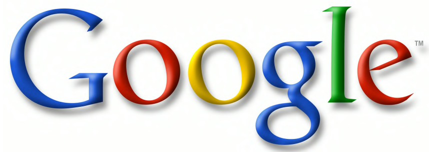


This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

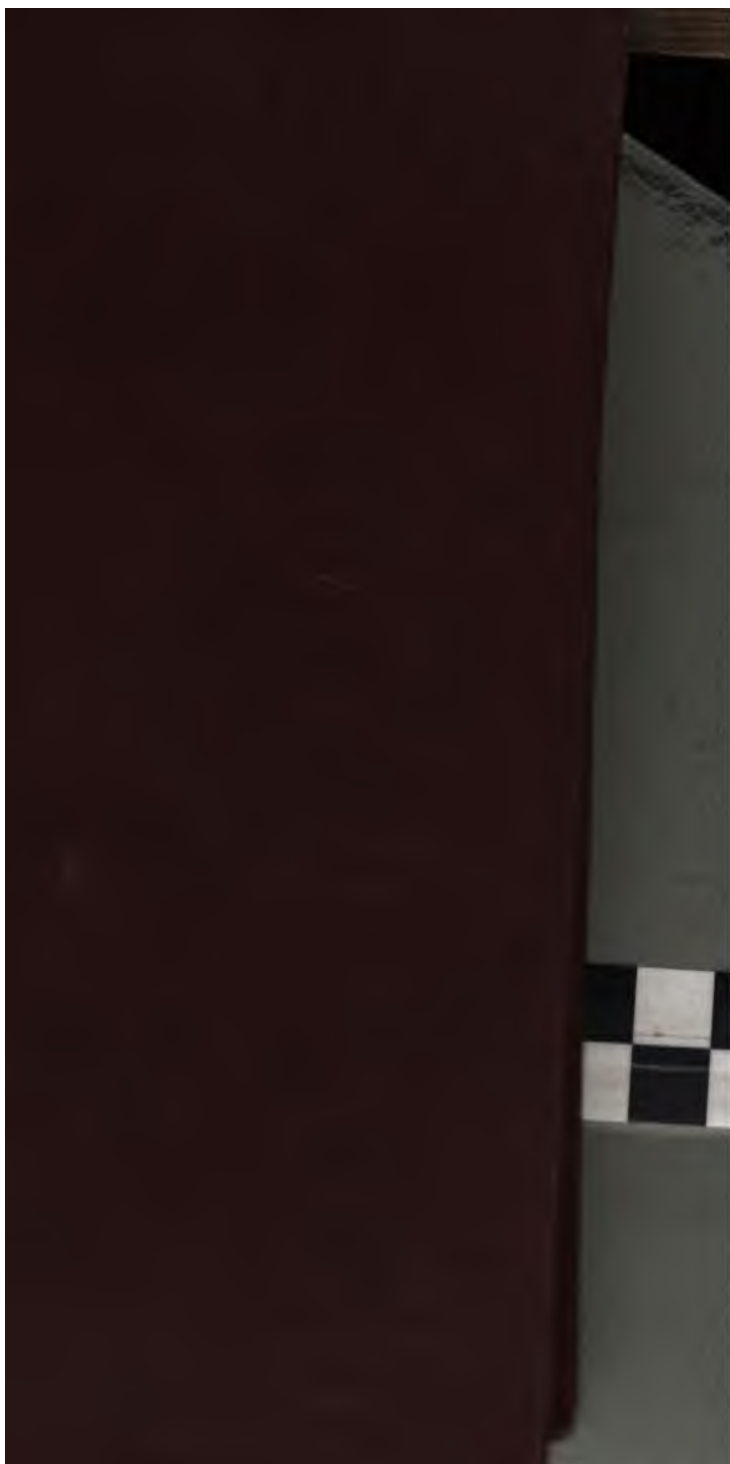
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/



THE

ALPHEUS FELCH HISTORICAL LIBRARY

BEQUEATHED

TO THE

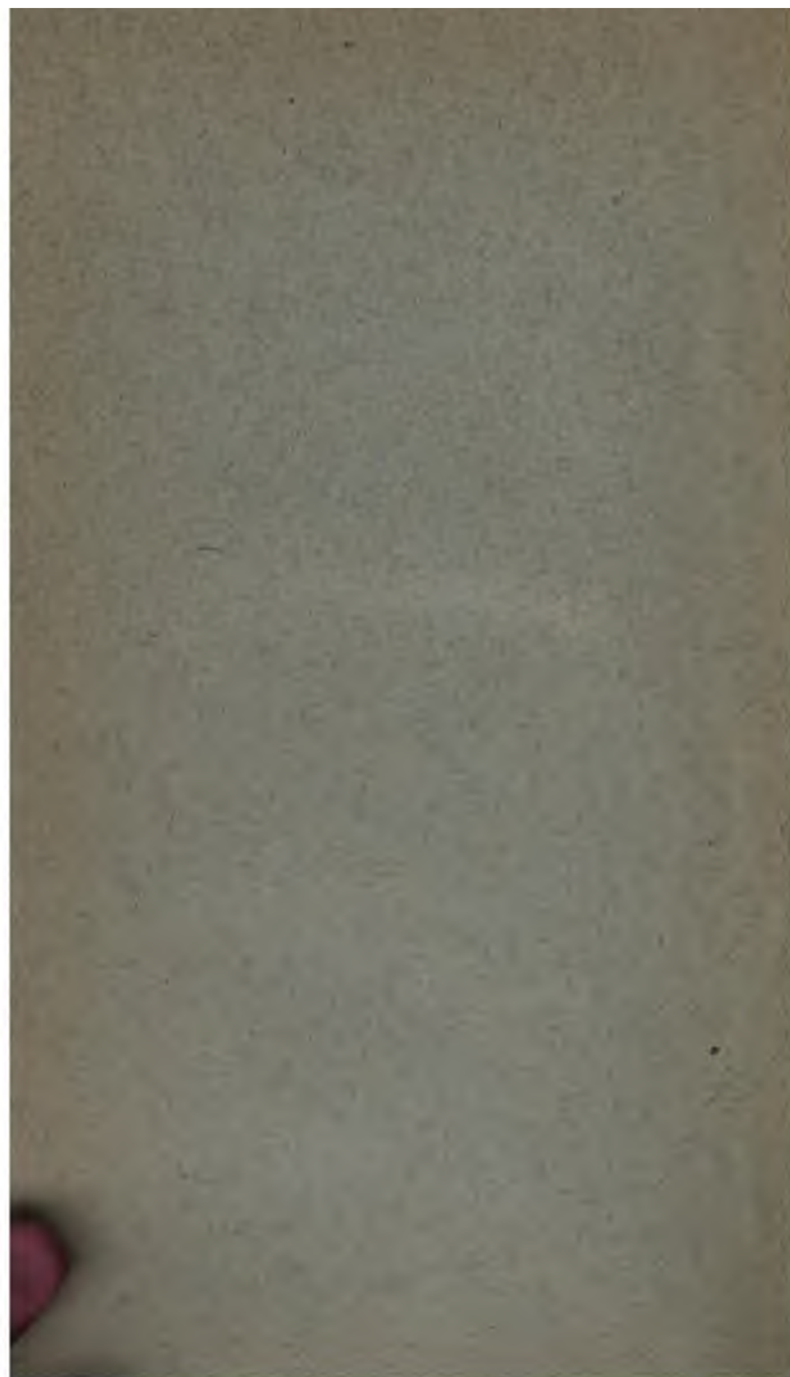
UNIVERSITY OF MICHIGAN

BY THE

HON. ALPHEUS FELCH.

1896.

350
R67



ELEMENTARY LAW.

69103

BY

WILLIAM C. ROBINSON, LL.D.

PROFESSOR OF ELEMENTARY LAW IN YALE COLLEGE.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1882.

Entered, according to Act of Congress, in the year 1882,
By William C. Robinson,
In the Office of the Librarian of Congress at Washington.

University Press:
John Wilson and Son, Cambridge.

TO

HENDRICK BRADLEY WRIGHT,

OF PENNSYLVANIA,

IN REMEMBRANCE OF HIS KINDNESS AS AN INSTRUCTOR

AND HIS FIDELITY AS A FRIEND,

THIS TREATISE

IS

RESPECTFULLY INSCRIBED.

PREFACE.

This work is intended to serve three purposes: (1) To form a text-book for the use of students in law-schools, and of others who are under competent instruction; (2) To guide private students in their investigation of the rules and definitions of the law; (3) To render students familiar with some of the leading treatises upon the principal topics of the law.

An experience of several years, in the direction of legal studies, has convinced the author, that the progress of the student, in the different branches of the law, is vastly facilitated by a previous examination of those branches collectively, and with reference to their relations to each other. In order to provide the means of thoroughly and quickly making this examination, he has, therefore, endeavored to bring together, in this narrow compass, the elementary principles and doctrines of the law, exhibiting them in their logical and practical connections with each other, and thus acquainting the student, at the outset of his labors, with the nature and scope of the science, which he is afterwards to master in detail.

The benefits, hitherto resulting to the members of the Law Department of Yale College from this introduction to their severer studies, inspires the author with the hope that his work may prove serviceable to many, who pursue their professional researches under the auspices of other Schools of Law.

Regarding this treatise as a manual for the use of students, the author has adopted a style as didactic and concise as possible. Nearly every sentence is intended to be an answer to a question, and to embody some maxim, principle, or definition. Illustrations, as well as explanations, have generally been omitted, the student having access to such aids in the text-books to which he is constantly referred. Conjectures, and expressions of private opinion, have also been scrupulously avoided, and the beaten track of authority has been followed, as nearly as the author could himself discern it. If he has made any mistake therein, it is his consolation that the careful student will correct the error, by an examination of the works, to which the readings continually direct him.

In the preparation of this manual, the author has also had in mind the wants of those students, who, deprived of the advantages of a law-school, and, possibly, of every other mode of instruction worthy ot the name, are endeavoring, in private, to acquire a knowledge of the law. Hence, in selecting and arranging the collateral readings, he has attempted not merely to direct attention to those passages,

which support or illustrate the positions taken in the text, but to map out, by means of these readings, a complete course of study on the several branches of the law, and, as far as possible, to present those branches in their historical development as well as in their present condition. This will be especially apparent in respect to the subjects of Real Property and Criminal Law.

In the use of this treatise by the private student, the following method should be pursued. The text should first be thoroughly mastered, the rules and definitions being *committed to memory*, and the authorities referred to being examined, as far as may be necessary to an understanding of the principle stated in the text. Then, beginning once more with the Introduction, each paragraph, with its accompanying readings, should be carefully studied, *in the order given*, so far as access can be had to the text-books therein named. Pursuing this method, even the unassisted student, with limited library facilities, may hope to acquire, within a reasonable period of time, an extensive and systematic knowledge of the law.

Another, and by no means unimportant, object of this work is to familiarize the student with some of the leading treatises on the different branches of the law. Treatises are to the student, as well as to the lawyer, the "tools of his trade," and one of the necessities of an accomplished student or practitioner is the ability to refer readily to authority, upon the

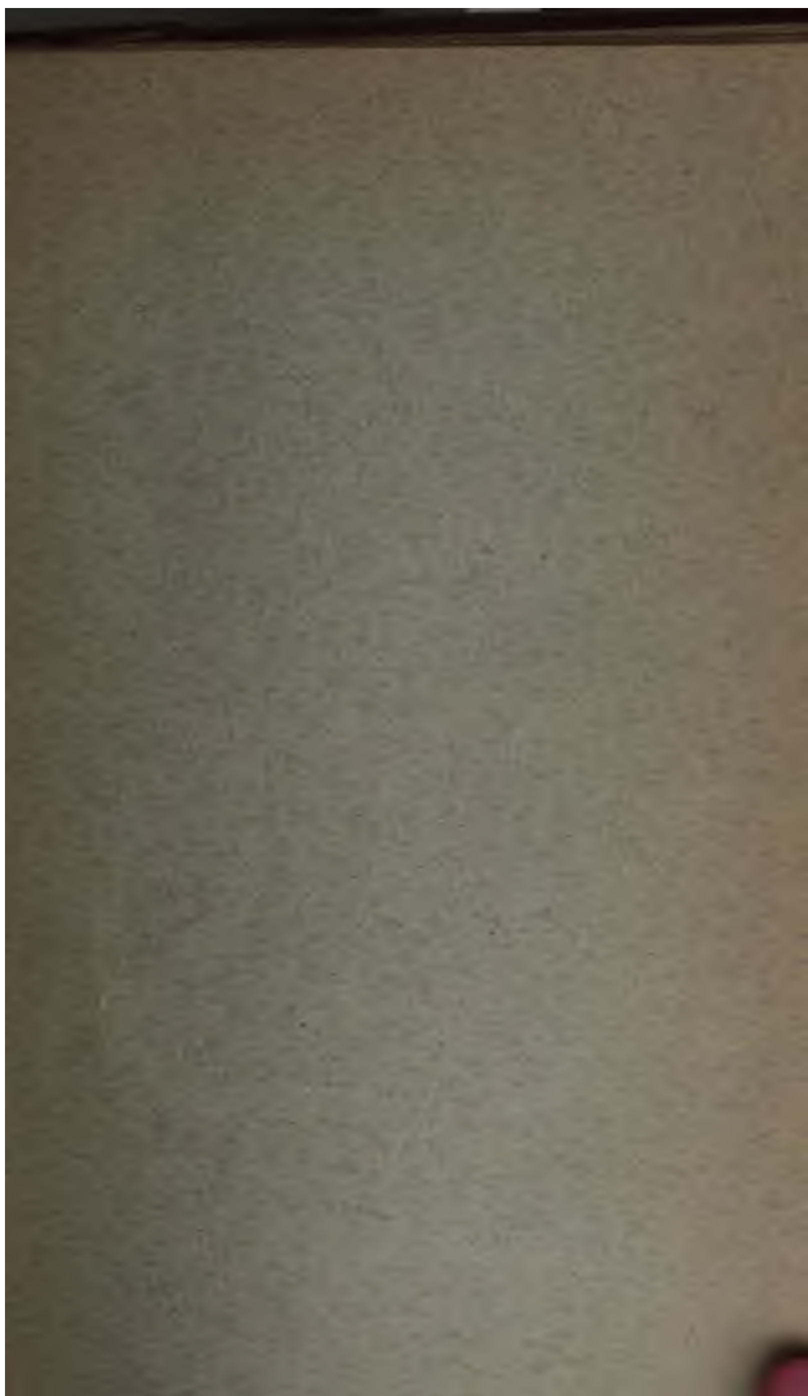


TABLE OF REFERENCES.

REFERENCES.	TEXT-BOOK.	EDITION.	MODE OF REFERENCE.
Abbot U. S. Prac.	Abbot on United States Courts and their Practice.	N. Y., 1869.	Top paging.
Adams Eq. Jur.	Adams' Doctrine of Equity.	Philada., 1855.	Side paging.
Addison Torts.	Addison on the Law of Torts.	N. Y., 1876.	Sections.
Angell and Ames Corp.	Angell and Ames on the Law of Private Corporations.	Boston, 1871.	Sections.
Arch. Cr. Pr.	Archbold on Criminal Procedure. Waterman's notes.	N. Y., 1860.	Top paging.
Austin Jur.	Austin's Lectures on Jurisprudence.	London, 1869.	Lectures.
B. & H. L. C. C.	Bennett and Heard's Leading Criminal Cases.	Boston, 1869.	Top paging.
Bac. Abr.	Bacon's New Abridgment of the Law. Gwillim's notes.	London, 1798.	Titles.
Bigelow L.C. Torts.	Bigelow's Leading Cases on the Law of Torts.	Boston, 1875.	Top paging.
Bish. C. L.	Bishop on Criminal Law.	Boston, 1877.	Sections.
Bish. C. P.	Bishop on Criminal Procedure.	Boston, 1880.	Sections.
Bishop First Book of Law.	Bishop's First Book of the Law.	Boston, 1868.	Chapters.
Bish. Mar. and Div.	Bishop on Marriage and Divorce.	Boston, 1881.	Chapters.
Bl. Comm.	Blackstone's Commentaries.	Philada., 1861.	Side paging.
Bliss Code Pl.	Bliss on Code Pleading.	St. Louis, 1879.	Sections.
Broom Comm.	Broom's Commentaries on the Common Law.	Philada., 1873.	Side paging.
Broom Leg. Max.	Broom's Legal Maxims.	Philada., 1868.	Side paging.
Burlamaqui.	Burlamaqui on Natural and Political Law.	Philada., 1832.	Top paging.
Burrill Circ. Ev.	Burrill on Circumstantial Evidence.	N. Y., 1859.	Top paging.

REFERENCES.	TEXT-BOOK.	EDITION.	MODE OF REFERENCE.
Chitty C. L.	Chitty on Criminal Law.	Philada., 1819.	Side paging.
Chitty Gen. Prac.	Chitty on the Practice of the Law, commonly called Chitty's General Practice.	Philada., 1834.	Top paging.
Chitty Pl.	Chitty on Pleading.	Springf'ld, 1859.	Side paging.
Com. Dig.	Comyns' Digest of the Laws of England.	N. Y., 1824.	Titles.
Conn.	Connecticut Reports.		Top paging.
Cooley Const. Lim.	Cooley on Constitutional Limitations.	Boston, 1878.	Side paging.
Cooley Const. Law.	Cooley on General Principles of Constitutional Law.	Boston, 1880.	Top paging.
Cooley Torts.	Cooley on the Law of Torts.	Chicago, 1880.	Top paging.
Cruise Dig.	Cruise's Digest of the Laws of England respecting Real Property.	N. Y., 1827.	Chapters.
Curtis U. S. Courts.	Curtis on Jurisdiction, &c. of the Courts of U. S.	Boston, 1880.	Top paging.
Cushing Leg. Assemb.	Cushing's Law of Legislative Assemblies.	Boston, 1866.	Top paging.
Dal.	Dallas' United States and Pennsylvania Reports.	Philada., 1798.	Top paging.
Daniell Ch. Pr.	Daniell's Pleading and Practice in Chancery.	Boston, 1865.	Top paging.
Dillon Mun. Cor.	Dillon on the Law of Municipal Corporations.	Boston, 1881.	Sections.
Drake Attachment.	Drake on Attachment.	Boston, 1873.	Sections.
Federalist.	Federalist.	Hallowell, 1857.	Numbers.
Frothingham Rise Rep.	Frothingham's Rise of the Republic.	Boston, 1872.	Top paging.
Gould Pl.	Gould on the Principles of Pleading.	Albany, 1861.	Chapters.
Graham and Waterman N. T.	Graham and Waterman on Law of New Trials.	N. Y., 1855.	Top paging.
Greenl. on Ev.	Greenleaf on the Law of Evidence.	Boston, 1876.	Sections.
H. P. C.	Hale on the History of the Pleas of the Crown.	Philada., 1847.	Side paging.
High Ex. Leg. Rem.	High on Extraordinary Legal Remedies.	Chicago, 1874.	Chapters.
High Inj.	High on the Law of Injunctions.	Chicago, 1874.	Sections.
High Receivers.	High on the Law of Receivers.	Chicago, 1876.	Sections.
Hill. Rem.	Hilliard on Remedies for Torts.	Boston, 1873.	Chapters.
Hill. Torts.	Hilliard on the Law of Torts.	Boston, 1866.	Chapters.

REFERENCES.	TEXT-BOOK.	EDITION.	MODE OF REFERENCE.
Hurd Hab. Corp.	Hurd on Habeas Corpus.	Albany, 1876.	Chapters.
Jameson Const. Conv.	Jameson on Constitutional Convention.	N. Y., 1867.	Sections.
Jarman Wills.	Jarman on Wills. Bigelow's Edition.	Boston, 1881.	Chapters.
Kent Comm.	Kent's Commentaries on American Law.	Boston, 1860.	Lectures and side paging.
Kerr Inj.	Kerr on Injunctions.	Boston, 1871.	Side paging.
McFarland's case.	Ibid.	N. Y., 1870.	Volume.
Mitford and Tyler Eq. Pl.	Mitford's and Tyler's Chancery Pleadings.	N. Y., 1876.	Top paging.
Moses on Mandamus.	Ibid.	Albany, 1867.	Chapters.
Pars. Cont.	Parsons on the Law of Contracts.	Boston, 1873.	Chapters.
Pars. Mar. Law.	Parsons on Maritime Law.	Boston, 1859.	Chapters.
Pet.	Peters' Reports Supreme Ct. of United States.		Top paging.
Pomeroy Mun. Law.	Pomeroy's Introduction to Municipal Law.	N. Y., 1865.	Sections.
Pomeroy Rem.	Pomeroy's Remedies and Remedial Rights.	Boston, 1876.	Sections.
Potter Corp.	Potter on Corporations.	N. Y., 1881.	Sections.
Potter's Dwarris on Stat.	Dwarris on Statutes. Potter's Notes.	Albany, 1871.	Top paging
Redfield Wills.	Redfield on the Law of Wills.	Boston, 1866.	Chapters.
Reeve Dom. Rel.	Reeve on the Law of Baron and Femme, commonly called Reeve's Domestic Relations.	Albany, 1867.	Side paging
Rev. Stat. U. S. 1878.	Revised Statutes of the United States.	Washing'n, 1878.	Titles.
Root.	Root's Connecticut Reports.	Hartford, 1798.	Top paging.
Russ. Cr.	Russell on Crimes and Misdemeanors.	Philada., 1857.	Side paging.
Russ. and Ry.	Russell and Ryan's Crown Cases.	Philada., 1839.	Side paging.
Sedgwick on Stat. and Const. Law.	Sedgwick on Statutory and Constitutional Law.	N. Y., 1857.	Top paging.
Schouler Dom. Rel.	Schouler on the Law of the Domestic Relations.	Boston, 1870.	Top paging.
Shep. Touchstone.	Sheppard's Touchstone.	Dublin, 1785.	Chapters.
Smith L. C.	Smith's Leading Cases.	Philada., 1847.	Cases.
Starkie Ev.	Starkie on Evidence. Sharswood's Notes.	Philada., 1860.	Side paging.
Stephen Ev.	Stephen on Evidence.	Chicago, 1879.	Chapters.
Stephen Pl.	Stephen on Pleading.	Philada., 1867.	Side paging.
Story Const.	Story on the Constitution.	Boston, 1873.	Sections.
Story Eq. Jur.	Story's Equity Jurisprudence.	Boston, 1846.	Sections.

REFERENCES.	TEXT-BOOK.	EDITION.	MODE OF REFERENCE.
Story Eq. Pl.	Story's Equity Pleadings.	Boston, 1840.	Sections.
Swift Dig.	Swift's Digest of the Laws of Connecticut.	N. Haven, 1862.	Side paging.
Tidd Prac.	Tidd's Practice.	Philada., 1828.	Side paging.
Vattel.	Vattel's Law of Nations.	Dublin, 1792.	Sections.
Walker Am. Law.	Walker's American Law.	Boston, 1878.	Sections.
Washb. R. P.	Washburn on the American Law of Real Property.	Boston, 1876.	Chapters.
Whart. C. L.	Wharton on Criminal Law.	Philada., 1874.	Sections.
Willard Eq. Jur.	Willard on Equity Jurisprudence.	N. Y., 1875.	Side paging.
Will. P. P.	Williams on the Law of Personal Property, 61 and 62 Law Library.	Philada., 1848.	Side paging.
Will. R. P.	Williams on the Law of Real Property.	Philada., 1866.	Side paging.
Wilson.	Lectures on Law in Works of James Wilson.	Philada., 1804.	Top paging.
Woolsey Int. Law.	Woolsey on International Law.	N. Y., 1879.	Sections.

TABLE OF CONTENTS.

INTRODUCTION.

§ 1. Of Law in General.
2. Of International and Municipal Law.
3. Of Federal and State Law.
4. Of Unwritten and Written Law.
5. Of the Unwritten Law of the United States.
6. Of the Development of the Unwritten Law.
7. Of Maxims, Definitions, and Judicial Decisions.
8. Of the Written Law of the United States.
9. Of Statutes.
10. Of Public and Private Statutes.
11. Of Declaratory and Remedial Statutes.
12. Of Affirmative and Negative Statutes.
13. Of the Interpretation and Application of Law.
14. Of the Interpretation of Statutes.
15. Of the Object of Law.
16. Of Rights and Wrongs.
17. Of Natural Persons.
18. Of Artificial Persons. Corporations.
19. Of Aggregate and Sole Corporations.
20. Of Public and Private Corporations.
21. Of Equity.
22. Of Maritime Law.

BOOK I.

OF PRIVATE RIGHTS.

§ 23. Of Absolute Rights.
24. Of Relative Rights.

CHAPTER I.

OF THE RIGHT OF PERSONAL SECURITY.

§ 25. Of Life.
26. Of the Limbs.
27. Of the Body.
28. Of Health.
29. Of Reputation.
30. Of the Rights of the State over the Person of the Subject.
31. Of the Methods by which the Law Protects Life, Limbs, and Body.
32. Of the Methods by which the Law Protects Health.
33. Of the Methods by which the Law Protects Reputation.

CHAPTER II.

OF THE RIGHT OF PERSONAL LIBERTY.

§ 34. Of Freedom and Imprisonment.
35. Of the Rights of the State over the Liberty of the Subject.
36. Of the Methods by which the Law Protects Personal Liberty.

CHAPTER III.

OF THE RIGHT OF PRIVATE PROPERTY.

§ 37. Of the Right of Property.
38. Of Property in General.
39. Of Corporeal Property.
40. Of Incorporeal Property.
41. Of Real Property.
42. Of Personal Property.

§ 43. Of Fixtures.
44. Of Corporeal Real Property. Land.
45. Of Incorporeal Real Property. Incorporeal Hereditaments.
46. Of Advowsons.
47. Of Tithes.
48. Of Commons.
49. Of Ways.
50. Of Offices.
51. Of Dignities.
52. Of Franchises.
53. Of Corodies and Pensions.
54. Of Annuities.
55. Of Rents.
56. Of Incorporeal Hereditaments in the United States.
57. Of Easements of Support, Water, Light, Air, Party-Walls, Wharves, &c.
58. Of Corporeal Personal Property.
59. Of Incorporeal Personal Property.
60. Of Estates.
61. Of the Ownership and Transfer of Estates.
62. Of Real and Personal Estates.
63. Of Legal and Equitable Estates.

CHAPTER IV.

OF ESTATES IN REAL PROPERTY.

§ 64. Of the Attributes of Estates in Real Property.
65. Of Real and Personal Estates in Real Property.
66. Of Ancient Manors.
67. Of Feudal Services.
68. Of Feudal Estates for Life.
69. Of Estates of Freehold and Less than Freehold.
70. Of the Seisin of Freehold Estates.
71. Of the Seisin during the Existence of Estates Less than Freehold. Disseisin.
72. Of the Seisin of Concurrent Freehold Estates.
73. Of Legal Presumptions as to Seisin and Freehold.
74. Of Seisin in Fact and Seisin in Law.

§ 75. Of Livery of Seisin.
76. Of Freeholds *in Futuro*.
77. Of Uses.
78. Of the Statute of Uses.
79. Of Trusts.
80. Of the Effect of the Statute of Uses on Livery of Seisin.
81. Of the Effect of the Statute of Uses on Freeholds *in Futuro*.
82. Of "Livery" and "Grant."
83. Of the Possession of Estates Less than Freehold.
84. Of Entry.

CHAPTER V.

OF REAL ESTATES IN REAL PROPERTY.

§ 85. Of Freehold Estates in General.
86. Of Estates in Fee-Simple.
87. Of Estates in Fee-Tail.
88. Of Estates for Life.
89. Of the Creation of Estates for Life.
90. Of Estates Tail after Possibility of Issue Extinct.
91. Of Estates by Curtesy.
92. Of Estates in Dower.
93. Of the Incidents of Estates for Life.

CHAPTER VI.

OF PERSONAL ESTATES IN REAL PROPERTY.

§ 94. Of Estates for Years.
95. Of Estates at Will.
96. Of Estates from Year to Year.
97. Of Estates by Sufferance.

CHAPTER VII.

OF THE TENURE OF ESTATES IN REAL PROPERTY.

§ 98. Of Feudal Tenures.
99. Of Tenures in the United States.

§ 100. Of Absolute and Conditional Estates.
101. Of Express and Implied Conditions.
102. Of Precedent and Subsequent Conditions.
103. Of Conditional Limitations.
104. Of the Transfer of Conditional Estates.

CHAPTER VIII.

OF THE TIME OF THE ENJOYMENT OF ESTATES IN REAL PROPERTY.

§ 105. Of the Enjoyment of Estates.
106. Of Estates in Expectancy. Reversions. Remainders. Executory Interests.
107. Of the Distinctions between Reversions, Remainders, and Executory Interests.
108. Of Estates in Reversion.
109. Of Vested Remainders.
110. Of Contingent Remainders.
111. Of the Alienation of Remainders.
112. Of Executory Interests. Rule against Perpetuities.

CHAPTER IX.

OF THE NUMBER AND CONNEXION OF THE TENANTS IN ESTATES IN REAL PROPERTY.

§ 113. Of Joint and Several Estates.
114. Of Estates in Severalty.
115. Of Estates in Joint-Tenancy. The Four Unities.
116. Of Estates in Joint-Tenancy. Survivorship.
117. Of the Incidents of Estates in Joint-Tenancy.
118. Of the Alienation of Estates in Joint-Tenancy.
119. Of the Destruction of Estates in Joint-Tenancy.
120. Of Estates in Common.
121. Of the Creation of Estates in Common. Coparcenary.
122. Of the Incidents and Destruction of Estates in Common.

CHAPTER X.

OF THE TITLE TO ESTATES IN REAL PROPERTY.

§ 123. Of Title. Title by Descent. Title by Purchase.
124. Of Consanguinity.
125. Of the Whole Blood and Half Blood.
126. Of the Rules of Descent.
127. Of Title by Purchase.
128. Of Title by Escheat.
129. Of Title by Accretion. Alluvion. Avulsion.
130. Of Title by Abandonment.
131. Of Title by Forfeiture.
132. Of Title by Prescription.
133. Of Title by Possession.
134. Of Title by Marriage.
135. Of Title by Execution.
136. Of Title by Judicial Decree.
137. Of Title by Eminent Domain.
138. Of Title by Grant and Devise.
139. Of Title by Public Grant.
140. Of Title by Private Grant. Deeds.
141. Of Indentures and Deeds-Poll.
142. Of Original and Derivative Deeds.
143. Of Deeds in the United States.
144. Of the Parts of a Deed.
145. Of the Construction of Deeds.
146. Of the Execution of Deeds.
147. Of the Delivery of Deeds.
148. Of a Will of Lands.
149. Of the Revocation of Wills.
150. Of the Construction of Wills.
151. Of Devisable Estates.

CHAPTER XI.

OF ESTATES IN PERSONAL PROPERTY.

§ 152. Of Chattels. Chattels Real. Chattels Personal.
153. Of Chattels Personal. Choses in Possession and in Action.

§ 154. Of Estates in Chattels Personal.
155. Of Qualified Estates in Chattels Personal.
156. Of the Tenure, Time, and Tenancy of Estates in Chattels Personal.

CHAPTER XII.

OF THE TITLE TO ESTATES IN PERSONAL PROPERTY.

§ 157. Of Title by Prerogative.
158. Of Title by Forfeiture.
159. Of Title by Succession.
160. Of Title by Marriage.
161. Of Title by Judicial Decree.
162. Of Title by Occupancy.
163. Of Title by Accession and Confusion.
164. Of Title by Creation.
165. Of Title by Gift.
166. Of Title by Testament.
167. Of the Requisites of a Testament.
168. Of Title by Contract.
169. Of the Parties to a Contract.
170. Of the Consideration of Contracts.
171. Of the Subject-Matter of Contracts.
172. Of the "Meeting of the Minds."
173. Of Oral and Written Contracts. Statute of Frauds.
174. Of Express and Implied Contracts.
175. Of Executed and Executory Contracts.
176. Of the Validity and Construction of Contracts.
177. Of Contracts of Sale.
178. Of Contracts of Bailment.
179. Of Contracts of Agency.
180. Of Contracts of Partnership.
181. Of Contracts of Insurance.
182. Of Contracts of Indorsement. Bills and Notes.
183. Of Contracts of Guaranty and Suretyship.
184. Of Collateral Contracts. Debt. Warranty.

CHAPTER XIII.

OF THE RIGHTS ARISING FROM THE RELATION OF HUSBAND AND WIFE.

§ 185. Of the Contract of Marriage.
186. Of the Parties, Consideration, and Subject-Matter of the Contract of Marriage.
187. Of the Form of the Contract of Marriage.
188. Of Divorce.
189. Of the Merger of the Legal Existence of the Wife in that of the Husband.
190. Of the Rights of the Husband over the Wife.
191. Of the Duties of the Husband toward the Wife.

CHAPTER XIV.

OF THE RIGHTS ARISING FROM THE RELATION OF PARENT AND CHILD.

§ 192. Of Legitimate and Illegitimate Children.
193. Of the Rights of Parents over Legitimate Children.
194. Of the Duties of Parents toward Legitimate Children.
195. Of the Duties of Parents toward Illegitimate Children.
196. Of the Reciprocal Rights and Duties of Parents and their Adult Children.

CHAPTER XV.

OF THE RIGHTS ARISING FROM THE RELATION OF GUARDIAN AND WARD.

§ 197. Of Guardian and Ward.
198. Of Guardians by Nature.
199. Of Guardians by Appointment.
200. Of the Reciprocal Rights and Duties of Guardians and Wards.
201. Of the Management of the Ward's Estate by the Guardian.
202. Of the Cessation of the Relation of Guardian and Ward.

CHAPTER XVI.

OF THE RIGHTS ARISING OUT OF THE RELATION OF MASTER AND SERVANT.

§ 203. Of Master and Servant.
204. Of Apprentices.
205. Of Hired Servants.
206. Of Menials.
207. Of Agents.
208. Of Factors and Brokers.
209. Of Auctioneers.
210. Of Attorneys in Fact.
211. Of Attorneys at Law.

BOOK II.

OF PRIVATE WRONGS.

§ 212. Of the Nature of a Private Wrong.

CHAPTER I.

OF WRONGS WHICH VIOLATE THE RIGHTS OF PERSONAL SECURITY AND PERSONAL LIBERTY.

§ 213. Of Menaces and Assaults.
214. Of Battery, Wounding, and Mayhem.
215. Of Nuisances to Health.
216. Of Libel.
217. Of Slander.
218. Of Malicious Prosecution.
219. Of False Imprisonment.

CHAPTER II.

OF WRONGS WHICH VIOLATE THE RIGHT OF PRIVATE PROPERTY.

§ 220. Of Disseisin.
221. Of Abatement, Intrusion, Discontinuance, and Deforcement.

§ 222. Of Trespass *Quare Clausum.*
223. Of Nuisances to Property.
224. Of Waste.
225. Of Disturbance.
226. Of the Asportation and Detention of Choses in Possession.
227. Of Injuries to Choses in Possession.
228. Of Breaches of Contract.
229. Of Fraud.
230. Of Conspiracy.

CHAPTER III.

OF WRONGS WHICH VIOLATE RELATIVE RIGHTS.

§ 231. Of Wrongs Committed against Each Other by the Parties to a Relation.
232. Of Wrongs Committed by Third Persons against the Parties to a Relation.
233. Of the Abduction of a Wife.
234. Of Criminal Conversation.
235. Of the Battery of a Wife.
236. Of the Abduction of a Child.
237. Of the Abduction of a Ward.
238. Of Retainer.
239. Of the Battery of a Servant.
240. Of Seduction.
241. Of Wrongs against Persons *in Loco Parentis.*

CHAPTER IV.

OF LEGAL REMEDIES.

§ 242. Of the Nature of Legal Remedies.
243. Of Cases where the Law Refuses to Apply its Remedies.
244. Of Self-Defence.
245. Of Recaption.
246. Of Entry.
247. Of Abatement.

§ 248. Of Distress.
249. Of Accord and Satisfaction.
250. Of Arbitration.
251. Of Retainer.
252. Of Remitter.
253. Of Actions at Law.
254. Of Real Actions.
255. Of Mixed Actions. Ejectment.
256. Of Personal Actions.
257. Of Trespass.
258. Of Trespass on the Case.
259. Of Trover.
260. Of Replevin.
261. Of Detinue.
262. Of Assumpsit. Implied Contracts.
263. Of Debt.
264. Of Covenant.
265. Of Account.
266. Of Scire Facias.
267. Of Foreign Attachment.
268. Of Mandamus.
269. Of Prohibition.
270. Of Quo Warranto.
271. Of Habeas Corpus.

CHAPTER V.

OF THE PROCEEDINGS IN AN ACTION AT LAW.

§ 272. Of the Courts of Law and Equity.
273. Of Judges, Clerks, Sheriffs, and Juries.
274. Of Causes and Parties.
275. Of Plaintiffs in Actions *Ex Contractu*.
276. Of Plaintiffs in Actions *Ex Delicto*.
277. Of Defendants in Actions *Ex Contractu*.
278. Of Defendants in Actions *Ex Delicto*.
279. Of the Nature, Kinds, and Service of Process.
280. Of the Return of Process. Appearance.
281. Of Pleadings.

§ 282. Of the Classes and Order of Pleadings.
283. Of Demurrer. Traverse. Confession and Avoidance.
284. Of the Jurisdiction of Courts.
285. Of Pleas to the Jurisdiction.
286. Of Pleas in Abatement.
287. Of the Declaration, Pleas in Bar, and Subsequent Pleadings.
288. Of Code Pleading.
289. Of Issues and Trial.
290. Of the Jury. Challenges.
291. Of Direct and Circumstantial Evidence.
292. Of Material and Relevant Facts.
293. Of Facts Judicially Noticed.
294. Of Written and Oral Evidence.
295. Of Primary and Secondary Evidence.
296. Of Depositions.
297. Of Subpœnas. Subpœnas Duces Tecum.
298. Of the Competency of Witnesses.
299. Of Confidential Communications.
300. Of Hearsay Evidence.
301. Of the Examination of Witnesses.
302. Of the Burden of Proof.
303. Of Presumptions.
304. Of the Charge of the Judge.
305. Of the Deliberations of the Jury.
306. Of the Verdict.
307. Of New Trials.
308. Of Arrest of Judgment.
309. Of Judgments.
310. Of Audita Querela.
311. Of Writs of Error.
312. Of the Nature, Kinds, and Service of Executions.

CHAPTER VI.

OF EQUITABLE REMEDIES.

§ 313. Of Prohibitory and Mandatory Injunctions.
314. Of Temporary and Perpetual Injunctions.
315. Of Injunctions against Fraud.

§ 316. Of Injunctions against Irreparable Injury to Property.
317. Of Injunctions against Injuries to Health and Comfort.
318. Of Injunctions against Injuries to Relative Rights.
319. Of the Specific Performance of Contracts.
320. Of the Rescission of Contracts.
321. Of the Correction of Mistakes.
322. Of the Interpretation of Contracts.
323. Of Relief against Fraud.
324. Of Account, Equitable Assignment, and Interpleader.
325. Of the Redemption and Foreclosure of Mortgages.
326. Of the Separate Maintenance and Separate Property of Married Women.
327. Of Receivers.
328. Of Trusts.
329. Of the Perpetuation of Testimony.
330. Of Discovery.
331. Of Enforcing or Setting Aside Awards.
332. Of Enforcing Judgments at Law.
333. Of General Equitable Relief.

CHAPTER VII.

OF PROCEEDINGS IN EQUITY.

§ 334. Of Bills.
335. Of Process.
336. Of Appearance.
337. Of Demurrers.
338. Of Pleas.
339. Of Answers.
340. Of Replication. Amendments.
341. Of Trial and Evidence.
342. Of Decrees.
343. Of Bills of Review.

BOOK III.

OF PUBLIC RIGHTS.

§ 344. Of the Nature of Public Rights.

CHAPTER I.

OF THE NATURE AND FUNCTIONS OF A STATE.

§ 345. Of the State.
346. Of the Formation of the United States.
347. Of the Dissolution of the State.
348. Of the Supreme Power of the People.
349. Of the Functions of the State. Government.
350. Of the Government of the United States.
351. Of the Legislative Function.
352. Of the Executive Function.
353. Of Subordinate Executive Officers.
354. Of the Judicial Function. The Supreme Court.
355. Of the Circuit Courts.
356. Of the District Courts.
357. Of the Courts of the Individual States.
358. Of the Exercise of Judicial Functions.
359. Of Officers *De Jure* and *De Facto*.

CHAPTER II.

OF SUBJECTS AND THEIR RELATIONS TO THE STATE.

§ 360. Of Subjects.
361. Of Allegiance.
362. Of Native-Born Citizens.
363. Of Naturalized Citizens.
364. Of Naturalization.
365. Of Aliens.
366. Of Citizens of the Individual States.

CHAPTER III.

OF THE RIGHTS OF A STATE OVER ITS SUBJECTS.

§ 367. Of the Rights of States in General over their Subjects.
368. Of the Rights of the United States over their Subjects.
369. Of Obedience to the State.
370. Of Military Service.

§ 371. Of Eminent Domain.
372. Of Taxes.

CHAPTER IV.

OF THE RIGHTS OF THE SUBJECT IN OR AGAINST THE STATE.

§ 373. Of the Duties of States in General to their Subjects.
374. Of Protection against Wrongs from Co-Subjects.
375. Of Protection against Wrongs from the State.
376. Of Protection against Wrongs from Foreign States.
377. Of the Redress of Wrongs Committed by Co-Subjects.
378. Of the Redress of Wrongs Committed by the State.
379. Of the Redress of Wrongs Committed by Foreign States.
380. Of the Duties of the State toward Citizens and Aliens.
381. Of the Duties of the United States toward their Subjects.

BOOK IV.

OF PUBLIC WRONGS.

§ 382. Of Torts and Crimes.
383. Of the Legal Separation of Torts and Crimes.
384. Of the Definitions of Crime.

CHAPTER I.

OF THE ELEMENTS OF CRIME.

§ 385. Of Criminal Act and Criminal Intent.
386. Of Specific Intent.
387. Of Drunkenness as Affecting Intent.
388. Of Infancy as Affecting Intent.
389. Of Insanity as Affecting Intent.
390. Of Mistake as Affecting Intent.
391. Of Accident as Affecting Intent.
392. Of Necessity as Affecting Intent.
393. Of Compulsion as Affecting Intent.

CHAPTER II.

OF THE DEGREES OF CRIME.

§ 394. Of Treason.
395. Of Felony.
396. Of Common Law and Statute Felonies.
397. Of Misdemeanors.

CHAPTER III.

OF TREASON.

§ 398. Of the Nature of Treason.
399. Of Ancient Common Law Treasons.
400. Of Treason against the United States. Levying War.
401. Of Treason against the United States. Adhering to the Public Enemy.
402. Of Treason against an Individual State.
403. Of the Necessity of an Overt Act.
404. Of Alienage as Affecting Treason.
405. Of Misprision of Treason.

CHAPTER IV.

OF FELONIES AGAINST THE PERSONS OF INDIVIDUALS.

§ 406. Of Murder. The Person Killing.
407. Of Murder. The Person Killed.
408. Of Murder. The Act of Killing.
409. Of Murder. Justifiable and Excusable Killing.
410. Of Murder. Malice Express or Implied. Degrees.
411. Of the Presumption of Malice from the Unlawful Killing.
412. Of Manslaughter.
413. Of Voluntary Manslaughter.
414. Of Killing in Actual Combat.
415. Of Involuntary Manslaughter.
416. Of Rape. The Carnal Knowledge.
417. Of Rape. The Unlawful Carnal Knowledge.
418. Of Rape. The Want of Consent. Force.
419. Of Rape. The Evidence of the Complainant.

CHAPTER V.

OF FELONIES AGAINST THE PROPERTY OF INDIVIDUALS.

§ 420. Of Arson. The Burning.
421. Of Arson. The Unlawful Burning.
422. Of Arson. The House.
423. Of Arson. The Ownership of the House.
424. Of Burglary. The Breaking.
425. Of Burglary. The Entering.
426. Of Burglary. The House.
427. Of Burglary. The Ownership of the House.
428. Of Burglary. The Night Season.
429. Of Burglary. The Felonious Intent.
430. Of Larceny. The Taking and Carrying Away.
431. Of Larceny. The Property.
432. Of Larceny. The Ownership of the Property.
433. Of Larceny. The Felonious Intent.
434. Of Robbery. The Element of Larceny.
435. Of Robbery. The Person or Presence of the Owner.
436. Of Robbery. The Violence or Putting in Fear.

CHAPTER VI.

OF MISDEMEANORS AND STATUTE FELONIES.

§ 437. Of Statute-Felonies.
438. Of the Classes of Misdemeanors and Statute-Felonies.
439. Of Perjury.
440. Of Bribery.
441. Of Escape. Prison-Breach. Rescue.
442. Of Receiving Stolen Goods.
443. Of Compounding Crime.
444. Of Falsifying Records.
445. Of Obstructing Process.
446. Of Barratry.
447. Of Maintenance.
448. Of Champerty.
449. Of Conspiracy.
450. Of Embracery.

§ 451. Of Official Negligence.
452. Of Oppression
453. Of Extortion.
454. Of Misprision of Felony.
455. Of Riot. Rout. Unlawful Assembly.
456. Of Carrying Arms.
457. Of Challenging. Duelling.
458. Of Affray.
459. Of Disturbing Meetings.
460. Of Forcible Entry and Detainer.
461. Of Libel.
462. Of Cheating. Embezzlement. False Pretences.
463. Of Nuisances to Health.
464. Of Bigamy.
465. Of Blasphemy. Profanity.
466. Of Public Nuisances.
467. Of Assault. Battery. Mayhem.
468. Of False Imprisonment. Kidnapping.
469. Of Forgery.
470. Of Malicious Mischief.
471. Of Piracy.
472. Of Attempts.
473. Of Solicitations.

CHAPTER VII.

OF THE RELATION OF THE CRIMINAL ACTOR TO THE CRIMINAL ACT.

§ 474. Of Principals and Accessories.
475. Of Principals in the First Degree.
476. Of Principals in the Second Degree.
477. Of Accessories before the Fact.
478. Of Accessories after the Fact.

CHAPTER VIII.

OF CRIMINAL PROCEDURE.

§ 479. Of the Successive Steps in Criminal Procedure.
480. Of Arrest with Warrant.

§ 481. Of Arrest without Warrant.
482. Of Arrest by Hue and Cry.
483. Of the Act of Arrest.
484. Of Arrest on Requisition. Extradition.
485. Of the Return of the Warrant, and Proceedings Thereon.
486. Of Commitment.
487. Of Bail. Bail-Piece.
488. Of Informations.
489. Of Indictments. Grand-Jury.
490. Of Presentments.
491. Of the Requisites of an Indictment.
492. Of the Description of the Accused.
493. Of the Description of the Venue.
494. Of the Description of the Date of the Criminal Act.
495. Of the Description of the Person or Property Injured.
496. Of the Description of the Criminal Act. Technical Words.
497. Of the Joinder of Counts. Duplicity. Repugnancy. Uncertainty.
498. Of the Joinder of Offenders and Offences.
499. Of Process.
500. Of Arraignment. Standing Mute.
501. Of Counsel. Guardian ad Litem. Motion to Quash.
502. Of the Plea of Guilty.
503. Of Pleas to the Jurisdiction.
504. Of Pleas in Abatement.
505. Of Demurrers.
506. Of the Plea of Former Conviction.
507. Of the Plea of Former Acquittal.
508. Of the Plea of Pardon.
509. Of the Plea of Not Guilty.
510. Of Trial. Petit-Jury. Challenges.
511. Of Evidence in Criminal Causes.
512. Of the Arguments of Counsel.
513. Of the Charge of the Judge.
514. Of the Deliberations of the Jury. The Verdict.
515. Of Motion for a New Trial.
516. Of Motion in Arrest of Judgment.
517. Of Judgment.

§ 518. Of Writ of Error.
519. Of Pardon.
520. Of Execution.
521. Of Stay of Execution in Capital Cases on Account of Pregnancy or Insanity.
522. Of Execution in Capital Cases.

NOTE.

By the word State (spelled with a capital) is meant one of the States of the American Union. Spelled otherwise, it refers to political societies or states in general.

INTRODUCTION.

---

§ 1. Of Law in General.

Law, in its widest sense, is a rule of action, prescribed by a superior and which the inferior is bound to obey. *Law, in its technical sense*, is a rule of civil conduct, prescribed by competent political authority, commanding certain things as necessary to, and forbidding other certain things as inconsistent with, the peace and order of society.

Read 1 Bl. Comm., pp. 38–44.

§ 2. Of International and Municipal Law.

Law, in this latter sense, is of two kinds: International and Municipal. *International law* is that rule of civil conduct, which is prescribed by the common consent of Christian nations, and regulates their intercourse with one another. *Municipal law* is that rule of civil conduct, which is prescribed by the supreme power in a state, and regulates the intercourse of the state with its subjects and of those subjects with each other.

Read 1 Bl. Comm., pp. 44–58.
1 Kent Comm., Lect. i, pp. 1-4.
Woolsey Int. Law, § 5.

§ 3. Of Federal and State Law.

American municipal law is, as to its object, of two kinds: Federal and State. *Federal law* is that rule of civil conduct, which is prescribed by the supreme power in the United States, and regulates, in matters of a national character, the intercourse of the federal government with the people, and of the people with each other or with citizens of foreign states. *State law* is that rule of civil conduct, which is prescribed by the supreme power in each individual State, and regulates, in all matters not of a national character, the intercourse of such State with its own people and of its people among themselves.

Read Const. U. S., Art. i, Sec. 8, 10, Amend. ix, x.
1 Kent Comm., Lect. xi, p. 237, Lect. xviii, xix.
Cooley Const. Lim., p. 2.

§ 4. Of Unwritten and Written Law.

American municipal law is, as to its origin, of two kinds: Unwritten and Written. *Unwritten law* (known also as *customary law*, or *common law*) is that rule of civil conduct, which originated in the common wisdom and experience of society, in time became an established custom, and has finally received judicial sanction and affirmance in the decision of the courts of last resort. *Written law* is that rule of civil conduct, which has been prescribed directly, in so many words, by the supreme power of the state itself.

Read 1 Bl. Comm., pp. 62–67, 85.
Austin Jur., Lect. xxviii, xxix, xxx.
1 Kent Comm., Lect. xxi, p. 472.
Pomeroy Mun. Law, §§ 37–39.
Walker Am. Law, §§ 17, 18.

§ 5. Of the Unwritten Law of the United States.

The United States, as such, has no common, or unwritten, law; and when its courts are called upon to administer the principles of that law, they are guided by it as it exists in the State where the cause arose. In Louisiana, the Roman or Civil law is the source and depository of unwritten law. In the other States, the courts have assumed, or the legislatures or constitutions have declared, the written and unwritten law of England, as it existed at the Revolution, to be the common law of such States, so far as it was applicable to the situation of their people.

Read 1 Kent Comm., Lect. xxi, p. 473 and notes.
Bishop First Book of Law, B. ii, ch. 6 and notes.
1 Abbott U. S. Prac., pp. 195–197.
Wheaton *v.* Peters, 8 Pet., p. 591.
Van Ness *v.* Pacard, 2 Pet., p. 137.
Cooley Const. Lim., pp. 21–25.

§ 6. Of the Development of the Unwritten Law.

Unwritten law is constantly developing by the judicial recognition, as law, of customs hitherto unrecognized. That a custom may be so recognized it must be: (1) *Immemorial;* i. e. it must have existed for a sufficient period of time to have become established as a rule of action in that class of cases, of which it is henceforth to be regarded as the law; (2) *Continued;* i. e. it must not have been alternated with antagonistic customs, but must have been constantly applied whenever any of this class of cases has arisen; (3) *Peaceable;* i. e. it must not have been subject to contention or dispute, but have been acquiesced in by all the persons who were interested in such cases; (4) *Reasonable,* i. e. it must not be opposed to any fundamental principle of justice, nor, in its practical operation, be injurious to the public, or to that class of persons to whose

conduct it relates; (5) *Certain;* i. e. it must not, either in the rights which it confers or in the duties it imposes, be indefinite or open to conjecture, but must furnish, to all persons interested in such cases, a reliable and intelligible rule of action; (6) *Compulsory;* i. e. its observance must not have been optional with individuals, but it must have been regarded as obliging all those persons to whose actions it pertains; (7) *Consistent with other customs;* i. e. it must not contradict, or limit the observance of, any other judicially established custom by which this class of cases is already governed.

Read 1 Bl. Comm., pp. 75–79.
Austin Jur., Lect. xxviii, xxix, xxx.
1 Root, Preface, pp. xi–xiii.
Broom Comm., pp. 9–20.

§ 7. Of Maxims, Definitions, and Judicial Decisions.

Unwritten law has been expressed in maxims, definitions, and the judgments of the courts. *A maxim* is the short and formal statement of an established principle of law. More than two thousand of these maxims now exist, many of which are of great antiquity, and most of which are of the highest authority and value. *A definition* is an enumeration of the distinguishing characteristics of the act, the object, or the right defined. The principal definitions of the common law are very ancient, and are regarded by the courts with great respect. *A judicial decision* is either the recognition or affirmance of a rule of law, or the application of a known rule to a certain state of facts. In either case, it is the promulgation of a law; the former being its simple statement as a rule; the latter indicating its practical scope and obligation. These maxims, definitions, and judicial decisions are now contained in the

treatises and digests of the common law, and in those reports of adjudged cases, which, beginning with the Year Books in the reign of Edward II, have been continued to the present day.

Read 1 Bl. Comm., pp. 68–73.
1 Kent Comm., Lect. xxi, pp. 473–475, Lect. xxii, pp. 499–513.
Pomeroy Mun. Law, §§ 911–917.
Broom Leg. Max., Preface.

§ 8. Of the Written Law of the United States.

The written law of the United States consists of the Federal Constitution, the Acts of Congress, and the Treaties made by its authority. *The written law of the individual State* consists of its Constitution and its Statutes.

Read 1 Kent Comm., Lect. xx, pp. 447–454.
Cooley Const. Lim., pp. 2–4, 12.
Pomeroy Mun. Law, § 36.
Walker Am. Law, § 17.

§ 9. Of Statutes.

A statute is a rule of civil conduct, established and promulgated by the legislature according to the forms prescribed by the Constitution. Unless otherwise provided, it *takes effect* from the date of its enactment.

Read 1 Kent Comm., Lect. xx, pp. 447–459.
Cooley Const. Lim., pp. 130–132, 156–158.
Potter's Dwarris on Stat., pp. 169–173.
Sedgwick Stat. and Const. Law, pp. 81–84.

§ 10. Of Public and Private Statutes.

Statutes, as to the objects to which they relate, are of two kinds: Public and Private. *Public statutes* are those

which concern the government, or the public interest, or all persons, or the whole of any class of persons. Of all public statutes the courts of the same state take *judicial notice*, and, in a suit at law, the party claiming under them is not obliged to plead or prove them. All other statutes are *private statutes*, and, in a suit at law involving such statutes they must be both pleaded and proved. A statute, which is private in its nature, becomes a public statute in its effect, when so declared by the legislature.

Read 1 Bl. Comm., p. 86.
1 Kent Comm., Lect. xx, pp. 459, 460.
Bac. Abr., Statute F, L.
Potter's Dwarris on Stat., pp. 52–57.
Sedgwick Stat. and Const. Law, pp. 30–36.

§ 11. Of Declaratory and Remedial Statutes.

Statutes, as to their purpose, are of two kinds: Declaratory and Remedial. *Declaratory statutes* are those which are intended to remove a doubt as to the existence or effect of some rule of the unwritten law. *Remedial statutes* are those which are intended to extend or to restrain the operation of some existing rule of the unwritten law, or to establish a new rule of law.

Read 1 Bl. Comm., pp. 86, 87.
Potter's Dwarris on Stat., pp. 68–73.
Sedgwick Stat. and Const. Law, pp. 36–38.

§ 12. Of Affirmative and Negative Statutes.

Statutes, as to their form, are of two kinds: Affirmative and Negative. *Affirmative statutes* are those which are expressed in affirmative terms. Such statutes do not change or abrogate the rules of the unwritten law. Acts which would have been valid under the unwritten law, before

the passage of such a statute, will be of the same legal effect if performed after its passage; and the creation of a new right, by such a statute, does not modify the rights existing under the unwritten law. *Negative statutes* are those which, either by their words or by necessary implication, express a negative. Against such statutes the rules of the unwritten law are of no force whatever.

Read Bac. Abr., Statute G.
Potter's Dwarris on Stat., pp. 68–72.
Sedgwick Stat. and Const. Law, pp. 38-41.

§ 13. Of the Interpretation and Application of Law.

In the interpretation and application of a rule of law, whether written or unwritten, attention is first paid to the *words* of which it is composed. These words are taken in their usual popular meaning unless they are terms of art, or technical terms, when they are understood according to their acceptation in the particular trade or science to which they belong. Where the meaning of any word or phrase is uncertain the *context* is consulted; and if, in another part of the same rule of law, the same word or phrase occurs, the interpretation given to it in both places ought to be the same. In like manner, where the rule itself is doubtful, the whole body of the law upon that subject is to be considered, and such construction given to the doubtful rule as brings it into harmony with other certain rules. The *subject-matter*, to which the rule of law relates, is also a valuable guide in exploring its significance. Every legislative power is presumed to have possessed a complete knowledge of the subject, concerning which it has prescribed a rule of law, and to have chosen its expressions with a constant reference thereto; and, therefore, in interpreting this rule, the nature of this subject-matter must be equally regarded.

The *effects and consequences* of a rule of law also aid in ascertaining its true meaning. When, under one interpretation, these effects and consequences are absurd, unjust, or contrary to the public good, and, under another interpretation, such effects and consequences are reasonable and just, it is evident that the latter interpretation is alone correct. The *reason and spirit* of a rule of law, or the cause which moved the legislature to prescribe it, is another indication of its actual significance. Of every legislative act intelligent purpose can be predicated, and the end contemplated by that act, and toward which it was directed by the legislative power, must always be considered in determining the character of the act itself.

Read 1 Bl. Comm., pp. 59–61.
1 Kent Comm., Lect. xx, pp. 462–465.

§ 14. Of the Interpretation of Statutes.

In addition to these universal rules of legal interpretation, there are certain special rules applicable to the interpretation of statutes, of which the following are the most important:

Declaratory statutes are limited in meaning by the true meaning of that rule of the unwritten law which they declare.

Remedial statutes are to be interpreted by ascertaining the condition of the unwritten law at the time of the enactment of the statute, the mischief against which the unwritten law did not provide, and the remedy intended to be afforded by the statute; and then giving to the statute that construction, which will most fully suppress the mischief and apply the remedy.

Statutes must be so interpreted as to be consistent with all constitutional provisions, and every statute, which cannot be so interpreted, is unconstitutional and void.

Statutes, limiting the power of future legislatures, or commanding impossible things, are void.

Statutes, which plainly contradict the unwritten law, supersede it, and, to that extent, render it invalid.

Later statutes repeal prior statutes when plainly contrary thereto, but, if such statutes can be reconciled, both must stand, and have concurrent operation. When a repealing statute is itself repealed, the old statute revives.

Statutes which are in their nature contracts, and under which rights have become vested, cannot be so repealed as to divest such rights.

Statutes, when reason and justice so require, may be interpreted in such a manner that acts within the letter shall be considered as without the meaning, and acts without the letter shall be considered as within the meaning.

Penal statutes are construed strictly in the interest of the accused, their effect being limited by the express words employed and not extended by implication.

Statutes intended to prevent frauds are construed liberally, in order that the design thereof may be accomplished.

Statutes, which treat of things or persons of an inferior rank, cannot, by any general words, be extended to those of a superior.

Different statutes, relating to the same subject-matter, are regarded as one statute, and each must, if possible, be so construed that full effect will be given to all. One part of a statute must be construed by another, so that, if possible, the whole may stand.

A saving, or *proviso*, totally repugnant to the body of a statute, is void.

When a statute contains a word, whose meaning is already known to the unwritten law, the word has the same meaning in the statute.

Where words in the same statute are clearly repugnant to each other, the last will supersede the first.

Words whose meaning, as to one statute, has been determined, are presumed to have the same meaning in all subsequent statutes, unless the contrary is expressed.

General words, in one clause of a statute, may be limited by particular words in a subsequent clause of the same statute; but when a particular thing has been granted or limited in one clause of a statute, it cannot be taken away or altered by any subsequent general words.

In construing a doubtful statute the preamble and title of the statute may be considered.

The construction of a statute may be affected by long continued practice.

The contemporaneous exposition of a statute, by those living at the date of its enactment, is of high authority.

When a statute, already existing in one state, is adopted into the written law of another state, the construction given to the statute, in the former state, is also adopted with it.

In a statute, which is intended to impose a duty, the word *may* is interpreted as *must*.

Read 1 Bl. Comm., pp. 87–91.
Bac. Abr., Statute I.
1 Swift Dig., pp. 11–13.
Potter's Dwarris on Stat., pp. 47–51, 67, 121–146, 174–264.
Sedgwick Stat. and Const. Law, pp. 225–446.
Cooley Const. Lim., p. 188.

§ 15. Of the Object of Law.

Law *protects rights* and *redresses wrongs*. The existence of a right, in one man, imposes upon every other man the duty to respect it; and law protects rights by enforcing the performance of this duty. Every wrong is thus a violation of some duty; and law redresses wrongs, either

by directly punishing the wrong-doer, or by compelling him to make due satisfaction to the person wronged.

Read Austin Jur., Outl., p. 34, Lect. xiv, pp. 377–381, Lect. xvi, pp. 405–410.

§ 16. Of Rights and Wrongs.

Rights, at law, are of two kinds: Private and Public. *Private rights* are those rights which belong to private persons, as such, and to public bodies when acting in a private capacity. *Public rights* are those which the state possesses over its own subjects, and which the subjects, in their turn, possess in, or against, the state. Wrongs, at law, are also of two kinds: Private and Public. *Private wrongs* (known also as *torts*) are those whereby the rights, which belong to private persons, as such, or to public bodies acting in a private capacity, are violated. *Public wrongs* (known also as *crimes*) are those by which the rights of the state over its people, or those of the people in, or against, the state, are either diminished or destroyed.

Read 1 Bl. Comm., p. 122.
3 Bl. Comm., pp. 1–3.
Austin Jur., Lect. xvii, pp. 416–418.
Pomeroy Mun. Law, §§ 19–23.
Walker Am. Law, § 16.

§ 17. Of Natural Persons.

The persons, whose rights the law protects, and whose wrongs the law redresses, are of two kinds: Natural and Artificial. *Natural persons* are living human beings, of whatever age, sex, or condition. The life of a human being begins, in contemplation of law, as soon as he is

able to stir in his mother's womb, and ceases at the instant of physical death. Every legitimate unborn infant is regarded as born, for all beneficial purposes. He is entitled to legal protection, may have a guardian appointed for him, and may inherit land or take it under a will.

Read 1 Bl. Comm., pp. 123, 130.
Walker Am. Law, § 20.

§ 18. Of Artificial Persons. Corporations.

Artificial persons (also called *bodies-politic*, or *corporations*) are persons created by law, for purposes which natural persons would be unable to accomplish. They consist of one or more natural persons; but neither their corporate existence, nor their corporate individuality, depends upon the number, or the identity, of the natural persons of whom they are composed. As legal persons, they are invisible, intangible, and immortal; and are endowed only with such attributes as are expressly conferred, or necessarily implied, by law. In other respects, their rights and duties resemble those of natural persons.

Read 1 Bl. Comm., pp. 467–469, 472–476.
2 Kent Comm., Lect. xxxiii, pp. 267–269, 278, 299.
Angell and Ames Corp., §§ 1–12.
Potter Corp., §§ 1–9.
Dillon Mun. Corp., § 18.
Walker Am. Law, § 90.

§ 19. Of Aggregate and Sole Corporations.

Corporations are, as to their membership, of two kinds: Aggregate and Sole. *Aggregate corporations* consist of two or more natural persons. *Sole corporations* consist of one

natural person, acting in some official capacity. Sole corporations are seldom found in the United States.

Read 1 Bl. Comm., pp. 469, 470.
2 Kent Comm., Lect. xxxiii, pp. 273, 274.
Angell and Ames Corp., §§ 26-29.
Potter Corp., § 18.
Walker Am. Law, § 92.

§ 20. Of Public and Private Corporations.

Corporations are, as to their purposes, of two kinds: Public and Private. *Public corporations* are such as are created for political purposes, like counties, towns, and cities. They are invested with certain governmental powers, to be exercised within their territorial limits, and also with the power to take and hold property for their corporate use. *Private corporations* are such as are created for the private benefit of the collective members of the corporation, and are designed to regulate and promote their religious, social, or financial interests.

Read 2 Kent Comm., Lect. xxxiii, pp. 275, 276.
Angell and Ames Corp., §§ 30-35.
Potter Corp., §§ 15-17.
Dillon Mun. Corp., §§ 52-56.
Walker Am. Law, § 92.

§ 21. Of Equity.

Besides the written and unwritten law, properly so called, there are other rules of civil conduct, which are practically applied, by certain courts, to the enforcement of rights and the redress of wrongs. The most important of these is that system of rules known as Equity. *Equity* is intended to supply the defects, and correct the evils, created

by the universality and inflexibility of the rules of law. It is administered by courts of Chancery, which proceed according to their own peculiar methods, and which administer justice in certain cases where there is no strictly legal right, or where courts of law cannot afford to the injured party an adequate relief. The jurisdiction of these courts is very extensive, and their practical value rivals that of courts of law.

Read 1 Bl. Comm., pp. 61, 92.
3 Bl. Comm., pp. 429–437.
Pomeroy Mun. Law, §§ 163–167.
Story Eq. Jur., §§ 1–57.
Walker Am. Law, § 18.

§ 22. Of Maritime Law.

Maritime law is that system of rules which governs actions performed upon, or relating to, the sea. These rules are very ancient, and of world-wide application, and are practically applied by courts of *admiralty.*

Read 3 Bl. Comm., pp. 106–109.
3 Kent Comm., Lect. xlii, pp. 1–21.
Pomeroy Mun. Law, §§ 172, 173.
1 Pars. Mar. Law, B. i, Ch. i.

ELEMENTARY LAW.

BOOK I.

OF PRIVATE RIGHTS.

§ 23. Of Absolute Rights.

Private rights are of two kinds: Absolute and Relative. *Absolute rights* are those which belong to man, as man, whether out of society or in it. They are natural, inherent, and inalienable. They are neither created by, nor dependent upon, the provisions of positive law, though the principal object of all law is to preserve and vindicate them. They are three in number: The Right of Personal Security; The Right of Personal Liberty; The Right of Private Property.

Read 1 Bl. Comm., pp. 123–129.
1 Kent Comm., Lect. xxiv, pp. 1–12.
Pomeroy Mun. Law, §§ 626–633.

§ 24. Of Relative Rights.

Relative rights are those which belong to man as a member of society, and as occupying certain relations toward other men. Some of these rights are natural and inherent; others depend for their existence, as well as for their protection, on the rules of law. They are four in number, arising out of these four relations: Husband and Wife; Parent and Child; Guardian and Ward; Master and Servant.

Read 1 Bl. Comm., pp. 123, 422.
2 Kent Comm., Lect. xxv, p. 39.

CHAPTER I.

OF THE RIGHT OF PERSONAL SECURITY.

§ 25. Of Life.

The right of personal security is that right which every man has to the legal and uninterrupted enjoyment of his life, limbs, body, health, and reputation. Every human being, even an unborn infant, has a legal right to live, and to enjoy his life, without interruption or disturbance from his fellow-men. Any invasion of this right constitutes the gravest wrong known to the law, and merits and receives the severest punishment.

Read 1 Bl. Comm., pp. 129, 130.
4 Bl. Comm., p. 177.

§ 26. Of the Limbs.

The limbs are those members of the human body which are useful in fight; as the hands, eyes, and front teeth. Of such value are these members esteemed in law, that a man may defend his limbs, as well as his life, by killing his assailant; and the mutilation of these members was punishable, at common law, with death. A contract, entered into under a reasonable fear of injury to life or limb, is invalid, and may be avoided by the contracting party, at his pleasure.

Read 1 Bl. Comm., pp. 130, 131.
4 Bl. Comm., pp. 205–208.
Bac. Abr., Duress, Maihem.
1 Pars. Cont., B. i, Ch. xix, Sec. 4.

§ 27. Of the Body.

The body includes all portions of the human body except the limbs. Although the law protects this against injury, yet it is not regarded as so sacred or important as either life or limb. In defence of his body merely, a man cannot legally take life, nor are contracts, entered into under fear of injury to the body, void.

Read 1 Bl. Comm., pp. 131, 134.
Bac. Abr., Assault, Duress.
1 Pars. Cont., B. i, Ch. xix, Sec. 4.

§ 28. Of Health.

Health consists in freedom from physical pain, discomfort, and weakness. The enjoyment of health is essential to the true enjoyment of life, and the law, therefore, protects it against injuries, both from the actions and omissions of other men.

Read 1 Bl. Comm., p. 134.
3 Bl. Comm., p. 122.
4 Bl. Comm., pp. 161, 162.
1 Hill. Torts, Ch. xix, § 6.

§ 29. Of Reputation.

The reputation of a man is that favorable opinion, which other men entertain concerning his character or capabilities. To this opinion every man has a legal right, until by his own misconduct he has forfeited it; and any violation of this right is regarded and treated by the law as a grievous wrong.

Read 1 Bl. Comm., p. 134.
1 Kent Comm., Lect. xxiv, pp. 16–19.
Cooley Torts, pp. 30–33.

§ 30. Of the Rights of the State over the Person of the Subject.

The enjoyment of life, limbs, body, health, and reputation are, however, *subordinate to the rules of law.* Individual rights yield to public necessity; and whenever the preservation of political society demands the surrender of any of these rights, either as a punishment for crime or as essential to the public safety, the individual must suffer in order that the state may be preserved. The mode of their enjoyment by one individual must also, to some extent, be limited by the same rules, in order to secure to other individuals their proper exercise of the same rights; since, in society, the law can in no other way protect the rights of all than by impartially restricting them, whenever they conflict with one another.

Read 1 Bl. Comm., p. 123–129.
4 Bl. Comm., pp. 7–14, 178–182.
1 Kent Comm., Lect. xxiv, pp. 12–26.
Broom Leg. Max., pp. 1–10.
Cooley Const. Lim., pp. 414–465.

§ 31. Of the Methods by which the Law Protects Life, Limbs, and Body.

The law protects life, limbs, and body: (1) By giving to every man the right of *self-defence;* (2) By securing, through its general provisions, such *peace and order in society* that injuries to them are not likely to occur; (3) By *punishing* actual or attempted injuries to them as *criminal offences;* (4) By giving, to the injured person, compensation for his injury, to be recovered from his injurer in *a suit at law;* (5) By compelling private persons, when necessary, to *support* those who stand in certain relations to them; (6) By making *public provision* for the des-

titute; (7) By special enactments, *prohibiting monopolies* and *protecting trade and labor.*

Read 1 Bl. Comm., pp. 131, 359–365, 447–449.
3 Bl. Comm., pp. 3, 4, 120–122.
4 Bl. Comm., pp. 154, 158–161, 184–188, 205–218.
1 Kent Comm., Lect. xxiv, pp. 12–26.
Pomeroy Mun. Law, §§ 634–640.

§ 32. Of the Methods by which the Law Protects Health.

The law protects health: (1) By giving to the party, whose health is endangered, the right to *remove the cause of danger*, whenever this can be done without disturbing the public peace; (2) By *punishing*, as *criminal offences*, those actions or omissions which endanger health; (3) By giving compensation to the injured person in *a suit at law;* (4) By *compelling the person*, in whose actions or omissions the cause of danger has originated, *to remove it.*

Read 3 Bl. Comm., pp. 5, 122, 123.
4 Bl. Comm., pp. 161, 162.
1 Hill. Torts, Ch. xix, § 6.
2 Story Eq. Jur., § 926.

§ 33. Of the Methods by which the Law Protects Reputation.

The law protects reputation: (1) By *presuming* that the *character* of every man is *good* until the contrary is proved; (2) By *punishing* the more serious attacks upon it as *criminal offences;* (3) By giving compensation to the injured person in *a suit at law.*

Read 3 Bl. Comm., pp. 123–127.
4 Bl. Comm., pp. 150, 151.
1 Kent Comm., Lect. xxiv, pp. 16, 17.
Bac. Abr., Libel, Slander.
Pomeroy Mun. Law, §§ 641–645.
1 Greenl. Ev., §§ 34, 35.
3 Greenl. Ev., § 29.

CHAPTER II.

OF THE RIGHT OF PERSONAL LIBERTY.

§ 34. Of Freedom and Imprisonment.

The right of personal liberty is the right which every man has to move his person to whatever place his inclinations may direct, without restraint except by due course of law. This right to move includes the right to remain at rest; and whenever, by any force or show of force, a man is compelled either to go or to stay, against his will, his personal liberty is violated and he is said to undergo *imprisonment.* The place where, the method by which, and the length of time for which, such restraint is applied, are immaterial. In any case, it constitutes an imprisonment; and, unless effected in the lawful enforcement of some legal right, is a gross invasion of his liberty and is severely punished by the law. Against improper interference with his liberty a man may use all necessary force, and any obligation entered into by him, while thus unlawfully restrained and as a condition of his deliverance therefrom, is of no validity against him.

Read 1 Bl. Comm., pp. 134–138.
3 Bl. Comm., pp. 127, 128.
1 Kent Comm., Lect. xxiv, p. 26.
Bac. Abr., Duress, Trespass D, 3.
1 Hill. Torts, Ch. vi, §§ 1–2 a.
Bigelow L. C. Torts, pp. 272–275.

§ 35. Of the Rights of the State over the Liberty of the Subject.

In the enjoyment of his personal liberty, as well as in that of his personal security, the citizen is limited by the rules

of law. By various forms of legal process he is liable to be restrained, not only as defendant in a civil suit or criminal proceeding, but as a juror, or a witness, or a member of a legislative body. He may be compelled to serve in the army or the navy of the United States, or in the militia, or the *posse comitatus* of the individual State. In all these cases the legal provisions, governing such restraint, must be strictly followed by the authority by whom it is applied, or the imprisonment will be unlawful, and all participators therein will be liable to punishment.

Read 1 Bl. Comm., pp. 135, 136, 343, 408–421.
3 Bl. Comm., pp. 287–290, 354, 369.
Broom Leg. Max., pp. 1, 2.
Const. U. S., Art. i, Sec. 8.
Bac. Abr., Trespass D, 3
Cushing Leg. Assemb., pp. 101–103.
Pomeroy Mun. Law, §§ 647–652.

§ 36. Of the Methods by which the Law Protects Personal Liberty.

The law protects the right of personal liberty: (1) By giving to every man *the right to free himself* whenever unlawfully confined; (2) By *regulating legal imprisonment* with great exactness; (3) By delivering the person, who has been illegally confined, through the judicial proceeding known as *the Writ of Habeas Corpus;* (4) By *punishing* violations of this right as *criminal offences;* (5) By giving compensation to the injured party in *a suit at law.*

Read 1 Bl. Comm., pp. 135–138.
3 Bl. Comm., pp. 128–138.
4 Bl. Comm., pp. 218, 219.
1 Kent Comm., Lect. xxiv, pp. 26–34.
Pomeroy Mun. Law, §§ 653–658.
Cooley Const. Lim., pp. 295–350.
Bigelow L. C. Torts, pp. 268–285.
Hurd Hab. Corp., B. i.

CHAPTER III.

OF THE RIGHT OF PRIVATE PROPERTY.

§ 37. Of the Right of Property.

The right of private property is the right which every man has to use and dispose of all his own property, subject to no control save that of the law. To the protection of this right, and the redress of the wrongs by which it is violated, the law devotes by far the greater share of its attention. The rules, which govern the two preceding rights, are clear and few in number; the wrongs against them are infrequent; and the remedies are simple and easily applied. The rules, which govern the right of private property, are, on the contrary, numerous and difficult; the right itself is constantly invaded; and the methods of redress are manifold and intricate.

Read 1 Bl. Comm., pp. 138–140.
2 Bl. Comm., pp. 1–15.
2 Kent Comm., Lect. xxxiv, pp. 317–340.
Pomeroy Mun. Law, §§ 669–672.

§ 38. Of Property in General.

Property includes whatever can be exclusively possessed or enjoyed. Certain material objects, such as the ocean, light or air when unconfined, and the forces of nature, cannot be thus exclusively enjoyed, and, therefore, are not property. With a few such exceptions everything that

exists, whether physically tangible or not, can be subjected to the ownership of man, and, while so subjected, is protected by the law as private property.

Read 2 Bl. Comm., pp. 14, 15.
1 Kent Comm., Lect. ii, pp. 26–29.
Pomeroy Mun. Law, §§ 544, 779.
Cooley Const. Lim., pp. 590–592.
Walker Am. Law, § 21.

§ 39. Of Corporeal Property.

Property, as to its intrinsic character, is of two kinds; Corporeal and Incorporeal. *Corporeal property* is that which has a substantive existence. It includes lands, buildings, animals, and all other material objects, which are capable of being owned by man. It can be physically possessed and enjoyed, and can be transferred from one man to another by the act known as *delivery*.

Read 2 Bl. Comm., p. 17.
1 Cruise Dig., Tit. i, § 2.
Will. R. P., pp. 11, 12.
1 Wash. R. P., B. i, Ch. i, §§ 35–39.

§ 40. Of Incorporeal Property.

Incorporeal property is that which has no substantive existence, but exists merely in contemplation of law. It includes all rights to corporeal property, or to the use of such property. It cannot be physically possessed, although its enjoyment may consist in the performance of physical acts, or may result in the physical possession of corporeal property. It can be transferred from one man to another only by an agreement, or something equivalent thereto, in pur-

suance of which the former owner ceases, and the present one begins, to exercise the right and to receive its benefits.

Read 2 Bl. Comm., pp. 17, 20, 21, 317.
1 Cruise Dig., Tit. i, § 10.
4 Cruise Dig., Tit. xxxii, Ch. iv, §§ 39, 40, 43.
3 Kent Comm., Lect. lii, pp. 402, 403.
Will. R. P., pp. 11, 12, 220, 221.
1 Wash. R. P., B. i, Ch. i, §§ 37–40.

§ 41. Of Real Property.

Property, as to its legal character, is of two kinds; Real and Personal. *Real property* is that which, in contemplation of law, is immovable. It is so called because, anciently, the owner of it, when dispossessed, could recover, in a suit at law, the possession of the real thing itself. It is said to consist in lands, tenements, and hereditaments. *Hereditament* is a general term, including everything that can be inherited; that is, everything which will vest in the heir, by operation of law, upon the death of the ancestor. *Tenement* is a term of more limited signification, including such hereditaments as, under the feudal law, can be holden of some superior lord. *Land* is a term of still narrower meaning, including only such tenements as are corporeal. Real property thus embraces not only land, and all objects which, in contemplation of law, are immovably attached to land, but also all those rights, the period of whose duration is unascertainable, and which the law, therefore, regards as permanent and without end.

Read 2 Bl. Comm., pp. 16, 17.
1 Cruise Dig., Tit. i, § 1.
4 Cruise Dig., Tit. xxxii, Ch. xx, §§ 54, 55.
3 Kent Comm., Lect. lii, p. 401.
Will. R. P., pp. 1–10.
1 Wash. R. P., B. i, Ch. i, §§ 2, 3, 36.
Walker Am. Law, § 21.

§ 42. Of Personal Property.

Personal property is that which, in contemplation of law, is movable. It is so called because, anciently, the owner of it, when dispossessed, could not recover the possession of the real thing itself, but could only recover damages, to be enforced against the person of the dispossessor. The reason of this name has long since disappeared; movable property, as well as immovable, being generally now recoverable *in specie*, when it can be found. Personal property is also known as *chattels*. It includes every object which, in contemplation of law, is not immovably attached to land, and all those rights whose period of duration is fixed or ascertainable, and which the law, therefore, regards as movable and transitory.

Read 2 Bl. Comm., pp. 384–387.
2 Kent Comm., Lect. xxxv, pp. 340–342.
Will. R. P., pp. 6–9.

§ 43. Of Fixtures.

The legal character of property is liable to change without any change in its intrinsic character. An object which, considered in itself, is personal, may enter into such relations with real property as to become also real; and objects, in their nature real, may by severance from the realty become personal. Trees growing on the land are real; when cut, and lying in logs on the land, are personal. The materials, of which a house is to be built, are personal; but, when constructed into a building, may become real. These changes in the legal character of property give rise to many serious and difficult questions, the rules governing which are usually known as the law of *fixtures*.

Read 2 Kent Comm., Lect. xxxv, pp. 343–347.
Will. R. P., p. 8 note.
1 Wash. R. P., B. i, Ch. i, §§ 4–32.
Elwes *v.* Mawe, 2 Smith L. C., p. 99.

§ 44. Of Corporeal Real Property. Land.

Corporeal real property is land. *Land* embraces not only the surface of the earth and everything that grows upon it, or is, in law, permanently attached to it, but everything that lies beneath it, or is included in the space above it. Water in marshes, ponds or streams; woods, rocks, and buildings; metals within their native beds; the atmosphere that rests above the surface, are land: and, by a deed of land, all objects of this character will pass without specific mention. The owner of land is thus truly said to own from the centre of the earth to the highest heavens; and no other person can lawfully, without his consent, appropriate any portion of the space above the surface, or of the minerals below it.

Read 2 Bl. Comm., pp. 17–19.
1 Cruise Dig., Tit. i, §§ 3, 6–9.
3 Kent Comm., Lect. lii, p. 401.
Will. R. P., pp. 13–15.
1 Wash. R. P., B. i, Ch. i, § 3.
3 Wash. R. P., B. iii, Ch. v, Sec. 4, § 31.

§ 45. Of Incorporeal Real Property; Incorporeal Hereditaments.

Incorporeal real property embraces all those permanent rights which concern, or are annexed to, or are exercisible within, or result in the enjoyment of, corporeal property. As these rights pass by descent, from ancestor to heir, they are called *incorporeal hereditaments*. The principal ones, known to ancient English law, were: (1) Advowsons; (2) Tithes; (3) Commons; (4) Ways; (5) Offices; (6) Dignities; (7) Franchises; (8) Corodies or Pensions; (9) Annuities; (10) Rents.

Read 2 Bl. Comm., pp. 20, 21.
3 Cruise Dig., Tit. xxi, Ch. i, §§ 2, 3.
2 Wash. R. P., B. ii, Ch. i, Sec. 1, §§ 1, 2.

§ 46. Of Advowsons.

An advowson is the right of presentation to a benefice. *A benefice* is the right to perform ecclesiastical functions in a parish, and to receive the emoluments derived therefrom. To present to a benefice is to appoint the clergyman, who is to discharge these duties and enjoy these privileges. This right of presentation usually subsists in the owner of the estate, in which such parish is comprised, or in some other patron whose appointment, when confirmed by the ecclesiastical authority, vests the benefice in the appointee. As a method of providing for the friends or dependants of the patron, it was once a right of considerable value.

Read 2 Bl. Comm., pp. 21-24.
3 Cruise Dig., Tit. xxi.

§ 47. Of Tithes.

A tithe is the right, which the incumbent of a benefice has, to one tenth part of the yearly increase of his parishioners, whether derived from lands, or from the stock upon lands, or from their personal industry.

Read 2 Bl. Comm., pp. 24-32.
3 Cruise Dig., Tit. xxii.

§ 48. Of Common.

A common is the right of one man to take a profit from the land of another. It is of various kinds; such as *common of pasture*, or the right to pasture cattle in another's field; *common of piscary*, or the right to catch fish in waters on the land of another; *common of turbary*, or the right to cut turf on the land of another, similar to which is the right to take stone, coal, or minerals from common land;

common of estovers, or the right to take wood from the land of another for fuel, or for the repair of fences, buildings, or agricultural implements.

Read 2 Bl. Comm., pp. 32–35.
3 Cruise Dig., Tit. xxiii.
3 Kent Comm., Lect. lii, pp. 403–419.

§ 49. Of Ways.

A way is the right of one man to pass and repass over the land of another, by some accustomed or designated path. This right may be general, empowering its owner to cross the land of the other party in any manner and with any vehicles he pleases, or it may be restricted both in the method and extent of its enjoyment.

Read 2 Bl. Comm., pp. 35, 36.
3 Cruise Dig., Tit. xxiv.
3 Kent Comm., Lect. lii, pp. 419–427.
2 Wash. R. P., B. ii, Ch. i, Sec. 3, §§ 30–34.

§ 50. Of Offices.

An office is the right to perform certain official acts, and to receive the fees and emoluments accruing therefrom. This right, even in some cases where the duties were of a public nature, could formerly, under the laws of England, be granted to a man and his heirs, and be held by them as inheritable property.

Read 2 Bl. Comm., p. 36.
3 Cruise Dig., Tit. xxv.
3 Kent Comm., Lect. lii, pp. 454–458.

§ 51. Of Dignities.

A dignity is the right to use and enjoy a title of honor. Originally such titles were annexed to the possession of

estates in lands, were created by a grant of such estates, and by the descent of those estates were transmitted to the heirs of the grantee.

Read 1 Bl. Comm., pp. 396–401.
2 Bl. Comm., p. 37.
3 Cruise Dig., Tit. xxvi.

§ 52. Of Franchises.

A franchise is the right of a subject to exercise certain powers, and to enjoy certain privileges, which naturally belong to the state. In England franchises were formerly very numerous, and were conferred by royal charter, but in this country they are comparatively few, and are created by legislative grant. The right of natural persons to be a corporation, the right to operate a public ferry and collect toll, are instances of this hereditament.

Read 2 Bl. Comm., pp. 37–40.
3 Cruise Dig., Tit. xxvii.
3 Kent Comm., Lect. lii, pp. 458–460.
2 Wash. R. P., B. ii, Ch. i, Sec. 2.

§ 53. Of Corodies and Pensions.

A corody is the right of one person to receive sustenance from another on account of the ownership, by that other, of some corporeal hereditament. When a stipend in money is paid instead of such sustenance, the right to receive the same is called *a pension.* This right usually subsisted only between persons who were ecclesiastically related to each other.

Read 1 Bl. Comm., p. 283.
2 Bl. Comm., p. 40.

§ 54. Of Annuities.

An annuity is the right of one person to receive a yearly stipend in money from another, on account of some personal obligation assumed by, or imposed upon, that other. When such an annuity is granted to a man and his heirs, it is an incorporeal hereditament.

Read 2 Bl. Comm., p. 40.
3 Kent Comm., Lect. lii, p. 460.

§ 55. Of Rents.

A rent is the right of one man to receive a certain yearly profit out of the corporeal real property of another. The profit received may be in money or in the product of the corporeal property, but it must be certain in amount, be payable at yearly periods or at aliquot parts of a year, and be distinct in its nature from the corporeal real property out of which it issues.

Read 2 Bl. Comm., pp. 41–43.
3 Cruise Dig., Tit. xxviii.
3 Kent Comm., Lect. lii, pp. 460–485.
2 Wash. R. P., B. ii, Ch. i, Sec. 1, §§ 3–20.

§ 56. Of Incorporeal Hereditaments in the United States.

Of these ten incorporeal hereditaments, only *commons*, *ways*, *franchises*, and *rents* are now of any practical importance in the United States.

Read 3 Kent Comm., Lect. lii, p. 403.
Walker Am. Law, § 125.

§ 57. Of Easements of Support, Water, Light, Air, Party-Walls, Wharves, &c.

Besides the foregoing permanent rights there are several others, now equally well recognized by law. Among

these are the right of every owner of land to have *the soil supported* in its natural position by the land of adjoining or subjacent owners; the right of one man *to draw water* from, through, or across the land of another; the right of the owner of land to receive *light and air* uninterruptedly across the land of another; the right of persons owning adjoining buildings to *the lateral support* of each building by the other; the right which each of the owners of two buildings, separated from each other only by a common or *party-wall*, has in the entire separating wall; the right of the owners of different stories, in the same house, to the *support* afforded by the stories below, and to the *protection* derived from the stories above; and the right of persons, who own land upon the shore of the sea or upon navigable rivers, *to build piers and wharves*, provided they do not thereby obstruct navigation.

Read 3 Kent Comm., Lect. lii, pp. 427–432, 436–449.
2 Wash. R. P., B. ii, Ch. i, Sec. 3.
Walker Am. Law, §§ 126, 127.

§ 58. Of Corporeal Personal Property.

Corporeal personal property embraces all those objects, whether animate or inanimate, which, in contemplation of law, are movable.

Read 2 Bl. Comm., pp. 387, 388.
2 Kent Comm., Lect. xxxv, pp. 340, 342.

§ 59. Of Incorporeal Personal Property.

Incorporeal personal property includes all transitory rights, whether relating to real or personal property. It embraces those interests in real property, whose duration is fixed or ascertainable; all transient rights in or concerning corporeal personal property; all rights to the labor and

services of others; and all rights to demand and receive payment of money, whether arising out of simple promises or any other form of obligation.

Read 2 Bl. Comm., pp. 386, 387, 397.
2 Kent Comm., Lect. xxxv, p. 351.
Will. R. P., p. 357.

§ 60. Of Estates.

The law distinguishes between the property itself and the interest which the owner has therein. This interest is known as *an estate;* and, when complete, it consists of the right of property, the right of possession, and actual possession. The right of property may, however, vest in one person, the right of possession in another, and actual possession in still another. Several incomplete estates may also concurrently exist in the same property; the owner of each estate having the right of property appropriate thereto, and such rights of possession, and such actual possession, as are consistent with the legal character and attributes of the co-existing estates. The different interests of a landlord and his tenant in the same corporeal real property, or of the owner and the hirer of corporeal personal property are instances of such concurrent estates.

Read 2 Bl. Comm., pp. 103, 107, 195–199.
1 Cruise Dig., Tit. i, §§ 11, 49.
3 Cruise Dig., Tit. xxix, Ch. i.
4 Kent Comm., Lect. lxv, p. 373.
Will. R. P., pp. 16, 17.
1 Wash. R. P., B. i, Ch. iii. §§ 1–8.

§ 61. Of the Ownership and Transfer of Estates.

An estate may belong to one person, or to several persons collectively. It may also be transmitted from one person to another, or lesser estates may be carved out of

it by the owner and be granted to others. The relation between co-owners or successive owners of the same estate, or between persons one of whom derives his estate from the other, is known as *privity of estate.*

Read 2 Bl. Comm., pp. 107, 179, 200, 201.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, § 1.
2 Wash. R. P., B. ii, Ch. i, Sec. 1, § 16.
1 Greenl. Ev., §§ 189, 523.

§ 62. Of Real and Personal Estates.

Estates, like property, are, in their legal character, of two kinds: Real and Personal. *A real estate* is one which, in contemplation of law, is permanent and without end; and every estate is such when the date of its termination is not determined by, or ascertainable from or at the date of, the act which creates it. *A personal estate* is one which, in contemplation of law, is not permanent and without end; that is, when the date of its termination is determined by, or ascertainable from or at the time of, the act which creates it.

Read 2 Bl. Comm., p. 386.
1 Cruise Dig., Tit. i, §§ 12–15; Tit. viii, Ch. i, §§ 25, 26.
2 Kent Comm., Lect. xxxv, p. 342.
Will. R. P., pp. 8, 9.
1 Wash. R. P., B. i, Ch. iii, §§ 9–11.

§ 63. Of Legal and Equitable Estates.

The law also distinguishes between an estate in property and the benefits to be derived from the ownership of such estate. One man may have the right of property, the right of possession, and the actual possession, of real or personal property, while another man is entitled to all the results which flow from the enjoyment of these rights. In

such cases, the estate of the former is the only one recognized in courts of law, and hence is called *the legal estate.* The owner of the beneficial interest can, however, in a court of equity, compel the former to account to him for all the profits accruing from the property; and his interest is, therefore, known as *the equitable estate.*

Read 2 Bl. Comm., pp. 272, 327–329, 337.
1 Cruise Dig., Tit. xi, Ch. i, § 2; Tit. xii, Ch. i, §§ 1, 3.
Shep. Touchstone, Ch. xxiv, §§ 1–3.
4 Kent Comm., Lect. lxi, pp. 289–293, 301–305.
1 Wash. R. P., B. i, Ch. i, § 42.
2 Wash. R. P., B. ii, Ch. ii, Sec. 1, §§ 5, 6; Ch. iii, Sec. 1, §§ 5, 6.

CHAPTER IV.

OF ESTATES IN REAL PROPERTY.

§ 64. Of the Attributes of Estates in Real Property.

Estates in real property present five points for consideration: (1) The legal character of the estate itself; (2) The tenure by which such estate may be holden; (3) The time when such estate is to begin to be enjoyed; (4) The relations with other men into which the ownership of the estate brings the owner thereof; (5) The title by which such estate may be acquired.

Read 2 Bl. Comm., p. 103.
1 Cruise Dig., Tit. i, § 11.

§ 65. Of Real and Personal Estates in Real Property.

Estates in real property are of two kinds: Real and Personal. *A real estate in real property* is such an interest therein as, in contemplation of law, is permanent and without end. *A personal estate in real property* is such an interest therein as, in contemplation of law, is not permanent and without end.

Read 2 Bl. Comm., pp. 103, 386.
1 Cruise Dig., Tit. i, §§ 12-14; Tit. viii, Ch. i, §§ 25, 26.
2 Kent Comm., Lect. xxxv, p. 342.
Will. R. P., pp. 8, 9.
1 Wash. R. P., B. i, Ch. iii, §§ 9-11.

§ 66. Of Ancient Manors.

A real estate in real property is also called a *freehold.* Under the feudal system, a large proportion of the lands of England were held in what were known as baronies or manors. *A manor* was a more or less extensive tract of land, granted by the crown to some feudal lord, and occupied by him with his freemen and his serfs. One part of this land was reserved for the private use of the lord himself. Another part was granted out in separate holdings to the freemen. A third part was inhabited by the serfs or villeins; and the remainder, usually the poorest portion and called *the waste*, was enjoyed by all, in common, for the gathering of wood or turf, or for the pasturing of cattle. The rights of the various inhabitants of the manor in this fourth portion, or waste, were among the principal incorporeal hereditaments then known to the law.

Read 2 Bl. Comm., pp. 90-95.
1 Cruise Dig., Prelim. Diss. Ch. iii, §§ 32-43.
Will. R. P., pp. 110, 322, 323.
1 Wash. R. P., B. i, Ch. ii, § 23.

§ 67. Of Feudal Services.

Each of these persons held his estate in subjection to some feudal superior. The lord held the manor, immediately or mediately, of the king, upon condition of rendering to him certain feudal services. The freemen held their lands of the lord upon the same condition. The serfs, or villeins, held their lands at the will of the lord, and rendered to him such services as he saw fit to require.

Read 2 Bl. Comm., pp. 59-62, 90-95.
1 Cruise Dig., Prelim. Diss. Ch. i, §§ 14, 25, 53-55, 62; Ch. ii, §§ 2-14; Ch. iii, § 34.
3 Kent Comm., Lect. liii, pp. 487, 494-496.
Will. R. P., pp. 111, 112, 323-325.
1 Wash. R. P., B. i, Ch. ii, §§ 13, 20, 26.

§ 68. Of Feudal Estates for Life.

The relations, thus existing between the lord of the manor and his freemen, were supposed to continue during the entire life of the tenant. The tenant, although a freeman, became "the lord's man." He was obliged to render the stipulated or customary services, under penalty of forfeiting his estate; and, so long as the services were rendered, the estate remained in him as his own exclusive property. The duration of estate and services being thus commensurate, and the services being, in contemplation of law, for the life of the tenant, the estate was held to be for life also; and hence it soon became a principle of feudal law that no estate, less than an estate for life, was worthy the acceptance of a freeman, or could be a freehold.

Read 2 Bl. Comm., pp. 53–56, 104.
1 Cruise Dig., Prelim. Diss. Ch. i, §§ 47–57, 62–66.
4 Kent Comm., Lect. lv, pp. 23, 24.
Will. R. P., pp. 22, 111.
1 Wash. R. P., B. i, Ch. ii, § 51; Ch. iii, § 10.

§ 69. Of Estates of Freehold and Less than Freehold.

Human life, being of uncertain and unascertainable duration, is presumed by law to be permanent and without end. An estate for life possesses the same legal character, and is, therefore, held to be of a higher order than any estate the period of whose existence can be ascertained, no matter of how many years that period may consist. An estate, granted for a thousand years, is thus, in law, a less estate than one granted for life, however certain it may be that the former will outlast the latter; and no estate is greater, in law, than an estate for life except one, which is so created that it will exist during the lifetime of the tenant, and, after his death, descend to his heirs. From these principles arises the first great division of estates in real

property, into freehold estates and estates less than freehold: *freehold estates* including life-estates and inheritable estates; *estates less than freehold* including all estates for fixed periods of time, and all estates, the period of whose duration may be determined, or can be ascertained, at the time when the estate itself is created. The former are real estates in real property. The latter are personal estates in real property, and are generally known as *chattels real.*

Read 2 Bl. Comm., pp. 104, 143, 386, 387.
1 Cruise Dig., Tit. i, § 14; Tit. viii, Ch. i, §§ 2, 25.
4 Kent Comm., Lect. lv, pp. 23, 24; Lect. lvi, p. 85.

§ 70. Of the Seisin of Freehold Estates.

The possession of corporeal real property, by one who has a freehold estate therein, is known as seisin. *Seisin* is not the mere physical occupation of the land, nor does it necessarily include it; and occupation may be exclusively enjoyed by one man while the seisin is vested in another. Seisin is, however, so essential an element of a freehold estate, that such an estate can neither be created nor legally exist without it; and if the seisin and estate chance to be severed, the law cannot recognize the existence of the latter until, in some manner, the former is regained.

Read 2 Bl. Comm., pp. 53, 104, 120, 208, 209, 311.
1 Cruise Dig., Prelim. Diss. Ch. i, § 41; Tit. i, § 23.
4 Kent Comm., Lect. lxvii, p. 482.
1 Wash. R. P., B. i, Ch. ii, §§ 11, 65, 73–84.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 1–5.

§ 71. Of the Seisin during the Existence of Estates Less than Freehold. Disseisin.

Seisin is predicable only of a freehold, and occupation becomes seisin only when the freehold tenant is himself

the occupant. When the owner of an estate less than freehold is in actual possession of the land, the seisin is in him, out of whose freehold the estate less than freehold was derived. When lands are in the occupation of a person who has no actual freehold interest therein, and who does not claim under, or as tenant of, the owner of the freehold, the freeholder is said to be *disseised;* and the law then finds both estate and seisin in this adverse occupant, until the freeholder assumes possession of the lands.

Read 2 Bl. Comm., pp. 144, 195, 196.
1 Cruise Dig., Tit. i, §§ 33–35; Tit. viii, Ch. i, §§ 12.
4 Kent Comm., Lect. lxv, p. 386; Lect. lxvii, pp. 482–484.
1 Wash. R. P., B. i, Ch. ii, §§ 52, 53, 80; Ch. x, Sec. 1, § 7.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 1–5.
3 Wash. R. P., B. iii, Ch. ii, Sec. 7, § 10.

§ 72. Of the Seisin of Concurrent Freehold Estates.

Several different estates of freehold may concurrently exist in the same land; as an estate for life in one man and an inheritable estate in another. In such cases there is, however, but one actual seisin, and that is in the freehold tenant who, by himself or by some person holding under him, actually occupies the land. The seisin of the other estates exists, however, in contemplation of law, and is said to rest temporarily upon, and to be represented by, the seisin of the actual possessor.

Read 2 Bl. Comm., pp. 107, 164–167.
4 Kent Comm., Lect. lix, pp. 198, 234, 258–260; Lect. lxv, pp. 386, 387.
Will. R. P., pp. 231–234.
1 Wash. R. P., B. i, Ch. ii, §§ 70, 85–97; Ch. iii, § 16.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 1–5.

§ 73. Of Legal Presumptions as to Seisin and Freehold.

The law presumes, as to every parcel of land, that a freehold estate therein, and its accompanying seisin, always exists in some person. Thus on the failure or the termination of any estate of freehold, the law finds the freehold and seisin of the land in him, out of whose estate such failing or determined freehold has been carved; and, on the failure of the ultimate inheritable estate, regards both ownership and seisin as vested in the state.

Read 2 Bl. Comm., pp. 107, 168 note 9.
1 Cruise Dig., Tit. i, § 36.
2 Cruise Dig., Tit. xvii, §§ 2, 3.
4 Kent Comm., Lect. lxiii, pp. 353, 354; Lect. lxvi, pp. 423–428.
Will. R. P., pp. 248, 249.
1 Wash. R. P., B. i, Ch. ii, § 97.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 1–5.
3 Wash. R. P., B. iii, Ch. ii, Sec. 1, § 1.

§ 74. Of Seisin in Fact and Seisin in Law.

Seisin is of two kinds: Seisin in Fact and Seisin in Law. *Seisin in fact* is the actual occupation of the land, either by the freeholder himself or by some other person claiming under him. *Seisin in law* occurs where no one is in actual occupation of the land; as where an ancestor has died leaving lands vacant. The seisin, in such cases, is presumed by law to be in him who has the freehold interest, and may, at any time, be converted by him into seisin in fact.

Read 1 Cruise Dig., Tit. i, §§ 24–30.
1 Wash. R. P., B. i, Ch. ii, §§ 73–82.
3 Wash. R. P., B. iii, Ch. ii, Sec. 7, § 9.

§ 75. Of Livery of Seisin.

The creation of a freehold estate necessitates the transfer of the seisin to him, in whose favor the estate is created.

Hence no person can create a freehold unless he has the seisin in himself; and one, who has the seisin, can create a freehold only by some act which is, in law, sufficient to divest himself of the seisin, and to confer it upon his grantee. This act was formerly called *livery of seisin*, and consisted in the delivery by the grantor to the grantee, on the land and in presence of the other freeholders of the same manor, of a turf, or twig, or other substance taken from the land.

Read 2 Bl. Comm., pp. 314–316.
1 Cruise Dig., Prelim. Diss. Ch. i, §§ 41–44.
4 Cruise Dig., Tit. xxxii, Ch. iv, §§ 7–21.
Shep. Touchstone, Ch. ix, §§ 4–11.
Will. R. P., p. 249.
1 Wash. R. P., B. i, Ch. ii, §§ 64–69.

§ 76. Of Freeholds in Futuro.

The act called livery of seisin was a present act, taking immediate effect, at once transferring the possession and creating the estate. Hence it was held to be impossible to create a freehold to commence *in futuro;* and equally impossible to create a freehold which should come into enjoyment *in futuro*, unless, at the same time, an intermediate estate were created, to whose owner livery of seisin might be made, both on his own behalf and on behalf of the future freehold tenant. And therefore if, in any manner, the intermediate estate should fail before the actual seisin could vest in the future freehold tenant, the seisin would revert to him, out of whose freehold both estates had been created, and the estate, as well as seisin, of the future tenant would be forever gone.

Read 2 Bl. Comm., pp. 144, 165–168, 314–316.
1 Cruise Dig., Tit. i, § 37.
4 Kent Comm., Lect. lix, p. 234.
Will. R. P., p. 249.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 1–5.

§ 77. Of Uses.

Although many of the rules of law, by which corporeal real property is governed, originated in this theory of seisin and in the character of the act by which it was transferred, the necessity of actual livery of seisin was destroyed by the interpretation given to a statute passed in the year 27 Henry VIII. (A. D. 1535), and called the *statute of uses*. Prior to this statute, many acts of parliament had been enacted, to prevent the accumulation of real property in the hands of corporations. These acts were called *acts of mortmain*, and usually provided that all grants to such corporations should be void. The force of these acts was, however, easily evaded by granting land and making livery of seisin to some person, who could lawfully receive it, and directing him to hold it for the use and benefit of the corporate body. A grant so made vested the estate and seisin in the actual grantee, who, in a court of law, was thenceforth recognized as the sole owner of the land. But courts of equity, regarding only the intent of the grantor to confer the beneficial interest on the corporation, compelled the legal owner to account to it for all the profits of the land. By this method the corporation, though by law forbidden to take or hold the lands, was treated in equity as their true owner, and ultimately received the entire benefits of the estate.

Read 2 Bl. Comm., pp. 268–273.
1 Cruise Dig., Tit. i, § 41; Tit. xi, Ch. i, § 5.
2 Kent Comm., Lect. xxxiii, p. 282.
4 Kent Comm., Lect. lxi, pp. 289–293.
Will. R. P., pp. 144, 145.
2 Wash. R. P., B. ii, Ch. ii, Sec. 1, §§ 2–5.

§ 78. Of the Statute of Uses.

The Statute of Uses was intended to correct this method of evading the acts of mortmain. It provided that where-ever the *use* of land vested, there the *seisin*, by operation of law, should *also* vest. The seisin was thus made to *follow the use* into any person to whom the use might at any time be transferred; and if the use were given to one, who could not legally receive the seisin, the transfer of the use itself was void, and both the legal and the equitable estates remained in the grantor. Before the passage of this statute, a grant to A., to the use of B., with livery of seisin made to A., conferred on A. the entire legal estate, leaving B. to compel him to account in equity for all benefits derived therefrom. After the passage of this statute, a grant to A., for the use of B., with livery of seisin made to A., conferred on B. the legal as well as the equitable estate; and if B. were forbidden by law to receive the legal estate, the whole grant was void.

Read 2 Bl. Comm., pp. 327–335.
1 Cruise Dig., Tit. xi, Ch. iii, §§ 3–5, 40, 41.
4 Kent Comm., Lect. lxi, pp. 294–297.
Will. R. P., pp. 146–148.
2 Wash. R. P., B. ii, Ch. ii, Sec. 2, §§ 1–4.

§ 79. Of Trusts.

For a short time the purposes of this statute seemed to be accomplished. The courts of law, however, having declared that *a use could not be limited upon a use;* i. e. that in a grant to A., to the use of B., to the use of C., the use to C. was void and the entire seisin and estate vested and remained in B.; the courts of equity embraced the opportunity to carry out the supposed intention of the grantor, by holding that the use to C., though void at law, was good in equity, and by compelling B. to account to C. for

all the benefits of the estate. This second use in C. was called *a trust*, and the separation of the legal from the equitable estate thus became as easy and effective, as it had been before the statute was adopted.

Read 2 Bl. Comm., pp. 335–337.
1 Cruise Dig., Tit. xii, Ch. i, §§ 1–5.
4 Kent Comm., Lect. lxi, pp. 301, 302.
Will. R. P., pp. 149–151.
2 Wash. R. P., B. ii, Ch. ii, Sec. 2, § 5; Ch. iii, Sec. 1, §§ 5–7.
Walker Am. Law, §§ 150–153.

§ 80. Of the Effect of the Statute of Uses on Livery of Seisin.

The creation of an estate of freehold by livery of seisin was an open and public act. The declaration or bestowal of a use was, on the contrary, often a secret act; and in some cases, without any act whatever, the vesting of a use was implied by law. Thus, on the granting of an estate to A. with livery of seisin, a verbal direction to him, to account to B. for the profits thereof, was sufficient to confer the use on B. Or if the owner of land, by a mere oral contract, agreed to sell the land to B. and actually received his price, however small that price might be, a use was immediately implied in B. Hence, when the Statute of Uses was passed, vesting the seisin in whomsoever had the use, livery of seisin was no longer necessary, and the mere oral declaration of a use, or a parol bargain to convey, was sufficient to transfer both the seisin and estate. And although, since the *statute of frauds* (29 Charles II.), no freehold interest in lands can be created or transferred except in writing, yet the operation of the Statute of Uses still remains the same, and seisin passes now without other

formalities than such as are legally necessary to create the estate.

Read 2 Bl. Comm., pp. 330, 331, 337–339.
1 Cruise Dig., Tit. xi, Ch. i, § 4; Ch. iv, §§ 11–15.
4 Cruise Dig., Tit. xxxii, Ch. ix, §§ 1–5.
4 Kent Comm., Lect. lxi, p. 291; Lect. lxvii, pp. 495, 496.
Will. R. P., pp. 147, 167, 168.
2 Wash. R. P., B. ii, Ch. ii, Sec. 2, §§ 31–38.

§ 81. Of the Effect of the Statute of Uses on Freeholds in Futuro.

The creation of a freehold estate to commence *in futuro* also became possible under the same statute. The present act of livery of seisin being no longer indispensable, and seisin ever following the use, it was only necessary to create a use to spring up *in futuro*, and, when the use arose, the seisin vested with it in the one to whom the use was given. A grant of land to A., to the use of B. from and after a certain future event, causes the use to spring up in B. whenever that event occurs; and the law, thereupon, without further act of any person, regards the seisin also as in B.

Read 2 Bl. Comm., pp. 334, 335.
1 Cruise Dig., Tit. xi, Ch. ii, §§ 28, 29.
4 Kent Comm., Lect. lxi, pp. 296–299.
Will. R. P., pp. 267–271.
2 Wash. R. P., B. ii, Ch. ii, Sec. 2, §§ 23, 24.

§ 82. Of "Livery" and "Grant."

Seisin is predicable only of corporeal real property. As incorporeal property cannot be physically possessed, it cannot be created by any act conferring physical possession,

but only by some contract or agreement, called a grant. Hence corporeal real property is often said *to lie in livery*, and incorporeal *to lie in grant.*

Read 2 Bl. Comm., p. 317.
4 Cruise Dig., Tit. xxxii, Ch. iv, §§ 38–40.
4 Kent Comm., Lect. lxvii, p. 490.
Will. R. P., p. 220.
1 Wash. R. P., B. i, Ch. i, § 38.

§ 83. Of the Possession of Estates Less than Freehold.

Of personal estates in corporeal real property there can also be no seisin. All such estates are carved out of some freehold, and although actual possession is essential to render the owner's interest complete, yet even during such possession the tenant has the occupation only, while the seisin still remains in the freeholder under whom he claims.

Read 2 Bl. Comm., p. 144.
1 Cruise Dig., Tit. viii, Ch. i, §§ 12–15.
4 Kent Comm., Lect. lvi, pp. 94, 95; Lect. lxv, p. 386.
Will. R. P., p. 364.
1 Wash. R. P., B. i, Ch. x, Sec. 1, §§ 7, 8.

§ 84. Of Entry.

The act, by which the owner of an estate in corporeal real property takes physical possession of the same, is known as *entry*. If his estate is created by actual livery of seisin, his reception of the seisin on the land, from the grantor, constitutes his entry. If his estate is otherwise created, or if it descends to him from a deceased ancestor, or if, once having had possession, he has been disseised, or if estates, whose possession takes precedence of his own, have been determined, his entry consists in going on the land and

claiming it as his, according to the nature of his actual estate.

Read 2 Bl. Comm., p. 312.
3 Bl. Comm., pp. 174–179.
1 Cruise Dig., Tit. i, §§ 24–28.
2 Cruise Dig., Tit. xiii, Ch. ii, §§ 41–55.
1 Wash. R. P., B. i, Ch. ii, § 66.
2 Wash. R. P., B. i, Ch. xiv, §§ 15, 16.
3 Wash. R. P., B. iii, Ch. ii, Sec. 7, § 12.

CHAPTER V.

OF REAL ESTATES IN REAL PROPERTY.

§ 85. Of Freehold Estates in General.

Real estates in real property are of two kinds: Estates of Inheritance, and Estates for Life. *An estate of inheritance* (known also as an *estate in fee*) is an estate so created that it may survive the original owner, and, at his death, descend to his heir-at-law. *An estate for life* is an estate so created that it must terminate with the life of the owner, or with the life of some other specified person.

Read 2 Bl. Comm., pp. 104–106, 120.
1 Cruise Dig., Tit. i, §§ 42–44; Tit. iii, Ch. i, § 1.
4 Kent Comm., Lect. liv, p. 4.
1 Wash. R. P., B. i, Ch. iii, §§ 31, 32; Ch. v, Sec. 1, §§ 1, 3.

§ 86. Of Estates in Fee-Simple.

Estates in fee are of two kinds: Estates in Fee-Simple, and Estates in Fee-Tail. *An estate in fee-simple* is an estate granted to a man and his heirs in general. This is the largest possible estate. It includes all other estates and is the sum of all. The owner may freely alienate it, or he may create lesser estates out of it; and, when these lesser estates have all expired, the fee-simple will still rest in him or his heirs.

Read 2 Bl. Comm., pp. 104–109.
1 Cruise Dig., Tit. i, §§ 45–86.
4 Kent Comm., Lect. liv, pp. 4–10.
Will. R. P., pp. 58–62, 74.
1 Wash. R. P., B. i, Ch. iii, §§ 33–93.

§ 87. Of Estates in Fee-Tail.

An estate in fee-tail is an estate granted to a man and the heirs of his body. Estates tail are called *general*, when granted to a man and the heirs of his body in general; *special*, when granted to a man and certain special heirs of his body; *male*, when granted to a man and the male heirs of his body; *female*, when granted to a man and the female heirs of his body. An estate tail is also called a *conditional fee*. It was originally an estate for the life of the donee, so granted as to enlarge to a fee upon the birth of heirs capable of inheriting, and to shrink again into a life-estate when the possibility of issue, able to inherit, became extinct. During its continuance the owner could use the property as freely as if his estate were a fee-simple, but he could alienate it only for his own life. These estates lost their chief value with the decline of the feudal system, could be defeated by various devices, and, in this country, are of little practical importance.

Read 2 Bl. Comm., pp. 109–119.
1 Cruise Dig., Tit. ii.
4 Kent Comm., Lect. liv, pp. 11–22.
Will. R. P., pp. 33–47, 54.
1 Wash. R. P., B. i, Ch. iv.

§ 88. Of Estates for Life.

Estates for life are, as to their duration, of two kinds: Estates for the life of the tenant, and Estates *per auter vie*. *Estates for the life of the tenant* are such as are so created as to exist during the life of the tenant, and to expire at his death. *Estates per auter vie* are such as are so created in favor of one man as to exist during the life of another. The tenant is then called *tenant per auter vie*, and the person, during whose life the estate is to continue, is the *cestui que vie*. If the *cestui que vie* dies before the *tenant per auter vie*,

the estate, of course, ceases. If the tenant *per auter vie* dies before the *cestui que vie*, the estate still endures, and, formerly, might have been taken possession of and enjoyed by any person as *a general occupant.* Later, it went to the heir-at-law, executor, grantee or devisee of the tenant *per auter vie* as *special occupant.* In some States, it is now regarded as a chattel interest in the hands of the personal representatives of the deceased tenant *per auter vie.*

Read 2 Bl. Comm., pp. 120, 121, 258–262.
1 Cruise Dig., Tit. iii, Ch. i, §§ 1–16, 46–59.
4 Kent Comm., Lect. lv, pp. 23–27.
Will. R. P., pp. 17–22.
1 Wash. R. P., B. i, Ch. v, Sec. 1.

89. Of the Creation of Estates for Life.

Estates for life are created either by an express grant from one person to another, or by operation of law.

Read 2 Bl. Comm., p. 120.
1 Cruise Dig., Tit. iii, Ch. i, § 2.
4 Kent Comm., Lect. lv, p. 24.
1 Wash. R. P., B. i, Ch. v, Sec. 1, § 2.

§ 90. Of Estates Tail after Possibility of Issue Extinct.

Three kinds of estates for life are created by operation of law: Estates tail after possibility of issue extinct; Estates by Curtesy; and Estates in Dower. *An estate tail after possibility of issue extinct* is an estate originally granted in special tail, but which, because no heirs now exist or can ever exist who could inherit it, has been reduced, by the operation of law, from a fee to a life-estate in the present holder. The possibility of issue becomes thus extinct

only upon the death, without living issue, of some person to whose issue the estate is confined by the grant.

Read 2 Bl. Comm., pp. 124–126.
1 Cruise Dig., Tit. iv.
Will. R. P., p. 52.
1 Wash. R. P., B. i, Ch. iv, §§ 58, 59.

§ 91. Of Estates by Curtesy.

An estate by curtesy is the estate which a surviving husband has, by operation of law, in the real property of a deceased wife, who, during their married lifetime, was seised of an estate in fee in such real property, and who also, during their married lifetime, had by him a child, born alive, and capable of inheriting her estate. The marriage must have been lawful, or, if voidable, not avoided during the life of the wife. The estate of the wife must have been a fee, either legal or equitable. If the estate be in corporeal real property, either the wife, or her husband on her behalf, must have had the seisin in fact thereof during the coverture. Though the child must be born alive, the duration of its life is immaterial. This estate vests in the husband immediately upon the death of the wife, without further proceedings; and any circumstance, which would have determined her estate if she were living, will determine his. If not so determined, it ceases with his life, and the inheritance then goes onward in her heirs as if no curtesy had existed.

Read 2 Bl. Comm., pp. 126–128.
1 Cruise Dig., Tit. v.
4 Kent Comm., Lect. lv, pp. 27–35.
Will. R. P., pp. 209, 210.
1 Wash. R. P., B. i, Ch. vi.

§ 92. Of Estates in Dower.

An estate in dower is the estate which a surviving wife has, by operation of law, in one third of the real property of a deceased husband, who, during their married lifetime, was seised of such an estate in fee, in such real property, as her children could have inherited. This estate resembles that by curtesy. The rule as to marriage is the same. The rule as to seisin differs in this: that to create an estate in dower the husband need only have had seisin in law with right to immediate seisin in fact. A widow has no right to take specific land as dower before the same is set out to her, and, until this is done, she is usually entitled to support out of the estate. In some States, the widow has dower only in the real property of which her husband was seised in fee at the time of his death. The right of a widow to her dower may be destroyed by her acceptance, either before marriage or after the death of her husband, of some other competent provision made by him for her in lieu of dower. Dower, as well as curtesy, is also barred by a divorce from the bonds of marriage.

Read 2 Bl. Comm., pp. 129–139.
1 Cruise Dig., Tit. vi, vii.
4 Kent Comm., Lect. lv, pp. 35–72.
Will. R. P., pp. 213–217.
1 Wash. R. P., B. i, Ch. vii, viii.

§ 93. Of the Incidents of Estates for Life.

The owner of an estate for life has a right to the full enjoyment and use of the property and all its profits, during his estate; but, with the exception of tenant in tail after possibility of issue extinct, has no right to so use it as to impair the value of the estates which succeed his own. He may take from the land such wood as he needs for his fire, and for the necessary repairs of his tools, fences, and

buildings. He may also take minerals and ores from mines already opened. He has a right to the annual crops, and, if his estate determines between planting and harvest, otherwise than by his own act, his executors may gather them. The same rights vest in his under-tenants; and these do not lose their crops, even though the estate of the tenant for life be terminated by his voluntary act.

Read 2 Bl. Comm., pp. 122–124.
1 Cruise Dig., Tit. iii, Ch. i, §§ 17–31; Ch. ii.
4 Kent Comm., Lect. lv, pp. 73–82.
Will. R. P., pp. 23–25.
1 Wash. R. P., B. i, Ch. v, Sec. 2, 3, 4.

CHAPTER VI.

OF PERSONAL ESTATES IN REAL PROPERTY.

§ 94. Of Estates for Years.

Personal estates in real property are four: Estates for years; Estates at will; Estates from year to year; Estates by sufferance. *An estate for years* is an estate so created as to begin and end at certain specified dates. It is also called a *term* (from *terminus*) on account of its predetermined duration. It is usually created by a contract, called *a lease*, and may be limited to endure for a day, a year, a century, or any other fixed period. It may be created to commence either immediately or at some future day, but the estate vests in the lessee only when he begins to occupy the land. The lessee does not own the soil, but, within the limits created by his contract, he does own all the profits of it and all the use that can be made of it. He has a right to take necessary wood for his fuel and repairs; to gather and remove the crops whenever his estate terminates, without his own concurrence, before its specified end and between planting and harvest; to work mines already open; to erect buildings and remove them; and otherwise to employ and appropriate the current products of the land. He may also assign and convey his whole estate to others, or underlet a part thereof. This is practically one of the most important estates known to the law.

Read 2 Bl. Comm., pp. 140–145.
1 Cruise Dig., Tit. viii.
4 Kent Comm., Lect. lvi. pp. 85–111.
Will. R. P., pp. 359–376.
1 Wash. R. P., B. i, Ch. x.

§ 95. Of Estates at Will.

An estate at will is an estate so created as to continue during the will of the parties. It may be created by express grant, or by implication of law; and, generally, whenever a person is let into land by the owner thereof, without the grant of a freehold interest or of a certain term, and not under circumstances which show an intention to create an estate from year to year, as hereafter explained, the person so let in has an estate at will. The estate may be determined at the will of either party. Any acts of the lessor in assertion of his right of possession, or any acts of abandonment of possession on the part of the lessee, or the death of either party, put an end to this estate. While it exists it is a mere *scintilla* of interest, entitling the lessee only to the usufruct of the land. He has nothing that he can assign, though he may underlet. He is entitled to take necessary wood for his fire and repairs; and when his estate is determined by his lessor, without his consent, between planting and harvest, he can harvest and carry away the crops which he has planted. The liability of these estates to sudden termination, at the will of either party, was long ago restricted by the adoption of a rule, requiring that such party should give *notice* to the other of his intention to determine the estate. The time when this notice should be given was left uncertain; in some cases it being required to be given on the rent-day next preceding the day named as the cessation of the estate; in other cases, within a reasonable time. This rule, of course, destroyed the essential characteristic of an estate at will wherever it was applied, although there still may be estates which are so created that this rule cannot apply, and which will, therefore, be strictly estates at will.

Read 2 Bl. Comm., pp. 145–150.
1 Cruise Dig., Tit. ix, Ch. i, §§ 1–10.
4 Kent Comm., Lect. lvi, p. 111.
Will. R. P., p. 360.
1 Wash. R. P., B. i, Ch. xi, Sec. 1

§ 96. Of Estates from Year to Year.

An estate from year to year is an estate so created that the law implies an agreement between the parties that the estate shall cease one year from the date of its beginning. This estate grew out of the uncertainty of the rule as to the time when a notice to quit must be given, in order to determine an estate at will, and was the result of judicial legislation. It exists wherever an estate is created by a parol lease, reserving rent payable yearly or at aliquot parts of a year, and fixing no time for the termination of the estate. Such an estate is also implied from the occupation by one of the land of another, and the payment and acceptance of rent yearly or at aliquot parts of a year, without any express agreement. This estate, once created, continues until determined by *notice to quit*, or by some other sufficient legal cause. If the tenant holds, without such notice, into a second year, the law implies an agreement that the estate shall continue, upon the same terms as before, during that year, and in the same manner in successive years. The necessity of notice, in order to determine this estate, binds the lessee as well as the lessor. This notice must clearly indicate when the estate is to cease, and the date so fixed must correspond with the end of the period during which the tenant may lawfully hold. At common law, this notice must be given six months before the designated end of the estate, but this rule is often varied by statute. The notice, once given, may be revoked by mutual consent, in which case the estate continues as before. This estate, unlike the ordinary estate at will, may survive the lessee, and vest in his personal representatives. It is also assignable.

Read 2 Bl. Comm., p. 147.
1 Cruise Dig., Tit. ix, Ch. i, §§ 20–32.
4 Kent Comm., Lect. lvi, pp. 111–116.
Will. R. P., pp. 360, 361.
1 Wash. R. P., B. i, Ch. xi, Sec. 2.

§ 97. Of Estates by Sufferance.

An estate by sufferance is an estate which exists, by implication of law, in one who continues in wrongful possession of lands after the estate, by virtue of which he obtained rightful possession, has determined. Such estates are those of the tenant *per auter vie*, who holds after the death of *cestui que vie;* of a tenant for years or at will, whose possession continues after his estate has been determined; of undertenants, who occupy after the term of the original tenant has expired; of grantors, who agree to deliver possession by a day certain and neglect to do so. These estates rest on no privity of contract or estate between the owner and the tenant. The tenant has no right to any notice to quit, but may be expelled at any moment by the entry of the owner, and, if so expelled between planting and harvest, has no right to the crops which may then be growing.

Read 2 Bl. Comm., pp. 150, 151.
1 Cruise Dig., Tit. ix, Ch. ii.
4 Kent Comm., Lect. lvi, pp. 116–120.
Will. R. P., p. 360.
1 Wash. R. P., B. i, Ch. xii, Sec. 1.

CHAPTER VII.

OF THE TENURE OF ESTATES IN REAL PROPERTY.

§ 98. Of Feudal Tenures.

The feudal relation, subsisting between the lord of the manor and his tenant, was known as *tenure*. Anciently all estates were conditional, being held upon condition of performing certain services or rendering certain tribute. Tenures were of various kinds, differing according to the nature of the conditions imposed upon the tenant, and the legal dignity of his estate. With the decay of the feudal system, however, many of these forms of tenure disappeared, and, with one exception, all lay freehold tenures were abolished by the statute 12 Charles II.

Read 2 Bl. Comm., pp. 44–102.
1 Cruise Dig., Prelim. Diss.
3 Kent Comm., Lect. liii, pp. 487–509.
Will. R. P., pp. 108–122.
1 Wash. R. P., B. i, Ch. ii.

§ 99. Of Tenures in the United States.

In this country, tenure, in the feudal sense, never has been recognized. There is here no feudal superior, to whom service is to be rendered or tribute paid. In nearly all the States *tenure is allodial* (from *al*, the whole, and *od*, ownership), and the holder of an estate has the entire ownership thereof residing in him. Conditional estates indeed exist, and are both numerous and important; but the conditions originate in some contract between the parties, not in any feudal relation, and characterize or qualify

the existence of estates, and not the tenure by which they are held.

Read 3 Kent Comm., Lect. liii, pp. 509–514.
1 Wash. R. P., B. i, Ch. ii, § 98.

§ 100. Of Absolute and Conditional Estates.

Estates, as to the right of the holder thereof to their existence, are of two kinds: Absolute and Conditional. *An absolute estate* is an estate whose existence is independent and unqualified. *A conditional estate* is an estate whose existence depends upon the happening or not happening of some uncertain event.

Read 2 Bl. Comm., p. 152.
2 Cruise Dig., Tit. xiii, Ch. i, §§ 1, 2.
4 Kent Comm., Lect. lvii, p. 121.
2 Wash. R. P., B. i, Ch. xiv, § 1.

§ 101. Of Express and Implied Conditions.

Conditions qualifying the existence of estates are, as to their origin, of two kinds: Implied and Express. *An implied condition* is such as the law annexes to the existence of certain estates. *An express condition* is one which is stated, in so many words, in the grant by which the estate is created.

Read 2 Bl. Comm., pp. 152–154.
2 Cruise Dig., Tit. xiii, Ch. i, §§ 3–5.
4 Kent Comm., Lect. lvii, pp. 121–124.
2 Wash. R. P., B. i, Ch. xiv, § 2.

§ 102. Of Precedent and Subsequent Conditions.

Conditions qualifying the existence of estates are, as to their effect, of two kinds: Precedent and Subsequent. *A condition precedent* is one which must be fulfilled before an estate can come into existence. If such a condition be

impossible, or unlawful, it can never be fulfilled, and the estate can never vest in the grantee. *A condition subsequent* is one whose fulfilment will defeat an estate already vested. If such a condition be impossible, or unlawful, the estate can never be defeated. An estate in fee-tail is an instance of an estate upon condition precedent, being an estate for life, conditioned to become an estate in fee upon the birth of heirs capable of inheriting. An estate in *mortgage*, which is an estate created in favor of the holder of an obligation and conditioned to become void upon the performance of such obligation, is an instance of an estate upon condition subsequent.

Read 2 Bl. Comm., pp. 154–162.
2 Cruise Dig., Tit. xiii, Ch. i, §§ 6, 7; Tit. xv, Ch. i, § 11
4 Kent Comm., Lect. lvii, pp. 124–126, 130–133; Lect. lviii.
2 Wash. R. P., B. i, Ch. xiv, §§ 2, 4–9.
Walker Am. Law, §§ 142–148.

§ 103. Of Conditional Limitations.

Similar to a condition subsequent is *a conditional limitation*, which is a qualification annexed to an estate, and with the cessation of which the estate also ceases. It differs from a condition proper in this: that the fulfilment of the condition proper does not defeat the estate unless the person, in whose favor it is to be defeated, so elect; while, in a conditional limitation, the cessation of the qualification, *ipso facto*, determines the estate. An estate, granted to a woman, as long as she remains unmarried, is an instance of a conditional limitation.

Read 2 Bl. Comm., pp. 155, 156.
2 Cruise Dig., Tit. xiii, Ch. ii, §§ 67–69; Tit. xvi, Ch. ii, §§ 30–33.
4 Kent Comm., Lect. lvii, pp. 126–129.
2 Wash. R. P., B. i, Ch. xiv, §§ 27–31.

§ 104. Of the Transfer of Conditional Estates.

Any kind of an estate in real property may be granted subject to a condition, and will thenceforth remain subject thereto, notwithstanding any alienation or descent of the estate.

Read 2 Bl. Comm., pp. 109–111, 152.
2 Cruise Dig., Tit. xiii, Ch. i, § 9.
2 Wash. R. P., B. i, Ch. xiv, §§ 24, 25.

CHAPTER VIII.

OF THE TIME OF THE ENJOYMENT OF ESTATES IN REAL PROPERTY.

§ 105. Of the Enjoyment of Estates.

Estates, as to the time when they are to begin to be enjoyed, are of two kinds: Estates in Possession, and Estates in Expectancy. *An estate in possession* is an estate so created as to vest in the owner thereof a present right of present enjoyment. *An estate in expectancy* is an estate so created that the enjoyment thereof is postponed until some future day.

Read 2 Bl. Comm., p. 163.
2 Cruise Dig., Tit. xvi, Ch. i, § 1.
1 Wash. R. P., B. i, Ch. i, § 41.
2 Wash. R. P., B. ii. Ch. iv, Sec. 1, §§ 1-4.

§ 106. Of Estates in Expectancy. Reversions; Remainders; Executory Interests.

Estates in expectancy are of three kinds: Estates in Reversion; Estates in Remainder; and Executory Interests. *An estate in reversion* is that residue of his original estate which remains in a grantor, after he has granted to another a less estate than his own. *An estate in remainder* is an estate created by the same grant which creates another estate, and is limited to take effect in possession after that other estate has determined. *An executory interest* is an estate created to commence at some future time, without reference to any precedent or intermediate estate. Thus if A., owning a fee-simple estate, grant an estate for

life to B., the residue of the fee-simple still resides in A. as a *reversion*, and its enjoyment will commence after B.'s estate for life has determined. If, at the same time and by the same act, A. grants an estate for life to B., and the whole, or any part of, the residue of his fee-simple to C., the estate of C. is a *remainder*, and will take effect in possession only after the life-estate has ended. Or if A., for valuable consideration, grant the fee-simple to B. and his heirs, to hold to the use of C. and his heirs from and after a certain future event, the use, and consequently the entire seisin and estate, will, on the happening of that event, vest in C. and his heirs, and will meanwhile be known as an *executory interest.*

Read 2 Bl. Comm., pp. 163–176.
2 Cruise Dig., Tit. xvi, Ch. i, §§ 2–6; Ch. v; Tit. xvii, §§ 1–11.
4 Kent Comm., Lect. lix, pp. 197, 237; Lect. lx, p. 264; Lect. lxiii, p. 353.
Will. R. P., pp. 222, 223, 243.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 5–7; Ch. v, Sec. 2, § 1; Ch. vii, Sec. 1, § 1; Ch. viii, § 1.

§ 107. Of the Distinctions between Reversions, Remainders, and Executory Interests.

These three estates in expectancy differ, therefore, in the following particulars: (1) To the existence of a reversion or remainder a precedent, or *particular, estate* is necessary, but not so to an executory interest; (2) A reversion exists by operation of law, which always finds the ultimate fee-simple somewhere, while remainders and executory interests are created by act or agreement of the parties; (3) Reversions and remainders are estates at common law, and are governed by rules based on the doctrine that actual livery of seisin is essential to the creation of a freehold estate,

while executory interests are estates, which are created either by will or under the Statute of Uses, and are governed by rules peculiar to a devise, or by rules based on the doctrine that the seisin follows the use without any actual livery; (4) Remainders can be defeated by the lapse of the seisin into the grantor, through the determination of the particular estate before the remainder can take effect in possession, while nothing can prevent the final vesting of the seisin in the grantee of an unconditional executory interest.

Read 2 Bl. Comm., pp. 163–168, 173–178.
2 Cruise Dig., Tit. xvi, Ch. i, § 10; Ch. iv, §§ 2–4, 7; Ch. v, § 19; Tit. xvii, § 12.
4 Kent Comm., Lect. lix, pp. 233–237, 248, 253; Lect. lxiii, pp. 353–355.
Will. R. P., pp. 222, 223, 267.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 5–7, 10; Ch. v, Sec. 2, §§ 3, 4.

§ 108. Of Estates in Reversion.

An estate in reversion is a present vested estate and has all the properties of the grantor's original estate, except the right of immediate possession. It may be alienated by deed, or executory interests may be created out of it. Any permanent injury to the property, in which such estate is held, is a wrong against the reversioner, for which he may have his remedy at law.

Read 2 Bl. Comm., pp. 175, 281–284.
2 Cruise Dig., Tit. xvii, §§ 12–16.
Will. R. P., p. 223, 224.
2 Wash. R. P., B. ii, Ch. viii.

§ 109. Of Vested Remainders.

Estates in remainder are of two kinds: Vested and Contingent. *A vested remainder* is a remainder so created that,

from its commencement to its close, the seisin could vest instantly in the remainder-man in case the particular estate be determined. This can be true only when the remainder is limited to a definite person in being at the time of the grant. Such a remainder is not, however, certain to result in the possession of the estate. A grant to A. for life, remainder to B. for life, both being living persons, creates a vested remainder in B., yet B. may die before A., and his estate in remainder thus come to an end. "It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines," which characterizes a vested remainder.

Read 2 Bl. Comm., p. 168.
2 Cruise Dig., Tit. xvi, Ch. i, §§ 8, 9, 41, 45.
4 Kent Comm., Lect. lix, pp. 202–204.
Will. R. P., pp. 230–234.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 8–10, 15–17.

§ 110. Of Contingent Remainders.

A contingent remainder is a remainder so created that the particular estate can be determined, before the seisin of the remainder is able to vest in the remainder-man. This is the case wherever the remainder is limited to a person not in being, or to a person not at present capable of taking the estate, or when it is made dependent upon a future and uncertain event. A grant to A. for life, remainder to B.'s eldest son, B. having no son, is a contingent remainder, for A. may die before B. has any son. So a grant to A. for life, remainder to B. in fee if C. survive A., is a contingent remainder, for A. may outlive C. If, however, before the particular estate ceases, the person, to whom the contingent remainder

is limited, becomes capable of taking it, or if the event, on which the remainder depends, actually happens, and the seisin thus becomes able to vest in the remainder-man, the contingency is extinguished, and the remainder will thenceforth be a vested one.

Read 2 Bl. Comm., pp. 169–172.
2 Cruise Dig., Tit. xvi, Ch. i, §§ 10, 40, 41, 45; Ch. ii, iii, iv.
4 Kent Comm., Lect. lix, pp. 206–208.
Will. R. P., pp. 242–245, 247–251.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, §§ 8–10, 26; Sec. 3–6.

§ 111. Of the Alienation of Remainders.

A vested remainder is alienable by any form of conveyance which does not necessitate delivery of possession. A contingent remainder is also alienable when the contingency is one of event and not of person, there being, in the latter case, no one able to convey.

Read 2 Bl. Comm., p. 175.
4 Kent Comm., Lect. lix, pp. 205, 261.
Will. R. P., pp. 233, 255–257.
2 Wash. R. P., B. ii, Ch. iv, Sec. 1, § 20; Sec. 6, § 6.

§ 112. Of Executory Interests. Rule against Perpetuities.

Executory interests are of great variety. When created by will they are usually called *executory devises*. Although such interests may be created to commence *in futuro*, yet the *rule against perpetuities* forbids the creation of estates so limited as to take effect at a day more distant from the date of the grant, than during a life or lives in being and twenty-one years, (with the addition of the usual period of gestation,) after such lives have ceased. Whenever it is

doubtful whether the terms of a grant create an executory interest or a remainder, the estate so created is regarded as a remainder.

Read 2 Bl. Comm., pp. 173–175, 334, 335.
2 Cruise Dig., Tit. xvi, Ch. ii, § 28.
6 Cruise Dig., Tit. xxxviii, Ch. xvii, § 1; Ch. xviii, §§ 12, 13.
4 Kent Comm., Lect. lix, pp. 237–247; Lect. lx, pp. 264–271.
Will. R. P., pp. 267–271, 293, 294.
2 Wash. R. P., B. ii, Ch. v, Sec. 2, 3; Ch. vii, Sec. 1, § 1; Sec. 2, § 2.

CHAPTER IX.

OF THE NUMBER AND CONNEXION OF THE TENANTS IN ESTATES IN REAL PROPERTY.

§ 113. Of Joint and Several Estates.

Estates, as to the number and connexion of their tenants, are of three kinds: Estates in Severalty; Estates in Joint-Tenancy; and Estates in Common. *An estate in severalty* is an estate, both the ownership and possession of which are granted to, or vested in, one person only. *An estate in joint-tenancy* is an estate granted to two or more persons jointly. *An estate in common* is an estate vested in one person, but the possession of which is united with that of other estates, held by other persons, in the same property.

Read 2 Bl. Comm., pp. 179, 180, 191.
2 Cruise Dig., Tit. xviii, Ch. 1, §§ 1–3; Tit. xx, § 1.
4 Kent Comm., Lect. lxiv, pp. 357, 367.
Will. R. P., pp. 123, 127.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, §§ 1, 2; Sec. 3, § 1.

§ 114. Of Estates in Severalty.

An estate in severalty is the usual form of an estate, and all estates are presumed to be in severalty unless the contrary be expressly declared. The owner of such an estate has the entire control thereof, and may enjoy it as

he pleases, so long as he does nothing to impair the value of other estates in the same property.

Read 2 Bl. Comm., p. 179.
2 Cruise Dig., Tit. xviii, Ch. i, § 2.

§ 115. Of Estates in Joint-Tenancy. The Four Unities.

An estate in joint-tenancy is characterized by *the four unities:* Unity of estate; Unity of title; Unity of time; and Unity of possession. There is said to be *unity of estate*, because there is but one estate created, and because, whatever the number of persons to whom such estate is granted, they together constitute but one tenant. There is said to be *unity of title, time and possession*, because all these persons have their estate by the same act of the same grantor, enter upon its enjoyment at the same time, and possess it together as if they were but one person. All these unities are, however, reducible to the one unity of estate, since every estate is essentially a unit, and presupposes unity of title, time and possession.

Read 2 Bl. Comm., pp. 180–183.
2 Cruise Dig., Tit. xviii, Ch. i, §§ 12, 13, 17, 18, 27.
4 Kent Comm., Lect. lxiv, pp. 357, 358.
Will. R. P., pp. 123–126.
1 Wash. R. P., B. i., Ch. xiii, Sec. 1, § 6.

§ 116. Of Estates in Joint-Tenancy. Survivorship.

An estate in joint-tenancy is also characterized by *the right of survivorship*. For an estate, granted to two or more persons as one tenant, can never be without a tenant as long as either of such persons survive. In contemplation of law, therefore, the death of one joint-tenant works no change in the estate. It still inheres in the survivors, to the exclusion of the heirs or representatives of the de-

ceased co-tenant, and only ceases to exist when, in the last survivor, it becomes an estate in severalty.

Read 2 Bl Comm., pp. 183, 184.
2 Cruise Dig., Tit. xviii, Ch. i, §§ 28, 29.
4 Kent Comm., Lect. lxiv, pp. 360, 361.
Will. R. P., pp. 123–126.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, §§ 7–10.

§ 117. Of the Incidents of Estates in Joint-Tenancy.

The same unity of estate leads to other rules, viz.: that possession by one joint-tenant is possession by all; that if one purchases an adverse title it accrues to all, if they so elect: that one can neither sue or be sued alone in respect to the joint-estate: that the estate is not subject to dower or curtesy, nor can one of the joint-tenants devise his share therein.

Read 2 Bl. Comm., pp. 182, 183.
2 Cruise Dig., Tit. xviii, Ch. i, §§ 52, 62, 64.
4 Kent Comm., Lect. lxiv, p. 359.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, §§ 11–16, 21.

§ 118. Of the Alienation of Estates in Joint-Tenancy.

A joint-tenant may, however, alienate his share of the estate, either to his co-tenants or to a stranger. If to a stranger, the stranger thereby becomes tenant in common with the other joint-tenants; if to a sole co-tenant, he becomes tenant in severalty; if to one of several co-tenants, he becomes tenant in common as to the share aliened and remains joint-tenant as to the rest.

Read 2 Bl. Comm., p. 185.
2 Cruise Dig., Tit. xviii, Ch. ii, §§ 10–22.
4 Kent Comm., Lect. lxiv, p. 360.
Will. R. P., p. 127.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, §§ 17, 18.

§ 119. Of the Destruction of Estates in Joint-Tenancy.

Estates in joint-tenancy may be destroyed by destroying either of the unities of estate, title, or possession; by alienation to a stranger; by voluntary partition; or by vesting in a sole survivor.

Read 2 Bl. Comm., pp. 185–187.
2 Cruise Dig., Tit. xviii, Ch. ii.
4 Kent Comm., Lect. lxiv, pp. 363–366.
Will. R. P., pp. 128, 129.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, § 22; Sec. 7.

§ 120. Of Estates in Common.

Estates in common are characterized by *unity of possession.* Though they may have the other unities of time and title, yet these are not necessary, the community of possession being the only essential feature of the estate. The interest of the tenants is not a joint interest. Each has his own separate estate, which he can manage as he pleases provided he does not injure his co-tenants in so doing, and which he can convey by deed or will, or which may descend to his heirs. From this severalty of estate it results that, between tenants in common, there is no survivorship.

Read 2 Bl. Comm., p. 191.
2 Cruise Dig., Tit. xx, §§ 2, 21, 23.
4 Kent Comm., Lect. lxiv, pp. 367–369.
Will. R. P., pp. 127, 128.
1 Wash. R. P., B. i, Ch. xiii, Sec. 3, §§ 1–6, 10–16.

§ 121. Of the Creation of Estates in Common. Coparcenary.

This estate may be created either by grant, devise, descent, or the destruction of one of the unities of a joint-tenancy. Any estate, granted to two or more persons, will be considered an estate in common in each, unless it is

expressly declared to be joint in all. The same rule applies to a devise. The descent of an estate to two or more persons was formerly held to create a peculiar estate in them, called *coparcenary*, but in this country no distinction, between such estates and estates in common, has been recognized.

Read 2 Bl. Comm., pp. 187–193.
2 Cruise Dig., Tit. xx, §§ 3, 4, 7.
4 Kent Comm., Lect. lxiv, pp. 363, 364, 366, 367.
1 Wash. R. P., B. i, Ch. xiii, Sec. 1, § 9; Sec. 2.

§ 122. Of the Incidents and Destruction of Estates in Common.

An estate in common may be destroyed by the union of all the estates in common in one person, or by a partition of the property between the different tenants. While the estates continue in common, the possession of one tenant is usually regarded as the possession of all; though, if he erect buildings, or make improvements on the land, he cannot charge his co-tenants with any part of the expense thereof. Necessary repairs to existing buildings, however, he may make, and can claim contribution from his co-tenants on payment for the same.

Read 2 Bl. Comm., p. 194.
2 Cruise Dig., Tit. xx, §§ 14, 25, 34.
4 Kent Comm., Lect. lxiv, pp. 369–371.
Will. R. P., pp. 128, 129.
1 Wash. R. P., B. i, Ch. xiii, Sec. 3, §§ 7–9, 17–18; Sec. 7.

CHAPTER X.

OF THE TITLE TO ESTATES IN REAL PROPERTY.

§ 123. Of Title. Title by Descent. Title by Purchase.

Title is the means whereby an estate is acquired. An estate becomes complete in the owner thereof only when he has the right of property, the right of possession, and actual possession. *Title* is, therefore, the means by which the owner of an estate acquires his right of property, his right of possession, and his actual possession. Such titles are of two kinds: Titles by Descent, and Titles by Purchase. *Title by descent* is that title by which the heir-at-law acquires an estate upon the death of his ancestor. *Title by purchase* is any other title than that by descent, whether it be by operation of law, or by the act of the parties.

Read 2 Bl. Comm., pp. 195–201.
3 Cruise Dig., Tit. xxix, Ch. i, §§ 2–12, 16, 17, 22; Ch. ii, § 1.
4 Kent Comm., Lect. lxv, pp. 373, 374.
3 Wash. R. P., B. iii, Ch. i, Sec. 1.

§ 124. Of Consanguinity.

The descent of estates is governed by rules growing out of the doctrine of consanguinity. *Consanguinity* is the connection or relation of persons who are descended from the same stock, or common ancestor. It is of two kinds: Lineal and Collateral. *Lineal consanguinity* is the relation between persons, one of whom is descended in a direct line from the other. *Collateral consanguinity* is the relation between persons, who are descended from the same stock,

but not one from the other. The degree of consanguinity between two persons is computed, either by counting from the common ancestor to that one of the two persons who is most remote from him, or by adding together the number of degrees existing between each of the two persons and the common ancestor. The latter is the method usually adopted in this country.

Read 2 Bl. Comm., pp. 202–207.
3 Cruise Dig., Tit. xxix, Ch. ii, §§ 6, 7.
4 Kent Comm., Lect. lxv, pp. 412, 413.
3 Wash. R. P., B. iii, Ch. i, Sec. 2, §§ 11, 12.

§ 125. Of the Whole Blood and Half Blood.

Kindred of the whole blood are they who are descended, not only from the same ancestor, but from the same pair of ancestors. *Kindred of the half blood* are they who, though descended from the same ancestor, are descended from him through different marriages. Kindred of the half blood were anciently unable to inherit from each other.

Read 2 Bl. Comm., p. 227.
3 Cruise Dig., Tit. xxix, Ch. iii, §§ 52, 53.
4 Kent Comm., Lect. lxv, p. 403.
3 Wash. R. P., B. iii, Ch. i, Sec. 2, § 18.

§ 126. Of the Rules of Descent.

The seven canons of descent, as contained in Blackstone's Commentaries, are no longer in force either in this country or in England. Each of the States has its own laws of descent, subject, of course, to occasional changes, and the only reliable source of information concerning them is the statute-books, in which they are contained.

Read 2 Bl. Comm., pp. 208, 212, 214, 217, 220, 224, 234.
4 Kent Comm., Lect. lxv, pp. 374–419.
Will. R. P., pp. 92–107.
3 Wash. R. P., B. iii, Ch. i, Sec. 2, §§ 10, 13–44.

§ 127. Of Title by Purchase.

Title by purchase is of two kinds: Title by operation of law, and Title by act of the parties. *Title by operation of law* is the title by which a person acquires an estate either through the operation of law alone, acting *suo motu*, or through the operation of law, acting with reference to some precedent act of one of the parties. *Title by act of the parties* is the title whereby a person acquires an estate which has been voluntarily transferred to him, or created in his favor, by another, and voluntarily accepted by himself.

Read 2 Bl. Comm., p. 241.
3 Cruise Dig., Tit. xxx, §§ 1–4.
4 Kent Comm., Lect. lxvi, p. 423.
3 Wash. R. P., B. iii, Ch. i, Sec. 1, § 4.

§ 128. Of Title by Escheat.

Title by operation of law is of ten kinds: Title by Escheat; Title by Accretion; Title by Abandonment; Title by Forfeiture; Title by Prescription; Title by Possession; Title by Marriage; Title by Execution; Title by Judicial Decree; Title by Eminent Domain. *Title by escheat* is the title by which the state acquires an estate in the real property of such persons as die intestate and without lawful heirs. Theoretically, all owners of estates in real property originally derive their right thereto from the state, of whose territory that property forms a part; and, on failure of such owners, the property itself returns into the common ownership of the state. Before the state takes actual possession, however, there is usually an investigation, by suit, of its right to do so, called an *inquest of office*, or *office found*. When a state acquires property by escheat, it takes only the estate of the former owner, and holds it, or trans-

mits it, subject to all the burdens which attended it in his hands.

Read 2 Bl. Comm., pp. 244–257.
3 Cruise Dig., Tit. xxx, §§ 5–8, 11, 33, 39.
4 Kent Comm., Lect. lxvi, pp. 423–426.
Will. R. P., pp. 116, 117.
3 Wash. R. P., B. iii, Ch. ii, Sec. 1.

§ 129. Of Title by Accretion. Alluvion. Avulsion.

Title by accretion is the title by which the owner of land acquires an estate in other land, which has been gradually added thereto by the operation of natural causes. Thus in *alluvion*, where soil is gradually washed upon and united with the shore of the sea or of a river, it becomes the property of the owner of the land to which it is attached. So islands, formed in unnavigable rivers, belong to the owners of one or both banks, according to their situation in reference to the central line of the stream. So when a stream, running between two estates, gradually changes its course, the boundary line changes with it, and one proprietor loses what the other gains. But in *avulsion*, or the sudden removal by water of large quantities of soil, and their deposition on or annexation to the land of another, the ownership of the soil thus suddenly removed is not changed. And where a stream suddenly changes its course, so as to leave a body of land, belonging to one, annexed to that of another without the former intervening current of water, the ancient boundary is not altered, but the whole stream becomes the property of the one through whose land it now flows.

Read 2 Bl. Comm., pp. 261, 262.
3 Kent Comm., Lect. lii, p. 428.
3 Wash. R. P., B. iii, Ch. ii, Sec. 4.

§ 130. Of Title by Abandonment.

Title by abandonment is the title whereby the owner of an estate, which is subject to an incorporeal hereditament, acquires the right, without his own act, to hold his estate free from the burden of such incorporeal hereditament. This title can arise only where the owner of the incorporeal hereditament does some act inconsistent with the further existence of the same. Mere non-user is not enough to raise even a presumption of abandonment, unless continued for a long period (usually twenty years); and this presumption is of little force, unless aided by acts of the owner of the hereditament.

Read 3 Kent Comm., Lect. lii, pp. 448–452.
3 Wash. R. P., B. iii, Ch. ii, Sec. 5.

§ 131. Of Title by Forfeiture.

Title by forfeiture is the title by which the grantor of an estate upon condition subsequent, or his heirs or assigns, on fulfilment of such condition, again acquires an estate in the property in which such conditional estate was granted, or again enjoys his original estate free from the limitations imposed thereon by the existence of the conditional estate.

Read 2 Bl. Comm., pp. 153, 267–284.
2 Cruise Dig., Tit. xiii, Ch. ii, § 41.
4 Kent Comm., Lect. lxvi, pp. 426–428.
2 Wash. R. P., B. i, Ch. xiv, §§ 11–23.

§ 132. Of Title by Prescription.

Title by prescription is the title by which the possessor of an incorporeal hereditament, after a certain period of possession, acquires an estate in such hereditament. This title rests upon the rule of law, that such continued *possession raises a conclusive presumption that there has been a*

grant of such hereditament, to the possessor thereof, by the owner of the corporeal property in, or concerning, or annexed to, which the incorporeal hereditament is alleged to exist. The time, during which such possession must have continued is usually fixed by statute. *The possession must have been:* (1) *Adverse;* i. e. inconsistent with the enjoyment of the corporeal property by its true owner, according to the nature of his estate therein; (2) *Under a claim of right;* i. e. with the avowal, on the part of the possessor, that he has a legal right to the possession of the hereditament; (3) *Continuous;* i. e. without abandonment, or disuse, or substantial alteration in the mode of use, on the part of the possessor; (4) *Uninterrupted;* i. e. enjoyed, during the whole of the required period of time, by the same individual possessor, or by a series of individuals, each claiming title through his predecessors from the original adverse possessor; (5) *Peaceable;* i. e. without such action, on the part of the owner of the corporeal property, as suspends, or restricts, or terminates, or interferes with the enjoyment of the hereditament by its possessor; (6) *With the knowledge of the owner of the corporeal property.*

Read 2 Bl. Comm., pp. 263–266.
3 Cruise Dig., Tit. xxxi, Ch. i.
3 Kent Comm., Lect. lii, pp. 441–445.
2 Wash. R. P., B. ii, Ch. i, Sec. 3, §§ 6, 7, 17–29.
3 Wash. R. P., B. iii, Ch. ii, Sec. 3.

§ 133. Of Title by Possession.

Title by possession is the title by which the possessor of land, after a certain period of possession, acquires an estate in such land. This title rests upon the theory that such continued possession is inconsistent with actual ownership in any one else, and upon the rule that after such a lapse of time no antagonistic ownership shall be asserted; but there is no presumption of a transfer of the estate from

the former to the present owner. In order that it may result in title, *this possession must be:* (1) *Actual;* i. e. a physical occupation of the land by the alleged possessor, or by some other person claiming title under him; (2) *Definite;* i. e. confined within perceptible boundaries in such a manner that the precise extent of the physical occupation is always ascertainable; (3) *Notorious;* i. e. so open and apparent that no one, who was familiar with the land, could remain ignorant of such possession; (4) *Continued;* i. e. without abandonment of the land on the part of the possessor, and without entry on the part of its true owner; (5) *Adverse;* i. e. inconsistent with the seisin or possession of the land by its real owner, according to the nature of his estate therein; (6) *Exclusive;* i. e. undisturbed by the antagonistic occupation of any other claimant of the land; (7) *Uninterrupted;* i. e. enjoyed, during the whole of the required period of time, by the same person, or by a series of persons each claiming title, through his predecessors, from the original adverse possessor; (8) *Under a claim of right;* i. e. with the avowal, on the part of the possessor, that he has a legal right to the possession as the owner in fee-simple of the land itself. Such a possession justifies the presumption that the real owner of the land acquiesces in the claim of ownership, made by him who has the actual possession; and, after the prescribed period of acquiescence has elapsed, the law forbids the true owner to assert his title against the alleged title of the possessor. And, therefore, as the actual possessor of corporeal property has always a good title thereto against all the world except the true owner, when the true owner can no longer assert his title the ownership of the possessor becomes complete and indefeasible.

Read 2 Bl. Comm., pp. 195–199.
3 Cruise Dig., Tit. xxxi, Ch. ii, §§ 1, 2, 6, 15–26, 38–40.
3 Wash. R. P., B. iii, Ch. ii, Sec. 7.

§ 134. Of Title by Marriage.

Title by marriage is the title by which a husband acquires an estate in the real property of his wife, or a wife acquires an estate in the real property of her husband. The nature and extent of this estate, during the coverture, differs in the different States, and is to be ascertained by an examination of their statutes. Estates in dower and by curtesy, which arise at the termination of coverture are held by this title, the law vesting such estates in the husband or wife immediately on the death of the other party to the marriage.

Read 2 Kent Comm., Lect. xxviii, pp. 129–134.
Will. R. P., pp. 205–217.
1 Wash. R. P., B. i, Ch. ix, Sec. 1.
Reeve Dom. Rel., pp. 27–36, 39–59.
Schouler Dom. Rel., pp. 142–157, 163–166, 182–186.

§ 135. Of Title by Execution.

Title by execution is the title by which a creditor, or other person, acquires an estate in such real property of a debtor as is sold or set off, under process of law, in satisfaction of a judgment-debt. In all of the States, the estate of a judgment-debtor in real property may be seized and levied on in execution, and, in most of them, a judgment creates a lien on such estate without the issue or levy of an execution. The mode of levying an execution on real property differs very greatly in different States. In some, the land itself is set off and deeded to the creditor by the officer levying the execution. In others, the land is sold at auction by the officer, and deeded by him to the party purchasing. In others, the land may be placed by the sheriff in the possession of the creditor until the rents and profits pay the debt. By this title also are those lands acquired, which are sold at tax-sales to satisfy the duty owing

to the state, or at sales under a decree enforcing a lien or an assessment. In all these cases, the estate taken by the creditor or purchaser is subject to all the burdens existing upon it in the hands of the debtor, unless there be some special provision of law to the contrary.

Read 3 Bl. Comm., pp. 418, 419.
3 Cruise Dig., Tit. xiv, §§ 16–18.
4 Kent Comm., Lect. lxvi, pp. 428–438.
Will. R. P., pp. 77–80.
2 Wash. R. P., B. i, Ch. xv.
3 Wash. R. P., B. iii, Ch. iii, Sec. 2.

§ 136. Of Title by Judicial Decree.

Title by judicial decree is the title by which a person acquires an estate in real property as the direct result of judicial action. In some States, a Court of Equity has power to pass an estate from one person to another, without any act or voluntary acquiescence on the part of him from whom the estate passes. Thus, by the decree of a court foreclosing a mortgage, the equitable estate of the mortgagor is divested, and the whole estate vests in the foreclosing mortgagee. Thus also, by the decree of a court having jurisdiction in bankruptcy, the estate of the bankrupt is vested in his trustee. The estate of a guardian, who is appointed by a court, in the real property of his ward, or of an executor or administrator, who receives power from a Court of Probate to convey the land of the intestate, is of substantially the same origin. In these cases, as in those of preceding titles, the estate acquired is only that of the former owner, with its attendant burdens and liabilities.

Read 2 Bl. Comm., pp. 159, 285, 286.
2 Cruise Dig., Tit. xv, Ch. vi, §§ 1–3.
2 Wash. R. P., B. i, Ch. xvi, Sec. 10, §§ 10, 15.

§ 137. Of Title by Eminent Domain.

Title by eminent domain is the title by which the government acquires an estate in the real property of an individual, when the same is necessary for public use. The right of eminent domain, or the right to take private property for public use, is inherent in every government. A government also has power to exercise this right in favor of individuals or corporations engaged in prosecuting works of a *quasi* public nature, such as railroad, turnpike, and canal companies. But when property is so taken full compensation must be made therefor to its owner, and that mode of taking it, which is prescribed by law, must be strictly followed.

Read 2 Kent Comm., Lect. xxxiv, pp. 339, 340.
Cooley Const. Lim., pp. 523–571.
2 Dillon Mun. Cor., §§ 583–625.

§ 138. Of Title by Grant and Devise.

Title by act of the parties is of two kinds: Title by Grant, and Title by Devise. *Title by grant* is the title by which a person acquires an estate in real property, through the present voluntary act of the previous owner of such property. *Title by devise* is the title by which one man acquires an estate in the real property of another, after the death of that other and by his voluntary act.

Read 2 Bl. Comm., pp. 287–294.
4 Cruise Dig., Tit. xxxii, Ch. i, § 18.
4 Kent Comm., Lect. lxvii, p. 441.

§ 139. Of Title by Public Grant.

Title by grant is of two kinds: Title by Public Grant, and Title by Private Grant. *Title by public grant* is the title by which a person acquires an estate in real property,

which had previously belonged to the government, either of the United States or of one of the individual States. The fee of all unsold lands is either in the United States, or in the State where the lands are situated; and such lands may be granted by the government to which they belong, either by special act of the legislature, or by a proceeding authorized by the general statutes. In the latter case, the transfer is usually made by an instrument called a *Patent*, signed by a person duly authorized for that purpose, and sealed with the great seal of the state. The terms of this patent, when doubtful, are construed in favor of the government and against the grantee, except when the lands have been granted upon valuable consideration, in which case the rule is reversed. A patent, regularly issued, is conclusive evidence of title, and, when two legal patents conflict, the elder will prevail.

Read 3 Kent Comm., Lect. li.
3 Wash. R. P., B. iii, Ch. iii, Sec. 1.

§ 140. Of Title by Private Grant. Deeds.

Title by private grant is the title by which one man acquires an estate from another, during the lifetime of that other and by his voluntary act. The instrument by which an individual conveys an estate to another, to take effect during the lifetime of the grantor, is called a deed. *A deed* is a writing sealed and delivered between the parties. The *material* upon which it is written must be parchment or paper. It must be made *by* a *party* able to contract and, where obligations are imposed by the deed on the grantee, *to* a party also able to contract. It must be upon some *consideration*, either *good*, (as love and affection), or *valuable*, (as money or other property). The *terms* of the deed must be legally and orderly set forth. It must be free from any *erasures and interlineations* which are not explained

in writing on the face of the deed itself. It must also be *sealed* and *delivered.* In some of the States, *signing* by the grantor, the *attestation* of his signature by one or more witnesses, and his *acknowledgment* of the instrument as his deed before a magistrate, are necessary. The public *recording* of a deed is not essential to its validity, but is designed to protect the grantee against the claims of the grantor's creditors, and of his subsequent *bona fide* purchasers or mortgagees.

Read 2 Bl. Comm., pp. 295–298, 305–308.
4 Cruise Dig., Tit. xxxii, Ch. i, § 19; Ch. ii, §§ 1, 2, 48, 57, 61, 73, 80, 93.
4 Kent Comm., Lect. lxvii, pp. 450–459.
Will. R. P., pp. 137, 138, 141.
3 Wash. R. P., B. iii, Ch. iv, Sec. 1, 2.

§ 141. Of Indentures and Deeds-Poll.

Deeds, as to their parties, are of two kinds: Indentures and Deeds-Poll. *An indenture* is a deed executed by two or more parties, and by which they contract reciprocal obligations toward each other. *A deed-poll* is a deed executed only by the grantor.

Read 2 Bl. Comm., pp. 295, 296.
4 Cruise Dig., Tit. xxxii, Ch. i, §§ 23–28.
Will. R. P., pp. 139, 140.
3 Wash. R. P., B. iii, Ch. iv, Sec. 2, § 47.

§ 142. Of Original and Derivative Deeds.

Deeds, as to their effect, are of two kinds: Original and Derivative. *An original deed* is a deed which creates an estate. *A derivative deed* is a deed which modifies an estate already created. Original deeds are of eight kinds: (1) *Feoffment*, creating a fee-simple; (2) *Gift*, creating a

fee-tail; (3) *Grant*, creating an estate in incorporeal real property; (4) *Lease*, creating any estate less than that of the grantor; (5) *Exchange*, creating mutual estates in consideration of each other; (6) *Partition*, creating estates in severalty out of estates in joint-tenancy or in common; (7) *Bargain and sale*, creating any freehold estate; (8) *Covenant to stand seised to uses*, also creating any freehold estate. Of these, the first six were known to the common law, the last two arose under the statute of uses. Derivative deeds are of five kinds: (1) *Release*, which conveys to the present particular tenant the estate in remainder or reversion; (2) *Surrender*, which conveys the present particular estate to the remainder-man or reversioner; (3) *Confirmation*, which renders a voidable estate sure and unavoidable; (4) *Assignment*, which transfers the whole of an existing estate; (5) *Defeazance*, which accompanies another deed, and declares certain conditions upon which such deed is to be defeated.

Read 2 Bl. Comm., pp. 310–327, 338, 339.
4 Cruise Dig., Tit. xxxii, Ch. iv, §§ 1–3, 37–45; Ch. v, § 1; Ch. vi, §§ 1, 15, 20; Ch. vii, §§ 1, 15, 25; Ch. ix, §§ 4–8; Ch. x, § 2; Ch. xi, § 1.
4 Kent Comm., Lect. lxvii, pp. 480–496.
Will. R. P., pp. 130–143, 167, 168, 170.
3 Wash. R. P., B. iii, Ch. v, Sec. 1, 2.

143. Of Deeds in the United States.

In the United States, the mode of granting estates is by no means uniform. Many of the common law conveyances are practically obsolete. In some States, the ancient form of a feoffment, or a release, are alone employed. In others, a conveyance by bargain and sale, or lease and release, is still practised. The tendency is toward great

simplicity of form, and to a reduction of the number of instruments, as far as consistent with the safety and certainty of estates.

Read 4 Kent Comm., Lect. lxvii, pp. 489, 490, 495.
3 Wash. R. P., B. iii, Ch. v, Sec. 3.

144. Of the Parts of a Deed.

The parts of a deed are eight: *The Premises*, describing the parties, the consideration and the property; *The Habendum*, describing the estate granted; *The Tenendum*, declaring the tenure on which the estate is to be held; *The Reddendum*, describing the matters reserved to the grantor out of the estate granted; *The Conditions; The Covenant of Warranty; The other Covenants; The Conclusion*, embracing the execution, attestation, and acknowledgment. Not all these parts are necessary in every deed, but when necessary they should occupy their proper relative positions.

Read 2 Bl. Comm., pp. 298–304.
4 Cruise Dig., Tit. xxxii, Ch. ii, §§ 62–71.
4 Kent Comm., Lect. lxvii, pp. 460–480.
3 Wash. R. P., B. iii, Ch. v, Sec. 4, 5.

§ 145. Of the Construction of Deeds.

A deed is construed according to the intent of the parties, so far as the same can be ascertained from the terms of the deed itself. When the terms are doubtful, it is construed in favor of the grantee and against the grantor. A grant of a principal thing carries whatever incidentals may be necessary to its enjoyment, provided they belong to the grantor.

Read 2 Bl. Comm., pp. 379–381.
4 Cruise Dig., Tit. xxxii, Ch. xix, §§ 1–25, 31, 40.
4 Kent Comm., Lect. lxvii, pp. 467, 468.
3 Wash. R. P., B. iii, Ch. v, Sec. 4, §§ 24–59, 61–63.

§ 146. Of the Execution of Deeds.

A deed may be made by the grantor himself or by his duly authorized attorney. When the grantor is unable to read, the deed should be read to him before its execution, though a grantor is always presumed to know the contents of his deed, and cannot avoid it after delivery, except for fraud practised upon him in procuring it.

Read 2 Bl. Comm., pp. 304–308.
4 Cruise Dig., Tit. xxxii, Ch. ii, § 72.
3 Wash. R. P., B. iii, Ch. iv, Sec. 2, §§ 12, 13, 17, 18.

§ 147. Of the Delivery of Deeds.

The estate passes by *the delivery of the deed*, and unless the deed be delivered during the lifetime of the grantor it will be of no effect. But the delivery may be made either to the grantee himself, or to some third person with instructions to deliver the deed to the grantee upon the fulfilment of some condition, or at some future time, or at the death of the grantor; and, when it is finally delivered to the grantee and accepted by him, the delivery is regarded by law as having taken place at the date of its delivery to the third person by the grantor.

Read 2 Bl. Comm., p. 307.
4 Cruise Dig., Tit. xxxii, Ch. ii, §§ 80–92.
4 Kent Comm., Lect. lxvii, pp. 454–456.
Will. R. P., p. 138.
3 Wash. R. P., B. iii, Ch. iv, Sec. 2, §§ 20–46 a.

§ 148. Of a Will of Lands.

The instrument, by which one individual conveys to another an estate in real property, to take effect after the death of the former, is called a will. *A will* devising lands

must be in writing, and signed by the testator. In nearly all the States, it must be witnessed by persons who subscribe their names, as such witnesses, in the testator's presence. In some of the States, it must also be sealed. The testator, at the time the will is made, must be of the age required by the law of the State; must be of sufficient mind and memory to understand the nature of his property, the proper objects of his bounty, and the character of the act in which he is engaged; and must not be under legal disability.

Read 2 Bl. Comm., pp. 376–379, 496–503.
6 Cruise Dig., Tit. xxxviii, Ch. i, §§ 10, 13–15; Ch. ii, §§ 2, 6, 7, 10, 12; Ch. v, §§ 2, 4, 6–9, 14.
4 Kent Comm., Lect. lxviii, pp. 501, 505, 513–520.
Will. R. P., pp. 186–190.
3 Wash. R. P., B. iii, Ch. vi, §§ 1–16.
1 Redfield Wills, Ch. iv, v, vi.

§ 149. Of the Revocation of Wills.

A will may be *revoked* by the testator, during his lifetime, either by destroying it, or by making a later will containing words of revocation, or by his marriage and the birth of a child. The devise of specific property is also revoked, if the testator alienate such property before his death.

Read 2 Bl. Comm., p. 376.
6 Cruise Dig., Tit. xxxviii, Ch. vi, §§ 1, 3, 39, 53, 77.
4 Kent Comm., Lect. lxviii, pp. 520–534.
Will. R. P., pp. 191–194.
3 Wash. R. P., B. iii, Ch. vi, §§ 32–42.
1 Redfield Wills, Ch. vii.

§ 150. Of the Construction of Wills.

A will is *construed* according to the intent of the testator, and, in order to do this, courts will sometimes change the words of the will, by substituting one for the other. The construction is also made upon the entire will, not merely upon disjointed parts of it, and where there are two clauses, repugnant to each other, the latter will control.

Read 2 Bl. Comm., pp. 379–382.
6 Cruise Dig., Tit. xxxviii, Ch. ix, §§ 1–12, 15, 18, 25–27.
4 Kent Comm., Lect. lxviii, pp. 534–542.
Will. R. P., p. 195.
3 Wash. R. P., B. iii, Ch. vi, §§ 23–30.
1 Redfield Wills, Ch. ix.
1 Jarman Wills, Ch. xv, xvi.
2 Jarman Wills, Ch. li.

§ 151. Of Devisable Estates.

The owner of any estate in fee-simple, whether legal or equitable, may by devise dispose of his whole estate, or create lesser estates out of it at his pleasure. The estates so created vest immediately on the death of the testator, and, when the will is admitted to probate, it relates back to that event.

Read 2 Bl. Comm., p. 502.
6 Cruise Dig., Tit. xxxviii, Ch. i, § 18 ; Ch. iii, §§ 1–5, 7.
4 Kent Comm., Lect. lxviii, pp. 510–513.
3 Wash. R. P., B. iii, Ch. vi, §§ 19, 31.
1 Jarman Wills, Ch. iv.

CHAPTER XI.

OF ESTATES IN PERSONAL PROPERTY.

§ 152. Of Chattels. Chattels Real. Chattels Personal.

Personal property is also known as *chattels*. Chattels, as to their legal character, are of two kinds: Chattels Real, and Chattels Personal. *A chattel real* is a personal estate in real property, and is so called because the estate is a chattel, though the property be real. *A chattel personal* is any property whatever, except real property or some estate therein.

Read 2 Bl. Comm., pp. 384–388.
Will. R. P., pp. 1–3.
2 Kent Comm., Lect. xxxv, pp. 340–342.

§ 153. Of Chattels Personal. Choses in Possession and in Action.

Chattels personal are commonly called *choses*, and are of two kinds: Choses in Possession, and Choses in Action. *A chose in possession* is a chose of which the owner has the actual possession and enjoyment. *A chose in action* is a chose, to the possession of which the owner has a right, and yet of which he has not the actual possession. It is so called because an *action*, or suit at law, may be necessary in order to reduce it into actual possession. The amount of money due by one man to another on a debt, and the damages to which the injured party is entitled on a breach of contract, are instances of choses in action. The same name, *chose in action*, is, however, frequently applied

to the incorporeal right of the creditor to collect his debt, and to the right of the promisee to damages against the promisor. By a still greater latitude of speech, it is sometimes used to denote the written evidences of these incorporeal rights, such as bills, notes, bonds, and other instruments.

Read 2 Bl. Comm., pp. 389, 397.
Will. P. P., pp. 4–6, 9, 148.
2 Kent Comm., Lect. xxxv, p. 351.

§ 154. Of Estates in Chattels Personal.

Estates in chattels personal are of two kinds: Absolute and Qualified. *An absolute estate in chattels personal* is such an estate as cannot be lost without the act or default of the owner. *A qualified estate in chattels personal* is such an estate as may be lost without the act or default of the owner. Most estates in chattels personal are absolute estates.

Read 2 Bl. Comm., p. 389.
2 Kent Comm., Lect. xxxv, p. 347.

§ 155. Of Qualified Estates in Chattels Personal.

The liability of an estate in chattels personal to be lost, without the act or default of the owner, arises either from the nature of the chattel itself, or from the existence of other estates in the same chattel. Certain kinds of personal property are, in their very nature, incapable of absolute ownership. Such are the elements of air, light, and water, and animals *feræ naturæ*. These belong to a man while they are in his actual possession, but, in the course of nature or by their own volition, they may escape from him, and when they do so his estate in them is gone. Other kinds of personal property are capable of absolute

ownership; but while in these one man may have an absolute estate, which he may, at any time, assert to the exclusion of all others, another man may have, temporarily, a special estate therein, liable to be defeated by the assertion of the absolute estate. Such a special, or qualified, estate is that of the borrower, hirer, or pledgee of a chattel personal, of a common carrier in the goods carried, or of a sheriff in chattels attached or levied on in execution.

Read 2 Bl. Comm., pp. 389–396.
Will. P. P., pp. 21–30.
2 Kent Comm., Lect. xxxv, pp. 347–350.

§ 156. Of the Tenure, Time, and Tenancy of Estates in Chattels Personal.

A chattel, whether real or personal, is not inheritable, and no estate in fee, as such, can be created therein. The absolute ownership of a personal chattel is, however, analogous to an estate of fee-simple in lands, and the person, having such ownership, may grant to another an estate in such chattel, for life, for years, or at will. Particular estates, with remainder following, may also be created in chattels personal, wherever the use of such chattels does not consist in their consumption. Estates in chattels personal may also be held in severalty, joint-tenancy, or in common, in the same manner, and subject to the same general rules, as in estates in real property.

Read 2 Bl. Comm., pp. 398, 399.
Will. P. P., pp. 186–222.
2 Kent Comm., Lect. xxxv, pp. 350, 352–354.

CHAPTER XII.

OF THE TITLE TO ESTATES IN PERSONAL PROPERTY.

§ 157. Of Title by Prerogative.

Title to estates in chattels, real or personal, is of three kinds: Title by operation of law; Title by the sole act of the present owner; and Title by the joint act of the present and the former owner. Title by operation of law is of five kinds: Title by Prerogative; Title by Forfeiture; Title by Succession; Title by Marriage; and Title by Judicial Decree. *Title by prerogative* is the title by which the government acquires an estate in such private personal property as may be necessary for the public use. By a right, akin to that of eminent domain, a government may take personal property, whenever wanted for public use, upon making due compensation therefor. By the right of *taxation*, a right also inherent in every government, imposts and duties may be levied upon its subjects, so far as may be necessary to carry on the functions of such government. Goods taken from the enemy in time of war, goods waived or scattered by a thief in his flight when no owner can be found, wrecks found at sea or on shore when no owner appears, estrays or cattle whose owner is unknown, also usually vest in the state, and may be granted by it to individuals, either by some special act or by provisions in the general statutes. All such property is acquired by prerogative.

Read 1 Bl. Comm., pp. 290–299.
2 Bl. Comm., pp. 408–411.
2 Kent Comm., Lect. xxxvi, pp. 357–360.
Cooley Const. Lim., pp. 479–521.

§ 158. Of Title by Forfeiture.

Title by forfeiture is the title by which an estate in personal property is acquired as a consequence of some fault or crime on the part of its former owner. By this title fines and penalties for crime, and in some cases the implements of crime, vest in the government. Conditional estates in chattels, as in real property, may be forfeited by breach of condition; and the misuse of a chattel, by a person having a qualified estate therein, will sometimes determine his estate in favor of the absolute owner.

Read 2 Bl. Comm., pp. 420, 421.
2 Kent Comm., Lect. xxxvii, pp. 385–387.
1 Hill. Torts, Ch. i, §§ 20, 21.

§ 159. Of Title by Succession.

Title by succession is the title by which the personal representatives or successors of a former owner of personal property acquire an estate in the same. Such is the title by which the successive members of a corporation acquire its property and franchises from their predecessors. In judgment of law, a corporation never dies, and property, once vested in it, continues to belong to it, although the persons, who composed it at the time such property was acquired, have ceased to be its members. When new members succeed the old, they therefore succeed to the property and corporate rights which their predecessors, as such members, obtained and enjoyed, and the title of such new members is a title by succession. By the same title also are the remaining goods and chattels of a deceased intestate vested in his personal representatives, after administration on his estate, and the distribution thereof.

Read 2 Bl. Comm., pp. 430–433, 515–520.
2 Kent Comm., Lect. xxxvii, pp. 420–436.

160. Of Title by Marriage.

Title by marriage is the title by which a husband acquires an estate in the personal property of the wife, or by which the wife acquires an estate in the personal property of her husband. The entire *personal estate of the wife* was formerly vested, by her marriage, in the husband. *Her choses in possession* became absolutely and immediately his. *Her choses in action* became his if reduced by him to possession, or in any other way converted by him to his separate use. *Her chattels real* he could dispose of at his pleasure, or they might be taken for his debts. *The rents and profits of her real estates* were also his, as well as all the avails of her personal skill and labor. The wife, on the other hand, acquired no rights in the personal property of the husband during the coverture, except to those articles of clothing and ornament (called her *paraphernalia*), which were purchased by him for her use. After the cessation of the coverture by his death, she became entitled, if he died intestate, to succeed to a certain proportion of his personal estate. In most of the States, these rules of the common law have been greatly modified by statutes.

Read 2 Bl. Comm., pp. 433–436, 515.
Will. P. P., pp. 273–284.
2 Kent Comm., Lect. xxviii, pp. 130–143.
Reeve Dom. Rel., pp. 1–27, 37–39, 60–63.
Schouler Dom. Rel., pp. 111–142, 158–163, 168–175.

§ 161. Of Title by Judicial Decree.

Title by judicial decree is the title by which a person acquires an estate in personal property, as the direct result of judicial action. When the owner of personal property has recovered and collected damages, in an action of trespass or trover, from one who has wrongfully dispossessed

him of such property, the defendant in such action becomes the owner of such property, by virtue of the judgment and execution against him. Damages recovered in an action of tort, and costs or penalties recovered in any form of action, are acquired by the same title. Upon the involuntary bankruptcy of a tradesman, his personal estate is transferred to his assignee, by the judicial action which determines him to be bankrupt and appoints his assignee. The administrator of the estate of a deceased intestate becomes, for the time being, the owner of such decedent's personal property, by virtue of the decree of the probate court appointing him to administer thereon; and a guardian, appointed by a court, derives his title to the personal estate of his ward from the same source.

Read 2 Bl. Comm., pp. 436–439, 485, 486.
Will. P. P., pp. 42, 47, 258.
2 Kent Comm., Lect. xxxvii, pp. 387, 388, 399, 408.
1 Hill. Torts, Ch. i, §§ 40, 41.
3 Pars. Cont., Part ii, Ch. xii, Sec. 8, 9, 10.

§ 162. Of Title by Occupancy.

Title by the sole act of the present owner is of three kinds: Title by Occupancy; Title by Accession; and Title by Creation. *Title by occupancy* is the title by which a person acquires an estate in such personal property as, at the time of such acquisition, belonged to no one. The elements of light, air, and water, animals *feræ naturæ*, goods abandoned and found on the surface of the earth, are the principal classes of property acquired by occupancy.

Read 2 Bl. Comm., pp. 400–404.
2 Kent Comm., Lect. xxxvi, pp. 355–360.

§ 163. Of Title by Accession and Confusion.

Title by accession is the title by which the owner of personal property acquires an estate in such other personal property, as is naturally or artificially produced by, or united to, his own. The owner or hirer of animals is entitled to their progeny produced during his ownership or term. When materials, belonging to one person, are used in the construction of an article, by another person who furnishes the principal materials, the article constructed belongs to the latter. If an artist paints a picture on the canvas of another, the whole belongs to the artist. In these, and all other instances, the owner of the principal article becomes the owner of the accession. Akin to accession is *confusion*, which occurs when one person wilfully so mingles his own goods with those of another, that they cannot be distinguished from each other. In such cases, if the intermixture was by consent, each has his *pro rata* interest therein. But if the intermixture was not by consent, the wrong-doer loses his property, and the other becomes entitled to the whole.

Read 2 Bl. Comm., pp. 404, 405, 407.
2 Kent Comm., Lect. xxxvi, pp. 360–365.
2 Pars. Cont., B. iii, Ch. xi, Sec. 5, pp. 134–137.

§ 164. Of Title by Creation.

Title by creation is the title by which a person acquires an estate in such personal property as owes its existence or value to his skill and labor. The principal classes of property acquired by this title are inventions and literary property. *An invention* is any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not before known and used.

Literary property consists of the sentiments and language of books or other writings, the original designs of maps, charts, prints, cuts, or engravings, and the arrangement and composition of pieces of music. Both inventions and literary property belong solely to the author, as long as they are kept within his exclusive possession, but when circulated abroad, with his consent, become common property, and subject to the free use of the community. For the protection and encouragement of authors, however, the law now so provides that the benefits of their inventions or literary compositions may be secured to them, and that the public may, at the same time, enjoy the results of their literary or inventive skill. This is done, in the case of inventions, by what is called a *patent*, which is a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention; and, in the case of literary property, by what is called *copyright*, which is a grant of the exclusive right of printing, reprinting, publishing, and vending the productions, in which such literary property is contained. In this country, both patents and copyrights are granted by the United States, under the provisions of the Acts of Congress relating thereto.

Read 2 Bl. Comm., pp. 405–407.
Will. P. P., pp. 171–185.
2 Kent Comm., Lect. xxxvi, pp. 365–384.
2 Pars. Cont., B. iii, Ch. xiii, xiv.

§ 165. **Of Title by Gift.**

Title by the joint act of the present and the former owner is of three kinds: Title by Gift; Title by Testament; and Title by Contract. *Title by gift* is the title by which a person acquires an estate in personal property, through the immediate, voluntary, and gratuitous transfer

thereof to him, by its former owner. Gifts are of two kinds; gifts *inter vivos*, and gifts *causa mortis*. *A gift inter vivos* has no reference to the future, but goes into immediate and absolute effect. *A gift causa mortis* is a gift made by the donor in his last illness, or in contemplation and expectation of death, to be effective if he then dies, but, if he recovers, to be void. To both these kinds of gifts delivery is essential. If the property is subject to actual delivery, it must be so delivered. If not subject to actual delivery, there must be some act equivalent to it, whereby the donor parts not only with the possession, but with the dominion, of the property. If the gift be a chose in action it must be transferred by an assignment, or by some act equivalent thereto. When a gift is once perfected it is irrevocable, unless prejudicial to creditors, or unless the donor was under a legal incapacity, or was circumvented by fraud.

Read 2 Bl. Comm., pp. 440-442, 514.
Will. P. P., pp. 32-34, 237.
2 Kent Comm., Lect. xxxviii, pp. 437-448.
1 Pars. Cont., B. i, Ch. xv.
2 Redfield Wills, Ch. xii.

§ 166. Of Title by Testament.

Title by testament is the title by which one person acquires an estate in personal property from another, after the death of that other, and by his voluntary act. A *testament* is a will operating upon personal property alone. Such a will was formerly good when made by parol, in which case it was called a *nuncupative* will. In later times, parol wills were discouraged, and justified only in cases of great necessity, as of a soldier in actual military service, or of a sailor while at sea. The property disposed of in a testament is called a *legacy*, and the person, to

whom it is given, is known as a *legatee*. Although given absolutely by the will, such legacy is nevertheless conditional in its character; for if the debts due by the testator exceed the amount provided by him for their payment, the legacies may be abated, in part or entirely, according to the amount required to pay the debts. If a legatee dies before the testator, the legacy is lost or *lapsed*, and sinks into the residue of the estate. The assent of the executor is necessary to perfect the legal title of the legatee, and where the executor unreasonably withholds such assent, he may be compelled to yield it by decree of a court of equity. Legacies are ordinarily payable one year after the decease of the testator.

Read 2 Bl. Comm., pp. 489–520.
Will. P. P., pp. 233–255.
4 Kent Comm., Lect. lxviii, pp. 516–518.
1 Redfield Wills, Ch. vi.
2 Redfield Wills, Ch. xiii, Sec. 8, 14, 16, 17.

§ 167. Of the Requisites of a Testament.

The requisites of a will of personal property, as well as the mode and time of the vesting and payment of legacies, are now usually determined by statute in the different States. The rules, concerning the execution and construction of a written testament, are generally the same as those governing a devise.

Read 1 Redfield Wills, Ch. ii, iv, v, vi, vii, ix.

§ 168. Of Title by Contract.

Title by contract is the title by which a person acquires an estate in personal property, through the transfer thereof to him by another person, for a valuable consideration. A

contract is an agreement between two or more persons, upon sufficient consideration, to do or not to do a particular thing. Four things are necessary thereto: (1) Parties able to contract; (2) A sufficient consideration; (3) A subject-matter to be contracted for; (4) An actual contracting by proposal on the one side and acceptance on the other.

Read 2 Bl. Comm., p. 442.
1 Pars. Cont., Prelim. Ch., Sec. 2, 3.

§ 169. Of the Parties to a Contract.

Any person, not debarred therefrom by law, may make a contract. *An infant* cannot bind himself by any contract except for necessaries. *A married woman*, not abandoned by her husband, can make no contract except as to her sole and separate estate, unless empowered so to do by statute. *Insane persons*, and *persons under guardianship*, are also usually unable to contract.

Read 1 Bl. Comm., pp. 442–445, 465, 466.
2 Bl. Comm., pp. 290–293.
2 Kent Comm., Lect. xxviii, pp. 150–161; Lect. xxxi, pp. 234–243; Lect. xxxix, pp. 450–453.
1 Pars. Cont., B. i, Ch. xvii, Sec. 1, 3, 5–9; Ch. xviii, xix.

§ 170. Of the Consideration of Contracts.

The consideration of a contract must be both valuable and lawful. Any benefit arising to the party promising, or any prejudice to the party to whom the promise is made, is a sufficient consideration. *Mutual promises*, made at the same time, are sufficient considerations for each other;

and a subsisting legal obligation to do a thing is a sufficient consideration for a promise to do it.

Read 2 Bl. Comm., pp. 444–446.
Will. P. P., pp. 62–66.
2 Kent Comm., Lect. xxxix, pp. 463–468.
1 Pars. Cont., B. ii, Ch. i.

§ 171. Of the Subject-Matter of Contracts.

The subject-matter of a contract may be either some estate in real property, some visible and tangible chattel, some exercise of skill and labor, some forbearance of an existing right, or any other matter beneficial to the person to whom it is to be given or for whom it is to be done. In all cases, this subject-matter is property, whether it be a material object, or a mere right and obligation.

Read 2 Bl. Comm., p. 446.
1 Pars. Cont., B. iii, Ch. i, Prelim. Rem.

§ 172. Of the "Meeting of the Minds."

The actual contract consists in *the meeting of the minds* of the parties upon the same thing, and in the same sense. In other words, the thing, intended to be proposed and actually proposed on one side, must be, in all material respects, the very thing intended to be accepted and actually accepted on the other. In the absence of this meeting of minds there can be no contract.

Read 2 Kent Comm., Lect. xxxix, p. 477.
1 Pars. Cont., B. ii, Ch. ii.

§ 173. Of Oral and Written Contracts. Statute of Frauds.

Contracts may be either oral or in writing. Where they are in writing and under seal, they are called *specialties;*

when not under seal, they are called *simple* contracts. Certain contracts are, by the Statute of Frauds, 29 Charles II. c. 3, *required to be in writing.* Among these are: (1) Contracts for the sale of any interest in lands; (2) Contracts that cannot be performed within one year from their date; (3) Contracts binding an executor or administrator to pay a debt of his decedent out of his own estate; (4) Contracts to answer for the debt, default, or miscarriage of another; (5) Contracts made upon consideration of marriage. The principal legal difference, between a contract under seal and one not under seal, is that in the former the seal imports a sufficient consideration.

Read Will. P. P., pp. 62, 66–70, 75.
2 Kent Comm., Lect. xxxix, pp. 450, 510–512.
1 Pars. Cont., Prelim. Ch., Sec. 3.
3 Pars. Cont., Part ii, Ch. v.

§ 174. Of Express and Implied Contracts.

Contracts are said to be *express* when the mutual promises of the parties are declared, in so many words, either orally or in writing. They are *implied* when the law presumes the existence of such promises from the acts or circumstances of the parties.

Read 2 Bl. Comm., p. 443.
Will. P. P., p. 61.
2 Kent Comm., Lect. xxxix, p. 450.

§ 175. Of Executed and Executory Contracts.

Contracts are said to be *executed* when the thing, agreed to be done, has actually been performed. They are *executory* when the thing to be done has not been performed. A mutual contract may thus be executed as to one party, and remain executory as to the other.

Read 2 Bl. Comm., p. 443.
2 Kent Comm., Lect. xxxix, p. 450.

§ 176. Of The Validity and Construction of Contracts.

The validity and construction of contracts are governed by the *lex loci contractus*, or the law of the place where the contract is made and is to be performed. If made in one State and to be performed in another, the general rule is that the law of the State, where it is to be performed, will govern it. When a contract is broken, *the remedy* for such breach is governed by the *lex fori*, or law of the place where the suit is brought.

Read 2 Kent Comm., Lect. xxxix, pp. 453–463.
2 Pars. Cont., Part ii, Ch. i, ii.

§ 177. Of Contracts of Sale.

The principal contracts, by which estates in personal property may be acquired, are the following: Contracts of Sale; Contracts of Bailment; Contracts of Agency; Contracts of Partnership; Contracts of Insurance; Contracts of Indorsement; and Contracts of Guaranty or Suretyship. *A contract of sale* is a contract by which the ownership of some specific existing chattel is transferred from one person to another, in consideration of some specific price or recompense in value. Where this price or recompense is in money, the contract is a sale proper; where it is in goods, it is *exchange or barter*. All personal property which is bought and sold, or manufactured to order, and all *loaned* property, whose use consists in its consumption and for which a like quantity of the like property is to be returned, are acquired by this title.

Read 2 Bl. Comm., pp. 446–451.
Will. P. P., pp. 34–41.
2 Kent Comm., Lect. xxxix, pp. 468–477, 492–552.
1 Pars. Cont., B. iii, Ch. iv.

§ 178. Of Contracts of Bailment.

A contract of bailment is a contract by which the possession of some specific existing chattel is transferred from one person to another *in trust*, in consideration that the trust shall be duly executed, and that the chattel itself shall be restored to the owner by the bailee, as soon as the purposes of the bailment shall be fulfilled. This contract is of five kinds: (1) *Depositum*, a bailment of a chattel to be kept for the bailor and returned upon demand without a recompense; (2) *Mandatum*, a bailment of a chattel to one who undertakes, without recompense, to do some act for the bailor in respect to the thing bailed; (3) *Commodatum*, a bailment of a chattel, for a certain time, to be used by the bailee without paying for its use; (4) *Pignus*, a bailment of a chattel by a debtor to his creditor to be kept by the creditor till the debt be discharged; (5) *Locatio*, a bailment of a chattel to one who is to enjoy the temporary use thereof and pay, for such use, a reasonable compensation to the bailor, or who is to expend labor or services thereon and receive, for such labor or services, a reasonable compensation from the bailor.

Read 2 Bl. Comm., pp. 451–453.
Will. P. P., pp. 24–26.
2 Kent Comm., Lect. xl.
2 Pars. Cont., B. iii, Ch. xi.

§ 179. Of Contracts of Agency.

A contract of agency is a contract by which one person appoints another to act for him in the transaction of some business, and by which that other undertakes to transact such business properly, and to render an account thereof. Agents are of two kinds: *general agents*, who are appointed to do all the business of the principal of a particular kind or at a particular place, and whose acts bind the princi-

pal as long as they are within the general scope of his authority, even though they are contrary to his private instructions; and *special agents*, who are appointed for a particular purpose and under a limited power, and whose acts do not bind the principal when they exceed that power. The contract of agency may arise from an express agreement, or it may be implied from the conduct of the parties.

Read 2 Kent Comm., Lect. xli.
1 Pars. Cont., B. i, Ch. iii.

§ 180. Of Contracts of Partnership.

A contract of partnership is a contract by which two or more persons unite their property or labor in some lawful business, and agree to divide the profits, or bear the loss, in certain proportions. By this contract each partner acquires an interest in all the partnership property, becomes responsible for the partnership engagements, and is empowered, in transactions relating to the partnership, to bind by his acts the other partners as well as himself.

Read 3 Kent Comm., Lect. xliii.
1 Pars. Cont., B. i, Ch. xii.
Walker Am. Law, §§ 95-100.

§ 181. Of Contracts of Insurance.

A contract of insurance is a contract by which one person, in consideration of a stipulated premium paid to him by another, undertakes to indemnify that other against certain injuries to his property, or to pay to him, or his legal representatives, a certain sum of money upon the occurrence of some specified event. *Fire and marine insurance* are contracts to indemnify the assured against loss or damage to his property from fire, or from the perils and dangers of the sea. *Life and accident insurance* are contracts to pay cer-

tain sums of money, upon the death or accidental injury of some particular person. Besides these, there are other forms of contract, resulting in the existence of *annuities or endowments*, which are usually classed under the general name of insurance.

Read Will. P. P., pp. 133–136.
3 Kent Comm., Lect. xlviii, l.
2 Pars. Cont., B. iii, Ch. xvii, xviii, xix.

§ 182. Of Contracts of Indorsement. Bills and Notes. *A contract of indorsement* is a contract by which the holder of a negotiable bill or note agrees with another person, to whom, at the same time, he transfers the right to the sum of money named in such bill or note, that he will himself pay that sum to such person or his assigns, in case the prior parties to the bill or note fail to pay it when it becomes due. *A bill of exchange* and *a promissory note* are both, in effect, written promises to pay a definite sum of money after a definite period of time. Such a bill or note is *negotiable* when made payable "to bearer," or "to order;" in the former case, the rights arising under it being transferred by mere delivery of the instrument itself, in the latter, by its indorsement and delivery. *Indorsement* consists in the writing, by the holder, of his name across the back of the bill or note; and from this, when followed by delivery, the law implies (unless the contrary appears in writing in connection with the indorsement) an agreement, on his part, with all subsequent *bona fide* holders of the bill or note, that it shall be paid at maturity, *provided* the requisite demand be made, and notices given, by the person who shall then be the holder thereof.

Read 2 Bl. Comm., pp. 466–470.
Will. P. P., pp. 72–75.
3 Kent Comm., Lect. xliv, pp. 71–121.
1 Pars. Cont., B. i, Ch. xvi.

§ 183. Of Contracts of Guaranty and Suretyship.

A contract of guaranty or suretyship is a contract by which one person agrees with another to pay a debt, or discharge an obligation, due from some third person to that other, in case such third person shall fail to pay or discharge the same. This contract somewhat resembles that of indorsement, but it is not restricted, like that, to negotiable paper, nor are the rights and liabilities of the parties thereto, in all respects, the same.

Read Will. P. P., pp. 98–100.
3 Kent Comm., Lect. xliv, pp. 121–124.
2 Pars. Cont., B. iii, Ch. vii.

§ 184. Of Collateral Contracts. Debt. Warranty.

In addition to these contracts, by which an estate in personal property may be originally acquired, there are others, collateral to or resulting from these, by which additional, though not independent, rights may be obtained. Such is the *contract of warranty*, by which the vendor of chattels agrees with the vendee that the chattels sold are of a given quality and quantity, and which is collateral to the contract of sale. Such also is the *contract of debt*, by which one person agrees to pay to another a certain sum of money; and which results from a contract of sale where the price is not immediately paid, or from a contract of bailment whereby compensation becomes due to either party, or from any other contract, the fulfilment of which, on one side, creates an obligation, on the other, to pay a definite sum of money.

Read 2 Bl. Comm., pp. 451, 464–466.
3 Bl. Comm., p. 165.
Will. P. P., pp. 293, 294.
2 Kent Comm., Lect. xxxix, pp. 478–481.
1 Pars. Cont., B. iii, Ch. v.

CHAPTER XIII.

OF THE RIGHTS ARISING FROM THE RELATION OF HUSBAND AND WIFE.

§ 185. Of the Contract of Marriage.

The relation of husband and wife is created by *marriage*. In the eye of the law *marriage is a civil contract*, and, like any other contract, it requires parties able to contract, a sufficient consideration, a subject-matter to be contracted for, and an actual contracting.

Read 1 Bl. Comm., p. 433.
Reeve Dom. Rel., pp. 195, 196.
Schouler Dom. Rel., pp. 22–25.
1 Bish. Mar. and Div., B. i, Ch. i.

§ 186. Of the Parties, Consideration, and Subject-Matter of the Contract of Marriage.

Any person may contract in marriage who is not debarred therefrom by law. Persons so debarred are of four classes: (1) Those under age; i. e. males under fourteen and females under twelve; (2) Those who have another lawful husband or wife living; (3) Those within certain degrees of relationship; i. e. all related lineally, and all related collaterally within the third degree; (4) Those who are not of sound mind. The mutual promises of the parties are the *consideration* of the contract of marriage. The *subject-matter* of the contract is the rela-

tionship of husband and wife, with its entire duties and responsibilities as defined by law.

Read 1 Bl. Comm., pp. 434–439.
2 Kent Comm., Lect. xxvi, pp. 75–86.
2 Pars. Cont., B. iii, Ch. x, Sec. 4, pp. 81–83.
Reeve Dom. Rel., pp. 200–204.
Schouler Dom. Rel., pp. 26–38.
1 Bish. Mar. and Div., B. i, Ch. i, §§ 2, 3 ; B. iii, Ch. viii, ix, xvi, xviii, xix, xx.
Walker Am. Law, § 102.

§ 187. Of the Form of the Contract of Marriage.

To the actual contract *no specific form* is made necessary by the common law. Both parties must freely consent thereto, and must express that consent *per verba de presenti*, or by words which denote an actual and present acceptance of each other as husband and wife. Public policy, however, requires that some fixed mode of celebrating marriages should be observed, and the several States have, therefore, provided by statute for the form in which the contract should be made.

Read 1 Bl. Comm., pp. 439, 440.
2 Kent Comm., Lect. xxvi, pp. 86–93.
2 Pars. Cont., B. iii, Ch. x, Sec. 4, pp. 74–81.
Schouler Dom. Rel., pp. 39–50.
1 Bish. Mar. and Div., B. iii, Ch. xi, xii, xiii, xiv.
Walker Am. Law, § 102.

§ 188. Of Divorce.

The relation of husband and wife can be dissolved either by death or by divorce. The death of either party puts an end to the relation, and leaves the survivor free to

enter into another contract of marriage. The form of divorce known as *divorce a vinculo* has the same effect. *Divorce a mensa et thoro* is only a legal separation of the parties, leaving the relation itself intact. The methods and grounds of divorce, and its effect upon the mutual rights of property of the husband and wife, are matters generally regulated by statute.

Read 1 Bl. Comm., pp. 440, 441.
2 Kent Comm., Lect. xxvii, pp. 95–118, 125–128.
2 Pars. Cont., B. iii, Ch. x, Sec. 5.
Reeve Dom. Rel., pp. 205–210.
Schouler Dom. Rel., pp. 295–302.
1 Bish. Mar. and Div., B. i, Ch. ii.

§ 189. Of the Merger of the Legal Existence of the Wife in that of the Husband.

By marriage the husband and wife become one person at law, and, for most purposes, her legal existence and authority are merged in his. No *contracts* can be made between them without the intervention of trustees, and the contracts, which subsisted between them prior to the marriage, are dissolved. The wife cannot bind herself by any contract made without her husband's consent, nor can she sue, or be sued, separately and apart from him. The husband is responsible for all *debts* due from the wife at the time of the marriage, and for all the *torts and frauds* committed by her during coverture. Any invasion of her right of personal security, or personal liberty, is an injury to him, for which he is entitled to redress in a suit at law; and her private property, as we have already seen, vests in him either absolutely or temporarily, according to its nature or the mode in which he deals therewith. Courts of equity, however, recognize, to some extent, *the separate legal existence of the wife*, and regard as valid the exercise

by her of powers which at law she does not possess. The statutes of different States have also changed, in many respects, the liability of the husband for the debts and torts of the wife, as well as his interest in and control over her estate.

Read 1 Bl. Comm., pp. 442-444.
2 Kent Comm., Lect. xxviii, pp. 129, 143-146, 149-181.
1 Pars. Cont., B. i, Ch. xviii, Sec. 1, 2, 4, 5.
Reeve Dom. Rel., pp. 63, 64, 67-78, 86-91, 162-173.
Schouler Dom. Rel., pp. 62, 63, 69-75, 101-110, 187-239.

§ 190. Of the Rights of the Husband over the Wife.

The rights of a husband, in and over his wife, are two: Obedience and Service. The husband has the legal *control* of the person of his wife, and may put moderate restraints upon her liberty, if her conduct be such as to require it. If he changes his domicil, it is her duty to follow him. If she elopes and abandons him without cause, he may compel her to return. But he has no right to chastise her or to use physical violence toward her, except so far as is necessary to prevent her from doing violence to himself or others. The *services* of the wife, and the result thereof, also belong to the husband, at common law; though in some States, by statute, he is entitled to the result of her services only as a trustee, and holds them for her use.

Read 1 Bl. Comm., pp. 444, 445.
2 Kent Comm., Lect. xxviii, pp. 181, 182.
Reeve Dom. Rel., pp. 63, 65, 66.
Schouler Dom. Rel., pp. 53-61, 242-250.
Walker Am. Law, § 103.

§ 191. Of the Duties of the Husband toward the Wife.

The rights of the wife, in and from the husband, are also two: Protection and Support. Whatever he may lawfully do in his own *defence* he may do, and is naturally obliged to do, in defence of her. It is his duty to provide her with *necessaries* according to her station in life, and, if he refuses to do so, she may contract for them in his name, and he will be bound thereby. If he abandons her, or drives her from him, he leaves or sends his credit with her, and she may still contract debts for her necessaries in his name. This right will be forfeited by the wife if she elopes with an adulterer, or if she abandons her husband without cause and does not repent and offer to return to him. But the husband is not bound to support the wife out of his family, if he provides for her and treats her properly there; and, in all cases, persons supplying a wife with necessaries, without the consent of the husband, are bound to make inquiries, and, even after such inquiries, if they supply her they do it at their peril.

Read 1 Bl. Comm., pp. 442, 443.
2 Kent Comm., Lect. xxviii, pp. 146–149.
1 Pars. Cont., B. i, Ch. xviii, Sec. 3.
Reeve Dom. Rel., pp. 81–85.
Schouler Dom. Rel., pp. 76–98.
Walker Am. Law, § 104.

CHAPTER XIV.

OF THE RIGHTS ARISING FROM THE RELATION OF PARENT AND CHILD.

§ 192. Of Legitimate and Illegitimate Children.

The reciprocal rights of parent and child depend, in the first instance, upon the character of the child, as legitimate or illegitimate. *A child is legitimate* when it is born during, or within the usual period of gestation after, the coverture of its mother, and is not the offspring of an adulterous intercourse. *A child is illegitimate* when it is not born during, or within a competent time after, the coverture of its mother, or is born during such coverture as the result of an adulterous intercourse.

Read 1 Bl. Comm., pp. 446, 454–457.
2 Kent Comm., Lect. xxix, pp. 208–212.
Reeve Dom. Rel., pp. 270–274.
Schouler Dom. Rel., pp. 303–314.

§ 193. Of the Rights of Parents over Legitimate Children.

The rights of parents, in and over their legitimate children, are two: Obedience and Services. The father has control of the person of his legitimate minor child, and may compel its *obedience* by any reasonable exercise of force, but has no right to abuse it, or to inflict any permanent injury upon it. The same rule applies to schoolmasters, and all those who stand *in loco parentis*. The father is also entitled to the *services* of his legitimate minor child and to all the results thereof, and such results are subject

to the debts of the father, like any other portion of his estate. But a father may relinquish to his child the right to such services, after which they become the property of the child, even as against the creditors of the father.

Read 1 Bl. Comm., pp. 452–454.
2 Kent Comm., Lect. xxix, pp. 203–208.
1 Pars. Cont., B. i, Ch. xvii, Sec. 2, pp. 310–312.
Reeve Dom. Rel., pp. 288, 289, 290.
Schouler Dom. Rel., pp. 332–350, 367–371.

§ 194. Of the Duties of Parents toward Legitimate Children.

The rights of legitimate children, in and from their parents, are also two: Protection and Support. A parent is the natural guardian of the person of his child. As such it is his duty to *protect* it from external injury, and, in its defence, he may lawfully do anything that he might do in defence of himself. He is also bound to *support* his minor child, and provide it with necessaries suitable to his own rank and condition in life. In these *necessaries* are included not merely shelter, food, and clothing, but medical attendance to the child when sick, and instruction in such branches of learning as are deemed essential for children of the same station. If the father fails to supply these necessaries to his children living under his protection, or if by his cruelty he drives his children from him, a third person may supply them and charge the father with the amount. In this case, however, as in that of a wife, the third person is bound to make due inquiry, and even after such inquiry, if he supplies the child, will do so at his peril.

Read 1 Bl. Comm., pp. 446–452.
2 Kent Comm., Lect. xxix, pp. 189–203.
1 Pars. Cont., B. i, Ch. xvii, Sec. 2.
Reeve Dom. Rel., pp. 283, 286, 287.
Schouler Dom. Rel., pp. 315–331.

§ 195. Of the Duties of Parents toward Illegitimate Children.

An illegitimate child has no rights, as against its parents, except that of *support*. An illegitimate child is said to be *nullius filius*, or the son of nobody. At common law he has no inheritable blood, and no name until, by reputation, he acquires one of his own. Both the mother and the putative father are liable for the support of such a child, so far as may be necessary to keep it from becoming a public burden, and this liability may be enforced against the father, either at the suit of the mother, or of the town or parish upon which the child has been thrown for support.

Read 1 Bl. Comm., pp. 458, 459.
2 Kent Comm., Lect. xxix, pp. 212–217.
1 Pars. Cont., B. i, Ch. xvii, Sec. 10.
Reeve Dom. Rel., pp. 274–282.
Schouler Dom. Rel., pp. 379–388.

§ 196. Of the Reciprocal Rights and Duties of Parents and their Adult Children.

The reciprocal rights of parents and children generally cease on the arrival of the children at the age of twenty-one years. Yet if a child should, after that time, become a pauper and chargeable to the public, the parents would again be liable for its support; and the liability of an adult child, in case its parents become paupers and chargeable, is the same.

Read 1 Bl. Comm., p. 453.
2 Kent Comm., Lect. xxix, p. 206.
1 Pars. Cont., B. i, Ch. xvii, Sec. 2, p. 311.
Reeve Dom. Rel., pp. 283–286.
Schouler Dom. Rel., pp. 365, 366.

CHAPTER XV.

OF THE RIGHTS ARISING FROM THE RELATION OF GUARDIAN AND WARD.

§ 197. Of Guardian and Ward.

The relation of guardian and ward is of legal origin, and is intended partly to supply the place of, and partly to supplement, that of parent and child. *A guardian* is one, upon whom the care of the person or estate of a minor child has been conferred by law. Such minor child is called *a ward.*

Read 1 Bl. Comm., p. 460.
Reeve Dom. Rel., p. 311.
Schouler Dom. Rel., p. 389.

§ 198. Of Guardians by Nature.

Guardians are of two kinds: Guardians by nature, and Guardians by appointment. *A guardian by nature* has the care of the person of the ward. The father of a child, and, in some States, after his death its mother, is its guardian by nature. Their control over the estate of the child is usually regulated by statutes.

Read 1 Bl. Comm., p. 461.
2 Kent Comm., Lect. xxx, p. 220.
Reeve Dom. Rel., pp. 315, 320.
Schouler Dom. Rel., pp. 390–392, 406.

§ 199. Of Guardians by Appointment.

Guardians by appointment are such as are appointed, by some competent authority, to take charge of the person or

estate of a minor child. In some States, a father may, by his will, appoint such a guardian for his children, who is then called a *testamentary* guardian. Courts of probate and courts of equity also have the power to appoint guardians; and every court, before which civil or criminal proceedings against an infant, who has no parent or guardian, may be pending, is bound to appoint a guardian *ad litem* over him, to counsel and protect him in matters pertaining to the suit. All guardians by appointment are under the control of the court, by which they were appointed, or which has jurisdiction over the estates of their wards, and may at any time be called to account by such court, or removed by it for cause.

Read 1 Bl. Comm., pp. 462 note 8, 463.
2 Kent Comm., Lect. xxx, pp. 224–229.
1 Pars. Cont., B. i, Ch. ix, Sec. 1.
Reeve Dom. Rel., pp. 315–318, 321.
Schouler Dom. Rel., pp. 392–403, 405, 406–434.
Walker Am. Law, §§ 110, 111.

§ 200. Of the Reciprocal Rights and Duties of Guardians and Wards.

The reciprocal rights of guardian and ward depend upon the nature of the guardianship. *A guardian of the person* has a right to the obedience of the ward but not to its services, and owes it the duty of protection but not of support. *A guardian of the estate* is bound to support and educate the ward, out of the estate, in a manner suited to its station in life, but is not bound to protect it, or entitled to its obedience or services. His general duty is to manage the property of the ward with reasonable care and skill, and to account for and restore such property to the ward, when his guardianship has ceased.

Read 1 Bl. Comm., pp. 462, 463.
Reeve Dom. Rel., p. 324.
Schouler Dom. Rel., pp. 435, 448–460.

§ 201. Of the Management of the Ward's Estate by the Guardian.

The management of the ward's estate, though left largely to the discretion of the guardian, is in some respects strictly regulated by law. A guardian has power to lease the real property of the ward, and receive the rents and profits thereof, but no power to sell it, unless directed so to do by an order of court. He may sell the personal property without an order of court. He is not permitted to reap any benefit to himself from the ward's estate, other than is allowed him by the court as a remuneration for his services. If he makes an advantageous speculation with the ward's money, or settles a debt due from the estate on beneficial terms, the advantage accrues to the ward. If he suffers any waste or damage to the real property, or is guilty of negligence in regard to the personal property, he must make good the loss resulting therefrom. If he mingles the ward's money with his own, or lets it lie idle without cause, or purchases land therewith, he will be liable to pay over the same to the ward with interest, when his guardianship determines.

Read 2 Kent Comm., Lect. xxx, pp. 228–231.
1 Pars. Cont., B. i, Ch. ix, Sec. 2.
Reeve Dom. Rel., pp. 325, 326, 334–337.
Schouler Dom. Rel., pp. 461–517.
Walker Am. Law, § 113.

§ 202. Of the Cessation of the Relation of Guardian and Ward.

The relation of guardian and ward ceases on the arrival of the ward at the age of twenty-one years. The guardianship of a female ward ceases, as to both her person and estate, when she marries an adult, and as to her person when

she marries a minor. The guardianship of a male ward continues after his marriage as to his estate, but not as to his person.

Read 1 Bl. Comm., pp. 463, 464.
2 Kent Comm., Lect. xxx, pp. 225, 226; Lect. xxxi, p. 233.
Reeve Dom. Rel., pp. 327, 328.
Schouler Dom. Rel., pp. 423–426, 518, 519.

CHAPTER XVI.

OF THE RIGHTS ARISING OUT OF THE RELATION OF MASTER AND SERVANT.

§ 203. Of Master and Servant.

The relation of master and servant is practically the most important known to our law. *A master* is one who has a legal right of authority over another, by virtue of a contract subsisting between them. *A servant* is one who, by virtue of such contract, is subjected to authority.

Read 1 Bl. Comm., pp. 422–425.
2 Kent Comm., Lect. xxxii, pp. 248, 258.
Reeve Dom. Rel., p. 339.
Schouler Dom. Rel., pp. 599, 606–612.

§ 204. Of Apprentices.

Servants are of two kinds: Apprentices and Hired Servants. *An apprentice* is one who is bound out to a master, to learn some art or trade. When the person so bound out is an infant, the contract with the master must generally be made by the parent or guardian, with the consent of the infant, though there are cases in which an infant can bind himself. An apprenticeship can be created only by a deed, to which the infant is a party, and ceases at the death of the master, or on the arrival of the apprentice at the age mentioned in the deed. It may also be determined by the decree of a competent court, or by a deed in which the parties mutually release each other. During the continuance of the apprenticeship, the master

has the control of the person of the apprentice, and may command his time and labor to any extent within the terms of the contract. All results of the services rendered by the apprentice, whether with or without the master's consent, also belong to the master. But the master cannot assign to another his rights over the apprentice, nor send him abroad, nor employ him in labor not contemplated by the contract. The apprentice, on his part, has a right to be supported and instructed by his master, in the manner specified in the deed. Although the master cannot assign his rights to another, yet the contract, as a whole, may be assigned by consent of all parties, and a new master thus be substituted for the old.

Read 1 Bl. Comm., pp. 426–428.
2 Kent Comm., Lect. xxxii, pp. 261–266.
2 Pars. Cont., B. iii, Ch. viii, Sec. 2.
Reeve Dom. Rel., pp. 341–346.
Schouler Dom. Rel., pp. 604, 605.

§ 205. Of Hired Servants.

A hired servant is one who enters into the service of another, under a contract to render certain specific services in consideration of the payment of certain wages. The master has a right to the obedience of such servant, in all matters within the scope of the contract, and may have redress at law, against the servant, for any negligence or misfeasance of which he may be guilty. Such servant has a right to continue in the employment of the master during the time for which he was hired, and to receive the wages, or recompense, which the contract of service provides. The master is bound by the acts of his hired servant within the scope of his authority, and is liable for the injuries committed by him when in pursuit of the master's business. The relation, between the mas-

ter and the hired servant, may be terminated by the death of the master, by mutual consent, or by the completion of the term of service.

Read 1 Bl. Comm., pp. 428–432.
2 Kent Comm., Lect. xxxii, pp. 258–261.
1 Pars. Cont., B. i, Ch. v.
2 Pars. Cont., B. iii, Ch. viii, Sec. 1.
Reeve Dom. Rel., pp. 356–373, 377.
Schouler Dom. Rel., pp. 606–627, 633–647.

§ 206. Of Menials.

Hired servants are of three kinds: Menials; Day-laborers; and Agents. *A menial* is one who dwells in the household of the master, and is employed about domestic concerns, under a contract, express or implied, to continue in service for a certain time. *A day-laborer* is one who is hired upon occasion, to continue in service while occasion serves. *An agent* is one who is employed to transact business for, and in the stead of, another.

Read 1 Bl. Comm., pp. 425, 427.
Reeve Dom. Rel., p. 347.
Schouler Dom. Rel., pp. 600, 608, 609.

§ 207. Of Agents.

Agents may be divided into four classes: Agents commonly so called; Factors and Brokers; Auctioneers; and Attorneys. *Agents commonly so called* include clerks, salesmen, and others, whose services are devoted for the time being to the business of one master. These are governed by the ordinary rules which control the relation of master and servant.

Read 2 Kent Comm., Lect. xli, pp. 612, 617, 618.
Reeve Dom. Rel., pp. 347, 348.

§ 208. Of Factors and Brokers.

A factor or broker is one who is employed in the management of mercantile affairs, and usually acts for a number of persons at the same time. He is bound entirely by his instructions, and is liable for any negligence, want of punctuality, breach of orders or fraud. He has a lien on the goods of his principal for his commission, but cannot pawn them so as to deprive the owner of his property therein.

Read 2 Kent Comm., Lect. xli, pp. 622–628, 640.
1 Pars. Cont., B. i, Ch. iv.
Reeve Dom. Rel., pp. 348–351.

§ 209. Of Auctioneers.

An auctioneer is one who is employed to sell the goods of another to the highest bidder. He is the agent of both vendor and vendee. He is liable to the vendor for any negligence in the discharge of his duty, and for any credit he gives to the vendee. When he does not disclose the name of the vendor, he is liable to the vendee as if he were himself the vendor. He has a right to charge a commission for his services, and has a lien on the goods therefor.

Read 2 Kent Comm., Lect. xxxix, pp. 536–540.
1 Pars. Cont., B. iii, Ch. ii, pp. 493–498.
Reeve Dom. Rel., p. 351.

§ 210. Of Attorneys in Fact.

An attorney is one who is appointed to do a thing in the name of another. Attorneys are of two kinds: Attorneys in fact, and Attorneys at law. *An attorney in fact* is one who is appointed by some special act for some special purpose. Any person of sufficient understanding may

be such an attorney. The mode of appointment is usually by letter or power of attorney, which must be under seal when the attorney is to execute a covenant or deed. Such an attorney is bound to act with due diligence, and, at the conclusion of the business, to account to the principal.

Read 1 Pars. Cont., B. i, Ch. vi, pp. 110–112.
Reeve Dom. Rel., pp. 354, 355.

§ 211. Of Attorneys at Law.

An attorney at law is a sworn officer of a court of justice, who is employed by a party in a cause, to manage the same for him. The authority of an attorney extends to all matters necessary to the progress and determination of the cause, but he cannot release damages, or settle the points in controversy, without his client's consent. His duty is to be true to the court and his client, to manage the cause of his client with care, skill, and integrity, to preserve his client's secrets, and to keep his client informed of the state of his business. He has a right to reasonable compensation for his services, and, to secure this, generally has a lien upon such papers of his client as are in his hands, as well as on the judgment and costs which he may obtain.

Read 3 Bl. Comm., pp. 25–29.
2 Kent Comm., Lect. xli, pp. 640, 641.
1 Pars. Cont., B. i, Ch. vi, pp. 113–118.
Reeve Dom. Rel., pp. 351–354.

BOOK II.

OF PRIVATE WRONGS.

§ 212. Of the Nature of a Private Wrong.

A private wrong, or *tort*, consists in the wrongful act or omission (*injuria*) of one person, resulting in actual or legal damage (*damnum*) to another. Such wrong may be committed in three ways: (1) By *nonfeasance*, or the not-doing of that which the non-doer was under a legal obligation to do; (2) By *misfeasance*, or the doing, in an improper manner, of that which the doer was either bound to do, or had a right to do; (3) By *malfeasance*, or the doing of that which the doer had no right to do. Any wrongful act or omission, not resulting in actual or legal damage to another, is known as *injuria sine damno*, and is not a tort. Damage resulting from inevitable accident, or from the proper performance of a lawful act, is known as *damnum absque injuria*, and is also not a tort. Only when both *damnum* and *injuria* concur is a tort committed.

Read Broom Comm., pp. 74–108.
1 Hill. Torts, Ch. i, § 1 note c; Ch. iii, §§ 5–19, 23, 24, 35–48.
1 Addison Torts, §§ 1–12, 16.
Cooley Torts, pp. 62–81.

CHAPTER I.

OF WRONGS WHICH VIOLATE THE RIGHTS OF PERSONAL SECURITY AND PERSONAL LIBERTY.

§ 213. Of Menaces and Assaults.

The wrongs, which violate the right of personal security, are those by which a man is disturbed in the lawful enjoyment of his life, limbs, body, health, or reputation. Wrongs, by which a man is disturbed in the lawful enjoyment of his life, limbs, and body, are of two kinds: Threats and Violence. *A threat* is the manifestation by one person of an intent to do actual violence to another. Such manifestation may take place in two ways: (1) By words, or *menaces;* (2) By acts, or *assaults.* Menaces are torts whenever they cause *actual* loss or damage to the person menaced. Assaults are always torts, damage from them being implied by law.

Read 3 Bl. Comm., p. 120.
1 Hill. Torts, Ch. v, §§ 2–7.
2 Addison Torts, §§ 787–789.
Cooley Torts, pp. 29, 160, 161.
Bigelow L. C. Torts, pp. 217–234.

§ 214. Of Battery, Wounding, and Mayhem.

Violence is any wrongful act of one person, whereby either he, or his instrument of wrong-doing, is brought into contact with the limbs or body of another person. From such wrongful contact the law always implies damage.

When such contact produces either no actual damage, or but slight damage, it is called *a battery*. When it results in serious injury, it is called *a wounding*. When it causes the loss of a limb, it is called *a mayhem*.

Read 3 Bl. Comm., pp. 120, 121.
1 Hill. Torts, Ch. v, § 9.
2 Addison Torts, §§ 790, 791.
Cooley Torts, pp. 162–169.
Bigelow L. C. Torts, pp. 217–234.

§ 215. Of Nuisances to Health.

The wrong, by which a man is disturbed in the lawful enjoyment of his health, is nuisance. *Nuisance*, as a wrong against personal security, is any act or omission of one person, not amounting to violence, by which another is unlawfully annoyed or rendered uncomfortable. The production of offensive noises, the exposure and sale of unwholesome provisions, the leaving unguarded of wells, mining-shafts, or cellars, and the keeping of ferocious animals, are instances of nuisance.

Read 3 Bl. Comm., pp. 122, 123.
1 Hill. Torts, Ch. vi, §§ 30–32; Ch. xix, §§ 6, 9, 10.
1 Addison Torts, §§ 217–225, 228, 229, 253–258, 260–265.
Cooley Torts, pp. 596–607.
Bigelow L. C. Torts, pp. 454–492.

§ 216. Of Libel.

The wrongs, which disturb a man in the lawful enjoyment of his reputation, are three: Libel; Slander; and Malicious Prosecution. *A libel* is the wilful and malicious publication, in a permanent and visible form, of some matter tending to injure the reputation of another. Anything

which tends to disgrace or degrade a person, or to render him ridiculous, is *libellous matter*. If it be expressed either by printing, writing, signs, effigies, or pictures, it is *libellous in form*. Sending or exhibiting such libellous matter to any third person, or printing it in a book, newspaper, or handbill, which is intended for general circulation, is a sufficient *publication*. *Malice* is presumed from the fact of publication, but this presumption may be rebutted by showing that the publisher acted in good faith and upon lawful occasion. All persons concerned in the publication are *participators* in the wrong.

Read 3 Bl. Comm., pp. 125, 126.
Bac. Abr., Libel.
1 Hill. Torts, Ch. vii, §§ 2, 11, 13, 14; Ch. ix, §§ 2, 7; Ch. xi–xiv.
2 Addison Torts, §§ 1087–1115, 1140, 1147, 1148, 1157.
Cooley Torts, pp. 193–195, 204–221.
Bigelow L. C. Torts, pp. 90–99, 107–121, 151–177.

§ 217. Of Slander.

Slander is the wilful and malicious publication, by spoken words, of some matter tending to injure the reputation of another. Slanderous words are of two kinds: (1) Words from which the law implies damage, called words actionable *per se*; (2) Words from which the law does not imply damage, called words not actionable *per se*. *Words actionable per se* are of four kinds: (1) Words which charge a crime; (2) Words which impute an infectious disease; (3) Words derogatory to a person in his trade or profession; (4) Words derogatory to a person in his official character. *Words not actionable per se* become actionable when they are maliciously spoken, and produce actual damage. *Malice* is implied by law from the utterance of the words, unless the

circumstances of the speaking are such as to show that the speaker did not intend to attack the reputation of the person spoken of. This presumption of malice may be rebutted by proof that the occasion justified the speaking, or that the words themselves were true.

Read 3 Bl. Comm., pp. 123–125.
Bac. Abr., Slander.
1 Hill. Torts, Ch. vii–xiv.
2 Addison Torts, §§ 1116–1137, 1157.
Cooley Torts, pp. 193–221.
Bigelow L. C. Torts, pp. 73–177.

§ 218. Of Malicious Prosecution.

Malicious prosecution consists in the malicious preferment of a groundless criminal charge against another, without probable cause, and to his actual damage. The *falsehood* of a criminal charge is established by the determination of criminal proceedings in favor of the accused, either by a verdict of acquittal, or by the voluntary act of the public prosecutor. *Probable cause* is the existence of such facts and circumstances as would lead a reasonable and prudent man to believe in the guilt of the accused. *Malice* may be presumed from the want of probable cause, but the presumption may be rebutted by showing that the accuser acted in good faith, and in the reasonable belief that the charge was true. *Actual damage* to person, property, or reputation, must result from the preferment of the charge, for the law does not imply damage either from its malice, falsehood, or want of probable cause. The preferment of a true charge, however malicious, is no wrong.

Read 3 Bl. Comm., pp. 126, 127.
1 Hill Torts, Ch. xvi.
2 Addison Torts, §§ 852–860, 880, 882.
Cooley Torts, pp. 180–192.
Bigelow L. C. Torts, pp. 178–206.

§ 219. Of False Imprisonment

The wrong, by which the right of personal liberty is violated, is that of False Imprisonment. *False imprisonment* is the unlawful detention of the person of another. Every confinement or restraint of the person of another, in any place, in any manner, and for any period of time whatever, if unlawful, is a false imprisonment. Such confinement or restraint is unlawful in every case where it is not expressly authorized by law, and, even where so authorized, it is unlawful unless it be in the mode, in the place, and at the time, prescribed by law. All persons voluntarily aiding and assisting in a false imprisonment are responsible for the wrong committed thereby.

Read 3 Bl. Comm., p. 127.
1 Hill. Torts, Ch. vi, §§ 1-2 a, 6, 7, 9-29.
2 Addison Torts, §§ 798-819.
Cooley Torts, pp. 169-180.
Bigelow L. C. Torts, pp. 235-285.

CHAPTER II.

OF WRONGS WHICH VIOLATE THE RIGHT OF PRIVATE PROPERTY.

§ 220. Of Disseisin.

Wrongs, which violate the right of private property, are those whereby the owner of such property is disturbed in the lawful use, enjoyment, or disposal thereof. The wrongs, by which the owner of estates in real property may be thus disturbed, either deprive him of the possession of such property, or destroy or decrease the value of his estate therein without disturbing the possession. Wrongs involving dispossession are of two kinds: (1) Those which consist in the entering of one person into lands already in the lawful occupation of another, and the excluding that other from the enjoyment of the same; (2) Those which consist in the exclusion, from the possession of lands, of a person who has the right of enjoyment, but has never had the actual enjoyment thereof. The former of these wrongs is called disseisin. *Disseisin* is the privation of seisin. It takes the seisin of the estate from one man and places it in another. To constitute it there must not only be an entry upon lands, but the entry must be open, adverse, and unlawful, and with intent to exclude, and actual exclusion of, the lawful owner. It may be committed either by a stranger against the tenant, or by one of several tenants in common against his co-tenants. By it the disseisor acquires a right to the land, as against all persons

except the lawful owner, and, if his disseisin continue for a sufficient period, he gains a title by possession.

Read 3 Bl. Comm., pp. 167, 169–171, 188, 189, 196, 198, 199.
Bac. Abr., Disseisin.
1 Cruise Dig., Tit. i, §§ 33–35.
Cooley Torts, pp. 322–328.

§ 221. Of Abatement, Intrusion, Discontinuance, and Deforcement.

The wrongs, which consist in the exclusion from possession of a lawful owner who never had possession, are of four kinds: Abatement; Intrusion; Discontinuance; and Deforcement. *Abatement* is the unlawful entry of a stranger into lands held in fee, after the death of the tenant in fee, and before the entry of the heir or devisee. *Intrusion* is the unlawful entry of a stranger, into lands held in remainder or reversion, after the determination of the particular estate, and before the entry of the remainder-man or reversioner. *Discontinuance* is the occupation of lands held in fee-tail, after the death of a tenant-in-tail, by a person to whom such tenant-in-tail has granted an estate for a longer period than during the life of such tenant-in-tail. *Deforcement* is any exclusion, from the possession of lands, of a lawful owner never in possession, otherwise than by abatement, intrusion, and discontinuance. Withholding her dower from a widow, the retention of possession by a grantor, or by a tenant upon condition subsequent after the condition is fulfilled, are instances of deforcement.

Read 3 Bl. Comm., pp. 168, 169, 171–174.
Bac. Abr., Discontinuance.
1 Cruise Dig., Tit. i, §§ 31, 32; Tit. ii, Ch. ii, §§ 7–9.

§ 222. Of Trespass Quare Clausum.

The wrongs, which destroy or decrease the value of the estate without disturbing the possession, are four: Trespass; Nuisance; Waste; and Disturbance. *Trespass* is the unlawful entry of one person into the lands of another. Trespass to land is usually called *trespass quare clausum fregit,* every such trespass being, in the eye of the law, a forcible breaking into the enclosure of another. Any entry, however slight, and whether resulting in actual damage or not, if it be unlawful, is a trespass, and from it the law implies damage. Such *entry is unlawful* unless made by consent of the person in possession of the land, or in pursuance of some legal right or privilege. Trespass may be committed either by the personal entry of the trespasser himself, or by that of his servants acting under his orders, or by that of his cattle when it results from his act or neglect. It can be committed by a stranger against the tenant, or by one tenant in common against his co-tenants, or by a landlord against his own tenant. It can be committed only against a person who is in actual possession of the land, or, if there be no actual possession, against one who has the right of immediate possession. A person, whose original entry was by license of the possessor, or by authority of law, becomes a *trespasser ab initio* if he abuses such license or authority.

Read 3 Bl. Comm., pp. 208–215.
Bac. Abr., Trespass F, G 2.
1 Hill. Torts, Ch. xviii, §§ 6–11, 19–21, 35.
2 Hill. Torts, Ch. xxiv, §§ 1, 5 b, 6, 14, 18–27.
1 Addison Torts, §§ 375–385, 419–422.
Cooley Torts, pp. 302–332.
Bigelow L. C. Torts, pp. 341–387.

§ 223. Of Nuisances to Property.

A nuisance is any act or omission of one person, not amounting to a trespass, whereby another is disturbed in the enjoyment of his lands, or of incorporeal hereditaments annexed thereto. The methods, by which land may be subjected to this injury, are almost innumerable. The erection of adjacent buildings overhanging and discharging water upon it, the obstruction of ancient lights or watercourses, the excavation of adjoining and supporting lands, the removal of party-walls, the production or maintenance of injurious or offensive substances in proximity thereto, are instances of such nuisance. Nuisances to incorporeal hereditaments, annexed to land, consist in any act or omission of another, which renders them less useful to the owner of the land. The obstruction of a way or common, the erection and maintenance of rival ferries or markets, are instances of such nuisance. Every continuance of a nuisance is itself a wrong, and a person omitting to remove a nuisance, which he did not create but over which he has control, is a wrong-doer, and responsible for the injury occasioned thereby.

Read 3 Bl. Comm., pp. 216–219.
1 Hill. Torts, Ch. xix, §§ 1–9, 16–16 c ; Ch. xx.
2 Hill Torts, Ch. xxi, xxii.
1 Addison Torts, §§ 78–99, 217–229, 238–243, 282, 283.
Cooley Torts, pp. 366–374, 565–595, 608–614.
Bigelow L. C. Torts, pp. 454–558.

§ 224. Of Waste.

Waste is any act or omission of the tenant of a particular estate, by which the estate of the reversioner or remainderman is diminished in value. It is of two kinds : Voluntary and Permissive. *Voluntary waste* is the wilful act of

the tenant, permanently damaging the property. *Permissive waste* is the unlawful omission of the tenant to repair and preserve the property. Cutting down timber trees, destroying or removing buildings, opening new mines or quarries, are instances of voluntary waste. Suffering buildings or fences to become ruinous, or to be destroyed by fire for want of care, are instances of permissive waste. Waste can be committed by tenant for life or for years against the owner of the fee, but not by tenant in fee-simple against his heir, or by tenant in fee-tail against the next donee, each of these latter tenants being owners, for the time being, of the entire inheritance.

Read 2 Bl. Comm., pp. 281, 282.
Bac. Abr., Waste A, B, C.
2 Hill. Torts, Ch. xxvii.
1 Addison Torts, §§ 319–358, 362.
Cooley Torts, pp. 332–336.

§ 225. Of Disturbance.

Disturbance is any act of one person by which another is disturbed in the enjoyment of an incorporeal hereditament. If the incorporeal hereditament is annexed to an estate in lands, such disturbance is also a nuisance. *A common* is said to be disturbed where a person, who has no right to the common, pastures his cattle therein, or where a person, who has such a right, puts more cattle therein than he ought, or where the common itself is wrongfully enclosed so that it cannot be used by the commoners. *A franchise* is disturbed by any act of another, which diminishes its profits. *Tenure* is disturbed by any fraud or threat, which induces a tenant to abandon his land. *A way* is disturbed by obstructing it.

Read 3 Bl. Comm., pp. 236–242.
1 Addison Torts, §§ 78–99, 113–123, 125–196.
Cooley Torts, pp. 366–374.

§ 226. Of the Asportation and Detention of Choses in Possession.

The wrongs, whereby a man is disturbed in the lawful use, enjoyment, and disposal of his choses in possession, either deprive him of their possession, or destroy or decrease their value without disturbing the possession. Wrongs which involve dispossession are of two kinds: Asportation and Detention. *Asportation* is the unlawful taking of a chose in possession out of the possession of another. It can be committed either by the removal and destruction of the chose, or by its removal without destruction. It can be committed against any one who has the lawful possession of the chose, and by any one, even the owner, who has not the right of immediate possession. *Detention* is the unlawful keeping of a chose in possession out of the possession of another. Every asportation includes a detention, but detention may exist where the original taking was lawful. This injury can be committed by any person, even the owner of such chose, and against any person who has a right to its immediate possession. Asportation and detention are sometimes classed together under the name of *conversion*, which is any wrongful usurpation of dominion over the personal property of another, whether by an original wrongful removal, by a subsequent wrongful detention, or by an appropriation of the property to a use not consented to by the lawful owner.

Read 3 Bl. Comm., pp. 144–151.
Bac. Abr., Trespass E ; Trover B, D.
2 Hill. Torts, Ch. xxv.
1 Addison Torts, §§ 466–500, 515–519, 521–526.
Cooley Torts, pp. 436–470.
Bigelow L. C. Torts, pp. 388–453.

§ 227. Of Injuries to Choses in Possession.

The wrongs which destroy or decrease the value of a chose in possession, without disturbing the possession, are of two kinds: (1) Those in which the destruction or decrease of value results *directly* from the wrongful act of another; (2) Those in which such destruction or decrease results indirectly, or *consequentially*, from the wrongful act or omission of another. The particular wrongs, embraced in these two classes, are almost without number, and generally are without specific names. To the former class belong all injuries resulting from the wrongful application of any degree of force to the object injured. To the latter belong all injuries resulting from negligence, or from secondary causes which have been set in operation by a force, wrongfully exercised, but not applied to the object injured.

Read 3 Bl. Comm., p. 153.
Bac. Abr., Action on the Case C, F; Trespass E.
Cooley Torts, pp. 436–441.

§ 228. Of Breaches of Contract.

The wrongs by which a man is disturbed in the lawful use, enjoyment, and disposal of his choses in action, are known as *breaches of contract*. All choses in action arise from or are founded in contract, and the fulfilment of such contract is the reduction of such choses into the possession of their owner. This is as strictly true in contracts to render services, or to forbear a right, as in contracts to deliver goods. When the goods are delivered, when the right is forborne, when the services are rendered, the chose or property, which during the pendency of the contract was in action, becomes a chose in possession, and is as fully possessed and enjoyed by its owner as, in the nature of things, it can ever be. The non-fulfilment or breach of a contract is, therefore, the wrongful retention in action of

a chose which should be vested in possession, and contains all the elements of a private wrong. Breaches of contract are as numerous in kind as the contracts, which may be violated thereby. Any contract is broken by the failure of either party to do, or to refrain from doing, the thing which he agreed to do or not do, in the manner, time, and place, in which it was agreed to be done or not done. Such failure is itself, in the eye of the law, a wrongful act, unless excused or justified by the conduct of the other party, and from such wrongful act the law implies damage.

Read 3 Bl. Comm., p. 153.
1 Hill. Torts, Ch. i, §§ 1 note a, 2.
1 Addison Torts, §§ 27, 28.
Cooley Torts, pp. 2, 90, 91.

§ 229. Of Fraud.

The law presumes that the parties to every contract deal fairly and honestly with each other, and authorizes each of the parties to assume such fairness and honesty on the part of the other. Whenever, therefore, one of the parties wilfully deceives and thereby damages the other, a wrong is committed additional to, and distinct from, the breach of that contract, in which such fairness was presumed. This wrong is called *fraud*, and consists in any false representation, by word or act, made knowingly by one party to a contract, with intent to mislead the other party to such contract in some matter connected therewith, and resulting in actual damage to such other party.

Read 3 Bl. Comm., pp. 163-166.
2 Hill. Torts, Ch. xxvi.
2 Addison Torts, §§ 1174-1199, 1202-1210.
Cooley Torts, pp. 473-507.
Bigelow L. C. Torts, pp. 1-72.

§ 230. Of Conspiracy.

Where two or more persons conspire together to do an unlawful act, and do such act in pursuance of such *conspiracy*, and to the damage of the party conspired against, such conspiracy itself becomes a wrong additional to, and independent of, the particular injury sustained by the unlawful act, and renders all parties to such conspiracy liable therefor.

Read 2 Hill. Torts, Ch. xxxiii, §§ 16–19 b.
2 Addison Torts, § 850.
Cooley Torts, pp. 124–127, 279–282.
Bigelow L. C. Torts, pp. 207–216.

CHAPTER III.

OF WRONGS WHICH VIOLATE RELATIVE RIGHTS.

§ 231. Of Wrongs Committed against each other by the Parties to a Relation.

Wrongs, which violate relative rights, are such acts or omissions, of persons outside of a relation, as disturb the superior in such relation, in the enjoyment of those rights which, by virtue of that relation, he has in the inferior. The wrongs, by which the parties to a relation may violate the reciprocal rights of each other, are included in the wrongs against absolute rights. Thus if one party to a relation abuse, or unlawfully confine, the other, it is a wrong against the right of personal security or personal liberty; and, in the eye of the law, is an injury of the same nature as if committed against a person outside of such relation. So if one party to a relation withhold from the other some duty or service, which, by virtue of such relation, should be rendered to that other, the law, so far as it takes notice of such withholding, regards it as a breach of contract, and a violation of the right of private property. The wrongs which violate relative, as distinguished from absolute, rights, are, therefore, those committed by persons outside of the relation from which such rights arise.

Read 3 Bl. Comm., pp. 138, 142.
2 Addison Torts, §§ 1233–1261.
Cooley Torts, pp. 227, 228, 241, 549.
Reeve Dom. Rel., pp. 65, 288.

§ 232. Of Wrongs Committed by Third Persons against the Parties to a Relation.

Wrongs, which violate relative rights, are also wrongs which violate the right of the superior in a relation, as distinguished from the inferior. An inferior in a relation (as a wife, child, ward, or servant) has, by the common law, no rights in the superior which can be violated by third persons; and though a husband, parent, guardian, or master be prevented, by third persons, from fulfilling the duties of his relation, yet the other party to such relation sustains, at the hands of such third persons, no legal wrong. On the other hand, if the inferior in a relation be prevented, by a third person, from fulfilling his or her duties, the superior in such relation does sustain a legal wrong, at the hands of that third person, and such wrongs are therefore said to violate relative rights.

Read 3 Bl. Comm., pp. 142, 143.
Cooley Torts, pp. 222, 223, 235.

§ 233. Of the Abduction of a Wife.

The wrongs, which violate the rights of a husband to the obedience and services of his wife, are three: Abduction; Criminal Conversation; and Battery. *Abduction* is the unlawful taking or detention of a married woman from her husband. The taking or detention may be either by fraud, by persuasion, by violence, or even by harboring the wife against the will of her husband; and it is unlawful in all cases when not done in obedience to legal process, or in the necessary protection of the wife from the abuse of her husband.

Read 3 Bl. Comm., p. 139.
2 Hill. Torts, Ch. xlii, § 23.
2 Addison Torts, § 1271.
Cooley Torts, p. 225.
Bigelow L. C. Torts, pp. 328–337.
Schouler Dom. Rel., pp. 57–59.

§ 234. Of Criminal Conversation.

Criminal conversation is the carnal knowledge of a married woman, to the damage of her husband. In this wrong as in abduction, the law presumes the injury to have been accomplished by violence, since the wife has no legal power to consent thereto. If the husband consents to the intercourse he sustains no wrong, and such consent may be presumed if he suffers his wife to live as a prostitute. So if they be separated, by agreement, he sustains no injury, for the legal rights, which are violated by this wrong, have been relinquished by him.

Read 3 Bl. Comm., pp. 139, 140.
2 Hill. Torts, Ch. xlii, §§ 17–22.
Cooley Torts, pp. 224, 225.
Bigelow L. C. Torts, pp. 337–340.
Reeve Dom. Rel., p. 64.
Schouler Dom. Rel., p. 109.

§ 235. Of the Battery of a Wife.

Battery is the unlawful exercise of violence toward the person of a married woman, to the damage of her husband. Any threat or violence, offered to a wife, is a violation of her right of personal security, and renders the wrong-doer liable to her. If such violence so far injure her as to deprive her husband of her society or services, it becomes a violation of his rights in her, and renders the wrong-doer liable to him.

Read 3 Bl. Comm., p. 140.
2 Hill. Torts, Ch. xlii, §§ 1–3.
Cooley Torts, p. 226.
Reeve Dom. Rel., p. 63.
Schouler Dom. Rel., pp. 108, 109.

§ 236. Of the Abduction of a Child.

The wrong, which violates the right of a parent in his child, is Abduction. *Abduction*, as a wrong against this relation, is the unlawful taking or detention of a child from the custody and control of its parent. The taking or detention may be either by force, by fraud, by persuasion, or by harboring a fugitive child with intent to encourage him in his disobedience. It is unlawful unless done in pursuance of legal process, or in the necessary shelter or protection of the child, or after a voluntary relinquishment by the parent of his right to the control of the child.

Read 3 Bl. Comm., p. 140.
2 Hill. Torts, Ch. xliii, § 12.
Cooley Torts, p. 229.
Reeve Dom. Rel., pp. 291, 293.
Schouler Dom. Rel., p. 354.

§ 237. Of the Abduction of a Ward.

The wrong, which violates the right of a *guardian* of the person of a ward, in such ward, is the same as that which violates the right of a parent in his child.

Read 3 Bl. Comm., p. 141.
Cooley Torts, p. 236.
Schouler Dom. Rel., pp. 448, 454, 455.

§ 238. Of Retainer.

The wrongs, which violate the rights of a master in his servant, are three: Retainer; Battery; and Seduction. *Retainer* is the unlawful taking or detention of a known servant from his master, during the period of service. This taking or detention may be by fraud, by persuasion, by force, or by harboring a fugitive servant with intent to

10

encourage him in withholding his service from his master. Any person in the employment of another, whether as a menial, laborer, or agent, may be thus unlawfully taken or detained; and every such taking or detention is unlawful, unless it is done in obedience to legal process, or in the necessary protection of the servant from the abuse of his master.

Read 3 Bl. Comm., pp. 141, 142.
2 Hill. Torts, Ch. xl, §§ 29–31.
2 Addison Torts, §§ 1272, 1273.
Bigelow L. C. Torts, pp. 306–328.
Reeve Dom. Rel., p. 377.
Schouler Dom. Rel., pp. 354, 631–633.

§ 239. Of the Battery of a Servant.

Battery is the unlawful exercise of violence toward the servant of another, to the damage of that other. Threats or violence toward a servant are a violation of his absolute rights, and render the wrong-doer liable to him. If the violence be so extreme as to impair the value of his services to the master, it is a violation of the rights of the master, and renders the wrong-doer also liable to him.

Read 3 Bl. Comm., p. 142.
2 Hill. Torts, Ch. xl, § 28.
Reeve Dom. Rel., pp. 291, 376, 377.
Schouler Dom. Rel., pp. 631, 632.

§ 240. Of Seduction.

Seduction is the unlawful carnal knowledge of the female servant of another, to the damage of that other. The carnal knowledge may be procured by means of fraud, by persuasion, or by consent of the servant seduced. It must

be unlawful; i. e. by a person other than the husband of such servant. It must damage the master, by impairing the value to him of the services of such servant.

Read 2 Hill. Torts, Ch. xliii, §§ 1-5.
Bigelow L. C. Torts, pp. 286-305.

§ 241. Of Wrongs against Persons In Loco Parentis.

The relation of master and servant is implied by law between persons, who stand *in loco parentis*, and the minors, to whose services they are thus entitled. A parent, or guardian of the person, as well as a master, may thus be injured by the retainer, battery, or seduction of a minor daughter or ward, whether she resided with him or not, provided he was entitled to her services. If an adult daughter resides with her father and renders services to him, the relation of master and servant exists also between them, and her retainer, battery, or seduction becomes an injury to the father, which renders the wrong-doer liable to him.

Read 2 Kent Comm., Lect. xxix, p. 205.
2 Hill. Torts, Ch. xliii, § 6.
2 Addison Torts, §§ 1274-1280.
Cooley Torts, pp. 230-235, 236.
Bigelow L. C. Torts, pp. 286-305.
Reeve Dom. Rel., pp. 291-293.
Schouler Dom. Rel., pp. 353-361.

CHAPTER IV.

OF LEGAL REMEDIES.

§ 242. Of the Nature of Legal Remedies.

For every violation of a legal right the law, in some form, gives redress. This principle is expressed in the maxim *ubi jus ibi remedium;* the *jus* being a right recognized or created by law; the *remedium* consisting either in a restoration of the injured party to his former condition, so far as that can be done, or the payment to him of a compensation for his injury out of the property of the wrong-doer.

Read 3 Bl. Comm., pp. 22, 23, 116.
Broom Leg. Max., pp. 191–210.
1 Addison Torts, § 51.
Cooley Torts, pp. 19–21.

§ 243. Of Cases where the Law Refuses to Apply its Remedies.

There are, however, certain cases of violated legal rights in which, although the law recognizes the existence of the right and has a remedy by which the wrong could be redressed, it refuses to apply that remedy, on account of the encouragement to negligence or wrong-doing, which the application of such remedy would afford. These are: (1) *Joint wrongs;* i. e. where the damage has resulted from the joint act of the injured party and his injurer; (2) Cases involving *contributory negligence;* i. e. where the damage has resulted from negligence, and the injured party, by

his own negligence, has directly contributed thereto; (3) Cases involving *equal fault;* i. e. where the damage has resulted from the engagement of the injured party in an illegal transaction; (4) Cases involving an *estoppel;* i. e. where the damage has resulted from an act, which the wrong-doer was wilfully prevailed upon or influenced to do, by the words or conduct of the injured party; (5) Cases barred by the *Statute of Limitations;* i. e. where the injured party fails to pursue his remedy within the prescribed time.

Read Bac. Abr., Limitation of Actions.
Broom Leg. Max., pp. 265–295, 857–868.
1 Hill. Torts, Ch. iv, §§ 1-37.
1 Addison Torts, §§ 34, 427, 428.
2 Addison Torts, §§ 1360–1362, 1376.
Cooley Torts, pp. 151–159, 674–683.
2 Pars. Cont., Part ii, Ch. iii, Sec. 3, 11; Ch. iv.
3 Pars. Cont., Part ii, Ch. vi.
2 Greenleaf Ev., §§ 430–448.

§ 244. Of Self-Defence.

Legal remedies are of four classes: (1) Those which the injured party may himself apply; (2) Those which are applied by the joint act of both the injured and the injurer; (3) Those which are applied by the act of the law alone; (4) Those which are applied by the joint act of the parties and the law. The remedies, which the injured party may himself apply, are five: Self-defence; Recaption; Entry; Abatement; and Distress. *Self-defence* is the act of a party, forcibly resisting a forcible attack upon his own person or property, or upon the persons or property of those, whom by law he has a right to protect and defend. The degree of force, permissible in self-defence, depends upon the force of the attack, and the object against which that attack is di-

rected. In defence of life or limb a man may, if necessary, destroy life. To prevent or resist certain felonious attacks upon his property he may also, if necessary, take life. In defence of his body against ordinary assault or battery, or of his property against a trespass or a misdemeanor, he has no right to take life or do serious injury to limb. And whenever the force used in defence is unnecessary or excessive, the person using it becomes himself a wrong-doer, and is liable for the injuries, which such excess occasions.

Read 3 Bl. Comm., pp. 3, 4.
1 Hill. Torts, Ch. v, §§ 11–15.
2 Addison Torts, §§ 792–797.
Cooley Torts, pp. 45, 49, 50, 165–169.

§ 245. Of Recaption.

Recaption is the act of a party, whose wife, child, servant, or goods have been unlawfully taken or detained from him, whereby he retakes possession of the same. This he may do wherever he can find them, provided he does not thereby endanger the public peace, or trespass on the lands of any person who is not privy to the unlawful detainer.

Read 3 Bl. Comm., pp. 4, 5.
1 Addison Torts, § 523.
Cooley Torts, pp. 50–56.

§ 246. Of Entry.

Entry is the act of a party, entitled to the immediate possession of lands, whereby he takes possession of the same. Any act, which assumes in the doer thereof a dominion over the land, is a sufficient entry. Entry may be made either by a landlord upon lands held by his tenant at will

or tenant by sufferance, or by any person who has been ousted by the wrongful entry of an abator, intruder, or disseisor. Where the original entry of the present possessor was lawful, as in discontinuance and deforcement, or where the right of entry has been *tolled*, or taken away from the owner of the land by the death of the disseisor and the vesting of his apparent estate in his heir, entry cannot be made, and the remedy is by action or suit at law. Entry cannot be made when it will endanger the public peace.

Read 3 Bl. Comm., pp. 5, 174–179.
1 Hill. Torts, Ch. xviii, §§ 18, 35.
Cooley Torts, pp. 57, 58.

§ 247. Of Abatement.

Abatement is the act of a party, who is suffering from the wrongs called *nuisance*, whereby he removes the cause of his injury. This remedy must also be so pursued as not to endanger the public peace.

Read 3 Bl. Comm., pp. 5, 6.
1 Hill. Torts, Ch. xix, §§ 18, 18 a; Ch. xx, § 24.
1 Addison Torts, §§ 266–272.
Cooley Torts, pp. 46–49.

§ 248. Of Distress.

Distress is the act of a party, who has sustained some legal wrong, whereby he seizes the goods of the wrongdoer, and retains them until satisfaction be made. This remedy may be applied in two cases: (1) By *landlords*, who may distrain the goods or cattle of their tenants for non-payment of rent; (2) By possessors of land, who may distrain cattle found *damage feasant*, or doing damage, in their land. This remedy was anciently guarded by strict

rules, and, in this country, is now generally regulated by statute.

Read 3 Bl. Comm., pp. 6–15.
Bac. Abr., Distress.
1 Hill. Torts, Ch. xvii, §§ 21–26.
1 Addison Torts, §§ 706–753.
Cooley Torts, pp. 58–60.

§ 249. Of Accord and Satisfaction.

The remedies, which are applied by the joint act of the injured and the injurer, are two: Accord and Satisfaction, and Arbitration. *Accord and satisfaction* is the agreement of the injurer to give, and of the injured to receive, some valuable thing as a satisfaction for the wrong done, followed by the actual giving and receiving of such valuable thing.

Read 3 Bl. Comm., p. 16.
Bac. Abr., Accord and Satisfaction.
2 Addison Torts, § 1353.
2 Pars. Cont., Part ii, Ch. iii, Sec. 4.
2 Greenleaf Ev., §§ 28–33.

§ 250. Of Arbitration.

Arbitration is the agreement of the injurer and injured to submit, to the decision of a third person, all questions as to the wrong alleged to have been done, followed by the decision of such third person, and the compliance of both parties therewith. The agreement to submit is called the *submission*, and the decision of the third person is called the *award*. The award must be conformable to the terms of the submission, must specify without ambiguity what is to be done by the parties, must be possible and reasonable, and leave no point, that is contained in the submission, open to further controversy or discussion. When

such an award has been performed by the parties, the remedy of the injured party is complete.

Read 3 Bl. Comm., pp. 16, 17.
Bac. Abr., Arbitrament and Award.
2 Pars. Cont., Part ii, Ch. iii, Sec. 5.
2 Greenleaf Ev., §§ 69–81.

§ 251. Of Retainer.

The remedies, which are applied by the act of the law alone, are two: Retainer and Remitter. *Retainer* is the remedy which the law gives to a creditor, who has been appointed executor or administrator upon the estate of his deceased debtor, whereby he retains out of the estate a sum sufficient for the payment of his debt, in preference to other creditors of the same degree. This remedy is usually now applied only where the estate of the deceased debtor is solvent.

Read 3 Bl. Comm., pp. 18, 19.
Bac. Abr., Executors and Administrators A, 9.

§ 252. Of Remitter.

Remitter is the remedy which the law gives to the rightful owner of a freehold estate in real property, who has been ousted of possession, but afterwards has another freehold estate and the possession *cast upon* him under a defective title, whereby he is presumed to hold both his estate and his possession under his former and perfect title. This remedy is applied only where the defective estate is *cast upon* the disseisee by operation of law. If he *purchases* such an estate, no remitter takes place.

Read 3 Bl. Comm., pp. 19–21.
Com. Dig., Remitter.

§ 253. Of Actions at Law.

The remedies, which are applied by the joint act of the parties and the law, are called actions, or suits at law. *An action* is the pursuit of a legal remedy in a court of justice. The person pursuing the remedy is called the *plaintiff;* the person, against whom the remedy is sought, is called the *defendant.* The mode, by which the defendant is brought into court to answer to the claim of the plaintiff, is called the *process.* The mutual formal allegations of the parties in court, in affirmance or denial of the cause of action, are called the *pleadings.* The decision of the court is called the *judgment.* The proceeding, by which the judgment is enforced, is called the *execution.*

Read 3 Bl. Comm., pp. 23–25, 272, 279, 293, 395, 412.

§ 254. Of Real Actions.

Actions at common law are of three classes: Real Actions; Mixed Actions; and Personal Actions. A *real action* is an action brought to recover the possession of a freehold estate in real property, from which the plaintiff has been ousted. These actions were formerly numerous, and constituted a large portion of the business of the courts of common law. In later times, they have given place to mixed actions.

Read 3 Bl. Comm., pp. 117, 118.
1 Chitty Pl., p. 97.
2 Greenleaf Ev., §§ 547–559.
Pomeroy Rem., §§ 15–21.

§ 255. Of Mixed Actions. Ejectment.

A mixed action is an action brought to recover the possession of real property, from which the plaintiff has been ousted, together with damages for such ouster. The only mixed action, now of practical importance, is the action of

disseisin or *ejectment.* This action may be brought for the recovery of any real property, upon which entry can be made, and of which a sheriff can deliver the actual possession. It cannot be brought to recover an incorporeal hereditament or a personal chattel. Any person, who has a right to enter upon land and hold the exclusive possession thereof, may maintain this action, whether his estate therein be personal or real. Ejectment will lie against any person, who has wrongfully taken or retained possession of the land, to the exclusion of the lawful possessor, and under a claim of right. Certain acts of trespass may also be treated as an ouster, at the election of the lawful possessor, and this action sustained thereon. The plaintiff in ejectment must recover, if at all, by the strength of his own title, not by the weakness of that of the defendant, for actual possession of land gives the possessor a right thereto, as against every one but the lawful possessor. The damages recovered in this action are either nominal, (in which case an action of trespass lies to recover the value of the rents and profits during the period of dispossession,) or are measured by the amount of such rents and profits. The judgment, if for the plaintiff, is that he recover quiet and peaceable possession of the land with damages; which judgment the sheriff enforces by delivering the land into his possession, and collecting and paying over the damages out of the defendant's estate.

Read 3 Bl. Comm., pp. 118, 199–206.
Bac. Abr., Ejectment.
1 Chitty Pl., pp. 187–196.
2 Greenleaf Ev., §§ 303–337.
Hill. Rem., B. ii.

§ 256. Of Personal Actions.

A personal action is an action brought to recover the possession of personal property, or to recover damages

for some violation of absolute or relative rights. Personal actions are of two kinds: Actions *ex delicto*, and Actions *ex contractu*. *Actions ex delicto* are actions brought to recover the possession of personal property, or to recover damages for some wrong other than a breach of contract. *Actions ex contractu* are actions brought to recover damages for a breach of contract.

Read 3 Bl. Comm., p. 117.
Bac. Abr., Actions in General.
1 Chitty Pl., pp. 97, 125.

§ 257. Of Trespass.

Actions *ex delicto* are five: Trespass; Case; Trover; Replevin; and Detinue. *Trespass* is an action brought to recover damages for an injury, to person or property, directly resulting from the wrongful act of another. It is sometimes called an action of *trespass vi et armis*, from the fact that the wrongs, which it is intended to redress, involve the application of force to the object injured. Hence where the injured object is incorporeal, and not capable of being affected by force, this action will not lie. It is a proper remedy for threats or violence to the person, for false imprisonment, for trespass *quare clausum fregit*, for asportation of, or forcible damage to, personal property, for abduction, criminal conversation, or battery of a wife, for abduction of a child or ward, and for the battery or seduction of a servant.

Read 3 Bl. Comm., pp. 120–123, 138, 142, 151, 211.
Bac. Abr., Trespass.
1 Chitty Pl., pp. 125–132, 166–186.
1 Hill. Torts, Ch. iii, §§ 12, 13.
1 Addison Torts, § 97.
Cooley Torts, pp. 436–441.
2 Greenleaf Ev., §§ 612–635 a.

§ 258. Of Trespass on the Case.

Case is an action brought to recover damages for an injury, to person or property, indirectly and consequentially resulting from the wrongful act or omission of another. It is sometimes called an action of *trespass on the case*, from the fact that the wrongs, which it is intended to redress, do not necessarily involve the doing of a specific wrongful act in reference to the object injured, but grow out of the circumstances of the case, among which circumstances is some wrongful omission of the defendant, leading to the injury, or some wrongful act of his, by which are set in operation other and secondary causes, which, in their turn, produce the injury. Hence this action is a proper remedy for nuisance to the person, for libel, slander, and malicious prosecution, for nuisances to land, for waste and disturbance, for damage without force to personal property, for the retainer of a servant, for conspiracy, and for fraud.

Read 3 Bl. Comm., pp. 122, 123, 126, 142, 153, 165, 166, 220–237.
Bac. Abr., Action on the Case.
1 Chitty Pl., pp. 125–145.
1 Hill. Torts, Ch. iii, §§ 12, 13.
Cooley Torts, pp. 436–441.
2 Greenleaf Ev., §§ 223–232 b.

§ 259. Of Trover.

Trover is an action brought to recover damages for the wrongful taking or detention of goods from the possession of another. It is also called *conversion*, since every unlawful taking or detention of goods is a conversion, or usurpation of dominion over the same. It is a proper remedy for asportation or for detention, where the taking

detaining of the property is the sole element of in-
ry.

Read 3 Bl. Comm., p. 152.
Bac. Abr., Trover.
1 Chitty Pl., pp. 146–162.
2 Hill. Torts, Ch. xxv, §§ 1-3.
1 Addison Torts, §§ 524–542.
Cooley Torts, pp. 441-458.
2 Greenleaf Ev., §§ 636–649.

§ 260. Of Replevin.

Replevin is an action brought to recover the possession of personal property, which is unlawfully taken or detained, and, in some cases, damages for the unlawful asportation or detention. In ancient times, this remedy was principally used in cases of *distress*, to recover the possession of the property distrained, but has, in many of the States, been so extended as to lie in all cases, where goods are in the possession of one party and ought to be in that of another. The property to be replevied must be capable of actual delivery, and must be distinguishable from all other property.

Read 3 Bl. Comm., pp. 145-151.
Bac. Abr., Replevin and Avowry.
1 Chitty Pl., pp. 162–166.
1 Hill. Torts, Ch. xvii, §§ 23-26.
1 Addison Torts, §§ 754, 760–786.
2 Greenleaf Ev., §§ 560–570.
Hill. Rem., B. i.

§ 261. Of Detinue.

Detinue is also an action brought to recover the po
sion of personal property, which is unlawfully taken
tained. This remedy is of the same nature as re

and is designed to afford the same redress. When the action of replevin was confined principally to cases of original wrongful taking, this was the only remedy whereby goods lawfully taken, but unlawfully detained, could be recovered. The extension of the action of replevin has taken from the action of detinue much of its importance, and, in some of the States, it is now scarcely known.

Read 3 Bl. Comm., p. 151.
Bac. Abr., Detinue.
1 Chitty Pl., pp. 121–125.
1 Addison Torts, §§ 631–648.

§ 262. Of Assumpsit. Implied Contracts.

Actions *ex contractu* are three: Assumpsit; Debt; and Covenant. *Assumpsit* is an action brought to recover damages for the breach of an implied contract, or of an express contract not under seal. Implied contracts are of two classes: (1) Those implied between the state and its subjects, from the nature of the relation between them; (2) Those implied between individuals, from the nature of their dealings with each other. The first class includes the implied contracts to pay all legal taxes and imposts, to fulfil or submit to all judgments legally rendered, and to pay all fines and forfeitures legally incurred. The second class includes the following: (1) The contract called *quantum meruit*, or the implied agreement of every master to pay his servant what the services are reasonably worth; (2) The contract called *quantum valebat*, or the implied agreement of the vendee to pay the vendor what the property sold is reasonably worth; (3) The contract *of money had and received*, or the implied agreement of one who receives another's money, without giving valuable consideration for it, to pay it over to that other on demand; (4) The contract *of money laid out and expended*, or the implied agree-

ment of one, for whom another, at his request, has expended money without himself receiving valuable consideration for it, to pay it to that other on demand; (5) The contract *of money lent and advanced*, or the implied agreement of one, to whom another has loaned money, to pay it to that other on demand; (6) The contract *on account stated*, or the implied agreement of two merchants, who have adjusted their accounts with each other, that the balance due from either to the other shall be paid upon demand; (7) The contract *for fidelity and skill*, or the implied agreement of one, who undertakes to perform any service for another, that he will discharge his duties with the requisite diligence and skill, and the implied agreement of all contracting parties that fairness and honesty shall be observed between them.

Read 3 Bl. Comm., pp. 157–166.
Bac. Abr., Assumpsit.
1 Chitty Pl., pp. 98–108.
2 Greenleaf Ev., §§ 101–136 a.

§ 263. Of Debt.

Debt is an action brought to recover a specific sum of money, due and owing by one man to another. This action will lie whenever, by any contract, whether under seal or not and whether express or implied, a certain sum of money has become due and payable. It also lies upon judgments and records, to recover the amount due thereon.

Read 3 Bl. Comm., pp. 154, 155.
Bac. Abr., Debt.
1 Chitty Pl., pp. 109–115.
2 Greenleaf Ev., §§ 279–292.

§ 264. Of Covenant.

Covenant is an action brought to recover damages for the breach of a contract under seal. In cases where, by such breach, a specific and ascertained, or *liquidated*, sum becomes due as damages, covenant is a concurrent remedy with debt. In cases where such damages are *unliquidated*, covenant is the only remedy.

Read 3 Bl. Comm., pp. 155–157.
Bac. Abr., Covenant.
1 Chitty Pl., pp. 115–120.
2 Greenleaf Ev., §§ 233–247.

§ 265. Of Account.

In addition to the ordinary common law actions, there are certain special actions, which are intended to apply to certain special cases, or to supplement and enforce the remedies already mentioned. These are the following: Account; Scire Facias; and Foreign Attachment or Garnishment. *Account* is an action brought by a principal against his agent, or by one copartner against another, or by a ward against a guardian, to compel him to account for money or property intrusted to his care.

Read 3 Bl. Comm., p. 162.
Bac. Abr., Accompt.
1 Chitty Pl., p. 39.
2 Greenleaf Ev., §§ 34–39.

§ 266. Of Scire Facias.

Scire facias is an action brought upon some record, as a judgment or recognizance, to compel a party, interested in such record, to show cause why the mandate of the record should not be fulfilled or vacated.

Read 3 Bl. Comm., pp. 416, 421.
Bac. Abr., Scire Facias.
2 Tidd Prac., pp. 1139–1187.

§ 267. Of Foreign Attachment.

Foreign attachment or *Garnishment* is an action brought to compel a debtor of the plaintiff's debtor to pay to the plaintiff so much of the debt, due to the plaintiff's debtor, as will satisfy the plaintiff's claim.

Read Com. Dig., Attachment.
Drake Attachment, §§ 450–723.

§ 268. Of Mandamus.

Finally, there is a class of legal remedies known as *Prerogative Writs*, extraordinary in their character, and designed to afford peremptory relief in cases where no action could give adequate redress. These are the following: The Writ of Mandamus; The Writ of Prohibition; The Writ of Quo Warranto; and The Writ of Habeas Corpus. These four great writs issue either upon the application of the counsel for the government or the party aggrieved, and compliance with the orders contained therein may be enforced, if necessary, by fine and imprisonment. *The Writ of Mandamus* is an order issued by some superior court to an inferior court, or to a corporation, or to an officer, commanding such court, corporation, or officer to discharge some legal duty.

Read 3 Bl. Comm., pp. 110, 111, 264, 265.
Bac. Abr., Mandamus.
2 Addison Torts, §§ 1481–1523.
High Ex. Leg. Rem., Part i.
Moses Mandamus, Ch. i, ii.

§ 269. Of Prohibition.

The Writ of Prohibition is an order issued by a superior court to an inferior court, forbidding it further to take cognizance of a given action, then pending before such infe-

rior court, but either beyond its jurisdiction, or proceeded with in an improper manner.

Read 3 Bl. Comm., pp. 111–114.
Bac. Abr., Prohibition.
2 Addison Torts, §§ 1453–1465.
High Ex. Leg. Rem., Part ii, Ch. xxi.

§ 270. Of Quo Warranto.

The Writ of Quo Warranto is an order issued by a superior court, requiring a person or corporation to show by what authority it discharges certain duties, or enjoys certain franchises.

Read 3 Bl. Comm., pp. 262–264.
Com. Dig., Quo Warranto.
High Ex. Leg. Rem., Part ii, Ch. xiii–xx.

§ 271. Of Habeas Corpus.

The Writ of Habeas Corpus is an order issued by a court, directing a person in confinement to be brought before it, that the legality of the confinement may be determined.

Read 3 Bl. Comm., pp. 129–137.
Bac. Abr., Habeas Corpus.
Com. Dig., Habeas Corpus.
Hurd Hab. Corp., B. ii.

CHAPTER V.

OF THE PROCEEDINGS IN AN ACTION AT LAW.

§ 272. Of the Courts of Law and Equity.

An action is the pursuit of a legal remedy in a court of justice. *A court* is a place where justice is judicially administered. In a court of law, justice is judicially administered according to the principles and forms of law. In a court of equity, justice is judicially administered according to the principles and forms of equity. Courts of law and courts of equity thus differ from each other, not only in regard to the nature of the remedies they offer for the prevention or redress of wrongs, but in the forms of procedure by which those remedies are practically applied.

Read 3 Bl. Comm., pp. 23-25, 429-439.
1 Story Eq. Jur., §§ 1-37.
Pomeroy Mun. Law, §§ 40-43, 140-167, 218-233.

§ 273. Of Judges, Clerks, Sheriffs, and Juries.

A court of law is composed of one or more judges, clerks, a sheriff, and sometimes a jury, sitting for the transaction of judicial business, in the place, time, and manner prescribed by law. It is *the duty of the judge* to preside over and direct all the proceedings of the court, and to decide all questions of law arising in the course of such proceedings. It is *the duty of the clerks* to make and preserve true and complete records of the proceedings of the court, and to perform such ministerial functions as the

law, the ordinary course of practice, or the rules of the court may require. It is *the duty of the sheriff* to serve the process of the court, to preserve order during its sessions, and to execute its judgments. It is *the duty of the jury* to decide fairly and impartially the questions of fact presented to them, according to the evidence, and according to the rules of law as stated to them by the judge.

Read 1 Bl. Comm., pp. 339, 344.
3 Bl. Comm., pp. 24, 273, 317, 324, 365, 372, 375, 391–393.
Bac. Abr., Sheriff M.
Com. Dig., Record, Viscount C 4.
1 Tidd. Prac., pp. 37–53.
1 Starkie Ev., pp. 764–880.
Pomeroy Mun. Law, §§ 100–139, 241.
Walker Am. Law, § 48.

§ 274. Of Causes and Parties.

A court can exercise judicial functions only when some question or controversy, either of law or fact, is presented to it for decision; and since, to every controversy, there must be at least two parties, one of whom affirms, while the other denies, the point in question, it is essential to the action of a court that parties litigant appear before it, invoking its assistance and determination. Hence it is often said that every court of law has three constituent parts: *the plaintiff*, who affirms his right to the application of a given remedy; *the defendant*, who denies this right; and *the judicial power*, which, after due examination, must determine whether or not such remedy shall be applied.

Read 3 Bl. Comm., p. 25.
Pomeroy Mun. Law, §§ 300–303.

§ 275. Of Plaintiffs in Actions Ex Contractu.

The party-plaintiff, in an action at law, must be the person or persons, whose legal right has been violated by the alleged wrong. *In actions ex contractu*, the proper plaintiff is the person or persons, in whom the legal interest in the contract was vested, at the time the contract was broken. When one person has a legal, and another person has an equitable, interest in a contract, only the former can be the plaintiff in a court of law. Where several persons have a joint legal interest in a contract, they must all be joined as one plaintiff; where their legal interest is several, they cannot join, but each must bring his separate action. Where, of several persons, who have a joint legal interest in a contract, some are dead, the survivors only constitute the plaintiff; and where a person dies, in whom resided a sole or several legal interest in a contract, his executor or administrator is the proper plaintiff. An assignee in bankruptcy is the proper plaintiff in actions upon contracts, in which the bankrupt had a legal interest; and the husband is the proper plaintiff in actions upon contracts, in which his wife is legally interested, she being joined with him as plaintiff in actions upon contracts made by her before her marriage, and in actions for rent or other obligations accruing to her before marriage, in respect of her real estates in real property.

Read 1 Chitty Pl., pp. 1-32.
Gould Pl., Ch. iv, §§ 52-65.

§ 276. Of Plaintiffs in Actions Ex Delicto.

In actions ex delicto, for wrongs against the rights of personal security and personal liberty, *the proper plaintiff* is the person, whose security or liberty has been invaded. Where the security or liberty of several persons has been

violated by the same act of the defendant, each must bring his separate action, unless, as may sometimes occur, the damage resulting from the injury be joint. In actions for wrongs against the right of property, the plaintiff must be the person or persons, whose legal interest in the property has been affected by the alleged injury. Where this legal interest in the property vests in several persons jointly, all together constitute one plaintiff; but, where each has a several interest, each must sue alone. Where the legal interest is in one person, and the equitable interest is in another, only the former can be plaintiff in a suit at law. In actions *ex delicto* which survive the injured party, as is the case with most of those which lie for injuries to property, the executor or administrator of the decedent is the proper plaintiff; but where, of several persons, who were jointly interested at the date of the injury, some are dead, only the survivors can be joined as plaintiffs. In actions for the violation of relative rights, the superior in the relation must be the plaintiff.

Read 1 Chitty Pl., pp. 60–75.
Gould Pl., Ch. iv, §§ 52–57.

§ 277. Of Defendants in Actions Ex Contractu.

The party defendant, in an action at law, must always be the person or persons, by whom the alleged wrong has been committed. *In actions ex contractu*, for the breach of an express contract, the proper defendant is the person or persons, by whom the broken promise was originally made. In actions on implied contracts, the person or persons, who, under all the circumstances of the case, are subject to the legal liability, must be the defendant. Several persons, binding themselves jointly by their contract, must be joined also as defendant in an action for

the breach of such contract; though, where one of two or more joint-contractors is dead, the survivors only are named as defendant. Where each of several parties to the same contract is separately, and not jointly, bound thereby, each must be sued separately for his own breach of contract. Where the contract is several as well as joint, each may be separately sued, or all may be joined as the defendant in one action, as the plaintiff may prefer. Upon the death of a contracting party, if the contract-liability, or the right of action for its non-fulfilment, can survive, the proper defendant is his executor or administrator. Upon the contracts of a married woman, made before her marriage, the husband must be joined with her as the defendant.

Read 1 Chitty Pl., pp. 33–59.
Gould Pl., Ch. iv, §§ 66–73.

§ 278. Of Defendants in Actions Ex Delicto.

In actions ex delicto the person who commits the injury, whether by himself or by his agents, is to be made *defendant*. Where several persons join in the same wrongful act, each may be separately sued, or all may be joined as the defendant in one action, if the plaintiff so elect. Upon the death of the wrong-doer, if the action survive, his executor or administrator must be made defendant. In actions brought against a married woman for torts committed by her, either before or after marriage, both husband and wife must be named as defendant.

Read 1 Chitty Pl., pp. 76–93.
Gould Pl., Ch. iv, §§ 66, 74–78.

§ 279. Of the Nature, Kinds, and Service of Process.

The first step, in the institution of an action at law, is to bring the defendant into court, to answer to the claim

of the plaintiff, and to submit to the judgment of the court. This is done by means of process. *Process* is a general term, embracing all formal mandates of the court which are issued during the progress of a cause. The formal mandate of a court, by which the defendant is directed to appear and answer, is *original process*. The intermediate mandates, by which proceedings, that are subordinate or collateral to the main action, are commenced or forwarded, are known as *mesne process*. The mandate, by which the judgment of the court is enforced, is *final process*. Original and final process, and such mesne process as is directed against the defendant or his property, are known by the general name of *writs*. Original process is a written mandate, issued by the court, or by some other competent authority, directing the sheriff, or other proper officer, to summon the defendant to appear in court, at a day named therein, (called *the return-day*,) then and there to answer to the plaintiff's claim. When this process is a simple notice to appear, it is called *a summons*, and is served upon the defendant by reading it to him, or by leaving with him, or at his usual place of abode, a true and attested copy thereof. If the nature of the action be such that the defendant is liable to arrest upon original process therein, the process, by which the sheriff is commanded to arrest him, is known as *a capias*, and is served by taking his body into custody, and detaining him until duly released on bail, or committed in satisfaction of the judgment, or discharged by due course of law. In some States, the property of the defendant may be seized at the commencement of the suit, and held as security for his satisfaction of the judgment. The process, by which this is effected, is called *an attachment*, and is served by taking the property into the possession of the sheriff, as far as the nature of the property will permit, and holding it until the judgment be satisfied, or the property be otherwise

released by law. In some States also, a debt, due by a third person to the defendant, may be seized in the hands of such third person, and held as security for the satisfaction of the judgment. This is accomplished by a process known as *foreign attachment* or *garnishment*, and is served by notifying the third person to hold the debt, due from him to the defendant, subject to the order of the court or to final process. In all these forms of process, a summons to the defendant, to appear and answer, is necessarily embodied, all other original process being, in a certain sense, collateral and subsidiary to the mandate, by which the defendant is brought before the court.

Read 3 Bl. Comm., pp. 272–292.
Com. Dig., Attachment; Process A, C, D, E.
Stephen Pl., pp. 5–21.
1 Tidd Prac., pp. 116–130, 145–149, 165–199, 218–261.
3 Chitty Gen. Prac., pp. 140–145.

§ 280. Of the Return of Process. Appearance.

The sheriff, having served the process, must endorse thereon a short statement of his mode of service, (called his *return*,) and lodge the process, so endorsed, with the clerk of the court, on or before the return-day. It is the duty of the defendant to appear in court on the return-day, and, on his failure so to do, judgment may go against him *by default*. The plaintiff likewise must appear, or judgment may be taken against him by the defendant upon *nonsuit*. Anciently, both parties to a suit appeared in person, and orally made their respective claims concerning the matter in dispute. *Appearance* is now generally made by

attorney, and the mutual allegations of the parties are submitted to the court in writing.

Read 3 Bl. Comm., pp. 25–29, 273, 277, 278, 282, 287, 295, 296.
Com. Dig., Pleader B ; Process B, D 3–7, E 1–3 ; Retorn.
Stephen Pl., pp. 5, 21–28.
1 Tidd Prac., pp. 262–269.

§ 281. Of Pleadings.

These mutual allegations are called *the pleadings*. Their object is to apprise the court of the exact point or points, concerning which its judgment is desired. In order to secure this object, numerous technical rules concerning them have been from time to time adopted, tending to certainty, clearness, and brevity, in the statement of the real material issue. The discussion and illustration of these rules forms the subject-matter of the treatises on Pleading.

Read 3 Bl. Comm., pp. 293, 310–313.
1 Chitty Pl., pp. 213, 214, 221–239.
Stephen Pl., pp. 123–137, 240–426.
Gould Pl., Ch. i, §§ 1–3 ; Ch iii ; Ch. viii, §§ 1–31, 65–79.

§ 282. Of the Classes and Order of Pleadings.

The questions, presented to the court in any action at law, may be grouped in three classes : (1) Has the court, to which the process has been returned, authority to hear and determine the points in controversy? (2) Has the action itself been properly instituted? (3) Upon the merits of the controversy, which of the parties is entitled to a judgment, and for what amount shall such judgment

be rendered? Pleadings may, therefore, be grouped into three corresponding classes: (1) Pleadings which raise the question, whether the court has the requisite authority, called *pleadings to the jurisdiction;* (2) Pleadings which raise the question, whether the action has been properly instituted, called *pleadings in abatement;* (3) Pleadings which raise the question, whether, on the merits of the controversy, the plaintiff or defendant should have judgment, and which embrace all other pleadings than those previously named. These three classes of questions must be raised, when raised at all, in the foregoing order. An objection to the jurisdiction must be made, if ever, before the attention of the court has been directed to proceedings, which would become useless if the objection were afterward made and sustained. An objection to the mode, in which the action has been instituted, must be urged before the merits of the controversy are submitted to the court. In either of these cases, failure to raise these questions, at the proper time, is regarded as a waiver of the right to raise them, and an irrevocable submission of the parties to the judgment of the court, upon the action as already instituted.

Read 3 Bl. Comm., pp. 301, 303.
Bac. Abr., Pleas and Pleadings A.
Com. Dig., Abatement C.
1 Chitty Pl., pp. 440, 441.
Stephen Pl., pp. 46, 430, 431.
Gould Pl., Ch. ii; Ch. v, §§ 1–9.

§ 283. Of Demurrer. Traverse. Confession and Avoidance.

The question finally presented to the court for its decision, under any of these classes of pleadings, is called *the issue*, and is reached in one of three different ways: (1)

By a denial, upon one side, that the facts, alleged upon the other, are legally sufficient to sustain the action or the pleading, which denial is called *a demurrer;* (2) By a direct denial, upon one side, of the facts alleged upon the other, which denial is called *a traverse;* (3) By an admission, upon one side, of the facts alleged upon the other, coupled with an allegation of new facts, which justify or excuse or change the legal character of the facts admitted, which admission and allegation are called *a confession and avoidance.* A demurrer creates *an issue of law.* A traverse creates *an issue of fact.* A confession and avoidance may be traversed, or answered by another confession and avoidance, or by a demurrer; in the end, however, always terminating in a traverse, raising an issue of fact, or in a demurrer, raising an issue of law.

Read 3 Bl. Comm., pp. 314–324.
Bac. Abr., Pleas and Pleadings H, N.
Com. Dig., Pleader G, Q, R 1–16.
1 Chitty Pl., pp. 604, 653, 654, 660–670.
Stephen Pl., pp. 44, 52–59, 137–240.
Gould Pl., Ch. i, §§ 2–25; Ch. vii; Ch. ix, §§ 1–46.
2 Tidd Prac., pp. 750–773.

§ 284. Of the Jurisdiction of Courts.

The jurisdiction of a court is defined by law, and depends upon the character of the parties-litigant, and upon the subject-matter of the controversy. Where no jurisdiction has been given by law to the court over the subject-matter of the controversy, all proceedings in regard to it must inevitably be void; and the court should at once dismiss the action, whenever the want of jurisdiction becomes apparent. If the want of jurisdiction is dependent on the character of the parties-litigant, it can be waived, and

will be waived in case they suffer the action to proceed without objection.

Read Gould Pl., Ch. v, §§ 14–25.
Cooley Const. Lim., pp. 398–407.

§ 285. Of Pleas to the Jurisdiction.

An *objection to the jurisdiction* of a court may be taken either by motion or by plea. When the character of the parties and the subject-matter are so far disclosed by the process, or by the process taken in connection with the declaration, that an inspection thereof shows at once the want of jurisdiction, the attention of the court may be directed to the error by *a motion*, and it will immediately dismiss the action. But if the fault be not apparent upon such inspection, a formal pleading, on the part of the defendant, becomes necessary, in which the want of jurisdiction and its causes are distinctly stated, and which is called *a plea to the jurisdiction.* To this plea the plaintiff must reply either by a traverse, or confession and avoidance, or demurrer, and the defendant must answer, until an issue either of fact or law is reached.

Read 3 Bl. Comm., pp. 302, 303.
Bac. Abr., Pleas and Pleadings E.
Com. Dig., Abatement D.
1 Chitty Pl., pp. 441–446.
Gould Pl., Ch. v, §§ 13–30.

§ 286. Of Pleas in Abatement.

An objection to the mode, in which the action has been instituted, must be made by *plea in abatement.* The grounds of this objection are manifold, embracing: (1) Defects in the process; (2) Defects in the service of the process; (3) Incapacity of the plaintiff to sue; (4) Incapacity of the defendant to be sued; (5) Misdescription of the plaintiff;

(6) Misdescription of the defendant; (7) Misjoinder of parties; (8) Nonjoinder of parties; (9) Pendency of another action between the same parties, in which the same remedy is sought for the same wrong; (10) Variance between the cause of action as stated in the process, and as stated in the declaration. This plea must state the objection, and the grounds thereof, with the greatest possible precision; and in cases of misdescription, nonjoinder, and the like, must give the plaintiff such information as will enable him to correct his error. To this plea the plaintiff may reply, either by a traverse, or a confession and avoidance, or a demurrer; and, upon the issue thus attained, the court will either sustain the action in its present form, or will dismiss the action, or will permit the plaintiff to amend in such a manner as to cure the defect.

Read 3 Bl. Comm., pp. 302, 303.
Bac. Abr., Abatement, Misnomer.
Com. Dig., Abatement B, C, E–N.
1 Chitty Pl., pp. 446–467.
Stephen Pl., pp. 47–51, 432.
Gould Pl., Ch. v, §§ 31–159.
1 Tidd Prac., pp. 685–694.

§ 287. Of the Declaration, Pleas in Bar, and Subsequent Pleadings.

The first in order of those pleadings, which raise the question, whether on the merits of the controversy the plaintiff or defendant should have judgment, is *the declaration*. This is the plaintiff's statement of his cause of action. It must contain, in legal form and with all the necessary technical averments, a clear and concise description of the facts of which he complains, of the damage which he has sustained, and of the remedy for which he seeks. To this declaration the defendant may demur, de-

nying that the facts alleged constitute a cause of action; or he may *plead in bar*, either by traverse, or by confession and avoidance. Upon a traverse or demurrer, issue is immediately joined; but to a confession and avoidance the plaintiff may reply by traverse, or demurrer, or a new confession and avoidance, until, by final traverse or demurrer, issue is at last attained. Each stage of pleading, which is characterized by the affirmation or denial of any of the facts in controversy, has its own distinctive name; to wit, the plaintiff's *declaration;* the defendant's *plea;* the plaintiff's *replication;* the defendant's *rejoinder;* the plaintiff's *surrejoinder;* the defendant's *rebutter;* the plaintiff's *surrebutter*. Few pleadings ever reach this latest stage.

Read 3 Bl. Comm., pp. 293–295, 303–310.
Bac. Abr., Pleas and Pleadings.
Com. Dig., Pleader C, E, F, H, I, K, L.
1 Chitty Pl., pp. 239–240, 244–261, 409–414, 469–472, 521–548, 566–568, 577–580, 601–652.
Stephen Pl., pp. 30–44, 51–66.
Gould Pl., Ch. iv, §§ 1–51, 79–103; Ch. vi.
1 Tidd Prac., pp. 422–471, 695–715.

§ 288. Of Code-Pleading.

In many of the States, the system of *Code-Pleading* (so called to distinguish it from Common-Law Pleading) has been introduced, by which the ancient forms of pleadings have been simplified, and the issues, which involve the merits of the controversy, are more speedily and clearly ascertained. The object of the pleadings, however, remains the same, and the rules, by which that object is attained, are substantially unchanged.

Read Pomeroy Rem., §§ 28–111.
Bliss Code Pl., §§ 1–10, 135–142.

§ 289. Of Issues and Trial.

When the parties are once at issue upon any point, the next step in the proceedings is *to hear and determine* the questions, which are presented by such issue. *An issue of law* is heard and decided by the judge alone. *An issue of fact* may, and sometimes must, be heard and decided by a jury.

Read 3 Bl. Comm., pp. 324, 349–351.
Stephen Pl., p. 76.

§ 290. Of the Jury. Challenges.

A jury is a body of twelve men, summoned from the county where the court is held, and duly sworn to try the issues between the plaintiff and defendant, and to decide them according to the law and the evidence. The process, by which the sheriff is directed to summon into court the men who are to constitute the jury, is known as *a venire*, and must be served and returned in the manner provided by law. When the jurors appear in court, and before they are sworn to try the issue in any particular action, the parties to the action have a right to make objection, either to the whole body of jurors, or to any individual among them. Such an objection is called *a challenge*. Challenges are of two kinds: Challenges to the Array, and Challenges to the Polls. *A challenge to the array* is an objection to the whole body of jurors, on account of some defect in the *venire* or in its mode of service, or of some partiality in the sheriff by whom it was served. *A challenge to the polls* is an objection to one or more individual jurors, on account of legal disqualification, or of known or probable bias in favor of one of the parties. In some States also, either party may *peremptorily challenge* a certain number of jurors, without giving any reason therefor. If a challenge to the polls is sustained by the court, the juror is dis-

charged from service in that particular action, and another juror is substituted in his place. When a challenge to the array is sustained, a new *venire* is issued and served.

Read 3 Bl. Comm., pp. 352–366.
Bac. Abr., Juries.
Com. Dig., Challenge, Enquest.
2 Tidd Prac., pp. 904–908.

§ 291. Of Direct and Circumstantial Evidence.

The jury being sworn, the pleadings are read, and sometimes an explanatory statement of the issues is made by the counsel, in order that the applicability of the evidence, now to be introduced, may be more clearly understood. *Evidence* is the means by which the existence or non-existence of an alleged fact is legally ascertained. The existence or non-existence of an alleged fact may be ascertained in three ways: (1) By actual observation; (2) By the testimony of persons, who have a knowledge thereof derived from actual observation; (3) By inferring it from other facts, which have been actually observed or are established by proper testimony. Evidence of the first and second classes is known as *direct evidence*. Evidence of the third class is known as *indirect*, *inferential*, or *circumstantial evidence*.

Read 3 Bl. Comm., pp. 366–371.
2 Tidd Prac., pp. 908–910.
3 Chitty Gen. Prac., pp. 872–888.
1 Starkie Ev., pp. 15–17, 80–96, 820–866.
1 Greenleaf Ev., §§ 1, 2, 7–13 a.
Burrill Circ. Ev., pp. 1–8, 76–247.

§ 292. Of Material and Relevant Facts.

The sole questions, to be considered and decided by the jury, are those which are embodied in the issue. A fac

which, when proved, determines some question embodied in the issue, is *a material fact*. A fact from which, when proved, some material fact may legally be inferred, is called *a relevant fact*. Facts neither material nor relevant are, therefore, excluded from the consideration of the jury, and evidence concerning them is inadmissible.

Read Stephen Pl., p. 83.
1 Starkie Ev., pp. 10–12, 15–17.
1 Greenleaf Ev., §§ 50–73.
Stephen Ev., Introd. Part i.

§ 293. Of Facts Judicially Noticed.

In the trial of every issue, certain facts are presumed by law to be personally known, both to the judge and jury. Of these there are six classes: (1) *Political facts*, such as the existence of other nations, their flags and seals, the law of nations, the territorial divisions and political constitution of the state, the public matters which affect the state, its elections and general legislative meetings, its weights and measures, coins, and other circulating medium, and its public and special fasts and festivals; (2) *Legal facts*, including the public laws of the state, its various courts with their jurisdiction and rules of practice, their officers and seals, the names and persons of their judges, the general customs of trade, and such other matters relating to law and usage as are equally well known to all citizens; (3) *Official facts*, embracing the names and functions of the President, senators, representatives, ambassadors, marshals, sheriffs, and all who hold office in the state by virtue of public election or appointment, the signatures of the President, marshals and sheriffs, and the signatures and seals of notaries; (4) *Public history*, including the facts which constitute the political, social, and topographical

development of the state, and which are generally known and regarded as true; (5) *Natural history*, comprising such facts in nature as are permanent and uniform, and do not require special investigation in order to discover them, such as the number of days in a given month, the succession of the seasons, and the coincidence of week-days with certain days of the month and year; (6) *The vernacular language*, or the meaning of all common English words, and of such terms in art as are of ordinary use. Of all these facts courts *take judicial notice*, and regard them as established without further proof. All other facts, whether material or relevant, must be established by legal and sufficient evidence.

Read 1 Starkie Ev., pp. 735–741.
1 Greenleaf Ev., §§ 4–6.

§ 294. Of Written and Oral Evidence.

Evidence, as to its form, is of two kinds: Written and Oral. *Written evidence* consists of public and judicial records, deeds, bonds, and other instruments in writing. Written evidence is admissible, whenever the fact in question is the existence of the instrument itself, or whenever the contents of the instrument are legally sufficient to establish some material or relevant fact. *Oral evidence* consists of the *viva voce* statement of a witness, who is duly sworn and subjected to examination. Oral evidence is admissible only when the witness can testify, from his personal knowledge, as to the existence or non-existence of some material or relevant fact, or when he is called, as an expert, to testify to his opinion.

Read 3 Bl. Comm., pp. 367–369.
1 Starkie Ev., pp. 96, 102, 255.
1 Greenleaf Ev., §§ 306–308.

§ 295. Of Primary and Secondary Evidence.

The existence and the contents of a written instrument may be proved by the production of the instrument itself, or in certain cases where this cannot be done, by a properly attested copy, or where no copy even can be had, by oral evidence. The instrument itself is *primary evidence* of its existence and its contents; copies and oral evidence are *secondary evidence;* and secondary evidence is inadmissible, whenever primary evidence can be produced. The meaning or *construction* of an instrument is a matter for the decision of the judge, and oral evidence that the maker of the instrument did not himself mean what the instrument, as so interpreted, expresses is inadmissible.

Read Bac. Abr., Evidence F, G, I.
Com. Dig., Testmoigne — Evidence.
2 Tidd Prac., pp. 849–855.
1 Starkie Ev., pp. 255–583, 642–733.
1 Greenleaf Ev., §§ 82–97, 275–305, 470–583.

§ 296. Of Depositions.

Oral evidence is usually produced in open court, in the presence of the jury. Where this is impossible, by reason of the sickness of the witness or other cause, it may be taken in writing by some person, appointed for the purpose by the court, or authorized to do so by the general rules of law. The evidence, thus written, is called *a deposition*, and is read in court to the jury as the testimony of the witness.

Read 2 Tidd Prac., pp. 860–863.
1 Starkie Ev., pp. 409–434.
1 Greenleaf Ev., §§ 320–325.

§ 297. Of Subpœnas. Subpœnas Duces Tecum.

The process, by which witnesses are summoned to appear and testify, is known as *a subpœna*. When written instruments, in the possession of a third person, are needed as evidence, he may be summoned to appear and produce them, by a process known as *a subpœna duces tecum*. If such instruments are in possession of the opposite party, notice may be given to him to produce them, and if he refuse, secondary evidence of their existence and contents may be given.

Read 3 Bl. Comm., p. 369.
Bac. Abr., Evidence D.
2 Tidd Prac., pp. 855–860.
1 Starkie Ev., pp. 103–114.
1 Greenleaf Ev., §§ 309–319.

§ 298. Of the Competency of Witnesses.

Any person, who understands and recognizes the obligations of an oath, is *a competent witness*, unless disqualified by positive law. Formerly, all those who had been convicted of certain infamous crimes, and all those who were interested in the merits of the controversy, were so disqualified; but such interest or conviction is now regarded as affecting the credibility, rather than the competency, of a witness.

Read 3 Bl. Comm., pp. 369, 370.
Bac. Abr., Evidence A 4–6, B.
Com. Dig., Testmoigne — Witness.
1 Starkie Ev., pp. 22–34, 114–146.
1 Greenleaf Ev., §§ 326–333, 347–430.

§ 299. Of Confidential Communications.

With few exceptions, any witness may testify to any material or relevant fact within his personal knowledge.

But *husband and wife* are not allowed to testify against each other, unless in actions where some personal injury, inflicted by one upon the other, is the subject-matter of the controversy. *Public officers* are not permitted to testify to any secret affairs of state, or to any matters which the public interest requires to be concealed. *Counsel* are not allowed to testify to any matter confided to them by their clients, nor can *a client* be compelled to disclose any communication passing between himself and his counsel. No witness can be compelled to reveal matter, which would expose him to prosecution for a criminal offence, or to any public penalty or forfeiture.

Read 3 Bl. Comm., p. 370.
Bac. Abr., Evidence A 1–3.
1 Starkie Ev., pp. 39–42.
1 Greenleaf Ev., §§ 236–254 a, 334–346.

§ 300. Of Hearsay Evidence.

With few exceptions also, no witness is allowed to testify to statements, made to him or in his presence by other persons. Among these exceptions are the following: (1) Where the making of the statement is itself a material or relevant fact; (2) Where the statement was made by a party-litigant, or his agent, or some person in whose right he claims, and is an admission or a declaration against his interest; (3) Where the statement was *a dying declaration*, made under apprehension of immediate death by a person alleged to have been killed by another, and describing the method and the perpetrator of the homicide; (4) Where the statement was made by a person, since dead, insane, or beyond the reach of a *subpœna*, who at the time was testifying under oath in the same action, or in another action involving the same issues between the same parties, or their representatives in interest; (5)

Where the statement was made by a person, since deceased, in the ordinary course of business, or in the discharge of some professional duty, or in reference to the existence of some public right or custom and while no dispute concerning such right or custom existed; (6) When the statement was made by a person, since deceased, concerning relationship, births, deaths, or marriages, provided these facts are actually in issue, and the statement was made by the blood-relative of the person to whom they relate, or by the wife or husband of such blood-relative, and was also made before the facts themselves became matter of dispute; (7) When the statement was made by a testator, since deceased, concerning the contents of his will, and the will, though proved to have once existed, cannot now be found; (8) When the statement was made by a person, who, having been called as a witness in the same action, has testified inconsistently therewith; (9) Where the statement was made by a person, who, at the same time, performed some act, which has been shown in evidence, and which this statement is calculated to explain. Statements, not embraced in these exceptions, are known as *hearsay*, and are inadmissible.

Read 3 Bl. Comm., p. 368.
Bac. Abr., Evidence K, L, N.
1 Starkie Ev., pp. 35–39, 43–66.
1 Greenleaf Ev., §§ 98–235.
Stephen Ev., Part i, Ch. iv.

§ 301. Of the Examination of Witnesses.

The examination of a witness is divided into three stages: (1) Direct examination by the party who produces him; (2) Cross-examination by the adverse party; (3) Re-direct examination by his first examiner. The rules, which govern *the direct examination*, are few and simple. The witness

can be questioned only concerning material or relevant facts, or concerning matters necessary to explain such facts. Except in the case of adverse witnesses, no question, which suggests the desired answer, can be asked concerning any material or relevant fact; nor can a question, which assumes the existence of a fact not yet established, be permitted. The witness may, when necessary, assist his memory by reference to written memoranda, provided he can thereupon testify to the facts from his own recollection. *On cross-examination* a far greater latitude is allowed. *Leading questions*, suggesting the desired answer to the witness, may be employed. Collateral facts may also be elicited, and questions may be asked concerning almost any matter, which, in the discretion of the judge, may appear proper in order to test the veracity and knowledge of the witness. A witness cannot, however, be cross-examined as to any immaterial and irrelevant fact, merely for the purpose of contradicting him by other evidence. *The re-direct examination* is intended to enable the witness to explain the statements made on cross-examination, and is governed by the same general rules as the direct.

Read Bac. Abr., Evidence E 1.
3 Chitty Gen. Prac., pp. 890–903.
1 Starkie Ev., pp. 146–254.
1 Greenleaf Ev., §§ 431–469.

§ 302. Of the Burden of Proof.

The burden of proof, or the duty of supporting his position by a preponderance of evidence, rests on the affirmative. This may be either the plaintiff or defendant, according to the nature of the issue. The affirmative also usually goes forward in the presentation of his claims and in supporting them by evidence, and the negative having

followed with his claims and proof, the contest is then closed by the affirmative.

Read 1 Starkie Ev., pp. 585–595.
1 Greenleaf Ev., §§ 74–81.

§ 303. Of Presumptions.

The *admissibility of the evidence* offered on the trial is to be determined by the judge, according to the settled rules of law, or, in cases where no rule exists, according to his own discretion. The *sufficiency and weight of evidence* are to be, in almost every case, determined by the jury. There are, however, certain classes of facts, from which the law conclusively infers the existence or non-existence of other facts, and the jury are, therefore, compelled to find the latter whenever the former have been proved. From other classes of facts the law infers, but not conclusively, the existence or non-existence of other facts, and the jury, in such cases, are compelled to find the latter, only when the former have been proved, and when the inference, which the law usually derives therefrom, has not been rebutted. The rules of law, necessitating these conclusive or *prima facie* inferences, are called *presumptions*. The jury are also compelled to decide in accordance with the evidence actually presented; and a verdict clearly against the evidence is illegal, and will be set aside by the court on due application, and a new trial granted.

Read 3 Bl. Comm., pp. 371, 387.
Bac. Abr., Evidence H.
1 Starkie Ev., pp. 70–80, 96–101, 741–763.
1 Greenleaf Ev., §§ 14–48.
Burrill Circ. Ev., pp. 9–75.

§ 304. Of the Charge of the Judge.

After the evidence is closed and the arguments of counsel have been made, the judge instructs the jury in those rules of law, which are to guide them in arriving at their verdict. This instruction is called *the charge*, and in it he must not only state the law correctly, but so clearly and completely as to enable the jury to properly apply the evidence, and to decide legally every question embodied in the issue. Any default of the judge, in this respect, may become ground for a new trial, at the instance of the party prejudiced thereby.

Read 3 Bl. Comm., p. 375.
3 Chitty Gen. Prac., pp. 911–916.

§ 305. Of the Deliberations of the Jury.

The charge being finished, *the jury deliberate* in private upon the questions thus submitted to them, having before them the pleadings, documents, depositions, and other written evidence. The oral evidence they are expected to remember, and, if they do not remember it, they should return to the court-room, and hear anew so much of it as they may have forgotten. They cannot give evidence to each other, or examine any witness by themselves. If they are in doubt concerning any question of law, which was, or should have been, embraced in the charge, they may return and receive additional instructions. If, after due deliberation, they cannot agree on a decision, they report the disagreement to the judge, who takes back the papers and orders a new trial before another jury. When they do agree, they return into the court-room, and announce their decision in the mode prescribed by the statutes or the rules of court. This decision is called *a verdict*.

Read 3 Bl. Comm., pp. 375, 376.
2 Tidd Prac., pp. 916, 917.
3 Chitty Gen. Prac., p. 917.

§ 306. Of the Verdict.

Verdicts are of two kinds: General and Special. *A general verdict* finds the issue, in general terms, for the plaintiff or defendant, and is presumed to embrace a decision upon every question of fact presented in the issue. *A special verdict* recites all the facts in detail, as the jury find them to have been proved, and prays the advice of the court thereon; concluding conditionally, that if, upon all the facts so found, the court should be of the opinion that the plaintiff had a cause of action, then the verdict is for the plaintiff; if otherwise, for the defendant. The latter form of verdict is seldom adopted.

Read 3 Bl. Comm., pp. 377, 378.
Bac. Abr., Verdict.
Com. Dig., Pleader S.
1 Chitty Pl., pp. 673-684.
Stephen Pl., pp. 91-93.
2 Tidd Prac., pp. 928-932.

§ 307. Of New Trials.

The verdict of the jury has no validity until accepted by the judge. Any illegal conduct, in relation to the action, on the part of one or more of the jurors, or on the part of the prevailing party in relation to the jury; any material contradiction between the facts found by the verdict and the facts established by the evidence; any palpable variance between the rules of law delivered in the charge, and the rules by which the jury have been guided in their application of the testimony, or their decision of the issue; when duly brought to the attention of the judge, renders it his duty to *set aside the verdict* and to *order a new trial.* Proceedings for this purpose are usually by motion, addressed orally or in writing by the defeated party to the

judge, upon the allegations in which witnesses may, if necessary, be examined.

Read 3 Bl. Comm., pp. 378, 386–393.
Bac. Abr., Trial L.
Com. Dig., Pleader R 17.
Stephen Pl., pp. 94–96, 100.
2 Tidd Prac., pp. 934–949.
1 Starkie Ev., pp. 799–806.
1 Graham and Waterman N. T., Introd. pp. 1–502.
2 Graham and Waterman N. T., pp. 1–50.

§ 308. Of Arrest of Judgment.

Where it is apparent on the face of the pleadings that the verdict is improper, or that if accepted it cannot be sustained, *a motion in arrest of judgment* may be made by the defeated party, which, if successful, will result in the refusal of the judge to accept the verdict as the basis of a judgment, and in an order for the reconstruction of the pleadings from the point where the first defect appears. This correction of the pleadings is known as *a repleader*. When a verdict has been improperly rendered in favor of the defendant, and when neither on his present plea, nor on any other plea which he can offer, a verdict in his favor can legally be given, the judge may order *a judgment non obstante veredicto* to be entered for the plaintiff. Upon these motions, only material defects in the pleadings can be regarded, all formal defects being cured by verdict.

Read 3 Bl. Comm., pp. 393–395.
Com. Dig., Pleader R 18, S 47.
1 Chitty Pl., pp. 655–657.
Stephen Pl., pp. 96–100.
Gould Pl., Ch. x.
2 Tidd Prac., pp. 949–954.

§ 309. Of Judgments.

When a verdict is accepted, and no motion in arrest is interposed, it is followed by the judgment. *A judgment* is the sentence of the law, awarded and pronounced by the judge upon some question legally submitted to him. Judgments are of two kinds: Interlocutory and Final. *An interlocutory judgment* is a sentence pronounced by the judge, upon some question arising during the proceedings in an action. *A final judgment* is the sentence which determines the action itself. Final judgments may be rendered in several cases: (1) Upon *nonsuit;* i. e. where the plaintiff, having commenced an action, abandons it, and the defendant enters and takes a judgment for his costs; (2) Upon *default;* i. e. when the defendant does not appear to defend, and the plaintiff takes judgment against him for the debt, or damages, and costs; (3) Upon *confession;* i. e. where the defendant, in an action of debt, acknowledges the indebtedness in court, and the plaintiff takes judgment against him for the amount and costs; (4) Upon *nihil dicit;* i. e. where the defendant appears but refuses to plead according to the due course of law, and the plaintiff takes judgment against him for the debt, or damages, and costs; (5) Upon *demurrer;* i. e. where an issue of law, which is decisive of the action, is presented to the judge, and the prevailing party, if he be the plaintiff, takes judgment for the debt, or damages, and costs; but, if he be the defendant, for the costs only; (6) Upon *verdict* rendered by the jury. In all cases of judgment where debt or damages may be awarded, except upon the verdict of a jury, the amount must be determined by *a writ of inquiry*, or *a hearing in damages*, either before the judge or before some other person or persons appointed for the purpose. In judgments rendered upon verdict, the amount named in the verdict must be followed in the judgment, unless this amount be greater than the one claimed in the declaration. In such

a case, the prevailing party must enter *a remittitur* for the surplus, and take judgment only for the amount claimed, or the judgment will be erroneous. The recovery of costs, both as to the right thereto and the amount thereof, is generally regulated by statute.

Read 3 Bl. Comm., pp. 296, 297, 303, 324, 395–399.
Bac. Abr., Nonsuit.
Com. Dig., Pleader M, X, Y, Z.
Stephen Pl., pp. 104–116.
1 Tidd Prac., pp. 606, 609–631.
2 Tidd Prac., pp. 794–799, 917–927, 962–964.

§ 310. Of Audita Querela.

The process, by which a final judgment is enforced against the person or property of the defeated party, is called *an execution*. This issues, as a matter of course, out of the court, on the rendition of the judgment, unless stayed by the court on account of some proceeding on the part of the defeated party, which may render it unnecessary. The proceedings, of which the defeated party may avail himself for this purpose, are two: (1) An Audita Querela; (2) A Writ of Error. An *audita querela* is a proceeding, in which the defeated party claims that, since the rendition of the judgment, he has been legally released or discharged from the same, and prays that it may not be enforced against him. The question thus raised being examined by the court, in which the judgment was rendered, execution will be granted or withheld as justice may require.

Read 3 Bl. Comm., pp. 401, 405, 406.
Bac. Abr., Audita Querela, Supersedeas D 1.
Com. Dig., Audita Querela, Supersedeas.

§ 311. Of Writs of Error.

A writ of error is a proceeding in which the defeated party claims that the judgment is invalid, either on account of errors in law apparent on the face of the record, or on account of his own legal incapacity or want of opportunity to appear, or on account of a want of authority, on the part of the court, to render such a judgment. *The record* regularly consists of the process, pleadings, verdict, and judgment. When questions of law arise in the course of the proceedings, (as upon the admission or rejection of evidence and the like,) they can be made part of the record by a written statement, called *a bill of exceptions.* If the defeated party prevails in this proceeding, the judgment will be *reversed* and a new trial ordered, or such further proceedings had as will, if possible, correct the error. If he be also here defeated, the original judgment will be affirmed, and execution issued. A writ of error may be brought even after execution has been levied, and, if then successful, not only will the judgment be reversed, but the execution-creditor will be compelled to pay back the sum collected on the execution. In some of the States, motions, in the nature of writs of error, are permitted to be made, within a certain time after judgment has been rendered, and a correction of errors, or other desired relief, is thus secured as a part of the proceedings in the original action.

Read 3 Bl. Comm., pp. 406–411.
Bac. Abr., Bill of Exceptions, Error, Supersedeas D, E, F.
Com. Dig., Error, Pleader 3 B.
Stephen Pl., pp. 88, 89, 117–122.
2 Tidd Prac., pp. 910–914, 1188–1246.
1 Starkie Ev., pp. 790–797.

§ 312. Of the Nature, Kinds, and Service of Executions.

An execution is a process, directed to the sheriff or other proper officer, commanding him to satisfy the judgment upon the body, or the personal property, or the real property, of the defeated party. An execution, issued against the body of the defeated party, is called *a capias ad satisfaciendum.* It is served by arresting him and committing him to prison, there to be detained until discharged by due course of law. An execution, issued against the personal property of the defeated party, is called *a fieri facias.* It is served by seizing and selling so much of his goods and chattels, as may be needed for the payment of the judgment-debt. An execution, issued against the real property of the defeated party, is called sometimes *a levari facias*, sometimes *an elegit*, according to the method by which the lands themselves, or the profits thereof, are appropriated to the payment of the judgment-debt. In some States, the real property may be sold and the proceeds applied in payment; in other States, the property is deeded by the sheriff to the judgment-creditor; in still others, the possession of the property may be delivered to the creditor to hold until the income pays the debt. Certain special forms of action have also their peculiar forms of execution. In ejectment, the execution is called *an habere facias*, and is served by dispossessing the defendant and putting the plaintiff into peaceable possession of the lands. In the action of replevin, an execution sometimes issues to secure the restoration, to the defendant, of the property wrongfully replevied by the plaintiff. And in detinue, the execution may command the goods, for which, or for the price of which, the plaintiff sues, to be seized and restored to him. When the execution has been served according to its nature, it must be returned to court, with an account of the doings of the sheriff endorsed thereon. If the judgment is satisfied,

proceedings are at an end. If it is unsatisfied, other executions may be issued, at any time within such period as the statute permits, until satisfaction of the judgment be obtained.

Read 3 Bl. Comm., pp. 412–425.
Bac. Abr., Execution.
Com. Dig., Execution.
Stephen Pl., p. 116.
2 Tidd Prac., pp. 1030–1086.

CHAPTER VI.

OF EQUITABLE REMEDIES.

§ 313. Of Prohibitory and Mandatory Injunctions.

Equitable remedies are those which are applied by courts of equity, in cases where the only proper legal remedies would fail to give adequate relief. They are of two classes: (1) Those which are designed to prevent the commission or continuance of wrongs; (2) Those which are designed to redress wrongs already committed. Those which are designed to prevent wrongs are called injunctions. *An injunction* is a mandate, issuing out of a court of equity and enjoining the respondent, under suitable penalties, to refrain from the commission of some wrongful act, or to prevent the continuance of some wrong already in operation. When it merely forbids the doing of an act, it is known as *a prohibitory injunction.* Where it necessitates the doing of an act in prevention or suppression of a wrong, it is known as *a mandatory injunction.*

Read 1 Story Eq. Jur., §§ 25–33, 59–74.
2 Story Eq. Jur., §§ 861, 862.
Willard Eq. Jur., pp. 341, 342.
Kerr Inj., pp. 11, 230–232, 605–646.
High Inj., §§ 1, 2, 982–996.

§ 314. Of Temporary and Perpetual Injunctions.

An injunction, as to its effect, may be either temporary or perpetual. *A temporary injunction* prohibits the commission of the alleged wrongful act only until some definite date, or until further order of the court. Its object is to pre-

serve the rights of parties intact, until the merits of the controversy can be fully investigated. When such injunctions are issued upon the application of the petitioner, without previous notice to the respondent, they are called *ex parte injunctions*. *A perpetual injunction* is granted at the conclusion of an investigation, and forever prohibits the contemplated wrong.

Read 2 Story Eq. Jur., § 873.
Willard Eq. Jur., p. 341.
Kerr Inj., pp. 11, 12, 224–230.
High Inj., §§ 3–17, 878–945, 1001–1019.

§ 315. Of Injunctions against Fraud.

The principal purposes, for which injunctions may be issued, are the following: (1) To prevent fraud; (2) To prevent irreparable injury to property; (3) To prevent certain wrongs against personal security; (4) To prevent certain wrongs against relative rights. *Fraud* embraces every kind of artifice, by which one person can obtain an unjust advantage over another. It may consist in actual falsehood and deceit, or in the concealment of material facts, or in any other acts by which a proper confidence and trust are violated. It is also implied, in equity, from the circumstances or relations of certain contracting parties, and from the intrinsic nature of certain transactions. Any attempt to enforce against another an advantage obtained over him by fraud, whether such advantage were obtained by proceedings at law, or by a contract, or in any other manner, may be frustrated by an injunction.

Read 1 Story Eq. Jur., §§ 187–189.
2 Story Eq. Jur., §§ 874–908.
Willard Eq. Jur., pp. 345–367.
Adams Eq. Jur., pp. 194–197.
Kerr Inj., pp. 13–51.
High Inj., §§ 44, 45, 84–89, 109–128, 248, 709–782.

§ 316. Of Injunctions against Irreparable Injury to Property.

An irreparable injury to property is an injury for which the owner of the property cannot be compensated by the mere payment of money. In reference to real property, waste, nuisance, and certain forms of trespass are generally regarded as irreparable injuries. The destruction of some kinds of personal property, the infringement of patents, copyrights, and trade-marks, and sometimes even the misuse of personal property, in which another has an interest, are of the same nature, and, like them, may be prevented by injunction.

Read 2 Story Eq. Jur., §§ 909–959.
Willard Eq. Jur., pp. 367, 368, 370–401.
Adams Eq. Jur., pp. 207–219.
Kerr Inj., pp. 196–200, 235–255, 267–274, 287–297, 332–334, 337–340, 350, 354, 360–369, 393–395, 400–403, 439, 441–445, 474–489, 492–497, 535–539, 590–597.
High Inj., §§ 388–673.

§ 317. Of Injunctions against Injuries to Health and Comfort.

The wrongs against personal security, for the prevention of which injunctions are most frequently issued, are injuries to health. These are all classed under the head of *nuisances*, and may arise from the production, by another, of offensive and injurious odors or disagreeable noises, or from the collecting together of persons, in a turbulent manner, to the disturbance of the peace and quiet of a neighborhood, or from the keeping unguarded of ferocious animals in such a manner as to excite fear and apprehension, or from any other acts of similar character

and effect. Injunctions have also been granted to prevent threatened assaults.

Read 2 Story Eq. Jur., § 926.
Willard Eq. Jur., pp. 389, 390.
Kerr Inj., pp. 360–366.
High Inj., §§ 491–493.

§ 318. Of Injunctions against Injuries to Relative Rights.

Wrongs against relative rights may be prevented by injunction, when irreparable injury might otherwise be committed. Thus a guardian may, by injunction, prevent the *marriage of an infant ward;* a parent may obtain the same relief by settling property upon his child, and procuring himself to be appointed as its guardian; parents may be enjoined against an unwarranted interference with their children, and a husband may be enjoined against tyrannical restraint upon his wife.

Read 2 Story Eq. Jur., §§ 1341–1360.
Willard Eq. Jur., p. 369.
Kerr Inj., pp. 597–599.

§ 319. Of the Specific Performance of Contracts.

Equitable remedies of the second class are applied chiefly in the following cases: (1) To secure the specific performance of certain contracts; (2) To set aside certain contracts; (3) To correct the language of written contracts in accordance with the original intention of the parties; (4) To give an equitable interpretation to contracts; (5) To relieve against fraud; (6) To settle mutual accounts, where, by reason of the number of the parties or the character of their respective claims, justice cannot be done

in a court of law; (7) To foreclose or redeem mortgages; (8) To regulate the separate property of married women; (9) To appoint and control receivers; (10) To regulate trusts; (11) To perpetuate evidence; (12) To compel a discovery; (13) To enforce or set aside awards; (14) To aid the execution of the judgment of a court of law. The *specific performance* of a contract can be enforced only in a court of equity, the only redress, obtainable at law for breach of contract, being a money-compensation for the damage actually sustained. In many cases, however, such a compensation would be entirely inadequate. This is especially true of contracts for the sale of lands, where the vendor refuses to perfect the sale, but is also true in many contracts concerning personal property. In all such cases, if the contract is fair, equitable, and capable of being fully executed, a court of equity will order that it be specifically performed by the defaulting party.

Read 3 Bl. Comm., p. 426 n. 1.
2 Story Eq. Jur., §§ 708–793 b.
Willard Eq. Jur., pp. 263–300.
Adams Eq. Jur., pp. 77–92.

§ 320. Of the Rescission of Contracts.

A court of equity will also *set aside or abrogate a contract* which it would be inequitable to enforce. In general, a contract, entered into honestly and understandingly by both parties, will bind both, however disadvantageous to one or the other the performance of the same may be. But when either party has practised any fraud upon the other, or taken advantage of any confidential relationship between them, or exercised undue influence over the other, or where both parties have entered into the contract under a mistake, or where the contract is itself contrary to public policy, it is within the province of the court to protect

the just rights of the parties, by decreeing that the contract shall be null and void.

Read 1 Story Eq. Jur., §§ 191–251, 260–348, 384.
2 Story Eq. Jur., §§ 692–707.
Willard Eq. Jur., pp. 302–304.
Adams Eq. Jur., pp. 174–191.
Kerr Inj., pp. 47–51.

§ 321. Of the Correction of Mistakes.

The correction of mistakes, made by the parties in the language of their written contracts, is the peculiar duty of a court of equity. A court of law can recognize only the contract as actually written, and as interpreted according to the rules of law. Equity, however, has the power to carry out the exact intention of the parties, whatever the language which they have mistakenly employed, and to reform and amend the written instrument to make it correspond with their intention. These mistakes must have been *mutual*, since otherwise there could have been no such meeting of the minds of the parties, as to constitute a contract with which the written contract can be made to correspond; and, in such cases, if the written contract cannot be set aside for fraud or other cause, the parties must abide by its interpretation in the courts of law. These mistakes may have been either as to some material fact, or as to some matter of form, or even, in some cases, as to matter of law.

Read 1 Story Eq. Jur., §§ 110–181.
Willard Eq. Jur., pp. 59–84, 300–302.
Adams Eq. Jur., pp. 168–174.
Kerr Inj., pp. 52–55.

§ 322. Of the Interpretation of Contracts.

Contracts have usually the same *interpretation* both in law and equity. The rules which govern courts of equity,

in this respect, are, however, less rigid than the rules of law; and the true intention of the parties, when it can be ascertained, will always be regarded.

Read 1 Story Eq. Jur., §§ 156–160, 168, 179–181.
2 Story Eq. Jur., § 1531.
Kerr Inj., pp. 55, 497–501.

§ 323. Of Relief against Fraud.

Courts of equity also afford relief in all cases where *fraud* of any kind has been, or is about to be, practised by one person against another. Equitable jurisdiction, in matters involving this form of injury, is most extensive, and relief may be obtained in any manner which the circumstances of the particular case require. When *a contract is tainted with fraud* it may be set aside, or so far enforced only as equity requires. Where *penalties and forfeitures* are legally due from one person to another, but cannot be honestly and justly insisted on, equity will compel the latter to forego his claim. Where a *principal refuses to indemnify his surety*, or a *trustee refuses to give a proper bond* for the performance of his duties, equity can compel them to fulfil the obligations, which legally or justly rest upon them. Where one creditor has two funds, by which his debt is secured, and a subsequent creditor has security in only one of these funds, equity will *marshal the securities* by compelling the former creditor to resort to and exhaust the fund, in which he is solely interested, before applying the other to the satisfaction of his debt. When *title-deeds* are in the possession of a person, who has no right to retain them, equity will compel him to deliver them to the owner of the land. Where *void or satisfied notes*, or other obligations, are in the hands of a payee or other person who has no right thereto, equity will compel their return to the alleged maker. In all these cases, as in any others where it would

be unjust to leave the parties *in statu quo*, or would enable one to work an injury to another, or to drag him into useless litigation, equity affords prompt and sufficient remedies.

Read 1 Story Eq. Jur., §§ 78–110, 184–440, 550–577, 633–645.
2 Story Eq. Jur., §§ 692–707, 849, 850, 1301–1326.
Willard Eq. Jur., pp. 55, 56, 145–259, 304–308, 337–339.
Adams Eq. Jur., pp. 106–109.
Kerr Inj., pp. 31–51, 69–98.

§ 324. Of Account, Equitable Assignment, and Interpleader.

The determination of a controversy, involving the *account* of one person against another, is within the ordinary jurisdiction of the courts of law. A court of law, however, with its peculiar systems of pleading, trial, and judgment, cannot adjust reciprocal accounts where more than two interests are represented, or where some of the conflicting interests are legal and others merely equitable. Thus, in the settlement of copartnership affairs, when there are more than two partners, or in cases where each of the contending parties has an account against the other, concerning which dispute exists, a court of equity alone can take cognizance of all the rights in controversy, and do justice to the several interests of each. Thus, also, where the *equitable owner of a chose in action*, who, not having the legal interest, cannot sue thereon at law, proceeds against the other party to the contract, he must seek the aid of equity. And where two different parties make a claim, for the same subject-matter, on a third party who does not know which claim to recognize, the latter may compel the

claimants *to interplead* in equity, and first decide to which of them the subject-matter properly belongs.

Read 1 Story Eq. Jur., §§ 441–468, 490–505, 522–529, 659–664, 679–683.
2 Story Eq. Jur., §§ 800–824, 1039–1057 b, 1430–1444.
Willard Eq. Jur., pp. 85–92, 313–323, 460–464.
Adams Eq. Jur., pp. 202–206, 220–228, 239–247.
Kerr Inj., pp. 57–68, 99–102, 118–132.

§ 325. Of the Redemption and Foreclosure of Mortgages.

The interest of a mortgagor in mortgaged property is called *an equity of redemption.* It consists in the right to pay the mortgage-debt, and thus redeem the property. This right to redeem can only be extinguished by the act of the mortgagor, or by *a foreclosure* of the mortgage in a court of equity. And where a mortgagee refuses to accept the payment of the debt and release the property, the mortgagor may enforce his *right to redeem* in the same court.

Read 2 Story Eq. Jur., §§ 1004–1035 c.
Willard Eq. Jur., pp. 426, 427, 447–452.
Adams Eq. Jur., pp. 110–120.

§ 326. Of the Separate Maintenance and Separate Property of Married Women.

At law, *a married woman* is regarded as one person with her husband, but in equity she is, in some respects, treated as if she were still single. Thus, though at law no contract can be made between a wife and husband, in equity their contracts for her separate living and maintenance will be enforced. Property given to her *for her sole and separate use,* or over which, by contract with her husband before marriage, she is authorized to exercise exclusive

control, will in equity be regarded as vesting in her, in the same manner as if she were unmarried. A court of equity will recognize her acts and contracts, in reference to such property, as valid, and she may sue and be sued in equity thereon without her husband.

Read 1 Story Eq. Jur., § 243.
2 Story Eq. Jur., §§ 1366–1429.
Willard Eq. Jur., pp. 634–654.

§ 327. Of Receivers.

Upon the dissolution of a corporation or copartnership, where property remains on hand to be disposed of and the claims of creditors are to be adjusted, a court of equity has power *to appoint a receiver* to wind up its affairs. Also, in any case where property, the right to which is being litigated, is exposed to loss from want of care, it may be put into the hands of a receiver for safe-keeping, till the controversy is determined.

Read 1 Story Eq. Jur., § 672.
2 Story Eq. Jur., §§ 829–838.
Willard Eq. Jur., pp. 332–337.
Adams Eq. Jur., pp. 243, 352–355.
High Receivers, §§ 1–39, 287–289, 472–477.

§ 328. Of Trusts.

The supervision and administration of *trusts* is another very important branch of equitable jurisdiction. Whenever property is legally vested in one person, while the beneficial interest therein belongs to another, a trust exists which will be recognized and enforced in equity. Such trusts may be created expressly, or may be implied from circumstances. The person holding the legal interest i

called *a trustee*, and he alone can sue or be sued in a court of law. The owner of the beneficial interest is called the *cestui que trust*, and is in equity regarded as the true owner of the property. In order to protect his rights, equity assumes control of the entire trust-estate, appoints and removes trustees, compels them to perform their duties, and obliges them to account to the *cestui que trust* for the benefits derived from the estate.

Read 2 Story Eq. Jur., §§ 960–982, 1195–1300.
Willard Eq. Jur., pp. 410–426, 599–615.
Adams Eq. Jur., pp. 26–75.

§ 329. Of the Perpetuation of Testimony.

It sometimes happens that, before an action can be legally commenced, it becomes apparent that such action will be necessary, and that certain evidence, now available but which may not be within reach when such action is instituted, will become important. In cases of this character, a court of equity may secure *the perpetuation of the testimony*, by causing it to be taken, in some proper manner, and to be preserved among the records of the court, until it is needed at the trial.

Read 2 Story Eq. Jur., §§ 1505–1516.
Adams Eq. Jur., pp. 23–25.

§ 330. Of Discovery.

At law, no man can be compelled to testify against himself, or to produce books and papers which are antagonistic to his claims. A court of equity, however, can compel a party *to make discovery* of facts within his knowledge, and *to produce books and papers*, although they operate as evidence against him. This power is often exercised

in aid of an action pending, or to be instituted, in a court of law, as well as in connection with ordinary equity proceedings.

Read 2 Story Eq. Jur., §§ 689–691, 1480–1504.
Adams Eq. Jur., pp. 1–22.

§ 331. Of Enforcing or Setting Aside Awards.

Where *an award* of arbitrators directs the payment of a sum of money, an action at law may be brought to recover it. When the award requires the performance of some act, which courts of law cannot enforce, equity will, in certain cases, interfere, and compel the party to perform the act. A court of equity also has the power to set aside awards, whenever misbehavior or fraud in the parties, or corruption, partiality, or illegal action, on the part of the arbitrators, can be established.

Read 2 Story Eq. Jur., §§ 1450–1463, 1498, 1500.
Willard Eq. Jur., pp. 164, 358.
Adams Eq. Jur., pp. 191–193.
Kerr Inj., pp. 140–143.

§ 332. Of Enforcing Judgments at Law.

A court of equity will also lend its aid to *enforce the judgment* of a court of law. Thus, if a judgment-debtor conceals, or has fraudulently conveyed, his property, equity will assist the creditor in its discovery and appropriation to the payment of his claim.

Read 1 Story Eq. Jur., §§ 350–381.
Willard Eq. Jur., pp. 225–249.
Adams Eq. Jur., pp. 145–148.

§ 333. Of General Equitable Relief.

These instances exhibit the general character of those wrongs to which the remedies of equity are applicable. No classification can, however, embrace all such wrongs, for whenever a right exists which cannot be protected or enforced in courts of law, whether from its own nature, or from accident or fraud, or from any defect in their mode of procedure, a court of equity can give relief in such a manner as the nature of the case requires.

Read 3 Bl. Comm., pp. 429–439.
1 Story Eq. Jur., §§ 25–30.
Willard Eq. Jur., pp. 37–41.
Adams Eq. Jur., pp. xxxvii, xxxviii.

CHAPTER VII.

OF PROCEEDINGS IN EQUITY.

§ 334. Of Bills.

The methods, by which a court of equity applies its various remedies, are simple and flexible in the highest possible degree. The first step in the procedure is the filing of *the bill*, or petition, in which the petitioner sets forth with clearness and certainty, and in ordinary language, the wrong of which he complains, and requests the relief to which he considers himself entitled. Bills in equity are of two classes: Original and Not Original. *An original bill* relates to some matter, not already in litigation in equity between the same parties, and is the one by which proceedings are commenced. *A bill not original* relates to some matter already before the court, and is designed to add to, or continue, or introduce new matter into, or in some other manner to affect the proceedings instituted by the original bill. All persons materially interested in the subject-matter of the controversy, however numerous, should be made parties to the bill, in order to prevent a multiplicity of suits, and that a complete adjustment of all conflicting claims may be secured.

Read 3 Bl. Comm., pp. 442, 443.
Story Eq. Pl., §§ 16-290, 326-432.
Adams Eq. Jur., pp. 301-323.
Mitford and Tyler Eq. Pl., pp. 127-146.
1 Daniell Ch. Prac., pp 181, 182, 307, 308, 322-394.

§ 335. **Of Process.**

The *process* in equity is a *subpœna*, which regularly issues from the court, upon the filing of the bill. It is in the nature of a summons, and should direct that all parties, named as respondents in the bill, be notified to appear on the proper return-day, and show cause why the prayer of the petition should not be granted. If *a temporary injunction* be prayed for in the bill, and be granted, a notice thereof must be given to the parties enjoined, in the manner specified in the order granting the injunction, or in such other manner as the practice of the court requires.

Read 3 Bl. Comm., pp. 443–445.
Story Eq. Pl., §§ 44, 45.
Adams Eq. Jur., p. 324.
Kerr Inj., p. 625.
1 Daniell Ch. Prac., p. 428.

§ 336. **Of Appearance.**

The appearance of the respondent, in equity as well as at law, may be made by attorney or *solicitor;* and against such as fail to appear the bill may generally be *taken pro confesso*, and a decree be entered in favor of the petitioner. Upon appearance, it becomes the duty of the respondent to demur, or plead, or answer, as the exigencies of the case demand.

Read 3 Bl. Comm., p. 445.
Adams Eq. Jur., pp. 324, 326–329.
Mitford and Tyler Eq. Pl., pp. 432, 433.
1 Daniell Ch. Prac., pp. 499, 500, 558–564.

§ 337. **Of Demurrers.**

A demurrer in equity is a pleading, in which the respondent points out some defect in the bill, as a reason why he should not be compelled to answer further to its allega-

tions. This defect must, of course, be apparent on the face of the bill, and may consist either in a want of jurisdiction in the court, or in the incapacity of the parties to sue or be sued, or in the want of proper allegations in the bill itself. If a demurrer is sustained, the petitioner may *amend* his bill, and cure, if possible, the defects therein; if it is overruled, the respondent may plead or answer, as he deems expedient.

Read 3 Bl. Comm., p. 446.
Story Eq. Pl., §§ 436–646.
Adams Eq. Jur., pp. 333–336.
Mitford and Tyler Eq. Pl., pp. 202–311.
1 Daniell Ch. Prac., pp. 564–572, 623–629.

§ 338. Of Pleas.

A plea in equity is a special answer, in which the respondent urges some particular defence, by which the issue may be reduced to a single point. Such particular defences are a want of jurisdiction in the court, incapacity of the parties, or some statute, or matter of record, or other matter of fact, which defeats the claim of the petitioner. If this plea is sustained, the petitioner may amend his bill, or, if that be impossible, the plea will be a bar to his recovery on so much of the bill as is answered by the plea. If the plea is overruled, the respondent must answer, or suffer a decree to be taken against him.

Read 3 Bl. Comm., p. 446.
Story Eq. Pl., §§ 647–837.
Adams Eq. Jur., pp. 336–342.
Mitford and Tyler Eq. Pl., pp. 311–393.
1 Daniell Ch. Prac., pp. 630–651, 654, 655, 717–722.

§ 339. Of Answers.

An answer in equity is a denial, or a confession and avoidance, of all the material allegations in the bill. Respon-

dents, who are jointly interested, should answer jointly; those severally interested may answer separately. An insufficient answer may be excepted to by the petitioner, and, if the exception is sustained, a further answer will be ordered by the court.

Read 3 Bl. Comm., pp. 446, 447.
Story Eq. Pl., §§ 838–876.
Adams Eq. Jur., pp. 342–345.
Mitford and Tyler Eq. Pl., pp. 393–411.
1 Daniell Ch. Prac., pp. 723–786.

§ 340. Of Replication. Amendments.

Upon the filing of the answer, the petitioner may, if he deems it necessary, further *amend* his bill, or he may file *a replication*, to which the respondent may, if necessary, *rejoin;* and the pleadings may thus proceed until an affirmation upon one side, and a denial on the other, is attained, and the parties are prepared to submit their controversy to the investigation and determination of the court.

Read 3 Bl. Comm., p. 448.
Story Eq. Pl., §§ 877–905.
Adams Eq. Jur., pp. 346, 347.
Mitford and Tyler Eq. Pl., pp. 412–414.
2 Daniell Ch. Prac., pp. 826–830.

§ 341. Of Trial and Evidence.

Issues of fact are, in equity, *tried and decided* by the judge, and not by a jury. The *evidence* is taken, either before the judge himself, or before commissioners appointed for that purpose by the court. The rules, which govern the admissibility and production of the evidence, are, in general, the same as in courts of law, except in

reference to the admissibility of oral evidence to explain, rebut, or correct a written instrument.

Read 3 Bl. Comm., pp. 449–452.
Adams Eq. Jur., pp. 362–373.
Mitford and Tyler Eq. Pl., pp. 458–469.
2 Daniell Ch. Prac., pp. 831–981.

§ 342. Of Decrees.

The judgment of a court of equity is called *a decree.* If the judgment is in favor of the respondent, the bill is dismissed. If it is in favor of the petitioner, the decree orders the respondents, under a suitable penalty, to do, or to refrain from doing, the acts specified therein. The process, by which information as to this order is communicated to the respondents, answers to the execution in a court of law. If the respondents fail to execute the order of the court, the petitioner may sue for the penalty, or the respondents may be arrested, and punished by fine and imprisonment, for contempt of court.

Read 3 Bl. Comm., pp. 452–454.
Adams Eq. Jur., pp. 375–395.
Mitford and Tyler Eq. Pl., pp. 469–471, 490–492.
2 Daniell Ch. Prac., pp. 1000, 1059, 1060.

§ 343. Of Bills of Review.

A decree in equity, like a judgment at law, is final, unless reversed on account of error on the face of the record, or the discovery of some new evidence. The proceeding, in which such claims are urged and determined, is called a *bill of review.*

Read 3 Bl. Comm., p. 454.
Story Eq. Pl., §§ 403–428.
Adams Eq. Jur., pp. 416–420.
Mitford and Tyler Eq. Pl., pp. 181–192, 483–488.
2 Daniell Ch. Prac., pp. 1626–1647.

BOOK III.

OF PUBLIC RIGHTS.

§ 344. Of the Nature of Public Rights.

Public rights are the rights, which a state possesses over its subjects, and which the subjects, in their turn, possess in or against the state. In contemplation of law, a state is a political person, endowed with certain rights, and charged with the performance of certain duties. Some of these rights and duties arise out of its relations toward other states, and the rules, by which these are defined and regulated, constitute that division of the law called *international law.* Other rights and duties arise out of its relations toward its own subjects, and the rules, by which these are defined and regulated, constitute one branch of *municipal law.* The extent and character of the rights and duties, of the latter class, depend mainly upon the nature of the state, and upon the theory of civil government, which underlies its institutions.

Read 1 Bl. Comm., pp. 146, 233-239.
Vattel, B. i, § 2.
2 Burlamaqui, pp. 29-41.
Austin Jur., Lect. xliv.
Pomeroy Mun. Law, § 622.

CHAPTER I.

OF THE NATURE AND FUNCTIONS OF A STATE.

§ 345. Of the State.

According to the theory, which forms the basis of American institutions, *a state* is a political society, organized by the common consent of the inhabitants of a certain territory, for purposes of mutual advancement, protection, and defence, and exercising whatever powers are necessary to that end.

Read Vattel, B. i, §§ 1, 4, 14–23, 31.
1 Burlamaqui, pp. 134, 135.
2 Burlamaqui, pp. 1–15, 23–29, 73.
Declaration of Independence.
Federalist, No. xxxix.
1 Wilson, pp. 304–312.
Jameson Const. Conv., §§ 18–26.
Woolsey Int. Law, §§ 36, 37, 53, 56, 58.
Cooley Const. Lim., pp. 1, 2.
Cooley Const. Law, pp. 20–22.

§ 346. Of the Formation of the United States.

The United States is such a political society. It was organized by the common consent of the people, inhabiting its territory, to the terms of the compact called the Federal Constitution, and is endowed with those powers, and those only, which are essential to its accomplishment of the purposes, for which it was created. *The original thirteen States* are societies of the same nature. Their existence, as com-

munities, began in the common consent of the colonists, of whom they were composed, and, at the Revolution, they came into being, as independent political societies, not more by their deliverance from the English crown, than through the tacit acceptance of them, by their members, as the States to which they respectively belonged. Even though no precise act could be designated as the formation of such States by their people, yet the fact that the people of each State, by adopting the Federal Constitution, stripped their State of its chief attributes of sovereignty, and lodged them in another political society, would demonstrate that the individual State, as well as the United States, regards its organization as derived from the common consent of its members, and that it owes to them all its prerogatives and powers. The formation of those States, which, since 1789, have been created within the territories of the United States, and the mode and conditions of their organization, and admission to the Union, are still clearer illustrations of the same theory.

Read Federalist, No. xxxix-xlvi.
Jameson Const. Conv., §§ 27–51, 125–216.
1 Kent Comm., Lect. x, xix.
Frothingham Rise Rep., pp. 13–32, 104, 403–610.
Walker Am. Law, §§ 6, 8–15, 24–29.
Const. U. S., Preamble.
Cooley Const. Lim., pp. 5–11, 21–28.
Cooley Const. Law, pp. 1–19, 169–177, 194–198.
1 Story Const., §§ 207–280, 306–372, 457–517.

§ 347. Of the Dissolution of the State.

A political society, which derives its existence from the common consent of its members, may, by the same consent, be *re-organized or dissolved.* The people of the United States thus have the right to modify its fundamen-

tal law, to change the character of its government, or even to abolish it altogether. The people of the individual States have the same power over their organization, though subject to the limitations voluntarily accepted by them, in their adoption of the Federal Constitution. Such act, however, must be the act of the *whole* people, not of any fractional part thereof; and the whole people act, only when such change or abolition is made in the manner previously provided by law, or where all actually unite in the measures which modify or overthrow the state, or when those, who have withheld themselves from active participation in such measures, submit, either willingly or unwillingly, to the result.

Read Vattel, B. i, §§ 32–36.
2 Burlamaqui, pp. 90–97.
Declaration of Independence.
Walker Am. Law, § 89.
Cooley Const. Lim., pp. 28–34, 598.
Cooley Const. Law, pp. 25, 26.

§ 348. Of the Supreme Power of the People.

The state is thus, in the American idea, entirely in the hands of the people. It derives all its just powers from the consent of the governed. It exists only to secure to its subjects the enjoyment of their inalienable rights; and when it fails to protect, or becomes destructive of, those rights, "it is *the right of the people* to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." This idea lies at the foundation of every correct interpretation of American public law, whether it be the law of public rights or the law of public wrongs, and must especially be regarded in comparing the public law of

other nations with our own, and in attempting to apply to American institutions, or the American people, the principles which regulate and govern foreign states.

Read Declaration of Independence.
Const. U. S., Preamble.
Jameson Const. Conv., §§ 54–62.
Cooley Const. Lim., pp. 28, 37.
Cooley Const. Law, pp. 22–25.

§ 349. Of the Functions of the State. Government.

The functions of a state are of three kinds: Legislative; Executive; and Judicial. In discharge of its *legislative functions*, the state makes law. In discharge of its *executive functions*, it enforces law. In discharge of its *judicial functions*, it interprets and applies law. The exercise of these three functions is *government;* and the persons or bodies, by whom they are exercised, taken collectively, are sometimes called *the government.*

Read 1 Bl. Comm., pp. 146–149, 154, 155, 160, 161, 266–270.
2 Burlamaqui, pp. 51–54.
Federalist, No. xlvii–li.
1 Wilson, pp. 394–411.
Cooley Const. Law, pp. 43–45.

§ 350. Of the Government of the United States.

In ancient times, as in most countries in our own day, these three functions were centred in one man, or body of men, who thus became the supreme ruler of the state. But in the United States, and in each individual State, the legislative, executive, and judicial powers are separated from each other, and lodged in persons, or in public bodies, who are entirely distinct from one another, and, at the same

time, are so constituted that each shall serve as a salutary restraint upon the others. All these persons and public bodies are representatives of the people, are chosen by the people, and are answerable to the people for any breach of duty, or abuse of power.

Read 1 Bl. Comm., pp. 49–52.
2 Burlamaqui, pp. 41–45, 55–73.
1 Wilson, pp. 389–394, 415.
Walker Am. Law, §§ 4–7.
1 Story Const., §§ 518–544.

§ 351. Of the Legislative Function.

The legislative function, in the United States, is exercised by Congress, and, in the individual States, by their respective legislatures. Both Congress and these State legislatures are again divided into two bodies or *houses*, each of which has its separate powers and duties, but yet can make no law without the sanction of the other. These houses can exercise their legislative powers, only when in actual and lawful session.

Read Federalist, No. lii–lxvi.
2 Wilson, pp. 122–181.
1 Kent Comm., Lect. xi.
Walker Am. Law, §§ 30–37.
Cooley Const. Lim., pp. 85–92, 115–136.
Cooley Const. Law, pp. 45–51.
1 Story Const., §§ 545–570.

§ 352. Of the Executive Function.

The executive function is exercised by the President of the United States, and by the Governors of the individual States. Each has control over the *military* resources of his state, and is bound to use them, whenever it is necessary in order to enforce the law. Each has the power to *veto*

any measure of the legislature, and thereby compel it to reconsider, and either repeat or rescind, its action. Each also has a power, differently limited in different states, over the *reprieve* or *pardon* of convicted criminals. These powers belong to the executive, as such, and are derived, not by delegation from a superior authority, or by any legislative act, but from the constitution and organization of the state itself, and cannot be usurped or modified by either of the other branches of the government.

Read Federalist, No. xlvii–lxxvii.
1 Kent Comm., Lect. xiii.
Walker Am. Law, §§ 38–43.
Cooley Const. Lim., pp. 11, 115, 116, 153–155.
Cooley Const. Law, pp. 51, 100–107, 159–163.
1 Story Const., §§ 881–891.
2 Story Const., §§ 1410–1572.

§ 353. Of Subordinate Executive Officers.

Certain subordinate executive functions are exercised by other officers, either in pursuance of some legislative enactment, or in obedience to some mandate of judicial or executive authority. Such officers are *marshals*, *sheriffs*, *jailers*, *constables*, and others, by whatever name they may be known, whose duty it is to execute and enforce the laws.

Read 1 Bl. Comm., pp. 339–349.
1 Kent Comm., Lect. xiv, pp. 309–311.
Walker Am. Law, § 48.
1 Abbott U. S. Prac., pp. 268, 269.

§ 354. Of the Judicial Function. The Supreme Court.

The judicial function is exercised by the courts of the United States, and of the individual States. *The courts* of the United States are three: the Supreme Court; the

Circuit Courts; and the District Courts. *The Supreme Court* consists of a chief justice and associate justices, and has jurisdiction over all cases, in which an ambassador, a public minister, a consul, or a State may be a party, or which may lawfully be brought before it by appeal. This court sits only in Washington.

Read Federalist, No. lxxviii–lxxxiii.
2 Wilson, pp. 201–223.
1 Kent Comm., Lect. xiv, pp. 290–301; Lect. xv, xvi.
Walker Am. Law, §§ 44, 45, 49.
Cooley Const. Lim., pp. 12–15, 44–54, 399–413.
Cooley Const. Law, pp. 52, 53, 108–140.
Curtis U. S. Courts, pp. 1–93.
2 Story Const., §§ 1573–1795.
1 Abbott U. S. Prac., pp. 167-181, 312–343.

§ 355. Of the Circuit Courts.

The Circuit Courts each consist of three judges: a justice of the Supreme Court; the judge of the District Court for the district in which the Circuit Court is held; and the Circuit judge. These courts have jurisdiction over civil causes, involving five hundred dollars or upwards, which are brought by a citizen of one State against a citizen of another State, or in which the United States is plaintiff, or in which an alien is a party. They also have jurisdiction over matters in bankruptcy, over certain cases arising under the revenue laws, over all cases lawfully brought before them by appeal from the District Courts, and over all crimes cognizable under the authority of the United States, unless the Acts of Congress otherwise direct.

Read 1 Kent Comm., Lect. xiv, pp. 301–303.
Walker Am. Law, §§ 45, 49.
Curtis U. S. Courts, pp. 94–198.
1 Abbott U. S. Prac., pp. 299–311.

§ 356. Of the District Courts.

The District Courts each consist of one judge, resident in the district. These courts have jurisdiction over all admiralty and maritime causes and all matters in bankruptcy, and over all penal and criminal matters cognizable under the laws of the United States, exclusive jurisdiction over which is not vested either in the Supreme or Circuit Courts.

Read 1 Kent Comm., Lect. xiv, pp. 303–305; Lect. xvii.
Walker Am. Law, §§ 45, 49.
Curtis U. S. Courts, pp. 254–287.
1 Abbott U. S. Prac., pp. 283–298.

§ 357. Of the Courts of the Individual States.

There is no uniformity among the individual States, either as to the number or the organization of their courts. In every State there is some *supreme tribunal*, by which all questions as to the interpretation of laws, and their applicability to given states of fact, are finally and conclusively determined. Under these, are one or more *inferior courts*, in which all cases, civil or criminal, which are not within the exclusive jurisdiction of the courts of the United States, may be heard and decided. But the mode in which these courts may be created, their particular jurisdiction, the appointment or election of their judges, their terms of office, and their duties, are matters upon which each State has legislated for itself, and still, from time to time, exercises its reorganizing powers.

Read 2 Wilson, pp. 290–296.
Walker Am. Law, §§ 46, 47, 50.
Pomeroy Mun. Law, § 157.

§ 358. Of the Exercise of Judicial Functions.

Judicial functions can be exercised by courts, only when they are *in actual session* at the times and places specified

by law, and in the manner which the law provides. Proceedings at another time and place, or in another manner, though in the personal presence and under the direction of a judge, are *coram non judice*, and void.

Read 2 Wilson, pp. 211, 212.
2 Addison Torts, § 884.
Cooley Torts, pp. 416, 417.
3 Chitty Gen. Prac., p. 11.
1 Abbott U. S. Prac., pp. 186–188.
Cooley Const. Lim., pp. 96, 107.

§ 359. Of Officers De Jure and De Facto.

These several governmental functions can be lawfully exercised only by officers duly elected or appointed thereunto. Such an officer is called *an officer de jure*. Yet if a person should usurp an office and exercise its functions, under color of an election or appointment in itself not legal, he becomes *an officer de facto*, and his official acts are valid in reference to the rights, which innocent third persons may acquire thereby.

Read 1 Bl. Comm., p. 204.
2 Hill Torts, Ch. xxix, §§ 1 note a, 30.
Cooley Torts, pp. 401, 402.
Cooley Const. Lim., p. 618 n. 2.
State *v.* Carroll, 38 Conn. p. 449.

CHAPTER II.

OF SUBJECTS AND THEIR RELATIONS TO THE STATE.

§ 360. Of Subjects.

A subject is a person who is under legal obligation to submit to the authority of a state, in matters relating to the public welfare. The extent of this obligation depends upon the political character of the subject, and the duties he may owe to other states.

Read 1 Bl. Comm., pp. 369, 370.
2 Burlamaqui, pp. 29–31.
Jameson Const. Conv., §§ 52, 53.

§ 361. Of Allegiance.

The tie, which binds the subject to the state, is called *allegiance.* It originates in the compact, which is presumed to have been made, between the subject and the state, at the commencement of their political relations with each other, and is at once the foundation and the measure of the rights, which the state has in its subjects, and which they, in their turn, possess in, or against the state. Allegiance is of two kinds: Natural and Local. *Natural allegiance* is universal and perpetual. It cannot be forfeited, cancelled, or released by any change of time, or place, or circumstance. Only his own death, or the act of the state, can discharge the subject from its obligations. *Local allegiance* is territorial and temporary. It binds the

subject while actually within the state, but may at any time be terminated by his removal from it.

Read 1 Bl. Comm., pp. 366–374.
2 Kent Comm., Lect. xxv, pp. 42–49, 63, 64.
Woolsey Int. Law, §§ 66, 74.

§ 362. Of Native-Born Citizens.

Subjects are of two kinds: Citizens and Aliens. *A citizen* is one who owes to the state, of which he is a citizen, an universal and perpetual allegiance. Citizens of the United States are of two classes: Native-born, and Naturalized. *A native-born citizen* is one who was born within the jurisdiction and allegiance of the United States. The jurisdiction of the United States is co-extensive with its territory, and embraces all persons resident therein, except Indians and the official representatives of foreign states. The allegiance of the United States includes all its citizens, whether at home or abroad, and all other persons, (except Indians, and the official representatives of foreign states,) who are permanently domiciled within its jurisdiction. The persons, born within this jurisdiction and allegiance, are the following: (1) Those born, either at home or abroad, of parents who are citizens; (2) Those born, within the territory of the United States, of alien parents (Indians, and the official representatives of foreign states excepted) who are permanently domiciled within the United States.

Read 1 Bl. Comm., pp. 366, 374, 375.
Vattel, B. i, §§ 212, 213, 215–217.
2 Kent Comm., Lect. xxv, pp. 39–42.
Walker Am. Law, § 54.
Pomeroy Mun. Law, §§ 718, 720, 722.
Cooley Const. Law, pp. 241–243.

§ 363. Of Naturalized Citizens.

A naturalized citizen is one who was originally a citizen of a foreign state, but by the act of the United States has been adopted as its citizen. The right of a citizen thus to determine his allegiance to the state in which he was born, and assume the obligations of natural allegiance toward another state, has been always controverted, and, even in the United States, seems opposed to the current of judicial opinion. The right, however, has been practically exercised for many years, and has been expressly affirmed by Acts of Congress. It has also recently obtained a legal sanction, by means of treaties between the United States and certain foreign powers.

Read 1 Bl. Comm., pp. 369, 370.
Vattel, B. i, §§ 214, 220–226.
1 Wilson, pp. 312–317.
2 Kent Comm., Lect. xxv, pp. 42–50.
Woolsey Int. Law, §§ 65, 70.
Walker Am. Law, § 54.
Pomeroy Mun. Law, §§ 721, 723.

§ 364. Of Naturalization.

The subject of *naturalization* is regulated by the statutes of the United States. Those statutes recognize four classes of persons, as entitled to become adopted citizens: (1) Persons who have resided in the United States since June 18th, 1812; (2) Persons over twenty-one years of age, who have resided in the United States for a period of at least five years, and legally declared their intention to become citizens of the United States more than two years before their naturalization; (3) Persons over twenty-one years of age, who have resided in the United States for a continuous period of five years, three of which were during their minority; (4) Persons over twenty-one years of age, who have resided in the United States for one year, and

who have served in the military forces of the United States, and have been honorably discharged therefrom. Any such persons, appearing before a court of record, proving their compliance with these conditions, and taking the requisite oaths of allegiance, are admitted, together with such of their minor children as are resident in the United States, to all the privileges and responsibilities of citizenship.

Read 2 Kent Comm., Lect. xxv, pp. 51–53, 64–66.
Walker Am. Law, § 54.
Cooley Const. Law, pp. 243, 244.
Rev. Stat. U. S., 1878, Tit. xxx.

§ 365. Of Aliens.

An alien is a person born outside of the jurisdiction and allegiance of the United States, and not naturalized therein. Such persons, (Indians, and the representatives of foreign states excepted,) when within the territory of the United States, owe thereto a local and temporary allegiance. They are of two classes: Alien-friends and Alien-enemies. *An alien-friend* is an alien, resident in the United States, and with whose state the United States is at peace. *An alien-enemy* is an alien, resident in the United States, and with whose state the United States is at war.

Read 2 Kent Comm., Lect. xxv, pp. 50, 51.
Walker Am. Law, § 54.

§ 366. Of Citizens of the Individual States.

All citizens of the United States are citizens of the individual State, in which they were born or naturalized, or in which they may have become permanently domiciled. They are entitled to enjoy, during their residence in or

transit through any other State, all the immunities and privileges which belong to its own citizens.

Read Const. U. S., Art. iv, Sec. 2 ; Amend. xiv, Sec. 1.
Pomeroy Mun. Law, § 724.
Cooley Const. Lim., pp. 15–17, 397, 487.
Cooley Const. Law, pp. 187–189, 245–248.
2 Story Const., §§ 1930–1968.

CHAPTER III.

OF THE RIGHTS OF A STATE OVER ITS SUBJECTS.

§ 367. Of the Rights of States in General over their Subjects.

The nature and extent of the rights, which the state has over the subject, depend upon the character of the state, and the relations which the subject may sustain to other states. The United States, and each individual State, was constituted solely for the protection and defence of its own subjects, and its rights over them are limited, by its organization, to such measures as are necessary to that end. Moreover, the United States derives its powers entirely from the Federal Constitution, and has no rights except such as are expressly granted therein, or necessarily implied thereby. Each individual State has also its own Constitution, by which, as well as by the Federal Constitution, the powers originally inherent in such State are limited.

Read 2 Burlamaqui, pp. 6–89.
1 Kent Comm., Lect. xviii, xix.
Jameson Const. Conv., §§ 88–95.
Cooley Const. Law, pp. 29–37, 142–144.
2 Story Const., §§ 1353–1409.

§ 368. Of the Rights of the United States over their Subjects.

The subjects, both of the United States and of each individual State, consist of citizens and aliens. *Over its citizens*, a state has all the rights which its own character

and Constitution permit it to possess. *Over the alien*, residing in or passing through its territory, it has such rights as may be necessary to its own peace and order, and as, at the same time, are consistent with the duty of the alien to his native state. Subject to these different limitations, the rights of the United States, and of each individual State, are those which every state has over its own subjects, and which are necessarily contained in the idea of sovereignty.

Read Vattel, B. i, §§ 212, 213.
2 Kent Comm., Lect. xxv, pp. 63, 64.

§ 369. Of Obedience to the State.

The rights of a state over its subjects are two: Obedience and Support. *Obedience* to the state includes: (1) Obedience to the laws, whether enacted by the legislature, or recognized, by the courts, as part of the common law; (2) Obedience to all legitimate commands of executive officers; (3) Obedience to all valid judicial orders and decrees. The right to obedience implies the right to compel it. For this purpose the state has, and must have, *supreme power* over the lives, the persons, and the property of its subjects, and may enforce compliance with its laws, commands, and orders, by any means that may be legally established therefor.

Read 4 Bl. Comm., pp. 7–11.
Vattel, B. i, §§ 53, 54.
2 Burlamaqui, pp. 130–143.
1 Kent Comm., Lect. xxiv, pp. 13, 14.
Walker Am. Law, § 188.

§ 370. Of Military Service.

The right of *Support* includes: (1) The right to the personal services of the subject, whenever the same are needed

for the public welfare; (2) The right of eminent domain; (3) The right of taxation. The citizen is liable, at all times, to render *personal service* in the military or naval forces of the state, to aid in the arrest and pursuit of criminals, to render assistance to executive officers whenever legally summoned so to do, to serve on juries, and to do any other act, in the public interest, which the law may, from time to time, require. The alien, on the contrary, is usually exempt from military or naval service, from jury duty, and from any other liability, which is antagonistic to his natural allegiance.

Read Vattel, B. iii, §§ 7-10.
2 Burlamaqui, pp. 157-159.
Federalist, No. xxix.
2 Story Const., §§ 1199-1215.

§ 371. Of Eminent Domain.

The right of *eminent domain* is the right of the state to take private property for public use, upon making due compensation therefor. Every species of property, except money and choses in action, is subject to this right. It can be exercised only in accordance with legislative enactment. All proceedings under it are *stricti juris*, and the property taken must be necessary for, and appropriated to, some public, or *quasi* public, use.

Read Vattel, B. i, § 244.
2 Burlamaqui, pp. 149, 150.
Cooley Const. Lim., pp. 523-571.
Cooley Const. Law, pp. 331-342.

§ 372. Of Taxes.

The right of *taxation* is the right of the state to impose burdens or charges upon the persons or property of its

subjects, in order to raise money for public purposes. Taxation may be either *direct*, as upon polls and land, or *indirect*, as in duties and imposts upon articles of consumption. In all cases, it must be in strict accordance with legislative authority, and for public purposes alone. The United States has no power to tax the means by which the States perform their governmental functions, and the same limitation rests upon the taxing power of States in reference to the governmental agencies of the United States. Aliens, as well as citizens, are liable to taxation, and subject to the exercise of the right of eminent domain.

Read Vattel, B. i, §§ 240–243 ; B. ii, § 106.
2 Burlamaqui, pp. 147–149.
Federalist, No. xxx–xxxvi.
Cooley Const. Lim., pp. 479–521.
Cooley Const. Law, pp. 54–62.
1 Story Const., §§ 906–1053.

CHAPTER IV.

OF THE RIGHTS OF THE SUBJECT IN OR AGAINST THE STATE.

§ 373. Of the Duties of States in General to their Subjects.

The rights of the subject, in or against the state, are two: Protection and Vindication. These rights are due to the subject, in return for the allegiance which binds him to the state, and constitute the obligation which the state assumed in that original compact, by which they became politically related to each other.

Read 1 Bl. Comm., pp. 233–236, 369.
Vattel, B. i, §§ 38–51.
2 Burlamaqui, pp. 97–104.

§ 374. Of Protection against Wrongs from Co-Subjects.

The protection, which is due to the subject from the state, includes: (1) Protection against wrongs at the hands of co-subjects; (2) Protection against wrongs at the hands of the state itself; (3) Protection against wrongs at the hands of foreign states. The wrongs, which *one co-subject can inflict* upon another, are either torts or crimes. These, it is the duty of the state, as far as possible, to prevent, and this it does when it so discharges the three governmental functions as to secure the highest practicable degree of public peace and order, and, at the same time, places no unnecessary restraint upon the property or persons of its subjects.

Read 1 Bl. Comm., pp. 125–128, 141.
2 Burlamaqui, pp. 105–107.
Walker Am. Law, §§ 78–89.

§ 375. Of Protection against Wrongs from the State.

Of wrongs, committed against the subject *by the state* itself, some are mere torts or crimes, others involve the usurpation and abuse of power. Most wrongs committed by executive, and some of those committed by judicial, officers are among the former; and against these the state protects the subject, in the same manner as against wrongs committed by co-subjects. Unwarrantable acts of legislation, and corruption or incompetency in the courts, lie, however, outside of the ordinary domain of wrongs. Against these the state can protect the subject, only by its constitutional safeguards, and by the restrictions which it throws around the action of its courts and legislatures.

Read 2 Hill. Torts, Ch. xxviii, xxix, xxxii.
Cooley Torts, pp. 376–425.
Cooley Const. Law, pp. 144–159.
1 Story Const., §§ 533–543.

§ 376. Of Protection against Wrongs from Foreign States.

Wrongs may be committed against the subject *by a foreign state*, either by its direct governmental act, or by its sanction of some wrong, done by its own subject. A tort or crime, committed against the subject of one state by the subject of another, becomes the act of that other state, if it protects the wrong-doer from punishment, or denies to the injured party his appropriate redress. In that event, it is the duty of the state, whose subject has been injured, to demand satisfaction from the state, which, first by its subject and finally by its own act, has committed the wrong. A firm and persistent policy, in thus demanding and enforcing full regard for their rights, is a duty which every state owes to its subjects, and is the only means by which

such rights can be protected against invasion at the hands of foreign states.

Read Vattel, B. ii, §§ 71-78.
2 Burlamaqui, pp. 178, 179.
1 Wilson, pp. 371, 372.
Woolsey Int. Law, § 116.

§ 377. Of the Redress of Wrongs Committed by Co-Subjects.

The vindication, which is due to the subject from the state, is the complement of this protection. Entire protection of the subject, by the state, against the commission of legal wrongs, is impossible; and, when protection fails, it is the duty of the state to redress the injuries, which it could not prevent. This redress or vindication includes: (1) Redress of wrongs committed by co-subjects; (2) Redress of wrongs committed by the state itself; (3) Redress of wrongs committed by foreign states. The redress of wrongs committed by *co-subjects* is principally accomplished through the agency of courts. It is, therefore, the duty of the state to establish *courts*, and to so regulate the procedure therein, as to give redress with certainty, with justice, and without unnecessary expense or delay. It is also the duty of the state, by appropriate *legislation*, to provide against such fraudulent concealments of person or property as tend to defeat the ends of justice, to punish as crimes those torts which are either grievously injurious to the subject or of dangerous example, and to adopt all other measures necessary to secure that remedy for wrong, which the state, by its organization, pledges itself to afford.

Read 1 Bl. Comm., pp. 141, 142.
Vattel, B. i, §§ 158-172.
2 Burlamaqui, pp. 106, 107.
Walker Am. Law, § 88.

§ 378. Of the Redress of Wrongs Committed by the State.

The wrongs which are committed *by the state* itself, through its executive or judicial officers, and which are properly either torts or crimes, demand the same redress against the persons, who commit them, as do other wrongs received from a co-subject. In certain cases, also, the state, by its own permission, may be sued in its own courts, as if it were a private citizen. But when the *legislature* passes laws, which are unwarranted by its constitutional authority and are oppressive to the subject, there is no remedy against the legislative body, or the individuals of whom that body is composed. It is the duty of the courts to treat such laws as invalid, and to decline to aid in their enforcement. When officers, *judicial or executive*, become corrupt or incompetent, it is the duty of the state to remove them, and fill their places with competent and honest men. When all the branches of the government unite in an abuse or usurpation of power, the supreme duty devolves upon the people to overthrow the government, and establish a new one, "peaceably if they can, forcibly if they must."

Read 2 Burlamaqui, pp. 90–97.
Declaration of Independence.
Walker Am. Law, § 89.
Cooley Const. Lim., pp. 159–188.
Cooley Torts, p. 376.
Cooley Const. Law, pp. 25, 26, 144–159.
1 Story Const., §§ 742–813.

§ 379. Of the Redress of Wrongs Committed by Foreign States

The wrong, committed by the subject of one state against the subject of another, is in itself merely a tort or crime, and the remedy therefor is to be sought, in the first instance,

in the courts of the state, of which the wrong-doer is a subject. If such state refuses redress, and thereby adopts the act of the wrong-doer as its own, it is the duty of the state, of which the injured party is a subject, to demand, from the other state, a *reparation* for the injury, and to enforce its demand by retorsion, reprisal or, when necessary, even by actual war. This also is the only remedy, when the subject of one state is injured by the direct action of a foreign state.

Read Vattel, B. ii, §§ 341–350.
2 Burlamâqui, pp. 180–183.
Woolsey Int. Law, §§ 76, 116, 118.

§ 380. Of the Duties of the State toward Citizens and Aliens.

These rights of the subject, in or against the state, are qualified by the relations, which the subject himself occupies toward other states. To the *citizen* they belong in their widest extent. Complete protection and vindication at all times, in all places, in all his legal rights, and at all hazards, are due to him ; and the state, which withholds these, breaks the compact out of which its own existence sprang, and forfeits the allegiance of the citizen. The *alien*, on the other hand, has no right to protection or vindication against a foreign state. If he be an *alien-friend*, the state is bound to protect him against wrongs from itself or his co-subjects, and to afford to him the usual remedies in courts of justice. If he becomes an *alien-enemy*, these rights, as matters of strict law, are forfeited, and he may be regarded as a prisoner of war, and all his property may be confiscated by the state. Custom, however, of long standing and continuous observance sufficient almost to have the force of law, has recognized the equitable rights of alien-enemies,

and they are now treated like alien-friends, as long as they are permitted to remain within the territory of the state.

Read 1 Bl. Comm., pp. 369–372.
Vattel, B. ii, §§ 99–115; B. iii, §§ 70–77.
1 Kent Comm., Lect. iii, pp. 56–65.
2 Kent Comm., Lect. xxv, pp. 53–73.
Woolsey Int. Law, §§ 65–69, 71–74, 124–126.
Pomeroy Mun. Law, §§ 717, 725–727.

§ 381. Of the Duties of the United States toward their Subjects.

In the United States, these different rights, and their modes of exercise, are further qualified by the character of the United States, or of the individual State, and by the relations which the Federal Constitution has established between them. It is the duty of each individual State to protect its own subject against wrongs at the hands of his co-subject, and to afford redress, for the wrongs committed by its subject, to all persons whatsoever. It is the duty of the United States to protect its subject against certain wrongs at the hands of any state or person, and against all wrongs at the hands of any person, except his co-subject of the individual State. It is also the duty of the United States to redress those wrongs, whose commission it is its duty, so far as practicable, to prevent.

Read Walker Am. Law, §§ 8, 192, 196.
Cooley Const. Law, pp. 142–144, 244.

BOOK IV.

OF PUBLIC WRONGS.

§ 382. Of Torts and Crimes.

Public wrongs are those by which the rights of the state over the subject, or the rights of the subject in or against the state, are either diminished or destroyed. There is a sense in which all wrongs are public wrongs, since they involve an interruption of the duties of the subject to the state, or interfere with that protection which the state owes to the subject. But there are certain wrongs, which do not terminate upon the individual, whose property or person they assail, but reach through and beyond him to the social fabric of which he forms a part, and violate the peace and order of the state. Such wrongs contain an element of evil, which is wanting to the mere private injury. They strike at the foundations of all civil government, and justly are regarded, by the law, as wrongs of a different nature, and as demanding a different redress.

Read 4 Bl. Comm., pp. 1–7.
Broom Comm., pp. 866–873.
3 Wilson, pp. 4–6.
Austin Jur., Lect. xvii, xxvii.
1 Bish. C. L., §§ 230–278.
1 B. & H. L. C. C., pp. 1–34.

§ 383. Of the Legal Separation of Torts and Crimes.

What special wrongs do thus invade the majesty and security of the state largely depends upon the condition of society, and the character of the state itself. An act,

which, under a free government, would work no public evil, might, if committed under a despotic government, convulse or overthrow the state. An act which, half a century ago, would not have resulted even in private damage, to-day may cause far-reaching injury and loss. With every change in society or in the forms of government, and with every development of commerce, the character and effects of wrongs will also change, and with them must change the position of such wrongs before the law, and the methods which it uses for their prevention or redress. Hence it is true, in every case, that crimes are creatures of the law. The state is the divider of act from act, and, through its legislature and its courts, defines and specifies what wrongs are to be taken out of the great mass of private injuries, and punished as and for violations of public rights.

Read 1 Bl. Comm., pp. 54, 55, 57, 58.
1 H. P. C., pp. 1, 2, 13, 14.
3 Wilson, pp. 7–12.
1 Bish. C. L., §§ 209, 210, 773–785.

§ 384. Of the Definitions of Crime.

The definitions, which legal writers give of the word *crime*, differ according to the view they take of it, as denoting an injury to the public, or an act forbidden by the state. The following are illustrations:

"A crime is an act committed or omitted in violation of a public law, either forbidding or commanding it."

"A crime is an injury so atrocious in its nature, or so dangerous in its example, that, besides the loss that it occasions to the individual who suffers by it, it affects, in its immediate operation or in its consequences, the interest, the peace, the dignity, or the security of the public."

A crime is a wrong "which the government notices as

injurious to the public, and punishes, in what is called a criminal proceeding, in its own name."

A crime is "an offence which is pursued by the sovereign, or by the subordinates of the sovereign."

Considered both as a wrong against the public, and an act forbidden and punished by the state, it may be thus defined: A crime is a wrong, directly or indirectly affecting the public, to the commission of which the state has annexed certain pains and penalties, and which it prosecutes and punishes in its own name.

Read 4 Bl. Comm., p. 5.
3 Wilson, p. 4.
Austin Jur., Lect. xvii.
1 Bish. C. L., § 32.

CHAPTER I.

OF THE ELEMENTS OF CRIME.

§ 385. Of Criminal Act and Criminal Intent.

Every crime contains two elements: The Criminal Act, and The Criminal Intent. *The criminal act* consists of those external actions or omissions, which the law prohibits. *The criminal intent* is that evil and malicious will, which finds expression in the criminal act.

Read 4 Bl. Comm., pp. 20, 21.
Broom Comm., pp. 874–880.
1 H. P. C., pp. 14, 15.
1 Bish. C. L., §§ 204–208, 216–229, 285–291, 330–334, 337–345.

§ 386. Of Specific Intent.

The law regards some acts as crimes, without reference to the purpose which they were intended to accomplish. Other acts are criminal only when performed with some particular purpose or design. In the latter cases, this design enters into the nature of the act itself, and is called the *specific intent.* The specific intent and the criminal intent must not be confounded with each other. They have nothing in common, except that both are mental operations. The former determines the purpose, toward the accomplishment of which the act shall be directed; the latter determines that the act, so directed, shall be done. Nothing can show this difference more clearly than the

rules, by which the proof of these intents is governed. *The specific intent*, as part of the criminal act, must be alleged and proved, in the same manner as any other portion of the act. *The criminal intent*, on the other hand, is neither alleged nor proved, but is inferred from the commission of the act; and when the act itself has been established, the law presumes it to have been the expression of this evil will.

Read Broom Comm., p. 876.
1 Bish. C. L., §§ 320, 335.
3 Greenleaf Ev., §§ 13–19.

§ 387. Of Drunkenness as Affecting Intent.

This difference appears still further from the modes, in which the crimes of *voluntary drunkards* are regarded by the law. The rule is everywhere established, that the commission of a criminal act raises the presumption of the *criminal intent*, notwithstanding that the criminal was drunk, when he committed it. No other rule would be consistent with the safety of society. But where the existence of a *specific intent* is necessary to the criminal act, a degree of drunkenness, incompatible with the formation of that intent, negatives the act, and disproves the crime.

Read Broom Comm., pp. 887, 888.
1 H. P. C., p. 32.
1 Russ. Cr., pp. 7, 8.
1 Whart. C. L., §§ 32–44.
1 Bish. C. L., §§ 397–416.
1 B. & H. L. C. C., pp. 131–145.

§ 388. Of Infancy as Affecting Intent.

Although the criminal intent is thus presumed from the commission of the criminal act, this presumption is not

conclusive, but may be *rebutted* by proof of facts which indicate the absence of a criminal intent. Such facts are: (1) That the actor acted while under a certain age; (2) That the actor acted while in a state of insanity; (3) That the actor acted under a *bona fide* mistake of fact; (4) That the actor acted accidentally or by chance; (5) That the actor acted from necessity; (6) That the actor acted under compulsion. The criminal act of *an infant*, under fourteen years of age, raises no presumption of a criminal intent. Under the age of seven years, no person can commit a crime; for, whatever be the act, the law conclusively presumes the absence of a criminal intent. But between the ages of seven and fourteen, there is no presumption. In such cases, the prosecution must establish the intent, by such distinct and substantive evidence as indicates a guilty knowledge and an evil will.

Read 4 Bl. Comm., pp. 22–24.
Broom Comm., pp. 889, 890.
1 H. P. C., pp. 16–28.
1 Russ. Cr., pp. 1–6.
1 Arch. Cr. Pr., pp. 7–14.
1 Whart. C. L., §§ 58–65.
1 Bish. C. L., §§ 367–373.
1 B. & H. L. C. C., pp. 71–80.
3 Greenleaf Ev., §§ 3, 4.

§ 389. Of Insanity as Affecting Intent.

An insane person cannot commit a crime. What constitutes insanity, in this connection, has given rise to much discussion. One of the most famous of recent cases gives the following rule: Whenever a man does not know that the act he is committing is unlawful and morally wrong, and has not reason sufficient to apply such knowl-

edge and to be controlled by it, the law will not infer from his act the existence of a criminal intent.

Read 4 Bl. Comm., pp. 24–26.
Broom Comm., pp. 881–887.
1 H. P. C., pp. 29–37.
1 Russ. Cr., pp. 6–15.
1 Arch. Cr. Pr., pp. 15–42.
1 Whart. C. L., §§ 13–57 a.
1 Bish. C. L., §§ 374–396.
2 Bish. C. P., §§ 666–687.
1 B. & H. L. C. C., pp. 94–145.
3 Greenleaf Ev., §§ 5, 6.
McFarland's Case.

§ 390. Of Mistake as Affecting Intent.

It is a necessary rule of law, that *ignorance of the law* excuses no man. One who commits a criminal act with criminal intent, in ignorance that the act has been made a crime, is not protected by his ignorance, even though it were wholly unavoidable. But this rule has no application to a case of *ignorance of fact*. Wherever a person, in good faith and upon a reasonable belief that certain things are true, does an act, which, if those things were true, would not be a crime, the doing of such act under that belief, even if those things were not true, does not raise the presumption of a criminal intent.

Read 4 Bl. Comm., p. 27.
1 H. P. C., pp. 42, 43.
1 Russ. Cr., p. 25.
1 Arch. Cr. Pr., p. 55.
1 Whart. C. L., §§ 82, 83.
3 Greenleaf Ev., §§ 20, 21.
Rex *v.* Bailey, Russ. & Ry., p. 1.

§ 391. Of Accident as Affecting Intent.

An act, which in itself is lawful, but which, through *misfortune* or by *chance*, becomes a criminal act, affords no ground for the presumption of a criminal intent. But if the act be *originally unlawful*, the actor is responsible for its consequences, whether or not they are foreseen by him, and from the act, together with its consequences, the law presumes a criminal intent to do the wrong, which actually results.

Read 4 Bl. Comm., pp. 26, 27.
1 H. P. C., pp. 38–41.
1 Arch. Cr. Pr., pp. 52–54.
1 Bish. C. L., §§ 313-318, 323–329.

§ 392. Of Necessity as Affecting Intent.

A criminal act, if done from *necessity*, raises no presumption of the criminal intent. This necessity may be either actual or legal. *Legal necessity* is that which grows out of the obligation to perform some legal duty, as of a sheriff to execute a death-warrant, or of an officer to capture, even if he kills, an escaping felon. *Actual necessity* is that which grows out of the circumstances immediately attending the commission of the criminal act, as in all cases of true self-defence. This necessity must be real and not imaginary, must not have resulted from the fault of the actor, and must be of such a character as leaves no alternative but the commission of the criminal act.

Read 4 Bl. Comm., pp. 28, 30, 31, 184–187.
Broom Comm., pp. 880, 881.
1 H. P. C., pp. 52–58.
1 Whart. C. L., §§ 90 c, 90 d.
1 Bish. C. L., §§ 346–355.

§ 393. Of Compulsion as Affecting Intent.

From a criminal act, when done under *compulsion*, the law does not presume a criminal intent. In all such cases, the actor is but the innocent agent of another, who is himself the criminal. Compulsion, like necessity, may be actual or legal. *Actual compulsion* is the illegal exercise of force, by some third party, compelling the commission of the act. *Legal compulsion* is that which a husband is presumed by law to exercise over his wife, when, in his presence and by his command, she commits any criminal act less than an act of treason, robbery, or murder.

Read 4 Bl. Comm., pp. 27–31.
Broom Comm., pp. 890, 891.
1 H. P. C., pp. 43–52.
1 Russ. Cr., pp. 17–24.
1 Arch. Cr. Pr., pp. 43–47, 56, 57.
1 Whart. C. L., §§ 67–81, 90 a, 90 b.
1 Bish. C. L., §§ 346–366.
1 B. & H. L. C. C., pp. 81–94.
3 Greenleaf Ev., §§ 7–9.

CHAPTER II.

OF THE DEGREES OF CRIME.

§ 394. Of Treason.

The classes, or degrees, of crime are three: Treason; Felony; and Misdemeanor. *Treason* is not only a separate class of crime; it is the only crime of its class. It is also the worst of crimes; for it is directed, not at the person or property of the subject, or even at the public peace and order, but at the very existence of the state and of society.

Read 4 Bl. Comm., pp. 74, 75.
Broom Comm., p. 892.
1 Russ. Cr., p. 44.
1 Whart. C. L., § 1.
1 Bish. C. L., §§ 598–613.

§ 395. Of Felony.

Felony embraces all the crimes, whose prosecution and punishment are governed by those rules, which, under the ancient common law, controlled the prosecution and punishment of such offences as worked a forfeiture of the criminal's estate. Under the ancient law, a person who was convicted of certain crimes, called *felonies*, forfeited his estate; and this forfeiture was esteemed a punishment of such severity, that the law exercised great caution in the trial of such cases, and gave to the accused the benefit of many nice distinctions and technicalities, which, in other

cases, he did not need, or of which, on account of the enormity of the offence, he was deprived. Thus there grew up a peculiar procedure, in the prosecution and punishment of this class of crimes; and though forfeiture, as then inflicted, has ceased to be a penalty for crime, that procedure still continues, and has become the characteristic by which felony is distinguished from treason on the one hand, and misdemeanor on the other.

Read 4 Bl. Comm., pp. 94–98.
Broom Comm., p. 893.
1 Russ. Cr., p. 44.
1 Arch. Cr. Pr., pp. 1, 2.
1 Whart. C. L., § 2.
1 Bish. C. L., §§ 614–619.

§ 396. Of Common Law and Statute Felonies.

Felonies are of two kinds: Felonies at common law, and Felonies by statute. *Felonies at common law* were formerly very numerous, nearly every important offence having been, at one time or another, proceeded against and punished as a felony. In modern times, this number has been much reduced, and there are now but seven crimes, which are generally regarded as felonies at common law. These are: (1) Murder; (2) Manslaughter; (3) Rape; (4) Arson; (5) Burglary; (6) Theft; and (7) Robbery. *Felonies by statute* are those crimes, not otherwise made felonies, which are declared by statute to be felonies. They differ from common law felonies only in their origin, their mode of prosecution and punishment being the same.

Read 1 Russ. Cr., pp. 44, 45.
1 Arch. Cr. Pr., pp. 1, 2.
1 Whart. C. L., §§ 2, 10.
1 Bish. C. L., §§ 618–622.

§ 397. Of Misdemeanors.

Misdemeanor includes all crimes which are neither treason nor felony. These are very numerous, and of great variety, both as to the character of the criminal act, and as to the enormity of the moral guilt involved in its commission. Many of these crimes have no distinctive name, and are no otherwise defined than by the language of the statute, by which they are prohibited.

Read Broom Comm., pp. 893, 894.
1 Russ. Cr., p. 45.
1 Arch. Cr. Pr., pp. 2–6.
1 Whart. C. L., §§ 3–9.
1 Bish. C. L., §§ 623–625.

CHAPTER III.

OF TREASON.

§ 398. Of the Nature of Treason.

Treason is an act committed by the subject, in violation of the allegiance which binds him to the state. It is distinguished from all other crimes by this; that, whereas they attack primarily the property or person of an individual, or some single public interest, and indirectly, if at all, affect the state, treason assails the state itself, and seeks to overthrow and destroy that political society, which his allegiance obliges the subject to defend. Hence its name *treason*, denoting treachery and breach of faith, or that more expressive phrase, which characterized it in the Roman law, *crimen læsæ majestatis*, the crime of violated sovereignty.

Read 4 Bl. Comm., p. 75.
Broom Comm., pp. 892, 898.
1 H. P. C., pp. 58, 59.
2 Arch. Cr. Pr., pp. 882–884.
1 Bish. C. L., § 456.
2 Bish. C. L., §§ 1202–1204.

§ 399. Of Ancient Common Law Treasons.

Treason, under the ancient English law, necessarily embraced a great variety of offences, and to these, from time to time, were added, by forced judicial constructions, many actions which never before were suspected to be treasonable. In the statute 25 Edw. III, c. 2. (A. D. 1350–1),

these acts of treason were reduced to seven: (1) To compass or imagine the death of the King, or Queen, or their eldest son or heir; (2) To violate the King's consort, or his eldest daughter unmarried, or the wife of his eldest son or heir; (3) To levy war against the King within the realm; (4) To adhere to the King's enemies within the realm, and give them aid and comfort; (5) To counterfeit the King's great or privy seal; (6) To counterfeit the King's money, or to bring false money into the kingdom; (7) To kill the chancellor, treasurer or a judge, while in the discharge of his office. Afterwards, however, in the reign of Henry VIII, the spirit of inventing new and strange treasons was revived, and this crime was held to embrace such acts as calling the King names in a public writing, marrying his nephew or niece without his permission, or impugning his supremacy. By the statute 1 Mary c. 1, these so-called treasons were again abrogated, and the statute of Edw. III was reaffirmed. But in the succeeding reigns, the number was once more increased, and, even until the year A. D. 1847–8, included "the intending, within the realm or without, of any restraint of the heirs or successors of the King, and expressing such intention by any published writing, or by any overt act or deed."

Read 4 Bl. Comm., pp. 75–93.
Broom Comm., pp. 900–902.
1 H. P. C., pp. 77–239.
2 Chitty C. L., pp. 60–63.
2 Bish. C. L., §§ 1205–1213.

§ 400. Of Treason against the United States. Levying War.

Treason, in this country, may be committed either against the United States, or against an individual State. Treason can be committed against the United States only by levy-

ing war against them, or by adhering to their enemies, giving them aid and comfort. *Levying war* consists in the actual assembling of a body of men, in order to effect, by force, a treasonable purpose. The number of persons assembled is not material; a few may complete the offence as well as a thousand. Nor need actual fighting be proved; the assembling with a treasonable purpose being sufficient. *A treasonable purpose* is a purpose to attain, by force or by intimidation, some object of a public nature, as to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution, or compel its repeal. If war be thus actually levied, all persons, who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are guilty of treason.

Read 4 Bl. Comm., pp. 81, 82.
1 H. P. C., pp. 130–154.
2 Arch. Cr. Pr., pp. 889–892.
2 Whart. C. L., §§ 2718–2729.
1 Bish. C. L., §§ 177, 456.
2 Bish. C. L., §§ 1214–1229.
3 Greenleaf Ev., §§ 237, 242, 243.

§ 401. Of Treason against the United States. Adhering to the Public Enemy.

Adhering to the enemies of the United States, giving them aid and comfort, embraces every act which renders any assistance whatever to the public enemy, unless such act is performed unwillingly, and through a well-grounded fear of immediate death in case of refusal. Such acts are: the uniting with public enemies in acts of hostility against the United States or its allies; the delivering up of its castles, forts or ships of war, to its enemies through treachery; joining the enemy's forces, though no acts of hostility be

committed by them; raising troops for the enemy, or supplying them with money, arms or intelligence, even though such supplies be intercepted and never reach them. *The enemies of the United States* are the subjects of a foreign state, with whom the United States is at open war, and foreign pirates or robbers, acting under the authority of no particular state, but who actually invade the United States. Adherence and assistance to rebels, in arms against the United States, is "levying war," not "adhering to the public enemy."

Read 4 Bl. Comm., pp. 82, 83.
1 H. P. C., pp. 159–170.
2 Arch. Cr. Pr., pp. 892, 893.
2 Whart. C. L., §§ 2730–2733.
2 Bish. C. L., § 1234.
3 Greenleaf Ev., § 244.

§ 402. Of Treason against an Individual State.

Treason against an individual State, in the absence of Constitutional or statutory provisions, is an offence at common law, and is so recognized in the Constitution of the United States. Like treason against the United States, it consists only in levying war against the State, or in adhering to the public enemy. When the same act is treasonable both toward the United States and the individual State, it has been held to be treason against the United States alone.

Read 2 Arch. Cr. Pr., pp. 893–896.
2 Whart. C. L., §§ 2766–2772.
2 Bish. C. L., § 1254.

§ 403. Of the Necessity of an Overt Act.

Treason can be committed only by the doing of *an overt act*. Thus a conspiracy to levy war, or the actual enlist-

ment, for that purpose, of men who are never assembled, or words, spoken or written but not published, are not of themselves treasonable acts, though they become so if done in execution of a common purpose, which finds expression in an overt act of treason, or if they are committed in the attempt to aid the public enemy.

Read 4 Bl. Comm., pp. 79, 80.
Broom Comm., pp. 903, 904.
2 Chitty C. L., pp. 63–67.
2 Arch. Cr. Pr., pp. 888, 889.
2 Bish. C. L., §§ 1230–1233.
3 Greenleaf Ev., §§ 240, 241.

§ 404. Of Alienage as Affecting Treason.

As treason is the breach of allegiance, so there can be no treason where there is no allegiance. Under the English law *a resident alien*, owing a local allegiance to the state, could be guilty of this crime. It has been contended, however, in this country, that only a citizen can commit a treasonable act.

Read 4 Bl. Comm., p. 74.
Broom Comm., pp. 898, 899.
2 Whart. C. L., § 2735.
2 Bish. C. L., § 1235.
3 Greenleaf Ev., § 239.
Shanks *v.* Dupont, 3 Pet., p. 261.
U. S. *v.* Villato, 2 Dal., p. 370.

§ 405. Of Misprision of Treason.

Misprision of treason is the wilful concealment of a known treason, by a person who neither assents to nor takes part in the same. This crime is committed as well by neglect-

ing to give information of a treasonable act about to be performed, as by concealing the actor or the act, after it has been done.

Read 4 Bl. Comm., p. 120.
1 H. P. C., pp. 371–375.
2 Arch. Cr. Pr., p. 884.
1 Bish. C. L., § 226, 717–722.

CHAPTER IV.

OF FELONIES AGAINST THE PERSONS OF INDIVIDUALS.

§ 406. Of Murder. The Person Killing.

Felonies, at common law, against the persons of individuals are three: Murder; Manslaughter; and Rape. *Murder* is the unlawful killing of another with malice aforethought. An ancient definition, and the one commonly taken as the basis of treatises upon this crime, describes it as "where a person, of sound memory and discretion, unlawfully kills a reasonable creature, in being and in the peace, with malice aforethought either express or implied." This definition presents five topics for discussion: (1) The person killing; (2) The person killed; (3) The act of killing; (4) The unlawfulness of the killing; and (5) The malice aforethought. *The person killing* must be a person of sound memory and discretion. This is a simple repetition of the rule, applicable to all crime, that the criminal actor must be of sane mind, over seven years of age, and if under fourteen, proved to be capable of criminal intent.

Read 4 Bl. Comm., p. 195.
1 H. P. C., p. 434.
3 Chitty C. L., pp. 723–725.
1 Russ. Cr., pp. 484, 485.
1 Arch. Cr. Pr., pp. 831, 832.
2 Whart. C. L., § 930.
3 Greenleaf Ev., § 130.

§ 407. Of Murder. The Person Killed.

The person killed must be a reasonable creature, in being and in the peace. *A reasonable creature* is a human being,

as distinguished from an irrational animal, and from those abnormal products of the human species which are known as *monsters*. Such reasonable creature is *in being* when alive and full born. An infant, in the womb of its mother, is not a subject of murder, nor is it when delivered, unless its connection with the mother is so far severed, that its own independent life has actually begun. But if an infant, before birth, receive an injury, from which, after being fully born alive, it dies, its death is that of a creature in being, and the act which produces it, if the other elements of the crime be present, will be murder. A reasonable creature is *in the peace* whenever he is not a rebel, or a public enemy engaged in actual battle.

Read 4 Bl. Comm., p. 198.
3 Chitty C. L., p. 727.
1 Russ. Cr., pp. 485–487.
1 Arch. Cr. Pr., pp. 835–844.
2 Whart. C. L., §§ 940, 942, 943.
2 Bish. C. L., §§ 630–634.

§ 408. Of Murder. The Act of Killing.

The act of killing must be an act producing corporal injury, and must result in death within a year and a day from the date of its commission. Mere *threats*, or other representations, either by word or act, which operate only upon the mind, and, through the terror or anxiety which they engender, cause disease and death without the intervention of any physical injury, are not such killing as is necessary to constitute murder. But if a person, through such terror or anxiety, sustains an immediate *physical injury*, either as the result of his own desperate act or through an accident occasioned by his disturbed state of mind, the person, by whose threats or representations such terror or anxiety is caused, is guilty of a killing.

Although a killing thus implies a physical injury, it is not necessary that it be occasioned by any personal violence, on the part of the actor. To leave poison where it is likely to be taken, to permit ferocious animals to go at large, to ride a kicking horse among a crowd of people, to leave a child or sick person exposed to danger from the want of proper care or food, or to do any other act calculated to endanger life or to produce serious bodily harm, is killing, if death actually result therefrom. Death is conclusively presumed by law to have been produced by natural causes, unless it occurs within *a year and a day* from the infliction of the injury. In the computation of this period, the day, on which the injury was committed, is reckoned as the first.

Read 4 Bl. Comm., pp. 196, 197.
1 H. P. C., pp. 424–432.
3 Chitty C. L., pp. 725, 726.
1 Russ. Cr., pp. 488–509.
1 Arch. Cr. Pr., pp. 751–762, 832–835.
2 Whart. C. L., §§ 941, 941 a.
2 Bish. C. L., §§ 635–641.
3 Greenleaf Ev., §§ 134–142.

§ 409. Of Murder. Justifiable and Excusable Killing.

The act of *killing is unlawful* in every case, where it is not expressly justified or excused by law. The law *justifies* the killing of another in the following cases: (1) In *self-defence*, that is, where a felony, attended with force or great atrocity, is actually attempted against the person, habitation, or property of a man, or of some one whom he is under legal obligation to defend, and no other means of preventing such felony being at hand, he kills the felon; (2) Where an officer takes life in pursuance of a *legal warrant of execution* commanding him so to do; (3) Where a

felony has actually been committed, and the *felon* cannot be *arrested*, by the officer or private person in pursuit, except by killing him; (4) Where an officer is commanded by a *warrant to arrest* a certain person as a felon, and necessarily kills him in effecting such arrest. The law *excuses* the killing of another: (1) Where a man doing a *lawful act, with reasonable care* and without intention of bodily harm to any one, accidentally or by chance causes the death of another; (2) Where a man, who is without fault himself, being assaulted by another under such circumstances as to induce in his mind a reasonable belief that the *assailant* intends to take his life or do him serious bodily harm, and that this intention is likely to be accomplished, flees as far as he can, and seeing no other way of escape, kills his assailant.

Read 4 Bl. Comm., pp. 178–188.
Broom Comm., pp. 931, 932.
1 H. P. C., pp. 418, 478–502.
1 Russ. Cr., pp. 656–670.
1 Arch. Cr. Pr., pp. 763–805.
2 Whart. C. L., §§ 934–938, 1019–1042.
1 Bish. C. L., §§ 836–877.
2 Bish. C. L., §§ 619–622, 642–655.
3 Greenleaf Ev., §§ 115–118.

§ 410. Of Murder. Malice Express or Implied. Degrees.

Malice, in murder, is the intention to kill unlawfully; and if it exists for any period, however brief, before the killing and at the instant thereof, it is malice aforethought. Malice may be either express or implied. *Malice is express* when the act of killing is the result of a deliberate and premeditated design, evidenced by such external circumstances as lying in wait, antecedent menaces, or concerted schemes to do the person slain some bodily harm.

Malice is implied whenever the act producing death is of peculiar cruelty or wantonness, or is without provocation, or is, in itself, either a felony or calculated to do serious bodily harm, or consists in the use of dangerous weapons or poisons, or is committed under circumstances denoting a depraved inclination to mischief. But malice does not necessarily include hatred or ill-will toward the person killed, nor is it necessary that the death produced should be the death primarily intended by the slayer. An attempt to kill one person, resulting in the actual death of another, implies malice toward that other, and a wanton act, endangering the lives of persons in general, involves malice toward all those who are killed thereby. In many of the States, the crime of murder is divided into different *degrees*, which are distinguished from each other by the malice that accompanies the act. Murder in the first degree is generally murder with express malice, or from premeditated design; murder in the second degree either embracing all other murder, or such other as is characterized by the grosser forms of implied malice.

Read 4 Bl. Comm., pp. 198–201.
Broom Comm., pp. 918–920.
1 H. P. C., pp. 451–466.
3 Chitty C. L., pp. 727–730.
1 Russ. Cr., pp. 482–484, 532–538.
1 Arch. Cr. Pr., pp. 751–755, 844–877, 896–898.
2 Whart. C. L., §§ 944–968, 997, 1075–1114.
2 Bish. C. L., §§ 675–696, 723–729.
2 Bish. C. P., §§ 566–587.
3 Greenleaf Ev., §§ 144–148.

§ 411. Of the Presumption of Malice from the Unlawful Killing.

In all cases of homicide *the law presumes the act to be murder*, and throws upon the actor the burden of showing, if

he can, that he acted lawfully, or without malice. The presumption of *unlawfulness* may be *rebutted* by proving either of the states of fact, already mentioned as rendering the act of killing justifiable or excusable. The presumption of *malice* may be *rebutted* by showing that the killing was lawful, or that the actor was incapable of criminal intent, or that he acted under compulsion or mistake of fact, or that he acted in hot blood and without previous intent to kill.

Read 4 Bl. Comm., p. 201.
Broom Comm., pp. 920, 921.
3 Chitty C. L., p. 730.
1 Russ. Cr., p. 483.
1 Arch. Cr. Pr., p. 851.
2 Whart. C. L., § 944.
2 Bish. C. L., § 695.
1 B. & H. L. C. C., pp. 322–362.

§ 412. Of Manslaughter.

Manslaughter is the unlawful killing of another, without malice aforethought. Manslaughter includes every unlawful killing which is not murder. The distinction between these two crimes is only in regard to *malice aforethought*, which in murder is always present, and in manslaughter is always absent; and the same rules which govern one, in reference to the person killing, the person killed, the act of killing, and the unlawfulness of the act, govern the other also.

Read 4 Bl. Comm., pp. 191, 201.
Broom Comm., pp. 917, 918.
1 Russ. Cr., p. 579.
1 Arch. Cr. Pr., pp. 806, 807.
2 Whart. C. L., § 931.
2 Bish. C. L., §§ 623–628, 672-678, 720.
3 Greenleaf Ev., § 119.

§ 413. Of Voluntary Manslaughter.

Manslaughter is either voluntary or involuntary. *Voluntary manslaughter* is an unlawful killing, upon immediate provocation or in a sudden combat. No *provocation* will justify or excuse a homicide. If the provocation be slight, as by words or gestures, or by a mere trespass upon property, the killing will be murder, unless the circumstances, which attend it, denote that there was no intention to do serious bodily harm, in which case the killing will be manslaughter. Where the provocation is great, (as if the slayer find the person slain in adulterous connection with his wife,) and, in the heat of blood engendered by such provocation, the killing is committed, it is manslaughter. But whatever be the provocation, if it be sought by the slayer, the killing will be murder.

Read 4 Bl. Comm., pp. 191, 200, 201.
Broom Comm., pp. 921–924.
1 Russ. Cr., pp. 513–527, 580–585.
1 Arch. Cr. Pr., pp. 807–820.
2 Whart. C. L., §§ 931, 932, 969–986.
2 Bish. C. L., §§ 697–718.
3 Greenleaf Ev., §§ 121–127.

§ 414. Of Killing in Actual Combat.

Where, upon any provocation, *actual combat* ensues, and in such combat, and before the passions have had time to cool, one of the combatants, without previous ill-will and without any act of treachery, kills the other, it is manslaughter. But if, from the outset, the acts or words of the slayer indicate an intent to kill the other, or if he takes the person slain at an unfair advantage, it is murder.

Read 4 Bl. Comm., pp. 191, 192.
3 Chitty C. L., pp. 730–732.
1 Russ. Cr., pp. 527–532, 585–592.
1 Arch. Cr. Pr., pp. 820–829.
2 Whart. C. L., §§ 953, 955, 987–996.

§ 415. Of Involuntary Manslaughter.

Involuntary manslaughter is an unlawful killing, which results from the careless doing of some lawful act, or from the doing of some unlawful act, which is less than felony, and is not calculated to produce serious bodily harm. The doing of a *lawful act* with gross and wanton carelessness, and thereby causing death, is murder. The doing of such act with *carelessness* not wanton or malicious, with the same result, is manslaughter. When death results from a mere *misdemeanor* or from a *trespass*, and the act done was not, in its own nature, or from the operation of surrounding circumstances, likely to result in death or serious injury, it is manslaughter. But death produced by even a misdemeanor, which of its own nature is dangerous to life, is murder.

Read 4 Bl. Comm., pp. 192–194.
Broom Comm., pp. 925–930.
1 H. P. C., pp. 471–477.
1 Russ. Cr., pp. 538–548, 592–654.
2 Whart. C. L., §§ 933, 997–1018.
1 Bish. C. L., §§ 313, 314.
1 B. & H. L. C. C., pp. 50–71.
3 Greenleaf Ev., §§ 128, 129.

§ 416. Of Rape. The Carnal Knowledge.

Rape is the unlawful carnal knowledge of a woman, without her consent. In discussing this crime, three things are to be considered: (1) The carnal knowledge; (2) Its unlawfulness; (3) The absence of consent. To constitute *carnal knowledge*, penetration is absolutely necessary. There must be *res in re;* that is the sexual organ of the male must be entered, to some extent, within the sexual organs of the female. But the distance and dura-

tion of such penetration is not material, neither is seminal emission necessary to complete the crime.

Read 4 Bl. Comm., p. 210.
1 H. P. C., p. 628.
3 Chitty C. L., p. 810.
1 Russ. Cr., pp. 678–686.
2 Arch. Cr. Pr., pp. 152–158, 162–166.
2 Whart. C. L., §§ 1137–1140.
2 Bish. C. L., §§ 1107–1115, 1127–1132.
3 Greenleaf Ev., §§ 209, 210.

§ 417. Of Rape. The Unlawful Carnal Knowledge.

Carnal knowledge is always lawful, when it takes place between a man and his lawful wife. In all other cases, it is unlawful, whether the woman consents or not, though not, in all such cases, punishable as a crime.

Read 2 Arch. Cr. Pr., p. 158.
2 Whart. C. L., § 1136.

§ 418. Of Rape. The Want of Consent. Force.

All unlawful carnal knowledge is rape, unless the woman gives her intelligent and voluntary *consent* thereunto. If she yields to persuasion, or if her consent be elicited by fraud, it is no rape. But if she openly refuses, or if her acquiescence be merely passive, as if she be stupefied with drink or be insane, or if her resistance be prevented by fear of death or by ignorance of the nature of the act, it is rape. *A female under the age of ten years* cannot, in law, consent to sexual intercourse, and carnal knowledge of such a female is, therefore, always rape. *A male under the age of fourteen years* is presumed by law to be incapable of the sexual act, and proof of the

contrary will not be permitted. Such a person, consequently, cannot commit rape.

Read 4 Bl. Comm., p. 212.
1 H. P. C., pp. 629–631.
3 Chitty C. L., pp. 810, 811.
1 Russ. Cr., pp. 676–678, 693–697.
2 Arch. Cr. Pr., pp. 166–168.
2 Whart. C. L., §§ 1141–1148.
2 Bish. C. L., §§ 1116–1126.
2 B. & H. L. C. C., pp. 254–260.
3 Greenleaf Ev., § 211.

§ 419. Of Rape. The Evidence of the Complainant. The woman ravished is a competent, though not always a credible, witness against the accused, in prosecutions for this crime. If she be of good repute, if she presently discovered the offence and made pursuit of the offender, if she showed signs and marks of the injury, if the place where she alleges the act to have been done were remote from observation, and if the offender fled for it, her testimony is of great weight, and may alone be sufficient for conviction. But if she be of bad repute, or if she concealed the injury after she had opportunity to complain, or if the place where she alleges it to have been committed were public and inhabited, and she made no outcry; these, and similar circumstances, cast grave doubts upon her story. For though rape is a heinous crime, and, when actually committed, merits severe punishment, yet accusations of it are always to be regarded with suspicion, being often, if not generally, made either under sexual hallucination, or for purposes of extortion or revenge.

Read 4 Bl. Comm., pp. 213–215.
1 H. P. C., pp. 632–636.
3 Chitty C. L., pp. 812, 813.
1 Russ. Cr., pp. 688–691, 694, 695.
2 Arch. Cr. Pr., pp. 169–175.
2 Whart. C. L., §§ 1149–1152.

CHAPTER V.

OF FELONIES AGAINST THE PROPERTY OF INDIVIDUALS.

§ 420. Of Arson. The Burning.

Felonies, at common law, against the property of individuals, are four: Arson; Burglary; Theft; and Robbery. *Arson* is the unlawful burning of the house of another. This crime presents four points for discussion: (1) The burning; (2) Its unlawfulness; (3) The house; and (4) Its ownership. To constitute *a burning*, either the whole house, or some integral part thereof, must be actually destroyed by fire. If it be merely blackened by smoke, or scorched by flame, without destruction of its substance, or if that which is burned be personal property only, however wilful and malicious such burning may be, it is not arson. But the destruction by fire of any part of the house, whether great or small, is a burning; nor does it matter though the fire endures but a moment, or even goes out of itself.

Read 4 Bl. Comm., pp. 220, 222.
3 Chitty C. L., p. 1104.
2 Russ. Cr., pp. 548, 549.
2 Arch. Cr. Pr., pp. 709, 712–714.
2 Whart. C. L., §§ 1658–1662.
2 Bish. C. L., §§ 8, 10.
3 Greenleaf Ev., § 55.

§ 421. Of Arson. The Unlawful Burning.

Every burning, which is wilful and is not in pursuance of some public duty, is unlawful. An *involuntary burning*, by negligence or accident, is not a crime; nor is a wilful

burning criminal, when done *by competent authority* in order to impede a conflagration, stay a pestilence, or subserve some necessity of war. But *a burning, which is wilful and without authority*, will be unlawful, although the actor may not have intended to destroy the house by fire. A felon who, *in the perpetration of his felony*, employs means calculated to set fire to a house, or *one who burns his own house*, under circumstances which render it apparent that adjacent houses will also be burned, will, if such house or houses actually be consumed, be guilty of arson.

Read 4 Bl. Comm., p. 222.
3 Chitty C. L., pp. 1104, 1105.
2 Russ. Cr., pp. 549, 550.
2 Arch. Cr. Pr., pp. 723–727.
2 Whart. C. L., §§ 1663–1665.
2 Bish. C. L., §§ 14–16.
3 Greenleaf Ev., §§ 53, 56.

§ 422. Of Arson. The House.

A house is a building used for human habitation. If it were erected for that purpose but never yet occupied, or if, having been so occupied, it is now abandoned, it is not a house, in the sense in which that word is used in defining arson and burglary. But the *temporary absence* of its occupants does not take away its character as a dwelling. *A house includes* not only the building actually occupied as an abode, but all other buildings which immediately communicate therewith, or are in the same curtilage or common fence, or are within a reasonable distance from the dwelling, and, in their use, are subservient thereunto.

Read 4 Bl. Comm., pp. 221.
3 Chitty C. L., pp. 1105, 1106.
2 Russ. Cr., p. 552.
2 Arch. Cr. Pr., pp. 714–720.
2 Whart. C. L., §§ 1667–1670.
3 Greenleaf Ev., § 52.

§ 423. Of Arson. The Ownership of the House.

The ownership of a house, as regards this crime, is in him who has the legal right of occupation. A man cannot commit arson by burning a house in which he has a right to abide, whether he be the owner in fee, or a mere tenant for years or at will. But a *servant* or other person, temporarily residing in a house but not having the legal possession thereof, has no such ownership, neither has the owner of the fee as long as the actual right of occupation is in another.

Read 4 Bl. Comm., p. 221.
3 Chitty C. L., pp. 1106, 1107.
2 Russ. Cr., pp. 550, 551.
2 Arch. Cr. Pr., pp. 720-723.
2 Whart. C. L., §§ 1671, 1672, 1675-1677.
2 Bish. C. L., §§ 12, 13.
2 Bish. C. P., §§ 36-38.
3 Greenleaf Ev., §§ 54, 57.

§ 424. Of Burglary. The Breaking.

Burglary is the breaking and entering, in the night season, of the dwelling-house of another, with the intent to commit a felony therein. Six points are here to be considered: (1) The breaking; (2) The entering; (3) The night season; (4) The dwelling-house; (5) Its ownership; and (6) The felonious intent. *Breaking* is the removal of any portion of the house, which is relied upon as a security against intrusion, and which, as much as the nature of the case admits, actually serves as such security. Thus the opening of a door or window, or the removal of a screen or netting, is a breaking. Where, as in the case of a *chimney*, an aperture cannot be closed by any substance capable of being removed, an entrance through the aperture involves a breaking. But breaking does not neces-

sarily imply force. The mere lifting of a latch or of a window, the procuring of a door to be opened by *craft*, or by *intimidation* or by *conspiracy*, is breaking. To raise a window that is already partly open, to push back a door that already stands ajar, to walk or climb into an aperture already made, is, however, not a breaking. Breaking may be either for purposes of *egress or ingress;* for one who enters without breaking, in the night season, with felonious intent, completes his crime if, also in the night season, he breaks in order to go out. Breaking may be either of the outer wall of the house, or of those inner walls by which one part is separated from another.

Read 4 Bl. Comm., pp. 223, 226, 227.
Broom Comm., pp. 977, 979, 980.
1 H. P. C., pp. 551–555.
3 Chitty C. L., pp. 1093, 1094.
1 Russ. Cr., pp. 785–794.
2 Arch. Cr. Pr., pp. 263–277.
2 Whart. C. L., §§ 1531–1548.
2 Bish. C. L., §§ 90, 91, 96–100.
2 B. & H. L. C. C., pp. 43–66.
3 Greenleaf Ev., §§ 76, 77.

§ 425. Of Burglary. The Entering.

Entering consists in the insertion, into the interior of the house, of the whole body of the actor, or of a part thereof, or of something which is either connected with his body, or is under his immediate control, and is intended to be used in the commission of the felony. The thrusting of the hand, or of a cane or a hook, beyond the line, which severs the inside from the outside, in order to draw out goods, or of a pistol in order to demand the money of the occupant, is as complete an entry as if the burglar were within the room. But if tools, which are intended only for the break-

ing and not for the ulterior felony, fall or are thrust inside, it is no entry. The breaking and the entering must be related to each other, at least by a *community of intent;* for if the breaking be at one time for one purpose, and the entry be at another time and for another purpose, it is no burglary.

Read 4 Bl. Comm., pp. 226, 227.
Broom Comm., pp. 979, 980.
1 H. P. C., pp. 555, 556.
3 Chitty C. L., p. 1094.
1 Russ. Cr., pp. 794–797.
2 Arch. Cr. Pr., pp. 278–280.
2 Whart. C. L., §§ 1549–1553.
2 Bish. C. L., §§ 92–95.
3 Greenleaf Ev., § 78.

§ 426. Of Burglary. The House.

The dwelling-house, in burglary as in arson, signifies a building, which has been actually used for human habitation, and has not been permanently abandoned by its occupant. It embraces *all houses and outhouses*, within or without the curtilage, which are parcel of, and in their use are subservient to, the building used as an abode. When, *under the same roof*, there are some apartments used for residence and others occupied for purposes entirely different, as for stores or workshops, only the portions of the building used for residence are within the dwelling-house. Where *different families reside under one roof* but in different portions of the building, the portion of each family being distinct and separated from the rest and with a different outward entrance, each portion of the building is by itself a dwelling-house. So *suites of rooms* in a college, or in an inn of court, have been held to be dwelling-houses, as also rooms or lodgings in a private house, where the

actual owner of the house does not dwell under the same roof, or where he and his lodger enter by separate doors. But if there be but one external entrance, and the owner himself dwells in any part of such building, it constitutes but one dwelling-house.

Read 4 Bl. Comm., pp. 224–226.
Broom Comm., p. 978.
1 H. P. C., pp. 556–559.
3 Chitty C. L., pp. 1090–1092.
1 Russ. Cr., pp. 797–807.
2 Arch. Cr. Pr., pp. 281–290.
2 Whart. C. L., §§ 1555–1575.
2 Bish. C. L., §§ 104–108.
3 Greenleaf Ev., §§ 79, 80.

§ 427. Of Burglary. The Ownership of the House.

The ownership of a dwelling-house, in burglary as in arson, consists in the legal right of possession. The person who actually occupies a dwelling-house in his own right, and not as the guest or servant of another, is the owner thereof. *Separate dwelling-houses* under one roof are owned by those who occupy, as distinguished from the general owner of the whole; and the same is true of *separate lodgings* in a private house, where the general owner does not dwell therein, and where the lodgers have separate modes of entrance. *The dwelling-house of a wife*, who lives separated from her husband, is in the ownership of the husband.

Read 4 Bl. Comm., pp. 225, 226.
3 Chitty C. L., pp. 1096, 1097.
1 Russ. Cr., pp. 807–820.
2 Arch. Cr. Pr., pp. 291–306.
2 Whart. C. L., §§ 1577–1591.
2 Bish. C. P., §§ 137–139.
3 Greenleaf Ev., § 81.

§ 428. Of Burglary. The Night Season.

The night season is that period of the night, which intervenes between the total disappearance of daylight in the evening and its reappearance in the morning. *Daylight* is said to have disappeared when a man's face can no longer be discerned thereby. The presence or absence of *moonlight* is immaterial. The breaking and entering need not both be in *the same night:* if both are committed in the night season, and in pursuance of the same design, it is sufficient.

Read 4 Bl. Comm., p. 224.
1 H. P. C., pp. 550, 551.
3 Chitty C. L., pp. 1092, 1093.
1 Russ. Cr., pp. 820–822.
2 Arch. Cr. Pr., pp. 306–308.
2 Whart. C. L., §§ 1592–1597.
3 Greenleaf Ev., §§ 75, 83.

§ 429. Of Burglary. The Felonious Intent.

The breaking and entering must be with *intent to commit some felony* within the dwelling-house. Such felony may be murder, manslaughter, rape, arson, theft, robbery, or any statute-felony. This intent is *a specific intent*, and must be alleged and proved as a part of the criminal act. In the absence of such intent, the breaking and entering are mere trespasses.

Read 4 Bl. Comm., pp. 227, 228.
Broom Comm., pp. 981, 982.
1 H. P. C., p. 562.
3 Chitty C. L., p. 1095.
1 Russ. Cr., pp. 822–825.
2 Arch. Cr. Pr., pp. 308–312.
2 Whart. C. L., §§ 1598–1606.
2 Bish. C. L., §§ 109–117.
3 Greenleaf Ev., § 82.

§ 430. Of Larceny. The Taking and Carrying Away.

Theft or Larceny is the taking and carrying away of the personal property of another, with intent to steal the same. Four matters here demand attention: (1) The taking and carrying away; (2) The property; (3) Its ownership; and (4) The intent to steal. *Taking* is the forcible and wrongful prehension or grasping of an object. *Carrying away* is the wrongful removal of the object taken, from the place where it was when taken. The taking and carrying away, in larceny, are usually considered together under the name of *taking*, and, so considered, they consist in the forcible severance of the property, from the possession of the owner, against his will. This *severance must be complete*, but need be only for an instant and to the shortest distance possible; the mere lifting of an article out of its place being a taking. It must also be accomplished by some direct act of the taker, applying force to the object taken, either in the removal or reception thereof. But *the degree and kind of force* are immaterial; to lead or entice away a horse, or to accept a chattel which is delivered up through fear, are alike a taking. The severance must be *from the possession of the owner*. An article, abandoned by its owner, is not the subject of theft. But if he loses it by accident, or places it in the custody of another for a temporary purpose, it is still in his possession. Thus goods in the charge of *a servant*, as such, are in the possession of his master, and a taking and carrying away of them by the servant, with intent to steal, is theft. A bailment of goods by the owner, however, confers a special property therein upon the bailee, and vests the possession of them in him as against all other persons, including the bailor. *A bailee*, therefore, cannot steal the property of the bailor, unless by some misfeasance he first determines the bailment and, after that, takes and carries away the goods. The severance must also be *invito domino*, or against the owner's will. If the

owner consents thereto, even though his consent be obtained by fraud, it is no taking. But such consent must be to the severance of the property from his *possession*, as distinguished from a consent to the transfer of its *temporary custody*. For one, who by fraud or by persuasion, procures the owner to deliver to him an article, the owner not intending thereby to transfer the possession thereof, is guilty of a taking, if, after receiving it into his custody, he detains it against the owner's will.

Read 4 Bl. Comm., pp. 229–231.
Broom Comm., pp. 945, 949–953.
1 H. P. C., pp. 504–508.
3 Chitty C. L., pp. 917–920, 935–938.
2 Russ. Cr. Pr., pp. 2, 5–7, 19–62, 153–165.
2 Arch. Cr. Pr., pp. 375, 385–388, 404–428, 431–459.
2 Whart. C. L., §§ 1802–1817, 1840–1868.
2 Bish. C. L., §§ 758, 794–839, 853–883.
2 B. & H. L. C. C., pp. 181–204, 358–370.
3 Greenleaf Ev., §§ 150, 154–156, 161, 162.

§ 431. Of Larceny. The Property.

The property taken must be personal property. *Real property*, and things permanently annexed thereto, are not subjects of theft. If portions of the realty are severed from the mass thereof, and are thereby changed into personal property, such act of severance is not a theft, because, in their movable condition, these objects never were in the possession of their owner. But if this severance takes place at one time, and afterward such objects pass into the possession of their owner, a subsequent removal of them, with intent to steal, will be a theft. Thus if a person plucks apples from a tree, or tears a shutter from a house, and carries them immediately away, it is a trespass and no theft.

But if he lays the shutter or the apples on the ground of the owner, for a single instant after such severance, they pass into the possession of the owner in their movable condition, and the subsequent taking of them, with felonious intent, will be a theft. The property must not only be *personal property*, it must also be personal property *in possession*, as distinguished from such property *in action*. A *chose in action* is incapable of being stolen. Its very name implies that it is not *in*, and therefore cannot be taken *out of*, the possession of the owner. Bills, notes, bonds, and other instruments, which evidence the existence of such choses, are, however, frequently called choses in action, even by law-writers. Such instruments are not, at common law, subjects of theft, though generally made so by statute. The property taken must also be of some *intrinsic value*.

Read 4 Bl. Comm., pp. 232–236.
Broom Comm., pp. 946, 947.
1 H. P. C., pp. 510–512.
3 Chitty C. L., pp. 926–929.
2 Russ. Cr., pp. 62–86.
2 Arch. Cr. Pr., pp. 376–385.
2 Whart. C. L., §§ 1751–1768.
2 Bish. C. L., §§ 761–787.

§ 432. Of Larceny. The Ownership of the Property.

Ownership, in larceny as in other crimes, consists in the legal right of possession, and must reside in some one other than the taker. Things which can have no owner, as the corpse of a human being, animals of a base nature, or animals *feræ naturæ* and unreclaimed, cannot be stolen. Ownership is not devested either by the accidental loss of the property, or by the tortious and unlawful act of another. One person may have a general, and another a special, ownership in the same chattel. In such cases, the

taking of the property *by the general owner*, with intent to steal, will be a theft *from the special owner*, and the taking of it, with that intent, by a third person will be a theft from both owners. *Joint-tenants* and *tenants in common* have no ownership as against each other, nor has a husband any ownership as against his wife. The ownership of property attached, or held under an execution before sale, is still in the general owner, and property in the possession of an agent belongs, as against all third parties, to the principal. Clothing, worn by children, is owned both by them and by their parents.

Read 4 Bl. Comm., pp. 235, 236.
Broom Comm., pp. 947, 948.
1 H. P. C., pp. 512–515.
2 Russ. Cr., pp. 86–99.
2 Arch. Cr. Pr., pp. 357–368, 394–396, 431–460.
2 Whart. C. L., §§ 1818–1836.
2 Bish. C. L., §§ 788–793.

§ 433. Of Larceny The Felonious Intent.

The intent to steal is that which distinguishes theft from a mere trespass. This intent is called the *animus furandi*, and has been said to characterize the taking as a taking *lucri causa*, or for the sake of gain. The intent to steal embraces two intents: (1) The intent to permanently deprive the owner of his possession of the property; and (2) The intent to derive some benefit, actual or imaginary, to the taker. *A taking with intent to return* after using is not the intent to steal. Thus, where a servant took his master's goods and pawned them for his own benefit, but with the intention to redeem and restore them, it was held to be no theft. So where a thief, without permission, takes a horse merely to aid him in his flight with other property which he has stolen, and with the intent to abandon the horse and suffer him to return to the owner, it is not a

stealing of the horse. The taker must also intend some advantage to himself, but such advantage need not be of a pecuniary character, nor need it be a real advantage as distinguished from an imaginary one. Thus where a woman took and destroyed the letter of another, which she feared might injure her character; where a servant took his master's beans to save himself the trouble of preparing other food for the master's horses; where a man killed the horse of another to prevent it from being used as an evidence against him; where one stole a towel to make a present of it to another; in all these cases, and in many others similar thereto, it has been held that the taking was for the sake of gain, and that a complete intent to steal existed. This doctrine of *lucri causa* has, however, been the subject of much discussion by law-writers; and the courts, in which it has been considered, are not harmonious in their decisions. The *intent* to steal must exist *at the time of the taking*. If the taking be without intent to steal, that is, if the intent to steal is first formed in the mind of the taker after the severance of the object from the possession of the owner, there is no theft. And, on the other hand, if the taking be with the intent to steal, the theft is complete even though afterwards the thief repent and return the property. The intent to steal is *a specific intent*, and must be alleged and proved like any other part of the criminal act.

Read 4 Bl. Comm., p. 232.
Broom Comm., pp. 953-960.
1 H. P. C., pp. 508, 509.
3 Chitty C. L., pp. 920-924.
2 Russ. Cr., pp. 7-19.
2 Arch. Cr. Pr., pp. 389-394.
2 Whart. C. L., §§ 1769-1801.
2 Bish. C. L., §§ 840-852.
2 B. & H. L. C. C., pp. 409-432.
3 Greenleaf Ev., §§ 157-160.

§ 434. Of Robbery. The Element of Larceny.

Robbery is the theft of property from the person, or in the presence, of the owner, accomplished by violence, or by putting him in fear. Three things are here to be regarded: (1) The theft; (2) The person or presence of the owner; and (3) The violence, or putting him in fear. *The theft*, in robbery, consists of the same elements, and is governed by the same rules, as when perpetrated out of the presence of the owner, and without violence or putting him in fear. There must be a taking and carrying away, from the possession of the owner and against his will, of personal property, with the intent to steal.

Read 4 Bl. Comm., p. 242.
1 H. P. C., pp. 532, 533.
3 Chitty C. L., p. 802.
1 Russ. Cr., pp. 867, 869-873.
2 Arch. Cr. Pr., p. 524.
2 Whart. C. L., §§ 1695, 1697.
2 Bish. C. L., §§ 1156-1165.
3 Greenleaf Ev., §§ 223-227.

§ 435. Of Robbery. The Person or Presence of the Owner.

In robbery, however, the property must be taken *from the person, or in the presence of, the owner.* How far the limits of this presence extend is not easily determined. It includes all property which is in the sight of the owner, and under his immediate and personal care and protection. It is also held that property, however near to him, if not actually in his sight or under his control, is not in his presence. Thus where a master's goods were stolen by violence from his servant in the master's presence; where a traveller was assaulted by a thief, who then took away his horse standing by him; and where a person under fear threw his purse

by the wayside, and his assailant, immediately and in his sight, picked it up; in all these cases, the act was adjudged to be a taking from the presence of the owner. And, on the other hand, where thieves struck money from the owner's hand and it fell upon the ground, whence they immediately took it up, it not appearing that he saw them do so, or that the money remained within his control, it was held to be no robbery.

Read 4 Bl. Comm., p. 242.
1 H. P. C., pp. 532–534.
3 Chitty C. L., pp. 802, 803.
1 Russ. Cr., pp. 873, 874.
2 Arch. Cr. Pr., pp. 506–508, 528–532.
2 Whart. C. L., §§ 1696, 1701.
2 Bish. C. L., §§ 1177, 1178.
3 Greenleaf Ev., § 228.

§ 436. Of Robbery. The Violence or Putting in Fear.

The property must be taken either *by violence or by putting in fear*. When the taking is by violence, the violence must be some other exercise of physical force than that which is necessarily involved in the act of taking. It consists in an *attack upon the person* of the owner, in distinction from the mere attack upon his property. Thus where an object is snatched from the hand of the owner, or is stealthily extracted from his pocket, there is no robbery. But if it be attached by a chain to his neck, so that the taking of it applies force to his person, or if there be a struggle for its possession before the taking, there is sufficient violence to make the theft a robbery. The violence, as well as putting in fear, must, however, either *precede or accompany the taking;* for a personal injury, committed after a taking without violence, does not alter the original character of the theft. *To put in fear* is to excite, in the mind of the

owner, a reasonable apprehension that physical injury will be inflicted upon him, or that he will be prosecuted for the crime of sodomy. This fear may be excited by threats, or by acts which manifest the intent to commit violence. The property must be parted with by the owner, while he is under the influence of such fear, but it need not be at the same time that the threats were made against him. Thus where a thief compelled a man to swear that he would bring a sum of money to him at a certain place, and threatened him with death if he failed to do so, the delivery of the money at a subsequent time under such fear, and its acceptance by the thief, was held to be a robbery. So where, under fear of a prosecution for sodomy, a man promised to pay money, and afterwards, under the influence of the same fear, actually paid it, the taking of the money was considered robbery. It has been also decided that the threatened injury need not be to the person of the owner only, but that threats of violence to his child, if made in his presence and for the purpose of theft, are of the same effect as if the threat had been of violence to himself.

Read 4 Bl. Comm., pp. 242, 243.
1 H. P. C., p. 534.
3 Chitty C. L., pp. 803–805.
1 Russ. Cr., pp. 874–900.
2 Arch. Cr. Pr., pp. 508–520, 524–528.
2 Whart. C. L., §§ 1698–1700, 1702.
2 Bish. C. L., §§ 1166–1176.
3 Greenleaf Ev., §§ 229–235.

CHAPTER VI.

OF MISDEMEANORS AND STATUTE-FELONIES.

§ 437. Of Statute-Felonies.

All crimes, which are neither treason nor felony, are misdemeanors. *Statute-felonies* are either misdemeanors, whose prosecution and punishment are, by statute, made to follow the procedure in felony, or are acts, not before known as crimes, which, by statute, are made felony. No crime, however, can be a felony unless it is such at common law, or is expressly declared to be so by a statute.

Read 1 H. P. C., pp. 703–708.
1 Bish. C. L., §§ 235, 615, 618, 620, 622, 935.

§ 438. Of the Classes of Misdemeanors and Statute-Felonies.

Misdemeanors and statute-felonies have been divided into nine classes: (1) Crimes against Public Justice; (2) Crimes against Public Peace; (3) Crimes against Public Trade; (4) Crimes against Public Health; (5) Crimes against Public Policy; (6) Crimes against the Persons of individuals; (7) Crimes against the Property of individuals; (8) Attempts; and (9) Solicitations. This classification is not entirely accurate, for there are several offences, which attack more than one public interest or right, and therefore belong to two or more of these divisions. With this exception, however, it presents, as well as any other

that can be devised, the distinctive characteristics by which these crimes are separated from each other.

Read 4 Bl. Comm., pp. 128, 177.
1 Bish. C. L., §§ 444–597.

§ 439. Of Perjury.

Crimes against public justice are those crimes by which the course of legal proceedings is perverted, impeded, or prevented. The principal crimes of this class are the following: Perjury; Bribery; Escape; Prison-Breach; Rescue; Receiving stolen goods; Compounding; Falsifying Records; Obstructing Process; Barratry; Maintenance; Champerty; Conspiracy; Embracery; Official Negligence; Oppression; Extortion; Misprision of Felony. *Perjury* is the wilful giving of false testimony under oath, before a competent tribunal, upon a point material to the issue. *Testimony is wilfully false* when the person testifying wilfully misrepresents the matter as it lies in his own mind, as when he testifies to what he knows is not true, or to what he does not know to be true, or to what he believes to be false. It is the corrupt intention which constitutes this crime; and one who states the fact as it really is, if he believes that in so doing he is stating falsely, gives false testimony. But no statement, however untrue, if made under a *bona fide* mistake, is false testimony, even if such mistake were the result of great carelessness. *A person is under oath* whenever he has been sworn or affirmed in legal form by an officer duly empowered so to do. *A competent tribunal* is one, which by law has cognizance of judicial proceedings, though, in some States, it includes all authorities, by whom the truth of any issue, involving temporal disadvantage, may be investigated and decided. Testimony is upon a point *material* to the issue, whenever it is calculated to influence the tribunal in its decision of the

issue, whether such influence be great or small. *Subornation of perjury* is the procuring of another person to commit perjury.

Read 4 Bl. Comm., pp. 137–139.
2 Chitty C. L., pp. 302–318.
2 Russ. Cr., pp. 596–603, 622–669.
2 Arch. Cr. Pr., pp. 949–979.
2 Whart. C. L., §§ 2198–2287.
1 Bish. C. L., §§ 320, 437.
2 Bish. C. L., §§ 1014–1056, 1197–1199.
3 Greenleaf Ev., §§ 188–202.

§ 440. Of Bribery.

Bribery is the giving or receiving of any valuable thing, in order that the receiver may be corruptly influenced thereby, in the discharge of some public duty. This crime is committed equally by the giver and by the receiver. The acts, which it is designed to influence, need not be judicial acts; to procure a public appointment by means of an undue reward, and to corruptly obtain votes for a public office, are bribery.

Read 4 Bl. Comm., pp. 139, 140.
1 Russ. Cr., pp. 147–160.
2 Arch. Cr. Pr., pp. 903–906.
2 Bish. C. L., §§ 85–89.
3 Greenleaf Ev., §§ 71–73.

§ 441. Of Escape. Prison-Breach. Rescue.

Escape is the flight from custody of a person, who is under lawful arrest and imprisonment. It may also be committed by an officer, who either connives at the flight of a person from his custody, or negligently permits him to escape. The person escaping, and the officer who negligently permits it, are guilty of a misdemeanor, but an officer, who connives at an escape, becomes guilty of the

same degree of crime as that with which his prisoner was charged. *Prison-Breach* is the forcible breaking out of a lawful place of imprisonment, by a person who is lawfully confined therein, and who, by means of such breaking, effects his escape therefrom. The breaking, though actual, need not be intentional, but it must result from the force used in escaping. It must also be performed by the prisoner himself, or by others through his procurement, for if he escapes through an aperture which was broken without his consent, it is not prison-breach in him; nor is it prison-breach if he himself breaks and does not escape. To break from prison through necessity, as if the building be on fire, is not a crime. *Rescue* is the freeing of another, by force, from a lawful arrest or imprisonment. The rescuer thereby becomes guilty of the same degree of crime as that with which the person rescued was charged.

Read 4 Bl. Comm., pp. 130–132.
1 H. P. C., pp. 590–612.
1 Russ. Cr., pp. 416–436.
2 Arch. Cr. Pr., pp. 1074–1085.
2 Whart. C. L., §§ 2606–2615 f.
1 Bish. C. L., §§ 218, 316, 321.
2 Bish. C. L., §§ 1064–1106.

§ 442. Of Receiving Stolen Goods.

Receiving stolen goods, knowing them to have been stolen, is a crime, whenever such receiving was for the purpose of concealment or of profit. The receiver must have had manual possession of, or an actual control over, the goods, and must also have received them from the thief himself, and not from some other intermediate receiver.

Read 4 Bl. Comm., pp. 132, 133.
3 Chitty C. L., pp. 951–959.
2 Arch. Cr. Pr., pp. 653–675.
2 Whart. C. L., §§ 1888–1903.
1 Bish. C. L., §§ 567, 694, 785.
2 Bish. C. L., §§ 1137–1142.

§ 443. Of Compounding Crime.

Compounding is the agreement of the injured party not to prosecute for the offence, in consideration of some pecuniary advantage. Thus where the owner of stolen goods receives the same from the thief, under a contract not to inform or appear against him, or where he takes a note in consideration that he will not prosecute, it is a compounding. The gist of this offence is the concealment of the crime, and abstaining from prosecution, to the detriment of the public.

Read 4 Bl. Comm., pp. 133, 134, 136.
1 Russ. Cr., pp. 131–134.
2 Arch. Cr. Pr., pp. 1065–1067.
2 Whart. C. L., §§ 2505–2507.
1 Bish. C. L., §§ 267–276, 604, 694, 699, 709–715.
2 B. & H. L. C. C., pp. 216–247.

§ 444. Of Falsifying Records.

Falsifying Records is the wilful and fraudulent removal, suppression, or alteration of any public record. The law gives the highest credit to all public records, whether of a judicial or ministerial character; and any alteration thereof, not made under competent authority and for the purpose of properly correcting the same, is a crime of great magnitude. Thus to insert in, or erase names from, an indictment, to make or use a false affidavit, to change the parties or descriptions in the record of a deed, are such falsifications as amount to crime. Some writers treat this crime under the head of forgery.

Read 4 Bl. Comm., p. 128.
2 Russ. Cr., p. 414.

§ 445. Of Obstructing Process.

Obstructing Process consists in any act which is designed to, and actually does, prevent or hinder the officers of the law in the performance of their duties. This obstruction may be offered to the service either of civil or of criminal process; and, when offered to the service of criminal process, makes the actor a participant in the original crime, and liable to its penalty.

Read 4 Bl. Comm., p. 129.
1 Russ. Cr., pp. 408–415.
2 Arch. Cr. Pr., pp. 81–87.
1 Bish. C. L., §§ 340, 440, 464, 465, 696, 697.
2 Bish. C. L., §§ 1009–1013.

§ 446. Of Barratry.

Barratry is the habitual moving or exciting of quarrels between other persons, whether at law or otherwise. This crime cannot be committed by a single act, or by a series of acts constituting but one transaction. At least three instances are necessary, but whether three are always sufficient is still a question. The person guilty of this crime is called a *common barrator*, and, if he be an attorney-at-law, he is liable to be disbarred.

Read 4 Bl. Comm., p. 134.
1 Russ. Cr., p. 184.
2 Arch. Cr. Pr., pp. 1069–1071.
2 Bish. C. L., §§ 63–69.
3 Greenleaf Ev., §§ 66, 67.

§ 447. Of Maintenance.

Maintenance is the giving of aid, to either party in a suit, by a third person who has no legitimate interest therein. Such aid may be by the furnishing of money, or by the

hiring of counsel, or by giving to the party public countenance and support. The existence of certain relationships, between such third persons and the party to the suit, will, however, justify such assistance. Thus a father may aid the son, or a son the father; a husband may assist his wife, or a master his servant; and any one may aid a poor man in a suit to regain his right.

Read 4 Bl. Comm., pp. 134, 135.
1 Russ. Cr., pp. 175–178.
2 Arch. Cr. Pr., pp. 1072, 1073.
1 Bish. C. L., §§ 307, 541.
2 Bish. C. L., §§ 121–130.
3 Greenleaf Ev., §§ 180–183.

§ 448. Of Champerty.

Champerty is the giving of aid to either party in a suit, by a third person, under an agreement with such party that the proceeds of the suit, if any there be, shall be divided between them. Thus the agreement of an attorney to collect, by suit, a claim or claims, and take a certain proportion of the amount collected, or a bargain that if expense of the suit be borne by a third person, he shall have a percentage of the result, is champerty. Such agreements are void, and the recompense contracted for cannot be recovered by law. Akin to champerty is the buying or selling of a doubtful or pretended title to lands, in order that the buyer may carry on the suit, when the seller does not think it worth his while so to do. Such purchase and sale must be with knowledge of the impediment.

Read 4 Bl. Comm., p. 135.
1 Russ. Cr., pp. 178–181.
2 Arch. Cr. Pr., p. 1073.
1 Bish. C. L., §§ 307, 541.
2 Bish. C. L., §§ 131–140.
3 Greenleaf Ev., §§ 180–183.

§ 449. Of Conspiracy.

Conspiracy is the agreement of two or more persons to do an unlawful act, or to do a lawful act in an unlawful manner. A conspiracy cannot be committed by one person alone, nor by husband and wife alone, for they are legally but one. There must be between the conspirators a *concert* of will and endeavor, not a mere *coincidence* of intention or attempt. The agreement must be to do some act in itself a crime, or some act which becomes a crime by the manner in which it is undertaken. Thus an agreement to do an act which is immoral but not illegal, or to effect a purpose not immoral or illegal in itself, but prejudicial to the public when done by the confederation of many, or to extort money or injure reputation by acts which in an individual are not criminal, or to cheat and defraud, or to impoverish and ruin, a person by means not indictable in an individual, is a conspiracy, because, whatever the character of the act agreed to be done, the combination of numbers to effect it is a thing dangerous to the public, and not to be permitted by the law.

Read 4 Bl. Comm., pp. 136, 137.
3 Chitty C. L., pp. 1138–1144.
2 Russ. Cr., pp. 674–705.
2 Arch. Cr. Pr., pp. 1044–1061.
2 Whart. C. L., §§ 2287–2361.
1 Bish. C. L., §§ 432, 592, 633–639, 767, 792, 801, 814.
2 Bish. C. L., §§ 169–240.
3 Greenleaf Ev., §§ 89–99.

§ 450. Of Embracery.

Embracery is the attempt of any person to corruptly influence a jury. Any influence which is exerted by any person, whether himself a juror or not, either upon single jurors or on the whole panel, by means of any promises,

threats, persuasions, gifts, entreaties, or in any other way than by the evidence and arguments of counsel in open court, is a corrupt influence. The giving of a reward to a juror or jurors, after verdict, partakes of the same character.

Read 4 Bl. Comm., p. 140.
1 Russ. Cr., pp. 182, 183.
2 Arch. Cr. Pr., pp. 906, 907.
2 Bish. C. L., §§ 384–389.
3 Greenleaf Ev., §§ 100, 101.

§ 451. Of Official Negligence.

Official negligence is the voluntary failure of justices, sheriffs, constables, coroners, and other civil officers, to discharge those public duties which are imposed on them by the law. Where the duties are judicial in their character, the officer is not criminally liable unless he is corrupt, but where the duty is ministerial only, the neglect of it is always indictable. Legislators, judges of courts of record acting judicially, jurors, and such high officers of government as are entrusted with responsible discretionary duties, are not civil officers within the definition of this crime.

Read 4 Bl. Comm., p. 140.
1 Russ. Cr., pp. 135, 138–140, 145.
2 Arch. Cr. Pr., pp. 591–595.
2 Whart. C. L., §§ 2524–2528.
2 Bish. C. L., §§ 971–982.

§ 452. Of Oppression.

Oppression is the tyrannical partiality of any judge, justice, or other magistrate, in the administration of his office. To constitute this crime the acts of partiality must be corrupt, and proceed from dishonest motives, as from

fear or favor, and not from a mere error of judgment or mistake of law.

Read 4 Bl. Comm., p. 141.
1 Russ. Cr., pp. 135–137.
2 Whart. C. L., §§ 2517, 2518.

§ 453. Of Extortion.

Extortion is the corrupt demanding or taking by an officer, under color of his office, of any fee which is not due to him, or which exceeds what is due. *Any officer*, whether a justice, sheriff, attorney, tax-collector, or clerk of courts, and whether *de jure* or *de facto*, may commit this crime. *The thing extorted* must be taken as a fee; that is, demanded or received by the officer under color of his office. *The extortion* may be either by claiming a reward where the service is by law made gratuitous, or by demanding an amount greater than the law fixes for the service, or by refusing to perform the service till the fee is paid, in cases where the law does not entitle the officer to be paid in advance. *The motive* must be corrupt; for where the reward is paid voluntarily, in return for real benefits conferred by extra exertions of the officer, or where the officer acts in good faith under a mistake, there is no extortion. Extortion may be committed against a county or a corporation, as well as against an individual.

Read 4 Bl. Comm., p. 141.
1 Russ. Cr., pp. 142–144.
2 Arch. Cr. Pr., pp. 596–602.
2 Whart. C. L., §§ 2519–2523.
1 Bish. C. L., §§ 573, 587.
2 Bish. C. L., §§ 390–408.

§ 454. Of Misprision of Felony.

Misprision of felony is the neglect of any person, who knows that a felony has been or is about to be committed, to give such information as may prevent such felony, or bring the felon to justice. *Mere knowledge* of the felony, without assent to it, is enough to make the concealer guilty of this crime. If, by his assent, he contributes thereto, he becomes a partaker in the felony.

Read 4 Bl. Comm., p. 121.
1 Russ. Cr., p. 131.
1 Bish. C. L., §§ 604, 624, 716–722, 895.

§ 455. Of Riot. Rout. Unlawful Assembly.

Crimes against public peace are those crimes, by which the peace and security of the public are disturbed. The principal offences of this class are the following: Riot; Rout; Unlawful Assembly; Carrying Arms; Challenging; Duelling; Affray; Disturbing Meetings; Forcible Entry and Detainer; and Libel. *Riot* is the doing of some unlawful act of violence, or of some lawful act in a violent and tumultuous manner, by three or more persons, who are congregated together for that purpose. The act must be one calculated to create apprehension of danger, in the minds of persons other than the rioters. It need not be unlawful; for, if it be ever so lawful, the doing of it in a turbulent manner, calculated to excite terror, amounts to riot. Nor is it necessary that the intent to do the riotous act exist before the actual assembling of the rioters; for a peaceable and lawful assembly may, by the subsequent formation of a riotous design, and the commission of the riotous act in pursuance thereof, become a riot. *All persons who join* the assemblage while it is engaged in a riot, and assist therein, are as truly rioters as if they had co-operated with it from the begin-

ning. All persons who are present, and concur in the acts of the assembly, are also responsible therefor. *Rout* is the congregating together of three or more persons, for the purpose of doing some act which, if done, would amount to riot, and the doing by them of something in reference thereto. It agrees in all respects with riot, except that it may be a complete offence without the commission of the intended act. *Unlawful Assembly* is the congregating together of three or more persons, for the purpose of doing some act which, if done, would amount to riot. Such an assembly need not intend any specific mischief; if it is of a character calculated to excite public terror and alarm, it is unlawful.

Read 4 Bl. Comm., pp. 146, 147.
1 Russ. Cr., pp. 266–274.
2 Arch. Cr. Pr., pp. 934–945.
2 Whart. C. L., §§ 2473–2493.
1 Bish. C. L., §§ 534, 537, 632, 637, 658, 795, 875.
2 Bish. C. L., §§ 56, 226, 653–655, 691, 1143–1155, 1183–1186, 1256–1259.
3 Greenleaf Ev., §§ 216–222.

§ 456. Of Carrying Arms.

Carrying Arms is the going about armed with dangerous or unusual weapons, to the terror of the public. The Constitution of the United States secures the right to keep and bear arms, such as are used for purposes of war, in defence of the citizens or the state. It gives, however, no right to carry unusual weapons, or to carry any weapon in a tumultuous manner and to the disturbance of the public peace.

Read 4 Bl. Comm., p. 149.
1 Bish. C. L., § 540.
Cooley Const. Lim., p. 350.
Cooley Const. Law, pp. 270–272.

§ 457. Of Challenging. Duelling.

Challenging is the exciting, inviting, or provoking of another to fight. *Duelling* is the agreement of two or more persons to fight, and their actual fighting in pursuance of such agreement. A challenge may be verbal or written, and may be expressed in any words which are intended to be understood, and are understood, as an invitation to fight. Mere words of abuse, however, do not constitute a challenge. When *death* results *from a duel*, it is murder in the person killing; and all persons present, and giving countenance to the duel, are guilty of the same crime.

Read 4 Bl. Comm., pp. 150, 199.
1 Russ. Cr., pp. 297, 298.
2 Whart. C. L., §§ 2674–2685 b.
1 Bish. C. L., §§ 540, 654.
2 Bish. C. L., §§ 311–317.

§ 453. Of Affray.

Affray is the fighting of two or more persons in a public place, to the terror of the public. *A public place* is a place to which people in general are, at the time, privileged to resort, without an invitation. A fight in a private place, though in the presence of others, is not an affray. *Mere words* are not such fighting as to constitute an affray; actual or attempted violence is necessary. The terror may be actual, or it may be presumed by law from the fighting itself, if calculated to excite it. An affray may be aggravated by the circumstances under which it is committed, as if it be dangerous in its tendency, or occur in a court of justice.

Read 4 Bl. Comm., pp. 145, 146.
1 Russ. Cr., pp. 291–296.
2 Arch. Cr. Pr., pp. 945–948.
2 Whart. C. L., §§ 2494–2498.
1 Bish. C. L., § 535.
2 Bish. C. L., §§ 1–7.

§ 459. Of Disturbing Meetings.

Disturbing Meetings is the wrongful interruption of persons, who are assembled for a lawful purpose. All persons have a right peaceably to assemble for worship, for political discussion, or for any other purpose not in itself unlawful, and the invasion of this right by others is an indictable offence. What amounts to a disturbance depends upon the circumstances of each individual case, for what is proper in one kind of meeting would not be permissible in another. But the interruption must be wilful and designed, and not the result of accident or mistake.

Read 1 Russ. Cr., p. 299.
1 Bish. C. L., § 542.
2 Bish. C. L., §§ 301–310.

§ 460. Of Forcible Entry and Detainer.

Forcible Entry is an entry upon land which is in the peaceable possession of another, with such an array of force as to cause terror in those who are present opposing. *Forcible Detainer* is the detaining of the possession of land, from a person rightfully entitled thereto, by such force as to excite terror in those who are present claiming possession. *The premises entered upon* must be in the peaceable possession, as distinguished from the bare custody, of another; and *the act of entry or detainer* must be accompanied by such violence of conduct or language, or be effected by such an array of numbers, as to excite a reasonable apprehension, in the minds of those who oppose it, that bodily harm to themselves, or a breach of the public peace, will result, if they do not cease to hold or claim their possession. But *the violence* may be offered either to the property or to the person, and either upon the premises or apart therefrom, provided it is coupled

with a claim to the possession of the land, and with a design thereby to enforce such claim.

Read 4 Bl. Comm., p. 148.
3 Chitty C. L., pp. 1120–1123.
1 Russ. Cr., pp. 304, 307–316.
2 Arch. Cr. Pr., pp. 330–340.
2 Whart. C. L., §§ 2013–2055 b.
1 Bish. C. L., §§ 536–538.
2 Bish. C. L., §§ 489–516.

§ 461. Of Libel.

Libel is the wilful and malicious publication, in a permanent and visible form, of some matter tending to injure the reputation of another. It involves the same acts as the private wrong of the same name.

Read 4 Bl. Comm., pp. 150–153.
3 Chitty C. L., pp. 866–877.
1 Russ. Cr., pp. 220–264.
2 Arch. Cr. Pr., pp. 195–253.
2 Whart. C. L., §§ 2535–2605 a.
1 Bish. C. L., §§ 204, 221, 308, 319, 591, 734, 761.
2 Bish. C. L., §§ 905–949.
1 B. & H. L. C. C., pp. 145–157.
2 B. & H. L. C. C., pp. 432–445.
3 Greenleaf Ev., §§ 164–179.

§ 462. Of Cheating. Embezzlement. False Pretences.

Crimes against public trade are crimes, by which the freedom and security of public trade are restricted or impaired. The principal crime of this class is Cheating. *Cheating* is the perpetration of a fraud, injurious to the person or estate of another, by means against which common prudence cannot guard. *Mere words*, whether spoken or written, however false, do not amount to a cheat. There

must be some visible *symbol or token*, of such a nature that, according to the customs of society, all persons are supposed to place confidence therein. Thus false weights or measures, false dice, worthless bank-bills, forged instruments, such as deeds, orders, notes or receipts, are tokens, the use of which, in defrauding another, makes such fraud a cheat. The person defrauded must have acted in consequence of his reliance on the truth of such token or symbol, for if his consent to the transaction was induced by other motives it is not a cheat. *Embezzlement* and *False Pretences* are fraudulent acts of one person, by which injury is done to another, but which do not amount to cheats at common law. They are made criminal both by English and American statutes, and the details of the crimes must be gathered from the statutes themselves. In general terms, however, *embezzlement* may be defined as the fraudulent conversion of property, by a person to whom it has been entrusted by the owner; and *false pretences* as the obtaining of the personal chattels of another, by means of such false representations, in regard to existing facts, as induce the owner to part with his property.

Read 4 Bl. Comm., pp. 157, 158.
3 Chitty C. L., pp. 994–999.
2 Russ. Cr., pp. 167–234, 275–313.
2 Arch. Cr. Pr., pp. 560–590, 603–652.
2 Whart. C. L., §§ 1905–1961, 2056–2162 h.
1 Bish. C. L., §§ 257, 438, 567, 571, 582, 584–586.
2 Bish. C. L., §§ 141–168, 318–383, 409–488.
3 Greenleaf Ev., §§ 84–88.

§ 463. Of Nuisances to Health.

Crimes against public health are those crimes, by which the physical health of the people at large is endangered or impaired. The sale of unwholesome provisions, the de-

filement of wells or springs of drinking-water, the bringing into a public place of persons or animals afflicted with infectious diseases, are the principal crimes of this class.

Read 4 Bl. Comm., pp. 161, 162.
1 Russ. Cr., pp. 105–110.
1 Bish. C. L., §§ 489–494.

§ 464. Of Bigamy.

Crimes against public policy are those crimes, by which the decency, morals, or good order of society are violated. The principal crimes of this class are: Bigamy; Blasphemy; Profanity; and Public Nuisances. *Bigamy* consists in the contracting of a marriage, during the continuance of a prior lawful marriage relation. *The prior marriage* must have been valid, or, if voidable, not avoided, and must not have been dissolved either by death or by divorce. After seven years absence, unheard-from, of one party to a marriage, the other may presume the death of the one absent, and may contract another marriage without incurring the guilt of bigamy. *The second marriage* must have been so contracted that it would have been valid, but for the existence of the former.

Read 4 Bl. Comm., pp. 163–165.
1 Russ. Cr., pp. 185–190, 208–210, 217–219.
2 Arch. Cr. Pr., pp. 1023–1033.
2 Whart. C. L., §§ 2616–2642.
1 Bish. C. L., § 502.
3 Greenleaf Ev., §§ 203–208.

§ 465. Of Blasphemy. Profanity.

Blasphemy is any reproach, oral or written, wilfully cast upon God, his name, attributes, or religion. Any words calculated and designed to impair and destroy the reverence, respect, and confidence, due to God as the creator,

governor, and judge of the world, such as a denial of his being or providence, or any profane and malicious scoffing at the Holy Scriptures, exposing them to contempt and ridicule, or any other declarations which tend to subvert religion and piety, are blasphemy. *Profanity* consists in the use of words which import an imprecation of future divine vengeance.

Read 4 Bl. Comm., pp. 59, 60.
1 Bish. C. L., § 498.
2 Bish. C. L., §§ 73–84.
3 Greenleaf Ev., §§ 68–70.

§ 466. Of Public Nuisances.

A Public Nuisance is any act or omission, which unlawfully annoys or injures the public. *An annoyance or injury is public* when it is committed in a public place, or against a number of persons, and is, in its nature, calculated to injure or annoy all who come within its influence. The number of persons or families, necessary to constitute the public, is at least three. The principal acts or omissions, which are indictable as nuisances, are these: Keeping a bawdy-house, or house of ill-fame; Keeping a disorderly-house, or house where people resort to the disturbance of the public; Eaves-dropping; Wilful exposure of the person in a public place; Keeping a public gaming-house; Public Drunkenness; Public Lewdness; Immoral Exhibitions; Carrying on trades injurious to the public; Obstructing public highways or navigable waters.

Read 4 Bl. Comm., pp. 167–169.
1 Russ. Cr., pp. 317–407.
2 Arch. Cr. Pr., pp. 980–1023.
2 Whart. C. L., §§ 2362–2428.
1 Bish. C. L., §§ 227, 243, 244, 531, 1071–1151.
3 Greenleaf Ev., §§ 184–187.

§ 467. Of Assault. Battery. Mayhem.

Crimes against the persons of individuals are those crimes, by which the rights of personal security and personal liberty are violated. They are principally the following: Assault; Battery; Mayhem; False Imprisonment; and Kidnapping. *An Assault* is a manifestation, by acts, of a present purpose to do unlawful physical violence to another. *Battery* is the actual doing of unlawful physical violence to another. These crimes involve the same acts as the private wrongs, which are called by the same names. *Mayhem* is the doing of such physical violence to the person of another, as to render him less able, in fighting, to defend himself or annoy his enemy. To put out the eye, to cut off the hand or foot or any part thereof, to break a bone in the hand, to crush the mouth or head, to pull out the tongue, to break the fore-teeth, to castrate a man, to burn or sear a limb so as to wither and weaken it, are mayhems. But to cut off the nose or ears, or destroy the back-teeth, are not mayhems.

Read 4 Bl. Comm., pp. 205–208, 216, 217.
3 Chitty C. L., pp. 784–787.
1 Russ. Cr., pp. 719, 720, 750–759.
2 Arch. Cr. Pr., pp. 11–17, 39–76.
2 Whart. C. L., §§ 1171–1175, 1241–1295.
1 Bish. C. L., §§ 259, 260, 470, 548.
2 Bish. C. L., §§ 22–62, 70–72, 1001–1008.
3 Greenleaf Ev., §§ 58–65.

§ 468. Of False Imprisonment. Kidnapping.

False Imprisonment is the unlawful detention of the person of another. It involves the same acts as the tort which is known by the same name. *Kidnapping* is the unlawful removal of a person from his own state or country, against his will. Actual force is not necessary; if the

removal be accomplished by threats, it is sufficient. Nor is resistance, on the part of the person kidnapped, necessary; the carrying away of a child too young to consent, or of any person while in a state of insensibility and unable to resist, or whose resistance is overcome by menaces, constitutes the crime.

Read 4 Bl. Comm., pp. 218, 219.
2 Arch. Cr. Pr., pp. 91–94, 133–140.
2 Whart. C. L., §§ 1202–1213.
2 Bish. C. L., §§ 26, 56, 746–756.

§ 469. Of Forgery.

Crimes against the property of individuals are those crimes, by which the right of private property is violated. The principal crimes of this class are: Forgery; Counterfeiting; Malicious Mischief; and Piracy. *Forgery* is the false and fraudulent making or alteration of any writing, which, on its face, imports a legal obligation. *Any form of instrument*, by which one person can become legally obligated to another, is a writing subject to forgery. *Any alteration* of such an instrument, in any particular whereby its legal effect is varied, is a sufficient alteration to constitute a forgery. Such *alteration is false* when made by any person having no lawful right so to do; and *is fraudulent* when made with intent that the false instrument shall be used or received as valid. The *crime is completed* by the making or alteration of the instrument with intent to defraud, although no one may be in fact defrauded. *Counterfeiting* is the making of false coin in the similitude of the genuine. The coin need not be uttered or used as money, but it must be so far finished as to be capable of such use. It must be base or spurious,

and its resemblance to the genuine must be so close, as to be likely to deceive a person using ordinary caution.

Read 4 Bl. Comm., pp. 247–250.
3 Chitty C. L., pp. 1022–1044.
1 Russ. Cr., pp. 54–85.
2 Russ. Cr., pp. 318–408.
2 Arch. Cr. Pr., pp. 797–881, 909–916.
2 Whart. C. L., §§ 1418–1510.
1 Bish. C. L., §§ 479, 572, 584, 585, 650, 734, 748, 769.
2 Bish. C. L., §§ 158, 274–300, 521–612.
3 Greenleaf Ev., §§ 102–113.

§ 470. Of Malicious Mischief.

Malicious Mischief is the wilful and malicious injury or destruction of the property of another. It was anciently held that real as well as personal property was subject to this crime, and in some modern cases the same doctrine has been declared. The current of judicial opinion, however, favors its confinement to personal property. The injury done must be serious, and must be prompted by actual ill-will or resentment against the owner of the property injured.

Read 4 Bl. Comm., pp. 243–247.
2 Arch. Cr. Pr., pp. 708, 709.
2 Whart. C. L., §§ 2001–2012 c.
1 Bish. C. L., §§ 568–570, 577, 595.
2 Bish. C. L., §§ 983–1000.

§ 471. Of Piracy.

Piracy consists in the doing, on the high seas, of any act of robbery or depredation, which, if done upon the land, would be a felony. *The high seas* are the uninclosed waters of the ocean, outside of the general line of the

coast. Tide-waters, flowing in harbors or basins that are enclosed between headlands, are not high seas. But the mouth of a river a mile and a half wide, or a roadstead open to the sea and not land-locked, is the high sea. In this country, the crime is chiefly, if not altogether, a statutory one, and the description of its limits and characteristics is to be sought in the Acts of Congress.

Read 4 Bl. Comm., pp. 71–73.
3 Chitty C. L., pp. 1127–1130.
1 Russ. Cr., pp. 94–104.
2 Arch. Cr. Pr., pp. 680–691.
2 Whart. C. L., §§ 2829–2840.
1 Bish. C. L., §§ 120, 306.
2 Bish. C. L., §§ 1057–1063.

§ 472. Of Attempts.

An Attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission. An attempt always includes *a specific intent*, without which the act done would either be no crime, or a different crime from that attempted. This intent, therefore, must be both alleged and proved. *The act done* must be, in its nature, adapted to accomplish the crime intended. It is not necessary that the intended crime should have been actually possible to the one attempting, provided it were apparently so; for if it were evidently, in its own nature, impossible, the intent to commit it could not legally exist. Thus it has been held that a boy under fourteen cannot intend to commit rape, or a forger intend to defraud a person or corporation which does not exist; while, on the other hand, it has been decided that there may be an attempt to pick a pocket, though the pocket contains nothing, or an attempt to kill, although the intended victim is not within actual reach of

the weapon. The intent must subsist during the entire commission of the act, for only such a part thereof is an attempt as proceeds from the intent to commit the crime.

Read 2 Arch. Cr. Pr., pp. 29–32.
2 Whart. C. L., §§ 2686–2712.
1 Bish. C. L., §§ 204–206, 237, 434, 435, 540, 601, 675, 723–772.
2 B. & H. L. C. C., pp. 474–483.
3 Greenleaf Ev., § 2.

§ 473. Of Solicitations.

A Solicitation is the inciting or persuading of another to commit a felony or other serious crime. The solicitation is complete, though the person solicited refuse.

Read 2 Whart. C. L., § 2691.
1 Bish. C. L., §§ 501, 767, 768.
2 Bish. C. L., § 20.

CHAPTER VII.

OF THE RELATION OF THE CRIMINAL ACTOR TO THE CRIMINAL ACT.

§ 474. Of Principals and Accessories.

Criminal actors are of two classes, according to the relation which they sustain to the criminal act; Principals and Accessories. *A principal* is one who participates in the commission of the criminal act. *An accessory* is one who does not participate in the commission of the criminal act, but who concurs in or sanctions the act, and in some way contributes to its commission, or attempts to prevent its punishment. This distinction between principals and accessories is recognized only in regard to felony. *In treason*, all who are engaged are principals, whether they merely procure and encourage the treasonable act to be done, or actually participate in its commission, or harbor or assist the traitor; while those, who conceal the act after its commission, are guilty of *misprision*. *In misdemeanor* also, all, of whose guilt the law takes notice, are principals.

Read 4 Bl. Comm., pp. 34, 35, 36.
1 Chitty C. L., pp. 256, 261.
1 Russ. Cr., pp. 26, 32, 33.
1 Arch. Cr. Pr., p. 58.
1 Whart. C. L., §§ 112, 131.
1 Bish. C. L., §§ 604, 626–659.
3 Greenleaf Ev., §§ 40–50.

§ 475. Of Principals in the First Degree.

Principals are of two kinds: Principals in the First Degree, and Principals in the Second Degree. *A principal in the first degree* is one, who commits the act either directly by himself or through an innocent agent. Where several acts are necessary to complete a crime, and each act is done by a different person, each of such persons is a principal in the first degree. Where one commits a criminal act by means of an inanimate object, or by means of another person who is without criminal intent, he is principal in the first degree, even though absent at the doing of the act.

Read 4 Bl. Comm., pp. 34, 35.
1 H. P. C., p. 615.
1 Chitty C. L., p. 256.
1 Russ. Cr., p. 26.
1 Arch. Cr. Pr., pp. 58–61.
1 Whart. C. L., §§ 112–115.

§ 476. Of Principals in the Second Degree.

A principal in the second degree is one, who does not himself commit the act, but who is actually or constructively present at its commission, aiding and abetting therein. Any assistance or readiness to assist, however manifested, is an aiding and abetting. *A person is actually present* at the commission of a crime, when he is at the place where such crime is committed, while it is being committed. *He is constructively present* when he is so situated, with reference to the place where the crime is committed, while it is being committed, as to be able, if necessary, to personally assist therein.

Read 4 Bl. Comm., pp. 34, 35.
1 H. P. C., p. 615.
1 Chitty C. L., pp. 256–260.
1 Russ. Cr., pp. 26–30.
1 Arch. Cr. Pr., pp. 61–69.
1 Whart. C. L., §§ 116–133.

§ 477. Of Accessories Before the Fact.

Accessories are also of two kinds: Accessories Before the Fact, and Accessories After the Fact. *An accessory before the fact* is one, who does not participate in the commission of the act, but who concurs in and contributes to its commission. Any one, who procures, advises, or encourages another guilty person to commit a criminal act, is such an accessory, whether he be the original contriver of the crime or not. But the crime must be actually committed; for where there is no act there can be no accessory.

Read 4 Bl. Comm., pp. 35–37.
1 H. P. C., pp. 612–618.
1 Chitty C. L., pp. 261–264.
1 Russ. Cr., pp. 30–36.
1 Arch. Cr. Pr., pp. 70–78.
1 Whart. C. L., §§ 134–145.
1 Bish. C. L., §§ 660–689.

§ 478. Of Accessories After the Fact.

An accessory after the fact is one, who does not participate in the commission of the act, but who sanctions it after it has been committed, and endeavors to prevent its punishment. Any one who knows a crime to have been committed, and, with such knowledge, in any manner assists the criminal to escape from justice, becomes thereby an accessory after the fact. A father may not assist the son, nor may the husband assist the wife. If a wife assists her husband, she is presumed to do it under coercion, and is not an accessory. A person does not, however, become an accessory by *acts of charity or mercy* to a criminal, such as feeding him when in prison, or procuring bail or counsel for him. An accessory, whether before or after the fact,

cannot be tried, without his consent, before the trial and conviction of his principal.

Read 4 Bl. Comm., pp. 37–40.
1 H. P. C., pp. 618–626.
1 Chitty C. L., pp. 264–266.
1 Russ. Cr., pp. 36–43.
1 Arch. Cr. Pr., pp. 78–83.
1 Whart. C. L., §§ 146–154.
1 Bish. C. L., §§ 690–708.

CHAPTER VIII.

OF CRIMINAL PROCEDURE.

§ 479. Of the Successive Steps in Criminal Procedure.

The acts, which enter into the prosecution and punishment of crime, taken collectively, are known as *criminal procedure.* In its general character, this procedure is everywhere the same, though its details are largely dependent upon local usages and statutes. It consists of the following parts or stages: (1) Arrest; (2) Commitment and Bail; (3) Prosecution; (4) Process; (5) Arraignment; (6) Plea and Issue; (7) Trial and Verdict; (8) Motion for a New Trial; (9) Motion in Arrest of Judgment; (10) Judgment; (11) Reversal or Vacating of Judgment; (12) Pardon; (13) Execution. Many of these parts may not, and the whole cannot, be present in any given proceeding, nor is it necessary that those, which do occur, should succeed each other in the order above mentioned. In discussing them, only the general rules in reference to each can be examined, and the student is referred to the authorities, and especially to local statutes, for exact and detailed information.

Read 4 Bl. Comm., p. 289.
1 Bish. C. P., §§ 1-44.

§ 480. Of Arrest with Warrant.

An *arrest* is the apprehension, or taking into custody, of an alleged offender, in order that he may be brought to trial for the crime. It may be made: (1) By an officer, or

indifferent person, with warrant; (2) By an officer, or private person, without warrant; (3) By any person under a hue and cry. *A warrant* is a written mandate, issued by a proper magistrate, and directed to a proper officer or indifferent person, commanding him to arrest the alleged offender, and bring him before the proper authority to answer for the crime. *It should describe* the person to be arrested, the crime for which he is to be arrested, the tribunal before which he is to be brought, the person by whom it is to be served, and be dated and signed by the magistrate who issues it. Armed with this warrant, the person, to whom it is directed, may arrest the alleged offender, whoever he may be, at any time or place, and, in many cases, may break open the doors of any house, when such breaking is necessary in order to effect the arrest.

Read 4 Bl. Comm., pp. 289–292.
1 H. P. C., pp. 575–587.
2 H. P. C., pp. 105–120.
1 Chitty C. L., pp. 11–16, 31–64.
1 Arch. Cr. Pr., pp. 120–135.
3 Whart. C. L., §§ 2925, 2926.
1 Bish. C. P., §§ 187–207 a.
1 B. & H. L. C. C., pp. 202–228.

§ 481. Of Arrest without Warrant.

An officer may arrest without warrant: (1) When a felony, or any crime in violation of the public peace, is, at the time of the arrest, actually being committed in his presence; (2) When he has probable cause for believing that a felony has been committed, and that the person arrested is the felon. *A private person may arrest without warrant:* (1) When a felony, or any crime in violation of the public peace, is, at the time of the arrest, being committed in his presence; (2) When a felony has actually been committed,

and he has probable cause for believing that the person arrested is the felon.

Read 4 Bl. Comm., pp. 292, 293.
1 H. P. C., pp. 587–589.
2 H. P. C., pp. 72–98.
1 Chitty C. L., pp. 16–26.
1 Arch. Cr. Pr., pp. 87–119.
3 Whart. C. L., §§ 2927–2936.
1 Bish. C. P., §§ 164–186.
1 B. & H. L. C. C., pp. 177–202.

§ 482. Of Arrest by Hue and Cry.

A hue and cry is a general alarm, raised by a magistrate or other officer, and in some cases by a private person, for the pursuit and capture of a felon, or of one who has committed a dangerous assault. All persons, who are called upon to assist in the arrest under a hue and cry, are bound to do so, and each of them has the same authority, and may employ the same methods to effect the arrest, as an officer acting under a warrant.

Read 4 Bl. Comm., pp. 293, 294.
2 H. P. C., pp. 98–104.
1 Chitty C. L., pp. 26–31.
1 Arch. Cr. Pr., pp. 109–111.

§ 483. Of the Act of Arrest.

Actual physical prehension, of the body of the accused, is necessary to constitute an arrest in all cases, where he does not knowingly and voluntarily submit himself to custody. Yet *any act of taking*, such as a touch with the end of the finger or the locking up of the accused in a room, is a sufficient prehension; and the arrest is not vacated, though the arrested person immediately escape therefrom.

It is the duty of the person, making the arrest, *to disclose his official character* and purpose to the accused, unless the circumstances sufficiently declare it, and to inform him, if he desires it, of the crime with which he is charged, and of the tribunal before which he is about to be conveyed. It is also his duty *to use no unnecessary violence*, and, as soon as he reasonably can, to present the accused before the court having cognizance of the offence.

Read 3 Bl. Comm., p. 288.
1 H. P. C., pp. 458, 583.
1 Chitty C. L., pp. 12, 48, 51, 59, 60.
1 Arch. Cr. Pr., pp. 112, 113.
3 Whart. C. L., §§ 2922–2924, 2975.
1 Bish. C. P., §§ 156–163, 213–218.

§ 484. Of Arrest on Requisition. Extradition.

Where a criminal flees into a state other than that in which the crime was committed, no ordinary methods of arrest can reach him. The state, into which he flees, has no jurisdiction over him, because the crime was not committed against its people or its laws; and the state, whose law has been violated, is powerless, because a warrant, issued by its magistrates, is valid only within its territory. To meet this difficulty, the Constitution of the United States has provided that such fugitives from justice shall be delivered, by the authorities of the State into which they flee, to the authorities of the State where the crime was committed, upon demand of the executive authority of the latter State. This demand is called a *requisition*. By similar proceedings, under the *extradition* treaties of the United States, persons who have committed heinous crimes within the territory of the United States, and have

fled into the territory of certain foreign states, may also be arrested and returned.

Read 1 Arch. Cr. Pr., pp. 135–141.
3 Whart. C. L., §§ 2948–2973.
1 Bish. C. P., §§ 219–224 b.
Woolsey Int. Law, §§ 77–80.
Cooley Const. Law, pp. 189–192.

§ 485. Of the Return of the Warrant and Proceedings Thereon.

When the magistrate, before whom the alleged offender is presented, has final jurisdiction over the offence, *the trial* may either be immediately begun, or be postponed until a future day. Where the magistrate has not such jurisdiction, *the examination* of the evidence may be postponed, or it may be proceeded with, and the accused discharged or held to answer, as the facts require. If the trial or hearing is postponed, or if, after a hearing, the accused is held to answer, he must, in some way, be detained in custody until the trial is at an end. This is accomplished either by commitment or by bail.

Read 4 Bl. Comm., p. 296.
2 H. P. C., pp. 120, 121.
1 Chitty C. L., pp. 72–92.
1 Arch. Cr. Pr., pp. 149–167.
3 Whart. C. L., §§ 2977–2981.
1 Bish. C. P., §§ 225–234.

§ 486. Of Commitment.

Commitment is a written mandate, issued by the magistrate before whom the alleged offender is presented, and directed both to a proper officer and to the keeper of a

lawful place of imprisonment, commanding the officer to carry and deliver, and the keeper to receive and safely keep, the body of the accused during the time specified therein, or until he is released by due course of law. In pursuance of this mandate, the alleged offender, if not duly bailed, is taken to such place of imprisonment and there confined. A commitment is also called a *mittimus*. It must describe the alleged offender by his full name, or the name he gives as his; it must set out, with convenient certainty, the crime with which he is charged; and it must be dated and signed by the magistrate who issues it.

Read 4 Bl. Comm., p. 300.
2 H. P. C., pp. 122–124.
1 Chitty C. L., pp. 107–132.
1 Arch. Cr. Pr., pp. 167–184.
1 Bish. C. P., §§ 234–236.

§ 487. Of Bail. Bail-Piece.

Bail is the delivery or bailment of the arrested person to certain sureties, upon their giving sufficient security for his appearance in court. The person, so delivered or bailed, is thereafter in the custody of his sureties, and may, at any time and at any place, be arrested by them and surrendered to the court, in discharge of their liability; or they may sue out a warrant, called a *bail-piece*, and, upon this warrant, he may be arrested by the person to whom it is directed. In all bailable cases, the accused has the right to be enlarged, on reasonable bail, at any time between his arrest and his final sentence. If he appears in court at the time specified, his sureties are discharged. If he fails to appear, the security given for his appearance becomes forfeited, and may be appropriated or collected

in the same manner as any other property belonging or due to the state.

Read 4 Bl. Comm., pp. 297–299.
2 H. P. C., pp. 124–149.
1 Chitty C. L., pp. 92–106.
1 Arch. Cr. Pr., pp. 184–210.
3 Whart. C. L., §§ 2976, 2982–2989.
1 Bish. C. P., §§ 247–264 m.
1 B. & H. L. C. C., pp. 228–260.

§ 488. Of Informations.

Prosecution is the formal accusation of the alleged offender. It may take place before the arrest, and a warrant may be issued thereupon; or it may be made after the arrest, and when the accused is brought into the court which has final jurisdiction over his offence. It is of three kinds: Information; Indictment; and Presentment. *An information* is a written accusation, presented under oath, by a proper public prosecutor, to a court having jurisdiction of the offence charged therein. This is the mode of prosecution usually adopted in cases of small magnitude, though, in some States, it is used almost to the exclusion of every other.

Read 4 Bl. Comm., pp. 301, 308–310.
2 H. P. C., p. 156.
1 Chitty C. L., p. 166.
1 Arch. Cr. Pr., pp. 227–229.
1 Whart. C. L., pp. 211–214.
1 Bish. C. P., §§ 141–153, 712–715.

§ 489. Of Indictments. Grand-Jury.

An indictment is a written accusation, presented by a grand-jury, under oath and upon the suggestion of the public prosecutor, to a court having jurisdiction of the offence charged therein. *A grand-jury* is a body of men,

legally selected from among the people of a county, to inquire what offences have been committed therein. When assembled in court, they are duly sworn, and instructed in their duty by the judge. An indictment, framed by the public prosecutor against the alleged offender, is then laid before them, together with the evidence in support thereof. If twelve of the grand-jury agree that the evidence is sufficient to put the accused upon his trial, the foreman endorses the indictment as *a true bill*, and it is returned to court, in order that the offender may be tried thereon. If twelve do not agree that the evidence is sufficient, the indictment is endorsed and returned as *not a true bill*, and the accused is either discharged, or held to await action on a new indictment.

Read 4 Bl. Comm., pp. 302–306.
1 Chitty C. L., pp. 161–163, 305–325.
1 Arch. Cr. Pr., pp. 320–330, 528–539.
1 Whart. C. L., §§ 452–512.
1 Bish. C. P., §§ 130–135, 849–889.
1 B. & H. L. C. C., pp. 260–271.

§ 490. Of Presentments.

A presentment is a written accusation, presented by a grand-jury, under oath and of their own motion, to a court having jurisdiction of the offences charged therein. It is rarely employed except in cases of public nuisance, or of some dangerous and wide-spreading evil. Upon the preferment of such an accusation, the court usually orders an indictment to be framed, and issues a warrant thereon for the arrest of the alleged offender.

Read 4 Bl. Comm., pp. 301, 302.
2 H. P. C., pp. 152–155.
1 Chitty C. L., p. 163.
1 Arch. Cr. Pr., p. 342.
1 Bish. C. P., §§ 136–140.

§ 491. Of the Requisites of an Indictment.

Except that one is presented by the public prosecutor, and the other by a grand-jury, *an indictment and an information* are substantially the same. Each *must contain* a statement of all the facts and circumstances, necessary to constitute the crime, with such particularity and certainty, that the accused may know the nature of the crime, with which he is charged, and what he has to answer; that the jury may be warranted in their conclusion of guilty or not guilty upon the premises delivered to them; that the court may see, upon the record, a definite offence upon which judgment may be rendered; and that the record of conviction or acquittal may be pleaded in bar to a subsequent prosecution for the same offence.

Read 4 Bl. Comm., pp. 306, 307.
1 Chitty C. L., pp. 168–176.
1 Whart. C. L., §§ 285–304.
1 Bish. C. P., §§ 77–88, 318–359.
2 B. & H. L. C. C., pp. 94–163, 172–181.

§ 492. Of the Description of the Accused.

The rules, which have been established for the purpose of securing this particularity and certainty, relate especially to the description of the accused, of the place where and time when the criminal act was committed, of the property or person injured, and of the acts constituting the crime itself. *The name of the accused* must be stated at length, if it be known, and should be repeated in every distinct allegation. If he be *known by different names*, they should be stated under an *alias*. If his *name be not known* he should be described under some name, and if he plead under that name, it will be taken as his true one. His *place of residence* should also be stated, if known; if not known, he may be described as *a transient person.*

Any mistake, in these matters, can be taken advantage of only by plea in abatement, which will result in the correction of the error.

Read 2 H. P. C., pp. 175–177.
1 Chitty C. L., pp. 202–211.
1 Arch. Cr. Pr., pp. 261–264.
1 Whart. C. L., §§ 233–249.
1 Bish. C. P., §§ 669–689 b.

§ 493. Of the Description of the Venue.

The *venue*, or place of trial of the accused, must be in the same county where the crime was committed, and this must appear on the face of the indictment. If it does not so appear, the indictment may be quashed for want of jurisdiction, or a plea to the jurisdiction may be successfully interposed. It will also be invalid on demurrer, motion in arrest of judgment, or writ of error. If the mortal blow, in murder, is given in one county, and the victim dies in another, the *venue* must be laid either in the county where the blow was given, or in that where the death occurred. If goods are stolen in one county and carried into another, the *venue* may be laid in either.

Read 2 H. P. C., pp. 180, 181.
1 Chitty C. L., pp. 177–202.
1 Arch. Cr. Pr., pp. 230–254, 279–282.
1 Whart. C. L., §§ 277–284.
1 Bish. C. P., §§ 45–76, 360–385.

§ 494. Of the Description of the Date of the Criminal Act.

Some particular *day*, *month*, *and year* must be alleged as the date of each particular independent act, involved in the crime charged, and this date must show the act, as alleged, to have been committed within the time allowed

by the statutes of limitation. Where the crime is created by a statute, it must also be laid as committed after the enactment of the statute. *In burglary*, the act must be alleged to have been at or between such hours as are within the night season. *In murder*, the day of the stroke and of the death must both be stated, and the death must appear to have been within a year and a day after the mortal blow.

Read 2 H. P. C., pp. 177–179.
1 Chitty C. L., pp. 217–227.
1 Arch. Cr. Pr., pp. 275–278.
1 Whart. C. L., §§ 261–276, 444 a–451.
1 Bish. C. P., §§ 386–414.

§ 495. Of the Description of the Person or Property Injured.

When the criminal act consists in some injury to property, *the property injured* must be particularly described. In arson and burglary, the house, the town in which it is situated, the name of its owner, and other particulars sufficient to distinguish it from every other house, must be clearly stated. In theft and robbery, the articles stolen must be described in detail, with their value and the name of the owner. If his name be not known, the indictment should so declare. *The party injured* by the crime must be described by his name, if known; otherwise, as a person unknown.

Read 2 H. P. C., pp. 181–183.
1 Chitty C. L., pp. 211–217.
1 Arch. Cr. Pr., pp. 265–274.
1 Whart. C. L., §§ 250–259.

§ 496. Of the Description of the Criminal Act. Technical Words.

Each and every act, necessary to constitute the crime, must be so particularly and accurately stated as to fix and

define, beyond any doubt, the exact charge of the state against the accused. If the crime is an *offence at common law* only, the common law forms of indictment should be followed. If it is created or modified *by statute*, it is sufficient to allege it in the words of the statute, where such words contain a full and complete description of all the acts necessary to constitute the offence; otherwise, in addition to the words of the statute, such words must be employed as do define and specify the precise nature of the crime. The statement of the acts must be positive and assertive, not laid with a *whereas*, or by way of recital, or argumentatively. *Technical words*, where necessary, must be used. In all crimes involving violence, or a breach of the peace, the act must be alleged to have been committed *with force and arms*. In felonies, it must be alleged to have been done *feloniously*; in treason, *traitorously*; in burglary, *burglariously*; in robbery, *against the will*; in piracy, *piratically*; in murder, *with malice aforethought*. Also in murder, it must be charged that the accused *did kill and murder*, and, in murder by wounding or beating, that he *struck*, and that the wound was *mortal*. In rape, it must be alleged that the accused *ravished and carnally knew*. In indictments for mayhem, it must be stated that the accused *did maim*, and in those for barratry, that he is a *common barrator*. For these words, and such others as, at common law or by statute, are made technically descriptive of the whole crime or of any element therein, there are no substitutes, and an indictment, from which they are absent, cannot be sustained.

Read 2 H. P. C., pp. 170–173, 183–193.
1 Chitty C. L., pp. 227–247, 275–292.
1 Arch. Cr. Pr., pp. 282–307.
1 Whart. C. L., §§ 285–413.
1 Bish. C. P., §§ 415–420, 499–668.

§ 497. Of the Joinder of Counts. Duplicity. Repugnancy. Uncertainty.

An indictment may contain *one or more counts*. Each count must be of itself a full and complete charge of crime, and be sufficient to sustain a verdict, for no number of defective counts can make a good indictment. Matter stated in one count may by reference thereto, without restating it at length, be made a part of another count. *Different counts for different offences* may be joined in one indictment in cases of misdemeanor, though not in felony; but two distinct offences cannot be charged in the same count. If two or more distinct offences are joined in one count, the count is bad for *duplicity*. If material allegations in a count contradict each other, the count is bad for *repugnancy*. If the allegations are in the disjunctive, or in any other way fail to specify precisely what crime was committed, the count is bad for *uncertainty*. Immaterial allegations are *surplusage*, and inconsistencies therein do not vitiate the count. If one count in an indictment be good, a verdict on such count will be sustained, though other counts are defective.

Read 2 H. P. C., pp. 173, 174.
1 Chitty C. L., pp. 169–174, 248–255.
1 Arch. Cr. Pr., pp. 308–314.
1 Whart. C. L., §§ 382, 394, 396, 414–428.
3 Whart. C. L., §§ 3176-3181.
1 Bish. C. P., §§ 421–462, 477–498.

§ 498. Of the Joinder of Offenders and Offences.

Different offenders may be joined in one indictment, where they are alleged to have been joint actors in the commission of the crime. Different persons may also be prosecuted for *different offences*, of the same nature, in the same

indictment, but there can be no *joinder* of offenders where the crime is, in its nature, several.

Read 2 H. P. C., pp. 173, 174.
1 Chitty C. L., pp. 255, 267–271.
1 Arch. Cr. Pr., pp. 315–319.
1 Whart. C. L., §§ 429–435.
1 Bish. C. P., §§ 463–476.

§ 499. Of Process.

Process is a warrant issued for the apprehension of the offender after prosecution, in cases where he has not already been arrested and brought before the court. This warrant, and the arrest thereon, are subject to the same rules as those which govern a warrant and arrest before prosecution.

Read 4 Bl. Comm., p. 318.
2 H. P. C., pp. 194–215.
1 Chitty C. L., pp. 337–346.
1 Arch. Cr. Pr., pp. 343–350.

§ 500. Of Arraignment. Standing Mute.

Arraignment is the formal demand upon the accused, for his answer to the prosecution. A *person accused* of any crime, for which a corporal punishment may be inflicted, must be *present in court* during all such proceedings as are material to his case, and, if the charge against him be of felony, he must both appear and plead in person. Whenever he is to be arraigned and plead in person, he is called to the bar of the court, during its open session, the indictment is read to him, and he is required to state whether he is guilty or not guilty of the offence charged therein. If he makes no answer to this arraignment, he

is said to *stand mute*. This may occur either through his obstinacy, or because he is dumb, or is insane, or is ignorant of the language in which the proceedings are conducted. When an accused stands mute through obstinacy, or is dumb, the court will order a plea of not guilty to be entered. When he is ignorant of the language, an interpreter will be provided, to acquaint him of the charge, and inform the court of his answer. When he appears to be insane, a jury will be appointed to try the question of his sanity, and, if they find him to be of an unsound mind, he will be remanded for safe-keeping.

Read 4 Bl. Comm., pp. 322-329.
2 H. P. C., pp. 216-225, 314-322.
1 Chitty C. L., pp. 411, 414-428.
1 Arch. Cr. Pr., pp. 350-355.
1 Whart. C. L., §§ 530-532.
3 Whart. C. L., §§ 2991-3000, 3153-3155.
1 Bish. C. P., §§ 265-277, 728-733 b.
1 B. & H. L. C. C., pp. 433-439.

§ 501. Of Counsel. Guardian ad Litem. Motion to Quash.

In some States, it is the practice, before suffering the accused to answer, *to provide him with counsel*, if he is himself unable to procure any; and where he is an infant, and without a guardian, to appoint for him a guardian *ad litem*. *A motion to quash* the indictment, if to be made at all, should also be made before or at the time of the arraignment, though the court has power to allow such motion at any time before verdict. This motion is a request, addressed orally or in writing to the court, praying that no further proceedings be had upon the indictment. It may be based either upon matters apparent on the face of the

record, or upon extrinsic matters, if properly brought before the court.

Read 1 Chitty C. L., pp. 299–304, 407–411.
1 Arch. Cr. Pr., pp. 336–341.
1 Whart. C. L., §§ 518–524.
3 Whart. C. L., §§ 3004–3006.
1 Bish. C. P., §§ 114, 295–313, 758–774.

§ 502. Of the Plea of Guilty.

A *plea* is the answer, made by the accused, to the charge contained in the indictment. Pleas are of five kinds: (1) Plea of Guilty; (2) Plea to the Jurisdiction; (3) Pleas in Abatement; (4) Demurrer; (5) Pleas in Bar. *A plea of guilty* is the formal acknowledgment of the accused, in open court, that the allegations of the indictment are true. It is not necessarily a confession of guilt; it is merely an admission that he has done what is legally and properly charged against him. If the indictment is bad, the admission has no effect; if it is good, the admission is a waiver of the trial, and the court may forthwith proceed to judgment.

Read 4 Bl. Comm., p. 329.
2 H. P. C., pp. 225, 226.
1 Chitty C. L., pp. 428–431, 434–437.
1 Arch. Cr. Pr., pp. 355, 356.
1 Whart. C. L., §§ 530-533.
1 Bish. C. P., §§ 734–757, 795, 802–804.

§ 503. Of Pleas to the Jurisdiction.

A plea to the jurisdiction is an allegation that the court, before which the case is pending, has no authority to hear and determine the same. When this want of jurisdiction appears on the face of the record, the indictment may be

quashed on motion. Where it depends upon extrinsic circumstances, advantage can be taken of it only by plea.

Read 4 Bl. Comm., p. 333.
1 Chitty C. L., pp. 437–439.
1 Whart. C. L., §§ 534, 535.
1 Bish. C. P., § 794.

§ 504. Of Pleas in Abatement.

A plea in abatement is an allegation that the proceedings are void, by reason of some defect or irregularity therein. This plea may be based either upon matters apparent on the record, or on extrinsic facts.

Read 4 Bl. Comm., pp. 334, 335.
2 H. P. C., pp. 236–240.
1 Chitty C. L., pp. 444–451.
1 Arch. Cr. Pr., pp. 358–360.
1 Whart. C. L., §§ 536, 537.
1 Bish. C. P., §§ 791–793.
1 B. & H. L. C. C., pp. 272–276.

§ 505. Of Demurrers.

A demurrer is an allegation that the acts, described in the indictment, do not constitute a crime. It may be based either upon matters of substance, or upon such formal matters as are essential to the sufficiency of the indictment. When a demurrer is sustained, a new indictment must be presented, or the accused must be discharged. If it is overruled, judgment will go against him as on a plea of guilty, except in cases of felony.

Read 4 Bl. Comm., p. 334.
1 Chitty C. L., pp. 439–443.
1 Arch. Cr. Pr., pp. 380–383.
1 Whart. C. L., §§ 525–529.
1 Bish. C. P., §§ 775–786.
1 B. & H. L. C. C., pp. 276–295.

§ 506. Of the Plea of Former Conviction.

A plea in bar is either an allegation that the averments of the indictment are untrue, or it is a denial that the accused is liable to punishment for the acts therein described. Pleas in bar are of four kinds: (1) Former Conviction; (2) Former Acquittal; (3) Pardon; (4) Not Guilty. *The plea of former conviction* (called also *autrefois convict*) is an allegation that the accused has already been convicted of the offence charged in the indictment. It is a rule of law, that no person shall be put *in jeopardy* more than once for the same criminal act; and when such jeopardy is evidenced by a conviction or acquittal, that conviction or acquittal may be pleaded in bar to any subsequent prosecution for the same offence. This plea must set out the record of the former case, and must aver that the accused and the crime were the same as in the present indictment. It must also appear that the former conviction was regular, and was upon a sufficient indictment. *The offences are the same*, when the evidence, necessary to support the second indictment, would have been necessary and sufficient to procure a legal conviction on the first. But the offences must be the same in law as well as in act, for when the same act constitutes two or more distinct offences, a conviction of one will not bar a prosecution for the others. A former conviction or acquittal, obtained by the fraudulent act of the accused, will not be a bar to another prosecution for the same offence.

Read 4 Bl. Comm., p. 336.
2 H. P. C., pp. 251–255.
1 Chitty C. L., pp. 461–463.
1 Arch. Cr. Pr., pp. 371–374.
1 Whart. C. L., §§ 539–591.
1 Bish. C. L., §§ 978–1070.
1 Bish. C. P., §§ 805–831.
1 B. & H. L. C. C., pp. 440–482.

§ 507. Of the Plea of Former Acquittal.

A plea of former acquittal (called also *autrefois acquit*) is an allegation that the accused has already been acquitted of the particular offence charged in the indictment. This plea is based on the same principle, and governed by the same rules, as that of former conviction.

Read 4 Bl. Comm., p. 335.
2 H. P. C., pp. 241–250.
1 Chitty C. L., pp. 452–461.
1 Arch. Cr. Pr., pp. 360–371.
1 Whart. C. L., §§ 539–572.
1 Bish. C. P., §§ 805–831.
1 B. & H. L. C. C., pp. 513–542.

§ 508. Of the Plea of Pardon.

A plea of pardon is an allegation that the accused has been released, by competent authority, from liability to prosecution and punishment for the offence charged in the indictment. The power to pardon offences against the laws of the United States, except in cases of impeachment, is vested in the President. In most of the States, the governors have the same power in regard to offences against the laws of their respective States. *A pardon* is a matter of pure discretion, and may be either absolute or conditional. It takes effect only from the delivery of the charter of pardon to, and its acceptance by, the offender, and its operation is limited to the particular offence, which the charter describes. A plea of pardon must set out the charter, and make *profert* of the same, and the charter itself, duly verified, must be produced in court.

Read 4 Bl. Comm., p. 337.
1 Chitty C. L., pp. 463–470.
1 Arch. Cr. Pr., pp. 374–380.
1 Whart. C. L., §§ 591 a–591 g.
1 Bish. C. L., §§ 897–926.
1 Bish. C. P., §§ 832–848.

§ 509. Of the Plea of Not Guilty.

A plea of not guilty denies all the allegations in the indictment, as well as the sufficiency of the alleged matters to constitute a crime. Under this plea, any excuse or justification may be shown, or any other matter which does not admit the existence both of the criminal act and the criminal intent.

Read 4 Bl. Comm., pp. 338–341.
2 H. P. C., pp. 255–259.
1 Chitty C. L., pp. 470, 471.
1 Whart. C. L., §§ 530, 592.
1 Bish. C. P., §§ 794 a–801.

§ 510. Of Trial. Petit-Jury. Challenges.

A *trial* is a legal investigation of the issues created by the prosecution and the plea. No trial upon the merits can be had except under the plea of not guilty, and this trial is usually conducted before a petit-jury, acting under the direction, and with the assistance, of the court. *A petit-jury* is a body of men, legally selected from the people of the county, and duly impanelled and sworn to try and decide the issue, between the state and the accused. Before this jury are sworn, both the state and the accused have a right to object to such of them as, for sufficient reasons, ought not to participate in the trial of the case. These objections, like the similar objections made in civil causes, are called *challenges*, and are of the same classes, and are governed by the same general rules.

Read 4 Bl. Comm., pp. 349–355.
2 H. P. C., pp. 260–275.
1 Chitty C. L., pp. 500–553.
1 Arch. Cr. Pr., pp. 509–527, 541–565.
3 Whart. C. L., §§ 3039–3152.
1 Bish. C. P., §§ 890–949 b, 1017–1045.

§ 511. Of Evidence in Criminal Causes.

When the jury have been sworn, the indictment and plea are read to them, and the trial begins. The proceedings, which constitute a trial in criminal causes, are: The Production of the Evidence; The Arguments of Counsel; The Charge of the Court; and The Deliberations and Verdict of the Jury. The general rules, which govern the production of evidence, are the same in criminal as in civil cases. The principal special rules, applicable to criminal cases, are the following:

The state must prove affirmatively, and beyond a reasonable doubt, every material allegation in the indictment;

The testimony must be such as to exclude every reasonable hypothesis but that of the defendant's guilt;

The *corpus delicti* must be established by evidence other than the extrajudicial admissions of the accused;

Where *a specific intent* is alleged in the indictment, it must be proved as laid;

Circumstantial evidence is equally admissible, and may be equally conclusive, with direct evidence;

In capital cases, the evidence must be that of two competent witnesses or its equivalent;

In homicide, the declarations of the victim, made under the apprehension of impending death, are admissible to show the cause of the death, and the person of the slayer;

The voluntary confession of the accused, when made without fear or hope of favor, is competent evidence against him;

An accomplice is admissible as a witness against the accused, though the jury should be instructed not to convict on his uncorroborated testimony. The evidence of one accomplice is not corroborated by that of another;

Evidence of the character of the accused may be given in his behalf, but never against him, except in reply to such evidence first introduced in his favor;

The accused is always presumed innocent till he is proved to be guilty, and if, upon the whole evidence, there is reasonable doubt of his guilt, he is entitled to an acquittal.

Read 4 Bl. Comm., pp. 355–359.
2 H. P. C., pp. 276–293.
1 Chitty C. L., pp. 554–631.
2 Russ. Cr., pp. 725–988.
1 Arch. Cr. Pr., pp. 385–508, 566–585.
1 Whart. C. L., §§ 592–827.
3 Whart. C. L., §§ 3009, 3009 a.
1 Bish. C. P., §§ 960–973, 1046–1262.
1 B. & H. L. C. C., pp. 295–362.
2 B. & H. L. C. C., pp. 18–43, 260–283, 333–358, 393–408, 484–630.

§ 512. Of the Arguments of Counsel.

The arguments of counsel take place in the order prescribed by statute, or by local usage. At the opening of the case, and before the production of any evidence, the counsel for the state may, and generally does, explain to the jury the nature of the charge, and the testimony which he intends to bring forward to sustain it. The counsel for the accused, before introducing his evidence, usually explains, in the same manner, what he himself expects to prove. The remaining arguments consist of, and should be confined to, a discussion of the evidence and the law applicable thereunto. In some States, the counsel for the accused, and in others the counsel for the state, has the right to close.

Read 1 Arch. Cr. Pr., pp. 584–587.
3 Whart. C. L., §§ 3007, 3008, 3010–3011 b.
1 Bish. C. P., §§ 974, 975.

§ 513. Of the Charge of the Judge.

The charge of the court to the jury consists of an explanation of the law governing the case, and of such a review

of the evidence as may be necessary in connection therewith. If counsel on either side desire that particular propositions should be stated, as law, by the court to the jury, it is their duty to inform the court of their desire in proper season. If any mistake is made by the court in stating the law to the jury, the attention of the court should be called thereto forthwith, and an exception noted.

Read 1 Chitty C. L., pp. 631, 632.
1 Arch. Cr. Pr., pp. 587–592.
3 Whart. C. L., §§ 3161–3164.
1 Bish. C. P., §§ 976–982.

§ 514. Of the Deliberations of the Jury. The Verdict.

The deliberations of the jury, upon the law and the evidence, are conducted in private, while they are under the charge, though not in the presence of, an officer of the court. If, after due consultation, *they cannot agree* upon a verdict, they may be discharged, and the accused remanded for another trial. If they are in doubt upon any question of law or fact in the case, they may call upon the court for further instructions. When they are all agreed, either for conviction or acquittal, they return into court, their names are called, and the foreman delivers their conclusion of guilty or not guilty upon the matters alleged in the indictment. This conclusion is called the *verdict*, and when once pronounced by the foreman, ratified by the acquiescence of the other jurors, and duly recorded, it cannot be altered or amended, nor can any juror dissent therefrom. When the jury cannot agree to a *general verdict*, as that of guilty or not guilty, they may render a *partial verdict*, convicting the accused on one count in the indictment, or on one part of a divisible count, and acquitting him as to the residue; or they may render a *special verdict*,

finding the facts of the case, and leaving the legal inference from those facts to the decision of the court.

Read 4 Bl. Comm., pp. 361, 362.
2 H. P. C., pp. 293–313.
1 Chitty C. L., pp. 632–650.
1 Arch. Cr. Pr., pp. 593–609.
3 Whart. C. L., §§ 3165–3199.
1 Bish. C. P., §§ 982 a–1016.
1 B. & H. L. C. C., pp. 363–433, 482–512.

§ 515. Of Motion for a New Trial.

After a verdict of conviction, and before judgment or sentence by the court, there are two proceedings of which the accused, if he has occasion, may avail himself. These are: Motion for a New Trial, and Motion in Arrest of Judgment. *A motion for a new trial* may be based upon any material irregularity in the course of the proceedings, such as defects in summoning or impanelling the jury, the misconduct of the jury, misrulings or misdirections of the court, the discovery of new and material evidence, the illegality of the verdict or its non-conformity to the evidence, or the invalidity of the verdict itself. If this motion be granted, the accused will again be put upon his trial on the same indictment, but before another jury.

Read 4 Bl. Comm., p. 375.
1 Chitty C. L., pp. 653–661.
1 Arch. Cr. Pr., pp. 610–670.
3 Whart. C. L., §§ 3220–3394 a.
1 Bish. C. P., §§ 1268–1281.
1 B. & H. L. C. C., pp. 554–599.

§ 516. Of Motion in Arrest of Judgment.

A motion in arrest of judgment may be based upon any material defect which appears on the face of the record,

and which makes the proceedings apparently erroneous, such as repugnancy or uncertainty in the indictment, or variance between the indictment and the verdict. If the judgment be arrested upon motion, all the proceedings will be set aside, and judgment of acquittal given; but this judgment will be no bar to a subsequent prosecution.

Read 1 Chitty C. L., pp. 661–664.
1 Arch. Cr. Pr., pp. 671–674.
3 Whart. C. L., §§ 3200–3207.
1 Bish. C. P., §§ 1282–1288.

§ 517. Of Judgment.

If neither of these motions is made, or having been made is denied, the court proceeds to judgment. *Judgment* is the order of the court, directing the kind and measure of punishment to be inflicted on the accused. This judgment must be pronounced in open court, and must be in conformity with the law, prescribing the punishment. The court has power over the judgment after it has been pronounced, and may respite or suspend its execution for any reasonable cause, as if the offender should become insane, or desire to apply for a reprieve or pardon. The court also has power to correct or change the judgment, at any time during the same term of court, and before the execution of the judgment has begun.

Read 4 Bl. Comm., pp. 375, 378.
2 H. P. C., pp. 391–406.
1 Chitty C. L., pp. 695–722.
1 Arch. Cr. Pr., pp. 674–710.
3 Whart. C. L., §§ 3395–3425 f.
1 Bish. C. L., §§ 927–977.
1 Bish. C. P., §§ 1289–1334.

§ 518. Of Writ of Error.

There are two methods by which, even after judgment, the accused may be relieved against any error or mistake in the proceedings, whereby injury has been, or is about to be, inflicted on him. These are: By Reversing or Vacating the Judgment, and By Pardon. A judgment may be reversed, on *writ of error*, for any mistake of law apparent on the face of the record. This writ is a matter of right. It does not lie until final judgment has been rendered, and does not reach preliminary matters, and such as are pleadable only in abatement. But errors, which would be fatal on demurrer, or on motion in arrest of judgment, are grounds of reversal upon writ of error.

Read 4 Bl. Comm., pp. 391, 392.
1 Chitty C. L., pp. 747–754.
1 Arch. Cr. Pr., pp. 717–727.
3 Whart. C. L., §§ 3208–3219 b.
1 Bish. C. P., §§ 1361–1374.
1 B. & H. L. C. C., pp. 599–612.

§ 519. Of Pardon.

A petition for a pardon is addressed to the executive or other pardoning power, and may be based upon any matters which render the execution of the judgment inexpedient or inequitable.

Read 4 Bl. Comm., pp. 398–402.
1 Chitty C. L., pp. 762–777.
1 Arch. Cr. Pr., pp. 374–380.
1 Whart. C. L., §§ 591 a–591 g.
1 Bish. C. L., §§ 897–926.

§ 520. Of Execution.

These different measures being untried or unsuccessful, the judgment is carried into effect by execution. *Execu-*

tion is the infliction, upon the offender, of the punishment imposed and ordered by the court. *Where the punishment is a fine*, the court directs, in the judgment, that the offender stand committed till the fine be paid; and thereupon, in default of payment, a mittimus will issue, under which the offender will be imprisoned till he pays the fine, or is discharged by due course of law. *When the punishment is imprisonment*, he will be confined, under a similar mittimus, during the time specified in the judgment. In both these cases, the provisions of the mittimus must be strictly complied with. It must be executed only by the persons to whom it is directed, the confinement must be in the place and manner specified, and, at the end of the term of imprisonment, the offender must be released. Any violation of these provisions will subject the person violating them to an action for false imprisonment.

Read 4 Bl. Comm., p. 403.
2 H. P. C., pp. 406–411.
1 Chitty C. L., pp. 779–814.
1 Arch. Cr. Pr., pp. 732–743.
1 Bish. C. P., §§ 1335–1339.

§ 521. Of Stay of Execution in Capital Cases on Account of Pregnancy or Insanity.

In capital cases, there are two causes which operate to *delay or prevent execution*. When a woman is sentenced to death while pregnant, or becomes pregnant after such sentence, the court by whom the sentence was pronounced, upon suggestion of the *pregnancy*, will cause an investigation to be instituted, and, if the pregnancy be proved, will stay the execution of the sentence till the child be born. If, after the birth of one child, a *second pregnancy* occur, a further stay will not, according to the prevailing rule, be granted. Also, when a person under sentence of death

becomes *insane*, or where the fact of his insanity first becomes apparent after sentence, the execution will be stayed till his recovery.

Read 4 Bl. Comm., pp. 394–396.
2 H. P. C., pp. 412–414.
1 Chitty C. L., pp. 757–761.

§ 522. Of Execution in Capital Cases.

Execution, in capital cases, is usually done *by a warrant*, issuing from the court in which the judgment was pronounced, and directed to the sheriff of the county, commanding him to hang the offender, by the neck, till he be dead. *This warrant will protect* only those to whom it is directed, and will protect them only when they strictly follow its commands. *If an unauthorized person* takes upon himself to execute a death-warrant, he will be guilty of murder. If the authorized officer executes it in *an unauthorized manner*, as by changing the mode of death, he will be guilty of manslaughter, if not of murder. The warrant must also be *fully* executed; and if, through any accident or mistake in the mode of hanging, the offender should revive, he must be hanged again and until his life is actually extinct.

Read 4 Bl. Comm., pp. 403–406.
1 Chitty C. L., pp. 779–789.
1 Arch. Cr. Pr., pp. 732–737.

END.

INDEX.

SECTION
ABANDONMENT, title by 130
ABATEMENT of nuisances 247
ouster by 221
pleas in 286
grounds for 286
judgment in 286
in criminal cases 504
ABDUCTION of child 236
ward 237
wife 233
remedy for 257
ABROGATION OF CONTRACTS in equity 320
ACCESSION, title by 163
ACCESSORIES after the fact 478
before the fact 477
ACCOMPLICES, evidence of 511
ACCORD AND SATISFACTION 249
ACCOUNT, action of 265
between partners, in equity 324
stated 262
ACCRETION, title by 129
ACQUITTAL, FORMER 507
ACTIONS defined 253, 272
ex contractu 256
plaintiffs in 275
defendants in 277
ex delicto 256
plaintiffs in 276
defendants in 278

SECTION

Actions, mixed 255
of account 265
assumpsit 262
covenant 264
debt 263
detinue 261
disseisin 255
foreign attachment or garnishment 267
replevin 260
scire facias 266
trespass 257
on the case 258
trover 259
pending, a cause of abatement 286
personal 256
real 254
Adhering to the Public Enemy 401
Administrator, retainer of debt by 251
title of, to property of decedent . . . 161
when defendant 277, 278
plaintiff 275, 276
Adverse Possession, effect of 132, 133
Advowson defined 46
Affray 458
Agency, contract of 179
Agents, classes of 207
Air, right to 57
Aliens defined 365
cannot commit treason 404
duty of, to State 368, 369, 370, 372
rights of, from State 380
Allegiance defined 361
right of citizen to change 363
Allodial Tenure 99
Alluvion 129
Amendment of pleadings in equity 337, 338, 340
law 286
Animals Feræ Naturæ 155, 162
title to increase of 163
Animus Furandi defined 433

SECTION
Annuity defined 54
Answer in equity 339
Appearance of parties in equity 336
law 280
Apprentices, rights and duties of 204
Arbitration and Award 250
Arguments of counsel 304
in criminal cases 512
Arms, Carrying, when a crime 456
Arraignment 500
Arrest, escape from 441
in civil cases 279
criminal cases 480–484
with warrant 480
without warrant 481
by hue and cry 482
by private person 481
Arrest of Judgment 308
in criminal cases 516
Arson defined 420
burning in 420
unlawfulness of 421
house in 422
ownership of 423
Asportation of chattels 226
remedy for 257, 259, 260
Assault defined 213
injunctions against 317
when actionable 213
Assembly, right of 459
unlawful, defined 455
Assets, marshalling of 323
Assignee in Bankruptcy, title of 136, 161
Assignment, deed of 142
Assumpsit, action of 262
Attachment, writ of 279
service of 279
Attempt to commit crime 472
Attorney defined 210
at law, rights and duties of 211

SECTION
ATTORNEY in fact, rights and duties of 210
AUCTIONEER, rights and duties of 209
AUDITA QUERELA 310
AUTREFOIS ACQUIT 507
AUTREFOIS CONVICT 506
AVULSION 129
AWARD, requisites of 250
setting aside or enforcement of, in equity . . . 331

BAIL in criminal cases 487
forfeiture of 487
rights of surety in 487
BAILMENT, contract of 178
BAIL-PIECE 487
BANKRUPT, title to personal estate of 161
trustee of, when plaintiff 275
BANKRUPTCY, effect of, on real property of bankrupt . . 136
title of assignee in 136, 161
BARGAIN AND SALE, deed of 142
BARRATRY 446
BATTERY defined 214
as a crime 467
of servant 239
wife 235
remedy for 257
BAWDY-HOUSE, keeping a 466
BENEFICE defined 46
presentation to 46
BIGAMY 464
BILL IN EQUITY, original and not original 334
parties to 334
BILL OF EXCEPTIONS 311
BILL OF EXCHANGE defined 182
how transferred 182
indorsement of 182
BLASPHEMY 465
BODY defined 27
defence of 27
how protected by law 31
no duress by fear of injury to 27

SECTION

BREACH OF CONTRACT 228
the tortious element in 228
BRIBERY 440
BROKERS, rights and duties of 208
BURDEN OF PROOF 302
BURGLARY defined 424
breaking in 424
entering in 425
house in 426
ownership of 427
night season in 428
specific intent in 429
BURNING defined 420
by owner 421, 423
tenant 423
unlawful, when 421

CAPIAS defined 279
service of 279
CAPIAS AD SATISFACIENDUM 312
service of 312
CARNAL KNOWLEDGE defined 416
when lawful 417
rape 418
unlawful 417
CARRYING ARMS, when criminal 456
CARRYING AWAY, in robbery 434
theft 430
CASE, action on the 258
CESTUI QUE TRUST defined 328
CESTUI QUE VIE defined 88
CHALLENGE OF JURY 290
in criminal cases 510
to the array 290
to the polls 290
CHALLENGING 457
CHAMPERTY 448
CHANCE, act done by, no crime 391
CHANCERY power of, to pass title to land 136
CHARACTER, evidence of in criminal cases 511

SECTION

CHARGE OF JUDGE 304
error in 304
in criminal cases 513
CHATTELS defined 42
absolute estates in 154
estates in common in 156
joint tenancy in 156
remainder in 156
severalty in 156
title to by accession 163
confusion 163
contract 168
creation 164
forfeiture 158
gift 165
judicial decree 161
marriage 160
occupancy 162
prerogative 157
succession 159
testament 166
qualified estates in 154, 155
real 69
real and personal 152
remedies for injuries to 257–261
CHEATING 462
CHILD, abduction of 236
illegitimate defined 192
duties of parents to 195
legitimate defined 192
duties of parents to 194
cease, when . . . 196
rights of parents over 193
marriage of, when prevented by injunction . . . 318
when protected from parents by injunction . . . 318
CHOSES IN ACTION defined 153
equitable owner of, how protected . 324
founded on contract 228
not subject to theft at common law . 431
CHOSES IN POSSESSION defined 153

SECTION

Circuit Court of United States 355
Citizens, duties of, to state 367–372
of United States, native-born 362
naturalized 363
rights of, in different States . 366
rights of, from state 373–381
Clerk of Court, duties of 273
Code-Pleading 288
Commitment 486
Commodatum 178
Common defined 48
disturbance of 225
kinds of 48
nuisance to 223
Common Law defined 4
of individual States 5
Louisiana 5
United States 5
Competency of Witnesses 298
Compounding Informations 443
Compulsion, act done by, no crime 393
Condition, estates upon 98–104
express and implied 101
precedent and subsequent 102
Conditional Fee defined 87
Conditional Limitation defined 103
Confession and Avoidance, plea of 283
Confessions of crime 511
Confidential Communications 299
Confirmation, deed of 142
Confusion, title by 163
Congress, divisions and powers of 351
Consanguinity, collateral and lineal 124
how computed 124
Consideration of Contracts 170
Conspiracy defined 230
as a crime 449
remedy for 258
Construction of contracts in equity 322
deeds 145

SECTION
CONSTRUCTION of statutes 14
wills 150
written instruments 295
CONTRACTS, abrogation of, in equity 320
between husband and wife 189
breach of 228
damage implied from 228
remedies for 262–264
choses in action founded on 228
consideration of 170
consist in meeting of minds 172
conspiracy in regard to 230
construction of 176
correction of mistakes in by equity . . . 321
executed and executory 175
express and implied 174
fraud in 229
relieved by equity . . . 315, 320, 323
implied, classes of 262
of account stated 262
fidelity and skill 262
money had and received . . . 262
laid out and expended . . 262
lent and advanced . . . 262
quantum meruit 262
valebat 262
interpretation of, in equity 322
of agency 179
bailment 178
debt 184
guaranty and suretyship 183
indorsement 182
insurance 181
partnership 180
sale 177
warranty 184
oral and written 173
parties to 169
infants 169
insane persons 169

SECTION
CONTRACTS, parties to, married women 169, 189
wards under guardianship . . . 169
remedy for breach of, governed by lex fori . 176
requisites of 168
simple and special 173
specific performance of 319
subject-matter of 171
title by 168
validity of, governed by lex loci 176
void for duress 26, 34
CONTRIBUTORY NEGLIGENCE, effect of 243
CONVERSION defined 226
remedy for 259
CONVICTION, FORMER 506
COPARCENARY 121
COPY, when admissible in evidence 295
COPYRIGHT defined 164
remedy for infringement of 316
CORAM NON JUDICE 358
CORODY defined 53
CORPORATION defined 18
aggregate and sole 19
public and private 20
title of, to property 159
winding up of 327
COSTS, judgment for 309
title to 161
COUNSEL, appointment of, for accused 501
arguments of 304
in criminal cases 512
when not allowed to testify 299
COUNTERFEITING 469
COUNTS, several in an indictment 497
COURTS defined 272
jurisdiction of 284
want of 284
of equity 272
individual States 357
law 272
United States 354-356

SECTION
COURTS, officers of 273
parts of 274
when may lawfully act 274
COVENANT, action of 264
to stand seised to uses 142
CREATION, title by 164
CRIMEN LÆSÆ MAJESTATIS 398
CRIMES defined 384
against persons 406–419, 467, 468
property 420–436, 469–471
public health 463
justice 439–454
peace 455–461
policy 464–466
trade 462
degrees of 394–397
elements of 385
how created 383
identity of 506
of drunkards 387
who may commit 388
CRIMINAL ACT defined 385
how described in indictment 496
CRIMINAL ACTORS, classes of 474
how described in indictment . . . 492
presence in court of 500
CRIMINAL CONVERSATION defined 234
remedy for 257
CRIMINAL INTENT defined 385
how presumed and rebutted . . . 386–393
CRIMINAL LAW, why not uniform 383
CRIMINAL PROCEDURE 479
CROSS-EXAMINATION of witnesses 301
CUSTOM, certain 6
compulsory 6
consistent with other customs 6
continued 6
immemorial 6
peaceable 6
reasonable 6

SECTION

CUSTOM, when recognized as law 6
CUSTOMARY LAW defined 4

DAMAGE to choses in possession, direct and indirect. . . 227
remedies for . . 257, 258
DAMAGE-FEASANT, distress for cattle 248
DAMAGES, hearing in 309
liquidated and unliquidated 264
remission of 309
title to 161
DAMNUM ABSQUE INJURIA 212
DAUGHTER, seduction of 241
DAY-LABORER defined 206
DEATH, presumption of, from absence 461
DEBT, action of 263
contract of 184
of wife, husband responsible for 189
retainer of, by administrator or executor 251
DECLARATION defined 287
pleadings after 287
requisites of 287
DECLARATIONS accompanying an act 300
against interest 300
concerning pedigree 300
in the course of business 300
when admissible in evidence 300
DECREE in equity 342
how enforced 342
pro confesso 336
DEEDS, construction of 145
delivery of 147
execution and recording of 140, 143
forms of, poll and indenture 141
in the United States 143
kinds of 142
original and derivative 142
parts of 144
reading of, by grantor 146
requisites of 140
take effect when 147

SECTION
DE FACTO officers 359
DEFAULT 309
judgment by 280
DEFEASANCE, deed of 142
DEFENDANT defined 253
appearance of 280
in actions ex contractu 277
delicto 278
incapacity of, effect of 286
joinder of 277, 278
misdescription of, effect of 286
misjoinder of, effect of 286
nonjoinder of, effect of 286
DEFINITION defined 7
DEFORCEMENT, ouster by 221
DE JURE officers 359
DELIVERY, necessary to gift 165
of deed, effect of 147
DEMURRER in equity 337
law 283
DEPOSITION, how taken 296
DEPOSITUM defined 178
DESCENT, rule of 126
title by 123
DETAINER, FORCIBLE, defined 460
DETENTION of chattels, how and by whom committed . . 226
remedy for 259, 260, 261
DETINUE, action of 261
execution in 312
DEVISE, subjects of 151
takes effect when 151
title by 138
DIGNITY defined 51
DISAGREEMENT OF JURY 305
DISCONTINUANCE, ouster by 221
DISCOVERY in equity 330
DISEASES, spreading of infectious 463
DISORDERLY HOUSE, keeping a 466
DISSEISIN defined 220
action of 255

SECTION
DISSEISIN, effect of 71 220
how and by whom committed 220
DISTRESS of cattle taken damage feasant 248
remedy by 248
unlawful, remedy for 260
DISTRICT COURT OF THE UNITED STATES 356
DISTURBANCE of incorporeal hereditaments 225
remedy for . 258
DISTURBING MEETINGS 459
DIVORCE a mensa et thoro 188
a vinculo 188
effect of, on dower and curtesy . . . 92
DRUNKENNESS no excuse for crime 387
public 466
when rebuts specific intent 387
DUELLING defined 457
killing in, is murder 457
DUPLICITY in indictment defined 497
DYING DECLARATIONS, when evidence 300

EASEMENTS, classes of 57
EAVES-DROPPING 466
EJECTMENT, action of 255
execution in 312
ELEGIT, execution by 312
service of 312
ELEMENTS, title to 162
EMBEZZLEMENT 462
EMBRACERY 450
EMINENT DOMAIN defined 137
in aid of railroads, &c. 137
right of 137
title by 137, 371
ENTERING, in burglary, what is 425
ENTRY defined 84, 246
effect of 246
right of, tolled by descent 246
when necessary 84
EQUITABLE REMEDIES, classes of 313
EQUITY defined 21

SECTION

EQUITY, amendments of pleadings in 337, 338, 340
answer in 339
appearance of parties in 336
bill in 334
parties to 334
bill of review in 343
decree in 342
how enforced 342
pro confesso in 333
demurrer in 337
evidence in 341
general relief in 333
plea in 338
power of, to transfer estates in real property . . 136
province of 21
subpœna in 335
service of 335
trials in 341
EQUITY OF REDEMPTION 325
ERROR, WRIT OF 311, 518
ESCAPE 441
ESCHEAT, title by 128
ESTATE defined 60
ESTATES in personal property 154
absolute and qualified . 154, 155
tenancy of 156
tenure of 156
time of 156
in real property, attributes of 64
absolute and conditional . . . 100
alienation of 61
at will 95
by curtesy 91
by sufferance 97
concurrent 60
conditional, in the United States 99
consist of what 60
executory 106, 107, 112
for life 85, 88
how created 89

SECTION

Estates in real property, for life, incidents of 93
for years 94
freehold 66, 68, 69
effect of failure of . . 73
in futuro 76
how created . 76
presumed to exist somewhere 73
superior to less than freehold 69
from year to year 96
how determined 96
when implied 96
how owned and transmitted . 61, 82
in common 113, 120
creation of . . . 121
destruction of . . 122
incidents of . . . 122
coparcenary 121
dower 92
how barred 92
expectancy 105
fee 85
simple 86
tail 87
after possibility of issue extinct . . . 90
joint-tenancy 113
alienation of . 118
destruction of . 119
incidents of . 117
survivorship in 116
unities in . . 115
possession 105
remainder 106
reversion 106
severalty 113, 114
legal and equitable 63
less than freehold, possession essential to 83

SECTION

ESTATES in real property, number and connection of tenants in 113–122
on failure of owners go where . 128
of inheritance 85
real and personal . . . 62, 65, 69
rules of descent of 126
tenure of, feudal and allodial 98, 99
time of enjoyment of . . . 105–112
title to by abandonment . . . 130
accretion 129
descent 123
devise 138, 148
eminent domain . . 137
escheat 128
execution 135
forfeiture 131
grant 138
judicial decree . . 136
marriage 134
possession 133
prescription . . . 132
private grant . . . 140
public grant . . . 139
purchase . . . 123, 127
transfer of 61
upon condition 100–104
express and implied . . . 101
precedent and subsequent . 102
what devisable 151
whence originally derived . . 128
ESTOPPEL, defence of 243
EVIDENCE defined 291
admissibility of, how determined 303
hearsay 300
in criminal cases 511
equity 341
material 292, 439
oral and written 294

SECTION
EVIDENCE, order of 302
perpetuation of 329
primary and secondary 295
relevant 292
taken in former trial, when admissible . . . 300
EXAMINATION OF WITNESS 301
EXCEPTIONS, BILL OF 311
EXCHANGE, deed of 142
EXECUTION defined 253
alias 312
in capital cases 522
how stayed 521
criminal cases 520
levy of 312
on land 135
return of 312
stay of 310
title by 135
what subject to 135
EXECUTOR, action by 275, 276
title of to land 136
when defendant 277, 278
EXECUTORY DEVISES 112
EXECUTORY INTERESTS 106, 112
how distinguished from reversions
and remainders 107
EXHIBITIONS, IMMORAL 466
EXPOSURE OF PERSON in public 466
EXTORTION 453
EXTRADITION OF CRIMINALS 484

FACTORS, rights and duties of 208
FACTS, how proved 291
judicially noticed 293
material 292
relevant 292
what admissible in evidence 292
FALSE IMPRISONMENT defined 219
remedy for 257
FALSE PRETENCES 462

SECTION

Falsifying Records 444
Federal Law defined 3
Fee defined 85
simple, creation and alienation of 86
includes all other estates 86
tail, character and incidents of 87
Fees, illegal taking of 453
Felony defined 395
against persons 406–419
property 420–436
at common law, and by statute 396
misprision of 454
principal and accessory in 474–478
Feoffment, deed of 142
Feudal Tenures 98
Fidelity and Skill, implied contract for 262
Fieri Facias, service of 312
Fines, implied contract to pay 262
Fines and Penalties, title to 158
Fixtures defined 43
Forcible Entry and Detainer 460
Foreclosure of mortgages 325
effect of 136
Foreign Attachment defined 267
service of 279
Forfeiture, relief against in equity 323
title by 131, 158
Forgery 469
Former Acquittal 507
Former Conviction 506
Franchise defined 52
disturbance of 225
remedy for 258
Fraud defined 315
injunctions against 315
remedy for 258, 323
when a civil injury 229
implied in equity 315
Fraudulent Conveyances set aside in equity 332
Freehold defined 69

SECTION

GAMING-HOUSE, keeping a 466
GARNISHMENT defined 267
process of 279
service of 279
GENERAL OCCUPANT defined 88
GIFT causa mortis, defined 165
delivery in 165
deed of 142
inter vivos, defined 165
irrevocable 165
of chose in action how made 165
title by 165
GOODS, how taken in execution 312
GOVERNORS OF THE INDIVIDUAL STATES, powers of . . 352
GRAND-JURY, composition and duties of 489
GRANT, deed of 142
GRANTOR presumed to know contents of deed 146
GUARANTY, contract of 183
GUARDIAN defined 197
ad litem 199
by appointment 199
by nature 198
by whom appointed and controlled 199
of the estate, rights and duties of . . . 200, 201
person, rights and duties of 200
testamentary 199
title of to personal property of ward 161
real property of ward 136
GUARDIAN AND WARD, account between 265
relation of, ceases when 202
GUARDIANSHIP, persons under, when unable to contract . 169

HABEAS CORPUS, writ of 271
HABERE FACIAS, process of 312
service of 312
HEALTH, right to 28
crimes against 463
how protected by law 32
injuries to 215
HEARING IN DAMAGES 309

SECTION
HEARSAY EVIDENCE, when admissible 300
HEREDITAMENTS defined 41
incorporeal 45
classes of 45
effect of non-user of . . . 130
in the United States . . . 56
HIGH-SEAS defined 471
HIGHWAY, obstruction of 466
HIRED SERVANTS, rights and duties of 205
HOMICIDE from cruel or wanton act 410
felony 410
lawful act 415
misdemeanor 415
negligence 415
in actual combat 414
duel is murder 457
upon provocation 413
sought by slayer 413
when excusable or justifiable 409
with dangerous weapons 410
without provocation 410
HONESTY presumed in contracting parties 229
HOUSE in arson 422
burglary 426
HUE AND CRY 482
HUSBAND, defence and support of wife by, when forfeited 191
liability of, for debts and torts of wife 189
power of, to contract with wife 189
remedy of, for injury to wife 189
rights of, over person of wife 190
over property of wife 160
when defendant 277, 278
plaintiff 275, 276
HUSBAND AND WIFE, contracts between 189, 326
relation of, how created 185
dissolved 188
rights of, at law and in
equity 189–191, 326
when competent witnesses . . . 299
incompetent witnesses . . 299

SECTION
IGNORANCE of fact rebuts criminal intent 390
law no excuse for crime 390
ILLEGAL FEES, taking of 453
ILL-FAME, keeping house of 466
IMPRISONMENT defined 34, 219
duress by 34
resistance to, when lawful 34
when unlawful 219
IN BEING, who is 407
IN PARI DELICTO 243
IN THE PEACE, who is 407
INDENTURE, deed of 141
INDICTMENT defined 489
requisites of 491
INDORSEMENT, contract of 182
INFANT unable to commit crime, when 388
contract, when 169
unborn, killing of, not murder 407
rights of 17
INFORMATION defined 488
INFRINGEMENT of patents, copy-rights, and trade-marks,
injunctions against 316
INJUNCTIONS against assault 317
fraud 315
infringement of patents 316
irreparable injury 316
marriage of child or ward 318
nuisance 316, 317
parents, tyranny of 318
trespass 316
ex parte 314
perpetual and temporary 314
prohibitory and mandatory 313
to protect personal security 317
relative rights 318
INJURIA defined 212
INJURIA SINE DAMNO 212
INJURIES from an illegal transaction 243
joint act of injured and injurer 243
to chattels, direct and consequential 227

SECTION
INJURIES to chattels, remedies for 257–261
with consent of injured party 243
INNOCENCE, presumption of 511
INQUEST OF OFFICE 128
INSANE PERSON cannot commit crime 389
contract 169
INSOLVENCY, title of trustee in 136, 161
INSURANCE, contract of 181
fire and marine 181
life and accident 181
INTENT, criminal 385
specific 386
how proved and rebutted 386
INTENT TO STEAL defined 433
INTERNATIONAL LAW defined 2
INTERPLEADER in equity 324
INTESTATE ESTATE, title to 159, 161
INTRUSION, ouster by 221
INVENTIONS defined 164
title to 164
how protected 164, 316
IRREPARABLE INJURY, injunction against 316
ISLANDS in rivers belong to whom 129
ISSUE defined 283
trial of 289

JEOPARDY, FORMER 506
JOINDER OF OFFENDERS 498
JOINT-TENANCY, estates in 115–119
rights and duties of tenants in 117
JUDGE, charge of 304, 513
error in 304
duties of 274
JUDGMENT defined 253
arrest of 308, 516
final 309
implied contract to pay 262
interlocutory 309
non obstante veredicto 308
of law, how aided in equity 332

SECTION
JUDGMENT on confession 309
default 280, 309
demurrer 309
nihil dicit 309
non-suit 309
verdict 309
reversal of 311, 518
JUDICIAL DECISIONS 7
JUDICIAL DECREE, title by 136, 161
JUDICIAL FUNCTIONS, how exercised 358
JUDICIAL NOTICE, of what taken 293
JURISDICTION of courts, how determined 284
objection to, how taken 285
plea to 285
want of, how waived 284
JURISDICTION OF UNITED STATES COURTS . . . 354–356
JURY defined 290, 510
advice of court to 305, 514
attempt to corrupt 450
challenges of 290, 510
deliberations of 305, 514
disagreement of 305, 514
duties of 273, 305
in finding verdict 303
how summoned 290
misconduct of 307
verdict of 306
in criminal cases 514
JUS defined 242

KIDNAPPING 468
KILLING defined 408
when excusable or justifiable 409
KINDRED of half blood and whole blood 125

LAND defined 41, 44
how granted 140
taken in execution 135, 312
unsold, owner of 139
LARCENY defined 430

SECTION
LARCENY, carrying away in 430
property in 431
ownership of 432
specific intent in 433
taking in 430
LAW defined 1
common 4
in Louisiana 5
the courts of the United States . . . 5
the individual States 5
customary 4
federal 3
international 2
interpretation of 13
maritime 22
municipal 2
object of 15
State 3
unwritten 4
development of 6
written 4
of the United States and individual States . 8
LEADING QUESTIONS, when permitted 301
LEASE defined 94
deed of 142
LEGACY defined 166
abatement of, to pay debts 166
lapsed 166
when payable 166
LEGAL REMEDIES 242–271
LEGISLATURES OF STATES, divisions and powers of . . 351
LEVARI FACIAS, writ of 312
service of 312
LEVYING WAR 400
LEWDNESS, PUBLIC 466
LEX FORI 176
LEX LOCI CONTRACTUS 176
LIBEL defined 216
remedy for 258
LIBERTY, PERSONAL, right of 34

SECTION
LIBERTY, PERSONAL, protection of, by law 36
LIFE, begins and ends when 17
how protected by law 31
right to 25
LIFE ESTATES, creation and character of 88, 89
LIGHT, right to 57
LIMBS defined 26
defence of 26
duress by fear of loss of 26
how protected by law 31
LIMITATION, statute of 243
LITERARY PROPERTY defined 164
how protected by law 164, 316
title to 164
LIVERY AND GRANT 82
LIVERY OF SEISIN 75, 76
LOCATIO defined 178
LORD AND TENANT, feudal relation of 68
LOUISIANA, common law of 5
LUCRI CAUSA defined 433

MAINTENANCE 447
MALFEASANCE defined 212
MALICE in libel 216
malicious prosecution 218
murder 410
implied and express 410
presumed 411
slander 217
MALICIOUS MISCHIEF 470
MALICIOUS PROSECUTION 218
remedy for 258
MANDAMUS, writ of 268
MANDATORY INJUNCTION 313
MANDATUM defined 178
MANORS, ancient, described 66
MARRIAGE, contract of 185
consideration of 186
effect of, on husband and wife . . 189
property of parties . 160

SECTION
MARRIAGE, contract of, form of 187
how dissolved 188
parties to 186
subject-matter of 186
title by 134, 160
who may contract in 186
MARRIED WOMEN, contracts of, in equity 326
law 189
separate maintenance of 326
property of 326
MARSHALLING ASSETS 323
MASTER defined 203
liability of, for servant 205
rights and duties of 205
MASTER AND APPRENTICE, relation of 204
MASTER AND SERVANT, relation of 203–211
when implied 241
MATERIAL FACTS 292
MAXIMS 7
MAYHEM defined 214
MEETINGS, DISTURBING 459
MEETINGS, right of the people to hold 459
MENACE defined 213
when actionable 213
MENIALS defined 206
MILITARY FORCES, by whom controlled 352
MILITARY SERVICE, liability of citizen to 35, 370
MISDEMEANOR defined 397
MISFEASANCE defined 212
MISFORTUNE, act done by, not a crime 391
MISPRISION of felony 454
treason 405
MISTAKE in contract, correction of, in equity 321
MITTIMUS 486
MIXED ACTIONS 255
MONEY had and received 262
laid out and expended 262
lent and advanced 262
MORTGAGE defined 102
foreclosure of 325

SECTION

MORTGAGE, foreclosure of, effect of 136
redemption of 325
MORTMAIN, acts of 77
MOTION in arrest of judgment 308
in criminal cases 516
error 311
for new trial 307
in criminal cases 515
to erase 285
quash 501
MUNICIPAL LAW defined 2
MURDER defined 406
degrees of 410
killing in 408
malice in 410

NATURALIZATION, mode and effect of 364
NECESSARIES defined 194
right of third persons to supply 194
NECESSITY, act done by, no crime 392
what is 392
NEGLECT of plaintiff to pursue remedy, effect of . . . 243
NEGLIGENCE defined 212
contributory 243
official 451
NEW TRIAL, motion for 307
in criminal cases 515
NIGHT-SEASON in burglary 428
NIHIL DICIT, judgment of 309
NONFEASANCE defined 212
NONSUIT, judgment on 309
NON-USER OF EASEMENT, effect of 130
NOTES AND BONDS, when satisfied, how recovered in
equity 323
NOTICE TO QUIT 95, 96
NUISANCE, abatement of 247
continuance of, who liable for 223
injunctions against 316, 317
public 466
remedy for 258

SECTION

NUISANCE to health 215
incorporeal hereditaments 223
land 223
NUNCUPATIVE WILL defined 166

OATH, who is under 439
OBEDIENCE of subject to state 369
OBSTRUCTING PROCESS 445
OCCUPANCY, title by 162
OFFENDERS, joinder of 498
OFFICE defined 50
OFFICE-FOUND 128
OFFICERS de facto and de jure 359
duty of, in making arrests 480–483
when not allowed to testify 299
OFFICIAL NEGLIGENCE 451
OPPRESSION 452
ORAL EVIDENCE 294
how produced 296
OVERHANGING BUILDINGS a nuisance 223

PARDON, petition for 519
plea of 508
power of, where lodged 508
PARENT, duties of, to illegitimate child 195
legitimate child 194
rights of, over legitimate child . . 193
rights and duties of, cease when . 196
PARTITION, deed of 142
of estates in common 122
joint-tenancy 119
PARTNERS, account in equity 324
remedies between 265
PARTNERSHIP, contract of 180
winding up of, by receiver 327
PARTY-WALL, easement of 57
PATENT for invention 164
lands 139
injunction against infringement of 316
PAUPERS, support of, by relatives 196

SECTION
PEDIGREE, declaration concerning, admissible 300
PENALTIES AND FINES, title to 158
PENALTIES AND FORFEITURES, relief against in equity . 323
PENSION defined 53
PER AUTER VIE, tenant 88
PER VERBA DE PRESENTI 187
PERJURY 439
subornation of 439
PERPETUATION OF EVIDENCE 329
PERPETUITIES, rule against 112
PERSON, crimes against the 400–410, 407, 408
injured by crime, how described in indictment . 495
of the owner in robbery 435
of sound memory and discretion 406
remedy for injury to 257, 258
PERSONAL ACTIONS 256
PERSONAL LIBERTY, right of 34–36
how protected by law . . . 36
subject to law . . . 35
PERSONAL PROPERTY defined 42
why so called 42
PERSONAL SECURITY, right of 25–33
subject to law 30
PERSONS, artificial 18
natural 17
PETIT-JURY 290, 510
PIGNUS defined 178
PIRACY 471
PLAINTIFF defined 253
PLAINTIFFS in actions ex contractu 275
delicto 276
incapacity of, effect of 286
joinder of, in actions ex contractu 275
delicto 276
misdescription of, effect of 286
misjoinder of, effect of 286
nonjoinder of, effect of 286
surviving, actions by 275, 276
PLEA in abatement 286
in criminal cases 504

SECTION

Plea in bar 287
in criminal cases 506
equity 338
of former acquittal 507
conviction 506
guilty 502
not guilty 509
pardon 508
to the jurisdiction 285
in criminal cases 503
Pleadings defined 253
classes of 282
object and rules of 281
order of 282
Policy, Public, crimes against 464–466
Possession, Adverse, effect of 132, 133
nature of 132, 133
prima facio ownership 133
Prerogative, title by 157
Prerogative Writs 268
Prescription, title by 132
what possession necessary to . . 132
Presence, actual and constructive 476
of criminal in court 500
owner in robbery 435
Presentment defined 490
President of the United States, powers of 352
Presumptions 303
Pretended Titles, sale of 448
Primary Evidence 295
Principal compelled to indemnify surety 323
when bound by acts of agent 205
Principal and Agent, account between 265
Principals and Accessories 474, 478
Prior Action Pending, effect of 286
Prison-Breach 441
Private Grant, title by 140
Private Wrongs defined 212
Privity of Estate 61
Probable Cause defined 218

SECTION
PROCESS, civil, defined 253, 279
criminal 499
defects in, effect of 286
final 279
mesne 279
original 279
return of 280
service of 279
defects in, effect of 286
PROFANITY 465
PROHIBITION, writ of 269
PROMISSORY NOTE defined 182
indorsement of 182
transfer of 182
PROOF, BURDEN OF 302
PROPERTY, abandoned, title to 157, 162
attached, ownership of 432
constructed of another's materials, title to . . 163
corporeal 39
transfer of 39
created and transferred how 82
crimes against 420–436, 469, 471
defined 38
in larceny, what is 431
robbery, what is 434
incorporeal 40
injury to 223
remedy for 258
transfer of 40
trespass cannot be committed on . 257
injured by crime, how described in indictment 495
mobility of, legal not physical 43
ownership of, in theft 432
personal 42
corporeal 58
estates in, absolute and qualified 154, 155
for life and in fee . . . 156
in remainder and reversion 156
in severalty, joint-tenancy,
and in common . . . 156

SECTION

PROPERTY, personal, estates in, title to, by accession . . 163
confusion . . 163
contract . . . 168
creation . . . 164
forfeiture . . 158
gift 165
judicial decree . 161
marriage . . 160
occupancy . . 162
prerogative . . 157
succession . . 159
testament . . 166
incorporeal 59
real, corporeal 44
estates in, at will 95
by sufferance 97
for life 88
for years 94
from year to year 96
in common 120
fee simple 86
tail 87
joint-tenancy 115
remainder 109, 110
reversion 108
severalty 114
title to, by abandonment . . 130
accretion 129
descent 123
devise 138
eminent domain . 137
escheat 128
execution . . . 135
forfeiture . . . 131
judicial decree . . 136
marriage . . . 134
possession . . . 133
prescription . . . 132
private grant . . 140
public grant . . 139

SECTION

PROPERTY, real, estates in, title to, by purchase 127
right of 37
special 155
subject to theft, what is 431
taken in war, title to 157
thrown away by thief, title to 157
PROSECUTION in crime 488
malicious 218
PROVISIONS, sale of unwholesome 463
PUBLIC defined 466
PUBLIC ENEMY defined 401
PUBLIC GRANT, title by 139
PUBLIC PLACE defined 458
PUBLIC RIGHTS defined 344
PUBLIC WRONGS defined 382, 384
PUBLICATION in libel 216
PURCHASE, title by 127
PUTTING IN FEAR, in robbery, defined 436

QUALIFIED PROPERTY 154, 155
QUANTUM MERUIT 262
QUANTUM VALEBAT 262
QUASH, motion to 501
QUO WARRANTO, writ of 270

RAPE defined 416
emission in 416
penetration in 416
want of consent in 418
who cannot consent 418
woman a witness in 419
REAL ACTIONS 254
REASONABLE CREATURE 407
REBUTTER 287
RECAPTION, right of 245
RECEIVERS, appointment of, in equity 327
RECEIVING STOLEN GOODS 442
RECORDS, FALSIFYING 444
REDEMPTION OF MORTGAGE 325
RE-EXAMINATION OF WITNESS 301

SECTION
REJOINDER 287
RELATIVE RIGHTS, how injured 231, 232
RELEASE, deed of 142
RELEVANT FACTS 292
REMAINDER defined 106, 107
contingent 110, 111
vested 109, 111
REMEDIES, classes of 244
equitable 313
REMEDIUM defined 242
REMEDY for every wrong 242
when refused by law 243
REMITTER, remedy by 252
REMITTITUR 309
RENT defined 55
distress for 248
REPLEADER 308
REPLEVIN, action of 260
execution in 312
REPLICATION 287
in equity 340
REPRIEVE, power of 521
REPUGNANCY in indictment 497
REPUTATION, right to 29
how protected by law 33
REQUISITION of fugitive criminals 484
RESCUE 441
RETAINER of servant 238
remedy for 258
remedy by 251
RETURN of execution 312
process 280
RETURN-DAY 279
REVERSAL OF JUDGMENT 311
effect of 311
in criminal cases . . 518
REVERSION defined 106–108
REVIEW, bill of 343
RIGHT, absolute, defined 23
of personal liberty defined 34

SECTION

RIGHT of personal liberty, how protected by law . . . 36
subject to law 35
property defined 37
security defined 25
how protected by law . . 31–33
subject to law 30
private, defined 16
public, defined 16
relative, defined 24
remedy for every violation of 242
RIOT 455
RIVER-BED, belongs to whom 129
ROBBERY defined 434
person of owner in 435
presence of owner in 435
theft in 434
violence and putting in fear in 436
ROUT 455

SALE, contract of 177
SCHOOLMASTER, rights of, over pupil 198
SCIRE FACIAS, action of 266
SECONDARY EVIDENCE 295
SEDUCTION of daughter 241
servant 240
remedy for 257
SEISIN defined 70, 82
in fact and in law 74
livery of 75
pending concurrent freeholds 72
estates less than freehold 71, 83
presumption of 73
when occupation is 71
SEISIN, where found on failure of existing freehold . . . 73
SELF-DEFENCE 244
SERVANT defined 203
battery of 239
remedy for 257
relation of, when implied as to parents, guardians, &c. 241

SECTION
SERVANT, retainer of 238
remedy for 258
rights and duties of 205
seduction of 240
remedy for 257
SERVICES, FEUDAL 67
SHERIFF, duties of 273
SLANDER defined 217
malice in 217
remedy for 258
SOLICITATION 473
SOLICITOR 336
SPECIAL OCCUPANT 88
SPECIAL PROPERTY 155
in chattels, how lost 155
SPECIAL CONTRACT 173
SPECIFIC INTENT defined 386
how proved and rebutted 386
in burglary 429
theft 433
SPECIFIC PERFORMANCE of contracts 319
STANDING MUTE 500
STATE defined 345
protection of subject by 374–376
rights of, over alien 368–372
citizen 368–372
personal liberty 35
security 30
private property 157
vindication of subject by 377–381
wrongs of, against subject of foreign state 379
STATES OF THE AMERICAN UNION, executive functions of 352
how dissolved . . 347
organized . . 346
judicial functions of 354
law of 3
legislative functions of 351

SECTION

States of the American Union, vindication of subjects by 381
treason against . . 402
Statute defined 9
affirmative and negative 12
declaratory and remedial 11
interpretation of 14
public and private 10
judicial notice of 10
takes effect when 9
Statute of Limitations, effect of, on remedy . . . 243
Statute of Uses defined 77, 78
effect of, on freeholds in futuro . . . 81
livery of seisin 80
uses 79
object of 77, 78
Statute-Felonies 396, 437
Statutory Crimes, how described in indictment . . . 496
Stolen Goods, receiving of 442
Stream, effect of changes in, upon ownership of land . . 129
Subject defined 360
duties of, to state 367–372
protection of, by state 374–376
right of, to change allegiance 363
vindication of, by state 377–381
wrongs against, by state 375
Subornation of Perjury 439
Subpœna defined 297
duces tecum 297
in equity 335
service of 335
Succession, title by 159
Summons, writ of 279
service of 279
Support of Soil, right to 57
Supreme Court of the United States, jurisdiction of 354
Surety, relief of, against principal, in equity 323
Suretyship, contract of 183
Surplusage in indictment 497
Surrebutter 287

SECTION
SURREJOINDER 287
SURRENDER, deed of 142

TAKING in robbery 434
theft 430
TAXATION, right of 157, 372
of state functions by United States 372
United States functions by individual States 372
TAXES direct and indirect 372
implied contract to pay 262
TAX-SALES, effect of 135
TECHNICAL WORDS in indictment 496
TENANT, arson by 423
at will 95
by curtesy 91
sufferance 97
for life 88, 93
years 94
from year to year 96
in common 120–122
dower 92
fee simple 86
tail 87
after possibility of issue extinct . . 90
joint-tenancy 115–119
severalty 114
TENANT AND LORD, feudal relations of 68
TENEMENT defined 41
TENURES, allodial 99
feudal 67, 98
in the United States 99
TERM defined 94
TESTAMENT defined 166
execution and construction of 167
title by 166
TESTATOR, capacity of 148
TESTIMONY, when false 439
material to the issue 439
THEFT defined 430

SECTION

THEFT, carrying away in 430
property in 431
ownership of 432
specific intent in 433
taking in, against the owner's will 430
by bailee 430
consent 430
fraud 430
servant 430
THREATS defined 213
TIME OF CRIMINAL ACT, how laid in indictment 494
TITHES defined 47
TITLE defined 123
to personal property 157
by accession 163
confusion 163
contract 168
creation 164
forfeiture 158
gift 165
judicial decree 161
marriage 160
occupancy 162
prerogative 157
succession 159
testament 166
to real property 123
by abandonment 130
accretion 129
descent 123
devise 138, 148
eminent domain 137
escheat 128
execution 135
forfeiture 131
grant 138
private 140
public 139
judicial decree 136
marriage 134

SECTION
TITLE to real property by possession 133
prescription 132
purchase 123, 127
TITLE-DEEDS, possession of, how obtained in equity . . 323
TITLES, PRETENDED, sale of 448
TORTS defined 16, 212
elements of 212
of wife, liability of husband for 189
TRADES, INJURIOUS 215, 466
TRADE-MARK, injunction against infringement of . . . 316
TRAVERSE 283
TREASON defined 398
a degree of crime 394
against individual States 402
United States 400, 401
alien cannot commit 404
at common law 399
how committed 400, 401
misprision of 405
overt act in 403
TREASONABLE PURPOSE defined 400
TRESPASS ab initio 222
action of 257
de bonis asportatis 226
remedy for 257
defendant in, when entitled to the property injured 161
for mesne profits 255
how, by whom, and against whom committed . 222
injunctions against 316
on the case, action of 258
quare clausum 222
remedy for 257
vi et armis 257
TRIAL 289
in criminal cases 510
equity 341
TROVER, action of 259
defendant in, when entitled to the property converted 161

SECTION
TRUSTEE, how compelled to give bonds 323
TRUSTS defined 79
in equity 328

UBI JUS IBI REMEDIUM 242
UNCERTAINTY in indictment 497
UNITED STATES, common law in courts of. 5
executive functions of 352
how dissolved 347
organized 346
judicial functions of 354
jurisdiction of courts of 354–356
legislative functions of 351
protection and vindication of subjects by 381
treason against 400, 401
UNLAWFUL ASSEMBLY 455
UNSOLD LANDS, how granted 139
ownership of 139
UNWRITTEN LAW 4
USE UPON A USE 79
USES defined 77
statute of 77–79
effect of, on freeholds in futuro 81
livery of seisin 80

VENIRE 290
VENUE 493
VERDICT 305
against evidence, new trial for 303
error in, how taken advantage of 307
general 306
illegal 307
in criminal cases 514
special 306

WARD defined 197
abduction of 237
effect of marriage of, on guardianship 202
estate of, how managed by guardian 201
rights of 200

SECTION
WARRANT, arrest with and without 480, 481
WARRANTY, contract of 184
WASTE defined 224
how, by whom, and against whom committed . . 224
injunctions against 316
remedy for 258
WATER, easements in 57
navigable, obstruction of 466
WAY defined 49
disturbance of 223, 225
remedy for 258
WHARVES, right to build 57
WIFE, abduction of 233
remedy for 257
battery of 235
remedy for 257
criminal acts of, in presence of husband 393
criminal conversation with 234
how far subject to husband 190
recognized in equity 189
power of, to contract 169, 189
in equity 326
sue and be sued 189
in equity 326
rights of, as against husband 191
to property of husband 160
how forfeited . 92, 191
separate property of, in equity 326
services of, belong to husband 190
tyranny of husband over, injunctions against . . 318
WILL of lands, construction of 150
effect of 151
execution of 148
requisites of 148
revocation of 149
of personal property, construction of 167
requisites of 166, 167
WITNESS, competent when 298
cross-examination of 301
examination of 301

SECTION

WITNESS, may testify to what 299
not compelled to answer when 299
re-examination of 301
WORDS, actionable and non-actionable per se 217
WOUNDING defined 214
WRECKS, title to 157
WRIT OF ERROR 311
in criminal cases 518
WRITINGS, copies of, when admissible in evidence . . . 295
construed by court 295
in possession of adverse party, how obtained . 330
notice to produce 297
proof of . . . 297
oral evidence to vary 295
WRITS defined 279
of habeas corpus 271
mandamus 268
prohibition 269
quo warranto 270
prerogative 268
service of 279
WRITTEN EVIDENCE 294
WRONGS against personal liberty 219
property 220–230
security 213–218
superior in a relation 232
committed by parties in a relation against each other 231
from joint act of injured and injurer 243
unlawful transaction 243
of state against its subjects 375
subjects of other states . . . 376
private and public 16, 212, 382
remedy for all 242

University Press: John Wilson and Son, Cambridge.