or one who has recovered his understanding, after having (when under age or insane) aliened his lands; or for the heirs of such alienor. 3. The writs of cui in vita [whom in his lifetime] and cui ante divortium [whom before divorce]: (Ibid. 193.204.) for a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit* [whom in his lifetime, or whom before divorce, she could not contradict]) has aliened her estate. 4. The writ *ad communem legem* [at common law]: (Ibid.207.) for the reversioner, after the alienation and death of the particular tenant for life. 5. The writs *in casu proviso* [in the case provided] and *in consimili casu*: [in the like case] (Ibid. 205.206) which lay not *ad communem legem*, but are given by stat. Gloc. 6 Edw. I. c.7. and Westm. 2.13 Edw. I. c.24. for the reversioner after the alienation, but during the life, of the tenant in dower or other tenant for life. 6. The writ *ad terminum qui praeteriit* [for the term which has passed]: (Ibid.201.) for the reversioner, when the possession is withheld by the lessee or a stranger, after the determination of a lease for years. 7. The writ *causa matrimonii praelocuti* [in consideration of a marriage before agreed on]: (Ibid.205.) for a woman who gives land to a man in fee or for life, to the intent that he may marry her, and he does not. And the like case of other deforcements.

48. See pag.51.

49. Gilb. Ten.42.

50. Mirror.c.2.§ 25.

51. § 9. *Si dominus feodi negat haeredibus defuncti saisinam ejusdem feodi, justitiarii domini regis faciant inde fieri recognitionem per xii legales homines, qualem saisinam defunctus inde habuit, die qua suit vivus et mortuus; et, sicut recognitum fuerit, ita haeredibus ejus restituant.* § 10. *Justitiarii domini regis faciant fieri recognitionem de dissaisinis factis super assisam, a tempore quo dominus rex venit in Angliam proxime post pacem factam inter ipsum et regem filium suum*. ["§9. If the lord of the fee refuse to the heirs of the deceased seizin of the same fee, the king's justices may cause an inquiry to be made by twelve lawful men, of what seizin the deceased had on the day of his death, and according to the result of such inquiry it shall be restored to his heirs. §10. The king's justices shall cause an inquiry to be made of the disseizins made upon assize, from the time at which the king came into England, next after the peace made between him and his son."] (Spelm.Cod.3303.)

52. Finch. L.284.

53. 1 Inst.153.

54. § 234.

55. Co. Litt.159.

56. F.N.B.195. finch. L.290.

57. Fich. L.266,267.

58. Stat. Westm.2 13.Edw. I.c.20.

59. 2 Inst.399.

60. F.N.B.197. Finch. L.293.

61. Hale on F.N.B 221.

62. Fitzh. Abr. tit. consinage.15.

63. Bracton. l.4. de assis. mortis antecessoris, c.13.§ 3. F.N.B.196.

© Copyright 2003, 2005 Lonang Institute

64. See 1 Leon.267.

65. Boqth. 211.

66. F.N.B.177.

67. Booth. 262.

68. 2Inst.83,84.

69. l.4.c.49.

70. 32 Hen.VIII.c.2.

71. So Berthelet's original edition of the statute, A.D.1540: and Cay's, Pickering's, and Ruffhead's editions, examined with the record. Rastell's, and other intermediate editions, which Sir Edward Coke (2 Inst.95.) and other subsequent writers have followed. make it only forty years for rents, etc.

72. 8 Rep. 65.

73. 1 Inst. 153. Booth. 210

74. See pag.184.

75. See pag.19.

76. Finch. L. 267.

77. Co. Litt. 316.

78. F.N.B.255.

79. Ibid. 211,212.

80. Ibid. 217.

81. Ibid. 219. 8 Rep.88.

82. Finch. L.268.

83. F.N.B. 155.

84. See book II. ch. 21.

85. F.N.B. 1.

86. F.N.B. 1.5.

87. Ibid. 6. Co. Litt. 158.

88. F.N.B. 143.

89. Booth. 135.

90. F.N.B. 9.

91. See pag. 186.

92. Append. No.I.§ 1.

93. F.N.B.2. Finch. L.313.

94. Booth.91.

95. Append. No.I.§ 4.

© Copyright 2003, 2005 Lonang Institute

96. c.24

97. F.N.B.5.

98. See book II. ch.6.

99. Kitchen. tit. copyhold.

100. Bracton. L.1. c.11. l.4.tr.1.c.9. & tr.3. c.13. § 9. Old. Tenur. *t. tenir en socage* [to hold in socage]. Old N.B.*t. garde.* [wardship] *&t;. briefe de recto claus* [writ of right close]. F.N.B. 11.

101. Append. No.I. § 2.

102. Ibid. § 3.

103. F.N.B.3.4.

104. append. No.I. § 5.

105. Co. Litt.144.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 11

Of Dispossession, or Ouster, of Chattels Real

HAVING in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the freehold, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also te establish the right of property; the method which I there marked out leads me next to consider injuries by ouster, or dispossession, of chattels real; that is to say, by amoving the possession of the tenant either from an estate by statute-merchant, statute-staple, or *elegit*; or from an estate for years.

I. OUSTER, or amotion of possession, from estates held by either statute or *eligit* [he has chosen], is only liable to happen by a species of disseizin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate be merely a chattel interest, the owner shall have the same remedy as for an injury to a freehold; *viz.* by assize of *novel disseizin*.[1] But this depends upon the several statutes, which create these respective interests,[2] and which expressly provide and allow this remedy in case of dispossession. Upon which account it is that Sir Edward Coke observes,[3] that these tenants are said to hold their estates *ut liberum tenementum* [as a freehold], until their debts be paid: because by the statutes they shall have an assize, as tenant of the freehold shall have; and in that respect they have the similitude of a free-hold.[4]

II. As for ouster, or amotion of possession, from an estate for years; this happens only by a like kind of disseizin, ejection, or turning out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to te circumstances and situation of the wrongdoer: the writ of *ejectione firmae* [ejection of farm]; which lies against any one, the lessor, reversioner, remainder-man, or any stranger, who is himself the wrongdoer and has committed the injury complained of: and the writ of *quare ejecit infra terminum* [why he has ejected within the term]; which lies not against the wrongdoer or ejetor himself, but his feoffee or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

1. A WRIT then of *ejectione firmae*, or action of trespass in ejectment, lies, where lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainder-man, or any stranger, does eject or oust the lessee of his term.[5] In this case he shall have this writ of ejection, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him.[6] And by this writ it, with damages.

SINCE the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

WE have before seen,[7] that the writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor term from which he

© Copyright 2003, 2005 Lonang Institute

had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior[8] to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term[9]) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of *ejectione firmae*, for the trespass committed in ejecting him from his farm.[10] But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration (which go only for damages merely, and are silent as to any restitution) *viz.* a judgment to recover the term, and a writ of possession thereupon.[11] This method seems to have been settled as early as the reign of Edward IV:[12] though it has been said[13] to have first begun under Henry VII, because it probably was then first applied to its present principal use, that of trying the title to the land.

THE better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who has a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. For it would be an offense, called in our law maintenance, (of which in the next book) to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance.[14] When therefore a person, who has right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him.

For this injury the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any order to maintain the action, the plaintiff must, in case of any defense, make out four points before the court; *viz.* title, lease, entry, and ouster. First, he must show a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seized by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted or ejected him. Whereupon

© Copyright 2003, 2005 Lonang Institute

he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute, by delivering him the undisturbed and peaceable possession of his term.

THIS is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court, in order to show the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premiss in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle, who then sat in the court of upper bench; so called during the exile of king Charles the second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings[15] a lease for a term of years is stated to have been action; as by John Rogers to Richard Smith; which plaintiff ought to be some real person, and not merely and ideal fictitious one who has no existence, as frequently though unwarrantably practiced:[16] it is also stated that Smith, the lessee, entered; and that the defendant William Stiles, who is called the casual ejector, ousted him; for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration,[17] Stiles, the casual ejector, or defendant, sends a written notice to the tenant in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration; withal assuring him that he, Stiles the defendant, has no title at to the premises, and shall make no defense; and therefore advising the tenant to appear in court and defend his own title: otherwise the casual ejector will suffer judgment to be had against him; and thereby he, the actual tenant Saunders, will inevitably be turned out of possession.[18] On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment being had against Stiles the casual ejector, Saunders the real tenant will be turned out of possession by the sheriff.

BUT if the tenant in possession applies to be made defendant, it is allowed him upon this condition; that he enter into a rule of court[19] to confess, at the trial of the cause, three of the four requisites for the maintenance of the plaintiff's action; *viz.* the lease of Rogers the lessor, the entry of Smith the plaintiff, and his ouster by Saunders himself, now made the defendant instead of Stiles: which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will now stand upon the merits of the title only. This done, the declaration is altered by inserting the name George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff) on the demise of Rogers, (the lessor) against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But, if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go fro Richard Smith the nominal plaintiff, who by this trial has proved the right of John Rogers his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by

© Copyright 2003, 2005 Lonang Institute

collusion with the tenant of the land, all tenants are obliged by statute 11 Geo.II. c.19. on pain of forfeiting three years rent, to give notice to their landlord, when served with any declaration id ejectment: and any landlord may by leave of the court be made a co-defendant to the action; which indeed he had a right to demand, long before the provision of this statute:[20] in like manner as (previous to the statute of Westm. 2. c.3.) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant; the estate of those behind should be turned to a naked right.[21] But if the new defendant fails to appear at the trial, and to confess lease, entry, and ouster, the plaintiff Smith must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Stiles: for the condition on which Saunders was admitted a defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been made, must now be pursued as soon as the condition is broken. But execution shall be stayed, if any landlord after the default of his tenant applies to be made a defendant, and enters into the usual rule, to confess lease, entry, and ouster.[22]

THE damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that has right, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession has wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the judgment, or his lessor, against the tenant in possession; whether he be made party to the judgment, or suffers judgment to go by default.[23]

SUCH is the modern way, of obliquely bringing in question the title to lands tenements, in order to try it in this collateral manner; a method which is now universally adopted on almost every case. It is founded on the same principle as the ancient writs of assize, being calculated to try those real actions, as being infinitely more convenient for attaining the end of justice; because, the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud an chicane, and eviscerate he very truth of the title. The writ of ejectment and its nominal parties (as was resolved by all the judges[24]) are "judicially to be considered as the fictitious form of an action, rally brought by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement or justice in many respects; and to force the parties to go to trail on the merits, without being entangled in the nicety of pleadings on either side."

BUT a writ of ejectment is not an adequate means to try the title of all estates; for on such things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament;[25] except for tithes in the hands of lay appropriators, by the express purview of statute 32 Hen. VIII. c.7. which doctrine has since been extended by analogy to tithes in the hands of the clergy:[26] nor will it lie in such cases, where the entry of him that has right is taken away by descent,

© Copyright 2003, 2005 Lonang Institute

discontinuance, twenty years dispossession, or otherwise.

THIS action of ejectment is however rendered a very easy and expeditious remedy to landlords whose tenant are in *arrere*, by statute 4 Geo.II.c.28. which enacts, that every landlord, who has by his lease a right of re-entry in case of non-payment of rent, when half a year's rent is due, and no sufficient distress is to be had, may serve a declaration in ejectment on his tenant, or fix the same upon some notorious part of the premises, which shall be valid, without any formal re-entry or previous demand of rent. And a recovery id such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

2. THE writ of *quare ejecit infra terminum* lies, by the ancient law, where the wrongdoer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leases lands to another for years, and, after, the lessor or reversioner enters and makes a feoffment in fee or for life of the same lands to a stranger: now the lessee cannot bring a writ of *ejectione firmae* or ejectment against the feoffee; because he did not eject him, but the reversioner: neither can he have any such action to recover his term against the reversioner, who did oust him; because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute Westm. 2. c. 24. as in case where no adequate remedy was already provided.[27] And the action is brought against the feoffee for deforcing, or keeping out, the original lessee during the continuance of his term: and herein, as in the ejectment, the plaintiff shall recover of much of the term as remains, and also damages for that portion of it, whereof he has been unjustly deprived. But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it) this action is fallen into disuse.

NOTES

1. F.N.B.178.
2. Stat. Westm.2. 13.Edw. I.c.18. Stat. *de mercatoribus* [of merchants], 27 Edw. III. c.9.
3. 1 Inst.43.
4. See book II. ch.10.
5. F.N.B.220.
6. See appendix, No.II. § 1.
7. See pag.150.
8. F.N.B. 145.
9. See book II. ch.9.
10. p.6. Ric.II. *Ejectione firmae n'est que un action de trespass en son nature, et le plaintiff ne recovera son terme que est a venir, nient plus que en trespass home recovera damages pur trespass nient fait, mes a feser; mes il convient a suer par action de covenant al comen law a recoverer son terme: quod tota curia concessit. Et per Belknap, la comen ley est, lou home est ouste de son terme par estranger, il avera ejectione firmae versus cestuy que luy ouste; et fil soit ouste par son lessor, briefe de covenant; et si par lessee ou grantee de reversion, briefe de covenant versus son lessor, et countera especial count, etc.* [A writ of *ejectione firmae* is in its nature merely an action of trespass, and the plaintiff shall only recover that part of the term which is unexpired, the same as in trespass, a man shall recover no damages for a trespass not committed but to be committed. But to recover his term he must sue by an action of covenant at common law; to which the whole court assented. And per Belknap, where a man is ousted from his term by a stranger, the common law is, that he shall have a writ of *ejectione*

© Copyright 2003, 2005 Lonang Institute

f irmae against him who ousted him; and if he be ousted by his lessor, a writ of covenant; and if by the lessee, or grantee of the reversion, a writ of covenant against his lessor, and he shall count a special count, etc.] (Fitz. abr. t. eject. firm.2.)

11. See append. No.II. § 4. prope fin.

12. 7 Edw. IV.6. Per Fairfax; *si home port ejectione firmae, le plaintiff recovera son terme qui est arere, sibien come in quare ejecit infra terminum; et, si nul soit arere, donques tout in damages*. [If a plaintiff bring a writ of *ejectione firmae* he shall recover the remainder of his term as well as in a *quare ejecit infra terminum*, and, if it be all run out, he shall recover the whole in damages.] (Bro Abr. t. *quare ejecit infra termnum*. 6.).

13. F.N.B.220.

14. 1 Ch. Rep. append.39.

15. See appendix, No.II. § 1,2.

16. 6 Mod.309.

17. Append. No.II. § 2.

18. Ibid.

19. Ibid. § 3.

20. 7 Mod.70. Salk.257.

21. Bracton l.5.c.10. § 14.

22. Stat. 11.Geo.II.c.19.

23. 4 Burr.668.

24. Mich.32 Geo.II. 4 Burr.668.

25. Brownl.129. Cro. Car.492. Stra.54.

26. Cro. Car.301. 2 Lord Raym.789.

27. F.N.B. 198.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 12
Of Trespass

IN the two preceding chapters we have considered such injuries to real property, as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

THE second species therefore of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is by trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. Therefore beating another is a trespass; for which (as we have formerly seen) an action of trespass *vi et armis* in assault and battery will lie: taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis* [by force and arms], or on the case in trover and conversion, is given by the law: so also non-performance of promises or undertakings is a trespass; upon which an action of trespass on the case in *assumpsit* [undertaking] is grounded: and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or trespass in its largest sense; for which we have already seen,[1] that whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, and action of trespass *vi et armis* will lie; but, if the injury is only consequential, a special action of trespass on the case may be brought.

BUT in the limited and confined sense, in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum* [mine and yours], or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman law seem to have made a direct prohibition necessary, in order to constitute this injury: "*qui alienum fundum ingreditur, potest a domino, si is praeviderit, prohiberi ne ingrediatur.*"[2] ["He who enters on another's land may be resisted by the owner if he shall have previously forbidden it."] But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the quantum of that satisfaction, by considering how far the offense was willful or inadvertent, and by estimating the value of the actual damage sustained.

EVERY unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* [why he broke his close]. For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other: for, if no other special loss can be

© Copyright 2003, 2005 Lonang Institute

assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage.[3]

ONE must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.[4] Thus if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes;[5] for they have an exclusive interest and freehold therein for time. But before entry and actual possession, one cannot maintain an action of trespass, though he has the freehold in law.[6] And therefore an heir before entry cannot have this action against an abator;[7] though a disseizee might have it against a disseizor, for the injury done by the disseizin itself, at which time the plaintiff was seized of the land: but he cannot have it for any act done after the disseizin, until he has gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii* [remitter], supposes the freehold to have all case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer by a mode of redress, which was calculated merely for injuries committed against the land while in the possession of the owner. But by the statute 6 Ann. c.18. if guardian or trustee for any infant, a husband seized *jure uxoris* [in right of his wife], or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over an continue in possession of the lands or tenements, they are now adjudged to be trespassers; and the reversioner or remainder-man once in every year, by motion to the court of chancery, procure the *cestuy que use* to be produced by the tenant of land, or may enter thereon in case of his refusal or willful neglect. And, by the statutes of 4 Geo. II. c.28. and 11 Geo. II. c.19. in case after the determination of any term of life, lives, or years, any person shall willfully hold over the same, the feoffor is entitled to recover by action of debt, either a rent of double the annual value of the premises, in case he himself has demanded and given notice in writing to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from any tenant having power to determine his lease, and he afterwards neglects to carry it into due execution.

A MAN is answerable for not only his own trespass, but that of his cattle also: for by his negligent keeping they stray upon the land of another (and much more if he permits, or drives them on) and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus damage-feasant, or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy *in foro contentioso* [in a court of litigation], by action. And the action that lies in either of these cases, of trespass committed upon another's land either by a man himself or his cattle, is the action of trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus suit, conculavit, et consumpsit, etc*[8] [why he broke the close of the said A. at B. by force and arms, razed, trampled on, and consumed the grass of the said A, lately growing thereon, with certain beasts to the value of twenty shillings, etc.]: for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts coming upon the land be proved, it is an act of trespass for which the plaintiff must

© Copyright 2003, 2005 Lonang Institute

recover some damage; such however as the jury shall think proper to assess.

IN trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege injury to have been committed by continuation from one given day to another, (which is called laying the action with a *continuando* [continuation]) and the plaintiff shall not be compelled to bring separate actions for every day's separate offense.[9] But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated act of trespass committed, (as cutting down a certain number or trees) they may be laid to be done, not continually, but at diverse days and times within a given period.[10]

IN some cases trespass is justifiable; or, rather, entry on another's land or house shall not in those cases be accounted trespass: as if a man comes there to demand or pay money, there payable; or to execute, in legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner to attend his cattle, communing on the estate; for the apparent necessity of the thing.[11] Also it has been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass:[12] which humane provision seems borrowed from the Mosaic law.[13] In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying such creatures is profitable to the public.[14] But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio* [from the beginning]:[15] as if one comes into a tavern and will not go out in reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass.[16] But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him.[17] So if a landlord distrained for rent, and willfully killed the distress, this by the common law made him a trespasser *ab initio*:[18] and so indeed would any other irregularity have done, till the statute 11 Geo. II. c.19. which enacts that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action on the case for the real specific injury sustained, unless tender of amends has been made. But still, if a reversioner, who enters on pretense of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*.[19] So also in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though the law warrants the hunting of such noxious animals for the public good, yet it is held[20] that such things must be done in an ordinary and usual manner; therefore that being an ordinary course to kill them *viz.* by hunting the court held that the digging for them was unlawful.

A MAN may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defense brings the title of the estate in question. Thus is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; thought it is not so usual

© Copyright 2003, 2005 Lonang Institute

as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

IN order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia* [among others]) enacted by statutes 43 Eliz. c.6. and 22 and 23 Car. II. c.9. §.136. that where the jury who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages; unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8&9; W. III. c.11. which enacts, that in all actions of trespass, wherein it shall appear that the trespass was willful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is willful, where the defendant has notice, and is especially forewarned not to come on the land; as every trespass is malicious, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to be to harass and distress the plaintiff. The other exception is by statute 4&5 W.&M. c. 23. which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs.[21]

NOTES

1. See pag. 123.
2. Inst. 2.1.12.
3. F.N.B. 87,88.
4. Dyer.285. 2 Roll. Abr. 549.
5. Cro. Eliz.421.
6. 2 Roll. Abr.553.
7. 11 Rep.5.
8. Registr. 94.
9. 2 Roll. Abr. 545. Lord Raym. 240. 7 Mod. 152.
10. Salk. 638,639. Lord Raym. 823.
11. 8Rep.146.
12. Gilb. Ev. 253. Trials *per pais*. ch.15. pag. 438.
13. Levit. 19:9, etc. 23:22. Deut. 24:19, etc.
14. Cro. Jac.321.
15. Finch. L.47. Cro. Jac 148.
16. 2 Roll. Abr. 561.

© Copyright 2003, 2005 Lonang Institute

17. 8 Rep. 147.
18. Finch. L. 47.
19. 8 Rep. 146.
20. Cro.Jac. 321.
21. Lord Raym. 149.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 13
Of Nuisance

A THIRD species of real injuries to a man's land and tenements, is by nuisance. Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds; public or common nuisances, which affect the public, and are an annoyance to all the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanor: and private nuisances; which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.[1] We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

I. IN discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

1. FIRST, as to corporeal inheritances. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie.[2] Likewise to erect a house or other building so near to mine, that it stops up my ancient lights and windows, is a nuisance of a similar nature.[3] But in this latter case it is necessary that the windows be ancient, that is, have subsisted there time out of mind; otherwise there is no injury done. For he has much right to build a new edifice upon his ground, as I have upon mine: since every man do what he pleases upon the upright or perpendicular of his own soil; and it was my folly to build so near another's ground.[4] Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.[5] A like injury is, if one's neighbor sets up and exercises any offensive trade; as a tanner's, a tallowchandler's or the like: for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, *sic utere tuo, ut alienum non laedas* [use your property to not injure that of another]:" this therefore is an actionable nuisance.[6] So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for *cujus est solum, ejus est usque ad coelum* [whoever has the land possesses all the space upwards indefinitely]: 2. Stopping ancient lights: and, 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.[7]

AS to nuisances to one's lands: if one erects a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance.[8] And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also, if may neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance.[9]

© Copyright 2003, 2005 Lonang Institute

WITH regard to other corporeal hereditaments: it is a nuisance to stop or divert water that uses to run to another's meadow or mill;[10] to corrupt or poison a water-course, by erecting a dyehouse or a lime-pit for the use of trade, in the upper part of the stream;[11] or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbor. So closely does the law of England enforce that excellent rule or gospel-morality, of “doing to others, as we would they should do unto ourselves.”

2. As to incorporeal hereditaments, the law carries itself with the same equity. If have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or plowing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought.[12] Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that it does me a prejudice, it is a nuisance to the freehold which I have in my market or fair.[13] But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir Matthew Hale[14] construes the *dieta*, or reasonable day's journey, mentioned by Bracton,[15] to be twenty miles: as indeed it is usually understood not only in our own law,[16] but also in the civil,[17] from which we probably borrowed it. So that if the new market be not within seven miles of the old one it is no nuisance; for it is held reasonable that every man should have a market within one third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it may be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is nuisance to the owner of the old one. For where there is a ferry by proscription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subject; otherwise he maybe grievously amerced:[18] it would be therefore extremely hard, if a new ferry were to share his profits, which does not also share his burden. But, where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in neighborhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria* [damage without injury].[19]

II. LET us next attend to the remedies, which the law has given for this injury of nuisance. And here I must premise that the law gives no private remedy for any thing but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it; or, he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action of a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and *pater-familias* of the kingdom.[20] Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case shall have a private satisfaction by action. As if, by means of a ditch dug across a public way,

© Copyright 2003, 2005 Lonang Institute

which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action.[21] Also if a man has abated, or removed, a nuisance which offended him (as we may remember it was stated, in the first chapter of this book, that the party injured has a right to do) in this case he is entitled to no action.[22] For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: but having made his election of one remedy, he is totally precluded from the other.

THE remedies by suit, are, 1. By action on the case for damages; in which the party injured shall only recover a satisfaction for the injury sustained; but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one;[23] and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions; the assize of nuisance, and the writ of *quod permittat prosternere* [that he permit to put down]: which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions however can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case.[24]

2. AN assize of nuisance is a writ, wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui* [to the damage of his freehold], and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein:[25] and, if the assize is found for the plaintiff, he shall have judgment of two things; 1. To have the nuisance abated; and 2. To recover damages.[26] Formerly an assize of nuisance only lay against the very wrongdoer himself who levied, or did, the nuisance; and did not lie against any person to whom he had aliened the tenements, whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2. 13 Edw. I. c. 24. for granting a similar writ, *in casu consimili* [in a similar case], where no former precedent was to be found. The statute enacts, that "*de caetero non recedant querentes a curia domini regis, pro eo quod tenementum transfertur de uno in alium*" ["moreover the complainants shall not be obliged to abandon their action because the tenement is transferred to another"]; and then gives the form of a new writ in this case; which only differs from the old one in this, that, where the assize is brought against the very person only who levied the nuisance, it is said, "*quod A.* (the wrongdoer) *injuste levavit tale nocumentum*" ["that A. unjustly levied such a nuisance"]; but, where the lands are aliened to another person, the complaint is against both; "*quod A.* (the wrongdoer) *et B.* (the alienee) *levaverunt*" ["that A. and B. levied"].[27] For every continuation, as was before said, is a fresh nuisance; and therefore the complaint is as well grounded against the alienee who continues it, as against the alienor who first levied it.

3. BEFORE this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere*; which is in the nature of a writ of right, and therefore subject to greater delays.[28] This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere,* the nuisance complained of; and, unless he so permits, to summon him to appear in court, and then show cause why he will not.[29] And this writ lies as well for the alienee of the party first injured, as against the alienee of the party first injuring; as has been

© Copyright 2003, 2005 Lonang Institute

determined by all the judges.[30] And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

BOTH these actions, of assize of nuisance, and of *quod permittat prosternere*, are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that has possession only, against another that has like satisfaction, the process is therefore easier: and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbor; who had rather continue to pay damages, than remove his nuisance. For in such case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus*, or power of the county, to level it.

NOTES

1. Finch. L.188.
2. F.N.B.184.
3. 9 Rep.58.
4. Cro. Eliz. 118. Salk. 459.
5. 9 Rep.58.
6. Cro. Car. 510.
7. 9 Rep.58.
8. 1 Roll. Abr.89.
9. Hale on F.N.B.427.
10. F.N.B.184.
11. 9 Rep. 59. 2 Roll. Abr.141.
12. F.N.B. 183. 2 Roll. Abr.140.
13. F.N.B. 184. 2 Roll. Abr.141.
14. on F.N.B.184.
15. l.3. c.16.
16. 2 Inst.567.
17. Ff.2.11.1.
18. 2 Roll. Abr.140.
19. Hale on F.N.B. 184.
20. Vaugh. 341, 342.
21. Co. Litt.56. 5 Rep. 73.
22. 9 Rep. 55.

© Copyright 2003, 2005 Lonang Institute

23. 2 Leon. pl. 129. Cro. Eliz. 402.
24. Finch. L. 289.
25. F.N.B. 183.
26. 9 Rep. 55.
27. Ibid.
28. 2 Inst. 405.
29. F.N.B. 124.
30. 5 Rep. 100, 101.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 14

Of Waste

THE fourth species of injury, that may be offered to one's real property, is by waste, or destruction in lands tenements. What shall be called waste was considered at large in a former volume,[1] as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall therefore here only beg lease to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum*: and that this *vastum*, or waste, is either voluntary or permissive; the one by actual and designed demolition of the lands, woods, and houses; the other arising form mere negligence, and want of sufficient care in reparations, fences, and the like. So that my only business is at present to show, to whom this waste is an injury; and of course who is entitled to any, and what, remedy by action.

I. THE persons, who may be injured by waste, are such as have some interest in the estate wasted: for if a man be the absolute tenant in fee-simple, without any encumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt to, without being impeachable or accountable for it to any one. And, though his heir is sure to be the sufferer, yet *nemo est haeres viventis* [no one is heir to the living]: no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the civil notion, so an *haeres natus* [natural heir] and an *haeres factus* [appointed heir]; or, in the more accurate phraseology of our English law, he may aliene or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his at law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste in undoubtedly *damnum* [damaged], it is *absque injuria* [without injury].

ONE species of interest, which is injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of estovers, or a right of cutting and carrying away wood for house-bote, plow-bote, etc. Here, if the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers, this is an injury to the commoner, amounting to no less than a disseizin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by assize, if entitled to a freehold in such common: but if he has only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods, out of which his estovers were to issue.[2]

BUT the most usual and important interest, that is hurt by this commission of waste, is that of him who has the remainder or reversion of the inheritance, after a particular estate for life or years in being. Here, if the particular tenant, (be it the tenant in dower or by curtesy, who was answerable for waste at the common law,[3] or the lessee for life or years, who was first made liable by the statutes of Marlbridge[4] and of Gloucester[5]) if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion the law has given a remedy; that is, to him to whom the inheritance appertains in expectancy.[6] For he, who has the remainder for life

© Copyright 2003, 2005 Lonang Institute

only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then has suffered no injury. Yet a parson, vicar, arch-deacon, prebendary, and the like, who are seized in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have for the benefit of the church and of the successor a fee-simple qualified: and yet, as they are not seized in their own right, the writ of waste shall not say, *ad exhaeredationem ipsius* [to his disinheritance], as for other tenants in fee-simple; but *ad exhaeredationem ecclesiae*, [to the disinheritance of the church] in whose right the fee-simple is held.[7]

II. THE redress for this injury of waste is of two kinds, preventive, and corrective: the former of which is by writ of *estrepement*, the latter by that of waste.

1. ESTREPEMENT is an old French word, signifying the same as waste or extirpation: and the writ of *estrepement* lay at the common law, after judgment obtained in any action real,[8] and before possession was delivered by to sheriff; stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But, as in some cases the defendant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester[9] gave another writ of *estrepement, pendente placito* [waste pending the suit], commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepamentum pendente placito dicto indiscusso*."[10] ["That he commit no waste during the continuance of the suit."] And, by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction.[11] In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente lite* [pending suit], nay even at the time of suing out the original writ, or first process: but, in an action where damages were recovered, the defendant could only have a writ of *estrepement*, if he was apprehensive of waste after verdict had;[12] for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the quantum of damages. But now it seems to be held, by an equitable construction of the statute of Gloucester, and in advancement of the remedy, that a writ of *estrepement*, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as so those wherein only possession is had of the lands: for peradventure, says the law, the tenant may not be of ability to satisfy the demandant his full damages.[13] And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of *estrepement* will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ: it is therefore reasonable that he should have this writ of preventive justice, since he in his present suit debarred of any farther remedial.[14] If a writ of *estrepement*, forbidding waste, directed and delivered to the tenant, as it may be, and he afterwards proceeds to commit waste, and action may be carried on upon the foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem* [he did not commit waste against prohibition]: and, if upon verdict it be found that he did, the plaintiff may recover costs and damages;[15] or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ.[16] But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even

© Copyright 2003, 2005 Lonang Institute

by raising the *posse comitatus*, if it can be done no other way.

BESIDES this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make farther order. Which is now become the most usual way of preventing waste.

2. A WRIT of waste is also an action, partly founded upon the common law and partly upon the statute of Gloucester;[17] and may be brought by him who has the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action is also maintainable in pursuance[18] of statute Westm.2.by one tenant in common of the inheritance against another, who makes waste in the estate held in common. The equity of which statute extends to joint-tenant, but not to coparceners: because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste.[19] But these tenants in common and joint-tenants not liable to the penalties of the statute of Gloucester, which extends only to such as have life-estates, and do waste to the prejudice of the inheritance. The waste however must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: *nam de minimis non curat lex* [the law does not recognize trifles].[20]

THIS action of waste is a mixed; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place waste, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and show cause, why he has committed waste and destruction in the place named, *ad exhaeredationem*, to the disinheritance, of the plaintiff.[21] And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, go in person to the place alleged to be wasted, and there inquire of the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded.[22] For the law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and afterwards suffers judgment to go against him by default, or upon a *nihil dicit*, (when he makes no answer, puts in no plea, in defense) this amounts to a confession of the waste; since, having once appeared, he cannot now pretend ignorance of the charge. Now therefore the sheriff shall not go to the place to inquire of the fact, whether any waste has, or has not, been committed; for this is already ascertained by the silent confession of the defendant: but he shall only, as in defaults upon other actions, make inquiry of the *quantum* [quantity] of damages.[23] The defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident.[24] But it is no defense to say, that a stranger did the waste, for against him the plaintiff has no remedy: though the defendant is entitled to sue such stranger in an action of trespass *vi et armis*, and shall recover the damages he has suffered in consequence of such unlawful act.[25]

© Copyright 2003, 2005 Lonang Institute

WHEN the waste and damages are thus ascertained, either by confession, verdict, or inquiry of the sheriff, judgment is given, in pursuance of the statute of Gloucester, c. 5. that the plaintiff shall recover the place wasted; for which he has immediately a writ of seizin, provided the particular estate be still subsisting, (for, if be expired, there can be no forfeiture of the land) and also that the plaintiff shall recover treble the damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being.

NOTES

1. See Vol. II. ch. 18.
2. F.N.B. 59. 9 Rep. 112.
3. 2 Inst. 299.
4. 52 Hen. III. c. 23.
5. 6 Edw. l. c. 5.
6. Co. Litt. 53.
7. Ibid. 341.
8. 2 Inst. 328.
9. 6 Edw. J. c. 13.
10. Regist. 77.
11. 2 Inst. 329.
12. F.N.B. 60, 61.
13. Ibid. 61.
14. 5 Rep. 115.
15. Moor. 100.
16. Hob. 85.
17. 6 Edw. I. c. 5.
18. 13 Edw. I. c. 22.
19. 2 Inst 403, 404.
20. Finch. L. 29.
21. F.N.B. 55.
22. Poph. 24.
23. Cro. Eliz. 18. 290.
24. Co. Litt. 53.
25. Law of *nisi prius*. 112.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 15
Of Subtraction

SUBTRACTION, which is the fifth species of injuries affecting a man's real property, happens, when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disseizin, in that this is committed without any denial of the right, consisting merely in non-performance; that strikes at very title of the party injured, and amounts to an ouster or actual dispossession. Subtraction however, being clearly an injury, is remediable by due course of law: but the remedy differs according to the nature, or by custom only.

I. FEALTY, suit of court, and rent, are duties and services usually issuing and arising *ratione tenurae* [by reason of the tenure], being the conditions upon which the ancient lords granted out their lands to their feudatories: whereby it was stipulated, that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feudal bond or *commune vinculum* [common bond] between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and there from time to time give their assistance, by serving on juries, either to decide the property of their neighbors in the court-baron, or correct their misdemeanors in the court-leet; and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in rustic employments or praedial labor, or (which is *instar omnium* [equal to all]) in money, which will provide all the rest; all which are comprised under the one general name of *reditus*, return, or rent. And the subtraction or nonobservance of any these conditions, by neglecting, to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to freehold of the lord, by diminishing and depreciating the value of his seigniory.

THE general remedy for all these is by distress; and it is the only remedy at the common law for the two first of them. The nature of distresses, their incidents and consequences, we have before more than once explained:[1] it may here suffice to remember, that they are a taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from that distresses be reasonable and moderate; but, in the case so distress fealty or suit of court, no distress can be unreasonable, immoderate, or too large:[2] for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm, done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction to its quantity, and may be repeated from time to time, until the stubbornness of the party is conquered, is called a distress infinite; which is also used for some other purposes, as in summoning jurors, and the like.

OTHER remedies for subtraction of rents or services are, 1. By action of debt, for the breach of this express contract, of which enough has been formerly said. This is the most usual remedy, when recourse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free services are now reduced, since the abolition of the military tenures. But for a freehold rent, reserved on a lease for life, etc, no action of debt lay by the common law, during the continuance of the freehold out of which it issued:[3] for the law would not suffer a real injury to be remedied by an action that was merely personal. However by the statutes 8 Ann. c.14. and 5 Geo. III. c. 17. actions of debt may now be brought at any time to recover such freehold rents. 2. An

© Copyright 2003, 2005 Lonang Institute

assize of *mort d' ancestor* [death of ancestor] or *novel disseizin* will lie of rents as well of land;[4] if the lord, for the sake of trying the possessory right, will elect to suppose himself ousted or disseized thereof. This is now seldom heard of; and all other real actions, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law. Of this species however is, 3. The writ *de consuetudinibus et servitiis* [of customs and services], which lies for the lord against his tenant, who withholds from him the rents and services due by custom, or tenure, for his land.[5] This compels a specific payment or performance of the rent or service; but there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of *cessavit* [he has ceased]: which lies, by the statutes of Gloucester, 6 Edw. I. c. 4.and of Westm. 2. 13 Edw. I. c. 21&41;. when a man who holds lands of a lord by rent or other services, neglects or ceases to perform his services for two years together; or where a religious house has lands given it, on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the *cesser* or neglect have continued for two years, the lord or donor and his heirs shall have a writ of *cessavit* to recover the land itself, *eo quod tenens in faciendis servitiis per biennium jam cessavit.*[6] ["Because the tenant has already ceased to do service for two years."] And in like manner, by the civil law, if a tenant, (who held lands upon payment of rent or services, or as they call it "*jure emphyteutico*,") neglected to pay or perform them *per totum triennium* [for three whole years], he might be ejected from such emphyteutic lands.[7] But by the statute of Gloucester, the *cessavit* does not lie for lands let upon fee-simple rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises; or unless the tenant has so enclosed the land, that the lord cannot come upon it to distrain.[8] For the law prefers the simple and ordinary remedies, by distress, or by the actions just now mentioned, to this extraordinary one of forfeiture for a *cessavit*; and therefore the same statute of Gloucester has provided farther, that upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land. And to this the statute of Westm.2. conforms, so far as may stand with convenience and reason of law.[9] It is easy to observe, that the statute 4 Geo.II. c.28. which was mentioned in a former chapter,[10] and which permits landlords who have right of re-entry for non-payment of rent, to serve an ejectment on their tenants, when half a year's rent is due, and there is no distress on the premises; it is easy, I say, to observe, that this provision is in some measure copied from the ancient writ of *cessavit*: especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after. 5. There is also another very effectual remedy, which takes place when the tenant upon a writ of assize for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict: in which case the lord may have a writ of right, *sur disclaimer* [on disclaimer], grounded on this denial of tenure; and shall, upon proof the tenure, recover back the land itself so held, as a punishment to the tenant for such his false disclaimer.[11] This piece of retaliating justice, whereby the tenant who endeavors to defraud his lord is himself deprived of the estate, as it evidently proceeds upon feudal principles, so it is expressly to be met with in the feudal constitutions:[12] "*vassallus, qui abnegavit feudum ejusve conditionem, exspoliabitur*." ["The vassal who denies his fee or the condition (by which he held it) shall be deprived."]

AND, as on the one hand the ancient law provided these several remedies to obviate the knavery and punish the ingratitude of the tenant, so on the other hand it was equally careful to redress the oppression of the lord; by furnishing, 1. The writ of *ne injuste vexes* [do not unjustly oppress];[13]

© Copyright 2003, 2005 Lonang Institute

which is an ancient writ founded on that chapter[14] of Magna Carta, which prohibits distresses for greater services than are really due to the lord; being itself of the prohibitory kind, and yet in the nature of a writ of right.[15] It lies, where the tenant in fee-simple and his ancestors have held of the lord by certain services; and the lord has obtained seizin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seizin given by his own hands; but is driven to this writ, to divest the lord's possession, and establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. But this writ does not lie for tenant in tail; for he may avoid such seizin of the lord, obtained from the payment of this ancestors, by plea to an avowry in replevin.[16] 2. The writ of *mesne, de medio*; which is also in the nature of a writ of right,[17] and lies, when upon a subinfeudation the *mesne* or middle lord[18] suffers his under-tenant, or tenant *paravail*, to be distrained upon by lord paramount, for the rent due to him from the mesne lord.[19] And in such case the tenant shall have judgment to be acquitted (or indemnified) by the mesne lord; and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his mesnalty, and the tenant shall hold immediately of the lord paramount himself.[20]

II. THUS far of the remedies for subtraction of rents or other services due by tenure. There are also other services, due by ancient custom and prescription only. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit, (their *secta, a sequendo*) from the ancient mill. This is not only a damage, but an injury, to the owner; because this not only a damage, but an injury, to the owner; because this prescription might have a very reasonable foundation; *viz.* upon the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition, that, when erected, they should all grind their corn there only. And for this injury the owner shall have a writ *de secta ad molendinum* [for suit at his mill],[21] commanding the defendant to do his suit at that mill, *quam ad illud facere debet, et solet* [which he ought, and usually did], or show good cause to the contrary: in which action the validity of the prescription may be tried, and if it be found for the owner, he shall recover damages against the defendant.[22] In like manner, and for like reasons, the register[23] will inform us, that a man may have a writ of *secta ad furnum, secta ad torrale, et ad ominia alia hujusmodi* [suit at the oven, suit at the kiln, and all others of the same kind]; for suit due to his *furnum*, his public oven or bakehouse; or to his *torrale*, his kiln, or malthouse; when a person's ancestors have erected a convenience of that sort for the benefit of the neighborhood, upon an agreement (proved by immemorial custom) that all the inhabitants should use and resort to it, when erected. But besides these special remedies for subtractions, to compel the specific performance of the service due by custom; an action on the case will also lie for all of them, to repair the party injured in damages. And thus much for the injury of subtraction.

NOTES

1. See pag. 6. 147.
2. Finch. L. 285.
3. 1 Roll. Abr. 595.
4. F.N.B. 195.

© Copyright 2003, 2005 Lonang Institute

5. Ibid. 151.
6. Ibid 208.
7. Cod. 4. 66. 2.
8. F.N.B. 209. 2 Inst. 298.
9. 2 Inst. 401, 460.
10. See pag. 206.
11. Finch L. 270, 271.
12. Feud. l.2.t.26.
13. F.N.B. 10.
14. C.10.
15. Booth. 126.
16. F.N.B. 11. 2 Inst. 21.
17. Booth. 136.
18. See book II. ch. 5. pag. 59, 60.
19. F.N.B. 135.
20. 2 Inst. 374.
21. F.N.B. 123.
22. Co.Entr. 461.
23. fol. 153.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 16
Of Disturbance

THE sixth and last species of real injuries is that of disturbance; which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it.[1] I shall consider five sorts of this injury; *viz.* 1. Disturbance of franchises. 2. Disturbance of common. 3. Disturbance of ways. 4. Disturbance of tenure. 5. Disturbance of patronage.

I. DISTURBANCE of franchises happens, when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, seizing waifs or estrays, or (in short) any other species of franchise whatsoever; and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces, or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market; or hunts in my free-warren; or refuses to pay me the accustomed toll; hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty: in every case of this kind, which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which as the law has given no other writ, he is therefore entitled to sue for damages by a species action on the case: or, in case of toll, may take a distress if he pleases.[2]

II. THE disturbance of common comes next to be considered; where any act is done, by which the right of another to his common is incommoded or diminished. This may happen, in the first place, where one who has no right of common, put his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who has a right common, puts in cattle which are not commonable as hogs and goats; which amounts to the same inconvenience. But the lord of the soil my (by custom or prescription, but not without) put a stranger's cattle into the common;[3] and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common.[4] The lord also of the soil may justify making burrows therein, and putting in rabbits, so as they do not increase to so large a number as totally to destroy the common.[5] But in general, in case the beasts of a stranger, or the uncommonable cattle of a commoner be found upon the land, the lord or any of the commoners may distrain them damage-feasant:[6] or the commoner may bring an action on the case to recover damages, provided injury done be any thing considerable; so that he may lay his action with a *per quod* [by which], or allege that thereby he was deprived of his common. But for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed.[7]

ANOTHER disturbance of common is by surcharging it; or putting more cattle therein than the pasture and herbage will sustain, or the party has a right to do. In this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can properly speaking only happen, where the common is appendant or appurtenant,[8] and of course limitable by law; or where, when in gross, it is expressly limited and certain: for where a man has common in gross, *sans nombre* or without stint, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts:[9] for the law will

© Copyright 2003, 2005 Lonang Institute

not suppose that, at the original grant of the common, the lord meant to exclude himself.

THE usual remedies, for surcharging the common, are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass; both which may be had by the lord: or, lastly, by a special action on the case for damages; in which any commoner may be plaintiff.[10] But the ancient and most effectual method of proceeding is by writ of admeasurement of pasture. This lies, either where a common appurtenant or in gross is certain as to number, or where a man has common appendant or appurtenant to his land, the quantity of which common has never yet been ascertained. I either of these cases, as well the lord, as any of the commoners, is entitled to this writ of admeasurement; which is one of those writs, that are called vicontiel,[11] being directed to the sheriff, (*vice-comiti*) and not to be returned to any superior court, till finally executed by him. It recites a complaint, that the defendant has surcharged, *superoneravit*, the common: and therefore commands the sheriff to admeasure and apportion it; that the defendant may not have more than belongs to him, and that the plaintiff may have his rightful share. And upon this suit all the commoners shall be admeasured, as well those who have not, as those who have, surcharged the common; as well the plaintiff, as the defendant.[12] The execution of this writ must be by a jury of twelve men, who are upon their oaths to ascertain, under the superintendence of the sheriff, what and how many cattle each commoner is entitled to feed. And the rule for this admeasurement is generally understood to be, that the commoner shall not turn more cattle upon the common, than are sufficient to manure and stock the land to which his right of common is annexed; or, as our ancient law expressed it, such cattle only as are *levant* and *couchant* [rising up and lying down] upon his tenement:[13] which being a thing uncertain before admeasurement, has frequently, though erroneously, occasioned this unmeasured right of common to be called a common without stint or *sans nombre*;[14] a thing which, though possible in law, does in fact very rarely exist.

IF, after the admeasurement has thus ascertained the right, the same defendant surcharges the common again, the plaintiff may have a writ of second surcharge, *de secunda superoneratione*, which is given by the statute Westm. 2. 13 Edw. I. c. 8. and thereby the sheriff is directed to inquire by a jury, whether the defendant has in fact again surcharged the common, contrary to the tenor of the last admeasurement: and if he has, he shall then forfeit to the king the supernumerary cattle put in, and also shall pay damages to the plaintiff.[15] This process seems highly equitable: for the first offense is held to be committed through mere inadvertence; and therefore there are no damages or forfeiture on the first writ, which was only to ascertain the right which was disputed: but the second offense is a willful contempt and injustice; and therefore punished very properly with not only damages, but also forfeiture. And herein the right, being once settled, is never again disputed; but only the fact is tried, whether there be any second surcharge or no: which gives this neglected proceeding a great advantage over the modern method, by action on the case, wherein the quantum of common belonging to the defendant must be proved upon every fresh trial, for every repeated offense.

THERE is yet another disturbance of common, when the owner of the land, or other person, so encloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit, to which he is by law entitled. This may be done, either by erecting fences, or by driving the cattle off the land, or by plowing up the soil of the common.[16] Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities, that they devour the whole herbage, and thereby

© Copyright 2003, 2005 Lonang Institute

destroy the common. For in such case, though the commoner may not destroy the rabbits, yet the law looks upon this as an injurious disturbance of his right, and has given him his remedy by action against the owner.[17] This kind of disturbance does indeed amount to a disseizin, and if the commoner chooses to consider it in that light, the law has given him an assize of *novel disseizin*, against the lord, to recover the possession of his common.[18] Or it has given a writ of *quod permittat* [that he permit] against any stranger, as well as the owner of the land, in case of such a disturbance to the plaintiff as amounts to a total deprivation of his common; whereby the defendant shall be compelled to permit the plaintiff to enjoy his common as he ought.[19] But if the commoner does not choose to bring a real action to recover seizin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assize or a *quod permittat*.[20]

THERE are cases indeed, in which the lord may enclose and abridge the common; for which, as they are no injury to any one, so no one is entitled to any remedy. For it is provided by the statute of Merton, 20 Hen. III. c. 4. that the lord may approve, that is, enclose and convert to the uses of husbandry (which is a melioration or approvement) any waste grounds, woods, or pastures, in which his tenants have common *appendant* to their estates; provided he leaves sufficient common to his tenants, according to the proportion of their land. And this is extremely reasonable: for it would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor; provided such advantage and improvement be no way derogatory from the former grants. The statute Westm. 2. 13 Edw. I. c. 46. extends this liberty of approving, in like manner, against all others that have common appurtenant, or in gross, as well as against the tenants of the lord, who have their common appendant; and farther enacts that no assize of *novel disseizin*, for common, shall lie against a lord for erecting on the common any windmill, sheephouse, or other necessary buildings therein specified: which, Sir Edward Coke says,[21] are only put as examples; and that any other necessary improvements may be made by the lord, though in reality they abridge the common, and make it less sufficient for the commoners. And lastly, by statutes 29 Geo. II. c. 36. and 31 Geo. II. c. 41. it is particularly enacted, that any lords of wastes and commons, with the consent of the major part, in number and value, of the commoners, may enclose any part thereof, for the growth of timber and underwood.

III. THE third species of disturbance, that of ways, is very similar in its nature to the last: it principally happening when a person, who has a right to a way over another's grounds, by grant or prescription, is obstructed by enclosures, or other obstacles, or by plowing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a nuisance for which an assize will lie, as mentioned in a former chapter.[22] But if the right of way, thus obstructed by the tenant, be only in gross, (that is, annexed to a man's person and unconnected with any lands or testaments) or if the obstruction of a way belonging to an house or land is made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or testaments, and therefore does not fall under the legal notion of a nuisance, which must be laid, *ad nocumentum liberi tenementi* [the damage of his freehold];[23] and the obstruction of it by a stranger can never tend to put the right of way in dispute: the remedy therefore for these disturbances is not by assize or any real action, but by the universal remedy of action on the case to recover damages.[24]

© Copyright 2003, 2005 Lonang Institute

IV. THE fourth species of disturbance is that of disturbance of tenure, or breaking that connection, which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. The having an estate well tenanted is an advantage that every landlord must be every sensible of; and therefore the driving away a tenant from off his estate is an injury of no small consequence. If therefore there be a tenant at will of any lands or testaments, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord,[25] and gives him a reparation in damages against the offender by a special action on the case.

V. THE fifth and last species of disturbance, but by far the most considerable, is that of disturbance of patronage; which is an hindrance or obstruction of a patron to present his clerk to a benefice.

THIS injury was distinguished at common law from another species of injury, called usurpation; which is an absolute ouster or dispossession of the patron, and happens when a stranger, that has no right, presents a clerk, and he is thereupon admitted and instituted.[26] In which case, of usurpation, the patron lost by the common law not only his turn of presenting *pro hac vice* [for this time], but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the mean time he recovered his right by a real action, *viz.* a writ of right of advowson.[27] The reason given for his losing the present turn, and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster he is disseized of lands or houses; since the only possession, of which an advowson is capable, is by actual presentation and admission of one's clerk. And therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted,[28]) the church was absolutely full; and the usurper became seized of the advowson. Which seizin or possession it was impossible for the true patron to remove by any possessory action, or other means, during the plenary or fulness of the church; and when it became void afresh, he could not present, since another had the right of possession. The only remedy therefore, which the patron had left, was to try the mere right in a writ of right of advowson; which is a peculiar writ of right, framed for this special purpose, but in every other respect corresponding with other writs of right:[29] and, if a man recovered therein, he regained his advowson and was entitled to present at the next avoidance.[30] But in order to such recovery he must allege a presentation in himself or some of his ancestors, which proves him or them to have been once in possession: for, as a grant of the advowson, during the fullness of the church, conveys no manner of possession for the present, therefore a purchaser, until he has presented, has no actual seizin whereon to ground a writ of right.[31] Thus stood the common law.

BUT bishops, in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2. 13 Edw. I. c. 5. §. 2. that if a possessory action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation; which gives back to him the seizin of the advowson. Yet

© Copyright 2003, 2005 Lonang Institute

still, if the true patron omitted to bring his action within six months, the seizin was gained by the usurper, and the patron to recover it was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted by statute 7 Ann. c. 18. that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but, during those six months, it is only a species of disturbance.

DISTURBERS of a right of advowson may therefore be these three persons; the pseudo-patron, his clerk, and the ordinary: the pretended patron, by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. These disturbances are vexatious and injurious to him who has the right: and therefore, if he be not wanting to himself, the law (besides the writ of right of advowson, which is a final and conclusive remedy) has given him two inferior possessory actions for his relief; an assize of *darrein presentment* [last presentation], and a writ of *quare impedit* [why impeded]; in which the patron is always the plaintiff, and not the clerk. For the law supposes the injury to be offered to him only, by obstructing or refusing the admission of his nominee; and not to the clerk, who has no right in him till institution, and of course can suffer no injury.

1. AN assize of *darrein presentment*, or last presentation, lies when a man, or his ancestors, under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real patron. In which case the patron shall have this writ,[32] directed to the sheriff to summon an assize or jury, to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assize determines that question, a writ shall issue to the bishop; to institute the clerk of that patron, in whose favor the determination is made, and also to give damages, in pursuance of statute Westm. 2. 13 Edw. I. c. 5. This question, it is to be observed, was, before the statute 7 Ann. before-mentioned, entirely conclusive, as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs; unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right, which is a title superior to all others. But that statute having given a right to any person to bring a *quare impedit*, and to recover (if his title be good) notwithstanding the last presentation, by whomsoever made; assizes of *darrein presentment*, now not being in any wise conclusive, have been totally disused, as indeed they began to be before; a *quare impedit* being a more general, and therefore a more usual action. For the assize of *darrein presentment* lies only where a man has an advowson by descent from his ancestors; but the writ of *quare impedit* is equally remedial whether a man claims title by descent or by purchase.[33]

2. I PROCEED therefore, secondly, to inquire into the nature[34] of a writ of *quare impedit*, now the only action used in case of the disturbance of patronage: and shall first premise the usual

© Copyright 2003, 2005 Lonang Institute

proceedings previous to the bringing of the writ.

UPON the vacancy of a living the patron, we known, is bound to present within six calendar months,[35] otherwise it will lapse to the bishop. But, if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient;[36] unless the church be full, or there be notice of any litigation. For if any position be intended, it is usual for each party to enter a *caveat* [beware] with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law;[37] but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity.[38] But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and, if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus* [right of advowson], he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron;[39] and if, upon such inquiry made and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts.

THE clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* [double complaint]:[40] which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the arch-bishop, or from an arch-bishop to the delegates: and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

THUS far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go so far: for, upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop, for the temporal injury done to his property, in disturbing him in his presentation. And, if the delay arises from the bishop alone, as upon pretense of incapacity, or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only. But it is most advisable to bring it against all three: for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit:[41] but, if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate;[42] for the right of the patron is the principal question in the cause.[43] If the clerk be left out, and has received institution before the action brought (as is sometimes the case) the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant, and party to the suit, to hear what he can allege against it. For which reasons it is the safer way always to insert them, all three, in the writ.

THE writ of *quare impedit*[44] commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a

© Copyright 2003, 2005 Lonang Institute

vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct: and unless they so do, then that they appear in court to show the reason why they hinder him.

IMMEDIATELY on the suing our of the *quare impedit*, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a *ne admittas* [do not admit];[45] which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop does, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *scire facias* [show cause]:[46] and shall have a special action against the bishop, called a *quare incumbravit* [why encumbered]; to recover the presentation, and also satisfaction in damages for the injury done him by encumbering the church with a clerk, pending the suit, and after the *ne admittas* received.[47] But if the bishop has encumbered the church by instituting the clerk, before the *ne admittas* issued, no *quare incumbravit* lies; for the bishop has no legal notice, till the writ of *ne admittas* is served upon him. The patron is therefore left to his *quare impedit* merely; which, as was before observed,[48] now lies (since the statute of Westm. 2.) as well upon a recent usurpation within six months past, as upon a disturbance without any usurpation had.

IN the proceedings upon a *quare impedit*, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; surrender he must recover by the strength of his own right, and not by the weakness of the defendant's: and he must also show a disturbance before the action brought.[49] Upon this the bishop and the clerk usually disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron; who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be inquired: 1. If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2. and, 3. In case of plenarty [an occupied benefice] upon a usurpation, whether six calendar[50] months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit*, brought *infra tempus semestre* [within half a year]. So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

IF it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the presentation;[51] and, if the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* [pending suit] by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hac vice*, but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance: or, in case of his insolvency, he shall void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum* [for admitting the clerk],[52] reciting the

© Copyright 2003, 2005 Lonang Institute

judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of quare non admisit,[53] and recover ample satisfaction in damages.

BESIDES these possessory actions, there may be also had (as has before been incidentally mentioned) a writ of right of advowson, which resembles other writs of right: the only distinguishing advantage now attending it, being, that it is more conclusive than a *quare impedit*; since to an action of *quare impedit* a recovery had in a writ of right may be pleaded in bar.

THERE is no limitation with regard to the time within which any actions touching advowsons are to be brought; at least none later than the times of Richard I and Henry III: for by statute 1 Mar. St. 2. c. 5. the statute of limitations, 32 Hen. VIII. c. 2. is declared not to extend to any writ of right of advowson, *quare impedit*, or assize of *darrein presentment*, or *jus patronatus*. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question, not the right have opportunity to be tried, within sixty years, which is the longest period of limitation assigned by the statute of Henry VIII. For Sir Edward Coke[54] tells us, that there was a parson of one of his churches, that had been incumbent there above fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years.[55] Had therefore the last of these incumbents been the clerk of a usurper, or had been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shown a clear title and seizin by presentation and admission of the prior incumbent. But though, for these reasons, a limitation is highly improper with respect only to the length of time; yet, as the title of advowsons is, for want of some limitation, rendered more precarious than that of any other hereditament, it might not perhaps be amiss if a limitation were established with respect to the number of avoidances; or, rather, if a limitation were compounded of the length of time and the number of avoidances together: for instance, if no seizin were admitted to be alleged in any of these writs of patronage, after sixty years and four avoidances were past.

IN a writ of *quare impedit*, which is almost the only real action that remains in common use, and also in the assize of *darrein presentment*, and writ of right, the patron only, and not the clerk, is allowed to sue the disturber. But, by virtue of several acts of parliament,[56] there is one species of presentations, in which a remedy, to be sued in the temporal courts, is put into the hands of the clerks presented, as well as of the owners of the advowson. I mean the presentation to such benefices, as belong to roman catholic patrons; which, according to their several counties, are vested in and secured to the two universities of this kingdom. And particularly by the statute of 12 Ann. St. 2. c. 14. §. 4. a new method of proceeding is provided; *viz.* that, besides the writs of *quare impedit*, which the universities as patrons are entitled to bring, they, or their clerks, may be at liberty to file a bill in equity against any person presenting to such livings, and disturbing their right of patronage, or his *cestui qui trust*, or any other person whom they have cause to suspect; in order to compel a discovery of any secret trusts, for the benefit of papists, in evasion of those laws whereby this right of advowson is vested in those learned bodies: and also (by the statute 11 Geo. II.) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bona fide* [in good faith] to a protestant purchaser, for the benefit of protestants, and for a full consideration; without which requisites every such grant or conveyance of any advowson or

© Copyright 2003, 2005 Lonang Institute

avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose: but in no instance but this does the common law permit the clerk himself to interfere in recovering a presentation, of which he is afterwards to have the advantage. For besides that he has (as was before observed) no temporal right in him till after institution and induction; and, as he therefore can suffer no wrong, is consequently entitled to no remedy; this exclusion of the clerk from being plaintiff seems also to arise from the very great honor and regard, which the law pays to his sacred function. For it looks upon the care of souls as too arduous and important a task to be eagerly sought for by any serious clergyman; and therefore will not permit him to contend openly at law for a charge and trust, which it presumes he undertakes with diffidence.

BUT when the clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assize, ejectment, debt, or trespass, (as the case may happen) which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he has not I him the entire fee and right:[57] but he is entitled to a special remedy called a writ of *juris utrum* [the right belongs], which is sometimes styled the parson's writ of right,[58] being the highest writ which he can have.[59] This lies for a parson or a prebendary at common law, and for a vicar by statute 14 Edw. III. c. 17. and is in the nature of an assize, to inquire whether the testaments in question are frankalmoign belonging to the church of the demandant, or else the lay fee of the tenant.[60] And thereby the demandant may recover lands and testaments belonging to the church, which were aliened by the predecessor; or of which he was disseized; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death.[61] But since the restraining statute of 13 Eliz. c. 10. whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years;[62] for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.

NOTES

1. Finch. L. 187.
2. Cro. Eliz. 558.
3. 1 Roll. Abr. 396.
4. Co. Litt. 122.
5. Cro. Eliz. 876. Cro. Jac. 195. Lutw. 108.
6. 9 Rep.112.
7. Ibid.
8. See book II. ch. 3.
9. 1 Roll. Abr. 399.
10. Freem. 273.
11. 2 Inst. 369.

© Copyright 2003, 2005 Lonang Institute

12. F. N. B. 125.
13. Bro. Abr. t. prescription. 28.
14. Hardr. 117.
15. F. N. B. 126. 2 Inst. 370.
16. Cro. Eliz. 198.
17. Cro. Jac. 195.
18. F. N. B. 179.
19. Finch. L. 275. F. N. B. 123.
20. Cro. Jac. 195.
21. 2 Inst. 476.
22. ch. 13. pag. 218.
23. F. N. B. 183.
24. Hale on F. N. B. 183. Lutw. 111. 119.
25. Hal. Anal. c. 40. 1 Roll. Abr. 108.
26. Co. Litt. 277.
27. 6 Rep. 49.
28. Ibid.
29. F. N. B. 30.
30. Ibid. 36.
31. 2 Inst. 357.
32. F. N. B. 31.
33. 2 Inst. 355.
34. See Boswell's case. 6 Rep. 48.
35. See book II. ch. 18.
36. See book I. ch. 11.
37. 1 Burn. 207.
38. 1 Roll. Rep. 191.
39. 1 Burn. 16, 17.
40. Ibid. 113.
41. Cro. Jac. 93.
42. Hob. 316.
43. 7 Rep. 25.
44. F. N. B. 32.

© Copyright 2003, 2005 Lonang Institute

45. Ibid. 37.

46. 2 Sid. 94.

47. F. N. B. 48.

48. Vaugh. 7, 8.

49. Hob. 199.

50. 2 Inst. 361.

51. Stat. Westm. 2. 13 Edw. I. c. 5 § 3.

52. F. N. B. 38.

53. Ibid. 47.

54. 1 Inst. 115.

55. The two last incumbents of the rectory of Chelsfield cum Farnborough in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751.

56. Stat. 3 Jac. I. c. 5. 1 W. & M. c. 26. 12 Ann. St. 2. c. 14. 11 Geo. II. c. 17.

57. F. N. B. 49.

58. Booth. 221.

59. F. N. B. 48.

60. Registr. 32.

61. F. N. B. 48, 49.

62. Booth. 221.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 17

Of Injuries Proceeding From, or Affecting, the Crown

HAVING in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by the command and authority of the king, signified by his original writs returnable in his several courts of justice, which thence derive a jurisdiction of examining and determining the complaint; I proceed now to inquire of the mode of redressing those injuries to which the crown itself is a party: which injuries are either where the crown is the aggressor, and which therefore cannot without a solecism admit of the same kind of remedy;[1] or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the royal prerogative. In treating therefore of these, we will consider first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. THAT the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed,[2] 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.[3] Whenever therefore it happens, that, by misinformation or inadvertence, the crown has been induced to invade the private rights of any of its subject, though no action will lie against the sovereign,[4] (for who shall command the king?[5]) yet the law has 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 that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

THE distance between the sovereign and his subjects is such, that it rarely can happen, that any personal injury can immediately and directly proceed from the prince to any private man: and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. The inconvenience therefore of a mischief that is barely possible, is (as Mr. Locke has observed[6]) 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.[7] 2. By *monstrans de droit* [showing of right], manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer.[8] The former is of use, where the king is in full possession of the hereditaments or chattels, and the party suggests such a right as controvert the title of the crown, grounded on facts disclosed in the petition itself; in

© Copyright 2003, 2005 Lonang Institute

which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate:[9] and then, upon this answer being endorsed or underwritten by the king, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party[10]) a commission shall issue to inquire of the truth of this suggestion:[11] 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 disseizor of lands, which are held of the crown, dies seized without any heir, whereby the king is *prima facie* [on its face] 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 disseizee shall have remedy be petition of right, suggesting the title of the crown, and his own superior right before the disseizin made.[12] 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 has the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disseizin, as the dying without any heir) the party grieved shall have *monstrans de droit* at the common law.[13] 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 allow inquisitions of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases.[14] These proceedings are had in the petty bag office in the court of chancery: and, if upon either rof them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restituatur petenti, salvo jure domini regis* [that the king's hand be removed, and possession restored to petitioner, saving the king's right];[15] which last clause is always added to judgments against the king,[16] to whom no *laches* [delay] is ever imputed, and whose right is never defeated by any limitation or length of time. And by such judgment the crown is instantly out of possession;[17] so that there needs not the indecent interposition of his own officers to transfer the seizin from the king to the party aggrieved.

II. THE methods of redressing such injuries as the crown may receive from a subject, are,

1. 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 disseized 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:[18] but the may bring a *quare impedit* [why impeded],[19] which always supposes the complainant to be seized or possessed of the advowson: and he may prosecute this writ, as well as every other, 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 not for breaking his close, or any other injury done upon his soil or possession.[20] It would be equally tedious and difficult, to run through every minute distinction that might be gleaned from our ancient books with regard to this matter; nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process, as are peculiarly confined to the crown.

2. SUCH is that of inquisition or inquest of office: which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii* [by virtue of office], or by writ to them sent for the purpose, or by commissioners specially appointed, concerning any matter that entitles the king to

© Copyright 2003, 2005 Lonang Institute

the possession of lands or testaments, goods or chattels.[21] This is done by a jury of no determinate number; being either twelve, or less, or more. As, to inquire, whether the king's tenant for life died seized, whereby the reversion accrues to the king: whether A, who held immediately of the crown, died without heirs; in which case the lands belong to the king by escheat: whether B be attained of treason; whereby his estate is forfeited to the crown: whether C who has purchased lands be an alien; which is another cause of forfeiture: whether D be an idiot *a nativitate* [from birth]; and therefore, together with his lands, appertains to the custody of the king: and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us: when, upon the death of every one of the king's tenants, an inquest of office was held, called an *inquisitio post mortem* [inquest after death], to inquire of what lands he died seized, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer-seizin*, or other advantages, as the circumstances of the case might turn out, To superintend and regulate these inquiries the court of wards and liveries was instituted by statute 32 Hen. VIII. c. 46. which was abolished at the restoration of king Charles the second, together with the oppressive tenures upon which it was founded.

WITH regard to other matters the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offenses. For every jury which tries a man for treason or felony, every coroner's inquest that sits upon a *felo de se* [suicide], or one killed by chancemedley [accident], is, not only with regard to chattels, but also as to real interests, in all respects an inquest of office: and if they find the treason or felony, or even the flight of the party accused (though innocent) the king is thereupon, by virtue of this office found, entitled to have his forfeitures; and also in the case of chancemedley, he or his grantees are entitled to such things, by way of deodand, as have moved to the death of the party.

THESE inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from, any thing.[22] For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any mans' possessions upon bare surmises without the intervention of a jury.[23] It is however particularly enacted by the statute 33 Hen. VIII. c. 20. that, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of this sort before office found, therefore by the statute 18 Hen. VI. c. 6. it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And, by he bill of rights at the revolution, 1 W. & M. St. 2. c. 2. it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which indeed was the law of the land in the reign of Edward the third.[24]

WITH regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued.[25] As on the other hand, by the *articuli super cartas* [articles upon the charters],[26] if the king's escheator or sheriff seize lands into the king's hand without cause, upon taking them out of the kings hand again, the party shall have the mesne profits restored to him

© Copyright 2003, 2005 Lonang Institute

IN order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his petition of right, which discloses new facts not found by the office, and his *monstrans de droit*, which relies on the facts as found; but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery: yet still, in some special cases, he has no remedy left but a mere petition of right.[27] These traverses, as well as the *monstrans de droit*, were greatly enlarged and regulated for the benefit of the subject, by the statutes before-mentioned, and others.[28] And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff;[29] and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur, etc*.

3. WHERE the crown has unadvisedly granted any thing by letters patent, which ought not to be granted,[30] or where the patentee has done an act that amounts to a forfeiture of the grant,[31] the remedy to repeal the patent is by writ of *scire facias* [show cause] in chancery.[32] This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*.[33] And so also, if, upon office untruly found for the king, he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant.[34]

4. AN information on behalf of the crown, filed in the exchequer by the king's attorney general, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong[35] committed in the lands or other possessions of the crown. It differs from an information filed in the court of king's bench, of which we shall treat in the next book; in that this is instituted to redress a private wrong, by which the property of the crown is affected, that is calculated to punish some public wrong, or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney general, who "gives the court to understand and be informed of" the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject. The most usual informations are those of intrusion and debt: intrusion, for any trespass committed on the lands of the crown,[36] as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and debt, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws, which are enacted for the establishment and support of the revenue: others, which regard mere matters of police and public conveyance, being usually left to be enforced by common informers, in the *qui tam* [popular] informations or actions, of which we have formerly spoken.[37] But after the attorney general has informed upon the breach of a penal law, no other information can be received.[38] There is also an information *in rem* [in respect to the thing], when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title or the king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was usually filed in the king's exchequer, and thereupon a proclamation was made for the owner (if any) to come in the claim the effects; and at the same time there issued a commission of appraisement to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown.[39] And when, in later times, forfeitures of the goods themselves,

© Copyright 2003, 2005 Lonang Institute

as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. A WRIT of *quo warranto* [by what warrant] is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right.[40] 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;[41] but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I. c. 1. and 18 Edw. I. St. 2.[42] 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;[43] and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And is 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 has disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it.[44]

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.[45] Which, together with the length 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 has long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only.

DURING the violent proceedings that took place in the latter end of the reign of king Charles the second, it was among other things thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the conveyance was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and during their state of anarchy the crown named all their magistrates. This exertion of power, though perhaps *in summo jure* [in strict right] it was for the most part strictly legal, gave a great and just alarm; the new-modeling of all corporations being a very large stride towards establishing arbitrary power: and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M. c. 8. which enacts, that the franchises of the city of London shall never be forfeited again for any cause whatsoever.

THIS proceeding is however now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Ann. c. 20. which

© Copyright 2003, 2005 Lonang Institute

permits an information in nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the relator) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster as well as a fine may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

6. THE writ of *mandamus* [we command][46] is also made by the same statute 9 Ann. c. 20. a most full and effectual remedy, in the first place for refusal or admission where a person is entitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. These are injuries, for which though redress for the party interested may be had by assize, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench, commanding, upon good cause shown to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of *mandamus*; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return; and, after judgment obtained for the prosecutor, he shall have a peremptory writ of *mandamus* to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution.[47] So that now the writ of *mandamus*, in cases within this statute, is in the nature of an action, and a writ of error may be had thereon.[48]

THIS writ of *mandamus* may also be issued, in pursuance of the statute 11 Geo. I. c. 4. in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; to require the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen.

WE have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe, that the main difficulty which attends their discussion arises from their great variety, which is apt at our first acquaintance to breed a confusion of ideas, and a kind of distraction in the memory: a difficulty not a little increased by the very immethodical arrangement, too justly complained of in our ancient writers; but which will insensibly wear away when they come to be reconsidered, and we are a little familiarized to those terms of art in which the language of our ancestors has obscured them. Terms of art there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent use: and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. This difficulty therefore, however great it may appear at first view, will shrink to nothing upon a nearer approach; and be rather advantageous than of any disservice, by imprinting a clear and distinct notion of the nature of these several remedies. And, such as it is, it arises principally from the excellence of our English laws; which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description: whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not

© Copyright 2003, 2005 Lonang Institute

to prescribe the remedy. And I may venture to affirm, that there is hardly a possible injury, that can be offered either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly adapted to his own particular grievance.

IN the several personal actions which we have cursorily explained, as debt, trespass, detinue, action on the case, and the like, it is easy to observe how plain, perspicuous, and simple the remedy is, as chalked out by the ancient common law. In real actions for the recovery of landed and other permanent property, as the right is more intricate, the feudal or rather Norman remedy by real actions is somewhat more complex and difficult, and attended with some delays. And since, in order to obviate those difficulties, and retrench those delays, we have permitted the rights of real property to be drawn into question in mixed or personal suits, we are (it must be owned) obliged to have recourse too such arbitrary fictions and expedients, that unless we had developed their principles, and traced out their progress and history, our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural, that ever was adopted by a free and enlightened people.

BUT this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas, on which the laws were devised and established, the prince by his edict may promulgate 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 the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counselors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice; and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new-modeling any branch of our statute laws (though relating but to roads or to parish-settlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequences, 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 conveyances more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sat in our courts of equity, to show them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great

© Copyright 2003, 2005 Lonang Institute

fundamental alterations. The only difficulty that attends them arises from their fictions and circuities, but, when once we have discovered the proper clew, that labyrinth is easily pervaded. We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of conveyance, are cheerful and commodious, thought their approaches are winding and difficult.

IN this part of our disquisitions I however thought it may duty to unfold, as far as intelligibly I could, the nature of these real actions, as well as of personal remedies. And this not only because they are still in force, still the law of the land, though obsolete and disused; and may perhaps, in their turn, be hereafter with some necessary corrections called out again into common use; but also because, as a sensible writer has well observed,[49] "whoever considers how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of another, will I presume be far from thinking any of the old learning useless, which will so much conduce to the perfect understanding of the modern." And besides I should have done great injustice to the founders of our legal constitution, had I led the student to imagine, that the remedial instruments of our law were originally contrived in so complicated a form, as we now present them to his view: had I, for instance, entirely passed over the direct and obvious remedies by assizes and writs of entry, and only laid before him the modern method of prosecuting a writ of ejectment.

NOTES

1. Bro. Abr. t. petition. 12. t. prerogative. 2.
2. Book I. ch. 7. pag. 243-246.
3. Plowd. 487.
4. Jenkins. 78.
5. Finch. L. 83.
6. on Gov. p. 2. § 205.
7. Bro. Abr. t. prerog. 2. Fitzh. Abr. t. error. 8.
8. Skin. 609.
9. Finch. L. 236.
10. State Tr. vii. 134.
11. Skin. 608. Raft. Entr. 461.
12. Bro. Abr. t. petition. 20. 4 Rep. 58.
13. 4 Rep. 55.
14. Skin. 608.
15. 2 Inst. 695. Raft. Entr. 463.
16. Finch. L. 460.
17. Ibid. 459.

© Copyright 2003, 2005 Lonang Institute

18. Bro. Abr. t. prerogative. 89.
19. F. N. B. 32.
20. Bro. Abr. t. prerog. 130. F. N. B. 90.
21. Finch. L. 323, 4, 5.
22. Finch. L. 82.
23. Gilb. hist. exch. 132. Hob. 347.
24. 2 Inst. 48.
25. Finch. L. 325, 326.
26. 28 Edw. l. St. 3. c. 19.
27. Finch. L. 324.
28. Stat. 34 Edw. III. c. 13. 36 Edw. III. c. 13. 2 & 3 Edw. VI. c. 8.
29. Law of *nisi prius*. 202.
30. See book II. ch. 21.
31. Dyer. 198.
32. 3 Lev. 220. 4 Inst. 88.
33. 2 Ventr. 344.
34. Bro. Abr. t. *scire facias*. 69. 185.
35. Moor. 375.
36. Cro. Jac. 212. 1 Leon. 48. Savil. 49.
37. See pag. 160.
38. Hardr. 201.
39. Gilb. hist. of exch. ch. 13.
40. Finch. L. 322. 2 Inst. 282.
41. Old Nat. Brev. fol. 107. edit. 1534.
42. 2 Inst. 498. Raft. Entr. 540.
43. 2 Inst. 498.
44. Cro. Jac. 259. 1 Show. 280.
45. 1 Sid. 86. 2 Show. 47. 12 Mod. 225.
46. See pag. 110.
47. 11 Rep. 79.
48. 1 P. Wms. 351.
49. Hawk. Abr. Co. Litt. pref.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 18

Of The Pursuit of Remedies by Action; and, First, of the Original Writ

HAVING, under the head of redress by suit in courts, pointed out in the preceding pages, in the first place, the nature and several species of courts of justice, wherein remedies are administered for all sorts of private wrongs; and, in the second place, shown to which of these courts in particular application must be made for redress, according to the distinction of justice, or, in other words, what wrongs are cognizable by one court, and what by another; I proceeded, under the title of injuries cognizable by the courts of common law, to define and explain the specific remedies by action, provided for every possible degree of wrong or injury; as well such remedies as are dormant and out of use, as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended, without some acquaintance with the other: and, I am now, in the last place, to examine the manner in which these several remedies are pursued and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.

IN treating of remedies by action at common law, I shall confine myself to the modern method of practice in our courts of judicature. For, though I thought it necessary to throw out a few observations on the nature of real actions, however at present disused, in order to demonstrate the coherence and uniformity of our legal constitution, and that there was no injury so obstinate and inveterate, but which might in the end be eradicated by some or other of those remedial writs; yet it would be too irksome a task to perplex both my readers and myself with explaining all the rules of proceeding in these obsolete actions; which are frequently mere positive establishments, the *forma et figura judicii* [form and appearance of judgment], and conduce very little to illustrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, I shall endeavor to hint at them incidentally.

WHAT therefore the student may expect in this and the succeeding chapters, is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of common pleas at Westminster; that being the court originally constituted for the prosecution of all civil actions. It is true that the courts of king's bench and exchequer, in order, without entrenching upon ancient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of civil suits: but, as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in al of them. So that, in giving an abstract or history[1] of the progress of a suit through the court of common pleas, we shall at the same time give a general account of the proceedings of the other two courts; taking notice however of any considerable difference in the local practice of each. And the same abstract will moreover afford us some general idea of the conduct of a cause in the inferior courts of common law, those in cities and boroughs, or in the court-baron, or hundred, or county court: all which conform (as near as may be) to the example of the superior tribunals, to which their causes may probably be, in some stage or other, removed.

THE most natural and perspicuous way of considering the subject before us, will be (I apprehend)

© Copyright 2003, 2005 Lonang Institute

to pursue it is the order and method wherein the proceedings themselves follow each other; rather than to distract and subdivide it by any more logical analysis. The general therefore and orderly parts of a suit are these; 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in nature of appeals: 8. The execution.

FIRST, then, of the original, or original writ; which is the beginning or foundation of the suit. When a person has 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 he stated fees, an original or original writ, from the court of chancery, which is the *officina justitiae*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king in parchment, sealed with his great seal,[2] and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself: which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment.[3] 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;[4] 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*." ["To none will we sell, to none deny, to none delay either right or justice."]

ORIGINAL writs are either optional or peremptory; or, in the language of our law, they are either a *praecipe*, or a *si te fecerit securum* [if he give you security].[5] The *praecipe* is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he has not done it.[6] The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ is drawn up in the form of a *praecipe* or command, to do thus or show cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit. The other species of original writs is called a *si fecerit te securum*, from the words of the writ, which directs the sheriff to cause

© Copyright 2003, 2005 Lonang Institute

the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim.[7] This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which and minister complete redress, the intervention of some judicature is necessary. Such are writ of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives good security of prosecuting his claim. Both species of writs are *teste*'d, or witnessed, in the king's own name; "witness ourself at Westminster," or wherever the chancery may be held.

THE security here spoken of, to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. The whole of it is at present become a mere matter of form; and John Doe and Richard Roe are always returned as the standing pledges for this purpose. The ancient use of them was to answer for the plaintiff; who in case he brought an action without cause, or failed in the prosecution of it when brought, was liable to an amercement from the crown for raising a false accusation; and so the form of the judgment still is.[8] In like manner as by the Gothic constitutions no person was permitted to lay a complaint against another, "*nisi sub scriptura aut specificatione trium testium, quod actionem vellet persequi*" ["unless under writing, or the specification of three witnesses, that he will prosecute the action"]:[9] and, as by the laws of Sancho I, king of Portugal, damages were given against a plaintiff who prosecuted a groundless action.[10]

THE day, on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the return of the writ; it being then returned by him to the kings justices at Westminster. And it is always made returnable at the distance of at least fifteen days from the date or *teste*, that the defendant may have time to come up to Westminster, even from the most remote parts of the kingdom; and upon some day in one of the four terms, in which the court sits for the dispatch of business.

THESE terms are supposed by Mr. Selden[11] to have been instituted by William the conqueror: but Sir Henry Spelman has 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* [lawful and unlawful days], went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of advent and Christmas, which gave rise to the winter vacation; the time of lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation, between midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays also, and some peculiar 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.[12]

© Copyright 2003, 2005 Lonang Institute

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,[13] that from advent to the octave of the epiphany, from *septuagesima* [seventieth] 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[14] mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express,[15] that in the reign of king Edward the first no secular plea could be held, nor any man sworn on the evangelists,[16] 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 and prelates did nevertheless grant dispensations, (of which many are preserved in Rymer's *foedera* of the time of king Henry the third) that assizes and juries might be taken in some of these holy seasons upon reasonable occasions. And soon afterwards a general dispensation was established in parliament, by statute Westm. 1. 3 Edw. I. c. 51. which declares, that "forasmuch as it is great charity to do right unto all men at all times when need shall be, by the assent of all the prelates it was provided, that assizes of *novel disseizin*, *mort d' ancestor* [death of ancestor], and *darrein presentment* [last presentation] should be taken in advent, septuagesima, and lent, even as well as inquests may be taken; 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 or saint's day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly trinity term by statute 32 Hen. VIII. c. 2. and Michaelmas term b statute 16 Car. I. c. 6. and again by statute 24 Geo. II. c. 48.

THERE are in each of these terms stated days called days in bank, *dies in banco*; that is, days of appearance in the court of common pleas, called usually *bancum*, or *commune bancum* [common bank], to distinguish it from *bancum regis* [royal bank] or the court of king's bench. They are generally at the distance of about a week from each other, and regulated by some festival of the church. on some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term; whereof every term has more or less, said by the mirror[17] to have been originally fixed by king Alfred, but certainly settled as early as the statute of 51 Hen. III. St. 2. But though many of the return days are fixed upon Sundays, yet the court never sits to receive these returns till the Monday after:[18] and therefore no proceedings can be had, or judgment can be given, or supposed to be given, on the Sunday.[19]

THE first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint; which falling on the thirteenth of January, the octave therefore or first day of Hilary term is the twentieth of January. And thereon the court sits to take *essoigns*, or excuses for such as do not appear according to the summons of the writ: wherefore this is usually called the *essoign* day of the term. But the person summoned has three days of grace, beyond the return of the writ, in which to make his appearance; and if he appears on the fourth day inclusive, the *quarto die post* [after four days], it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to be obliged to appear, or to do any other act, at the precise time appointed or required. The feudal law therefore always allowed

© Copyright 2003, 2005 Lonang Institute www.lonang.com

three distinct days of citation, before the defendant was adjudged contumacious for not appearing:[20] preserving in this respect the German custom, of which Tacitus thus speaks,[21] "*illud ex libertate vitium, quod non simul nec jussi conveniunt; sed et alter et tertius dies cunctatione coëntium absumitur*." ["There is this fault resulting from their liberty, that they come not together at the time appointed, but a second and a third day are lost by the delay of those who are to assemble."] And a similar indulgence prevailed in the Gothic constitution: "*illud enim nimiae libertatis indicium, concessa toties impunitas non parendi; nec enim trinis judicii consessibus peonam perditae causae contumax meruit*."[22] ["For the impunity with which they so often neglected to appear was a sign of their excessive liberty; nor were the contumacious punished by losing their cause, as three days grace was allowed."] Therefore at the beginning of each term, the court does not sit for dispatch of business till the fourth day, as in Hilary term on the twenty-third of January; and in Trinity term, by statute 32 Hen. VIII. c. 21. not till the sixth day; which is therefore usually called and set down in the almanacs as the first day of the term.

NOTES

1. In deducing this history the student must not expect authorities to be constantly cited; as practical knowledge is not so much to be learned from any books of law, as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations; which in general he has been studious to avoid, where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the possession will find it necessary to peruse the books of entries, ancient and modern; which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient; from which a man of a liberal education and tolerable understanding may glean *pro re nata* [for that occasion] as much as is sufficient for his purpose. These books of practice, as they are called, are all pretty much on a level, in point of composition and solid instruction; so that that which bears the latest edition is usually the best. But Gilbert's history and practice of the court of common pleas is a book of a very different stamp: and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner.

2. Finch. L. 237.

3. Flet. l. 2. c. 34.

4. Mirr. c. 2. § 5.

5. Finch. L. 257.

6. Append. No. III. § 1.

7. Append. No. II. § 1.

8. Finch. L. 189. 252.

9. Stiernh. *de jure* Gothor. l. 3. c. 7.

10. Mod. Un. Hist. xxii. 45.

11. Jan. Angl. l. 2. § 9.

12. Spelman of the terms.

13. c. 3. *de temporibus et diebus pacis* [concerning the times and days of peace].

14. c. 3. § 8.

15. c. 53.

© Copyright 2003, 2005 Lonang Institute

16. See pag. 58.
17. c. 5. § 108.
18. Registr. 19. Salk. 627. 6 Mod. 250.
19. 1 Jon. 156. Swann & Broome. B. R. Mich. 5. Geo. III. et in Dom. Proc. 1766.
20. Feud. l. 2. t. 22.
21. de mor. Germ. c. 11.
22. Stiernh. *de jur*e Goth. l. 1. c. 6.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 19
Of Process

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.[1] 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 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:[2] in like manner as in the civil law the first process is by personal citation, *in jus vocando* [by citing to justice].[3] This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's grounds;[4] (which stick or wand among the northern nations is called the *baculus nunciatorius* [message staff][5]) and by statute 31 Eliz. c. 3. it 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,[6] "*pone per vadium et salvos plegio*s, 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 does not appear;[7] or by making him find safe pledges or sureties, who shall be amerced in case of his non-appearance.[8] 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;[9] 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.[10]

IF, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of *distringas*,[11] or distress, infinite; which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which he forfeits to the king if he does not appear.[12] In like manner as by the civil law, if the defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus*" ["his adversary is put into possession of his goods"].

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 farther process as nugatory.[13] And besides, upon feudal principles, the person of a feudatory was not liable to be attached for injuries merely

© Copyright 2003, 2005 Lonang Institute

civil, lest thereby his lord should be deprived of his personal services. But, in cases of injury accompanied with force, the law, to punish the breach of the peace and prevent its disturbance for the future, provided also a process against the defendant's person, in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum* [take him to answer].[14] But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* [taking] was also allowed, to arrest the person, in actions of account, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III. c. 23. and Westm. 2. 13 Edw. I. c. 11. in actions of debt and detinue, 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* [why he has broken his close], for breaking the plaintiff's close, *vi et armis* [by force and arms]; 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 has nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues,[15] being a writ commanding the sheriff to take the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt, or trespass, etc, as the case may be. 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 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.

THIS is the regular and orderly method of process. But it is now usual in practice, to sue out the *capias* in the first instance, upon a supposed return of the sheriff; especially if it be suspected that the defendant, upon notice of the action, will abscond: and afterwards a fictitious original is drawn up, with a proper return thereupon, in order to give the proceedings a color of regularity. When this *capias* is delivered to the sheriff, he by his under-sheriff grants a warrant to his inferior officers, or bailiffs, to execute it on the defendant. And, if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the action is laid) cannot find the defendant in his jurisdiction, he returns that he is not found, *non est inventus*, in his bailiwick: whereupon another writ issues, called a *testatum capias*,[16] directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is testified, *testatum est*, that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him, as in the former *capias*. But here also, when the action is brought in one county and the defendant lives in another, it is usual, for saving trouble, time, and expense, to make out a *testatum capias* at the first; supposing not only an original, but also a former *capias*, to have been granted, which in fact never was. And this fiction,

© Copyright 2003, 2005 Lonang Institute

being beneficial to all parties, is readily acquiesced in and is now become the settled practice; being one among may instances to illustrate that maxim of law, that *in fictione juris consistit aequitas* [legal fictions are founded in equity].

BUT where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff cannot find the defendant upon the first writ of *capias*, and returns a *non est inventus* [he is not found], there issues out an alias writ, and after that a pluries, to the same effect as the former:[17] 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* [cause to be required] may be sued out,[18] which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and, if he does, then to take him, as in a *capias*: but if he does not appear, and is returned *quinto exactus* [required five times], he shall then be outlawed by the coroners of the county. Also by statutes 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[19] 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 any 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*.[20] And since, by a variety of statutes (the same which allow the writ of *capias* before-mentioned) process of outlawry does lie in diverse actions that are merely civil; provided they be commenced by original and not by bill.[21] If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum* [take the outlaw],[22] and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court (and in the king's bench without any personal appearance, so that he appears by attorney, according to statute 4 & 5 W. & 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.

SUCH is the first process in the court of common pleas. In the king's bench they may also (and frequently do) proceed in certain causes, particularly in actions of ejectment and trespass, by original writ, with attachment and *capias* thereon;[23] returnable, not as Westminster, where the common pleas are now fixed in consequence of Magna Carta, but "ubicunque fuerimus in Anglia," wheresoever the king shall then be in England; the king's bench being removable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a bill of Middlesex; and therefore so entitled, because the court now sits in that county; for if it sat in Kent, it would then be a bill of Kent. For though, as the justices of this court have, by its fundamental constitution, power to determine all offenses and trespasses, by the common law and custom of the realm,[24] it needed no original writ from the crown to give it cognizance of any misdemeanor in the county wherein it resides; yet as, by this court's coming into any county, it immediately superseded the ordinary

© Copyright 2003, 2005 Lonang Institute

administration of justice by the general commissions of eyre and of *oyer* and *terminer* [hear and determine],[25] a process of its own became necessary, within the county where it sat, to bring in such persons as were accused of committing any forcible injury. The bill of Middlesex[26] is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed; since, when once the defendant is taken into custody of the marshal, or prison-keeper of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal's prisoner; for, as soon as he appears, or puts in bail, to the process, he is deemed by so doing to be in such custody of the marshal, as will give the court a jurisdiction to proceed.[27] And, upon these accounts, in the bill or process a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county: but, if he returns "*non est inventus*," then there issues out a writ of *latitat* [in hiding],[28] to the sheriff of another county, as Berks; which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*" lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But, as in the common pleas the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding *capias*; so in the king's bench a *latitat* is usually sued out upon only a supposed, and not an actual, bill of Middlesex. So that, in fact, a *latitat* may be called the first process in the court of king's bench, as the *testatum capias* is in the common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the king's bench likewise, if he lives in Middlesex, the process must still be by bill of Middlesex only.

IN the exchequer the first process is by writ of quo minus, in order to give the court a jurisdiction over pleas between party and party. In which writ[29] the plaintiff is alleged to be the king's farmer, or debtor, and that the defendant has done him the injury complained of, *quo minus sufficiens existit*, by which he is the less able, to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.

THUS differently do the three courts set out at first, in the commencement of a suit; for which the reason is obvious: since by this means the two courts of king's bench and exchequer entitle themselves to hold plea in subjects causes, which by the original constitution of Westminster-hall they were not empowered to do. Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

IF the sheriff has found the defendant upon any of the former writs, the *capias*, *latitat*, etc, he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the courts (at length authorized by statute 12 Geo. I. c. 29. which was amended by statute 5 Geo. II. c. 27. and made perpetual by statute 21 Geo. II. c. 3.) the sheriff or his officer can now only personally serve the defendant with a copy of the writ or process, and with notice in writing to

© Copyright 2003, 2005 Lonang Institute

appear by his attorney in court to defend this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called common bail, being the same two imaginary persons that were pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if the defendant does not appear upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance for him, as if he had really appeared; and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

BUT if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then in order to arrest the defendant, and make him put in substantial sureties for his appearance, called special bail, it is required by statute 13 Car. II. St. 2. c. 2. that the true cause of action should be expressed in the body of the writ or process. This statute (without any such intention in the makers) had like to have ousted the king's bench of all its jurisdiction over civil injuries without force: for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. But to remedy this inconvenience, the officers of the king's bench devised a method of adding what is called a clause of *ac etiam* [and also] to the usual complaint of trespass; the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea of trespass, and also to a bill of debt:[30] the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. In return for which, lord chief justice North a few years afterwards, in order to save the suitors of his court the trouble and expense of suing out special originals, directed that in the common pleas, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might be also added to the writ of *capias*, containing the true cause of action; as, "that the said Charles the defendant may answer to the plaintiff of a plea of trespass in breaking his close: and also, *ac etiam*, may answer him, according to the custom of the court, in a certain plea of trespass upon the case, upon promises, to the value of twenty pounds, etc."[31] The sum sworn to by the plaintiff is marked upon the back of the writ; and the sheriff, or his officer the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and, having so done, to return the writ with a *cepi corpus* [taken the body] endorsed thereon.

AN arrest must be by corporal seizing or touching the defendant's body; after which the bailiff may justify breaking open the house in which he is, to take him: otherwise he has no such power; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defense and asylum, wherein he should suffer no violence. Which principle is carried so far in the civil law, that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls.[32] Peers of the realm, members of parliament, and corporations, are privileged from arrests; and of course from outlawries.[33] And against them the process to enforce an appearance must be by summons and distress infinite, instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by bill (called usually a bill of privilege) as being personally present in court.[34] Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by statute 50 Edw. III. c. 5. and 1 Ric. II. c. 16. as likewise members of convocation actually attending thereon, by statute 8 Hen. VI. c. 1. Suitors, witnesses, and other persons, necessarily attending any courts of

© Copyright 2003, 2005 Lonang Institute

record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting. The king has moreover a special prerogative, (which indeed is very seldom exerted[35]) that he may by his writ of protection privilege a defendant from all personal, and many real, suits for one year at a time, and no longer; in respect of his being engaged in his service out of the realm.[36] And the king also by the common law might take his creditor into his protection, so that no one might sue or arrest him till the king's debt were paid:[37] but b the statute 25 Edw. III. St. 5. c. 19. notwithstanding such protection, another creditor may proceed t judgment against him, with a stay of execution, till the king's debt be paid; unless such creditor will undertake for the king's debt, and then he shall have execution for both. And, lastly, by statute 29 Car. II. c. 7. no arrest can be made, nor process served upon a Sunday, except for treason, felony, or breach of the peace.

When the defendant is regularly arrested, he must either go to prison, for safe custody; or put in special bail to the sheriff. For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called bail (from the French word, bailer, to deliver) because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance; and is supposed to continue in their friendly custody instead of going to jail. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen) to insure the defendant's appearance at the return of the writ; which obligation is called the bail bond.[38] The sheriff, if he pleases, may let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI. C. 10. to take (if it be tendered) a sufficient bailbond: and, by statute 12 Geo. I. C. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ.

Upon the return of the writ, or within four days after, the defendant must appear according to the exigency of the writ. This appearance is effected by putting in and justifying bail to the action; which is commonly called putting in bail above. If this be not done, and the bail that were taken by the sheriff below are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 & 5 Ann. c. 16.) and bring an action thereupon against the sheriff's bail. But if the bail, so accepted by the sheriff, be insolvent persons, the plaintiff may proceed against the sheriff himself, by calling upon him, first, to return the writ (if not already done) and afterwards to bring in the body of the defendant. And, if the sheriff does not then cause sufficient bail to be put in above, he will himself be responsible to the plaintiff.

The bail above, or bail to the action, must be put in either in open court, or before one of the judges thereof; or else, in the country, before a commissioner appointed for that purpose by virtue of the statue 3 W. & M. c. 4. which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance[39] in court or before the judge or commissioner, whereby they do jointly and severally undertake, that if the defendant be condemned in the action h e shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him: which recognizance is transmitted to the court in a slip of parchment entitled a bail piece.[40] And, if

© Copyright 2003, 2005 Lonang Institute

required, the bail must justify themselves in court, or before the commissioner in the country, by swearing themselves house-keepers, and each of them to be worth double the sum for which they are bail, after payment of all their debts. This answers in some measure to the *stipulatio* [stipulation] or *satisdatio* [satisfaction] of the Roman laws,[41] which is mutually given by each litigant party to the other: by the plaintiff, that he will prosecute his suit, and pay the costs if he loses his cause; in like manner as our law still requires nominal pledges of prosecution from the plaintiff: by the defendant, that he shall continue in court, and abide the sentence of the judge, much like our special bail; but with this difference, that the fidejussores [sureties] were there absolutely bound *judicatum solvere*, to see the costs and condemnation paid at all events: whereas our special bail may be discharged, by surrendering the defendant into custody, within the time allowed by law; for which purpose they are at all times entitled to a warrant to apprehend him.[42]

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due, where the plaintiff can swear that the cause of action amounts to ten pounds: but in actions where the damages are precarious, being to be assessed *ad libitum* [at pleasure] by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action; and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery; or upon such special circumstances, as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable: for the action is not so properly against them in person, as against the effects of the deceased in their possession. But special bail is required even of them, in actions for a *devastavit*, or wasting the goods of the deceased; that wrong being of their own committing.

Thus much for process; which is only meant to bring the defendant into court, in order to contest the suit, and abide the determination of the law. When he appears either in person as a prisoner, or out upon bail, then follow the pleadings between the parties, which we shall consider at large in the next chapter.

NOTES

1. Finch. L. 436.
2. Ibid. 344. 352.
3. Ff. 2. 4. 1.
4. Dalt. of sher. c. 31.
5. Stiernh. *de jure Sueon*. l. 1. c. 6.
6. Append. No. III. § 2.
7. Finch. L. 345.
8. Dalt. sher. c. 32.
9. Finch. L. 305. 352.
10. Append. No. II. § 1.
11. Append. No. III. § 2.

© Copyright 2003, 2005 Lonang Institute

12. Finch. L. 352.

13. Ff. 2. 4. 19.

14. 3 Rep. 12.

15. Append. No. III. § 2.

16. Append. No. III. § 2.

17. Ibid.

18. Ibid.

19. Append. No. III. § 2.

20. Co. Litt. 128.

21. 1 Sid. 159.

22. Append. No. III. § 2.

23. Ibid. No. II. § 1.

24. Bro. Abr. t. *oyer & determiner*. 8.

25. Bro. Abr. t. jurisdiction, 66. 3. Inst. 27.

26. Append. No. III. § 3.

27. 4 Inst. 72.

28. Append. No. III. § 3.

29. Ibid. § 4.

30. Append. No. III. § 3.

31. Lilly pract. Reg. t. *ac etiam*. North's life of lord Guilford. 99.

32. Ff. 2. 4. 18)21.

33. Whitelock of parl. 206, 207.

34. Bro. Abr. t. bille. 29. 12 Mod. 163.

35. Sir. Edward Coke informs us, (1 Inst. 131.) that herein "he could say nothing of his own experience; for albeit queen Elizabeth maintained many wars, yet she granted few or no protections: and her reason was, that he was no fit subject to be employed in her service, that was subject to other mens actions; lest she might be thought to delay justice." But king William, in 1692, granted one to lord Cutts, to protect him from being outlawed by his tailor: (3 Lev. 332.) which is the last that appears upon our books.

36. Finch. L. 454. 3 Lev. 332.

37. F. N. B. 28. Co. Litt. 131.

38. Append. No. III. § 5.

39. Append. No. III. § 5.

40. Ibid.

41. Inst. L. 4. t. 11. Ff. l. 2. t. 8

42. 2 Show. 202. 6 Mod. 231.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 20
Of Pleading

PLEADINGS are the mutual altercations between the plaintiff and defendant; which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus*, or *viva voce* [by word of mouth], in court, and then minuted down by the chief clerks, or prothonotaries; whence in our old law French the pleadings are frequently denominated the *parol*.

The first of these is the declaration, *narratio*, or count, anciently called the *tale*;[1] in which the plaintiff sets forth his cause of complain at length: being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place, when and where the injury was committed. But we may remember[2] that, in the king's bench, when the defendant is brought into court by bill of Middlesex, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury, he thinks proper; unless he has held him to bail by a special *ac etiam* [and also], which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a *capias* [taking] to secure the defendant's person, it was the ancient practice and is therefore still warrantable in the common pleas, to sue out a writ of trespass *quare clausum fregit* [why he has broken his close], for breaking the plaintiff's close; and plaintiff declares in whatever action the nature of his actual injury may require; as an action of covenant, or on the case for breach of contract, or other less forcible transgression:[3] unless by holding the defendant to bail on a special *ac etiam*, he has bound himself to declare accordingly.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc, affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; but in transitory actions, for injuries that might have happened any where, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid. Though if the defendant will make affidavit, that the cause of action, if any, arose not in that but in another county, the court will direct a change of the venue, or *visne*, (that is, the *vicinia* or neighborhood in which the injury is declared to be done) and will oblige the plaintiff to declare in the proper county. For the statute 6 Ric. II. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the venue, if required, and not to insist rigidly on abating the writ: which practice began in the reign of James the first.[4] And this power is discretionally exercised, so as not to cause but prevent a defect of justice. Therefore the court will not change the venue to any of the four northern counties, previous to the spring circuit; because there the assizes are held only once a year, at the time of the summer circuit. And it will sometimes remove the venue from the proper jurisdiction, (especially of the narrow and limited kind) upon a suggestion, duly supported, that a fair and impartial trail cannot be had therein.[5]

It is generally usual in actions upon the case to set forth several cases, by different counts in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case upon an *assumpsit* [undertaking] for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as

© Copyright 2003, 2005 Lonang Institute

that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant* [amount of value]; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds: and so on in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, "and thereupon he brings suit, etc; *inde producit sectam*, &c." By which word, suit or *secta*, (*a sequendo* [from following]) were anciently understood the witnesses or followers of the plaintiff.[6] For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case.[7] But the actual production of the suit, the *secta*, or followers, is now antiquated; and has been totally disused, at least ever since the reign of Edward the third, though the form of it still continues.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, which, as we before observed,[8] are now mere names of form; though formerly they were of use to answer to the king for the amercements of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him.[9] For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and thereupon a nonsuit, or *non prosequitur*, is entered; and he is said to be *nonpros.*' d. And for thus deserting his complaint, after making a false claim or complaint (*pro falso clamore suo*) he shall not only pay costs to the defendant, but is liable to be amerced to the king. A *retraxit* [withdrawal] differs from a nonsuit, in that the one is negative, and the other positive: the nonsuit is a default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit, in court, and by this he forever loses his action. A discontinuance is some what similar to a nonsuit: for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. Anciently, by the demise of the king, all suits depending in his courts were at once discontinued, and the plaintiff was obliged to renew the process, by suing out a fresh writ from the successor; the virtue of the former writ being totally gone, and the defendant no longer bound to attend in consequence thereof: but, to prevent the expense as well as delay attending this rule of law, the statute 1 Edw. VI. C. 7. enacts, that by the death of the king no action shall be discontinued; but all proceedings shall stand good as if the same king had been living.

When the plaintiff has stated his case in the declaration, it is incumbent on the defendant within a reasonable time to make his defense and to put in a plea; or else the plaintiff will at once recover judgment by default, or *nihil dicit* [no answer] of the defendant.

Defense, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification; but merely an opposing or denial (from the French verb defender) of the truth or validity of the complaint. It is the *contestatio litis* [opening of a case] of the civilians: a general

© Copyright 2003, 2005 Lonang Institute

assertion that the plaintiff has no ground of action, which assertion is afterwards extended and maintained in his plea. For if would be ridiculous to supposed that the defendant comes and defends (or, in the vulgar acceptation justifies) the force and injury, in one line, and pleads that he is not guilty of the trespass complained of, in the next. And therefore in actions of dower, where the demandant does not count of any injury done, but merely demands her endowment,[10] and in assizes of land, where also there is no injury alleged, but merely a question of right stated for the determination of the recognitors or jury, the tenant makes no such defense.[11] In writs of entry,[12] where no injury is stated in the count, but merely the right of the demandant and the defective title of the tenant, the tenant comes and defends or denies his right, *jus suum*, that is (as I understand it, though with a small grammatical inaccuracy) the right of the demandant, the only one expressly mentioned in the pleadings: or else denies his own right to be such, as is suggested by the count of the demandant. And in writs of right[13] the tenant always comes and defends the right of the demandant and his seizin, *jus praedicti S. et seisinam ipsius* [right and seizin of the aforesaid S.],[14] (or else the seizin of his ancestor, upon which he counts, as the case may be) and the demandant may reply, that the tenant unjustly defends his, the demandant's right, and the seizin on which he counts.[15] All which is extremely clear, if we understand by defense an opposition or denial, but is otherwise inexplicably difficult.[16]

The courts were formerly very nice and curious with respect to the nature of the defense, so that if no defense was made, though a sufficient plea was pleaded, the plaintiff should recover judgment:[17] and therefore the book, entitled *novae narratione*s or the new talys,[18] at the end of almost every count, *narratio*, or tale, subjoins such defense as is proper for the defendant to make. For a general defense or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waved all pleas of misnosmer [misnaming];[19] by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other when and where it should behoove him, he acknowledged the jurisdiction of the court.[20] But of late years these niceties have been very deservedly discountenanced;[21] though they still seem to be law, if insisted on.[22]

AFTER defense made, the defendant must put in his plea. But, before he pleads, he is entitled to demand one imparlance,[23] or *licentia loquendi* [liberty of speaking], and may have more granted by consent of the plaintiff; to see if he can end the matter amicably without farther suit, by talking with the plaintiff: a practice, which is[24] supposed to have arisen from a principle of religion, in obedience to that precept of the gospel, “agree with thine adversary quickly whilst thou art in the way with him.”[25] And it may be observed that this gospel precept has plain reference to the Roman law of the twelve tables, which expressly directed the plaintiff and defendant to make up the matter, while they were in the way, or going to the praetor;) *in via, rem uti pacunt orato*. There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a view of the thing in question, in order to ascertain its identity and other circumstances. He may crave *oyer*[26] of the writ, or of the bond, or other specialty upon which the action is brought; that is to hear it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves: whereupon the whole is entered verbatim upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. In real actions also the tenant may pray in aid, or call for assistance of another, to help

© Copyright 2003, 2005 Lonang Institute

him to plead, because of the feebleness and imbecility of his own estate. Thus a tenant for life may pray in aid of him that has the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action and help to defend the title. Voucher also is the calling in of some person to answer the action, that has warranted the title to the tenant or defendant. This we still make use of in the form of common recoveries,[27] which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he is made defendant instead of the vouchor: but, if he afterwards makes default, recovery shall be had against the original defendant; and he shall recover over an equivalent in value, against the deficient vouchee. In assizes indeed, where the principal question is whether the demandant or his ancestors were or were not in possession till the ouster happened, and the title of the tenant is little (if at all) discussed, there no voucher is allowed; but the tenant may bring a writ of *warrantia chartae* [warranties of deeds] against the warrantor, to compel him to assist him with a good plea or defense, or else to render damages and the value of the land, if recovered against the tenant.[28] In many real actions also,[29] brought by or against an infant under the age of twenty-one years, and also in actions of debt bought against him, as heir to any deceased ancestor, either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age, or in our legal phrase that the infant may have his age, and that the *parol* may *demur*, that is that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby.[30] But, by the statutes of Westm. I. 3 Edw. I. c. 46. and of Gloucester 6 Edw. I. c. 2. in writs of entry *sur disseisin* [on disseizin] in some particular cases, and in actions ancestrel brought by an infant, the *parol* shall not demur: otherwise he might be deforced of his whole property, and even want a maintenance, till he came of age. So likewise in a writ of dower the heir shall not have his age; for it is necessary that the widow's claim be immediately determined, else she may want a present subsistence.[31] Nor shall an infant patron have it in a *quare impedit* [why impeded],[32] since the law holds it necessary and expedient, that the church be immediately filled. It is in this stage also of the cause, if at all, that cognizance of the suit must be claimed or demanded; when any person or body corporate has the franchise, not only of bolding pleas within a particular limited jurisdiction, but also of the cognizance of pleas: and that, either without any words exclusive of other courts, which entitles the lord of the franchise, whenever any suit that belongs to his jurisdiction is commenced in the courts at Westminster, to demand the cognizance thereof; or with such exclusive words, which also entitle the defendant to plead to the jurisdiction of the court.[33] Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As when a scholar or other privileged person of the universities of Oxford or Cambridge is impleaded in the courts at Westminster for any cause of action whatsoever, unless upon a question of freehold.[34] In these cases, by the charter of those learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which, if made in due time and with due proof of the facts alleged, is regularly allowed by the courts.[35] It must be demanded before any imparlance, for that is a submission to the jurisdiction of the superior court: and it will not be allowed if it occasions a failure of justice,[36] or if an action be brought against the person himself who claims the franchise, unless he has also a power in such case of making another judge.[37]

WHEN these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; dilatory pleas, and pleas to the action. Dilatory pleas are such as tend merely to delay or

© Copyright 2003, 2005 Lonang Institute

put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action.

I. DILATORY pleas are, I. To the jurisdiction of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, etc. 2. To the disability of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *praemunire* [forewarning], not *in rerum natura* [the nature of things] (being only a fictitious person) an infant, a feme-covert, or a monk professed. 3. In abatement: which abatement is either of the writ, or the count, for some defect in one of them; as by misnaming the defendant, which is called a *misnosmer*; giving him a wrong addition, as esquire instead of knight; or other want of form in any material respect. Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto* [from wrongdoing], for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona* [a personal action dies with the person];[38] and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu* [from contract], by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors:[39] being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 & 5 Ann. c. 16. no dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better;[40] that is, show him how it might be amended, that there may not be two objections upon the same account.

ALL pleas to the jurisdiction conclude to the cognizance of the court; praying "judgment, whether the court will have farther cognizance of the suit:" pleas to the disability conclude to the person; by praying "judgment, if the said A the plaintiff ought to be answered:" and pleas in abatement (when the suit is by original) conclude to the writ or declaration; by praying "judgment of the writ, or declaration, and that the same may be quashed," *cassetur*, made void, or abated: but, if the action be by bill, the plea must pray "judgment of the bill," and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

WHEN these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court,[41] or to amend and new-frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of *respondeat ouster*, or to answer over

© Copyright 2003, 2005 Lonang Institute

in some better manner. It if then incumbent on him to plead

2. A PLEA to the action; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, *tout temps prist*, and still is ready, *uncore prist*, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costs,[42] but not the debt itself; though in some particular cases the creditor will totally lose his money.[43] But frequently the defendant confesses one part of the complaint (by a *cognovit actionem* [acknowledge the action] in respect thereof) and traverses or denies the rest: in order to avoid the expense of carrying that part to a formal trial, which he has no ground to litigate. A species of this sort of confession is the payment of money into court: which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff; by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any farther proceedings. This may be done upon what is called a motion; which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause; and it is usually grounded upon an affidavit, (the perfect tense of the verb *affido*) being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts, upon which the motion is grounded: though no such affidavit is necessary for payment of money into court. If, after the money paid in, the plaintiff proceeds in his suit, it is at his own peril: for, if he does not prove more due than is so paid into court, he shall be nonsuited and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due. In the French law the rule of practice is grounded upon principles somewhat similar to this; for there, if a person be sued for more than he owes, yet he loses his cause if he does not tender so much as he really does owe.[44] To this head may also be referred the practice of what is called a set-off: whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand; but, on the other, sets up a demand of his own, to counterbalance that of the plaintiff, either in the whole or in part: as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and, in case he pleads such set-off, must pay the remaining balance into court. This answers very nearly to the *compensatio*, or stoppage, of the civil law,[45] and depends on the statutes 2 Geo. II. c. 22. and 8 Geo. II. c. 24. which enact, that, where are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar, or given in evidence upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand.

PLEAS, that totally deny the cause of complaint are either the general issue, or a special plea, in bar.

I. THE general issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass either *vi et armis*, or on the case, *non culpabilis*, not guilty;[46] in debt upon contract, *nil debet*, he owes nothing; in debt

© Copyright 2003, 2005 Lonang Institute

on bond, *non est factum*, it is not his deed; on an *assumpsit*, *non assumpsit*, he made no such promise. Or in real actions, *nul tort*, no wrong done; *nul disseisin*, no disseizin; and in a writ of right, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which we mean a fact affirmed on one side and denied on the other.

FORMERLY the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defense, and to keep the law and the fact distinct. And it is an invariable rule, that every defense, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shown it to be otherwise; especially with the aid of a new trial, in case either party be unfairly surprised by the other.

2. SPECIAL pleas, in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action.[47] A justification is likewise a special plea in bar; as in actions of assault and battery, son assault demesne, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

ALSO a man may plead the statutes of limitations in bar; or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action. This, by the statute of 32 Hen. VIII. c. 2. in a writ of right is sixty years: in assizes, writs of entry, or other possessory actions real, of the seizin of one's ancestors, in lands; and either of their seizin, or one's own, in rents, suits, and services; fifty years: and in actions real for lands grounded upon one's own seizin or possession, such possession must have been within thirty years. By statute I Mar. St. 2. c. 5. this limitation does not extend to any suit for advowsons, upon reasons given in a former chapter.[48] But by the statute 21 Jac. I. c. 2. a time of limitation was extended to the case of the king; so that possession for sixty years precedent to 19 Febr. 1623,[49] is a bar even against the prerogative, in derogation of the ancient maxim "*nullum tempus occurrit regi*" ["no time runs against the king"]. By another statute. 21 Jac. I. c. 16. twenty years is the time of limitation in any writ of *formedon* [form of gift]: and, by a consequence, twenty years is also the limitation in every action of ejectment; for no ejectment can be brought, unless where the lessor of the plaintiff is entitled to enter on the lands,[50] and by the statute 21 Jac. I. c. 16. no entry can be made by any man, unless within twenty years after his right shall accrue. As to all personal actions, they are limited by the statute late mentioned to six years

© Copyright 2003, 2005 Lonang Institute

after the cause of action commenced; except actions of assault, battery, mayhem, and imprisonment, which must be brought within four years, and actions for words, which must be brought within two years, after the injury committed. And by the statute 31 Eliz. c. 5. all suits, indictments, and informations, upon any penal statutes, where any forfeiture is to the crown, shall be sued within two years, and where the forfeiture is to a subject, within one year, after the offense committed; unless where any other time is specially limited by the statute. Lastly, by statute 10 W. III. c. 14. no writ of error, or *scire facias* [show cause], shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within twenty years. The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those unnumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law therefore holds, that "*interest reipublicae ut sit finis litium*" ["the public goods requires an end to litigation"]: and upon the same principle the Athenian laws in general prohibited all actions, where the injury was committed five years before the complaint was made.[51] If therefore in any suit, the injury, or cause so action, happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: as upon an *assumpsit*, or promise to pay money to the plaintiff, the defendant may plead *non assumpsit infra sex annos*; he made no such promise within six years; which is an effectual bar to the complaint.

AN estoppel is likewise a special plea in bar: which happens where a man has done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who has no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying, that he had no freehold at the time, and therefore was incapable of levying it.

THE conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, mutatis mutandis, with regard to other parts of pleading) are, I. That it be single and containing only one matter; for duplicity begets confusion. But by statute 4 & 5 Ann. c. 16. a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, these three, not guilty, *son assault demesne* [his own assault], and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of trial.

SPECIAL pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form:) "and this he is ready to verify.") This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

IT is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assize or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time give color to the plaintiff, or suppose him to have

© Copyright 2003, 2005 Lonang Institute

an appearance or color of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be, that he claims by feoffment with livery from A, by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort*, *nul disseizin*, in assize, or not guilty in an action of trespass. But he may allege this specially, provided he goes farther and says, that the plaintiff claiming by color of a prior deed of feoffment, without livery, entered; upon whom he entered; and may then refer himself to the judgment of the court which of these two titles is the best in point of law.[52]

WHEN the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and reply to the defendant's plea: either traversing it, that is, totally denying it; as if on an action of debt upon bond the defendant pleads *solvit ad diem* [paid when due], that he paid the money when due, here the plaintiff in his replication may totally traverse this plea, by denying that the defendant paid it: or he may allege new matter in contradiction to the defendant's plea; as when the defendant pleads no award made, the plaintiff may reply, and set forth an actual award, and assign a breach:[53] or the replication may confess and avoid the plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for the trespassing upon land whereof the plaintiff is seized, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life. To the replication the defendant may rejoin, or put in an answer called a rejoinder. The plaintiff may answer the rejoinder by a *sur-rejoinder*; upon which the defendant may rebut; and the plaintiff answer him by a *sur-rebutter*. Which pleas, replications, rejoinders, sur-rejoinders, rebutters, and sur-rebutters answer to the *exceptio, replicatio, duplicatio, triplicatio*, and *quadruplicatio* of the Roman laws [exception, replication, duplication, triplication, and quadruplication].[54]

THE whole of this process is denominated the pleading; in the several stages of which it must be carefully observed, not to depart or vary from the title or defense, which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he has performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no other choice, but to traverse the fact of the replication, or else to demur upon the law of it.

YET in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a new or novel assignment. As, if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries as the real place of the injury.[55]

© Copyright 2003, 2005 Lonang Institute

IT has previously been observed[56] that duplicity in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a protestation; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the *gerund*, *protestando*) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke has defined[57] a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his seigniory; he could not in this case both plead affirmatively that the plaintiff was his villein, and also take issue upon the demand; for then his plea would have been double, as the former alone would have been a good bar to the action: but he might have alleged the villenage of the plaintiff, by way of protestation, and then have denied the demand. By this means the future vassalage of the plaintiff was saved to the defendant, in case the issue was found in his (the defendant's) favor:[58] for the protestation prevented that conclusion, which would otherwise have resulted from the rest of his defense, that he had enfranchised the plaintiff;[59] since no villein could maintain a civil action against his old. So also if a defendant, by way of inducement to the point of his defense, alleges (among other matters) a particular mode of seizin or tenure, which the plaintiff is unwilling to admit, and yet desires to take issue on the principal point of the defense, he must deny the seizin or tenure by way of protestation, and then traverse the defensive matter. So, lastly, if an award be set forth by the plaintiff, and he can assign a breach in one part of it (*viz.* the non-payment of a sum of money) and yet is afraid to admit the performance of the rest of the award, or to aver in general a non-performance of any part of it, lest something should appear to have been performed; he may save to himself any advantage he might hereafter make of the general non-performance, by alleging that by protestation; and plead only the non-payment of the money.[60]

IN any stage of the pleadings, when either side advances or affirms any new matter, he usually (as was said) avers it to be true; "and this he is ready to verify." On the other hand, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called; the language of which is different according to the party by whom the issue is tendered: for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the county," thereby submitting himself to the judgment of his peers:[61] but if the traverse lies upon the plaintiff, he tenders the issue or prays the judgment of the peers against the defendant in another form; thus, "and this he prays may be inquired of by the country."

BUT if either side (as, for instance, the defendant) pleads a special negative plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no

© Copyright 2003, 2005 Lonang Institute

award was made, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then and not before tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

NOTES

1. Append. No. II. § 2. No. III. § 6.
2. See pag. 285. 288.
3. 2 Ventr. 259.
4. 2 Salk. 670.
5. Stra. 874. – Mylock v. Saladine. Trin. 4 Geo. III. B. R.
6. Seld. In Fortesc. C. 21.
7. Bract. 400. Flet. l. 2. c. 6.
8. See pag. 275.
9. 3 Bulstr. 275. 4 Inst. 189.
10. Rastal. Entr. 234.
11. Booth of real actions. 118.
12. Vol.II. append. No. V. § 2.
13. Append. No. I. § 5.
14. Co. Entr. 182.
15. Nov. Narr. 230. edit. 1534.
16. The true reason of this, says Booth, (on real actions. 94. 112.) I could never yet find.
17. Co. Litt. 127.
18. edit. 1534.
19. Theloal. dig. l.14. c. I. pag. 357.
20. *En la defence sont iij choses entendantz: per tant quil defende tort et force, home doyt entendre quil se excuse de tort a luy surmys per tounte, et fait se partie al ple; et per tant quil defende les damages, il affirme le partie able destre respondu; et per tant quil defende ou et quant il devera, il accepte la poiar de courte de conustre ou trier lour ple*. [By defending the force and injury the defendant waved all pleas of misnosmer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other when and where it should behoove him, he acknowledged the jurisdiction of the court.] (Mod. tenend. cur. 408. edit 1534.) See also Co. Litt. 127.
21. Salk. 217. Lord Raym. 282.
22. Carth. 230. Lord Raym. 117.
23. Append. No. III. § 6.

© Copyright 2003, 2005 Lonang Institute

24. Gilb. Hist. Com. Pl. 35.

25. Matth. V. 25.

26. Append. No. III. § 6.

27. Vol. II. append. No. V. § 2.

28. F. N. B. 135.

29. Dyer. 137.

30. Finch. L. 360.

31. I Roll. Abr. 137.

32. Ibid. 138.

33. 2 Lord Raym. 836. 10 Mod. 126.

34. See pag. 83.

35. Hardr. 505.

36. 2 Ventr. 363.

37. Hob. 87. Yearbook, M. 8 Hen. VI. 20. In this latter case the chancellor of Oxford claimed cognizance of an action of trespass brought against himself; which was disallowed, because he should not be judge in his own cause. The argument used by sergeant Rolfe, on behalf of the cognizance, is curious and worth transcribing. – *Jeo vous dirai un fable. En ascun temps suit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et disoyent a luy, "peccasti:" et il dit, "judica me:" et ils disoyent, "non possumus, quia caput es ecclesiae; judica teipsum:" et l'apostol' dit, "judico me cremari;" et suit combustus; et apres suit un sainct. Et in ceo cas il suit son juge demene, et issint n'est pas inconvenient que un home soit juge demene*. [I will tell you a story. There was formerly a pope, and he committed a great crime, and the cardinals came to him, and said, "you have sinned:" and he said "judge me:" and they answered, "we cannot, for you are the head of the church; judge yourself:" and the apostle said, "I sentence myself to be burned;" and burned he was; and afterwards he was made a saint. And in that case he was his own judge, and therefore it is not improper that a man should judge himself.]

38. 4 Inst. 315.

39. Mar. 14.

40. Brownl. 139.

41. Co. Entr. 271.

42. I Vent. 21.

43. Litt. § 338. Co. Litt. 209.

44. Sp. L. b. 6. c. 4.

45. Ff. 16. 2. I.

46. Append. No. II. § 4.

47. Append. No. III. § 6.

48. See pag. 250.

49. 3 Inst. 189.

50. See pag. 206.

51. Pott. Ant. b. I. c. 21.

© Copyright 2003, 2005 Lonang Institute

52. Dr. & St. d. 2. c. 53.
53. Append. No. III. § 6.
54. Inst. 4. 14. Bract. l. 5. tr. 5. c. I.
55. Bro. Abr. t. *trespass*. 205. 284.
56. pag. 308.
57. I Inst. 124.
58. Co. Litt. 126.
59. See book II. ch. 6. pag. 94.
60. Append. No. III. § 6.
61. Append. No. II. § 4.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 21

Of Issue and Demurrer

ISSUE, *exitus*, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of law, or matter of fact.

AN issue upon matter of law is called a demurrer: and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, *demoratur*, rests or abides upon the point in question. As, if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger's right; here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

THE form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defense; and therefore praying judgment for want of sufficient matter alleged.[1] Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exceptions to the form, or manner of pleading, the party demurring must by statute 27 Eliz. c. 5. and 4 & 5 Ann. c. 16. set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a general, or such a special demurrer, the opposite party avers it to be sufficient, which is called a joinder in demurrer,[2] and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

AN issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, “and this he prays may be inquired of by the country,” or “and of this he puts himself upon the country,” it may immediately be subjoined by the other party, “and the said A. B. does the like.” Which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question.[3] And this issue, of fact, must generally speaking be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin, *per patriam*) that is, by jury. Which establishment, of different tribunals for determining these different issues, is in some measure agreeable to the course of justice in the Roman republic, where the *judices ordinarii* [ordinary judges] determined only questions of fact, but questions of law were referred to the decisions of the *centumviri*.[4]

BUT here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the parties be kept or continued in court from day to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearance in court again. Therefore in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the

© Copyright 2003, 2005 Lonang Institute

plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the continuance, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted the cause is thereby discontinued, and the defendant is discharged fine die, without a day, for this turn: for by his appearance in court he has obeyed the command of the king's writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin *de novo* [anew].

NOW it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as, that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, *viz.* at the day given for his next appearance, he is permitted to plead it in what is called a plea *puis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defense, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the parties.[5] And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or laches, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of *audita querela* [a heard complaint], of which hereafter. And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

WE have said, that demurrers, or questions concerning the sufficiency of the matters alleged in the pleadings, are to be determined by the judges of the court, upon solemn argument by counsel on both sides; and to that end a demurrer book is made up, containing all the proceedings at length, which are afterwards entered on record; and copies thereof, called paper-books, are delivered to the judges to peruse. The record[6] is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had; all entered verbatim on the roll, and also the issue or demurrer, and joinder therein.

THESE were formerly all written, as indeed all public proceedings were, in Norman or law French, and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. An evident and shameful badge, it must be owned, of tyranny and foreign servitude; being introduced under the auspices of William the Norman, and his sons: whereby the observation of the Roman satirist was once more verified, that "*Gallia causidicos docuit facunda Britannos*" ["eloquent Gaul has instructed British lawyers"].[7] This continued till the reign of Edward III; who, having employed his arms successfully in subduing the crown of France, thought it unbeseeming the dignity of the victors to use any longer the language of a vanquished country. By a statute therefore, passed

© Copyright 2003, 2005 Lonang Institute

in the thirty-sixth year of his reign,[8] it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. In like manner as don Alonso X, king of Castile (the great-grandfather of our Edward III) obliged his subjects to use the Castilian tongue in all legal proceedings;[9] and as, in 1286, the German language was established in the courts of the empire.[10] And perhaps if our legislature had then directed that the writs themselves, which are mandates from the king to his subjects to perform certain acts or to appear at certain places, should have been framed in the English language, according to the rule of our ancient law,[11] it had not been very improper. But the record or enrollment of those writs and the proceedings thereon, which was calculated for the benefit of posterity, was more serviceable (because more durable) in a dead and immutable language than in any flux or living one. The practitioners however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law French; and of course when those notes came to be published, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of a Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs in its grammar and orthography as much from the modern French, as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were concurrently used by our ancestors for several centuries together, the two idioms have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of Normandy, collected in their *grand coustumier*, as well if not better than a Frenchman bred within the walls of Paris.

THE Latin, which succeeded the French for the entry and enrollment of pleas, and which continued in use for four centuries, answers so nearly to the English (oftentimes word for word) that it is not at all surprising it should generally be imagined to be totally fabricated at home, with little more art or trouble than by adding Roman terminations to English words. Whereas in reality it is a very universal dialect, spread throughout all Europe at the irruption of the northern nations, and particularly accommodated and molded to answer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity or (if the reader pleases) the poverty and baldness of its texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style: for it may be observed, that those laws and ordinances, of public as well as private communities, are generally the most easily understood, where strength and perspicuity, nor harmony or elegance of expression, have been principally consulted in compiling them. These northern nations, or rather their legislators, though they resolved to make use of the Latin tongue in promulgating their laws, as being more durable and more generally known to their conquered subjects than their own Teutonic dialects, yet either through choice or necessity have frequently intermixed therein some words of a Gothic original; which is, more or less the case in every country of Europe, and therefore not to be imputed as any peculiar blemish in our English legal latinity.[12] The truth is, what is generally denominated law-latin is in reality a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of

© Copyright 2003, 2005 Lonang Institute

Attica, Rome, and Palmyra have sunk beneath the stroke of time.

AS to the objection of locking up the law in a strange and unknown tongue, this is of little weight with regard to records, which few have occasion to read but such as do, or ought to, understand the rudiments of Latin. And besides it may be observed of the law-latin, as the very ingenious Sir John Davies[13] observes of the law-french, "that it is so very easy to be learned, that the meanest wit that ever came to the study of the law does come to understand it almost perfectly in ten days without a reader."

IT is true indeed that the many terms of art, with which the law abounds, are sufficiently harsh when latinized (yet not more so than those of other sciences) and may, as Mr. Selden observes,[14] give offense "to some grammarians of squeamish stomachs, who would rather choose to live in ignorance of things the most useful and important, than to have their delicate ears wounded by the use of a word, unknown to Cicero, Salust, or the other writers of the Augustan age." Yet this is no more than must unavoidably happen when things of modern use, of which the Romans had no idea, and consequently no phrases to express them, come to be delivered in the Latin tongue. It would puzzle the most classical scholar to find an appellation, in his pure latinity, for a constable, a record, or a deed of feoffment: it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect *constabularius, recordum,* and *feoffamentum.* Thus again, another uncouth word of our ancient laws (for I defend not the ridiculous barbarisms sometimes introduced by the ignorance of modern practitioners) the substantive *murdrum,* or the verb *murdrare,* however harsh and unclassical it may seem, was necessarily framed to express a particular offense; since no other word in being, *occidere, interficere, necare* [to kill, put to death, to slay], or the like, was sufficient to express the intention of the criminal, or *quo animo* the act was perpetrated; and therefore by no means came up to the notion of murder at present entertained by our law; *viz.* a killing with malice aforethought.

A SIMILAR necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire: for, without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate *fidei-commissarios,* φιδειχομμισσαριως [trustees];[15] *cubiculum,* χωβωχλειον [bed-chamber];[16] *filium-familias,* παιδα–φαμιλιας [son of a family];[17] *repudium,* ρεπωδιον [divorce];[18] *compromissum,* χομπρομισσον [compromise];[19] *reverentia et obsequium,* ρευερεντια χοφ οβσεχωιον [reverence and compliance];[20] and the like. They studied more the exact and precise import of the words, than the neatness and delicacy of their cadence. And my academical readers will excuse me for suggesting, that the terms of the law are not more numerous, more uncouth, or more numerous, more uncouth, or more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy, nay even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas More's famous legal question[21] contains in it nothing more difficult, than the definition which in his time the philosophers currently gave of their *materia prima* [primary matter], the groundwork of all natural knowledge; that it is "*neque quid, neque quantum, neque quale, neque aliquid eorum quibus ens determinatur*" ["neither that, nor as much as, nor such as, nor any part of those things by which being is determined"]; or its subsequent explanation by Adrian Heereboord, who assures us[22] that "*materia prima non est corpus, neque per formam corporeitatis, neque per simplicem essentiam: est tamen ens, et quidem substantia, licet incompleta; habetque actum ex se entitativum, et simul est potentia subjectiva.*" ["Primary matter is not body, neither by form of embodiment nor by simple

© Copyright 2003, 2005 Lonang Institute

essence: nevertheless it is a being, and certain substance although incomplete; and has a self-defining action from itself, and is at the same time a subjective power."] The law therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence.

THIS technical Latin continued in use from the time of its first introduction, till the subversion of our ancient constitution under Cromwell; when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of king Charles, this novelty was no longer countenanced; the practitioners finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26. This was done, in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attorneys are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the first. And it has much enhanced the expense of all legal proceedings: for since the practitioners are confined (for the sake of the stamp duties, which are thereby considerably increased) to write only a stated number of words in a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin; it follows that the number of sheets must be very much augmented by the change.[23] The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of *nisi prius*, *quare impedit*, *fieri facias*, *habeas corpus*, and the rest, not being capable of an English dress with any degree of seriousness) that in two years time a new act was obliged to be made, 6 Geo. II. c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

WHAT is said of the alteration of language by the statute 4 Geo. II. c. 26. will hold equally strong with respect to the prohibition of using the ancient immutable court hand in writing the records or other legal proceedings; whereby the reading of any record that is forty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinian;[24] "*ne per scripturam aliqua fiat in posterum dubitatio, jubemus non per siglorum captiones et compendiosa aenigmata ejusdem codicis textum conscribi, sed per literarum consequentiam explanari concedimus.*" ["Lest, through the method of writing, the meaning of this code be rendered doubtful to posterity, we command that it be not written in abbreviations or acronyms; but that it be rendered plain by the regular succession of letters."] But, to return to our demurrer.

WHEN the substance of the record is completed, and copies are delivered to the judges, the matter of law, upon which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is thereupon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causa venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the

© Copyright 2003, 2005 Lonang Institute

justification to be legal: now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.

AN issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined in the channel prescribed by law. To which examination, of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

NOTES

1. Append. No. III. § 6.
2. Ibid.
3. Append. No. II. § 4.
4. Cic. de Ocator. l. I. c. 38.
5. Cro. Eliz. 49.
6. Append. No. II. § 4. No. III. § 6.
7. Juv. XV. III.
8. c. 15.
9. Mod. Un. Hist. XX. 211.
10. Ibid. XXiX. 235.
11. Mirr. c. 4. § 3.
12. The following sentence, "*si quis ad battalia curte sua exierit*, if any one goes out of his own court to fight," etc. may raise a smile in the student as a flaming modern anglicism: but he may meet with it, among others of the same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. (Add. I. c. 5. § 2.)
13. Pref. Rep.
14. Pref. ad Eadmer.
15. Nov. I. c. I.
16. Nov. 8. edict. Constantinop.
17. Nov. 117. c. I.
18. Ibid. c. 8.
19. Nov. 82. c. II.
20. Nov. 78. c. 2.
21. See pag. 149.
22. Philosoph. natural. c. I. § 28, etc.
23. For instance, these words, "*secundum formam statuti*," are now converted into seven, "according to the form of the statute."
24. de concept. digest. § 13.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 22

Of the Several Species of Trial

THE uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humor, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

IT has sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions;[1] which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact, of multiplicity, is allowed; and that thereby the researches of the student are rendered more difficult and laborious: but that, with proper industry, the result of those inquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. They bring us the examples of arbitrary governments, of Denmark, Muscovy, and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics, in ancient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

IN an arbitrary, despotic, government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those nations, *viz.* the commonalty, boors or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may see, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

AGAIN; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short end to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables: but as luxury, politeness, and dominion increased, the civil law increased in the same

© Copyright 2003, 2005 Lonang Institute

proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a private family are short and well-known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way: and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new-model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or, in fine, because of the natural imbecility and imperfection that attends all human proceedings. But, wherever this happens to be the case in any material points, the legislature is ready, and from time to time both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

WHATEVER instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed the reverse is most strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance in the civil law: the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists, are literally without number. And these glosses, which are mere private opinions of scholastic doctors (and not, like our books of reports, judicial determinations of the court) are all of authority sufficient to be vouched and relied on; which must needs breed great distraction and confusion in their tribunals. The same may be said of the canon law; though the text thereof is not of half the antiquity with the common law of England; and though the more ancient any system of laws is, the more it is liable to be perplexed with the multitude of judicial decrees. When therefore a body of laws, of so high antiquity as the English, is in general so clear and perspicuous, it argues deep wisdom and foresight in such as laid the foundations, and great care and circumspection, in such as have built the superstructure.

BUT is not (it will be asked) the multitude of lawsuits, which we daily see and experience, an argument against the clearness and certainty of the law itself?. By no means: for among the various

© Copyright 2003, 2005 Lonang Institute

disputes and controversies, which are daily to be met with in the course of legal proceedings, it is obvious to observe how very few arise from obscurity in the rules or maxims of law. An action shall seldom be heard of, to determine a question of inheritance, unless the fact of the descent be controverted. But the dubious points, which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals, in their solemn dispositions of property; in their contracts, conveyances, and testaments. It is an object indeed of the utmost importance in this free and commercial country, to lay as few restraints as possible upon the transfer of possessions from hand to hand, or their various designations marked out by the prudence, convenience, or necessities, or even by the caprice, of their owners: yet to investigate the intention of the owner is frequently matter of difficulty, among heaps of entangled conveyances or wills of a various obscurity. The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others. Thus the powers, the interest, the privileges, and properties of a tenant for life, and a tenant in tail, are clearly distinguished and precisely settled by law: but, what words in a will shall constitute this or that estate, has occasionally been disputed for more than two centuries past; and will continue to be disputed as long as the carelessness, the ignorance, or singularity of testators shall continue to clothe their intentions in dark or newfangled expressions.

BUT, notwithstanding so vast an accession of legal controversies, arising from so fertile a fund as the ignorance and wilfulness of individuals, these will bear no comparison in point of number to those which are founded upon the dishonesty, and disingenuity of the parties: by either their suggesting complaints that are false in fact, and thereupon bringing groundless actions; or by their denying such facts as are true, in setting up unwarrantable defenses. *Ex facto oritur jus* [law arises from fact]: if therefore the fact be perverted or misrepresented, the law which arise from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.

THESE modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient, in Westminster-hall, to settle (upon solemn argument) every demurrer or other special point of law that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England; exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

TRIAL then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried: of all which we will take a cursory view in this and the subsequent chapter. For the law of England so industriously endeavors to investigate truth at any rat, that it will not confine itself to one, or to a few, manners of trial; but varies its examination of facts according to the nature of the facts themselves: this being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial, which the nature of the case affords, and no other, shall be admitted in the English courts of justice.

THE species of trials in civil cases are seven. By record; by inspection, or examination; by

© Copyright 2003, 2005 Lonang Institute

certificate; by witnesses; by wager of battle; by wager of law; and by jury.

I. FIRST then of the trial by record. This is only used in one particular instance: and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like; and the opposite party pleads "*nul tiel record*," that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, "and this he prays may be inquired of by the record, and the other does the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth his record or he shall be condemned;" and, on his failure, his antagonist shall have judgment to recover. The trial therefore of this issue is merely by the record; for, as Sir Edward Coke[2] observes, a record or enrollment is a monument of so high a nature, and imports in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. Thus titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record.[3] Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of record.[4] And also, whether a manor be held in ancient demesne or not, shall be tried by the record of domesday in the king's exchequer.

II. TRIAL by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious facts: and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone. As in case of a suit to reverse a fine for non-age of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriff,[5] commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not; "*ut per aspectum corporis sui constare poterit justiciariis nostris, si praedictus A sit plenae aetatis, necne*."[6] If however the court has, upon inspection, any doubt of the age of the party, (as may frequently be the case) it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath of *voir dire* [speak truly], *veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him: or the court may examine his mother, his god-father, or the like.[7]

IN like manner if a defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies; in this case the judges shall determine by inspection and examination, whether he be the plaintiff or not.[8] Also if a man be found by a jury an idiot *a nativitate* [from birth], he may come in person into the chancery before the chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not: and if, upon such view and inquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effect.[9]

© Copyright 2003, 2005 Lonang Institute

ANOTHER instance in which the trial by inspection may be used, is when upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons.[10] And, by analogy to this, in an action of trespass for mayhem, the court, (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase the damages at their own discretion;[11] as may also be the case upon view of an atrocious battery.[12] But then the battery must likewise be alleged so certainly in the declaration, that it may appear to be the same with the battery inspected.

ALSO, to ascertain any circumstances relative to a particular day past, it has been tried by an inspection of the almanac by the court. Thus, upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a Sunday, it appearing to be on 26 February, 26 Eliz. and upon inspection of the almanacs of that year it was found that the 26th of February in that year actually fell upon a Sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed.[13] But, in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.

III. THE trial by certificate is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus, I. If the issue be whether A was absent with the king in his army out of the realm in time of war, this shall be tried[14] by the certificate of the mareschall of the king's host in writing under his seal, which shall be sent to the justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, *ultra mare* [beyond the sea], at Bordeaux, or in the service of the mayor of Bordeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Calais.[15] But, when this was law,[16] those towns were under the dominion of the crown of England. And therefore, by a parity of reason, it should now hold that in similar cases, arising at Jamaica or Minorca, the trial should now hold that should be by certificate from the governor of those islands. We also find[17] that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons. 3. For matters within the realm; the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder;[18] upon a surmise from the party alleging it, that the custom ought to be thus tried: else it must be tried by the country.[19] As, the custom of distributing the effects of freemen deceased; of enrolling apprentices; or that he who is free of one trade may use another; if any of these, or other similar, points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested, in the suit; as in an action brought for a penalty inflicted by the custom: for there the reason of the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recorder.[20] 4. In some cases, the sheriff of London's certificate shall be the final trial: as if the issue be, whether the defendant be a citizen of London or a foreigner,[21] in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, because one of the

© Copyright 2003, 2005 Lonang Institute

parties is a privileged person. In this case, the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal; to which it has also been usual to add an affidavit of the fact: but if the parties be at issue between themselves, whether A is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate;[22] because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege: so that this must be left to the ordinary course of determination. 5. In matters of ecclesiastical jurisdiction, as marriage, and of course general bastardy, and also excommunication, and orders, these, and other like matters, shall be tried by the bishop's certificate.[23] As if it be pleaded in abatement, that the plaintiff is excommunicated, and issue is joined thereon; or if a man claims an estate by descent, and the tenant alleges the demandant to be a bastard; or if on a writ of dower the heir pleads no marriage; or if the issue in a *quare impedit* [why impeded] be, whether or no the church be full by institution; all these being matters of mere ecclesiastical cognizance, shall be tried by certificate from the ordinary. But in an action on the case for calling a man bastard, the defendant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury:[24] because, whether the plaintiff be found either a general or special bastard, the justification will be good; and no question of special bastardy shall be tried by the bishop's certificate, but by a jury.[25] For a special bastard is one born, before marriage, of parents who afterwards intermarry: which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop; who, whether the child be born before or after marriage, will be sure to return or certify him legitimate.[26] Ability of a clerk presented,[27] admission, institution, and deprivation of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge:[28] but induction shall be tried by a jury, because it is a matter of public notoriety,[29] and is likewise the corporal investiture of the temporal profits. Resignation of a benefice may be tried in either way;[30] but it seems most properly to fall within the bishop's cognizance. 6. The trial or all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate.[31] And thus much for those several issues, or matters of fact, which are proper to be tried by certificate.

IV. A FOURTH species of trial is that by witnesses, per testes, without the intervention of a jury. This is the only method of trial known to the civil law; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined: but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance. Save only, that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this, being looked upon as a dilatory plea, is, in favor of the widow and for greater expedition, allowed to be tried by witnesses examined before the judges: and so, says Finch,[32] shall no other case in our law. But Sir Edward Coke[33] mentions some others: as, to try whether the tenant in a real action was duly summoned, or the validity of a challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And in every case Sir Edward Coke lays it down, that the affirmative must be proved by two witnesses at the least.

V. THE next species of trial is of great antiquity, but much disused; though still in force if the parties choose to abide by it: I mean the trial by wager of battle. This seems to have owed its original to the

© Copyright 2003, 2005 Lonang Institute

military spirit of our ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits, by this appeal to the God of battles, is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true, that the first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, A. D. 501, which are preserved in the Burgundian code. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike people from the earliest times.[34] And it may also seem from a passage in *Velleius Paterculus*,[35] that the Germans, when first they became known to the Romans, were wont [accustomed] to decide all contests of right by the sword: for when Quintilius Varus endeavored to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as a "*novitas incognitae, ut solita armis decerni, jure terminarentur*." ["An unknown innovation; that matters which had always been decided by arms should be determined by law."] And among the ancient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own country.[36]

THIS trial was introduced into England among other Norman customs by William the conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of chivalry and honor:[37] the second in appeals of felony,[38] of which we shall speak in the next book: and the third upon issue joined in a writ of right, the last and most solemn decision of real property. For in writs of right the *jus proprietatis* [right of property], which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the *jus possessionis* [right of possession], which are usually more plain and obvious, our ancestors did not in them appeal to the decision of providence. Another pretext for allowing it, upon these final writs of right, was also for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence be unable to prove it to a jury. But the most curious reason of all is given in the mirror,[39] that it is allowable upon warrant of the combat between David for the people of Israel of the one party, and Goliath for the Philistines of the other party: a reason, which pope Nicholas I very seriously decides to be inconclusive.[40] Of battle therefore on a writ of right[41] we are now to speak; and although the writ of right itself, and of course this trial thereof, be at present disused; yet, as it is law at this day, it may be matter of curiosity, at least, to inquire into the forms of this proceeding, as we may gather them from ancient authors.[42]

THE last trial by battle that was joined in a civil suit (though there was afterwards one in the court of chivalry in the reign of Charles the first;[43] and another tendered, but not joined, in a writ of right upon the northern circuit in 1638) was in the thirteenth year of queen Elizabeth, as reported by Sir James Dyer,[44] and was held in Tothill fields Westminster, "*non sine magna juris consultorum perturbatione*" ["not without great disturbance of the lawyers"], says Sir Henry Spelman,[45] who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows.

WHEN the tenant in a writ of right pleads the general issue, *viz.* that he has more right to hold, than the demandant has to recover; and offers to prove it by the body of his champion, which tender is accepted by the demandant; the tenant in the first place must produce his champion, who, by throwing down his glove as a gage or pledge, thus wages or stipulates battle with the champion of the demandant; who, by taking up the gage or glove, stipulates on his part to accept the challenge.

© Copyright 2003, 2005 Lonang Institute

The reason why it is waged by champions, and not by the parties themselves, in civil actions, is because, if any party to the suit dies, the suit must abate and be at an end for the present; and therefore no judgment could be given for the lands in question, if either of the parties were slain in battle:[46] and also that no person might claim an exemption from this trial, as was allowed in criminal cases, where the battle was waged in person.

A PIECE of ground is then in due time set out, of sixty feet square, enclosed with lists, and on one side a court erected for the judges of the court of common pleas, who attend there in their scarlet robes; and also a bar is prepared for the learned sergeants at law. When the court sits, which ought to be by sunrising, proclamation is made for the parities, and their champions; who are introduced by two knights, and are dressed in a suit of armor, with red sandals, barelegged from the knee downwards, bareheaded, and with bare arms to the elbows. The weapons allowed them are only batons, or staves, of an ell long [45 inches], and a four-cornered leather target; so that death very seldom ensued this civil combat. In the court military indeed they fought with sword and lance, according to Spelman and Rushworth; as likewise in France only villeins fought with the buckler and baton, gentlemen armed at all points. And upon this, and other circumstances, the president Montesquieu[47] has with great ingenuity not only deduced the impious custom of private duels upon imaginary points of honor, but has also traced the heroic madness of knight errantry, from the same original of judicial combats. But to proceed.

WHEN the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant then takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or a similar form; “hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne [nor] grass; nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and his saints.”

THE battle is thus begun, and the combatants are bound to fight till the stars appear in the evening: and, if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession: but, if victory declares itself for either party, for him is judgment finally given. This victory may arise, from the death of either of the champions: which indeed has rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained, if either champion proves recreant, that is, yields, and pronounces the horrible word of craven; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, *amittere liberam legem* [to lose legal liberty], that is, to become infamous and not be accounted *liber et legalis homo* [a free and lawful man]; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury or admitted as a witness in any cause.

© Copyright 2003, 2005 Lonang Institute

THIS is the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, has it in his election at this day to demand; and which was the only decision of such writ of right after the conquest, till Henry the second by consent of parliament introduced the grand assize,[48] a peculiar species of trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. Which example, of discountenancing these judicial combats, was imitated about a century afterwards in France, by an edict of Louis the pious, A. D. 1260, and soon after by the rest of Europe. The establishment of this alternative, Glanvil, chief justice to Henry the second, and probably his adviser herein, considers as a most noble improvement, as in fact it was, of the law.[49]

VI. A SIXTH species of trial is by wager of law, *vadiatio legis*, as the foregoing is called wager of battle, *vadiatio duelli*: because, as in the former case the defendant gave a pledge, gage, or *vadium*, to try by battle; so here he was to put in sureties or *vadios*, that at such a day he will make his law, that is, take the benefit which the law has allowed him.[50] For our ancestors considered, that there were many cases where an innocent man, of good credit, might be overborne by a multitude of false witnesses; and therefore established this species of trial, by the oath of the defendant himself: for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt, or other cause of action.

THIS method of trial is not only to be found in the codes of almost all the northern nations, that broke in upon the Roman empire and established petty kingdoms upon it ruins;[51] but its original may also be traced as far back as the Mosaic law. “If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord between them both, that he has not put his hand unto his neighbor's goods; and the owner of it shall accept thereof, and he shall not make it good.”[52] We shall likewise be able to discern a manifest resemblance, between this species of trial, and the canonical purgation of the popish clergy, when accused of any capital crime. The defendant or person accused was in both cases to make oath of his own innocence, and to produce a certain number of compurgators [sworn witnesses], who swore they believed his oath. Somewhat similar also to this is the *sacramentum decisionis*, or the voluntary and decisive oath of the civil law;[53] where one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary: which the adversary was bound to accept, or tender the same proposal back again; otherwise the whole was taken as confessed by him. But, though a custom somewhat similar to this prevailed formerly in the city of London,[54] yet in general the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury: but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases; and in those it has also devised other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

THE manner of waging and making law is this. He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors: a custom, which we find particularly described so early as in the league between Alfred and Guthrun the Dane;[55] for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant then, standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath.[56] And if he still persists, he is to repeat this or the like oath: “hear this, ye justices, that I do not own unto Richard Jones the sum of ten pounds, nor any penny

© Copyright 2003, 2005 Lonang Institute

thereof, in manner and form as the said Richard has declared against me. So help me God." And thereupon his eleven neighbors or compurgators shall avow upon their oaths, that they believe in their consciences that he says the truth; so that himself must be sworn *de fidelitate* [on his fidelity], and the eleven *de credulitate* [on their belief].[57] It is held indeed by later authorities[58] that fewer than eleven compurgators will do: but Sir Edward Coke is positive that there must be this number; and his opinion not only seems founded upon better authority, but also upon better reason: for, as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely by the oath of twelve men. And so indeed Glanvil expresses it,[59] "*jurabit duodecima manu*" ["he shall swear by twelve men"]: and in 9 Hen. III. when a defendant in an action of debt waged his law, it was adjudged by the court "*quod defendat se duodecima manu*" ["that he defend himself by twelve men"]. Thus too, in an author of the age of Edward the first,[60] we read, "*adjudicabitur reus ad legem suam duodecima manu.*"[61] ["The defendant shall be adjudged to make his law by twelve men."] And the ancient treatise, entitled *dyversite des courts*, expressly confirms Sir Edward Coke's opinion.[62]

IT must be however observed, that so long as the custom continued of producing the *secta*, the suit, or witnesses to give probability to the plaintiff's demand, (of which we spoke in a former chapter) the defendant was not put to wage his law, unless the *secta* was first produced, and their testimony was found consistent. To this purpose speaks Magna Carta, c. 28. "*Nullus ballivus de caetero ponat aliquem ad legem manifestam*," (that is, wager of battle) "*nec ad juramentum*," (that is, wager of law) "*simplici loquela sua*," (that is, merely by his count or declaration) "*sine testibus fidelibus ad hoc inductis*." ["No bailiff shall put any one to his wager of battle, or to his wager of law, on his simple declaration, without faithful witnesses brought for that purpose."] Which Fleta thus explains:[63] "*si petens sectam produxerit, et concordes inveniantur, tunc reus poterit vadiare legem suam contra petentem et contra sectam suam prolatam; sed si secta variabilis inveniatur, extunc non tenebitur legem vadiare contra sectam illam*." ["If the plaintiff bring his witnesses, and they agree in their testimony, then the defendant may wage his law against him, and against his suit: but if the suit vary in their testimony, he will thenceforward not be bound to wage his law against that suit."] It is true indeed, that Fleta expressly limits the number of compurgators to be only double to that of the *secta* produced; "*ut si duos vel tres testes produxerit ad probandum, oportet quod defensio fiat per quatuor vel per sex; ita quod pro quolibet teste duos producat juratores, usque ad duodecim*" ["if he bring two or three witnesses to prove the fact, the defense must be made by four or six: so that for every witness he must bring two jurors up to twelve"]: so that according to this doctrine the eleven compurgators were only to be produced, but not all of them sworn, unless the *secta* consisted of six. But, though this might possibly be the rule till the production of the *secta* was generally disused, since that time the *duodecima manus* seems to have been generally required.[64]

IN the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in criminal cases, unless the fact be extremely clear against the prisoner;[65] but was also absolutely required, in many civil cases: which an author of their own[66] very justly charges as being the source of frequent perjury. This, he tells us, was owing to the popish ecclesiastics, who introduced this method of purgation from their canon law; and, having sown a plentiful crop of oaths in all judicial proceedings, reaped afterwards an ample harvest of perjuries: for perjuries were punished in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never required; and is then only admitted, where an action is brought upon such matters as may be

© Copyright 2003, 2005 Lonang Institute

supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. Therefore it is only in actions of debt upon simple contract, or for an amercement in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; it is only in these actions, I say, that the defendant is admitted to wage his law:[67] so that wager of law lies not, when there is any specialty, as a bond or deed, to charge the defendant, for that would be cancelled if satisfied; but when the debt grows by word only. Nor does it lie in an action of debt, for arrears of an account, settled by auditors in a former action.[68] And by such wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the ancient times, presumed that no one would forswear himself, for any worldly thing.[69] Wager of law however lies in a real action, where the tenant alleges he was not legally summoned to appear, as well as in mere personal contracts.[70]

A MAN outlawed, attainted for false verdict, or for conspiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial by battle, shall not be permitted to wage his law. Neither shall an infant under the age of twenty-one, for he cannot be admitted to his oath; and therefore on the other hand, the course of justice shall flow equally, and the defendant, where an infant is plaintiff, shall not wage his law. But a feme-covert, when joined with her husband, may be admitted to wage her law: and an alien shall do it in his own language.[71]

IT is moreover a rule, that where a man is compellable by law to do any thing, whereby he becomes creditor to another, the defendant in that case shall not be admitted to wage his law: for then it would be in the power of any bad man to run in debt first, against the inclinations of his creditor, and afterwards to swear it away. But where the plaintiff has given voluntary credit to the defendant, there he may wage his law; for by giving him such credit, the plaintiff has himself borne testimony that he is one whose character may be trusted. Upon this principle it is, that in an action of debt against a prisoner by a jailer for his victuals, the defendant shall not wage his law: for the jailer cannot refuse the prisoner, and ought not to suffer him to perish for want of sustenance. But otherwise it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees, the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. And so, if a servant be retained according to the statute of laborers, 5 Eliz. c. 4. which obliges all single persons of a certain age, and not having other visible means of livelihood, to go out to service; in an action of debt for the wages of such a servant, the master shall not wage his law, because the plaintiff was compellable to serve. But it had been otherwise, had the hiring been by special contract, and not according to the statute.[72]

IN no case where a contempt, trespass, deceit, or any injury with force is alleged against the defendant, is he permitted to wage his law:[73] for it is impossible to presume he has satisfied the plaintiff his demand in such cases, where damages are uncertain and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself, where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which ours has so justly rejected.

EXECUTORS and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law:[74] for no man can with a safe conscience wage law of another man's contract; that

© Copyright 2003, 2005 Lonang Institute

is, swear that he never entered into it, or at least that he privately discharged it. The king also has his prerogative; for, as all wager of law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such wager on actions brought by him.[75] And this prerogative extends and is communicated to his debtor and accountant; for, on a writ of quo minus in the exchequer for a debt on simple contract, the defendant is not allowed to wage his law.[76]

THUS the wager of law never permitted, but where the defendant bore a fair and unreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: and many other prudential restrictions accompanied this indulgence. But at length it was considered, that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men: and therefore by degrees new remedies were devised, and new forms of action were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardiness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract; that being supplied by an action of trespass on the case for the breach of a promise or *assumpsit* [undertaking]; wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt. And, this being an action of trespass, no law can be waged therein. So, instead of an action of detinue to recover the very thing detained, an action of trespass on the case in trover and conversion is usually brought; wherein, though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of account a bill in equity is usually filed: wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed: otherwise an hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it.

THESE six species of trials, that we have considered in the present chapter, are only had in certain special and eccentric cases; where the trial by the country, *per pais*, or by jury, would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

NOTES

1. See the preface to Sir John Davies's reports: Wherein many of the following topics are discussed more at large.
2. I Inst. 117. 260.
3. 6 Rep. 53.
4. 9 Rep. 31.
5. 9 Rep. 31.
6. This question of non-age was formerly, according to Glanvil, (l. 13. c. 15.) tried by a jury of eight men; though now it

© Copyright 2003, 2005 Lonang Institute

is tried by inspection.

7. 2 Roll. Abr. 573.
8. 9 Rep. 30.
9. Ibid. 31.
10. 2 Roll. Abr. 578.
11. I Sid. 108.
12. Hardr. 408.
13. Cro. Eliz. 227.
14. Litt. § 102.
15. 9 Rep. 31.
16. 2 Roll. Abr. 583.
17. Dyer. 176, 177.
18. Co. Litt. 74. 4 Burr. 248.
19. Bro. Abr. t. trial. pl. 96.
20. Hop. 85.
21. Co. Litt. 74.
22. 2 Roll. Abr. 583.
23. Co. Litt. 74.
24. Hob. 179.
25. Dyer. 79.
26. See introd. to the great charter. edit. Oxon. *sub anno* 1253.
27. See book I. Ch. II.
28. 2 Inst. 632. Show. Parl. C. 88.
29. Dyer. 229.
30. 2 Roll. Abr. 583.
31. 9 Rep. 31.
32. L. 423.
33. I Inst. 6.
34. Seld. of duels. c. 5.
35. l. 2. c. 118.
36. Stiernh. *de jure* Sueon. l. I. c. 7.
37. Co. Litt. 261.
38. 2 Hawk. P. C. 45.

© Copyright 2003, 2005 Lonang Institute

39. c. 3. § 23.

40. Decret. Part. 2. caus. 2. qu. 5. c. 22.

41. Append. No. I. § 5.

42. Glanvil. l. 2. c. 3. vet. nat. brev. fol. 2. Nov. Narr. tit. Droit patent. fol. 231. (edit. 1534.) Yearbook. 29 Edw. III. 12. Finch. L. 421. Dyer. 301. 2 Inst. 247.

43. Rushw. coll. vol. 2. part. 2. fol. 112.

44. 301.

45. Gloss. 103.

46. Co. Litt. 294. *Dyversite des courts*. 304.

47. Sp. L. b. 28. c. 20. 22.

48. Append. No. I. § 6.

49. *Est autem magna assisa regale quoddam beneficium, clementia principis, de consilio procerum, populis indultum; quo vitae hominum, et status integritati tam salubriter consulitur, ut, retinendo quod quis possidet in libero tenemento soli, duelli casum declinare possint homines ambiguum. Ac per hoc contingit, insperatae et praematurae mortis ultimum evadere supplicium, vel saltem perennis infamiae opprobrium illius infesti et inverecundi verbi, quod in ore victi turpiter sonat, consecutivum. Ex aequitate item maxima prodita est legalis ista institutio. Jus enim, quod post multas et longas dilationes vix evincitur per duellum, per beneficium istius constitutionis commodius et acceleratius expeditur*. [The grand assize is a certain royal favor granted to the people by the clemency of the king, in counsel with his nobles: by which the lives and estates of men are so effectually consulted, that, every one retaining what he possesses in fee, may decline the doubtful event of the trial by battle: and by this means avoid the greatest of all punishments, an unexpected and premature death, or at least the disgrace and perpetual infamy attached to that base and odious word pronounced by the vanquished. This legal institution proceeds also from the highest equity: for the right which after many and long delays can scarcely be ascertained by battle, is, by this means, more commodiously and expeditiously determined.] (l. 2. c. 7.)

50. Co. Litt. 295.

51. Sp. L. b. 28. c. 13. Stiernhook *de jure Sueonum*. L. I. c. 9. Feud. l. I. t. 4. 10. 28.

52. Exod. 22:10.

53. Cod. 4. I. 12.

54. Bro. Abr. t. ley gager. 77.

55. cap. 3. Wilk. LL. Angl. Sax.

56. Salk. 682.

57. Co. Litt. 295.

58. 2 Ventr. 171.

59. l. I. c. 9.

60. Fitzh. Abr. t. ley. 78.

61. Henghem magna. c. 5.

62. *Il covint aver' oue luy xi maynz de jurer oue luy, sc. que ilz entendre en lour consciens que il disoyt voier*. [He must have eleven men to swear for him - that is, that they believe in their conscience that he has spoken the truth.] (fol. 306.)

63. l. 2. c. 63.

64. Bro. Abr. t. ley gager. 9.

© Copyright 2003, 2005 Lonang Institute

65. Mod. Un. Hist. xxxiii. 22.
66. Stiernhook *de jure Sueonum*. L. I. c. 9.
67. Co. Litt. 295.
68. 10 Rep. 103.
69. Co. Litt. 295.
70. Finch. L. 423.
71. Co. Litt. 295.
72. Co. Litt. 295.
73. Ibid. Raym. 286.
74. Finch. L. 424.
75. Ibid. 425.
76. Co. Litt. 295.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 23

Of The Trial by Jury

THE subject of our next inquiries will be the nature and method of the trial by jury; called also the trial *per pais*, or by the country. A trial that has been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavored to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies, their institution being ascribed by bishop Nicolson[1] to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, "*boni homines*" ["good men"], usually the vassals or tenants of the lord, being the equals or peers of the parties litigant: and, as the lord's vassals judged each other in the lord's courts, so the king's vassals, or the lords themselves, judged each other in the king's court.[2] In England we find actual mention of them so early as the laws of king Ethelred, and that not as a new invention.[3] Stiernhook[4] ascribes the invention of the jury, which in the Teutonic languages is denominated *nembda*, to Regner, king of Sweden and Denmark, who was contemporary with our king Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the great; to whom, on account of his having done much, it is usual to attribute everything: and as the tradition of ancient Greece placed to the account of their one Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment however and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always of highly esteemed and valued by the people that no conquest, no change of government, could ever prevail to abolish it. In Magna Carta it is more than once insisted on as the principal bulwark of our liberties; but especially by chap. 29. that no freeman shall be hurt in either his person or property, "*nisi per legale judicium parium suorum vel per legem terrae*" ["unless by the lawful judgment of his peers, or by the law of the land"]. A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before:[5] "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum*." ["No one shall be deprived of his property, but according to the custom of our predecessors, and by the judgment of his peers."] And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

BUT I will not misspend the reader's time in fruitless encomiums [praises] on this method of trial: but shall proceed to the dissection and examination of it in all its parts, from whence indeed its highest encomium will arise; since, the more it is searched into and understood, the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom: as well because he may be frequently called upon to determine in this capacity the rights of others, his fellow-subjects; as because his own property, his liberty, and his life, depend upon maintaining, in its legal force, the constitutional trial by jury.

TRIALS by jury in civil causes are of two kinds; extraordinary, and ordinary. The extraordinary I

© Copyright 2003, 2005 Lonang Institute

shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary.

THE first species of extraordinary trial by jury is that of the grand assize, which was instituted by king Henry the second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of dueling. For this purpose a writ *de magna assisa eligenda* [of choosing the grand assize] is directed to the sheriff,[6] to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvil;[7] who, having probably advised the measure itself, is more than usually copious in describing it: and these, all together, form the grand assize, or great jury, which is to try the matter of right, and must consist of sixteen jurors.[8]

ANOTHER species of extraordinary juries, is the jury to try an attaint; which is a process commenced against a former jury, for bringing in a false verdict; of which we shall speak more largely in a subsequent chapter. At present I shall only observe, that this jury is to consist of twenty-four of the best men in the county, who are called the grand jury in the attaint, to distinguish them from the first or petit jury; and these are to hear and try the goodness of the former verdict.

WITH regard to the ordinary trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, *viz.* by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore an issue is joined, by these words, “and this the said A prays may be inquired of by the country,” or, “and of this he puts himself upon the country, and the said B “does the like,” the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff “that he cause to “come here on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the “truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties.”[9] And such writ is accordingly issued to the sheriff.

THUS the cause stands ready for a trial at the bar of the court itself: for all trials were there anciently had, in actions which were there first commenced; which never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts: and all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began, to bring actions of any trifling value in the courts of Westminster-hall, it was found to be an intolerable burden to compel the parties, witnesses, and jurors, to come from Westmorland perhaps or Cornwall, to try an action of assault at Westminster. Therefore the legislature took into consideration, that the kin's justices came usually twice in the year into the several counties, *ad capiendas assisas*, to take or try writs of assize, of *mort d’ ancestor* [ancestor’s death], *novel disseizin* [new disseizin], nuisance, and the like. The form of which writs we may remember was stated to be, that they commanded the sheriff to summon an assize or jury, and go to view the land in question; and then to have the said jury ready at the next coming of the justices of the assize (together with the parties) to recognize and determine the disseizin, or other injury complained of. As therefore these judges were ready in the country to administer justice in

© Copyright 2003, 2005 Lonang Institute

real actions of assize, the legislature thought proper to refer other matters in issue to be also determined before them, whether of a mixed or personal kind. And therefore it was enacted by statute Westm. 2. 13. Edw. I. c. 30. that a clause of *nisi prius* [unless before] should be inserted in all the aforesaid writs of *venire facias* [cause to come]; that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's courts should be held) on such a day in Easter and Michaelmas terms; *nisi prius,* unless before that day the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms; and there the trial was had.

AN inconvenience attended this remedy: principally because, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason by the statute 42 Edw. III. c. 11. the method of trials by *nisi prius* was altered; and it was enacted that no inquests (except of assize and jail-delivery) should be taken by writ of *nisi prius,* till after the sheriff had returned the names of the jurors to the court above. So that now the cause of *nisi prius* is left out of the writ of *venire facia*s, which is the sheriff's warrant to warn the jury; and is inserted in another part of the proceedings, as we shall see presently.

FOR now the course is, to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, *viz.* hilary or trinity terms, which from the making up of the issues therein are usually called issuable terms. And he returns the names of the jurors in a panel (a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of *habeas corpora juratorum* [have the jurors' bodies], and in the king's bench a *distringas* [distraint], commanding the sheriff to have their bodies, or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is,[10] "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster; unless before that time, *viz.* on Wednesday the fourth of March, the justices of our lord the king, appointed to take assizes in that county, shall have come to Oxford, that is, to the place assigned for holding the assizes. Therefore the sheriff is commanded to have their bodies at Westminster on the said first day of next term, or before the said justices of assize, if before that time they come to Oxford; *viz.* on the fourth of March aforesaid." And, as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons this jury to appear at the assizes, and there the trial is had before the justices of assize and *nisi prius*: among whom (as has been said[11]) are usually two of the judges of the courts at Westminster, the whole kingdom being divided into six circuits for this purpose. And thus we may observe that the trial of common issues, at *nisi prius,* was in its original only a collateral incident to the original business of the justices of assize; though now, by the various revolutions of practice, it is become their principal employment: hardly anything remaining in use of the real assizes, but the name.

IF the sheriff be not an indifferent person; as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury; but the *venire* shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff,

© Copyright 2003, 2005 Lonang Institute

to execute process when he is deemed an improper person. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court, and sworn.[12] And these two, who are called *elisors*, or electors, shall indifferently name the jury, and their return is final.

LET us now pause awhile, and observe (with Sir Matthew Hale[13]) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first the person returning the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit willful errors, but likewise be responsible for the faults of either himself or his officers: and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the time of their return: the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in may weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause; while at the same time by means of the compulsory process (of *distringas* or *habeas corpora*) the cause is not like to be retarded through defect of jurors. Thirdly, as to the place of their appearance: which in causes of weight and consequence is at the bar of the court; but in ordinary cases at the assizes, held in the county where the cause of action arises, and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For, though the preparation of the causes in point of uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, on attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the country where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges of the superior court, if it be a trial at bar; or the judges of assize, delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no shall influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties, which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like. And, the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edw. III. c. 2. 8 Ric. II. c. 2. and 33 Hen. VIII. c. 24. that no judge of assize should hold pleas in any county wherein he was born or inhabits. And, as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their administration of justice, and conduct of trials, are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment. But let us now return to the assizes.

WHEN the general day of trial is fixed, the plaintiff or his attorney must bring down the record to the assizes, and enter it with the proper officer, in order to its being called on in course. If it be not

© Copyright 2003, 2005 Lonang Institute

so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by proviso; by reason of the clause then inserted in the sheriff's *venire*, *viz.* "*proviso*, provided that if two writs come to your hands, (that is one from the plaintiff and another from the defendant) you shall execute only one of them." But this practice begins to be disused, since the statute 14 Geo. II. c. 17. which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days notice of trial; and, if he lives at a greater distance, then fourteen days notice, in order to prevent surprise: and if the plaintiff then charges his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to be defendant for not proceeding to trial, by the same last mentioned statute. The defendant however, or plaintiff, may, upon good cause shown to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assizes.

BUT we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of *habeas corpora*, or *distringas*, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either special or common jurors. Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 Geo. II. c. 25. either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II. c. 18.) that the cause required such special jury.

A COMMON jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25. which appoints, that the sheriff shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two, jurors: and that their names, being written of tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; and unless a previous view of the lands, or tenements, or other matters in question, shall have been though necessary by the court: in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed to take such view; and then such of the jury as have appeared upon the view (if any[14]) shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

AS the jurors appear, when called, they shall be sworn, unless challenged by either party. Challenges are of two sorts; challenges to the array, and challenges to the polls.

CHALLENGES to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under-officer who arrayed the panel. And, generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array: but an unexpected use having been made of this dormant privilege by a spiritual lord,[15] (though his title to such privilege was very doubtful[16]) it was abolished by statute 24 Geo. II. c. 18. Also, by the policy of the ancient law, the jury was to come *de vicineto* [of the vicinity], from the neighborhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or *nembda*, was also collected out of every quarter of the country; "*binos, trinos, vel etiam senos, ex singulis territorii quadrantibus*."[17] ["Two, three, or even six, from every quarter of the country."] For, living in the neighborhood, they were properly the very country, or *pais*, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore the better knew what credit to give to the facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighborhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it for a long time has been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which in the reign of Edward III were constantly six,[18] being in the time of Fortescue[19] reduced to four. Afterwards indeed the statute 35 Hen. VIII. c. 6. restored the ancient number of six, but that clause was soon virtually repealed by statute 27 Eliz. c. 6. which required only two. And Sir Edward Coke also[20]gives us such a variety of circumstances, whereby the courts permitted this necessary number to be evaded, that it appears they were heartily tired of it. At length, by statute 4 & 5 Ann. c. 16. it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 Geo. II. c. 18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighborhood. The array by the ancient law may also be challenged, if an alien by party to the suit, and, upon a rule obtained by his motion to the court for a jury *de medietate linguae* [half foreign and half native], such a one be not returned by the sheriff, pursuant to the statute 28 Edw. III. c. 18. which enacts, that where either party is an alien born, the jury shall be one half aliens and the other denizens, if required, for the more impartial trial. A privilege indulged to strangers in no other country in the world; but which is as ancient with us as the time of king Ethelred, in whose statute *de monticolis Walliae* [of the mountaineers of Wales] (then aliens to the crown of England) cap. 3. it is ordained, that "*duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunto*." ["Let twelve lawful men, of whom six shall be Welsh and six English, give their verdict for English and Welsh."] But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore the statute 21 Hen.

© Copyright 2003, 2005 Lonang Institute

VI. c. 4. the whole jury are then directed to be denizens. And it may be questioned, whether the statute 3 Geo. II. c. 25. (before referred to) has not in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impaneling jurors, and the persons to be returned in such panel. So that the court might probably hesitate, especially in the case of special juries, how far it has now a power to direct a panel to be returned *de medietate linguae,* and to alter the method prescribed for striking a special jury, or balloting for common jurymen.

CHALLENGES to the polls *in capita* [in chief], are exceptions to particular jurors; and seem to answer the *recusatio judicis* [objection to the judge] in the civil and canon laws: by the constitutions of which a judge might be refused upon any suspicion of partiality.[21] By the laws of England also, in the times of Bracton[22] and Fleta,[23] a judge might be refused for good cause; but now the law is otherwise, and it is held that judges or justices cannot be challenged.[24] For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those, to whom the judge is accountable for his conduct.

BUT challenges to the polls of the jury (who are judges of fact) are reduced to four heads by Sir Edward Coke:[25] *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. *Propter honoris respectum* [on account of dignity]; as if a lord of parliament be impaneled on a jury, he may be challenged by either party, or he may challenge himself.

2. *Propter defectum* [on account of incompetency]; as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo* [a free and lawful man]. Under the word *homo* also, though a name common to both sexes, the female is however excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspectedto be intended; then upon the writ *de ventre inspiciendo* [of inspecting pregnancy] a jury of women is to be impaneled to try the question, whether with child, or not.[26] But the principal deficiency is defect of estate, sufficient to qualify him to be a juror. This depends upon a variety of statutes. And, first, by the statute Westm. 2. 13 Edw. I. c. 38. none shall pass on juries in assizes within the county, but such as may dispend [expend] 20 s. by the year at the least; which is increased to 40 s. by the statute 21 Edw. I. St. 1. and 2 Hen. V. St. 2. c. 3. This was doubled by the statute 27 Eliz. c. 6. which requires in every such case the jurors to have estate of freehold to the yearly value of 4£ at the least. But, the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 & 17 Car. II. c. 3. to 20£ per annum, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However by the statute 4 & 5 W. & M. c. 24. it was again raised to 10£ per annum in England and 6£ in Wales, of freehold lands or copyhold; which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts, though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Ric. III. c. 4. and 9 Hen. VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25. any leaseholder

© Copyright 2003, 2005 Lonang Institute

for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20£ per annum over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate linguae*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.

3. JURORS may be challenged *propter affectum* [on account of partiality], for suspicion of bias or partiality. This may either a principal challenge, or to the favor. A principal challenge is such, where the cause assigned carries with it *prima facie* [on its face] evident marks of suspicion, either of malice or favor: as, that a juror is of kin to either party within the ninth degree;[27] that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores* [above all exception]. Challenges to the favor, are where the party has no principal challenge; but object only some probably circumstances of suspicion, as acquaintance, and the like;[28] the validity of which must be left to the determination of triers, whose office it is to decide whether the juror be favorable or unfavorable. The triers, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and two triers shall try the next; and when another is found indifferent and sworn, the two triers shall be superseded, and the two first sworn on the jury shall try the rest.[29]

4. CHALLENGES *propter delictum* [on account of guilt] are for some crime or misdemeanor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if he has received judgment of the pillory, tumbrel, or the like; or to be branded, whipped, or stigmatized; or if he be outlawed or excommunicated, or has been attainted of false verdict, *praemunire* [forewarning], or forgery; or lastly, if he has proved recreant when champion in the trial by battle, and thereby has lost his *liberam legem* [free law]. A juror may himself be examined on oath of *voir dire, veritatem dicere* [speak truly], with regard to the three former of these causes of challenge, which are not to his dishonor; but not with regard to this head of challenge, *propter delictum*, which would be to make him either forswear or accuse himself, if guilty.

BESIDES these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded form serving; there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is excused, and not excluded. As by statute Westm. C. 13. Edw. I. c. 38. sick and decrepit persons, persons not commorant [residing] in the county, and men above seventy years old; and by the statute of 7 & 8 W. III. c. 32. infants under twenty-one. This exemption is also extended by diverse statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impaneled, must show their special exemption. Clergymen are also usually excused, out of favor and respect to their function: but, if they are seized of lands and tenements, they are in strictness liable to be impaneled in respect of their lay fees, unless they be in the service of the king or of some bishop; "*in obsequio domini regis, vel alicujus episcopi*."[30]

© Copyright 2003, 2005 Lonang Institute

IF by means of challenges, or other cause, a sufficient number of unexceptionable jurors does not appear at the trial, either party may pray a *tales*. A *tales* is a supply of such men, as are summoned upon the first panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales* [tales of ten, tales of eight], and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the statute 35 Hen. VIII. c. 6. and other subsequent statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus* [a tales from bystanders],[31] of persons present in court, to be joined to the other jurors to try the cause; who are liable however to the same challenges as the principal jurors. This is usually done, till the legal number of twelve be completed; in which patriarchal and apostolic number Sir Edward Coke[32] has discovered abundance of mystery.[33]

WHEN a sufficient number of persons impaneled, or *talesmen*, appear, they are then separately sworn, well and truly to try the issue between the parties, and a true verdict to give according to the evidence; and hence they are denominated the jury, *jurata*, and jurors, sc. *juratores*.

WE may here again observe, and observing we cannot but admire, how scrupulously delicate and how impartially just the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably, 1. In the avoiding of frauds and secret management, by electing the twelve jurors out of the whole panel by lot. 2. In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent; and repelling particular jurors, if probable cause be shown of malice or favor to either party. The prodigious multitude of exceptions or challenges allowed to jurors, who are the judges of fact, amounts nearly to the same thing as was practiced in the Roman republic, before she lost her liberty: that the select judges should be appointed by the praetor with the mutual consent of the parties. Or, as Tully[34] expresses it: "*neminem voluerunt majores nostri, non modo de existimatione cujusquam, sed ne pecuniaria quidem de re minima, esse judicem; nisi qui inter adversarios convenisset.*" ["Our ancestors would have no judge concerning the reputation of a man, or even of the least pecuniary matter, but him who had been agreed upon by the contending parties."]

INDEED these *selecti judices* [chosen judges] bore in many respects a remarkable resemblance to our juries: for they were first returned by the praetor; *de decuria senatoria conscribuntur*: then their names were drawn by lot, till a certain number was completed; *in urnam sortito mittuntur, ut de pluribus necessarius numerus confici posset*: then the parties were allowed their challenges; *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi aut inimicos aut ex aliqua re incommodos fore* [after the names were drawn, both the prosecutor and defendant were allowed to reject all those from the number whom they thought might from any cause be unfriendly or ill-disposed towards them]: next they struck what we call a *tales*; *rejectione celebrata, in eorum locum qui rejecti fuerunt, subsortiebatur praetor alios, quibus ille judicum legitimus numerus compleretur* [these being rejected, the praetor drew others to supply their place, by whom the lawful number of judges was completed]: lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent.*[35]

THE jury are now ready to hear the merits; and, to fix their attention the closer to the facts which

© Copyright 2003, 2005 Lonang Institute

they are impaneled and sworn to try, the pleading are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil;[36] *ei incumbit probatio, qui dicit, non qui negat: cum per rerum naturam factum-negantis probatio nulla sit*." ["The proof lies on him who asserts the fact, not on him who denies it, as from the nature of things a negative is no proof."] The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly[37] the whole record and process of the pleadings was read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and, when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

THE nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal evidence to a jury.[38] I shall only therefore select a few of the general heads and leading maxims, relative to this point, together with some observations on the manner of giving evidence.

AND, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of *non est factum*, and the issue is, whether it be the defendant's deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, *viz.* that the bond has no existence.

AGAIN; evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or proofs, (to which in common speech the name of evidence is usually confined) are either written, or *parol*, that is, by word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Ancient deeds of thirty years standing, which prove themselves; but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like) then an attested copy may be produced; or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of any particular facts. So too, books of account, or shop-books, are not allowed of themselves to be given in evidence

© Copyright 2003, 2005 Lonang Institute

for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence:[39] for, as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity,[40] the best evidence that can then be produced. However this dangerous species of evidence is not carried so far in England as abroad;[41] where a man's own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practiced with us[42]) with the suppletory oath of the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Jac. I. c. 12. (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unraveled and adjusted.

WITH regard to *parol* evidence, or witnesses; it must first be remembered, that there is a process to bring them in by writ of *subpoena ad testificandum* [command to testify]: which commands them, laying aside all pretenses and excuses, to appear at the trial on pain of 100£ to be forfeited to the king; to which the statute 5 Eliz. c. 9. has added a penalty of 10£ to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him, is bound to appear at all; nor, if he appears, is he bound to given evidence till such charges are actually paid him: except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the thorough investigation of truth: and, upon the same principle, in the Athenian courts, the witnesses who were summoned to attend the trial had their choice of three things; either to swear to the truth of the fact in question, to deny or abjure it, or else to pay a fine of a thousand drachmas.[43]

ALL witnesses, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury from other circumstances will judge of their credibility. Infamous persons are such as may be challenged as jurors, *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a *voir dire*, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, entrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence:[44] but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being entrusted in the cause.

ONE witness (if credible) is sufficient evidence to a jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy; and therefore does not always demand the testimony of two, as the civil law universally requires. "*Unius responsio testis omnino non audiatur*."[45] ["The

© Copyright 2003, 2005 Lonang Institute

evidence of one witness may never be admitted."] To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be *plena probatio* [full proof], they call the testimony of one, though never so clear and positive, *semi-plena probatio* [half proof] only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath: and, if his evidence happens to be in his own favor, this immediately converts the half proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England: which permits one witness to be sufficient where no more are to be had; and, to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa* [no one should be a witness in his own cause].

POSITIVE proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence or the doctrine of presumptions must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily, or usually, attend such facts; and these are called presumptions, which are only to be relied upon till contrary be actually proved. *Stabitur praesumptioni donec probetur in contrarium.*[46] Violent presumption is many times equal to full proof;[47] for there those circumstances appear, which necessarily attend the fact. As if a landlord sues for rent due at Michaelmas 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment: and it therefore induces so forcible a presumption, that no proof shall be admitted to the contrary.[48] Probable presumption, arising from such circumstances as usually attend the fact, has also its due weight: as if, in a suit for rent due 1754, the tenant proves the payment of the rent due in 1755, this will prevail to exonerate the tenant,[49] unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. Light, or rash, presumptions have no weight or validity at all.

THE oath administered to the witness is not only that what be deposes shall be true, but that he shall also depose the whole truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality, that might arise in his own breast. And if, either is his directions or decisions, he misstates the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions; stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2. 13 Edw. I. c. 31. or, if he refuses so to do, the party may have a compulsory writ against him,[50] commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action

© Copyright 2003, 2005 Lonang Institute

will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below. But a demurrer to evidence shall be determined by the court, out of which the record is sent. This happens, where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may if he pleases demur to the whole evidence; which admits the trust of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue:[51] which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

THIS open examination of witnesses *viva voce* [by word of mouth], in the presence of all mankind, is much more conducive to the clearing up of truth,[52] than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the respect and awe, with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the matter of it. These are a few of the advantages attending this, the English, way of giving testimony, *ore tenus*. Which was also indeed familiar among the ancient Romans, as may be collected from Quinctilian;[53] who lays down very good instructions for examining and cross-examining witnesses *viva voce*. And this, or somewhat like it, was continued as low as the time of Hadrian:[54] but the civil law, as it is now modeled, rejects all public examination of witnesses.

AS to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment as the written or *parol* evidence which is delivered in court. And therefore it has been often held,[55] that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed[56] to be, to do it according to the best of their own knowledge. Which construction was probably made out of tenderness to juries; that they might escape the heavy penalties of an attaint, in case they could show by any additional proof, that their

© Copyright 2003, 2005 Lonang Institute

verdict was agreeable to the truth, though not according to the evidence produced: with which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was gradually exploded, when attaints began to be disused, and new trials introduced in their stead. For it is quite incompatible with the grounds, upon which such new trials are every day awarded, *viz.* that the verdict was given without, or contrary to, evidence. And therefore, together with new trials, the practice seems to have been first introduced,[57] which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.

WHEN the evidence is gone through on both sides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support is, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

THE jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bull of the empire,[58] if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned,[59] the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart.[60] This necessity of a total unanimity seems to be peculiar to our own constitution;[61] or, at least, in the *nembda* or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.[62]

WHEN they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned,[63] in case he fails in his suit, as a punishment for his false claim. To be amerced, or *a mercie*, is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo* [at the king's mercy for his false claim]. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit, *non sequitur clamorem suum* [he does not pursue his claim]. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to call the plaintiff; and if neither he, nor anybody for him, appears, he is nonsuited, the jurors are discharged,

© Copyright 2003, 2005 Lonang Institute

the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is forever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

A VERDICT, *vere dictum*, is either privy, or public. A privy verdict is when the judge has left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court:[64] which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict; in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

SOMETIMES, if there arises in the case any difficult matter of law, the jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the statute Westm. 2. 13 Edw. I. c. 30. §. 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff and cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court as Westminster, from whence the issue came to be tried.

ANOTHER method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with judgment of the court or judge upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the case at length upon the *postea* [afterwards]. But in both these instances the jury may, if they thing proper, take upon themselves to determine at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.[65]

WHEN the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury: a trial, which besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable,

© Copyright 2003, 2005 Lonang Institute www.lonang.com

and certain; for a commission out of chancery, or the civil law courts, for examining witnesses in one cause will frequently last as long, and of course be full as expensive, as the trial of a hundred issues at *nisi prius*: and yet the fact cannot be determined by such commissioners at all; no, not till the depositions are published and read at the hearing of the cause in court.

UPON these accounts the trial by jury even has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! But this we must refer to the ensuing book of these commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or with for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer,[66] who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, were strangers to the trial by jury.

GREAT as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once that fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step towards establishing aristocracy, the most oppressive of absolute governments. The feudal system, which, for the sake

© Copyright 2003, 2005 Lonang Institute

of military subordination, pursued an aristocratical plain in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feudal peers. And in every country of the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow or regal government; unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigor so lately as the middle of last century,[67] is now fallen into disuse:[68] and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy.[69] It is therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to it's ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under variety of plausible pretenses, may in time imperceptibly undermine this best preservative of English liberty.

YET, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavoring to remove all the defects, as well at to improve the advantages, incident to this mode of inquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be,

1. THE want of a complete discovery by the oath of the parties. This each of them is now entitled to have, by going through the expense and circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be a matter of curious discussion, but is foreign to our present inquiries. It has long been introduced and established in our courts of equity, not to mention the civil law courts; and it seems the height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster-hall, and denied on the other: or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar; but, when sitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, common reason will tell us, that in the same country, governed by the same laws, such a mode of inquiry should be universally admitted, or else universally rejected.

2. A SECOND defect is a nature somewhat familiar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena*, which is then called a *subpoena duces tecum*. But, in mercantile transactions especially, the sight

© Copyright 2003, 2005 Lonang Institute

of the party's own books is frequently decisive; such, for instance, as the daybook of a trader, where the transaction must be recently entered, as really understood at the time; though subsequent events may tempt him to give it a different color. And as, this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article.

3. ANOTHER want is that of powers to examine witnesses abroad, and to receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories *de bene esse* [for the time being]; to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity: but such a practice has never yet been directly adopted[70] as the rule of a court of law.

4. THE administration of justice should not only be chase, but (like Caesar's wife) should not even be suspected. A jury coming from the neighborhood is in some respects a great advantage; but is often liable to strong objections: especially in small jurisdictions, as in cities which are counties of themselves, and such where assizes are but seldom held; or where the question in dispute has an extensive local tendency; where a cry has been raised and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that if a whole county is interested in the question to be tried, the trial by the rule of law[71] must be in some adjoining court: but, as there may be a strict interest so minute as not to occasion any bias, so there may be the strongest bias, where the whole county cannot be said to have any pecuniary interest. In all these cases, to summon a jury, laboring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretenses to another mode of trial. The courts of law will therefore in transitory actions very often change the venue, or county wherein the cause is to be tried:[72] but in local actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly and absolutely, the parties are driven to the delay and expense of a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.[73]

THE locality of trial required by the common law seems a consequence of the ancient locality of jurisdiction. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly they were usually demanded only in the court-baron of the manor, where the steward could summon no jurors but such as were the tenants of the lord. When the cause was removed to the hundred court, (as seems to have been the course in the Saxon times[74]) the lord of the hundred had a farther power to convoke the inhabitants of different vills to form a jury; observing probably always to intermix among them a stated number of tenants of that manor wherein the dispute arose. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at large: but was obliged (as a mark of the original locality of the cause) to return a competent number of

© Copyright 2003, 2005 Lonang Institute

hundredors; omitting the inferior distinction, if indeed it ever existed. And when at length, after the conquest, the king's justiciars drew the cognizance of the cause from the county court, though they could have summoned a jury from any part of the kingdom, yet they chose to take the cause as they found it, with all its local appendages; triable by a stated number of hundredors, mixed with other freeholders of the county. The restriction as to hundredors has gradually worn away, and at length entirely vanished;[75] that of counties still remains, for many beneficial purposes: but, as the king's courts have a jurisdiction coextensive with the kingdom, there surely can be no impropriety in departing from the general rule, when the great ends of justice warrant and require an exception.

I HAVE ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and not of enthusiasm or prejudice. But should they, after all, continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that was ever established in any country.

NOTES

1. *de jure Saxonum*, p. 12.
2. Sp. L. b. 30. c. 18. Capitul. Lud. pii. A. D. 819. c. 2.
3. Wilk LL. Angl. Sax. 117.
4. *de jure Sueonum*. l. I. c. 4.
5. LL. lougob. l. 3. t. 8. l. 4.
6. F. N. B. 4.
7. l. 2. c. 11-21.
8. Finch. l. 412. 1 Leon. 303.
9. Append. No. II. § 4.
10. Append. No. II. § 4.
11. See pag. 58.
12. Fortesc. de Laud. LL. c. 25.
13. Hist. C. L. c. 12.
14. 4 Burr. 252.
15. K. v. Bp. of Worcester. M. 23 Geo. II. B. R.
16. 2 Whitclocke of parl. 211.
17. Stiernhook *de jure Goth*. l. 1. c. 4.
18. Gilb. Hist. C. P. c. 8.
19. d Laud. LL. c. 25.
20. 1 Inst. 157.
21. Cod. 3. 1. 16. Decretal. i. 2. t. 28. c. 36.

© Copyright 2003, 2005 Lonang Institute

22. l. 5. c. 15.

23. l. 6. c. 37.

24. Co. Litt. 294.

25. 1 Inst. 156.

26. Cro. Eliz 566.

27. Finch. L. 401.

28. In the *nembda*, or jury, or the ancient Goths, three challenges only were allowed to the favor, but the principal challenges were indefinite. "*Licebat palam excipere, et semper ex probabili causa tres repudiari; etiam plures ex causa praegnanti et manifesta*." ["They might openly except to, and always refuse three for a probable cause; and even more for a pregnant and manifest cause."] (Stiernhook l. 1. c. 4.)

29. Co. Litt. 158.

30. F. N. B. 166. Reg. Brev. 179.

31. Append. No. II. § 4.

32. 1 Inst. 155.

33. Pausanias relates, that at the trial of Mars, for murder, in the court denominated *areopagus* from that incident, he was acquitted by a jury composed of twelve pagan deities. And Dr Hickes, who attributes the introduction of this number to the Normans, (though he allows the institution of juries in general to be of much higher antiquity in England) tells us that among the inhabitants of Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number twelve; "*nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quaedam esset religio*." ["Nothing was esteemed more sacred, nothing more venerable than this number, as though it contained within itself something holy."] (Dissert. epistolar. 4.)

34. pro Cluentio. 43.

35. Ascon. in Cic. Verr. 1. 6.

36. Ff. 22. 3. 2. Cod. 4. 19. 23.

37. Fortesc. c. 26.

38. This is admirably well performed in lord chief baron Gilbert's excellent treatise of evidence; a work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole; and which has lately been engrafted into that learned and useful work, the introduction to the law of *nisi prius*. 4to. 1767.

39. Law of *nisi prius*. 266.

40. Salk. 285.

41. Gail. observat. 2. 20. 23.

42. *Instrumenta domestica, seu adnotatio, si non aliis quoque adminiculis adjuventur, ad probationem sola non sufficiunt.* (Cod. 4. 19. 5.) *Nam exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit.* [Private instruments, or memoranda, unless supported by other evidence, are not alone sufficient proof. For it is a dangerous precedent to give credit to any memorandum by which the writer makes another man his debtor.] (Ibid. l. 7.)

43. Pott. Antiq. b. 1. c. 21.

44. Law of *nisi prius*, 267.

45. Cod. 4. 20. 9.

46. Co. Litt. 373.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

47. Ibid. 6.

48. Gilb. evid. 161.

49. Co. Litt. 373.

50. Reg. Br. 182. 2 Inst. 487.

51. Co. Littt. 72. 5 Rep. 104.

52. Hale's Hist. C. L. 254, 5, 6.

53. Instit. orat. l. 5. c. 7.

54. See his epistle to Varus, the legate or judge of Cilicia: "*tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus aestimationis sint; et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quae interrogaveras extempore verisimilia responderint.*" ["You are better able to judge what faith is to be placed in witnesses; who they are, and in what credit and estimation they are held; whether they seem to speak ingenuously, and whether their answers to your questions be preconcerted, or the expressions of the moment."] (Ff. 22. 5. 3.)

55. Year book, 14 Hen. VII. 29. Hob. 227. 1 Lev. 87.

56. Vaugh. 148, 149.

57. Styl. 233. 1 Sid. 133.

58. ch. 2.

59. Mirr. c. 4. § 24.

60. Lib. Ass. fol. 40. pl. 11.

61. See Barrington on the statutes. 17, 18, 19.

62. Stiernh. l. 1. c. 4.

63. pag. 275.

64. If the judge has adjourned the court to his own lodgings, and there receives the verdict, it is a public and not a privy verdict.

65. Litt. § 386.

66. Montesq. Sp. L. xi. 6.

67. 2 Whitelocke of parl. 427.

68. Mod. Un. Hist. xxxiii. 22.

69. Ibid. 17.

70. See pag. 75.

71. Stra. 1777.

72. See pag. 294.

73. This, among a number of other instances, was the case of the issues directed by the house of lords in the cause between the duke of Devonshire and the miners of the county of Derby, A. D. 1762.

74. LL. Edw. Conf. c. 32. Wilk. 203.

75. See pag. 360.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

CHAPTER 24

Of Judgment, and its Incidents

IN the following chapter we are to consider the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue.

IF the issue be an issue of fact; and, upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the plaintiff or defendant, or specially; or if the plaintiff makes default, or is nonsuit; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a *postea*.[1] The substance of which is, that *postea*, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff after the jury sworn made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the *postea*.

NEXT follows, sixthly, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be suspended, or finally arrested: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprise, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it, by arresting or staying the judgment.

1. CAUSES of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or *dehors* the record. Of this sort are want of notice of trial; or any flagrant misbehavior of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehavior of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith;[2] or if they have given exorbitant damages;[3] or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a new, or second, trial. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded:[4] for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of two preceding ones.

THE exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trail, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances, in the year books of the reigns of Edward III,[5] Henry IV,[6] and Henry VIII[7]of judgments being stayed (even after a trial at bar) and new *venire*'s awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice, Glyn, in 1655, grounded the first precedent that is reported in our books[8] for granting a new trial upon account of excessive damages given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal

© Copyright 2003, 2005 Lonang Institute

species of misbehavior. And, a few years before, a practice took rise in the common pleas,[9] of granting new trials upon the mere certificate of the judge, unfortified by any report of the evidence, that the verdict had passed against his opinion; though justice Rolle (who allowed of new trials in case of misbehavior, surprise, or fraud, or if the verdict was notoriously contrary to evidence[10]) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law,[11] that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised to the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the second new trials were granted upon affidavits;[12] and the former strictness of the courts of law, in respect of new trials, having driven many parties into equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.[13]

FORMERLY the only remedy for reversal of a verdict unduly given, was by writ of attaint; of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assize by Henry II,[14] in lieu of the Norman trial by battle. Such a sanction was probably thought necessary, when, instead of appealing to providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw, that a jury might give an erroneous verdict; and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy, which they provided, shows the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found a wrong verdict, they must be willfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great searcher of hearts; and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all: from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

THE judges saw this; and very early, even for the misbehavior of jurymen, instead of prosecuting the writ of attaint, awarded a second trial: and subsequent resolutions, for more than a century past, have so extended the benefit of this remedy, that the attaint is now as obsolete as the trial by battle which it succeeded: and we shall probably see the revival of the one as soon as the revival of the other. And there I cannot but again admire[15] the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, from the experience and approbation of the people supersede the necessity or desire of using or continuing the old.

IF every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtleties of law. Either party may be surprised by a piece of evidence, which (had he known of its production) he could have explained or answered; or

© Copyright 2003, 2005 Lonang Institute

may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them; nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion *instanter*; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse.

NEXT to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

GRANTING a new trial, under proper regulations, cures all these inconveniences, and at the same preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

A SUFFICIENT ground must however be laid before the court, to satisfy them that is necessary to justice that the cause should be farther considered. If the matter be such, as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by affidavit: if it arises from what passed at the trial, it is taken from the judge's information; who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at the large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colors are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

NOR do the courts lend to easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probably grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate.

IN granting such farther trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated

© Copyright 2003, 2005 Lonang Institute

in the preceding chapter; by laying the party applying under all such equitable terms, as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admissions of others, not intended to be litigated; the production of deeds, books, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expense of this proceeding are so small and trifling, that it never can be moved for to gain time or to gratify humor. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual force of obstinate chicane, delay, and expensive litigation.[16] With us no new trial is allowed unless there be a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shown, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attorneys, or even the judge or jury.

2. ARRESTS of judgment arise from intrinsic causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit*: for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, “the plaintiff is a bankrupt;” and the verdict finds specially that he said, “the plaintiff will be a bankrupt.” Or, thirdly, if the case laid in the declaration is not sufficient in point of law to found an action upon. And this is an invariable rule with regard to arrests of judgment upon matter of law, “that whatever is alleged in arrest of judgment must be such matter, as would upon demurrer have been sufficient to overturn the action or plea.” As if, on an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon; now, if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that to call a man a Jew is not actionable: and, if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. But the rule will not hold *e converso* [conversely], “that every thing that may be alleged as cause of demurrer will be good in arrest of judgment:” for if a declaration or plea omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defense, this omission shall be aided by a verdict. As if, in an action of trespass, the declaration does not allege that the trespass was committed on any certain day;[17] or if the defendant justifies, by prescribing for a right of common for his cattle, and does not plead that his cattle were *levant* and *couchant* [rising up and lying down] on the land;[18] though either of these defects might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, these exceptions cannot after verdict be moved in arrest of judgment. For the verdict

© Copyright 2003, 2005 Lonang Institute

ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose, that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective.[19] Exceptions therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and no suffered in the last stage of a cause, to unravel the whole proceedings. But if the thing omitted be essential to the action or defense, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself,[20] or if to an action of debt the defendant pleads not guilty instead of *nil debet* [nothing owed],[21] these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second.

IF, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, on an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise;[22] or if, in an action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the day[23] (which, if found for the plaintiff, would be inconclusive, as it might have been paid before) in these cases the court will after verdict award a repleader, *quod partes replacitent* [the parties may replead]: unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless.[24] And, whenever a repleader is granted, the pleadings must begin *de novo* [anew] at that stage of them, whether it be the plea, replication, or rejoinder, etc, wherein there appears to have been the first defect, or deviation from the regular course.[25]

IF judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll, or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a verdict: thirdly, where both the fact and the law arising thereon are admitted by the defendant: which is the case of judgments by confession or default: or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and, therefore abandons or withdraws his prosecution; which is the case in judgments upon a nonsuit or *retraxit* [withdrawal].

THE judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: against him, who has rode over my corn, I may recover damages by law; but A has rode over my corn; therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law: if the minor, it is then an issue of fact: but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow. Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries; and the suit or action is the vehicle or

© Copyright 2003, 2005 Lonang Institute www.lonang.com

means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out, and therefore the stile of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, "it is considered," *consideratum est per curiam* [it is considered by the court], that the plaintiff do recover his damages, this debt, his possession, and the like: which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court, after due deliberation and inquiry.

ALL these species of judgments are either interlocutory or final. Interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action: in which it is considered by the court, that the defendant do answer over, *respondeat ouster*; that is, put in a more substantial plea.[26] It is easy to observe, that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had, when the defendant has put in a better answer.

BUT the interlocutory judgments, most usually spoken of, are those incomplete judgments, whereby the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained: which is a matter that cannot be done without the intervention of a jury. As by the old Gothic constitution the cause was not completely finished, till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad aestimationem pretii, damni, lucri, etc*." ["to execute the decrees of court, to estimate the price, damage, gain, etc."][27] This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, it the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit* [no answer]; as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem* [acknowledge the action], where he acknowledges the plaintiff's demand to be just: or by *non sum informatus* [I am not instructed], when the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff, or in defense of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of detinue or debt for a sum or thing certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a bond-creditor's security, for the debtor to execute a warrant of attorney to any one, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit, cognovit actionem,* or *non sum informatus*) in an action of debt to be brought by the creditor for the specific sum due: which judgment, when confessed, is absolutely complete and binding. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, "that the plaintiff ought to recover his damages, (indefinitely) but, because the court know not what damages the said plaintiff has sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition when taken into court." This process is called a writ of inquiry: in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at *nisi prius*, what damages the plaintiff has really sustained; and when their verdict is given, which must assess some damages (but to what amount they please) the sheriff returns the inquisition into court, which is entered upon the roll in manner of a *postea*; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, with a demurrer is determined for

© Copyright 2003, 2005 Lonang Institute

the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete, till a writ of inquiry is awarded to assess damages, and returned; after which the judgment is completely entered.

FINAL judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due;[28] or be taken up, *capiatur*, to pay a fine to the king, in case of any forcible injury.[29] Though now by statute 5 & 6 W. 7 M. c. 12. no writ of *capias* shall issue for this fine, but the plaintiff shall pay 6 s 8 d, and be allowed it against the defendant among his other costs. And therefore in judgments in the court of common pleas they enter that the fine is remitted, and in the court of king's bench they now take no notice of any fine or *capias* at all.[30] But if judgment be for the defendant, then it is considered, that the plaintiff and his pledges of prosecuting be (nominally) amerced for his false suit, and that the defendant may go without a day, *eat sine die*, that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared.[31]

THUS much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that "*victus victori in expensis condemnandus est*" ["he who loses the suit pays costs to his adversary"].[32] Though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, *eo nominee* [by that name], to the demandant in a real action was the statute of Gloucester, 6 Edw. I. c. 1. as did the statute of Marlbridge 52 Hen. III. c. 6. to the defendant in one particular case, relative to wardship in chivalry: though in reality costs were always considered and included in that quantum of damages, in such actions where damages are given; and, even now, costs for the plaintiff are always entered on the roll as increase of damages by the court.[33] But, because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and farther directs, that the same rule shall hold place in all cases where the party is to recover damages. And therefore in such actions where no damages were then recoverable (as in *quare impedit* [why impeded], in which damages were not given till the statute of Westm. 2. 13. Edw. I.) no costs are now allowed;[34] unless they have been expressly given by some subsequent statute. The statute 3. Hen. VII. c. 10. was the first which allowed any costs on a writ of error. But no costs were allowed the defendant in any shape, till the statutes 23 Hen. VIII. c. 15. 4 Jac. I. c. 3. 8 & 9 W. III. c. 11. and 4 & 5 Ann. c. 16. which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had, in case he had recovered. These costs on both sides are taxed and moderated by the prothonotary, or other proper officer of the court.

THE king (and any person suing to his use[35]) shall neither pay, nor receive costs: for besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose, that the queen-consort participates of the same privilege; for, in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her.[36] In two other cases an exemption also lies from paying costs. Executors and administrators, when suing in the right of the deceased, shall pay none.[37] And paupers, that is such

© Copyright 2003, 2005 Lonang Institute

as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12. to have original writs and subpoenas *gratis* [freely], and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Hen. VIII. c. 15. but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costs:[38] though that practice is now disused.[39] It seems however agreed, that a pauper may recover costs, though he pay none; for the counsel and clerks are bound to give their labor to him, but not to his antagonists.[40] To prevent also trifling and malicious actions, for words, for assault and battery, and for trespass, it is enacted by statutes 43 Eliz. c. 6. 21 Jac. I. c. 16. and 22 & 23 Car. II. c. 9 §. 136. that, where the jury who try any of these actions shall given less damages than 40 s. the plaintiff shall be allowed no more costs than damages, unless the judge before whom the cause is tried shall certify under his hand on the back of the record, that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. Also by statute 4 & 5 W. & M. c. 23. and 8 & 9 W. III. c. 11. if the trespass were committed in hunting or sporting by an inferior tradesman, or if it appear to be willfully and maliciously committed, the plaintiff shall have full costs,[41] though his damages as assessed by the jury amount to less than 40 s.

AFTER judgment is entered, execution will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings; and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter.

NOTES

1. Append. No. 11. § 6.
2. Law of *nisi prius*. 303, 4.
3. Comb. 357.
4. 6 Mod. 22. Salk. 649.
5. 24 Edw. III. 24. Bro. Abr. t. verdite. 17.
6. 11 Hen.IV. 18. Bro. Abr. t. Enquest. 75.
7. 14 Hen. VII. 1. Bro. Abr. t. verdite. 18.
8. Styl. 466.
9. Ibid. 138.
10. 1 Sid. 235. Styl. Pract. Reg. 310, 311. edit. 1657.
11. Cro. Eliz. 616. Palm. 325.
12. 1 Sid. 235. 2 Lev. 140.
13. 4 Burr. 395.
14. *Ipsi regali institutioni eleganter inserta*. [Expertly inserted in that royal institution.] (Glanv. l. 2. c. 19.)
15. See pag. 268.
16. Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March 1745; and, after many interlocutory orders and sentences below, appealed

© Copyright 2003, 2005 Lonang Institute

from and reheard as far as the course of proceedings would admit, was finally determined in April 1749: the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of king's bench or common pleas, have lasted a tenth of the time, or have cost a twentieth part of the expense.

17. Carth. 389.
18. Cro. Jac. 44.
19. 1 Mod. 292.
20. Salk. 365.
21. Cro. Eliz. 778.
22. 2 Ventr. 196.
23. Stra. 994.
24. 4 Burr. 301, 302.
25. Raym, 458. Salk. 579.
26. 2 Saund. 30.
27. Stiernhook *de jure. Goth*. l. 1. c. 4.
28. 5 Rep. 49.
29. Append. No. II. § 4.
30. Salk. 54. Carth. 390.
31. Append. No. III. § 6.
32. Cod. 3. 1. 13.
33. Append. No. II. § 4.
34. 10 Rep. 116.
35. Stat. 24. Hen. VIII. c. 8.
36. F. N. B. 101. Co. Litt. 133.
37. Cro. Jac. 229.
38. 1 Sid. 261. 7 Mod. 114.
39. Salk. 506.
40. 1 Equ. Cas. abr. 125.
41. See pag. 214, 215.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 25

Of Proceedings, in the Nature of Appeals

PROCEEDINGS, in the nature of appeals from the proceedings of the king's courts of law, are of various kinds; according to the subject matter in which they are concerned. They are principally three.

I. A WRIT of attaint: which lies to inquire whether a jury of twelve men gave a false verdict;[1] that so the judgment following thereupon may be reversed: and this must be brought in the lifetime of him for whom the verdict was given, and of two at least of the jurors who gave it. This lay, at the common law, only upon verdicts in actions for such personal injuries as did not amount to trespass. For in real wrongs the party injured had redress by writ of right; but, after verdict against him in personal suits, he had no other remedy: and it did not lie in actions of trespass, for a very extraordinary reason; because, if the verdict was set aside, the king would lose his fine.[2] But by statute Westm. 1. 3 Edw. I. c. 38. it was given in all pleas of land, franchise, or freehold: and, by several subsequent statutes, in the reigns of Edward III[3] and his grandson,[4] it was allowed in almost every action, except in a writ of right; for there no attaint lay, either by common law or statute, because it was determined by the grand assize, consisting of sixteen jurors.[5]

THE jury who are to try this false verdict must be twenty-four, and are called the grand jury; for the law wills not that the oath of one jury of twelve men should be attainted or set aside by an equal number, nor by less indeed than double the former. And he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit. For as their verdict is now trying, and the question is whether or no they did right upon the evidence that appeared to them, the law judged it the highest absurdity to produce any subsequent proof upon such trial, and to condemn the prior jurisdiction for not believing evidence which they never knew. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter:[6] because the petit jury may have formed their verdict upon evidence of their own knowledge, which never appeared in court; and because very terrible was the judgment which the common law inflicted upon them, if the grand jury found their verdict a false one. The judgment was, 1. That they should lose their *liberam legem* [free law], and become forever infamous. 2. That they should forfeit all their goods and chattels. 3. That their lands and tenements should be seized into the king's hands. 4. That their wives and children should be thrown out of doors. 5. Hat their houses should be razed and thrown down. 6. That their trees should be rooted up. 7. That their meadows should be plowed. 8. That their bodies should be cast into jail. 9. That the party should be restored to all that he lost by reason of the unjust verdict. But as the severity of this punishment had its usual effect, in preventing the law from being executed, therefore by the statute 11 Hen. VII. c. 24. revived by 23 Hen. VIII. c. 3. a more moderate punishment was inflicted upon attainted jurors; *viz.* perpetual infamy, and, if the cause of action were above 40£ value, a forfeiture of 20£ apiece by the jurors; or, if under 40£ then 5£ apiece; to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election;[7] and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting new trials, has so superseded the use of both sorts of attaints, that I have not observed any instance of an attaint in our books, later than the sixteenth century.[8] By the old Gothic constitution indeed no certificate of a judge was allowed, in matters of evidence, to countervail the oath of the jury: but their verdict,

© Copyright 2003, 2005 Lonang Institute

however erroneous, was absolutely final and conclusive. "*Testes sunt de judice et de actis ejus; judex vero de ipsis vicissim testari non potest, vere an falso jurent: qualicunque enim eorum assertioni standum est et judicandum*." Yet they had a proceeding from whence our attaint may be derived. If, upon a lawful trial before a superior tribunal, they were found to have given a false verdict, they were fined, and rendered infamous for the future. "*Si tamen evidenti argumento falsum jurasse convincantur (id quod superius judicium cognoscere debet) mulctantur in bonis, de caetero perjuri et intestabiles*."[9]

II. AN *audita querela* [a heard complaint] is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff has given him a general release; or if the defendant has paid the debt to the plaintiff, without entering satisfaction on the record. In these and the like cases, wherein the defendant has good matter to plead, but has had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance* [since the last adjournment], which, as was shown in a former chapter,[10] must always be before judgment) an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant has been heard, *audita querela defendentis*, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them.[11] It also lies for bail, when judgment is obtained against them by *scire facias* [show cause] to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by *audita querela*;[12] which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defense, but by the ordinary forms of law had no opportunity to make it. but the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression,[13] and driven it quite out of practice.

III. BUT, thirdly, the principal method of redress for erroneous judgments in the king's courts of record, is by writ of error to some superior court, of appeal.

A WRIT of error[14] lies for some supposed mistake in the proceedings of a court of record; for, to amend errors in a base court, not of record, a writ of false judgment lies.[15] The writ of error only lies upon matter of law arising upon the face of the proceedings; for that no evidence is required to substantiate or support it: and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

FORMERLY the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in paper;[16] for they were then considered as only in *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during the term the record is in the breast of the court; but afterwards it admitted of no alteration.[17] But now the courts are become more

© Copyright 2003, 2005 Lonang Institute

liberal; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be part. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore that, till then, they have power to permit amendments by the common law. Mistakes are also effectually helped by the statutes of amendment and *jeofails*: so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception.[18] These statutes are many in number, and the provisions in them too minute and particular to be here taken notice of, otherwise than by referring to the statutes themselves;[19] by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned.

THIS is at present the general doctrine of amendments; and its rise and history are somewhat curious. In the early ages of our jurisprudence, when all pleadings were *ore tenus* [made orally], if a slip was perceived and objected to by the opposite party or the court, the pleader instantly acknowledged his error and rectified his plea; which gave occasion to that length of dialogue reported in the ancient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I. the pleadings are directed to be carried on in that principality, *sine calumpnia verborum, non observata illa dura consuetudine, "qui cadit a syllaba cadit a tota causa.*" [Without strictness to the letter; the rigid custom not being observed, that "who fails in one syllable loses the whole cause."] The judgments were entered up immediately by the clerks and officers of the court; and if any mis-entry was made, it was rectified by the minutes or the remembrance of the court itself.

WHEN the treatise by Britton was published, in the name and by authority of the king, (probably about the 13 Edw. I. because the last statutes therein referred to are those of Winchester and Westminster the second) a check seems intended to be given to the unwarrantable practices of some judges, who had made false entries on the rolls to cover their own misbehavior, and had taken upon them by amendments and erasures to falsify their own records. The king therefore declares[20] that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may erase their rolls, nor amend them, nor record them, contrary to their original enrollment." The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private erasure or amendment be altered to any sinister purpose.

BUT when afterwards king Edward, on his return from his French dominions is the seventeenth year of his reign, after upwards of three years absence, found it necessary (or convenient) to prosecute his judges for their corruption and other malpractices, the perversion of judgments[21] by erasing and altering records was one of the causes assigned for the heavy punishments inflicted upon almost all the king's justices, even the most able and upright.[22] The severity of which proceedings seems so to have alarmed the succeeding judges, that, through a fear of being said to do wrong, they hesitated at doing that which was right. As it was so hazardous to alter a record, even from compassionate motives, (as happened in Hengham's case, which in strictness was certainly indefensible) they

© Copyright 2003, 2005 Lonang Institute

resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In Edward the third's time indeed, they once ventured (upon the certificate of the justice in eyre) to estreat [extract] a larger fine than had been recorded by the clerk of the court below;[23] but, instead of amending the clerk's erroneous record, they made a second enrollment of what the justice had declared *ore tenus*; and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every record is said to import in itself.[24] And, in the reign of Richard the second, there are instances[25] of their refusing to amend the most palpable errors and mis-entries, unless by the authority of parliament.

TO this real sullenness, but affected timidity, of the judges such a narrowness of thinking was added, that every slip (even of a syllable or a letter[26]) was now held to be fatal to the pleader, and overturned his client's cause.[27] If they durst [dared] not, or would not, set right mere formal mistakes at any time upon equitable terms and conditions, they at least should have held, that trifling objections were at all times inadmissible; and that more solid exceptions in point of form came too late when the merits had been tried. They might, through a decent degree of tenderness, have excused themselves from amending in criminal, and especially in capital, cases. They needed not have granted an amendment, where it would work in injustice to either party; or where he could not be put in as good a condition, as if his adversary had made no mistake. And, if it was feared that an amendment after trial might subject the jury to an attaint, how easy was it to make waiving the attaint the condition of allowing the amendment! And yet these were among the absurd reasons alleged for never suffering amendments at all![28]

THE precedents then set were afterwards most scrupulously followed,[29] to the great obstruction of justice, and ruin of the suitors; who have formerly suffered as much by these obstinate scruples and literal strictness of the courts, as they could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or misspellings: and justice was perpetually entangled in a net of mere technical jargon. The legislature has therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties: and its endeavors have been of late so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated; and will probably in a few years be no more remembered, that the learning of essoins and defaults, or the counterpleas of voucher, are at present. But, to return to our writs of error.

IF a writ of error be brought after verdict, he that brings the writ, or that is plaintiff in error, must in most cases find substantial pledges of prosecution, or bail:[30] to prevent delays by frivolous pretenses to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular, instances, by virtue of the several statutes, recited in the margin.[31]

A WRIT of error lies from the inferior courts of record in England into the king's bench,[32] and not into the common pleas.[33] Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench; and then from

© Copyright 2003, 2005 Lonang Institute

the king's bench the cause is removable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas: and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein (except where the king is party) it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer; and from thence also to the house of lords:[34] but where the proceedings in the king's bench are commenced by original writ, sued out of chancery, (which must be for some forcible injury, in which the king is supposed to be a party, in order to punish the trespass committed in a criminal manner) this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for reversal or affirmance of judgments by writs in the nature of appeals.

NOTES

1. Finch. L. 484.
2. Bro. Abr. t. atteint. 42.
3. Stat 1 Edw. c. 6, 5 Edw. III. c. 7, 28 Edw. III. c. 8, 34 Edw. III. c. 7.
4. Stat. 9 Ric. II. c. 3.
5. Bro. Abr. t. atteint. 42.
6. Finch. L. 486.
7. 3 Inst. 164.
8. 1593. M. 35 & 36 Eliz. Cro Eliz. 309.
9. Stiernhook *de jure Goth*. l. 1. c. 4.
10. See pag. 317.
11. Finch. L. 488. F. N. B. 102.
12. 1 Roll. Abr. 308.
13. Lord Raym. 439.
14. Append. No. III. § 6.
15. Finch. L. 484.
16. 4 Bur. 1099.
17. Co. Litt. 260.
18. Stra,. 1011.
19. Stat. 14 Edw. III. c. 6. 9 Hen. V. c. 4. 4 Hen. VI. c. 3. 8 Hen. VI. c. 12 & 15. 32 Hen. VIII. c. 30. 18 Eliz. c. 14. 21 Jac.

© Copyright 2003, 2005 Lonang Institute

I. c. 13. 16 & 16 Car. II. c. 8. (styled in 1 Ventr. 100. an omnipotent act) 4 & 5 Ann. c. 16. 9 Ann. c. 20. 5 Geo. I. c. 13.

20. Britt. proëm. 2, 3.

21. *Judicia perverterunt, et in aliis erraverunt*. [The perversion of judgments by erasing and altering records.] (Matth. Westm. A. D. 1289.)

22. Among the other judges, Sir Ralph Hengham chief justice of the king's bench is said to have been fined 7,000 marks, Sir Adam Stratton chief baron of the exchequer 34,000 marks, and Thomas Wayland chief justice of the common pleas to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates; the whole amount of the forfeitures being upwards of 100,000 marks, or 70,000 pounds, (3 Pryn. Rec. 401, 402.) An incredible sum in those days, before paper credit was in use, and when the annual salary of a chief justice was only sixty marks. (Claus. 6 Edw. l. m. 6. Dugd. chron. ser. 26.) The charge against Sir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatises of practice) was only, according to a tradition that was current in Richard the third's time, (Yearbook. M. 2 Ric. III. 10.) his altering out of mere compassion a fine, which was set upon a very poor man, from 13 s. 4 d. to 6 s. 8 d. for which he was fined 800 marks; a more probable sum that 7,000. It is true, the book calls the judge so punished Ingham and not Hengham: but I find no judge of the name of Ingham in Dugdale's Series; and Sir Edward Coke (4 Inst. 255.) and Sir Matthew Hale (1 P. C. 646.) understand it to have been the chief justice. And certainly his offenses was nothing very atrocious or disgraceful: for though removed from the king's bench at this time (together with the rest of the judges) we find him about twelve years afterwards made chief justice of the common pleas, (Pat. 29 Edw. I. m. 7. Dugd. chron. fer. 32.) in which office he continued till his death in 2 Edw. II. (Claus. 1 Edw. II. m. 19. Pat. 2 Edw. II. p. 1. m. 9. Dugd. 34. Selden. pref. to Hengham.) There is an appendix to this tradition, remembered by justice Southcote in the reign of queen Elizabeth; (3 Inst. 72. 4 Inst. 255.) that with this fine of chief justice Hengham a clock-house was built at Westminster, and furnished with a clock, to be heard into Westminster-hall. Upon which story I shall only remark, that the first introduction of clocks was not till an hundred years afterwards, about the end of the fourteenth century. (Encyclopedie. tit. horloge.)

23. 1 Hal. P. C. 647.

24. 1 Leon. 183. Co. Litt. 117. See pag. 331.

25. 1 Hal. P. C. 648.

26. Stat. 14 Edw. III. c. 6.

27. In those days it was strictly true, what Ruggle (in his ignoramus) has humorously applied to more modern pleadings; "*in nostra lege unum comma evertit totum placitum*" ["in our law one comma overturns the whole plea"].

28. Styl. 207.

29. 8 Rep. 156. etc.

30. Stat. 3 Jac. I. c. 8. 13. Car. II. c. 2. 16 & 17 Car. II. c. 8.

31. 3 Hen. VII. c. 10. 13 Car. II. c. 2. 8 & 9 W. III. c. 11. 4 & 5 Ann. c. 16.

32. See chap. 4.

33. Finch. L. 480. Dyer. 250.

34. Stat. 27 Eliz. c. 8.

© Copyright 2003, 2005 Lonang Institute

CHAPTER 26
Of Execution

IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the execution of that judgment; or, putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

IF the plaintiff recovers in an action real or mixed, wherein the seizin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam* [that you give him seizin], or writ of seizin, of a freehold; or an *habere facias possessionem* [that you give him possession], or writ of possession,[1] of a chattel interest.[2] These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land of recovered: in the execution of which, the sheriff may take with him the *posse comitatus*, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seizin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a *quare impedit* [why impeded], or assize of *darrein presentment* [last presentation], the execution is by a writ *de clerico admittendo* [on admitting the clerk]; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff.

IN other actions where the judgment is, that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assize or *quod permittat prosternere* [that he permit to put down] for a nuisance, where one part of the judgment is *quod amoveatur*, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment.[3] Upon a replevin the writ of execution is that *de retorno habendo* [to have the return];[4] and, if the distress be eloigned, the defendant shall have a *capias in withernam* [take in reprisal],[5] but on the plaintiff's tendering the damages and submitting to a fine the process in *withernam* shall be stayed.[6] In detinue, after judgment, the plaintiff shall have a *distringas* [distraint], to compel the defendant to deliver the goods, by repeated distresses of his chattels;[7] or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered: and, if the defendant still continues obstinate, the sheriff shall summon an inquest to ascertain the plaintiff's damages, which shall be levied (like other damages) by seizure of the person or goods of the defendant. So that, after all, in replevin and detinue, (the only actions for recovering specific possession of personal chattels) if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value:[8] in imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not, like land and other real property, always amenable to the magistrate.

EXECUTIONS in actions where money only is recovered, as a debt or damages, (and not any specific chattel) are of five sorts: either against the body of the defendant; or against his goods and chattels; or against his goods and the profits of his lands; or against his goods and the possession of his land; or against all three, his body, lands, and goods.

© Copyright 2003, 2005 Lonang Institute

1. THE first of these species of execution, is by writ of *capias ad satisfaciendum* [take in satisfaction];[9] which distinguishes it from the former *capias, ad respondendum* [take him to respond], which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias*.[10] The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages: it therefore does not lie against any privileged persons, peers or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance,[11] where a defendant in 14 Edw. III. was discharged from a *capias* because he was of so advanced an age, *quod poenam imprisonamenti subire non potest* [he was unable to undergo the punishment of imprisonment]. If an action be brought against an husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and wife in execution:[12] but, if the action was originally brought against herself, when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband.[13] Yet, if judgment be recovered against an husband and wife for the contract, nay even for the personal misbehavior,[14] of the wife during her coverture, the *capias* shall issue against the husband only: which is one of the greatest privileges of English wives.

THE writ of *capias ad satisfaciendum* is an execution of the highest nature, in as much as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only, by statute 21 Jac. I. c. 24. if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out new executions against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster, on a day therein named, to make the plaintiff satisfaction for his demand. And if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out as may all other executory process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

WHEN a defendant is once in custody upon this process, he is to be kept *in arcta et salva custodia* [in close and safe custody]: and, if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests and what is called mesne process, being such as intervenes between the commencement and end of a suit,[15] the sheriff, till the statute 8 & 9 W. III. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ: yet, upon a taking in execution, he could never give any indulgence; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper, after which he never can retake his prisoner again,[16] (though the plaintiff may retake him at any time[17]) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent; and then upon fresh pursuit the defendant may be retaken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escape.[18] A rescue of a prisoner in execution, either going to jail or in jail, or a breach of prison, will not excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, seeing he may command the power of the county.[19] But by statute 32 Geo. II. c. 28. if a defendant, charged in execution for any debt less than 100£ will surrender all his effects to his

© Copyright 2003, 2005 Lonang Institute

creditors, (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10£) and will make oath of his punctual compliance with the statute, the prisoner may be discharged, unless the creditor insists on detaining him; in which case he shall allow him 2 s. 4 d. per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of the defendant, though never more against his person. And, on the other hand, the creditors may, as in case of bankruptcy, compel (under pain of transportation for seven years) such debtor charged in execution for any debt under 100£ to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person.

IF a *capias ad satisfaciendum* is sued out, and a *non est inventus* [he is not found] is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative; that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or, that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place.[20] In order to which a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages: and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause (for afterwards is not sufficient) the plaintiff may have judgment against the bail, and take out a writ of *capias ad satisfaciendum*, or other process of execution against them.

2. THE next species of execution is against the goods and chattels of the defendant; and is called a writ of *fieri facias* [cause to be made],[21] from the words in it where the sheriff is commanded, *quod fieri faciat de bonis*, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies as well against privileged persons, peers, etc, as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors,[22] to execute either this, or the former, writ: but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods.[23] And he may sell the goods and chattels (even an estate for years, which is a chattel real[24]) of the defendant, till he has raised enough to satisfy the judgment and costs: first paying the landlord of the premises, upon which the goods are found, the arrears of rent the due, not exceeding one year's rent in the whole.[25] If part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.[26]

3. A THIRD species of execution is by writ of *levari facias* [to make levy]; which affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff.[27] Little use is now made of this writ; the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a *levari* or *fieri facias*,[28] to levy the debt and damages *de bonis ecclesiasticis* [of ecclesiastical goods], which are not to be touched by lay hands: and thereupon the bishop sends out a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till

© Copyright 2003, 2005 Lonang Institute

the full sum be raised.[29]

4. THE fourth species of execution is by the writ of *elegit* [he has chosen]; which is a judicial writ given by the statute Westm. 2. 13 Edw. I. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of *fieri facias*, or *levari facias*; but not the possession of the lands themselves: which was a natural consequence of the feudal principles, which prohibited the alienation, and of course the encumbering of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could taken the possession of lands, but only levy the growing profits: so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ, (called an *elegit*, because it is in the choice or one of the former) by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plow) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands, whether held in his own name, or by any other in trust for him,[30] are also to be delivered to the plaintiff; to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired; as, till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by *elegit*, of whom we spoke in a former part of these commentaries.[31] We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seized for, debts; because by this means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided he tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrain upon for his services. And, upon the same feudal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment.[32] But, in case of a debt to the king, it appears by Magna Carta, c. 8. that it was allowed by the common law for him to take possession of the lands till the debt was paid. for, he, being the grand superior and ultimate proprietor of all landed estates, might seize the lands into his own hands, if any thing was owing from the vassal; and could not be said to be defrauded of his services, when the ouster of the vassal proceeded from his own command. This execution, or seizing of lands by *elegit*, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*; for such *elegit* is in this case no more in effect than a *fieri facias*.[33] So that body and goods may be taken in execution, or land and goods; but not body and land too, upon any judgment between subject and subject in the course of the common law. But

5. UPON some prosecutions given by statute; as in the case of recognizances or debts acknowledged on statutes merchant, or statutes staple; (pursuant to the statutes 13 Edw. I. *de mercaribus*, and 27. Edw. III. c. 9.) upon forfeiture of these, the body lands, and goods, may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an extent or *extendi facias*, because the sheriff is to cause the lands, etc, to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.[34] And by statute 33 Hen. VIII. c. 39. all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple: though indeed,

© Copyright 2003, 2005 Lonang Institute

before this statute, the king was entitled to sue out execution against the body, lands, and goods of his accountant or debtor.[35] And his debt shall, in suing out execution, be preferred to that of every other creditor, who has not obtained judgment before the king commenced his suit.[36] The king's judgment also affects all lands, which the king's debtor has at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4. has at or after the time of his entering on the office: so that, if such officer of the crown alienes for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a *bona fide* [good faith] purchaser; though the money for which he is accountable was received by the vendor many years after the alienation.[37] Whereas judgments between subject and subject related, even at common law, no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels, but from the date of the writ of execution. And now, by the statute of frauds, 29 Car. II. c. 3. the judgment shall not bind the land in the hands of a *bona fide* purchaser, but only from the time of actually signing the same; nor the goods in the hands of a stranger, or a purchaser,[38] but only from the actual delivery of the writ to the sheriff.

THESE are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by this compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes *prima facie* [on its face] that the judgment is satisfied and extinct: yet however it will grant a writ of *scire facias* in pursuance of statute Westm. 2. 13 Edw. I. c. 45. for the defendant to show cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such mater as he has to allege, in order to show why process of execution should not be issued: or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.[39]

IN this manner are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice, and their respective officers. In the course therefore of the present volume we have, first, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a view of remedies by suit or action in courts: and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shown in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and cognizance. We afterwards proceeded to consider the nature and distribution of wrongs and injuries, affecting every species of personal and real rights, with the respective remedies by suit, which the law of the land has afforded for every possible injury. And, lastly, we have deduced and pointed out the method and progress of obtaining such remedies in the courts of justice: proceeding from the first general complaint or original writ; through all the stages of process, to compel the defendant's appearance; and of pleading, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon demurrer, or the truth of the facts alleged and denied, upon issue joined, and its several trials; to the judgment or sentence of the law, with respect to the nature and amount of the redress to be specifically given: till, after considering the suspension of that judgment by writs in the nature of appeals, we arrived at its final execution; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent

© Copyright 2003, 2005 Lonang Institute

damages, or by the confinement of his body, who is guilty of the injury complained of.

THIS care and circumspection in the law,) in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not be receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprise; and in finally enforcing the judgment, when nothing can be alleged to impeach it;) this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without entrenching upon those of any other individual in the nation, this parental solicitude which pervades our whole legal constitution, is the genuine offspring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given a handle, in some degree, to those complaints, of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavor to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent. But the frequent disappointments and the constant discountenance, that they meet with in the courts of justice, have confined these men (to the honor of this age be it spoken) both in number and reputation to indeed a very despicable compass.

YET some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint;[40] from liberty, property, civility, commerce, and an extent of populous territory: which whenever we are willing to exchange for tyranny, poverty, barbarism, idleness, and a barren desert, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us, that more time and circumspection are requisite in causes, where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious; and what the law gives them today may be seized by their prince tomorrow. In Turkey, says Montesquieu,[41] where little regard is shown to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bastinadoed [beat on the feet], and then sends them about their business. But in free states the trouble, expense, and delays of judicial proceedings are the price that every subject pays for his liberty: and in all governments, he adds, the formalities of law increase, in proportion to the value which is set on the honor, the fortune, the liberty, and life of the subject.

FROM these principles it might reasonably follow, that the English courts should be more subject to delays than those of other nations; as they set a greater value on life, on liberty, and on property. But it is our peculiar felicity to enjoy the advantage, and yet to be exempted from a proportionable share of the burden. For the course of the civil law, to which most other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the suitors of those courts in England, where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue[42] accuses (of his own knowledge) their courts of most

© Copyright 2003, 2005 Lonang Institute www.lonang.com

unexampled delays in administering justice; but even a writer of their own[43] has not scrupled to testify, that there were in his time more causes there depending than in all Europe besides, and some of them an hundred years old. But (not to enlarge upon the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendments and jeofails,[44] and by other more modern regulations, which it now might be indelicate to mention, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty-eight judicial or triverbial[45] days allowed to the praetor for hearing causes:[46] whereas with us, one fourth of the year is term time, in which three courts constantly sit for the dispatch of matters of law; besides the very close attendance of the court of chancery for determining suits in equity, and the numerous courts of assize and *nisi prius* that sit in vacation for the trial of matters of fact. Indeed there is no other country in the known world, that has an institution so commodious and so adapted to the dispatch of causes, as our trials by jury in those courts for the decision of facts: in no other nation under heaven does justice make her progress twice in each year into every part of the kingdom, to decide upon the spot by the voice of the people themselves the disputes of the remotest provinces.

AND here this part of our commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by those courts. These will therefore be the subject of the ensuing chapter.

NOTES

1. Append. No. II. § 4
2. Finch. L. 470.
3. Comb. 10.
4. See pag. 150.
5. See pag. 148.
6. 2 Leon. 174.
7. 1 Roll. Abr. 737. Rastal. Entr. 215.
8. Keilw. 64.
9. Append. No. III. § 7.
10. 3 Rep. 12.
11. 1 Inst. 289.
12. Moor. 704.
13. Cro. Jac. 323.
14. Cro. Car. 513.
15. See pag. 279.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

16. 3 Rep. 52. 1 Sid. 330.

17. Stat. 8 & 9 W. III. c. 27.

18. F. N. B. 130.

19. Cro. Jac. 419.

20. Lutw. 1269–1273.

21. Append. No. III. § 7.

22. 5 Rep. 92.

23. Palm. 54.

24. 8 Rep. 171.

25. Stat. 8 Ann. c. 14.

26. 1 Roll. Abr. 904. Cro. Eliz. 344.

27. Finch. L. 471.

28. Pegistr. orig. 300. judic. 22. 2 Inst. 4.

29. 2 Burn. eccl. law. 329.

30. Stat. 29. Car. II. c. 3.

31. Book II. ch. 10.

32. 1 Roll. Abr. 888.

33. Hob. 58.

34. F. N. B. 131.

35. 3 Rep. 12.

36. Stat. 33. Hen. VIII. c. 29.

37. 10 Rep. 55, 56.

38. Skin. 257.

39. Co. Litt. 290.

40. See pag. 327.

41. Sp. L. b. 6. ch. 2.

42. de Laud. LL. c. 53.

43. Bodin. de Republ. l. 6. c. 6.

44. See pag. 406.

45. Otherwise called *dies fasti, in quibus licebat praetori fari tria verba, do, dico, addico.* [Lawful days, when the praetor could use three words, I judge, I expound, I execute.] (Calv. Lex. 285.)

46. Spelman of the terms. § 4. c. 2.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

CHAPTER 27

Of Proceedings in the Courts of Equity

BEFORE we enter on the proposed subject of the ensuing chapter, *viz.*, the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations, which were made in the beginning of this book[1] on the principal tribunals of that kind, acknowledged by the constitution of England; and to premise a few remarks upon those particular causes, wherein any of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

I HAVE already[2] attempted to trace (though every concisely) the history, rise, and progress, of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer: with a distinction however as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

1. UPON the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view; but resulted to the king in his court of chancery, together with the general protection[3] of all other infants in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery has a right to appoint one: and, from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian *ad litem*, to manage the defense of the infant if a suit be commenced against him; a power which is incident to the jurisdiction of every court of justice:[4] but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

2. AS to idiots and lunatics: the king himself used formerly to commit the custody of them to proper committees, in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king[5] under his royal sign manual to the chancellor or keeper of his seal, to perform this office for him: and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council.[6] But the previous proceedings on the commission, to inquire whether or on the party be an idiot or a lunatic, are on the law-side of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. THE king, as *parens patriae* [parent of the country], has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is necessary, the attorney general, at the relation of some informant, (who is usually called the relator) files *ex officio* [officially] an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause

© Copyright 2003, 2005 Lonang Institute

in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And, as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers,[7] notwithstanding any loose opinions to the contrary.[8]

4. BY the several statutes, relating to bankrupts, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.

ON the other hand, the jurisdiction of the court of chancery does not extend to some causes, wherein relief may be had in the exchequer. No information can be brought, in chancery, for such mistaken charities, as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee.[9] Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king's treasure, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which has also a similar jurisdiction as a court of revenue; and like the other, consists of both a court of law and a court of equity.

IN all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers: or, if they differ in any thing more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all.

LET us next take a brief, but comprehensive, view of the general nature of equity, as now understood and practiced in our several courts of judicature. I have formerly touched upon it,[10] but imperfectly: it deserves a more complete explication. Yet, as nothing is hitherto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: they, who know them best, are too much employed to find time to write; and they, who have attended but little in those courts, must be often at a loss for materials.

EQUITY then, in its true and genuine meaning, is the soul and spirit of all law: positive law is construed, and rational law is made, by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of equity and a court of law, as contrasted to each other, are apt to confound and mislead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to certain degree.

1. THUS in the first place it is said,[11] that it is the business of a court of equity in England to abate the rigor of the common law. But no such power is contended for. Hard was the case of

© Copyright 2003, 2005 Lonang Institute

bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir:[12] yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor,[13] although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the to the real estate of the real estate of the son;[14] but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feudal principles, has long ago entirely ceased. The like may be observed of the descent of lands to remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half-brother;[15] and of the total stop to all justice, by causing the *parol* to demur,[16] whenever an infant is sued as heir or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian,[17] "*hoc quidem perquam durum est, sed ita lex scripta est*." ["This indeed is very hard, but such is the written law."]

2. IT is said,[18] that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity, of an act of parliament; and so, cases within the letter are frequently out of the equity. Here by equity we mean nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These then are the cases which, as Grotius[19] says, "*lex non exacte definit, sed arbitrio boni viri permittit*" ["law does not define exactly, but leaves discretion to the wise judge"]; in order to find out the true sense and meaning of the lawgiver, from every other topic of construction. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity: the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter, that sense in a single tittle.

3. AGAIN, it has been said,[20] that fraud, accident, and trust are the proper and peculiar objects of a court of equity. But every kind of fraud is equally cognizable, and equally adverted to, in a court of law: and some frauds are only cognizable there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. Many accidents are also supplied in a court of law; as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies: and many cannot be relieved even in a court of equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical trust indeed, created by the limitation of a second use, was forced into a court of equity, in the manner formerly mentioned:[21] and this species of trusts, extended by inference and construction, have ever since remained as a kind of *peculium* [peculiarity] in those courts. But there are other trusts, which are cognizable in a court of law: as deposits, and all manner of bailments; and especially that implied contract, so highly beneficial and useful, of having undertaken to account for

© Copyright 2003, 2005 Lonang Institute

money received to another's use,[22] which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. ONCE more; it has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge,[23] founded on the circumstances of every particular case. Whereas the system of our courts of equity is a labored connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus, the refusing a wife her dower in a trust-estate,[24] yet allowing the husband his curtesy: the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty:[25] the distinguishing between a mortgage at five per cent, with a clause of reduction to four, if the interest be regularly paid, and a mortgage at four per cent, with a clause of enlargement to five, if the payment of the interest be deferred; so that the former shall be deemed a conscientious, the latter an unrighteous, bargain:[26] all these, and other cases that might be instanced, are plainly rules of positive law; supported only by the reverence that is shown, and generally very properly shown, to a series of former determinations; that the rule of property may be uniform and stead. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances,[27] gives rise to a general rule.

IN short, if a court of equity in England did really act, as a very ingenious writer in the other part of the island supposes it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder he is so often mistaken. Grotius, or Pufendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law. Especially, as the notions before-mentioned, of the character, power, and practice of a court of equity, were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquarians and lawyers; Spelman,[28] Coke,[29] Lambard,[30] and Selden,[31] and even the great Bacon[32] himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen) partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in) but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as has totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden *pro re nata* [for the occasion], with more probity of intention than knowledge of the subject; founded on no settled principles, as being never designed, and therefore never used, for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

THE suggestion indeed of every bill, to give jurisdiction to the courts of equity, (copied from those early times) is, that the complainant has no remedy at the common law. But he, who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and

© Copyright 2003, 2005 Lonang Institute

at the same time casts his eye on the extent and variety of the cases in our equity-reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation, in both courts, are, or should be, exactly the same: both ought to adopt the best, or must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing: but, the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest: for the judges could not, as the law then stood, give judgment that the taking of interest became legal, as the necessary companion of commerce,[33] nay after the statute of 37 Hen. VIII. c. 9. had declared the debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow minded successors still adhered wilfully and technically to the letter of the ancient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the bond. At the same time more liberal men, who sat in the courts of equity, construed the instrument, according to its "just and true intent," as merely a security for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann. c. 16. and 7 Geo. II. c. 20. that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be followed in the courts of law.

AGAIN; neither a court of equity nor of law can vary men's wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5£ an acre for plowing up ancient meadow:[34] nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

THE rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined *secundum aequum et bonum* [according to right and justice], as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In mattes of positive right, both courts must submit to and follow those ancient and invariable maxims "*quae relicta sunt et tradita*" ["which are left and handed down to us"].[35] Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the subject of that law: as in case of the privileges of ambassadors,[36] hostages, or ransom-bills.[37] In mercantile transactions they follow the marine law,[38] and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper forum:[39] in

© Copyright 2003, 2005 Lonang Institute

matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject;[40] and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country,[41] and would both decide accordingly.

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 has been gradually erected that structure of jurisprudence, which prevails in our court of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which has 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 acquired a concurrent jurisdiction with every other court in all matters of account.[42] As incident to accounts, they take a concurrent cognizance of the administration of personal assets,[43] consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators.[44] As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto;[45] of all dealings in partnership,[46] and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents.[47] 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;[48] 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;[49] and which, and the same facts appeared on the trial, as now are discovered, he would never have obtained 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

© Copyright 2003, 2005 Lonang Institute

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,[50] 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,[51] 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.[52] 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.[53] In various kinds of frauds it assumes a concurrent[54] jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds,[55] decreeing re-conveyances,[56] or directing an absolute conveyance merely to stand as a security.[57] And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands,[58] 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,[59] 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[60] 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 has imperceptibly shifted its channel. Lambard in particular, in the reign of queen Elizabeth, lays it down,[61] 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

© Copyright 2003, 2005 Lonang Institute

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,[62] 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,[63] who have successively held the great seal, have by degrees erected the system or relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

IT were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim, that equity follows the law; and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. Every one, who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds[64] and copyholds[65]) and the forms of administering justice,[66] have arisen from this single reason, that the same thing was constantly effected by means of a subpoena in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

IT would carry me beyond the bounds of my present purpose, to go farther into this matter. I have been tempted to go so far, because the very learned author to whom I have alluded, and whose works have given exquisite pleasure to every contemplative lawyer is (among many others) a strong proof how easily names, and loose or unguarded expressions to be met with in the best of our writers, are apt to confound a stranger; and to give him erroneous ideas of separate jurisdictions now existing in England, which never were separated in any other country in the universe. It has also afforded me an opportunity to vindicate, on the one hand, the justice of our courts of law from being that harsh and illiberal rule, which many are too ready to suppose it; and, on the other, the justice of our courts of equity from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends, and controls it by the loose and fluctuating dictates of the conscience of a single judge. It is now high time to proceed to the practice of our courts of equity, thus explained and thus understood.

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 shows 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 matter charged in the bill. And if it be to quiet the possession of lands, to stay waste, or to stop proceedings

© Copyright 2003, 2005 Lonang Institute

at law, an injunction is also prayed in the nature of the *interdictum* of the civil law, commanding the defendant to cease.

THIS bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them: and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of queen Elizabeth, were commonly doctors of the civil law.[67] The master is to examine the propriety of the bill: and, if the reports it scandalous or impertinent, such mater must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

WHEN the bill is filed in the office of the six clerks, (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law[68] 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 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 till the defendant has put in his answer, and till the court shall make some farther 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 affidavits 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 be bill, on pain of 100£. 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 he 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, besides the ordinary form of attachment, directs the sheriff that he cause public proclamations to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a commission of rebellion is awarded against him, for not obeying the proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as was before observed,[69] 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,

© Copyright 2003, 2005 Lonang Institute

and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its process and decrees.[70] After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso* [as acknowledged], and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

IF the defendant is taken upon any of this process, he is to be committed to the fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this 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 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 issues against a member of the house of commons, except only that the lord chancellor sends him no letter missive.

THE ordinary process before-mentioned cannot be sued out, till after 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 does 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; 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

© Copyright 2003, 2005 Lonang Institute www.lonang.com

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.[71]

AN answer is the most usual defense that is mode to a plaintiff's bill. It is given in upon oath, or the honor of a peer or peeress; but, where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery: for there, in almost every case, the plaintiff may demand the 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 the 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 though 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 is also 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* [power has been given] 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 [by] 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

© Copyright 2003, 2005 Lonang Institute

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 the civil law. And for that purpose interrogatories are farmed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones; (as “did not you see this, or, did not you hear that?”) for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's officer appointed; but, for evidence who 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 skillful interpreters. And it has been held[72] that the deposition of an heathen who believes in the supreme being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

THE commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of 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

© Copyright 2003, 2005 Lonang Institute

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 authority of the master of the rolls to hear and determine causes, and his general power in the court of chancery, there were (not many years since) diverse questions and disputes very warmly agitated; to quiet which it was declared by statute 3 Go. 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 costs of attendance, and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

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:[73] 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, but 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. IV. 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 to B, or the existence of a *modus decimandi* [manner of

© Copyright 2003, 2005 Lonang Institute

tithing] or real and immemorial composition for tithes, But, as no jury can be summoned to attend this court, the facts 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 feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of 5£ with the defendant, that A was heir at law to B; and then avers that he is so; and brings his action for the 5£. The defendant allows the wager, but avers that A is not be 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* [judicial wager] of the Romans:[74] and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

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 an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench, 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 decree can do full and sufficient justice. These matters are always by the decree on the first hearing referred to a master in chancery to examine; which examinations frequently last for years: and then he is to report the 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;[75] which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing all the evidence taken in the cause, whether read before or not, is now admitted to be read: because it is the decree of the chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied.[76] 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

© Copyright 2003, 2005 Lonang Institute

then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill a review.

AN appeal to parliament, that is, to the house of lords, is the *dernier resort* [last resort] of the subject who thinks himself aggrieved by any interlocutory order or final determination in this court: and it is effected by petition to the house of peers, and not by writ of error, as upon judgments at common law. This jurisdiction is said[77] to have begun in 18 Jac. I. and certainly the first petition, which appears in the records of parliament, was preferred in that year;[78] and the first that was heard and determined (though the name of appeal was then a novelty) was presented in a few months after:[79] both leveled against the lord keeper Bacon for corruption, and other misbehavior. It was afterwards warmly controverted by the house of commons in the reign of Charles the second.[80] But this dispute is now at rest:[81] 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 statute 43 Eliz. c. 4.) an appeal to the king in parliament was always unquestionably allowed.[82] But no new evidence is admitted in the house of lords upon any account, for this is a distinct jurisdiction:[83] 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. This is the general method of proceeding in the courts of equity.

THE END OF THE THIRD BOOK.

NOTES

1. ch. 4. and 6.
2. pag. 49. etc.
3. F. N. B. 27.
4. Cro. Jac. 641. 2 Lev. 163. T. Jones. 90.
5. See book I. ch. 8.
6. 3 P. Wms. 108.
7. Duke's char. uses. 62. 128. Corporation of Burford v. Lenthall. Canc. 9 May, 1743
8. 2 Vern. 118.
9. Huggins v. Yorkbuildings Company. Canc. 24 Oct. 1740. Reeve v. Attorney-general. Canc. 27 Nov. 1741. Lightboun v. Attorney general. Canc. 2 May, 1743.
10. Vol. I. introd. § 2, & 3. ad cak.
11. Lord Kayms. prince. of equit. 44.
12. See Vol. II. ch. 23. pag. 378.

© Copyright 2003, 2005 Lonang Institute

13. Ibid. ch. 15. pag. 243, 244, ch. 23. pag. 377.

14. Ibid. ch. 14. pag. 208.

15. Ibid. pag. 227.

16. See pag. 300.

17. Ff. 40. 9. 12.

18. Lord Kayms, prince, of equ. 177.

19. *de aequitate*. § 3.

20. 1 Roll. Abr. 374. 4 Inst. 84. 10 Mod. l.

21. Book II. ch. 20.

22. See pag. 162.

23. This is stated by Mr. Selden (Tabletalk. tit. equity.) with more pleasantry than truth. “For law, we have a measure, and know what to trust to: equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. Tis all one, as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience.”

24. 2 P. Wms. 640. See Vol. II. pag. 337.

25. Salk. 154.

26. 2 Vern. 289. 316. 3 Atk. 520.

27. See the of Foster and Munt, 1 Vern. 473. with regard to the undisposed residuum of personal estates.

28. *Quae in summis tribunalibus multi a legum canone decernunt judices, solus (si res exegerit) cohibet cancellarius ex arbitrio; nec aliter decretis tenetur suae curiae vel sui ipsius, quin, elucente nova ratione, recognoscat quae voluerit, mutet et deleat, prout suae videbitur prudentiae*. [Those decisions which many judges in the highest tribunals make according to the rules of law, the chancellor alone (if the case require it) can restrain according to his pleasure; nor is he so bound by the decrees of his court, or those of himself, but, a new reason appearing, he may revise whatever he pleases, may alter and reverse as he shall think fit.] (gloss. 108.)

29. See pag. 53. 54.

30. Archeion. 71, 72, 73.

31. *ubi supra*.

32. De Augm. Scient. 1. 8. c. 3.

33. See Vol. II. pag. 456,

34. 2 Atk. 239.

35. *De jure naturae cogitare per nos atque dicere debumus; de jure populi Romani, quae relicta sunt et tradita*. [We should think and decide our natural rights for ourselves; but the rights of the Roman people are determined by the laws which are left and handed down to us.] (Cic. de. Leg. l. 3. ad calc.)

36. See Vol. I. pag. 253.

37. Ricord v. Lettenham. Tr. 5 Geo. III. B. R.

38. See Vol. I. pag. 75. Vol. II. pag. 459. 461. 467.

39. See Vol. II. pag. 513.

© Copyright 2003, 2005 Lonang Institute www.lonang.com

40. Ibid. 504.

41. Ibid. 463.

42. 1 Chan. Cas. 57.

43. 2 P. Wm. 145.

44. 2 Chan. Cas. 152.

45. 1 Squ. Cas. abr. 367.

46. 2 Vern. 277.

47. Ibid. 638.

48. 2 Chan. Cas 46.

49. 3 P. Wms. 148. Yearbook, 22 Edw. IV. 37. pl. 21.

50. 1 Equ. Cas. abr. 16.

51. 3 P. Wms. 215.

52. 1 Ch. Rep. 14. 2 Chan. Cas. 32.

53. 1 Vern. 308. Prec. Chan. 261. 1 P. Wms. 672. Stra. 404.

54. 2 P. Wms. 156.

55. 2 Vern. 32. 1 P. Wms. 239.

56. 1 Vern. 237.

57. 2 Vern. 84.

58. 1 Equ. Cas. abr. 337.

59. 2 p. Wms. 645. 668, 669.

60. See pag. 433.

61. Archeion. 71. 73.

62. 2 P. Wms. 685, 686.

63. See pag. 53. 54. 55.

64. Gilbert of ejectm. 2. 2 Bac. Abr. 160.

65. Bro. Abr. t. tenant per copie. 10. Litt. § 77.

66. See pag. 200.

67. Smith's commonw. b. 2. c. 12.

68. Stat. 14 & 15 Hen. VIII. c. 8.

69. pag. 50.

70. 1 Vern. 421.

71. *En cest court de chauncerie, home ne serra prejudice par son mispledging ou pur defaut de forme, mes solonque le veryte del mater: car il doit agarder solonque consciens, et nemi ex rigore juris*. [In this court of chancery a man shall not be prejudiced by his mispleading, or defect of form, but according to the truth of the matter; for the decision should be made according to conscience and not according to the rigor of law.] (*Dyversite des courts*. edit. 1534. fol. 296, 297. Bro. Abr. t.

© Copyright 2003, 2005 Lonang Institute

jurisdiction. 50.)

72. Omichund v. Barker. 1 Atk. 21.

73. On a trial at law if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it he shows a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

74. *Nota est sponsio judicialis: "Spondesne quingentos, si meus sit? Spondeo, si tuus sit. Et tu quoque spondesne quingentos, ni tuus sit? Spondeo, ni meus sit.*" [The judicial wager is known: "Do you engage to give me five hundred pounds, if it is mine? I promise it, if it is yours. And you also, do you promise me five hundred pounds if it is not yours? I promise it, if it is not mine."] Vide Heinecc. *Antiquitat.* l. 3. t. 16. § 3. & Sigon. *de judiciis* l. 21. p. 466. citat. ibid.

75. Stat. 3 Geo. II. c. 30. See pag. 450.

76. Gilb. Rep. 151, 152.

77. Com. journ. 13 Mar. 1704.

78. Lord's journ. 23 Mar, 1620.

79. Ibid. 3, 11, 12 Dec. 1621.

80. Com. journ. 19 Nov. 1675, etc.

81. Show. Parl. C. 81.

82. Duke's char. uses. 62.

83. Gilb. Rep. 155, 156.

© Copyright 2003, 2005 Lonang Institute

APPENDIX I

Proceedings on a Writ of Right Patent

§ 1. Writ of Right Patent in the Court Baron.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to Willoughby earl of Abingdon, greeting. **We** command you that without delay you hold full right to William Kent esquire, of one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you so do, let the sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. **Witness** ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of Prosecution, { John Doe. Richard Roe.

§ 2. Writ of TOLT, to Remove it into the County Court.

Charles Morton, esquire, sheriff of Oxfordshire, to John Long bailiff errant of our lord the king and of myself, greeting. **Because** by the complaint of William Kent esquire, personally present at my county-court, to wit, on Monday the sixth day of September in the thirtieth year of the reign of our lord GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, at Oxford in the shirehouse there held, I am informed, that although he himself the writ of our said lord the king of right patent directed to Willoughby earl of Abingdon, for this that he should hold full right to the said William Kent of one messuage and twenty acres of land with the appurtenances in Dorchester within my said county, of which Richard Allen deforces him, has been brought to the said Willoughby earl of Abingdon; yet, for that the said Willoughby earl of Abingdon favors the said Richard Allen in this part, and has hitherto delayed to do full right according to the exigence of the said writ, I command you on the part of our said lord the king, firmly enjoining, that in your proper person you go to the court baron of the said Willoughby earl of Abingdon at Dorchester aforesaid, and take away the plaint, which there is between the said William Kent and Richard Allen by the said writ, into my county court to be next held, and summon by good summoners the said Richard Allen, that he be at my county court on Monday the fourth day of October next coming at Oxford in the shirehouse there to be held, to answer to the said William Kent thereof. And have you there then the said plaint, the summoners, and this precept. **Given** in my county court at Oxford in the shirehouse, the sixth day of September, in the year aforesaid.

§ 3. Writ of PONE, to Remove it into the Court of Common Pleas.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. **Put**, at the request of William Kent, before our justices at Westminster on the morrow of All-Souls, the plaint which is in your county court by our writ of right, between the said William Kent demandant, and Richard Allen tenant, of one messuage and twenty acres of land with the appurtenances in Dorchester; and summon by good summoners the said Richard Allen, that he be then there, to answer to the said William Kent thereof.

© Copyright 2003, 2005 Lonang Institute

And have you there the summoners and this writ. **Witness** ourself at Westminster, the tenth day of September, in the thirtieth year of our reign.

§ 4. Writ of Right, *Quia Dominus Remisit Curiam*.

GEORGE the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Oxfordshire, greeting. **Command** Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land with the appurtenances in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard unjustly him. And unless he shall so do, and if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard, that he appear before our justices at Westminster on the morrow of All Souls, to show wherefore he has not done it. And have you there the summoners and this writ. Witness ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby earl of Abingdon, the chief lord of that fee, has thereupon remised unto us his court.

Pledges of Prosecution,	John Doe. Richard Roe.	Summoners of the within named Richard	John Den, Richard Fen.

§ 5. The Record, with Award of Battle.

Pleas at Westminster before Sir John Willes knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of saint Michael in the thirtieth year of the reign of the lord GEORGE the second, by the grace of God of Great Britain, France and Ireland, king, defender of the faith, etc.

Oxon. to wit. } **William** Kent, esquire, by James Parker his attorney, demands against Richard Allen, gentleman, on messuage and twenty acres of land, with the appurtenances, in Dorchester, as his right and inheritance, by writ of the lord the king of right, because Willoughby earl of Abingdon the chief lord of that fee has now thereupon remised to the lord the king his court. **And whereupon** he says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the lord GEORGE the first late king of Great Britain, by taking the esplees thereof to the value[1] [of ten shillings, and more, in rents, corn, and grass.] And that such is his right he offers [suit and good proof.] **And** the said Richard Allen, by Peter Jones his attorney, comes and defends the right of the said William Kent, and his seizin, when [and where it shall behoove him,] and all [that concerns it,] and whatsoever [he ought to defend,] and chiefly the tenements aforesaid with the appurtenances, as of fee and right, [namely, one messuage and twenty acres of land, with the appurtenances, in Dorchester.] **And** this he is ready to defend by the body of his free man, George Rumbold by name, who is present here in court ready to defend the same by his body, or in what manner soever the court of the lord the king shall consider that he ought to defend. And if any mischance should befall the said George (which God defend) he is ready to defend the same by another man, who [is bound and able to defend it.] **And** the said William Kent says, that the said Richard Allen unjustly defends the right of him the said William, and his seizin, etc, and all, etc, and whatsoever, etc, and chiefly of the tenements aforesaid

© Copyright 2003, 2005 Lonang Institute

with the appurtenances, as of fee and right, etc; because he says, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the said lord GEORGE the first late king of Great Britain, by taking the esplees thereof to the value, etc. **And** that such is his right, he is prepared to prove by the body of his freeman, Henry Broughton by name, who is present here in court ready to prove the same by his body, or in what manner soever the court of the lord the king shall consider that he ought to prove; and if any mischance should befall the said Henry (which God defend) he is ready to prove the same b another man, who, etc. **And** hereupon it is demanded of the said George and Henry, whether they are ready to make battle, as they before have waged it: who say that they are. **And** the same George Rumbold gives gage of defending, and the said Henry Broughton gives gage of proving; and, such engagement being given as the manner is, it is demanded of the said William Kent and Richard Allen, if they can say any thing wherefore battle ought not to be awarded in this case; who say that they cannot. **Therefore it is considered**, that battle be made thereon, etc. **And** the said George Rumbold finds pledges of battle, to wit, Paul Jenkins and Charles Carter; and the said Henry Broughton finds also pledges of battle, to wit, Reginald Read and Simon Tayler. **And thereupon** day is here given as well to the said William Kent as to the said Richard Allen, to wit, on the morrow of saint Martin next coming, by the assent as well of the said William Kent as of the said Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armor as becomes him, and ready to make the battle aforesaid: and that the bodies of them in the mean time be safely kept, on peril that shall fall thereon. **At** which day here come as well the said William Kent as the said Richard Allen by their attorneys aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armor as becomes them, ready to make the battle aforesaid, as they had before waged it. **And** hereupon day is further given by the court here, as well to the said William Kent as to the said Richard Allen, at Tothill near the city of Westminster in the county of Middlesex, to wit, on the morrow of the purification of the blessed virgin Mary next coming, by the assent as well of the said William as of the aforesaid Richard. And it is commanded, that each of them have then there his champion, armed in the form aforesaid, ready to make the battle aforesaid, and that their bodies in the mean time, etc. At which day here, to wit, at Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armor as becomes them, ready to make the battle aforesaid, as they before had waged it. And the said William Kent being solemnly called does not come, nor has prosecuted his writ aforesaid. **Therefore it is considered**, that the same William and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, etc, and also that the said Richard do hold the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said William and his heirs, forever, etc.

§ 6. Trial by the Grand Assize.

— And the said Richard Allen, by Peter Jones his attorney, comes and defends the right of the said William Kent, and his seizin, when, etc. and all, etc, and whatsoever, etc, and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, etc, and puts himself upon the grand assize of the lord the king, and prays recognition to be made, whether he himself has greater right to hold the tenements aforesaid with the appurtenances to him and his heirs as tenants thereof as he

© Copyright 2003, 2005 Lonang Institute

now holds them, or the said William to have the said tenements with the appurtenances as he above demands them. **And** he tenders here in court six shillings and eight-pence to the use of the lord the now king, etc, for that, to wit, it may be inquired of the time [of the seizin alleged by the demandant.] And he therefore prays, that it may be inquired by the assize, whether the said William Kent was seized of the tenements aforesaid with the appurtenances in his demesne as of fee in the time of the said lord the king GEORGE the first, as the said William in his demand before has alleged. **Therefore** it is commanded the sheriff, that he summon by good summoners four lawful knights of his county, girt with swords, that they be here on the octaves of saint Hilary next coming, to make election of the assize aforesaid. The same day is given as well to the said William Kent as to the said Richard Allen, here, etc. At which day here come as well the said William Kent as the said Richard Allen; and the sheriff, to wit, Sir Adam Alstone knight now returns, that he had caused to be summoned Charles Stephens, Randal Wheler, Toby Cox, and Thomas Munday, four lawful knights of his county, girt with swords, by John Doe and Richard Roe his bailiffs, to be here at the said octaves of saint Hilary, to do as the said writ thereof commands and requires; and that he said summoners, and each of them, are mainprized by John Day and James Fletcher. Whereupon the said Charles Stephens, Randal Wheler, Toby Cox, and Thomas Munday, four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and, being sworn, upon their oath in the presence of the parties aforesaid chose of themselves and others twenty-four, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Oliver Greenway, John Boys, Charles Price, knights, Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moore, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis, esquires, John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforesaid, who neither are of kin to the said William Kent nor to the said Richard Allen, to make recognition of the grand assize aforesaid. **Therefore** it is commanded the sheriff, that he cause them to come here from the day of Easter in fifteen days, to make the recognition aforesaid. The same day is there given to the parties aforesaid. At which day here come as well the said William Kent as the said Richard Allen, by their attorneys aforesaid, and the recognitors of the assize whereof mention is above made being called come, and certain of them, to wit, Charles Stephens, Randal Wheler, Toby Cox, Thomas Munday, Charles Price, knights, Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Christopher Ball, Lewis Long, and William Kirby, being elected, tried, and sworn, upon their oath say, that the said William Kent has more right to have the tenements aforesaid with the appurtenances to him and his heirs, as he demands the same, than the said Richard Allen to hold the same as he now holds them, according as the said William Kent by his writ aforesaid has supposed. **Therefore it is considered**, that the said William Kent do recover his seizin against the said Richard Allen of the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said Richard Allen and his heirs, forever: and the said Richard Allen in mercy, etc.

NOTES

1. N. B. The clauses, between hooks [brackets], in this and the subsequent numbers of the appendix, are usually no otherwise expressed in the records than by an etc.

© Copyright 2003, 2005 Lonang Institute

APPENDIX II

Proceedings on an Action of Trespass in Ejectment, by Original, in the King's Bench

§ 1. The Original Writ.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. **If** Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All-Souls, wheresoever we shall then be in England, to show wherefore with force and arms he entered into on messuage, with the appurtenances, in Sutton, which John Rogers, esquire, has demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the names of the pledges, and this writ. **Witness** ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Pledges of Prosecution,	John Doe. Richard Roe.	The within named William Stiles is attached by pledges,	John Den, Richard Fen.

§ 2. Copy of the Declaration Against the Casual Ejector; Who Gives Notice Thereupon to the Tenant in Possession.

Michaelmas, the 29th of king George the second.

Berks, to wit. **William** Stiles, late of Newbury in the said county, gentleman, was attached to answer to Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton in the county aforesaid, which John Rogers esquire demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king, etc. And whereupon the said Richard by Robert Martin his attorney complains, that whereas the said John Rogers on the first day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to the said Richard and his assigns, from the feast of saint Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenements, with the appurtenances, and was thereof possessed; and, the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard says, that he is injured and damaged to the value of twenty

© Copyright 2003, 2005 Lonang Institute

pounds. And thereupon he brings suit, etc.

Martin, for the plaintiff.
Peters, for the defendant.

Pledges of prosecution, John Doe. Richard Roe.

Mr. George Saunders,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary term in his majesty's court of king's bench at Westminster, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

5 January, 1756.

William Stiles.

§ 3. The Rule of Court.

Hilary Term, in the twenty-ninth Year of King GEORGE the second.

Berks, to wit. **It is ordered** by the court, by the assent of both parties, and their attorneys, that George Saunders, gentleman, may be made defendant, in the place of the now defendant William Stiles, and shall immediately appear to the plaintiff's action, and shall receive a declaration in a plea of trespass and ejectment of the tenements in question, and shall immediately plead thereto, not guilty: and, upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if, upon trial of the issue, the said George do not confess lease, entry, and ouster, and b reason thereof the pl cannot prosecute his writ, then the taxation of costs upon such *nonpros*. shall cease, and the said George shall pay such costs to the plaintiff, as by the court of our lord the king here shall be taxed and adjudged for such his default in nonperformance of this rule; and judgment shall be entered against the said William Stiles, now the casual ejector, by default. And it is further ordered, that, if upon the trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ, upon any other cause, than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself does not pay them.

By the Court.

Martin, for the plaintiff.
Newman, for the defendant.

© Copyright 2003, 2005 Lonang Institute

§ 4. The Record.

Pleas before the lord the king at Westminster, of the term of saint Hilary, in the twenty-ninth year of the reign of the lord GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, etc.

Berks, to wit. } **George** Saunders, late of Sutton in the county aforesaid, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, esquire, has demised to the said Richard for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the lord the king that now is. **And whereupon** the said Richard, by Robert Martin his attorney complains, that whereas the said John Rogers on the first day of October in the twenty-ninth year of the reign of the lord the king that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of saint Michael the archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said Richard being so possessed thereof, the said George afterwards, that is too say, on the first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid which is not yet expired, and ejected the fair Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said lord the king; whereby the said Richard says that he is injured and endamaged to the value of twenty pounds: and thereupon he brings suit, [and good proof.] **And** the aforesaid George Saunders, by Charles Newman his attorney, comes and defends the force and injury, when [and where it shall behoove him;] and says that he is in no wise guilty of the trespass and ejectment aforesaid, as the said Richard above complains against him; and thereof he puts himself upon the country: and the said Richard does likewise the same: **Therefore** let a jury come thereupon before the lord the king, on the octave of the purification of the blessed virgin Mary, wheresoever he shall then be in England; who neither [are of kin to the said Richard, nor to the said George;] to recognize [whether the said George be guilty of the trespass and ejectment aforesaid:] because as well [the said George, as the said Richard, between whom the difference is, have put themselves on the said jury.] The same day is there given to the parties aforesaid. **Afterwards** the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the lord the king, until the day of Easter in fifteen days, wheresoever the said lord the king shall then be in England; unless the justices of the lord the king assigned to take assizes in the county aforesaid, shall have come before that time, to wit, on Monday the eighth of March, at Reading in the said county, by the form of the statute [in that case provided,] by reason of the default of the jurors, [summoned to appear as aforesaid.] At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid; and the aforesaid justices of assize, before whom [the jury aforesaid came,] sent here their record before them had in these words, to wit: **Afterwards**, at the day and place within contained, before Heneage Legge, esquire, one of the barons of the exchequer of the lord the king, and Sir John Eardley Wilmot, knight, one of the justices of the said lord the king, assigned to hold pleas before

© Copyright 2003, 2005 Lonang Institute

the king himself, justices of the said lord the king, assigned to take assizes in the county of Berks by the form of the statute [in that case provided,] come as well the within named Richard Smith, as the within written George Saunders, by their attorneys within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon that jury: and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed a-new, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed a-new, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts and Daniel Parker, being likewise called, come; and, together with the other jurors aforesaid before impaneled and sworn, being elected, tried, and sworn, to speak the truth of the matter within contained, upon their oath say, that the aforesaid George Saunders is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid Richard Smith within complains against him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he has been put unto about his suit in that behalf, to twelve pence: and, for those costs and charges, to forty shillings. **Whereupon** the said Richard Smith, by his attorney aforesaid, prays judgment against the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid: and the said George Saunders, by his attorney aforesaid, said that the court here ought not to proceed to give judgment upon the said verdict, and prays that judgment against him the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried a-new by other jurors to be afresh impaneled. And, because the court of the lord the king here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the lord the king, until the morrow of the Ascension of our lord, wheresoever the said lord the king shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king is not yet advised thereof.

At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid: upon which, the record and matters aforesaid having been seen, and by the court of the lord the king now here fully understood, and al and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the lord the king now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid, **Therefore it is considered**, that the said Richard do recover against the said George his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight pence for his costs and charges aforesaid, by the court of the lord the king here awarded to the said Richard, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds, seven shillings, and eight pence. And let the said George be taken, [until he makes fine to the lord the king.] **And hereupon** the said Richard by his attorney aforesaid prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances: and it is granted unto him,

© Copyright 2003, 2005 Lonang Institute

returnable before the lord the king on the morrow of the holy Trinity, wheresoever he shall then be in England. At which day before the lord the king, at Westminster, comes the said Richard by his attorney aforesaid; and the sheriff, that is to say, Sir Thomas Reeve, knight, now sends, that he by virtue of the writ aforesaid to him directed, on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

© Copyright 2003, 2005 Lonang Institute

APPENDIX III

Proceedings on an Action of Debt, in the Court of Common Pleas; Removed into the King's Bench by Writ of Error

§ 1. Original.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **Command** Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him and unjustly detains, as he says. And unless he shall so do, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices at Westminster, on the octave of saint Hilary, to show wherefore he has not done it. And have you there then the summoners, and this writ. **Witness** ourself at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

Pledges of Prosecution, { John Doe. Richard Roe.

Summoners of the within named Charles Long, { Roger Morris. Henry Johnson.

§ 2. Process.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **Put** by gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices at Westminster on the octave of the purification of the blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says; and to show wherefore he was not before our justices at Westminster on the octave of saint Hilary, as he was summoned. And have there then the names of the pledges and this writ. **Witness** Sir John Willes knight, at Westminster, the twenty-third day of January in the twenty-eighth year of our reign.

The within named Charles Long is attached by pledges, { Edward Leigh. Robert Tanner.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **We** command you that you distrain Charles Long, late of Burford, gentleman, by all his lands and chattels within your bailiwick, so that neither he nor any one through him may lay hands on the same, until you shall receive from us another command thereupon; and that you answer to us of the issues of the same; and that you have his body before our justices at Westminster from the day of Easter in fifteen days, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he says, and to hear his judgment of his many defaults. **Witness** Sir John Willes, knight, at Westminster, the twelfth day of February in the twenty-eighth year of our reign.

The within-named Charles Long has nothing in my bailiwick, whereby he may be distrained.

© Copyright 2003, 2005 Lonang Institute

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says: and whereupon you have returned to our justices at Westminster, that the said Charles has nothing in our bailiwick, whereby he may be distrained. And have you there then this writ. **Witness** Sir John Willes, knight, at Westminster, the sixteenth day of April in the twenty-eighth year of our reign.

The within-named Charles Long is not found in my bailiwick.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says: and whereupon our sheriff of Oxfordshire has made a return to our justices at Westminster, at a certain day now past, that the aforesaid Charles not found in his bailiwick; and thereupon it is testified in our said court, that the aforesaid Charles lurks, wanders, and runs about in your county. And have you there then this writ. **Witness** Sir John Willes, knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

> "Or, upon the Return of *Non est inventus* upon the first *Capias*, the Plaintiff may sue out an Alias and a Pluries, and thence proceed to Outlawry; thus:

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. The command you, as formerly we commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the holy Trinity, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says. And have you there then this writ. **Witness** Sir Willes, knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

"The within-named Charles Long is not found in my bailiwick.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting, The command you, as we have more than once commanded you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the holy Trinity in three weeks, to answer to William Burton,

© Copyright 2003, 2005 Lonang Institute

gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains as he says. And have you there then this writ. **Witness** Sir John Willes knight, at Westminster, the thirteith day of May, in the twenty-eighth year of our reign.

"The within-named Charles Long is not found in my bailiwick.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **We** command you, that you cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until according to the law and custom of our realm of England he be outlawed, if he does not appear. And if he does appear, then take him and cause him to be safely kept, so that you may have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says. And whereupon you have returned to our justices at Westminster, from the day of the holy Trinity in three weeks, that he is not found in your bailiwick. And have you there then this writ. **Witness** Sir John Willes knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

"By virtue of this writ to me directed, at my county court held at Oxford in the county of Oxford, on Thursday the twenty-first day of June in the twenty-ninth year of the reign of the lord the king within written, the within-named Charles Long was required the first time and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-fourth day of July in the year aforesaid, the said Charles Long was required the second time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-first day of August in the year aforesaid, the said Charles Long was required the third time, and did not appear; and at my county court held at Oxford aforesaid, on Thursday the eighteenth day of September in the year aforesaid, the said Charles Long was required the fourth time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the sixteenth day of October in the year aforesaid, the said Charles Long, was required the fifth time, and did not appear; therefore the said Charles Long, by the judgment of the coroners of the said lord the king, of the county aforesaid, according to the law and custom of the kingdom of England, is outlawed.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **Whereas** by our writ we have lately commanded you that you should cause Charles Long, late of Burford, gentleman, to be required from county court to county court, until according to the law and custom of our realm of England he should be outlawed, if he did not appear: and if he did appear, then that you should take him and cause him to be safely kept, so that you might have his body before our justices at Westminster, on the morrow of All-Souls, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he says: **Therefore** we command you, by virtue of the statute in the thirty-first year of the lady Elizabeth late queen of England made and provided, that you cause the said Charles Long to be proclaimed upon three several days according to the form of that statute; (whereof one proclamation shall be made at or near the most usual door of the church of the parish wherein he inhabits) that he render himself unto you; so that you may have his body before our justices at Westminster at the day aforesaid, to answer the said

© Copyright 2003, 2005 Lonang Institute

William Burton of the plea aforesaid. And have you there then this writ. **Witness** Sir John Willes, knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

"By virtue of this writ to me directed, at my county court held at Oxford in the county of Oxford, on Thursday the twenty-sixth day of June in the twenty-ninth year of the reign of the lord the king within written, I caused to be proclaimed the first time; and at the general quarter sessions of the peace, held at Oxford aforesaid on Tuesday the fifteenth day of July in the year aforesaid, I caused to be proclaimed the second time; and at the most usual door of the church of Burford within-written on Sunday the third day of August in the year aforesaid, immediately after divine service, one month at the least before the within-named Charles Long was required the fifth time, I caused to be proclaimed the third time, that the said Charles Long should render himself unto me, as within it is commanded me.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. **We** command you, that you omit not by reason of any liberty of our county, but that you take Charles Long, late of Burford in the county of Oxford, gentleman, (being outlawed in the said county of Oxford, on Thursday, the sixteenth day of October last past, at the suit of William Burton, gentleman, of a plea of debt, as the sheriff of Oxfordshire aforesaid returned to out justices at Westminster on the morrow of All-Souls then next ensuing) if the said Charles Long may be found in your bailiwick; and him safely keep, so that you may have his body before our justices at Westminster from the day of saint Martin in fifteen days, to do and receive what our court shall consider concerning him in this behalf. **Witness** Sir John Willes, knight, at Westminster, the sixth day of November in the twenty-ninth year of our reign.

"By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready at the day and place within-contained, according as by this writ it is commanded me.

§ 3.[1] Bill of Middlesex, and Latiat Thereupon, in the Court of King's Bench.

"Middlesex, to wit. } **The sheriff** is commanded that he taken Charles Long, late of Burford in the county of Oxford, If he may be found in his bailiwick, and him safely keep, so that he may have his body before the lord the king at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, gentlemen, of a plea of trespass: [**and also** to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of the court of the said lord the king, before the king himself to be exhibited;] and that he have there then this precept.

"The within-named Charles Long is not found in my bailiwick.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. **Whereas** we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, gentleman, of plea of

© Copyright 2003, 2005 Lonang Institute

trespass; [**and also** to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to the exhibited;] and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William in our court before us it is sufficiently attested, that the aforesaid Charles lurks and runs about in your county: **Therefore** we command you, that you take him, if he maybe found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea [and bill] aforesaid: and have you have you there then this writ. **Witness** Sir Dudley Rider, knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

"By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready at the day and place within-contained, according as by this writ it is commanded me.

§ 4. Writ of *Quo Minus* in the Exchequer.

"GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Berkshire, greeting. **We** command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the barons of our exchequer at Westminster, on the morrow of the holy Trinity, to answer William Burton our debtor of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said exchequer, as he says he can reasonably show that the same he ought to render: and have you there this writ. **Witness** Sir Thomas Parker, knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

"By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready before the barons within-written, according as within it is commanded me."

§ 5. Special Bail; on the Arrest of the Defendant, Pursuant to the *Testatum Capias*, in page xiv.

Know all men by these presents, that we Charles Long of Burford in the county of Oxford, gentleman, Peter Hamond of Bix in the said county, yeoman, and Edward Thomlinson of Woodstock in the said county, innholder, are held and firmly bound to Christopher Jones, esquire, sheriff of the county of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves and each of us by himself for the whole and in gross, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May in the twenty-eighth year of the reign of our sovereign lord George the second by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and fifty-five.

The condition of this obligations is such, that if the above-bounden Charles Long do appear before

© Copyright 2003, 2005 Lonang Institute

the justices of our sovereign lord the king at Westminster, on the morrow of the holy Trinity, to answer William Burton, gentlemen, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full forece and virtue.

Sealed, and delivered, being first duly stamped, in the presence of
Henry Shaw.
Timothy Griffith.

Charles Long. (L. S.)
Peter Hamond. (L. S.)
Edward Thomlinson. (L. S.)

You Charles Long do acknowledge to owe unto the plaintiff four hundred pounds, and you John Rose and Peter Hamond do severally acknowledge to owe unto the same person the sum of two hundred pounds apiece, to be levied upon your several goods and chattels, lands and tenements, **upon condition** that, if the defendant be condemned in this action, he shall pay the condemnation, or render himself a prisoner in the Fleet for the same; and, if he fail so to do, you John Rose and Peter Hamond do undertake to do it for him,

Trinity Term, 28 Geo. II.

Berks, to wit. } **On** a *Testatum capias* against Charles Long, late of Burford in the county of Oxford, gentleman, returnable on the morrow of the holy Trinity, at the suit of William Burton, of a plea of debt of two hundred pounds;

The bail are, John Rose, of Witney in the county of Oxford, esquire. Peter Hamond, of Bix in the said county, yeoman.

Richard Price, attorney for the defendant. }

The party himself in £400.
Each of the bail in £200.

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand, seven hundred, and fifty-five, *de bene esse*, before me,

Robert Grove,
one of the commissioners.

§ 6. The Record, as Removed by Writ of Error.

The Lord the king has given in charge to his trusty and beloved Sir John Willes, knight, his writ closed in these words: GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to our trusty and beloved Sir John Willes, knight, greeting. **Because** in the record, and process, and also in the giving of judgment, of the plaint which was in our court before you, and your fellows, our justices of the bench, by our writ, between William Burton, gentleman, and Charles Long, late of Burford in the county of Oxford, gentleman, of a certain debt of two hundred pounds, which the said William demands of the said Charles,

© Copyright 2003, 2005 Lonang Institute

manifest error has intervened, to the great damage of him the said William, as we from his complaint are informed: we, being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them, and this writ; so that we may have them from the day of Easter in fifteen days, wheresoever we shall then be in England: that, the record and process aforesaid being inspected, we may cause t be done thereupon, for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. **Witness** ourself at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

The record and process, whereof in the said writ mention above is made, follow in these words, to wit:

Pleas at Westminster before Sir John Willes, knight, and his brethren, justices of the bench of the lord the king at Westminster, of the term of the holy Trinity, in the twenty-eighth year of the reign of the lord GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, etc.

Oxon. to wit. } **Charles** Long, late of Burford in the county aforesaid, gentleman, was summoned to answer William Burton, of Yarnton in the said county, gentleman, of a plea that he render unto him two hundred pounds, which he owes him and unjustly detains [as he says.] **And whereupon** the said William, by Thomas Gough his attorney, complains, that whereas on the first day of December, in the year of our lord one thousand, seven hundred, and fifty-four, at Banbury in this county, the said Charles by his writing obligatory did acknowledge himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the said William, whenever after the said Charles should be thereto required; nevertheless the said Charles (although often required) has not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether has refused, and does still refuse, to render the same; wherefore he says that he is injured, and has damage, to the value of ten pounds: and thereupon he brings suit, [and good proof.] **And** he brings here into court the writing obligatory aforesaid; which testifies the debt aforesaid in form aforesaid; the date whereof is the day and year before-mentioned. **And** the aforesaid Charles, by Richard Prince his attorney, comes and defends the force and injury when [and where it shall behoove him,] and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid:] he likewise craves oyer of the condition of the said writing, and it is read unto him in these words; "The condition of this obligation is such, that if the above bounden Charles Long, his heirs, executors, and administrators, and every of them, shall and do from time to time, and at all times hereafter, well and truly stand to, obey, observe, fulfill, and keep, the award, arbitrament, order, rule, judgment, final end, and determination, of David Stiles, of Woodstock in the said county, clerk, and Henry bacon, of Woodstock aforesaid, gentleman, (arbitrators indifferently nominated and chosen by and between the said Charles Long and the abovenamed William Burton, to arbitrate, award, order, rule, judge, and determine, of all and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts controversies, trespasses, and demands whatsoever had, moved, or depending, or which might have been had, moved, or depending, by and between the said parties, for any matter, cause, or thing,

© Copyright 2003, 2005 Lonang Institute

from the beginning of the world until the day of the date hereof) which the said arbitrators shall make and publish, of or in the premises, in writing under their hands and seals, or otherwise by work of mouth, in the presence of two credible witnesses, on or before the first day of January next ensuing the date hereof; then this obligation to be void and of none effect, or else to be and remain in full force and virtue."

Which being read and heard, the said Charles prays leave to imparl therein here until the octave of the holy Trinity; and it is granted unto him. The same day is given to the said William Burton here, etc. At which day, to wit, on the octave of the holy Trinity, here come as well the said William Burton as the said Charles Long, by their attorneys aforesaid: and hereupon the said William prays that the said Charles may answer to his writ and count aforesaid. **And** the aforesaid Charles defends the force and injury, when, etc. and says, that the said William ought not to have or maintain his said action against him; because he says, that the said David Stiles and Henry Bacon, the arbitrators before named in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above mentioned, according to the form and effect of the said condition: and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him; [and that he may go thereof without a day.] **And** the aforesaid William says, that for any thing above alleged by the said Charles in pleading, he ought not to be precluded from having his said action thereof against him; because he says, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew of Charlbury, in the county aforesaid, and Richard Morris of Wytham, in the county of Berks, the said arbitrators undertook the charge of the award arbitrament, order, rule judgment, final end, and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and there made and published their award by word of mouth in manner and form following, that is to say; The said arbitrators did award, order, and adjudge, that he the said Charles Long should forthwith pay to the said William Burton the sum of seventy-five pounds, and that thereupon al differences between them at the time of the making the said writing obligatory should finally cease and determine. And the said William further says, that although he afterwards, to wit on the sixth day of January, in the year of our Lord one thousand, seven hundred, and fifty-five, at Banbury aforesaid, requested the said Charles to pay to him the said William the said seventy-five pounds, yet (by protestation that the said Charles has not stood to, obeyed, observed, fulfilled, or kept any part of the said award, which by him the said Charles ought to have been stood to obeyed, observed, fulfilled, and kept) for further plea therein he says, that the said Charles the said seventy-five pounds to the said William has not hitherto paid: and this he is ready to verify. Wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of the said debt, to the adjudged unto him, etc. **And** the aforesaid Charles says, that the plea aforesaid, by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are in no wise sufficient in law for the said William to have or maintain his action aforesaid thereupon against him the said Charles; to which the said Charles has no necessity, neither is he obliged by the law of the land, in any manner to answer: and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the aforesaid William may be precluded from having his action aforesaid thereupon against him, etc. And the said Charles according to the form

© Copyright 2003, 2005 Lonang Institute

of the statute in that case made and provided, shows to the court here the causes of demurrer following; to wit, that it does not appear, by the replication aforesaid, that the said arbitrators made the same award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforesaid; and that the replication aforesaid is uncertain, insufficient, and wants form. And the aforesaid William says, that the plea aforesaid by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are good and sufficient in law for the said William to have and maintain the said action of him the said William thereupon against the said Charles; which said plea, and the matter therein contained, the said William is ready to verify and prove as the court shall award: and because the aforesaid Charles has not answered to that plea, nor has he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, etc. **And because** the justices here will advise themselves of and upon the premises before they give judgment thereupon a day is thereupon given to the parties aforesaid here, until the morrow of All Souls, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said Charles as the said William, by their said attorneys; and because the said justices here will farther advise themselves of and upon the premises before they give judgment thereupon, a day is farther given to the parties aforesaid here until the octave of saint Hilary, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said William Burton as the said Charles Long, by their said attorneys. **Wherefore**, the record and matters aforesaid having been seen, and by the justices here fully understood, and all and singular the premises being examined, and mature deliberation being had thereupon; for that it seems to the said justices here, that the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law, to have and maintain the action of the aforesaid William against the aforesaid Charles; **therefore it is considered**, that the aforesaid William take nothing by his writ aforesaid, but that he and his pledges of prosecution, to wit, John Doe and Richard Roe, be in mercy for his false complaint; and that the aforesaid Charles go thereof without a day, etc.

Afterwards, to wit, on Wednesday next after fifteen days Easter in this same term, before the lord the king, at Westminster, comes the aforesaid William Burton, by Peter Manwaring his attorney, and says, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this; to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where by the law of the land judgment should have been given for the said William Burton against the said Charles Long to be before the said lord the king, to hear the record and process aforesaid: and it is granted unto him: by which the sheriff aforesaid is commanded that by good [and lawful men of his bailiwick] he cause the aforesaid Charles Long to know, that he be before the lord the king from the day of Easter in five weeks, wheresoever [he shall then be in England,] to hear the record and process aforesaid, if [it shall have happened that in the same any error shall have intervened;] and farther [to do and receive what the court of the lord the king shall consider in this behalf.] The same day is given to the aforesaid William Burton. **At which day** before the lord the king, at Westminster, comes the aforesaid William Burton, by his attorney aforesaid: and the sheriff returns, that by virtue of the writ aforesaid to him directed he had caused the said Charles Long to know, that he be before the lord the king at the time aforesaid in the said writ contained, by John Den and Richard Fen,

© Copyright 2003, 2005 Lonang Institute

good, etc; as by the same writ was commanded him: which said Charles Long, according to the warning given him in this behalf, here comes by Thomas Webb his attorney. **Whereupon** the said William says, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, alleging the error aforesaid by him in the form aforesaid alleged, and prays, that the judgment aforesaid for the error aforesaid, and other, in the record and process aforesaid being, may be reversed, annulled, and entirely for nothing esteemed, and that the said Charles may rejoin to the errors aforesaid, and that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid, as of the matter aforesaid above for error assigned. **An**d the said Charles says, that neither in the record and process aforesaid, nor in the giving of the judgment aforesaid, in any thing is there erred: and he prays in like manner that the court of the said lord the king here may proceed to the examination as well of the record and process aforesaid, as of the matters aforesaid above for error assigned. **And because** the court of the lord the king here is not yet advised what judgment to give of and upon the premises, a day is thereof given of the parties aforesaid until the morrow of the holy Trinity, before the lord the king, wheresoever he shall then be in England, to hear their judgment of and upon the premises, for that the court of the lord the king here is not yet advised thereof. At which day before the lord the king, at Westminster, come the parties aforesaid by their attorneys aforesaid: **Whereupon**, as well the record and process aforesaid, and the judgment thereupon given, as the matters aforesaid by the said William above for error assigned, being seen, and by the court of the lord the king here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the lord the king here, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, **therefore it is considered**, that the judgment aforesaid, for the error aforesaid, and other, in the record and process aforesaid, be reversed, annulled, and entirely for nothing esteemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he has sustained, as well on occasion of the detention of the said debt, as for his costs and charges unto which he has been put about his suit in this behalf, to the said William with his consent by the court of the lord the king here adjudged. And the said Charles in mercy.

§ 7. Process of Execution.

GEORGE the second by the grace of God Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **We** command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us in three weeks from the day of the holy Trinity, wheresoever we shall then be in England, to satisfy William Burton for two hundred pounds debt, which the said William Burton has lately recovered against him in our court before us, and also fifty pounds, which were adjudged in our said court before us, to the said William Burton, for his damages which he has sustained, as well by occasion of the detention of the said debt, as for his costs and charges to which he has been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record: and have you there then this writ. **Witness** Sir Thomas Denison,[2] knight, at Westminster, the nineteenth day of June in the twenty-ninth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within-named Charles Long; which I have ready before the lord the king, at Westminster, at the day within-written, as within it is

© Copyright 2003, 2005 Lonang Institute

commanded me.

GEORGE the second by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Oxfordshire, greeting. **We** command you, that of the goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt, which William Burton lately in our court before us at Westminster has recovered against him, and also fifty pounds, which were adjudged in our court before us to the said William, for his damages which he has sustained, as well by occasion of the detention of his said debt, as for his costs and charges to which he has been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record: and have that money before us in three weeks from the day of the holy Trinity, wheresoever we shall then be in England, to render to the said William of his debt and damages aforesaid: and have there then this writ. **Witness** Sir Thomas Denison, knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within-written Charles Long two hundred and fifty pounds; which I have ready before the lord the king at Westminster at the day within-written, as it is within commanded me.

THE END.

NOTES

1. Note, that § 3. and § 4, are the usual method of process, to compel an appearance, in the courts of king's bench, and exchequer; in which the practice of those courts does principally differ from that of the court of common pleas: the subsequent stages of proceeding being nearly alike in them all.

2. The senior puisnè justice: there being no chief justice that term.

© Copyright 2003, 2005 Lonang Institute