

A HISTORY
OF
THE CRIMINAL LAW
OF ENGLAND.

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IN THREE VOLUMES.

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PREFACE.

THIS work, which attempts to relate the history of the Criminal Law of England, has a history of its own.

In 1863 I published what in one sense may be called the first edition of this work under the title of *A General View of the Criminal Law*. In 1869 I became Legal Member of the Council of the Viceroy in India, and held that office for about two years and a half, during which time my attention was strongly directed, from the legislative point of view, to the subject of Criminal Law, and particularly to its codification. Amongst other things, I drew and carried through the Legislative Council the Code of Criminal Procedure, Act X. of 1872, which, with some slight alterations and variations has just been reenacted and extended to the High Courts by Act X. of 1882.

In 1873 or 1874 I was informed that a second edition of my *General View* was wanted. I began to prepare one, but I found myself hampered at every page by the absence of any authoritative statement of the law to which I might refer. It then occurred to me that as there was no such statement in existence I might write something which at all events would express my own views as to what the law was, to which I might refer in discussing its provisions historically and critically. Acting on this I wrote my *Digest of the Criminal Law* which was published in 1877, and of which a third edition is just coming out. The *Digest* does

not deal with the subject of Procedure. In order at once to complete it and to enable the readers of the present work to see the law of Criminal Procedure as well as that of crimes and punishments stated systematically, I have (with the help of my eldest son) written as a companion to the earlier *Digest* a *Digest of the Law of Criminal Procedure*, which is published contemporaneously with the present work.

When the *Digest of the Criminal Law* was written it occurred to me that with a little alteration it would make a Draft Penal Code. I communicated this view to Lord Cairns (then Lord Chancellor) and to the late Lord Justice Holker (then Attorney-General), and under their authority I drew the Draft Criminal Code of 1878, which was introduced into Parliament by Sir John Holker in the session of that year. Thanks to a great extent to the admirable skill with which Sir John Holker brought forward a measure which he appreciated with extraordinary quickness, for I think his attention had never before been directed to the subject of codification, the bill was favourably received, but Parliament had not time to attend to it. A commission, however, was issued to Lord Blackburn, Mr. Justice Barry, Lord Justice Lush, and myself, to inquire into and consider and report upon the Draft Code. It was accordingly considered by us for about five months, namely from November, 1878, to May, 1879.¹ We sat daily during nearly the whole of that time, and discussed every line and nearly every word of every section. The Draft Code which was appended to the Report speaks for itself. It differs slightly from the Draft Code of 1878. The particulars of the differences are stated in the Report prefixed to the Draft Code of 1879. I did not discover, in the course of the searching discussions of every detail of the subject which took place, any serious error or omission

¹ The Report was signed June 12, 1879.

in the *Digest* upon which both measures were founded. Our report was presented too late for the Code to be passed in 1879. In 1880 there was a change of ministry, but in 1882 the part of the Code which related to Procedure was announced in the Queen's Speech as a Government measure. It had, however, to be postponed, like many other things, to matters of a more pressing nature. For reasons stated at length in the present work I should deeply regret the division of the Code into separate parts. Such a course would in my opinion produce confusion and deprive the measure of much of its value. If it is said that the Code taken as a whole is too extensive a measure to be disposed of in a single session, it may be replied that it is not longer than other single acts—for instance, the Merchant Shipping Act of 1854; and it may be added that by far the greater part of the Act is mere reenactment, and would in all probability give rise to no discussion. At all events, if the Bill is divided into two parts, it would be desirable to suspend the operation of the one first passed till the other could be enacted. They are so interwoven that it would be inconvenient to bring one into operation alone. To give a single instance. How can you retain the distinction between felony and misdemeanour as a part of the substantive law, and yet remove it from the law of procedure? How, if it is removed from the law of procedure, retain it as part of the substantive law? There is no hurry about the matter. The law as it stands is perfectly well understood and in substance requires little alteration. The use of codification would be to give it literary form, and so to render it generally accessible to all whom it concerns. Surely it would be unwise to perform the operation in such a way as to deprive the result of its principal value.

As soon as the sittings of the Criminal Code Commissions

were over I returned to the work which the preparation and revision of the Draft Codes of 1878 and 1879 had forced me to lay aside.

On turning back to the book published in 1863 I found that though the experience collected in the manner already stated had confirmed large parts of what I had written, the book was in many places crude and imperfect, and that in some respects it no longer represented my views. It seemed, accordingly, that if the work was to be republished it must be rewritten, and the present work is the result. I am conscious of many defects in it for which my best apology is that it has been written in the intervals of leisure left by my judicial duties. It is longer and more elaborate than I originally meant it to be, but, until I set myself to study the subject as a whole, and from the historical point of view, I had no idea of the way in which it connected itself with all the most interesting parts of our history, and it has been matter of unceasing interest to see how the crude, imperfect definitions of the thirteenth century were gradually moulded into the most complete and comprehensive body of criminal law in the world, and how the clumsy institutions of the thirteenth century gradually grew into a body of courts and a course of procedure which, in an age when everything is changed, have remained substantially unaltered, and are not alleged to require alteration in their main features. Much has been said and written of late years on the historical method of treating legal and political matters, and it has no doubt thrown great light on the laws and institutions of remote antiquity. Less has been done in investigating comparatively modern laws and institutions. The history of one part of our institutions has, under the name of constitutional history or law, been investigated with admirable skill and profound learning. Comparatively little has been done

towards writing the history of other branches of our law which are perhaps more intimately connected with the current business of life. Of these the criminal law is one of the most important and characteristic. No department of law can claim greater moral importance than that which, with the detail and precision necessary for legal purposes, stigmatises certain kinds of conduct as crimes, the commission of which involves, if detected, indelible infamy and the loss, as the case may be, of life, property, or personal liberty. A gradual change in the moral sentiments of the community as to crime in general and as to each separate crime in particular, displays itself in the history of legislation on the subject, and particularly in the history of legal punishments. The political and constitutional interest of the subject is not inferior to its moral interest. Every great constitutional question has had its effect both on criminal procedure and on the definition of crimes. I may instance the history of impeachments, the history of the criminal jurisdiction of the Privy Council, the history of the gradual development of the modern system of trial, the history of the law relating to treason, and that of the law relating to libel. Subjects of even more vital interest than politics have their bearing upon the criminal law. Any history of it which omitted the subject of religious offences would be incomplete, but that history involves a sketch of the process which has, in the course of about five centuries, changed a legislative system, based upon practically unanimous belief in the doctrines of the mediæval church, into a system which, according to some, is based upon the principle that for legislative purposes many religions are to be regarded as about equally true (which is probably what is meant by the principle of religious equality), and according to others on the principle that all religions are untrue.

The subject of criminal responsibility and the relation of madness to crime cannot be discussed without saying something on subjects forming the debateable land between ethics, physiology, and mental philosophy.

Again, the different views of social and political economy which have prevailed at different times have left traces, amongst others, on the laws which punish offences against trade, and on the laws against vagrancy and on the game laws.

Even the history of crimes which are crimes and nothing else, such as homicide in its two forms, and theft, is full of interest, partly because it illustrates the unexpressed views of many different ages upon violence and dishonesty, and partly because it is perhaps the most striking illustration to be found in any part of the law of the process by which the crude and meagre generalities of the early law were gradually elaborated into a system erring on the side of over luxuriance and refinement, but containing materials of the highest value for systematic legislation.

Lastly, the Criminal Law, like every other important branch of the law, connects itself with other systems, and that in several ways. First, the question of its local extent has much to do with questions connected with International Law. Secondly, it has been the parent of other systems, one of which at least (the Criminal Law of India) is on its own account a topic of great interest, whilst it becomes doubly interesting when it is regarded, as it ought to be, as a rationalised version of the system from which it was taken. Thirdly, it is difficult to criticise the system properly or to enter into its spirit except by comparing it with what may be described as the great rival system,—that which is contained in the French and German Penal Codes, both of which may be regarded to a certain extent as

rationalised versions and developments (though in each case at several removes) of the Criminal Law of Rome.

I have tried to deal with these matters in such a manner as to write a hitherto unwritten chapter of the history of England, and at the same time to explain one of the most important branches of the existing law, and to show on what foundations rests the Code in which it is proposed to embody it.

J. F. STEPHEN.

ANAVERNA,
RAVENSDALE,
CO. LOUTH,
Oct. 19, 1882.

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. For List of Cases named, STATUTES cited and GENERAL INDEX,
see end of VOLUME III.

ERRATA AND CORRIGENDA.

VOL. I.

- P. 56, last line, omit "[culpam]" and add the following note to the word "colpum":—"Colpus Gallis coup Iialis colpo diminutivum ex colaphus."—*Ducange, sub voce.*
- P. 70, note 2, for "Hen. 8," read, "Hen. 1."
- P. 71, line 20 from top, for "theoir," read, "theow."
- P. 98, last line, for "goal," read, "gsol."
- P. 116, last line of note 1, for "c. 79," read "c. 76."
- P. 126, The passage quoted from Bracton is in Vol. II., p. 538.
- P. 127, note 2, for "Sir H. Twiss," read, "Sir T. Twiss."
- P. 241, add to note 4 the following:—"The &c., to which this note is made is a misprint in Sir T. Twiss's edition for 'vic.,' the abbreviation of vicecomites, which makes the passage clear."

VOL. II.

- P. 17, note 1, line 2, for "Horace," read "Travers."
- P. 187, line 5 from the bottom, for "cur," read "cas."

VOL. III.

- P. 15, line 8 from bottom, dele "who."
- P. 21, line 17 from top, dele "two."
- P. 28, line next below the table, for "Horace," read "Travers."
- P. 152, note 1, for "Shaw," read "Show."
- P. 179, line 17, for "actiona," read "sections."
- P. 321, line 6 from top, for "they," read "he."

CRIMINAL LAW.

CHAPTER I.

STATEMENT OF THE SUBJECT OF THE WORK.

A COMPLETE account of any branch of the law ought to consist of three parts, corresponding to its past, present, and future condition respectively. These three parts are—

CHAP. I.
—

- (1) Its history.
- (2) A statement of it as an existing system.
- (3) A critical discussion of its component parts with a view to its improvement.

My *Digest of the Criminal Law* and the *Digest of the Law of Criminal Procedure* now published as a companion volume to it are attempts to state the most important parts of the criminal law as it is systematically. The present work is intended to relate its history, and to criticise its component parts with a view to their improvement. The criticism is for the most part interwoven with the history.

Before undertaking either of these tasks I must endeavour to define what I mean by the Criminal Law. The most obvious meaning of the expression is that part of the law which relates to crimes and their punishment—a crime being defined as an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act.

CHAP. I. This definition is too wide for practical purposes. If it were applied in its full latitude it would embrace all law whatever, for one specific peculiarity by which law is distinguished from morality is, that law is coercive, and all coercion at some stage involves the possibility of punishment. This might be shown in relation to matters altogether unconnected with criminal law, as the expression is commonly understood, such as legal maxims and the rules of inheritance. A judge who wilfully refused to act upon recognised legal maxims would be liable to impeachment. The proprietary rights which are protected by laws punishing offences against property are determined by the application of those laws. If there were no such crimes as theft, forcible entry, malicious mischief, and the like, and if there were no means of forcing people to respect proprietary rights, there would be no such thing as property by law.

This is no doubt a remote and abstract speculation. The principle on which it depends may be displayed by more obvious and important illustrations. It would be a violation of the common use of language to describe the law relating to the celebration of marriage, or the Merchant Shipping Act, or the law relating to the registration of births, as branches of the criminal law. Yet the statutes on each of these subjects contain a greater or less number of sanctioning clauses which it is difficult to understand without reference to the whole of the acts to which they belong. Thus, for instance, it is felony to celebrate marriage otherwise than according to the provisions of certain Acts of Parliament passed in 1823 and 1837, and these provisions form a connected system which cannot be understood without reference to the common law on the subject. These illustrations (which might be indefinitely multiplied) show that the definition of criminal law suggested above must either be considerably narrowed or must conflict with the common use of language by including many parts of the law to which the expression is not usually applied.

For all practical purposes a short description of the subject-matter to which the expression "criminal law" is commonly

¹ *Dig. Crim. Law*, 259, 260.

applied is more useful than any attempt to sum up in a few words the specific peculiarity by which this is distinguished from other parts of the law. The following is such a description: The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals, or upon rights annexed to their persons; or (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property.

The laws which relate to these subjects may again be classified under three heads; they are—

First, general doctrines pervading the whole subject. These doctrines might be called collectively the conditions of criminality. They consist partly of positive conditions, some of which enter more or less into the definition of nearly all offences, the most important being malice, fraud, negligence, knowledge, intention, will. There are also negative conditions or exceptions tacitly assumed in all definitions of crimes, which may be described collectively as matter of excuse.

Secondly, the definition of crimes and the apportionment to them of punishments.

Thirdly, the procedure by which in particular cases criminals are punished according to those definitions.

All the laws which would commonly be described as forming part of the criminal law of this country might be classified under one or other of these heads.

The description of criminal law which I have substituted for a definition in the stricter sense of the word is intended to exclude two large and important classes of laws which might perhaps be included not only with theoretical propriety, but in accordance with popular language, under the phrase "criminal law." These are, first, laws which constitute summary or police offences, and secondly, laws which impose upon certain offenders money penalties, which may be recovered by civil actions, brought in some cases by the person offended, in others by common informers. Summary offences have of

CHAP. I. late years multiplied to such an extent that the law relating to them may be regarded as forming a special head of the law of England. Such offences differ in many important particulars from those gross outrages against the public and against individuals which we commonly associate with the word crime. It would be an abuse of language to apply such a name to the conduct of a person who does not sweep the snow from before his doors, or in whose chimney a fire occurs. On the other hand, many common offences against person and property have of late years been rendered liable to punishment by courts of summary jurisdiction, and such cases and the courts by which they are tried fall within the scope of the subject of this book, and are dealt with in their place.

Penal actions by which private persons may in particular cases protect rights of a peculiar kind are still further removed from the associations which commonly connect themselves with a criminal prosecution.¹ If a lecture is published without the lecturer's leave, he has power, after taking certain precautions, to seize all published copies, and to recover a penalty in respect of each of them; but a proceeding to enforce such a right is a civil action, and differs in many ways from a criminal proceeding, though it has the practical effect of imposing a heavy fine on the person in default. I have not, however, left entirely unnoticed either the law relating to offences dealt with in a summary way or the law relating to penal actions.

I have intentionally substituted this short description of the contents of an actually existing body of law for any definition attempting to sum up the characteristics of criminal law in a more abstract way, because the only abstractions which in any degree correspond with existing facts in reference to law are too wide in their sweep to furnish materials for such a definition.

Austin's definition of a law leaves room for no other definition of a crime than an act or omission which the law punishes, and the reasons already given show that for practical purposes this definition is inconveniently wide. I do not think that this result in any way discredits Austin's definition of a law, which is nothing more than the

¹ 5 & 6 Will. 4, c. 65.

recognition and record of the fact that there are in all human societies rules of conduct, differing from other rules of conduct in the circumstance that obedience to them is in some cases, and may be in all cases, enforced by the collective strength of the society in which they exist. To confine the word "law" to such rules, and to apply it to them irrespectively of their goodness or badness and of their origin is, I think, the first condition of clearness in all speculations on the subject. The only alternative is to attempt to embody goodness or wisdom in the definition of law, one effect of which must be to introduce into all legal questions the uncertainty which belongs to all discussions upon morality. In the common use of language, however, the word "crime" and "criminal" no doubt connote moral guilt of a more serious character than that which is involved in a bare infringement of law as defined by Austin. The effect of this difference between the popular meaning of the words "crime" and "criminal," and that broader signification which it would be natural to attach to it in connection with Austin's definition of law, is given by restricting the meaning of the expression "criminal law" in the manner already stated.

Much discussion has taken place on subjects connected, or supposed to be connected, with criminal law, which I leave on one side, because it seems to me at once idle and interminable. The subject in question is usually called the ¹Right to Punish. On what ground, it is asked, and under what limitations, has Society a right to punish individuals? These questions appear to me to be almost entirely unmeaning, and quite unimportant. Societies are stronger than their individual members, and do as a fact systematically hurt them in various ways for various acts and omissions. The practice is useful under certain conditions, and injurious under other conditions. What these conditions are is a question for legislators. If, all matters being duly considered, the legislature consider it expedient to punish a given action in a given way, I think they would be guilty of weakness if they did not punish that action in

¹ Rossi's *Traité du Droit Criminel* is occupied principally by discussions on this subject.

CHAP. I. that way although they had no right to do so. If they considered it inexpedient that the act should be punished, they would be cruel if they punished it, however good a right they might have to do so. On this account the whole of the discussion as to the right to punish appears to me superfluous. I think indeed that from the nature of the case any conclusion as to any right alleged to exist antecedently to and independently of some law from which it is derived must be arbitrary and fanciful.

Taking this view of the elements of which the criminal law is composed, the next question is in what manner its history should be related.

In writing the history of a body of law, a difficulty presents itself which is inherent in the nature of the subject, and which reduces the writer to a choice between two modes of procedure, neither of which can be regarded as altogether satisfactory.

The law of England as a whole, or even the criminal law as a whole, can scarcely be said to have a history. There is no such series of continuous connected changes in the whole system as the use of the word "history" implies. Each particular part of the law, however, has been the subject of such changes. The law as to perjury and the definition of the crime of murder have each a history of their own, but the criminal law regarded as a whole is like a building, the parts of which have been erected at different times, in different styles and for different purposes. Each part has a history which begins at its foundation and ends when it reaches its present shape, but the whole has no history for it has no unity. How then is the history of the whole to be related? If an account of each successive change affecting any part is given in the order of time, the result is that it is impossible to follow the history of any one part, and the so called history becomes a mass of unconnected fragments. If, on the other hand, the history of each part is told uninterruptedly, there is a danger of frequent repetitions. After much consideration of the subject the second course has appeared to me on the whole to be the least objectionable of the two.

I have accordingly dealt with the subject in the following order :—First, I have given some account of the Criminal Law of Rome, which has in many ways exercised an influence on our own law. I have then described both the substantive law and the criminal procedure of the English before the Conquest. Passing to the history of the existing English Criminal Law I have given, first the history of the Courts. Under this head I have traced, first the history of the ordinary criminal courts, namely, the Queen's Bench Division of the High Court, the Assize Courts, the Courts of Quarter Sessions, the Courts of the Franchises, and the Welsh Courts. I have next given the history of the extraordinary criminal courts, namely, Parliament and the Court of the Lord High Steward. Lastly, I have given the history of the criminal jurisdiction of the Privy Council.

From the Courts I pass to the procedure followed in them, describing in successive chapters, first, the history of the procedure for the apprehension, examination, and committal or bail of a suspected person; secondly, the history of the various forms of accusation and trial, especially that of trial by jury and its incidents; thirdly, I have given the history of the development of trial by jury from the reign of Mary to that of George III., when the present system may be said to have been established; fourthly, I have given an account of our existing method of trial; fifthly, I have given the history of legal punishments; sixthly, I have given an account of the way in which prosecutions are managed and paid for. In conclusion, I have made some general observations on our system of criminal procedure viewed as a whole, and in particular I have given some account of the part of the Draft Code of 1879 which relates to procedure, and of the changes proposed by it in the existing law. I have also made a comparison between our own system and that of the *Code d'Instruction Criminelle* which prevails in France.

The second volume begins with a subject which has been little considered, and which is intermediate between criminal procedure and the substantive criminal law, namely, the limits of the criminal law in respect of time, place, and person.

I next proceed to treat of the substantive criminal law,

CHAP. I. including, first, the theory of criminal responsibility, and the exceptions to the general rule that men are responsible for their actions; secondly, the leading points in the general history of the law of crimes, considered as a whole; thirdly, the history of the principal classes of offences into which the criminal law may be divided.

These topics comprise all that need be said on the criminal law of England taken by itself, but the law of England resembles that of Rome in many ways, and perhaps in nothing so much as in the fact that it prevails in a great number of countries other than that of its origin, and this is perhaps more strikingly true of the criminal law than of any of its other departments. I have accordingly added to my account of the criminal law of England an account of the system adapted from it established in India, and some notices of other systems founded upon it.

The work concludes with detailed accounts of several trials, chosen as fair specimens of the practical results of English and French procedure.

As to the order in which some of these matters are discussed, I may observe that in a systematic exposition of an existing body of law it is natural to state first the substantive law, and then the law as to procedure by which it is applied to particular cases; but in treating the subject historically it seems more proper to begin with an account of Courts and other Officers of Justice, as the substantive law is to a great extent, perhaps mainly, developed by their decisions and by their tacit adoption of rules and principles before they are reduced to an express written form.

CHAPTER II.

ROMAN CRIMINAL LAW.

THE oldest part of the Roman Criminal Law was contained CHAP. II.
in the twelve tables. The twelve tables have been recon-
structed by various authors, of course more or less con-
jecturally, from the remaining fragments of them. The
following is M. Ortolan's ¹reproduction of what he numbers
as the eighth table "*de delictis*":—

1. Libels and insulting songs to be punished by death.
2. Breaking a limb, unless settled for, to be punished by retaliation.
3. Breaking the tooth or bone of a free man, 300 asses; of a slave, 15 asses.
4. For insulting another, 25 asses.
5. For ²damage to property caused unjustly If it is accidental, it must be repaired.
6. For damage caused by a quadruped, repair the damage or give up the animal.
7. An action lies against a man for pasturing his flock in the field of another.
8. ³Whoever injures crops by enchantments or conjures them from one field into another (punishment unknown).
9. Whoever by night furtively cuts or causes to be grazed crops raised by ploughing, shall be devoted to Ceres and

¹ Ortolan, *Explication Historique des Institutes*, i. 114-118. The references to Pothier are to Pothier's *Pandectæ Justinianæ*. 4 vols. Paris, 1818. This work contains all the texts of the Roman Law, arranged by Pothier in what he regards as their natural order. It is extremely useful.

² The fragment here is "*Rupitias . . . Sarcito*."

³ Pothier, i. cxx.

CHAP. II. ¹put to death if he is an adult, or if he is under the age of puberty shall be flogged at the discretion of the prætor and made to pay double value as damages.

10. Whoever burns a house or a stack of corn near a house knowingly and maliciously (*dolo*) shall be bound, beaten, and burnt. If by accident, he must pay damages. If he is too poor he must be ²slightly flogged.

11. A man who wrongfully cuts another's trees must pay twenty-five asses for each tree.

12. If a man is killed whilst committing theft by night he is lawfully killed.

13. If a thief is taken by day he may not be killed unless he resists with a weapon.

14. A thief taken in the fact (*fur manifestus*) must be beaten with rods, and adjudged (as a slave) to the person robbed. If he is a slave he must be beaten with rods and thrown from the Tarpeian rock. Youths are only to be beaten with rods at the discretion of the magistrate, and condemned to repair the damage.

15. A thief ³discovered by plate and girdle is to be deemed to be taken in the fact.

A thief discovered in possession of the stolen property (not by plate and girdle), and a thief who hides the stolen property in the house of a third person must restore three times the value of the property.

16. When an action is brought for a theft not manifest, the thief must pay twice the value of the money stolen.

17. Stolen property cannot be acquired by usucaption.

18. ⁴The interest of money is $8\frac{1}{3}$ per cent. per annum. A usurer who lends at a higher rate forfeits fourfold.

19. Breach of trust with a deposit is punished by double damages.

20. A guardian who appropriates the property of his ward forfeits double the amount.

¹ Pothier (i. cxxi.) says by hanging.

² *Levius castigatior.*

³ "*Lance licioque conceptum*"—a solemn search made with certain symbolical solemnities.

⁴ "*Si quis unciario fenore amplius fenerasset quadruplione luito.*" Unciarius fœnus is 1 per cent. per annum according to Pothier, $8\frac{1}{3}$ according to Ortolan. See also an account of the controversy as to the meaning of the phrase in the *Dictionary of Antiquities*, art. "Fœnus."

21. A patron who cheats his client is devoted to the gods ^{CHAP. II.}
¹(and may be killed by any one).

22. A person who, having been a ²witness in any business or contract, afterwards refuses to give his evidence, becomes infamous and incapable of making a will.

23. Whoever gives false evidence must be thrown from the Tarpeian rock.

24. Whoever knowingly and maliciously kills a free man must be put to death. ³Let him who uses wicked enchantments, or makes or gives poisons, be deemed a parricide.

25. ⁴If a man kills his parent, veil his head, sew him up in a sack, and throw him into the river.

26. No one is to make disturbances at night in the city under pain of death.

The excessive curtness of these provisions implies the existence of an all but unlimited discretion in those who had to administer the law. We know, indeed, from other sources, that in ancient Rome the courts and magistrates practically made their own laws to a great extent.

The laws of the Twelve Tables were of less importance in the history of the development of Roman law than the institutions by which they were carried into execution.

Criminal jurisdiction was originally in the hands of the Comitia Centuriata, or Tributa, and in some cases in those of the Senate. ⁵The Comitia Centuriata could sentence to death; the Comitia Tributa to exile. The Senate had an ill-defined jurisdiction which did not usually extend to capital cases. In cases of importance the Comitia and the Senate exercised their powers directly; but in other matters they delegated their powers to quæstors (inquirers, commissioners), who were appointed at first for particular cases, and afterwards for particular classes of cases. ⁶In very early times there are traces of standing quæstores parricidii. In later, though still in early times, ⁷we hear of a quæstio de conjurationibus, a quæstio de veneficiis, a quæstio de homicidiis established to deal with particular offences which happened to be common at a particular period. This led in time to the

¹ Pothier, i. cxxvii.

² Libripens.

³ Pothier, i. cxxix.

⁴ *Ib.*, cxxxii.

⁵ Ortolan, i. 216.

⁶ *Ib.*, 182-3.

⁷ *Ib.*, 217.

CHAP. II. establishment of standing commissions (quæstiones perpetuæ), for the purpose of dealing with particular classes of offences.

Each of them was established by a special law, and consisted of a prætor chosen annually, assisted by a sort of jury, consisting sometimes of as many as 100 judices, who were summoned for each particular case.

These courts, the Roman legislative assemblies, and afterwards the emperors, produced, in the course of centuries, a body of law, the comments upon or fragments of which fill the 47th and 48th books of the *Digest*, and the 9th book of the *Theodosian Code*. From these authorities we can acquire a knowledge of the Roman law relating to the definition of crimes and also of the procedure for their punishment.

The Roman lawyers in the days of Justinian divided crimes into three classes, according to the manner in which they were prosecuted, namely, *Publica Judicia*, *Extraordinaria Crimina*, and *Privata Delicta*. These I shall notice in their order.

I. PUBLICA JUDICIA.

The *Publica Judicia* were the representatives of the old "quæstiones perpetuæ." They related to crimes which were specifically forbidden by particular laws under defined penalties, capital (death or exile) or not.

Extraordinaria Crimina were offences for which no special quæstio, and no specific punishment, were provided. The punishment was (within limits) at the discretion of the judge, and the injured party might prosecute, though he was considered in doing so to protect rather the public interest than his own.

Privata Delicta were offences for which a special action was set apart involving a definite result for the injured party, such, *e.g.*, as the *actio furti* or *actio injuriarum*.

The classification is a little like a classification of English crimes, as being either (1) Treason or felony; (2) Misdemeanours at common law; or (3) Torts; and there is something of a resemblance between the way in which, in the course of ages, the *Publica Judicia* and the *Extraordinaria Crimina* came to be formed into a single class of offences, as to all of

which the punishment was more or less discretionary, and the gradual legislative removal in our own country of nearly every substantial distinction between felony and misdemeanour.

The crimes included under the head of Publica Judicia were those which were forbidden by the following laws:—

¹Lex Julia Majestatis, ²Lex Julia de Adulteriis, ³Lex Julia de Vi Publica et ⁴Privata, ⁵Lex Cornelia de Sicariis et Veneficiis, ⁶Lex Pompeia de Parricidis, ⁷Lex Cornelia de Falsis, ⁸Lex Julia Repetundarum, ⁹Lex Julia de Annona, ¹⁰Lex Julia Peculatus et de Sacrilegiis et de Residuis, ¹¹Lex Julia Ambitus, ¹²Lex Fabia de Plagiariis.

The text of these laws has not in any instance been preserved, though the style of the comments made upon them by the different jurists quoted in the *Digest* looks as if they had given in several instances the very words of the law. In the main, however, the *Digest* consists of observations, and of notes of decisions upon them; and in other classical authors there are passages which enable us to form some sort of estimate, or at least reasonable conjecture, as to the position which they held in the history of Roman law. They seem to have been not altogether unlike our modern Consolidation Acts, and their very words seem to have been as carefully noted and insisted upon as the wording of our own acts of Parliament. I should think it very doubtful whether they defined the fundamental terms which occur in them, any more than the Consolidation Acts of 1861 define murder and theft.

¹³ Thus, for instance, the Lex Julia Majestatis had been preceded by a provision in the Twelve Tables, the Lex Gabinia, the Lex Apuleia, the Lex Varia, and the Lex Cornelia, just as the Offences Against the Person Act was preceded by the statute of Stabbing, the Coventry Act, the Waltham Black Act, the Consolidation Act of George IV., and many others.

Roman Criminal Law does not appear to have been reduced to any very definite form by those who are treated as authorities by the compilers of the *Digest*. The titles follow

¹ Dig. xlviii., Tit. 4.

² *Ib.* 5.

³ *Ib.* 6.

⁴ *Ib.* 7.

⁵ *Ib.* 8.

⁶ *Ib.* 9.

⁷ *Ib.* 10.

⁸ *Ib.* 11.

⁹ *Ib.* 12.

¹⁰ *Ib.* 13.

¹¹ *Ib.* 14.

¹² *Ib.* 15.

¹³ Pothier, iv. 407—8.

CHAP. II. each other in no particular order, and the contents of the titles are arranged as far as can be judged at random. I notice the offences in the order in which they stand.

THE LEX JULIA MAJESTATIS.—¹“Majestas,” says Cicero, “residet proprie in populo Romano. Hanc minuere dicitur, “qui de dignitate aut amplitudine aut potestate Populi “Romani, aut eorum quibus populus potestatem dederit “aliquid derogat.” The offence of Majestas was divided into “perduellio” and “læsa majestas.” Perduellio included offences closely resembling treason by levying war or assisting the Queen’s enemies, and inciting to mutiny. It also included the offence of governors refusing to give up their provinces, or the command of their forces, and some other matters which with us would be dealt with under the Mutiny Act.

Læsa Majestas included every kind of act by which public authority was resisted, or usurped by a private person, or by which any sort of disrespect was shown to the Emperor. The interpretation put upon the law on this subject varied according to the temper of the different emperors. It reached at times a depth of servility of which it is difficult in our days to form an estimate. For instance, ²“Non con-“trahit crimen majestatis qui statuas Cæsaris vetustate cor-“ruptas reficit,” which implies that some one thought other-“wise. On the other hand, they sometimes rose to a theatrical magnanimity. ³“Si quis,” wrote Theodosius, “modestiae “nescius et pudoris ignarus, improbo petulantique maledicto “nomina nostra crediderit lacessenda; ac temulentia turbu-“lentus, obtreceptor temporum nostrorum fuerit; eum poenae “nolumus subjugari neque durum aliquid nec asperum “volumus sustinere; quoniam si id ex levitate processerit “contemnendum est, si ex insania miseratione dignissimum, “si ab injuria remittendum.” The case that the emperor might deserve what was said of him does not suggest itself.

By the law of the Twelve Tables Majestas was punished by flogging to death. Under the republic it was punished by exile. Afterwards by death.

LEX JULIA DE ADULTERIIS.—The Lex Julia de Adulteriis

¹ Pothier, iv. 408.

² Dig. xlviii. 4, 5.

³ Cod. ix. 7.

appears to have been directed against sexual crimes of every sort. It punished adultery (on the part of the wife but not on the part of the husband), fornication (*stuprum*) in certain cases, incest, polygamy, unnatural offences, and pimping. It is unnecessary to say much on this subject, but one or two points may be mentioned on account of a possible connection between them and part of our own law. A father had a right to kill both his married daughter and her accomplice if she was taken in adultery either in his house or in her husband's. The husband had no such right as to his wife in any case, and no such right as to her accomplice unless he was ¹an infamous person or a slave, taken not in his father-in-law's house, but in his own. If, however, the husband did kill the adulterer irregularly he was less severely punished than in other cases of homicide.

²“*Si legis auctoritate cessante, inconsulto dolore adulterum interemit quamvis homicidium perpetratum sit, tamen, quia et nox et dolor justus factum ejus relevant potest in exilium dari.*” By one of the Novels (cxvii.) a man might kill as an adulterer any person whom he found in his wife's company either in that person's house or in the husband's house, or in an inn or “in suburbanis,” after being thrice warned in writing and in the presence of three witnesses not to see her.

The father's right to kill (*jus occidendi*) was rather wider, but was narrowly limited. “*Permittitur patri tam adoptivo quam naturali, adulterum cum filia cujuscumque dignitatis, domi suæ, vel generi sui deprehensum suâ manu occidere.*” If the father was not himself emancipated he had not the right in question. It was to be exercised in respect of an offence committed in his own house or in that of his son-in-law only. ³The offenders

¹ Pothier, iv. 427. “*Infames et eos qui corpore questum faciunt.*” They are elsewhere enumerated pimps, showmen, dancers, and singers, persons convicted by a *publicum judicium*, the freedman of the husband, the wife, the father, mother, son, or daughter.

² Pothier, iv. 428.

³ The text is very curious. “*Quod ait lex INCONTINENTI FILLAM OCCIDAT; sic erit accipiendum, ne occiso hodie adultero reservet, et post dies filiam occidat; vel contra. Debet enim prope uno ictu et uno impetu utrumque occidere æquali ira adversus utrumque sumpta. Quod si non affectavit sed dum adulterum occidit profugit filia, et interpositis horis apprehensa est a patre qui persequabatur Incontinenti videbitur occidisse.*” Dig. xlviii. 5 23, 4.

CHAP. II. must be taken in the fact. It must be done at once. It was immaterial which was killed first, but if the adulterer only was killed and the daughter spared, the father was guilty of murder under the Lex Cornelia. If, however, the adulterer was killed and the adulteress having been wounded with intent to kill recovered, "verbis quidem legis non "liberatur" (pater) "sed Divus Marcus et Commodus rescipserunt impunitatem ei concedi." ¹The reason for the greater latitude given to the father is thus stated: "Plerumque pietas "paterni nominis consilium pro liberis capit. Cæterum mariti "calor et impetus facile decernentis fuit refrænandus." This is a reason against killing at all. It hardly seems probable that any legislator should have devised such a law entirely on its merits, and it probably requires some historical explanation. Perhaps it is a relic of the ancient law which regarded the wife as her husband's daughter, and which gave every father power of life and death over his children. This power would, while it was in force, give the husband the right to kill the adulterous wife, but he would do so in his paternal character, and thus in later times the right would be restricted to the natural father. I mention this law because of its analogy to our own law as to one species of provocation which reduces murder to manslaughter. ²The punishment of adultery was "relegation" to an island, the woman losing half her dower and a third of her goods, and the man half his goods.

LEX JULIA DE VI PUBLICA ET PRIVATA.—The Lex Julia de Vi Publica consolidated several earlier laws which punished acts of violence not falling within the law against Majestas on the one hand or the law "De Sicariis et Veneficiis" on the other. There is no trace of any specific definition of these vague expressions having been contained in the law, and it does not appear whether there was only one law on the subject divided into two heads, or two distinct laws; but the different texts illustrating "Vis Publica" suggest some such definition as—Illegal violence not otherwise punishable, in which the public are interested either by reason of the character of the offender or by reason of the

¹ Dig. xlviii. 5, 22, 4.

² Pothier, iv. 425.

character of the person injured, or by reason of the purpose for which it is employed. CHAP. II.

The following were cases of the offence:—

A public officer inflicting death or any other corporal punishment on a Roman citizen pending an appeal.

Assaults upon or insults to ambassadors.

Levying new taxes without authority.

The acts which, under our mediæval law would have been described as maintenance or would have fallen under the statutes against badges and liveries were "Vis Publica." Thus, ¹"qui dolo malo fecerit quominus judicia tuto exercentur, aut iudices ut oportet judicent." ²"Qui turbæ seditiosisve faciendæ consilium inierint, servosve aut liberos homines in armis habuerit," and the extent of the rule is proved by the exceptions made to it. "Exceptus est qui propter venationem habent homines qui cum bestiis pugnent ministros enim ad ea habere conceditur." Vis Publica also included what we should call forcible entry by armed men. ³"Qui hominibus armatis possessorem domo agrove suo aut navi sua dejecerit, expugnaverit concursu." It also included many kinds of riots. ⁴"Qui cœtu . . . incendium fecerit . . . quive fecerit quominus sepeliatur"—⁵"qui convocatis hominibus vim fecerit quo quis verberetur et pulsetur neque homo occisus."

Rape was punished as Vis Publica, and not under the Lex Julia de Adulteriis.

Vis Privata was a milder form of Vis Publica, indeed it is doubtful whether one at least of the texts quoted above does not refer to it. The characteristic feature of Vis Privata seems to have been taking the law into one's own hands. Marcus Antoninus in an imperial rescript says:—⁶"Tu vim putas esse solum si homines vulnerentur? vis est et tunc quoties quis id quod deberi sibi putat, non per iudicem reposit."'

The punishment of Vis Publica was exile, and in some cases death; the punishment of Vis Privata confiscation of the third of the offender's property and loss of certain civil rights.

THE LEX CORNELIA DE SICARIIS ET VENEFCIIS.—The Lex Cornelia de Sicariis et Veneficiis was passed by Sylla

¹ Dig. xlviii. 6, 10.

² Pothier, iv. 436.

³ Dig. xlviii. 6,

⁴ *Ib.* 6, 5.

⁵ *Ib.* 6, 10.

⁶ *Ib.* 7, 7.

CHAP. II. and had thus been in force about 600 years when the *Digest* was compiled. It was extended to incendiaries, and also in the time of Diocletian to astrologers and similar impostors.

The main subject of this law is homicide. The great extension given to it by commentators, and the want of any sort of systematic arrangement of the texts of the *Digest*, as well as the title of the law which might be literally translated, ¹“Stabbers and poisoners,” make it probable that the original law itself was very curt and general. It seems never to have been elaborated with any system, but the principal points which long afterwards presented themselves to English lawyers presented themselves to the various jurists and emperors, and received at their hands solutions which, however fragmentary and hesitating, have a resemblance to those of the English courts.

As to the persons to whom the law extended, it seems to have applied in the time of the Antonines to slaves as well as freemen. ²“Qui hominem occiderit punitur, non habitâ *“differentia cujus conditionis hominem interemit.”* The moment at which a child became a human being for this purpose seems to have been a moot point.

The curious points which English lawyers have considered with so much care as to the nature of the connection necessary to constitute homicide between the act causing death and the death caused by it do not seem to have occurred to the Roman lawyers, but there are various passages in the *Digest* which state the principal cases in which the intentional infliction of death was considered justifiable. They are all reducible to the cases of self-defence and the arrest or punishment of criminals.

The Roman doctrine as to the degrees of homicide is shortly summed up in a rescript of Hadrian's. The rule was that the degree of guilt depended on the offender's intention as displayed by the circumstances of his offence. ³“Eum *“qui hominem occidit, si non occidendi animo hoc admisit *“absolvi posse. Et qui hominem non occidit sed vulneravit**

¹ “Sicarii propriis sunt latrones cultellis utentes recurvis ad similitudinem eorum quos Romani ~~scias~~ dixere qui ita breves erant ut occultari sinu vestis possent.”—Pothier, iv. 489.

² Dig. xlviii. 8, 1, 2.

³ *Ib.* 8, 1, 3.

“ ut occidat pro homicida damnandum. Et ex re constitu-
 endum hoc. Nam si gladium strixerit et in eo percusserit
 indubitate occidendi animo id eum admississe, sed si clavi
 percussit aut cuccuma ” (an iron-bound stick) “ in rixa,
 quamvis ferro percusserit tamen non occidendi animo
 leniendam pœnam ejus qui in rixa casu magis quam
 voluntate homicidium admisit.”

CHAP. II.

Killing by negligence was not within the Lex Cornelia, though it might subject the offender to an “*extraordinarium judicium*.” The only form of provocation which seems to have been recognised as affording grounds for diminishing the punishment was the case of adultery already referred to.

¹ Special provision was made for the offence of poisoning, as to which the law was extremely severe, applying to every one “*qui venenum necandi hominis causa fecerit, vel ven- diderit.*” Poisoning is naturally an object of excessive dread in an age in which physical science is at a low ebb, and when belief in witchcraft and other “*maleficia*” prevails. The famous case of the cook who was boiled to death by Act of Parliament in Henry VIII.’s time, and Sir E. Coke’s account of the “*Great Oyer of Poisoning*,” are parallel instances. ² In the French Code Penal poisoning is distinguished as a special offence.

LEX POMPEIA DE PARRICIDIIS.—Parricide was killing any relation nearer than or in the degree of a first cousin.

Parricide as well as poisoning must have fallen under the Lex Cornelia de Sicariis, but the distinction is not without an analogy in English law. It may be compared to petty treason, which ceased to be distinguished from murder only in 1828, by the operation of 9 Geo. 4, c. 31, s. 52.

Homicide under the Republic was punished by confiscation of goods and imprisonment in an island; under the Antonines by death. ³ “*Nisi honestiori loco positi fuerint ut pœnam legis sustineant.*” Common people were thrown to the beasts. There was no special punishment for poisoners, or apparently for parricides, unless the person killed

¹ Dig. xlviii. 8, 3.

² Art. 301. “*Est qualifié empoisonnement tout attentat à la vie d'une personne par l'effet de substances qui peuvent donner la mort plus ou moins promptement, de quelque manière que ces substances aient été employées ou administrées, et quelles qu'en aient été les suites.*”

³ Dig. xlviii. 8, 3, 5.

CHAP. II. was a father or mother, in which case the offender was burnt, that punishment having been substituted for the ancient one of drowning with a cock, snake, and dog. Burning was also the punishment of incendiaries.

LEX CORNELIA DE FALSIS.—The Lex Cornelia De Falsis was divided into two heads, namely, the *lex testamentaria*, the main subject of which was forging and suppressing wills, and *nummaria*, the main subject of which was counterfeiting money. ¹ Paulus's statement of the effect of the law, seems as if he had preserved its very words, "Qui testamentum amoverit, celaverit, eripuerit, deleverit, interleverit, subjecerit, resignaverit, quive testamentum falsum scripserit, signaverit, recitaverit dolo malo, cujusve dolo malo id factum erit." This branch of the law was afterwards extended to other offences. A provision was made either by the Emperor Claudius, or by a decree of the senate in the time of Tiberius, subjecting to the penalties of the Lex Cornelia, every one who when drawing up the will or codicil of another inserted in his own hand a legacy to himself, or (as the law was interpreted) to any person under his power. ² Passages in the code seem to imply that this was meant as a precaution against fraud, and that even the testator's order was no excuse. "Senatus consulto et edicto Divi Claudii prohibitum est eos qui ad scribenda testamenta adhibentur quamvis dictante testatore aliquod emolumentum ipsis futurum scribere. Et poena legis Corneliae facienti irrogata est, cujus veniam deprecantibus ob ignorantiam et profitentibus a relicto discedere, amplissimus ordo vel divi principes veniam raro dederunt." The same inference seems to follow from texts which show the effect of a special and general ratification by the testator in particular cases.

The Lex Cornelia Testamentaria came in process of time to be extended to every sort of instrument other than wills. ³ Ulpian says generally, "Poena legis Corneliae

¹ Dig. xlviii. 10, 2. Compare the language of 24 & 25 Vic. c. 98, s. 2: "Whoever, with intent to defraud" (*dolo malo*), "shall forge, or alter" (*interleverit*), "or shall offer, utter, dispose of, or put off" (*recitaverit*), "knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument." The 24 & 25 Vic. c. 96, s. 29 makes it penal to "cancel" (*deleverit*), "obliterate, or conceal" (*celaverit*) "any will," &c.

² Cod. ix. 23, 3, and compare laws 4 6.

³ Dig. xlviii. 10, 9, 3.

"irrogatur ei qui quid aliud quam in testamento sciens CHAP. II.
 "dolo malo falsum signaverit signarive curaverit." And
 Paulus and Marcian say the same as to all who falsify
 accounts, registers, contracts, or other writings, sealed
 or not.

A man might indeed commit the "crimen falsi" in a¹ genuine document if he dated it falsely, or otherwise made it appear to be what it was not. The law was also extended to giving and suborning false evidence, and to the corruption of judges. Modestinus extends it still further. He says:² "De impudentia " ejus qui diversa duobus testimonia præbuit cujus ita anceps " fides vacillat quod crimine falsi teneatur nec dubitandum " est."

The law indeed applied to certain fraudulent contracts, to the fraudulent assumption of a false name, and as Paulus says, by a constitution of Adrian to one "who sells the " same thing to two different people."

The punishment of "falsum" under the Antonines was, in the case of a person of low rank, imprisonment in the mines, in the case of a person of higher rank, forfeiture of goods, and relegation to an island.

The Lex Cornelia Nummaria, like the Lex Testamentaria, is referred to in terms which resemble those of the parallel English enactments. ³ "Qui nummos aureos argenteos " adulteraverit, laverit, conflaverit, raserit, corruperit vitia- " verit." I do not find express mention in the *Corpus Juris* of the offence of passing bad money, but a characteristic provision occurs as to the refusal of good money. It was put on the same footing as coining on account of the disrespect shown to the image and superscription of the prince. The text quoted above concludes, "vultave signatam monetam " præter adulterinam reprobaverit." Constantine said: ⁴ "Omnes solidi in quibus nostri vultus ac veneratio una " est, uno pretio estimanda sunt. . . Nec enim qui

¹ This is also the law of England—see *R. v. Ritson*, L.R. 1 C.C.R. 200.

² Dig. xlviii. 10, 27, 1.

³ Pothier, iv. 455. Cf. 24 & 25 Vic. c. 99, s. 4: "Impair, diminish, or lighten " any of the Queen's gold or silver coin;" and s. 3: "Wash, case over, or " colour any piece of gold or silver."

⁴ Pothier, iv. 456.

CHAP. II. "majore habitu faciei extenditur majoris est pretii; aut qui
"angustiore expressione concluditur minoris haberi credendus
"est quum pondus idem existat."

The use of false measures, the assumption of marks of dignity, and changing children, were regarded as species of "the crimen falsi," or as analogous to it.

LEX JULIA REPETUNDARUM.—¹ The Lex Julia Repetundarum punished every sort of official extortion, being a sort of Consolidation Act replacing five earlier enactments. The law provided that no one was to receive anything whatever, either for giving or for withholding any judicial or official order. "Tenetur qui, quum aliquam potestatem haberet, pecuniam ob judicandum discernendumve acceperit."

The Lex Julia is also supposed to have contained provisions not altogether unlike those of certain Acts of Parliament relating to British officers in India. By the rules of the Indian Civil Service a civilian may not hold land in his own district, and by Act of Parliament it is unlawful for any one whatever to make any present to him. By the Lex Julia Repetundarum, ² "Quod a præsidente sui procuratore vel quolibet alio in ea provincia in qua administrat, licet per suppositam personam comparatum est, infirmato contractu vindicatur, et æstimatio ejus fisco infertur. Nam et navem in eadem provincia in qua quis administrat ædificare prohibetur."

The offence of "repetundarum" became in the time of the Antonines an "extraordinarium crimen," instead of a "publicum judicium," except indeed in cases in which the order corruptly given involved consequences of extreme importance, as, for instance, when a judge was bribed to have a man put to death. In such instances the punishment was capital. In others it was fourfold damages.

LEX JULIA DE ANNONA.—³ This was a law against what was formerly called forestalling and regrating in English

¹ Dig. xviii. 11, 3. Marcian. He gives elsewhere a much longer enumeration: "Ne quis ob judicem arbitrumve dandum mutandum jubendumve ut judicet; neve ob non dandum non mutandum non jubendum ut judicet," &c.; and see Pothier, iv. 457-

² Pothier, iv. 458.

³ Dig. xviii. 12.

law—anticipating and so raising the price of food in the market. CHAP. II.

LEX JULIA PECULATUS, ET DE SACRILEGIIS ET DE RESIDUIS.
—These three offences were different forms of the offence of public dishonesty. ¹The law against “peculators” forbade “ne quis ex pecuniâ sacrâ, religiosâ, publicâve auferat, “neve intercipient, neve in rem suam vertat, neve faciat quo quis auferat, intercipient, vel in rem suam vertat, nisi cui utique lege licebit. Neve quis in aurum, argentum, æs publicum quid indat, neve immisceat, neve quo quid indatur immisceatur, faciat sciens dolo malo quo id pejus fiat.” In other words it was theft of, or injury to, anything which was either consecrated to the gods, or was public property. The following illustrations are given of cases of peculation. Workmen in the mint coining too much money and carrying off the surplus; ²carrying off title-deeds to state lands, and fraudulently altering them, and various frauds and irregularities as to the public accounts.

The punishment of peculation was the mines, or exile and forfeiture of property, according to the rank of the offender.

Sacrilege was the stealing of something at once public and sacred, but as appears from ³a passage in Quintilian, the definition was not free from doubt. Sacrilege was punished with death, sometimes by burning, often by throwing to the beasts. Parts of the temples were peculiarly sacred. ⁴“Qui sacrarium ingressus interdium vel noctu sacrarium aliquid inde aufert excæcator; qui vero extra sacrarium e templo reliquo aufert verberatus et tonsus exilio multatur,” says Ulpian, which seems inconsistent with what he had said before as to capital punishment.

¹ Dig. xlviii. 13, 1.

² “Qui tabulam æream legis formæve agrorum aut quid aliud continentem refixerit vel quid inde immutaverit.”—Dig. xlviii. 13, 8.

³ “Qui privatam pecuniam de templo surripuit sacrilegii reus est. Culpæ manifesta. Quæstio est an huic crimini nomen quod est in lege conveniat. Ergo ambigitur an hoc sacrilegium sit. Accusator quia de templo sit surrepta pecunia utitur hoc nomine. Reus quia privatam surripuerit negat esse sacrilegium sed furtum. Actor ergo ita finiet sacrilegium est surripere aliquid de sacro. Reus ita finiet sacrilegium est surripere aliquid sacri.”—Quintilian, *Inst.* vii. 3.

⁴ Pothier, iv. 462.

CHAP. II. Theodosius and others assimilated heresy to sacrilege. They put on the same footing, doubting the decisions of the Emperor, and (very strangely) the attempt to get appointed governor of the province in which a man was born.

The law "De Residuis" applied to those who, being accountable to the public, did not fully account for what they had received.

LEX JULIA AMBITUS.—¹The Lex Julia Ambitus seems to have consolidated the provisions of ten previous laws. It was passed by Augustus. It was probably a sort of Corrupt Practices Act, but when popular election was replaced by the appointment of officers by the Emperor, the law became obsolete.

LEX FABIA DE PLAGIARIIS.—²Plagium was the crime of manstealing—selling a free man as a slave. The punishment was at first fine, but afterwards the mines or death.

II. EXTRAORDINARIA CRIMINA.

The second class into which crimes were divided were "extraordinaria crimina," in translating which expression it must be remembered that "crimen" means accusation and not offence, and that "extraordinarium" refers to the nature of the procedure, and not to the quality of the offence. The expression indicates, in fact, a less formal mode of procedure than had originally been appropriated to the Publica Judicia, though, as I shall have occasion to explain more fully under the head of Procedure, the distinction between the two classes was of hardly any practical importance when the Pandects were compiled. The "extraordinaria crimina" noticed in the 47th book of the *Digest* are as follows:—

FAMILY OFFENCES.—³"Sollicitatores alienarum nuptiarum, itemque matrimoniorum interpellatores"—persons who attempted to seduce or procure the divorce of a married woman. Also those who corrupted youths of either sex.

¹ Dig. xlviii. 14; Pothier, iv. 463.

² *Ib.* 15.

³ *Ib.* xlvii. 11, 1. These come under the general head of "extraordinaria crimina" in the *Digest*.

INTRODUCING NEW RELIGIONS.—¹“ Si quis aliquid fecerit quo leves hominum animi superstitione numinis terrentur.” “ Qui novas, et usui vel rationi incognitas religiones inducunt ex quibus animi hominum moveantur.” These and the laws against unlawful societies were the laws by which the Christians were persecuted. This was probably the law to which the Philippians appealed against Paul and Silas. “ These men being Jews do exceedingly trouble our city, and teach customs which are not lawful for us to observe nor to receive, being Romans ” (Acts xvi. 20, 21).

ENGROSSING.—²To raise the price of corn was an “ extraordinarium crimen.” It does not appear where the line was drawn between this offence and that which fell under the Lex Julia de Annona.

ABORTION.—³A woman who procured her own miscarriage was liable as for an “ extraordinarium crimen,” but not under the Lex Julia against homicides. An unborn child was not regarded as a human being.

VAGABONDS.—⁴An extraordinary prosecution lies against vagabonds who carry about snakes and show them, if any one is injured by the fear they cause. This is a little like our law against rogues and vagabonds.

SPECIAL OFFENCES IN PARTICULAR PROVINCES.—⁵Of offences of this kind two are mentioned in the *Digest*, namely, in Arabia σκοπελισμος, which consisted in laying stones on an enemy's ground as a threat that if the owner cultivated the land “ malo leto periturus esset insidiis eorum qui scopulos posuissent ”—a sort of primitive threatening letter, not unlike letters still occasionally delivered in Ireland to prevent the occupancy of lands from which a tenant has been ejected.

⁶In Egypt the breach of *chomata*, dykes of the Nile, was a special offence.

Scopelismus was punished by death. The breach of banks by the mines, at first, and afterwards by burning alive. It is rather singular that these and no other local offences

¹ Pothier, iv. 375.

⁴ *Ib.* 11, 11.

² *Dig.* xlvii. 11, 6.

⁵ *Ib.* 11, 9.

³ *Ib.* 11, 4.

⁶ *Ib.* 11, 10.

CHAP. II. should be mentioned in the *Digest*. It would have been natural to expect that in so vast an empire many local laws must have been in force which would be deserving of notice.

OFFENCES RELATING TO TOMBS.—The texts given in the 12th title of the 47th book of the *Digest* mix up inextricably the civil remedies relating to the violation of tombs, with provisions as to criminal prosecutions. ¹Tombs were violated by burying other bodies in them, by using them as habitations, and in various other ways, and the offender was in most cases liable to an action for a penalty sometimes of 100 and sometimes of 200 aurei. Those who plundered dead bodies were punished capitally, or by the mines, especially if they committed their crime in armed bands.

CONCUSSIO.—²Concussio is defined by Cujas, “terror in-jectus pecuniæ alteriusve rei extorquendæ gratiâ.” It answers in fact to our extortion by a public officer. A text from Macer shows that the offence bordered, so to speak, on the “publicum judicium” of the “crimen falsi.”

³“Concussionis judicium publicum non est, sed si ideo “pecuniam quis accepit, quod crimen minatus sit, potest “judicium publicum esse ex senatus consultis quibus pœnâ “Legis Corneliæ” (*i.e.* Falsi) “teneri jubentur qui in accusa- “tionem innocentium coierint, quive ob accusandum vel non “accusandum, denuntiandum vel non denuntiandum testimo- “nium pecuniam acceperint.” No reference is made to the Lex Julia Repetundarum, which is stated by Macer somewhat less widely than by Marcian who belongs to the same period. Macer’s statement of the Lex Julia Repetundarum reads like a word for word quotation: “Præcipit ne quis ob judicem “arbitrumve dandum mutandum jubendumve ut judicet, “neve ob non dandum non mutandum non jubendum ut “judicet; neve ob hominem in vincula publica conjiciendum “vinciendum vincirive jubendum, exve vinculis dimittendum; “neve quis ob hominem condemnandum absolvendumve; “neve ob litem æstimandam, judiciumve capitis pecuniæve “faciendum vel non faciendum aliquid acceperit.”

¹ “Prætor ait . . . si quis in sepulchro dolo male habitaverit.”—Dig. xlvii. 12, 3.

² Pothier, iv. 379.

³ Dig. xlvii. 13, 2.

⁴ *Ib.* xlviii. 11, 7.

Upon the whole it may be that "concessio" and "repetundarum" may be likened to common extortion and judicial corruption respectively.

ABIGEI.—Theft in general was treated as a tort, but some particular kinds of thieves were subject either to "publica iudicia," or to "extraordinaria crimina." Amongst the latter were "abigei" "drivers," or cattle thieves: ¹"qui pecora ex pascuis, vel ex armentis subtrahunt et quodammodo deprædantur; et abigendi studium quasi artem exercent, equos de gregibus vel boves de armentis abducunt. Cæterum si quis bovem aberrantem, vel equos in solitudine relictos abduxerit, non est abigeus sed fur potius." The stealing of a single horse or ox might make a man an abigeus, but it seems that ²the crime could not be committed on less than four pigs or ten sheep. They need not however be all taken together. In such a state of the law one would expect thefts of three pigs or eight sheep to become abnormally common. By a law of Hadrian this offence was punished by the mines, or, if the thieves were armed, capitally.

PREVARICATION.—³Prevarication was a crime connected with the administration of justice.

"Prevaricator," says Ulpian, "est quasi varicator" (a man with bandy legs) "qui diversam partem adjuvat proditâ causâ suâ." The name was strictly applied to accusers who favoured the accused in a "publicum iudicium." An advocate who betrayed his client was more properly called "proditor," a traitor. The prevaricator was punished as a false accuser.

RECEIVERS.—The receivers of robbers were punished like robbers. ⁴"Pessimum genus est receptatorum sine quibus nemo latere diu potest. Et præcipitur ut perinde puniantur atque latrones. In pari causa habendi sunt qui quum apprehendere latrones possent pecunia accepta vel subreptorum parte demiserunt." Indulgence, though not complete impunity, was extended to those who were connected with the robber. "Eos tamen apud quos adfinis vel cognatus latro

¹ Dig. xlvii. 14, 1, 1.

² *Ib.* 14, 3.

³ *Ib.* 15, 1.

⁴ Paulus. *Ib.* 16, 1.

CHAP. II. "conservatus est, neque absolvendos neque severe admodum
"puniendos."

AGGRAVATED THEFT.—¹Thieves who stole under certain aggravated circumstances were subject to "extraordinaria crimina." The aggravations were as follows:—

(a) *Balnearii*, those who stole the clothes of bathers in the public baths.

(b) Those who stole by night (there is no definition of night) or who defended themselves by arms.

(c) Housebreakers (*effractores*).

(d) "*Expilatores qui sunt atrociores fures.*" It is not certain what was their special characteristic. Some say (fantastically), "*expilatores dici quod ne pilum quidem relinquunt in corpore spoliatorum.*" Others described them as, "*eos qui noctu viatoribus pallia et vestes diripiunt.*"

(e) *Saccularii*, thieves who stole by tricks such as pretended magic.

(f) *Directarii*. "*Hi qui in aliena coenacula se dirigunt furandi animo.*"

All these were punished at the discretion of the judge, the severest punishment being flogging and the mines.

CRIMEN EXPILATÆ HEREDITATIS. —²A stranger who plundered the property of a deceased person was liable to be proceeded against as upon an "extraordinarium crimen."

STELLIONATUS.—Stellionatus is defined by ³Pothier as "*omnis atrox dolus qui proprio nomine caret.*" It is strangely said to be derived from "*Stellio*," a spotted lizard, of which Pliny strangely observes, "*Quo nullum animal fraudulentius invidere homini tradunt.*" The difficulty of giving an adequate definition of fraud has been felt at all times. One mode of avoiding the difficulty is the invention of a conveniently vague term of abuse like "*stellionatus*" or "*dolus.*" Another is the plan of annexing the character of a crime to the combination of two things neither of which is criminal, as in our own conspiracy to defraud. The difficulty exists in the very nature of human conduct. The following are instances of "*Stellionatus*":—⁴"*Si quis merces supposuerit,*

¹ Dig. xlvii, 17 and 18.
² iv. 384.

³ *Ib.* 19.
⁴ Dig. xlvii. 20, 3, 1.

“vel obligatas averterit, vel si corruperit”—delivering goods different from those sold, or removing goods pledged, or injuring them. By our own law, two persons who conspired together for such a purpose would be guilty of an indictable conspiracy, but if one person did it alone he would commit at most an actionable fraud. CHAP. II.

DE TERMINO MOTO.—¹Moving or defacing landmarks was a criminal offence, partly on account of the great importance attached to them by the agrarian laws.

UNLAWFUL ASSOCIATIONS. — ²No associations whatever (with some slight exceptions) were allowed to exist unless they were specially authorised either by the Emperor or by the Senate. Those who formed such associations were punished in the same way as persons “adjudged to have occupied in arms public places or temples.” Meetings for religious purposes were permitted in the case of religions which were authorised by the State, but in no other cases. This was one of the principal laws under which Christianity was prohibited.

III. PRIVATA DELICTA.

Many of the commonest and, in practice, most important of the offences against person and property which fall within what I have described as the Criminal Law were treated by the Roman lawyers as mere private wrongs, “privata delicta,” though as time went on they seem to have come to be regarded as crimes. Two passages of Ulpian set this in a clear light. ³He says in his 2nd book (*De Officio Proconsulis*): “Si quis actionem quæ ex maleficiis oritur velit exsequi si quidem pecuniariter agere velit ad jus ordinarium remittendus erit: nec cogendus erit in crimen subscribere. Enimvero si extra ordinem ejus rei poenam exerceri velit, tunc subscribere eum in crimen oportebit.” ⁴In another passage (in his 38th book on the Edict) Ulpian says that in his time thefts were generally prosecuted as crimes: “Meminisse oportebit nunc furti plerumque criminaliter agi, et eum qui agit in crimen subscribere: non quasi publicum

¹ Dig. xlvii. tit. 21.

² Dig. xlvii. 1, 3.

³ *Ib.* tit. 22, 1, 1.

⁴ *Ib.* 2, 92.

CHAP. II. " sit iudicium sed quia visum est temeritatem agentium etiam
 " extraordinaria animadversione coercendam. Non ideo
 " tamen minus si qui velit poterit civiliter agere." One
 obvious cause for this would be that thefts would usually
 be committed by persons unable to pay damages.

The " privata delicta " mentioned in the *Digest* are as follows:—

FURTUM.—Theft is thus defined by Paulus:—¹ " Furtum
 " est contrectatio rei fraudulosa, lucri faciendi gratia, vel
 " ipsius rei, vel etiam usus ejus possessionisve, quod lege
 " naturali prohibitum est admittere." The definition omits
 the element which from other passages of the *Digest* it
 obviously ought to have contained of " invito domino." The
 manner in which the subject of theft is treated in the *Digest*
 has considerable resemblance to the manner in which it is
 dealt with in our own law, though there are also many differ-
 ences between them. Nearly every question which has pre-
 sented itself to English judges and courts at different times
 appears also to have presented itself to the Roman lawyers.
 A comparison between them will not be without interest.

²By the Roman law the offence of theft could be committed
 on anything which either was at the time or could be made
 movable. The Sabinians at one time held that land and
 buildings fraudulently sold were stolen, but the Proculeians
 were of the opposite opinion, and their view prevailed. It
 was always admitted that theft could be committed on
 things forming part of or growing from the soil, such as trees,
 stones, sand, and fruits. The Roman lawyers knew nothing
 apparently of the strange rules of the common law as to the
 things which are not the subject of larceny. Perhaps these
 rules were made to evade the severity of the common law
 punishment of theft. The most objectionable of all the
 common law rules (that by which things in action, as *e.g.*
 notes and bills, were not capable of being stolen) ³ was diame-
 trically opposed to the Roman law. " Qui tabulas aut
 " cautiones amovit, furti tenetur non tantum pretii ipsarum

¹ Dig. xlvii. 2, 1, 3. In the same passage the word is derived from
 " furvo, id est nigro . . . quod clam et obscuro fiat, et plerumque nocte."
 Other fantastic derivations are given.

² Pothier, iv. 327.

³ Dig. xlvii. 2, 27.

“ tabularum, verum ejus quod interfuit, quod ad æstimationem “ refertur ejus summæ quæ in his tabulis continetur.” This resembles 24 & 25 Vic. c. 96, s. 27, by which a person who steals a valuable security is punishable as if he had stolen a chattel of the like value.

As to the nature of the crime itself the Roman law was in one important particular far more severe than the common law. Theft as defined by the common law includes an intent to deprive the owner permanently of the stolen goods. The Roman law applied also to an intent to steal its use or possession. Thus: ¹“Si pignore creditor utatur furti tenetur,” ²“fullo et sarcinator” (a tailor), “qui polienda vel sarcienda “ vestimenta accepit si forte his utatur, ex contrectatione “ eorum furtum fecisse videtur quia non in eam causam ab “ eo videntur accepta.” ³“Qui jumenta sibi commodata “ longuis duxerit alienâve re invito domino usus sit furtum “ facit.” Perhaps, as the severity of the common law led to the various subtleties by which its operation was so much restricted, the principle that theft was in common cases only a civil injury may have led the Roman lawyers to extend the definition of it. The “contrectatio” of the Roman lawyers was somewhat wider than the “taking” which enters into the English definition of larceny. According to English law, if the first taking is lawful no subsequent unlawful dealing with the thing taken amounts to theft, special exceptions excepted. This does not seem to have occurred to the Roman lawyers, though they also regarded an actual touching of the stolen goods as essential to theft (⁴“Hoc jure utimur ut furtum “ sine contrectatione non fiat,” says Ulpian), but if there was such a touching it was immaterial whether it took place before or after the offender got possession of the thing stolen. ⁵Thus, barely to deny the receipt of a thing intrusted to one was not theft. To conceal it after receiving it with intent to convert it to one’s own use (intercipiendi causa) was theft. So, ⁶“Qui vendit rem alienam sciens, ita demum furtum “ committit si eam contrectaverit.”

¹ Dig. xlvii. 2, 54.

² *Ib.* 2, 82.

³ *Ib.* 2, 40, and see Pothier, iv. 329.

⁴ Dig. xlvii. 2, 52, 19.

⁵ *Ib.* 2, 12.

⁶ This is Pothier’s inference; see iv. 321.

CHAP. II. This view of the subject would avoid the distinction between theft and some of the forms of fraudulent breach of trust which went unpunished at common law. It would take away one of the impediments by which English lawyers were prevented from treating embezzlement as theft. This doctrine also leads, by a shorter and plainer route, to the conclusion at which the Court for Crown Cases Reserved lately arrived in the case of ¹R. v. Middleton. It was decided in that case that if *A* gives *B* a sovereign instead of a shilling, and *B* knowingly accepts and keeps the sovereign, *B* is guilty of theft. The case presented great difficulties, as may be seen by the judgment, but by the Roman lawyers it was very naturally decided: ²“Si rem meam quasi tuam tibi tradidero scienti meam esse, magis est” (it is the better opinion) “furtum te facere si lucrandi animo id feceris.” The difficulty with the Roman lawyers in such a case was not as to the “contrectatio,” but as to the “invito domino.”

It does not appear from the *Digest* that the Roman lawyers found as much difficulty as our own in determining on the precise moment at which theft is completed. Probably this arises from the different view taken of theft in the two systems. In a system which when it was formed regarded theft as a capital crime, it was obviously necessary to distinguish with perfect accuracy the moment at which the crime began. In a system in which theft was regarded as a civil injury this was immaterial, because no one would sue another for a mere formal theft. Another application of the same principle is, perhaps, to be found in the circumstance that one highly technical branch of the Roman law on the subject is not represented at all in English law. The *Digest* contains many texts turning on the question how much of a given article was stolen by a given act. ³A man who cut off part of a piece of plate (qui lancem rasis), was considered as having stolen the whole plate. It was a moot point whether a man who stole a bushel of corn from a heap or a cargo, stole the whole heap or cargo or only the bushel. This is one of the

¹ L. R. 2 C. C. R. 38. ² Dig. xlvii. 2, 44, 1.

³ *Ib.* 22, 2.

points which ¹Gibbon notices as illustrating the influence of the Stoic philosophy on the Roman law. May not the question of the measure of damages have been connected with it? The result of an "actio furti" was double or quadruple damages according as the theft was "nec manifestum" or "manifestum." The amount due could obviously not be ascertained unless the value of the stolen goods was known, and that again must depend on the question as to how much was stolen. A passage of Ulpian on this subject deserves to be quoted as a good instance of that mode of argument by illustration and analogy which from the nature of the case must always be a favourite with lawyers. ²"Si de navi oneratâ furto quis sextarium frumenti tulerit utrum totius oneris, an vero sextarii tantum furtum fecerit? Facilius hoc quæritur in horreo pleno. Et durum est dicere totius furtum fieri. Et quid si cisterna vini sit? Quid dicet? Aut aquæ cisterna? Quid deinde si [de] nave vinaria ut sunt multæ, in quas vinum effunditur? Quid dicemus de eo qui vinum hausit, an totius oneris fur sit? Et magis est et ut hic non totius dicamus."

The definition of theft according to Roman as well as according to English law included a mental element. By English law the taking in order to be felonious must be with intent to deprive another of his property permanently, wrongfully, and without claim of right. By Roman law the "contrectatio" must be "fraudulosa et lucri faciendi gratiâ." Of course a person who takes what does not belong to him, intending to deprive the owner of it, acts *primâ facie* fraudulently. The cases in which such a taking is innocent must under any system be exceptional. The exceptions in Roman law were much the same as they are in English law. By English law a claim of right excludes a felonious intent. Thus in Roman law, ³"recte dictum est qui putavit se domini voluntate rem attingere non esse furem." ⁴"Qui re sibi commodata, vel apud se depositâ, usus est aliter atque accepit, si existimavit se non invito domino id facere furti non tenetur." ⁵"Si quis ex bonis ejus quem putabat

¹ Gibbon, ch. xlv.² Dig. xlvii. 2, 21, 5.³ *Ib.* 2, 46, 7.⁴ *Ib.* 2, 76.⁵ *Ib.* 2, 83.

CHAP. II. "mortuum qui vivus erat, pro herede res apprehenderit, eum
"furtum non facere."

The principle in all these and other cases is the same; there is no theft where there is a claim of right.

The rule of the Roman law that misappropriation must be "lucri faciendi causâ" in order that it might amount to theft has been on several occasions rejected expressly from the English definition of theft. It is, indeed, obviously inexpedient and hardly capable of being applied. The *Digest* does not supply many illustrations of it, and the texts which bear upon it are not quite consistent. ¹ "Verum est," says Ulpian, "si meretricem alienam ancillam rapuit quis vel celavit furtum non esse; nec enim factum quæritur sed causa faciendi, causa autem faciendi libido fuit non furtum." Paulus, however, says, ² "Qui ancillam non meretricem libidinis causa surripuit furti actione tenebitur." An attempt has been made to reconcile these texts, but they appear to me clearly inconsistent. Possibly the "lucri faciendi causâ" may have been inserted in the definition mainly with the view of drawing a line between mischief and theft.

The Roman law at all events, regarded the question whether the thief or some one else was to profit by the offence as a matter of indifference. ³ "Si quis de manu alicujus nummos aureos vel argenteas vel aliam rem excusserit, ita furti tenetur si ideo fecit ut alius tolleret isque sustulerit."

The doctrine that theft must be "invito domino," against the will of the owner of the property stolen, is common to Roman and English law, though the two systems apply it somewhat differently. According to the law of England it is theft to take goods with the owner's consent if the consent is obtained by fraud, and if the owner intends to part with the possession only; but it is not theft to take goods with the owner's consent if he is persuaded by fraud to part not only with the possession but with the property.

By Roman law the line between theft and obtaining goods by false pretences turned not upon the question whether the

¹ Dig. xlvii. 2, 39.

² *Ib.* 2, 82, 2.

³ *Ib.* 2, 52, 14.

owner consented to part with the property or with the possession only, but upon the question as to the means by which he was deceived. If a man deceived another by personation, or by means regarded as equivalent to it, and so obtained his property, the offence was theft. ¹“Falsus creditor,” says Ulpian, “hoc est is qui se simulat creditorem, si quid “acceperit furtum facit, nec nummi ejus fiunt.” He also says, ²“Cum Titio honesto viro pecuniam credere vellem, subjecisti “mihi alium Titium egenum, quasi ille esset locuples, et nummos acceptos cum eo divisisti, furti tenearis quasi ope tuâ “consilioque furtum factum sit, sed et Titius furti tenebitur.” On the contrary, ³“Si quis nihil in personâ suâ mentitus est, “sed verbis fraudem adhibuit, fallax est magis quam furtum “facit, utputa si dixit se locupletem, si in mercem se collocaturum quod accepit, si fideiussores idoneos daturum, vel “pecuniam confestim se soluturum.” It must be observed that none of these cases, except perhaps the first, quite comes up to a false pretence of an existing fact. Perhaps if the case of a complete deception as to some existing fact other than that of the identity of a person had presented itself, the Roman lawyers would have held it to be theft. If so, their law and ours would be nearly coextensive, though they would not make the distinction which is made by us between theft and false pretences. The case of obtaining possession only by fraud and then converting the property (as where a man gets leave to mount a horse to try him and rides away) would present no difficulty to a Roman lawyer, as the riding the horse away would be clearly “fraudulosa contrectatio,” though the mounting was not “invito domino.”

It must be observed that the words “invito domino” were construed so strictly by some Roman lawyers, that the question was raised at all events, Whether, if a man gave up his property to a robber upon threats, the property was stolen? Labeo says, ⁴“Si quis cum sciret quid sibi surripi non prohibuit non potest furti agere. Paulus imo contra. Nam si

¹ Dig. xlvii, 2, 43.

² *Ib.* 2, 43, 3.

³ *Ib.* 2, 52, 21.

⁴ *Ib.* 2, 91.

CHAP. II. "quis scit sibi rapti, et quia non potest prohibere quievit furti
"agere potest."

The Roman and the English law on the subject of the possession of stolen property is not dissimilar, though many of the fictions which have been introduced into English law in order to evade the consequences of the rule, that a wrongful taking is always necessary in larceny, are dispensed with in Roman law by the more reasonable doctrine of "contrectatio."

In order that a thing might be stolen it was necessary by Roman law that it should be in the possession of some person, or that some one should intend to possess it. Things which had been abandoned by the owner, or which had never been reduced into possession, could not be stolen. ¹"Quodsi dominus quid dereliquit furtum non fit ejus, etiamsi ego furandi animum habuero. Nec enim furtum fit nisi sit cui fiat?" ²"Si apes feræ in arbore fundi tui apes fecerint, si quis eas vel favum abstulerit eum non teneri tibi furti, quia non fuerint tuæ; easque constat captarum terrâ mari cælo numero esse."

The Roman and the English law agree in some particulars as to the persons by whom theft can be committed.

Married persons could not steal from each other, nor was a married person guilty of theft who helped some one else to steal from his wife or husband.

³Joint owners could by the Roman law steal from each other, "Si socius communis rei furtum fecerit (potest enim communis rei furtum facere) indubitate dicendum est furti actionem competere." This is the precise equivalent of Mr. Russell Gurney's Act, 31 & 32 Vic. c. 116, s. 1.

The English rule of evidence as to recent possession was also recognised by the Romans. Thus in the Sixth Book of the Code Tit. ii. v., it is said, "Civile est quod [a te] adversarius tuus exigit: ut rei quod apud te fuisse fateris exhibeas venditorem, nam a transeunte et ignoto te emisse dicere non convenit volenti evitare alienam bono viro suspicionem." "You ought to produce the person who you say sold you what you own you had, for no one who has

¹ Dig. xlvii. 2, 43, 5.

² *Ib.* 2, 26.

³ *Ib.* 2, 45.

"any regard for his character for honesty will say he bought it from a man in the road whom he did not know." This statement is often made in English courts, but as a rule by those who can hardly expect "*evitare alienam bono viro suspicionem.*"

Besides the common action of theft there were several subordinate actions which provided for analogous wrongs. They were as follows:

DE TIGNO JUNCTO.—¹This was an action as old as the laws of the Twelve Tables providing a special remedy in the case of materials stolen and used up in erecting buildings, or scaffolds for vines. A distinction was made between this and other cases, "*ne vel ædificia sub hoc prætextu diruantur, vel vinearum cultura turbetur.*"

SI QUI TESTAMENTO LIBER.—This was a special action to provide for the case of a slave whose master had left him his liberty, and who, in the interval between the testator's death and the heir's succession fraudulently disposed of anything to which the heir would have a right when he succeeded to the inheritance. The necessity for such an action arose from the singular doctrines of the Roman law as to slavery and as to inheritance. During the interval after his master's death the slave was the property of the fictitious person, the inheritance itself. As soon as the heir succeeded the slave became free under the will. On attaining his freedom he was no longer punishable as a slave, and till he attained it he was not punishable as a free man. He could not therefore be punished in any way for what he did whilst he was a slave to the inheritance. The prætor's edict remedied this defect, ²"*Naturâ æquum est non esse impunitum eum qui hac spe audacior factus est quia neque ut servum se coerceri posse intelligit, spe imminentis libertatis, neque ut liberum damnari, quia hereditati furtum fecit, hoc est dominæ. Dominus autem dominave non possunt haberi furti actionem cum servo suo quamvis postea ad libertatem pervenerit.*"

The necessity which formerly existed for laying the property of the goods of a deceased person in the bishop of the

¹ Dig. xlvii. 3.

² *It.* 4, 1.

CHAP. II. diocese, and now in the judge of the Court of Probate, in prosecutions for stealing such goods before administration was taken out, has a sort of vague similarity to this proceeding.

FURTI ADVERSUS NAUTAS, CAUPONES, STABULARIOS.—

¹This was an action which lay against ship-masters, inn-keepers, and stable-keepers, for thefts committed by persons in their employ. "The master ought to answer for what is done by his sailors, whether they are free or slaves." This is right because he employs them at his own risk, but he is answerable only for injuries done by them on board his ship; if they do injury elsewhere he is not answerable for it. If he says beforehand that each of the passengers is to look after his own property, and that he (the master) will not be answerable for loss, and if the passengers agree he is not answerable. The master might free himself from responsibility as regarded the acts of his slave by giving up the slave in satisfaction (*noxæ dedendo*), but his responsibility for the fault of a free man employed by him was absolute. Ulpian speculates on the reason of this. ²"Cur ergo non exercitor condemnetur qui servum tam malum in nave admisit? Et cur liberi hominis nomine tenetur in solidum, servi vero non tenetur? Nisi forte idcirco, quod liberum quidem hominem adhibens, statuere debuit de eo qualis esset, in servo vero suo ignoscendum sit ei quasi in domestico malo, si noxæ dedere paratus sit. Si autem alienum adhibuit servum quasi in libero tenebitur."

³The title "*Si familia furtum fecisse dicitur*," throws further light on the responsibility of masters for the thefts and other offences of their slaves. The title goes into considerable detail, but it will be enough to say that masters were allowed as a matter of privilege to pay for damage done by their slaves, instead of being obliged to give them up by way of compensation, unless the injury done was done with the master's assent.

ARBORUM FURTIM CÆSARUM.—⁴This was a special action for damage short of theft to growing trees.

VI BONORUM RAPTORUM ET DE TURBA ET DE INCENDIO, RUINA, NAUFRAGIO, RATE, NAVE EXPUGNATA.—⁵These

¹ Dig. xlvii. 5. ² *Ib.* 5, 5. ³ *Ib.* 6. ⁴ *Ib.* 7. ⁵ *Ib.* 8 & 9.

titles relate to civil remedies for acts which amounted to the crime of "vis publica" or "privata," and of arson ("incendium"). Incidentally, however, several *Senatus Consulta* are mentioned which treat particular acts connected with wrecks and fires as crimes. Some of these are very like English Acts of Parliament. Thus: ¹"*Senatus consulto cavetur eos quorum fraude aut concilio naufragi suppressi per vim fuissent ne navi vel iis periclitantibus opitulentur legis Corneliæ quæ de sicariis lata est pœnis afficiendos.*" Compare with this 24 & 25 Vic. c. 100, s. 17, which renders liable to penal servitude for life every one who "prevents or impedes any person being on board of, or having quitted any ship or vessel in distress, wrecked, stranded, or cast on shore, in his endeavour to save his life, or prevents or impedes any person in his endeavour to save the life of any person so situated."

INJURIA.—The 10th title of the 47th book of the *Digest* is headed "*De injuriis et libellis famosis.*" The expression "injuria" in Roman law was nearly as vague a word as the expression "wrong" or "tort" in our own, for, in the wider sense, it included ²"*omne quod non jure fit,*" and in the narrower "*contumelia,*" or "*damnum culpâ datum.*" There are, however, four special heads of "injuria" referred to in the *Digest*, namely, injuries to the person, to dignity, to reputation, and to liberty. Injuries to the person consisted not only in blows, but in threatening gestures, and included the case of administering anything hurtful to the mind, ³"*si quis mentem alicujus medicamento aliove quo alienaverit.*"

An injury to "dignity" was apparently confined to a single case: ⁴"*Ad dignitatem cum comes matronæ abducitur.*" According to Roman manners, matrons were always accompanied in public by some person who acted the part, as we should say, of a chaperon. To cause such a person to desert his mistress was "*injuria ad dignitatem pertinens.*" If the offender went a step further his act was "*injuria ad infamiam pertinens,*" that is to say, if he paid attentions to any person the object of which was ⁵"*ut ex pudico*

¹ Dig. xlvii. 9, 3, 8.² *Ib.* 10, 1.³ *Ib.* 10, 1, 2.⁴ *Ib.* 10, 15.⁵ *Ib.* 10, 10.

CHAP. II. impudicus fiat." The special example given is, "Si quis mulierem appellaverit," and the word "appellare" is defined thus: ¹ "blandâ oratione alterius pudicitiam adtentare." "Hoc," observes Ulpian, "non est conviciium facere sed adversus bonos mores attentare." The offence seems to have been rather more extensive than the solicitation of chastity, which was, and theoretically still is, an ecclesiastical offence in England. Mere following a woman about was "injuria." "Quum quis honestam mulierem adsectatur. . . . Assectatur qui tacitus frequenter sequitur." Such attentions, however, must be "contra bonos mores." Ulpian is careful to explain that a man "non statim in edictum incidit, Si quis colludendi gratia id facit."

The law of libel and slander was in a very imperfectly developed state at the time when the *Digest* was compiled. The following texts show that defamation, whether written or verbal, was regarded as an instance of "injuria," and that the truth of a defamatory statement was a justification for it. ² "Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, etiam si alterius nomine ediderit vel sine nomine, uti de ea re agere liceret."

"Conviciium" was a form of "injuria." "Conviciium" is said to exist in the "collatio vocum." "Cum enim in unum complures voces conferuntur conviciium appellatur quasi convocium."

In order, however, to be a "conviciium," the "vociferatio" must be "adversus bonos mores," and "ad infamiam vel infamiam alicujus." Not only he who himself vociferated, but he who stirred up others to vociferation, committed the offence, and if the defamatory matter was uttered publicly "in cœtu" it was "conviciium," whether it was said by one person or by more persons than one. Defamatory matter spoken in private, ³ "conviciium non proprie dicitur, sed infamandi causa dictum."

The commonest form of defamation at that time appears to have been by symbolical actions, ⁴ as by wearing mourning, or

¹ Dig. xvii. 10, 15, 20.

² *Ib.* 10, 15, 22, 23.

³ *Ib.* 10, 15, 9.

⁴ *Ib.* 10, 15, 4.

⁵ *Ib.* 10, 15, 12.

⁶ *Ib.* 10, 15, 27.

going about unshorn, or with loose hair, as a protest against the oppression of the person defamed. CHAP. II.

The question of justification is dealt with in these few very inadequate words of Paulus: ¹“Eum qui nocentem infamavit non esse bonum æquum ob eam rem condemnari, peccata enim nocentium nota esse et oportere et expedire.”

“Injuria” might in some cases be committed by trespassers on property, as for instance by breaking into a dwelling-house, or entering upon land. ²“Divus Pius aucupibus ita rescripsit: non est (rationi) consentaneum ut per aliena prædia invitis dominis aucupium faciatis.” So it was “injuria” to make your neighbour’s room smoke. ³“Si inferiorum dominus sedium superioris vicini fumigandi causâ fumum faceret,” but as to this there was some doubt.

IV. CRIMINAL PROCEDURE.

It would be foreign to my purpose to try to describe the criminal procedure of the Romans under the Republic, or to specify the numerous changes which were made at different times in the constitution and powers of the various tribunals of a criminal jurisdiction. The only form in which the system can have influenced our own criminal law, is that which it assumed under the Empire. It is still possible to give a pretty full outline of the system which probably prevailed there when Britain was a Roman province.

⁴In the days of Constantine the Empire was divided as follows:—

I. There were four prætorian præfects, namely, the præfect of the East, who governed Eastern Africa, Syria, and Asia Minor; the præfect of Illyricum, who governed the whole of the South-East of Europe; the præfect of Italy, who governed Italy, the South-West of Germany, and Western Africa; and the præfect of the Gauls, who governed Gaul, Spain, and Britain. Rome and Constantinople, with their respective territories, were excluded from these præfectures, and were under municipal præfects of their own.

These præfectures were divided into thirteen dioceses,

¹ Dig. xlvii. 10, 18.

² Dig. xlvii. 10, 44.

³ Pothier, iv. 363.

⁴ Gibbon, ch. xvii.

CHAP. II. namely, 1. The East; 2. Egypt; 3. Ariana; 4. Pontica; 5. Thrace; 6. Macedonia; 7. Dacia; 8. Pannonia; 9. Italy; 10. Africa; 11. Gaul; 12. Spain; 13. Britain. Each of these was under a vicar or vice-præfect, except Egypt, the ruler of which was called the Augustal Præfect, and the East, the præfect of which was called the Count of the East. The dioceses were divided into 116 provinces, of which 3 were governed by proconsuls, 37 by consulars, 5 by correctors, and 71 by presidents. They are commonly called by the name of *proeses* in the *Digest*. Each province was composed of a number of cities greater or less with their *territoria*. The cities were of different ranks, some being colonies and others *municipia*, but each had their own magistrates. Through the *territoria* were distributed *stationarii milites* or policemen, who were under military organization, the superintendents being called centurions or *centenarii*. The *stationarii* were subject to a superior officer called *princeps pacis*, or *eirenarchia*—a word which it is impossible not to translate by justice of the peace. This organization of the Roman Empire corresponds with curious exactness to the organization of the British Empire in India, and especially in Northern India. India would have constituted a fifth præfecture, much larger than either of the others, or indeed than any two of them, but governed in much the same way. The Prætorian Præfect would answer precisely to the Governor-General, the Vicars to the Governors, Lieutenant-Governors, and Chief Commissioners of the different Indian provinces. The rulers of the Roman provinces would answer to the commissioners of divisions. The *civitas* with its *territorium* would correspond to a district. The officers of the *civitas* differed widely from the Indian magistrate of the district and his subordinates, as they were natives of their city, and permanent residents in it; but the *eirenarcha* or *princeps pacis* discharged some of the duties of the magistrate of the district, and the *milites stationarii*, with their decurions and centurions, answered precisely to the thannahdars, or officers in charge of police stations.

There were two modes of prosecuting crimes, public prosecutions and private prosecutions. Of these the private

prosecutions have left the strongest traces in history, as the great political cases which occur in the early history of Rome, and of some of which the speeches of Cicero are monuments, were for the most part prosecuted in this manner. Public prosecutions as carried on under the Empire were no doubt the ordinary course for the administration of justice, and as the trials which took place attracted comparatively little attention, and left no monuments behind them, the whole subject has fallen into oblivion. As, however, if any part of the Roman system influenced our own institutions it must have been this, I will consider it first.

PUBLIC PROSECUTIONS UNDER THE EMPIRE.—¹ When a crime was committed which disturbed the public peace, it was the duty of the *militēs stationarii* to apprehend the suspected persons, and to carry them before the eirenarcha, whose duty closely corresponded to that of an English justice of the peace, as may be gathered from the following remarkable passage of Marcian. ² “Hadrian wrote to Julius Secundus, and there are rescripts to the same effect that “the ³ letters of magistrates who send prisoners to the “president as if they were already convicted are not to be “taken as conclusive. A chapter of an order is still extant, “by which Antoninus Pius when President of Asia, enacted “in the form of an edict, that the eirenarchas, when they “apprehended robbers, should question them about their “accomplices and receivers, and send their examination “inclosed in a letter” (also called *elogium*), “and sealed up “for the information of the President. Persons sent up “with an “elogium” are to have a full trial” (*ex integro audiendū*), “although they have been sent with a letter from “the eirenarcha, or even brought by him. So too, both Pius “and other princes ordered that even those who were “reported for punishment ⁴ are to be tried, not as if they “were convicted, but from the beginning if there is any one

¹ The chief authorities for this are Pothier's preface to the 47th book of the *Digest*, and Godefroy's *Paratitū* to the Ninth Book of the *Theodosian Code*.

² Dig. xlviii. 3, 6.

³ They were called “*elogium*,” “*notoria*,” or “*notaria*.”

⁴ “*Qui requirendi annotati sunt*.”

CHAP. II. "to accuse them. Therefore, whoever tries them ought to send for the eirenarcha and require him to prove the contents of his report. If he has done it diligently and faithfully he must be ¹ commended; if he has acted hastily and ² without careful inquiry, it must be officially noted that the eirenarcha acted hastily, but if it appears that he questioned (probably tortured) the defendant maliciously, or reported what was not said as if it had been said, the eirenarcha, is to be punished for the sake of example, so as to prevent other things of the same sort in future."

This remarkable passage provides us with an outline of the procedure adopted in common cases of crime. The miles stationarius or his inferior officer arrests. The eirenarcha holds a preliminary investigation (probably with the aid of torture) and commits for trial (as we know from other texts referred to below) to the prison of the civitas, which may perhaps be described as the county town, of the territorium in which the offence was committed. He acts to some extent as a public prosecutor, as English justices did in the days of the Stuarts, and as Indian magistrates still do in many cases. The trial took place before the præses, who, like Indian Commissioners of Divisions in some parts of India, and till lately throughout all Northern India, exercised the powers of a judge of assize, and made a circuit to the different civitates in order to dispose of the business. The præses, as the passage under consideration shows, had before him the eirenarcha's report, and copies of the depositions just as an English judge of assize has the depositions taken before the magistrate. The præses seems to have exercised over the eirenarcha and his preliminary procedure a greater degree of discipline and superintendence than is exercised by any one over an English justice, or even over an Indian magistrate, subject though the latter is to an exceedingly strict system both of appeal and supervision.

PRIVATE PROSECUTIONS UNDER THE EMPIRE.—Crimes might be prosecuted under the Empire as well as under the Republic by a private prosecutor. In such cases the procedure closely resembled that which was pursued in

¹ *Qy.* "confirmed."

² *Non exquisitis argumentis.*

purely civil actions, indeed, the action for a *privatum delictum*—for instance, a prosecution for a common theft differed from other civil actions only as such actions differed from each other.

With regard to accusations of public crimes by private persons, the system was as follows:—

Any one might act as an accuser except women, minors, soldiers, persons convicted of crime, and some others. These excepted persons however, might prosecute in cases in which they were interested. “Si suam injuriam exequantur mortemve propinquorum defendant ab accusatione non excluduntur.”

All persons ¹ except the præses of the province during his tenure of office, and ² magistrates absent in good faith on public duties, were liable to accusation.

Under the Empire the accusation was made at Rome before the præfect of the city, and in the provinces before the præses. In each case the judge took cognizance of crimes committed within his district.

³ The accuser cited the accused before the præses, and obtained the leave of the præses to prosecute. The parties appeared before the judge. The accuser took an oath that his accusation was not calumnious, and stated the nature of his accusation. If the accused did not deny its truth he was held to have pleaded guilty. If he denied it his name was entered on a register of accused persons, and the accuser filed an indictment—*libellus*. The form was thus: ⁴ “Consul et dies. Apud illum prætorem vel proconsulem “Lucius-Titius professus est se Mæviam lege Julia de Adulteriis ream deferre, quod dicat eam cum Gaio Leio in “civitate illâ, domo illius, mense illo, consulibus illis, adultrium commississe.” It was we are told necessary to state the place, person, and month of the offence, but not the day or hour. Aggravations of the offence were to be stated in the libel, and it was to be signed by the accuser, who was liable to the penalty of retaliation if his accusation failed. If this provision was acted upon it must practically have put a stop to private accusations, ⁵ but there is some evidence that the *pœna*

¹ Dig. xlviii. 2, 11.

² *Ib.* 2, 12.

³ Pothier, iv. 397.

⁴ Dig. xlviii. 2, 3.

⁵ Coote's *Romans in Britain*, 307, 308.

CHAP. II. *talionis* was practically only a penalty which might be reduced by the judge in his discretion to a money fine.

The indictment might apparently be amended if an extension of time was allowed by the judge for that purpose.

The accuser was also bound over to prosecute, and if he did not appear he was not only liable to be punished in the discretion of the judge, but had to pay all the defendant's costs, including his travelling expenses.

A day was then fixed for the *judicium*, and under the Republic *judices* were appointed, a proceeding which had some resemblance to the appointment of a jury. It is difficult to say how long this system lasted, or who the *judices* were, especially under the Empire.

THE TRIAL.—The court being constituted, a certain time was allowed for the production of witnesses and documents, the witnesses being liable to be both examined in chief and cross-examined. It is difficult to say whether each side was allowed to call witnesses to facts. Pothier's opinion, founded on a passage of ¹Quintilian, is that both sides might call witnesses, but that the prosecutor only could compel their attendance. The following is the passage from Quintilian :—

“Duo genera sunt testium, aut voluntariorum, aut eorum quibus judex in publicis judiciis lege denuntiari solet, quorum altero utraque pars utitur, alterum accusatoribus tantum concessum est.”

That either party to a criminal prosecution should be debarred from calling witnesses is so repugnant to our conceptions of justice, that it seems at first difficult to imagine that such could ever have been the rule under any moderately civilized system. It will, however, be shown ²hereafter that trial by jury in its original form dispensed with witnesses altogether; that under the civil law as administered all over the Continent down to recent times the prosecutor only could call witnesses; and that in England the prisoner's right to call witnesses upon equal terms with the Crown was not established till the reign of Queen Anne. ³After the examination of the witnesses was

¹ Inst. v. 7.

² See pp. 349-53, *infra*.

³ Mr. Trollope, in his interesting *Life of Cicero*, observes that the prisoner

complete, the parties or their counsel (*patroni*) made speeches, of the character of which much may be learnt from Cicero's orations, and from Quintilian's *Institutes*, but of which nothing need be said here. ¹ The accused was allowed to call witnesses to character (*laudatores*). Finally, the decision was given, at the time when judices were appointed, by the vote of the judices by ballot, afterwards probably, or in cases where there were no judices, by the præses.

If the accused was acquitted the accuser might be convicted of calumny if the judge thought he had brought his accusation from improper motives. ² "Non utique qui non probat quod intendit protinus calumniari videtur. Nam ejus rei inquisitio arbitrio cognoscentis committitur qui reo absoluto, de accusatoris incipit consilio quærere qua mente ductus ad accusationem processit et si quidem justum errorem reperirit absolvit eum; si vero in evidenti calumniâ eum deprehenderit legitimam pœnam ei irrogat." The original punishment for calumny was branding the offender with a K on the face. Constantine enacted that instead of the face the hands and calves of the legs should be branded. The calumniator was also subjected to retaliation.

TORTURE.—The only further observation I have to make upon the Roman criminal procedure, relates to the use of torture. It formed an essential part of the procedure under the Empire, though the *Digest* contains passages which show that it was used with caution, and reserved in most cases for slaves. An edict of Augustus still remains which lays down a general principle on the subject: ³ "Quæstiones neque semper in omni causâ et personâ desiderari debere arbitror. Et quum capitalia et atrociora maleficia non aliter explorari et investigari possunt quam per servorum quæstiones; efficacissimas eas esse ad requirendam veritatem existimo et habendas censeo."

The commonest case for the application of torture was that

was not allowed to call witnesses. He allows me to say that his opinion, formed after a careful study of Cicero's orations, is that, whatever the law upon the subject may have been, there are no traces in the orations of any accused person having actually done so. I have not myself studied them from this point of view.

¹ Pothier, iv. 399.

² Dig. xlviii. 16, 3, 1.

³ *Ib.* 18, 8.

CHAP. II. of slaves who were liable to be tortured when their owners were suspected of offences. ¹“Ad tormenta servorum ita demum venire oportere cum suspectus est reus, et aliis argumentis ita probationi admovetur ut sola confessio servorum deesse videatur.” The accused himself might however be tortured, and that repeatedly, if the evidence against him was strong, but not otherwise. ²“Reus evidentioribus argumentis oppressus repeti in quæstionem potest, maxime si in tormenta animum corpusque duraverit. In eâ causâ in quâ nullus reus argumentis urgebatur tormenta non facile adhibenda sunt: sed instandum accusatori ut id quod intendat comprobet atque vincat.” ³The torturer was not to ask leading questions, “Qui quæstionem habiturus est non debet specialiter interrogare an *Lucius Titius hominidum fecerit*, sed generaliter quis id fecerit, alterum enim magis suggerentis quam requirentis videtur.” The evidence obtained by torture was to be received with caution, ⁴“Quæstioni fidem non semper nec tamen nunquam habendam: constitutionibus declaratur. Etenim res est fragilis et periculosa et quæ veritatem fallat. Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt ut ex primi iis veritas nullo modo possit: alii tanta sunt impatientia ut quovis mentiri quam pati tormenta velint; ita fit ut etiam vario modo fateantur ut non tantum se verum etiam alios comminentur.”

Such was the Roman law as to the definition of crimes, and the procedure for their punishment. It exercised greater or less influence on the corresponding part of the law of every nation in Europe, though in all it was far more deeply and widely modified by legislation than any other part of the Roman jurisprudence. Perhaps it was preserved with less alteration in Holland than elsewhere, as may be seen by reference to Grotius and Voet's commentary. It still retains a sort of vitality in the colonies conquered by England from the Dutch, though in Holland, as in other parts of the Continent of Europe, it has been superseded by more modern legislation.

¹ Dig. xlviii. 18, 1, 1.

² *Ib.* 18, 18, 1.

³ *Ib.* 18, 1, 21.

⁴ *Ib.* 18, 1, 23.

How far the system described in the *Digest* was ever in force in England is a problem which I suppose can never be solved. The German conquest took place in the fifth century, the Roman forces having been finally withdrawn in 409 (Gibbon, ch. xxxi.). The *Theodosian Code* was compiled not long afterwards, and the *Digest* as we have it, between 530 and 533. As, however, they were both founded on the existing law of the Roman Empire, and as there is no reason to suppose that Britain was treated differently from the other provinces, it is natural to suppose that the system described above obtained here as well as elsewhere. Whether any portion of it survived the German conquest, and so influenced the earlier and ultimately the existing English law is a question of purely antiquarian interest. In the laws made before the Conquest some expressions occur which have been taken from the Roman Law, but the important influence of Roman upon English law was exercised through the founders of the English common law long after the Norman conquest. Glanville and Bracton, but especially Bracton, are full of references to it, and indeed derived most of their definitions and principles directly from it, although it had little or no assignable influence on the modes of procedure. These were derived from other sources.

It is observed with great truth by ¹Rossi that there is a close analogy between the manner in which Roman and English laws were developed. In each the system in its origin consisted of crude and vague definitions gradually manipulated into a sort of system by legislation, especially by judicial legislation. The English system has at the present day had a history of about 600 years, if we take Bracton as the earliest writer who can now be regarded as in any sense an authority. The interval between the Twelve Tables and the compilations of Justinian was about a thousand years; but legislation was resorted to much more extensively, and at a much earlier date in the history of the Roman criminal law than in the history of our own. The various *leges Juliae* may be not at all unfairly compared to the Consolidation Acts of 1861, and they were passed about three centuries after the

¹ *Traité du Droit Pénal*, p. 49.

CHAP. II. legislation contained in the Twelve Tables. I do not think that the Roman criminal law, as stated in the authorities from which the preceding account has been extracted, contains anything which can justify the loose popular notion that Roman law is peculiarly complete and scientific. In the absence of the text of the laws themselves, it is difficult to form an opinion on the subject; but it would be idle to compare the heap of extracts collected in the *Digest*, and thrown together with no arrangement whatever, even with so clumsy a compilation as *Russell on Crimes*. It is infinitely less copious. It does not go into anything like such full detail, and it is certainly not better arranged, though *Russell on Crimes* is arranged exceedingly ill. The notion of extracting from the works of the jurists a set of definite, well stated, and duly qualified principles, and arranging them in their natural order in a complete coherent system, does not appear to have presented itself to Tribonian and his assistants, any more than it has to the great mass of writers on English law. There is a close resemblance between the two systems, and a resemblance all the more curious and interesting because the direct effect of the earlier on the later system, though still traceable, was small, but the resemblance is to be traced at least as distinctly in the defects of the two systems as in their merits.

CHAPTER III.

EARLY ENGLISH CRIMINAL LAW.

It is a matter of great difficulty, indeed I think it would be impossible, to give a full and systematic account of the criminal law which prevailed in England in early times. The original authorities are scanty, and all presume the existence of the very knowledge of which we are in search. Both the laws of the early kings and our own statute book presuppose knowledge of an unwritten law. Our own unwritten law can still be ascertained, but such parts of the earlier law as were not written have absolutely disappeared. The collection of *Ancient Laws and Institutes of England*, published by Mr. Thorpe, under the direction of the Record Commissioners, contains in all forty-seven sets of laws, or partly ecclesiastical, partly secular statutes, bearing the names of ¹fourteen different rulers. Of these the *Leges Henrici Primi*, though the least authentic, are, perhaps, the most instructive. They are obviously a compilation made in the time of Henry I., by some private person, of the laws then in force, or supposed to be in force, among the English. They form a sort of digest, collecting into one body many things to be found in the earlier enactments, as well as a good deal of matter which is not to be found there, but is, at all events in many places, extracted from the Civil and Canon law. It also contains several express references to the Salic Law, and the

CHAP. II.

¹ 1. Æthelbirt. 2. Alothhere and Eadric. 3. Wihtræd. 4. Alfred. 5. Ina. 6. Edward (the Elder). 7. Ethelstan. 8. Edmund. 9. Edgar. 10. Ethelred. 11. Cnut. 12. Edward the Confessor. 13. William the Conqueror. 14. *Leges Henrici Primi*. The references to Thorpe are to the 8vo edition in two volumes.

CHAP. III.

law of the Ripuarian Franks. It is a slovenly composition, full of inconsistencies, repetitions, and distinctions unnecessary in themselves, and forgotten as soon as they are made. With all its defects, however, the work probably gives us better means than any other now extant of forming an opinion as to the nature of law amongst the early English. ¹The general impression which it makes is that they had an abundance of customs and laws sufficiently well ascertained for practical purposes, but that when anything in the nature of a legal principle or definition was required they were quite at the mercy of any one whom they respected as a learned man, and who was prepared to lay down any such principle or definition upon or without any authority whatever. Roman law must have been the source from which such definitions and principles were drawn, because no other was then in existence. At what time, by whom, in what degree these principles and definitions were first introduced, how far locally they extended, how far they varied, are questions which will probably never be answered, and are of no importance.²

The laws of the different kings closely resemble each other in their general outline. Indeed, they are, to a great extent, re-enactments of each other, with additions and

¹ The laws of Edward the Confessor were collected, as their title states, in the fourth year after the Conquest, when William "Fecit summoniri per universos patrie comitatus Anglos nobiles sapientes, et in lege sua eruditos ut eorum consuetudines ab ipsis audiret."

² There is a work called the *Mirror*, which has been regarded as throwing light on the principles and definitions of the early English laws, and as showing that they were of Roman origin. It certainly is a curious book, but I cannot myself attach much importance to it. It was written not earlier than 13 Edw. 1 (A.D. 1285), as it refers to a statute passed in that year, but it contains all sorts of assertions about Alfred, and in particular a specification of forty judges, whom he is said to have hanged as murderers, for putting different people to death unjustly. It also contains a number of what profess to be indictments, or rather appeals, as the author calls them. It is difficult, to me at least, to understand how the assertions of a writer of the end of the thirteenth century, who gives no authorities, can be regarded as of any weight about the details of transactions said to have occurred 400 years before, and which are noticed by no one else. Alfred's laws do not even mention judges, nor do they in any respect confirm the strange assertions of the *Mirror*. My conjecture would be that the part of the *Mirror* which relates to the laws of Alfred, &c., is simply an invention. One of the author's objects was to protest against judicial corruption and other abuses of his time, and his assertion that Alfred executed forty specified judges for specified offences was probably made as a suggestion as to what ought to be. See some remarks on this book by Sir F. Palgrave, ii., cxliii.

variations; and most of them contain a greater or less admixture of moral and religious exhortation. The laws of Alfred, for instance, begin with the Ten Commandments, an adaptation of considerable parts of Exodus, extracts from the Acts, and a historical statement as to the diffusion of Christianity.

To extract anything complete or systematic from such materials is obviously impossible. There is, indeed, an abundant supply of modern literature upon the subject, but it is impossible to read it without perceiving that the results arrived at are, to a great extent, conjectural, and that the most learned and acute writers have frequently given to the public rather proofs of their own learning, industry, and ingenuity, than definite information. Moreover, questions about the early English, which bear upon the origin of the popular parts of our government, parliament, and trial by jury, have been debated with no small share of the heat which attaches to all political controversy.

I. EARLY ENGLISH CRIMES.

Pursuing the division of the subject already adopted, I will first describe, as well as I can, the early English doctrines on the subject of crimes, and next the system of criminal procedure then in force.

So far as I have been able to discover there are hardly any definitions of crimes in the early laws, but they contain provisions of one sort or another about a large proportion of the offences which would be defined in a modern criminal code.

The following are the principal offences against the Government referred to in the laws. ¹“Plotting against the king’s life, of himself, or by harbouring of exiles or of his men.” ²“Plotting against a lord.” ³Fighting in a church, or in the king’s house.” ⁴“Breaking the king’s

¹ Alfred 4; Thorpe, i. 63.

² Ethelstan 4; Thorpe, i. 203.

³ Ethelred, vii. 9; Thorpe, i. 331; Cnut, 60; Thorpe, i. 409.

⁴ This is mentioned in nearly all the laws, e.g. Ethelred, vii. 11; Thorpe, i. 331; Cnut, 12; Thorpe, i. 388.

CHAP. III. "peace (*frith*, or *grith*) or protection (*mund-bryce*)." ¹In several of the laws there is mention of *overseunesse* or *oferhynes*. This seems to have been a general expression, including whatever we should call contempt, and also disobedience to lawful authority, especially by public officers. ²Thus, "Qui justum judicium ordinabiliter habitum et legitime redditum improbaverit overseunesse Judicetur L. sol. in Westsaxa, si erga comitem XL. sol., &c." ³"Si quis a justitia regis implacitatus ad consilium exierit, et ad inculpacionem non responderit XX. marce vel overseunesse regis culpa sit."

Of offences against public justice ⁴perjury is mentioned on several occasions. Offences against religion and morals are dealt with at length in the ecclesiastical ordinances, but they are also mentioned frequently in the secular ordinances. Heathenism is thus defined: ⁵"Heathenism is that men worship idols, that is, they worship heathen gods and the sun or the moon, fire or rivers, water-wells or stones, or forest trees of any kind." Many of the laws contain provisions as to different forms of unchastity, adultery, incest and even simple fornication. ⁶By a law of Cnut's a woman was to "forfeit both nose and ears" for adultery. ⁷Procuring abortion seems to have been regarded as an ecclesiastical offence only. ⁸Some provisions occur as to witchcraft, and "making offerings to devils." The only offence at all resembling a public nuisance which I have noticed is *Stredbreche*, which is thus defined in the *Leges Henrici Primi*: ⁹"Stredbreche est si quis viam frangat concludendo, vel avertendo, vel fodiendo."

Offences against the persons of individuals are most minutely provided for by some of the laws, which contain provisions as to homicide, different kinds of wounds, rape, and indecent assaults. The definitions of these offences are assumed, but there are a few passages which to some extent recognize a distinction analogous to ours

¹ Thorpe, i. 537; Hen. 1, xxxiv. 3; Thorpe, i. 551, 593; Hen. 1, liii. 1; lxxxvii. 5.

² Thorpe, i. 537.

³ Thorpe, i. 538; Hen. 1, xlvi. 1.

⁴ Edw. 3; Eth. v. 25; vi. 28, &c. Hen. 1, xi. 6; Thorpe, i. 521.

⁵ Cnut, 5; Thorpe, i. 379, and see Edward and Guthrum 2; Thorpe, i. 169.

⁶ Cnut, 54; Thorpe, i. 407.

⁷ Hen. 1, lxx. 16; Thorpe, i. 574.

⁸ Wiht. 12, 13, &c.; Thorpe, i. 41.

⁹ lxxx. 5; Thorpe, i. 586.

between murder and killing by negligence. The distinction between murder and manslaughter, as we now understand it, is, I think, much more modern. The laws of Alfred embody the provisions of Exodus xxi. 12—15. They also provide for cases of accident or negligence. ¹“If at their common work one man slay another unwilfully, let the tree be given to the kindred, and let them have it off the land within xxx. days, or let him take possession of it that owns the wood”—a provision which assumes that the commonest case of accidental death was the felling of timber. ²“If a man have a spear over his shoulder and any man stake himself upon it that he” (the man with the spear) “pay the were” (compensation to the party) “without the wite” (the fine to the king). ³So in the laws of Henry I. it is laid down as a general principle that “qui inscienter peccat scienter emendet,” for which reason, if any one accidentally kills another in any game or exercise, or frightens a person so that he runs away and falls and so is killed, the person causing the death is to pay the *were*. Some obvious cases of justifiable homicide are also mentioned. One is remarkable because it affords a clear instance of the process by which Roman law found its way in particular cases into English law. ⁴“Pugnare potest homo contra eum quem cum desponsata sibi uxore post secundam et tertiam prohibitionem clausis hostiis et sub una coopertura inveniet.” ⁵This is obviously adopted from the provision in the novel cxvii. already noticed. A vague attempt is made in the *Leges Henrici Primi* to define homicide, but the writer arrives only at a tolerable classification of the degrees of guilt involved. The passage is a good specimen of the work in which it occurs: ⁶“Homicidium fit multis modis, multaque distancia in eo est in causâ et in personis. Aliquando autem fit per cupiditatem, vel contencionem temporalium, fit etiam per ebrietatem, fit per jussionem alicujus, fit etiam pro defen-

¹ Alf. 13; Thorpe, i. 71.

² Alf. 36; Thorpe, i. 85. I omit some obscure expressions as to the shape of the spear. The same law is given more fully, but in several parts indistinctly, in Leg. H. 1, c. lxxxviii.; Thorpe, i. 595.

³ Hen. 1, lxxxviii. 6; Thorpe, i. 595. ⁴ Hen. 1, lxxxii. 8; Thorpe, i. 591.

⁵ See *ante*, p. 15.

⁶ Hen. 1, lxxii. 1; Thorpe i. 577.

CHAP. III. "sione et justicia, de quibus ita meminit beatus Augustinus,
 " ' Si homicidium est hominem occidere, potest aliquando
 " ' accidere sine peccato; nam miles hostem, et iudex
 " ' nocentem, et cui forte in vita vel imprudenti telum manu
 " ' fugit, non mihi videntur peccare cum hominem occidunt.'
 " ¹. . . ' Fit etiam homicidium casu consilio.' "

The crime of inflicting bodily harm is described in some of the laws with almost surgical minuteness. Of the seventy-seven laws of Alfred, no less than thirty-four define the different injuries which may be inflicted by unlawful violence. Here is one specimen: ² "If the great toe be struck off let twenty shillings be paid him as *bot*. If it be the second toe, fifteen shillings. If the middle-most toe, nine shillings. If the fourth toe, six shillings. If the little toe be struck off let five shillings be paid him."

Of offences against property theft is the one most commonly referred to. I have found no definition of it in any of the laws, though I think it may be said to be the subject to which they refer most frequently. Some aggravated forms of the offence are, however, distinguished. Robbery, *roberia*, is frequently mentioned; but I think no definition of it is given. *Forestel* and *hamsocna* are defined: ³ "Forestel est si quis ex transverso incurrat vel in via expectet et assalliat inimicum suum." It is distinguished from a challenge to fight: "Si post eum expectet vel evocet ut ille revertatur in eum, non est forestel si se defendat." *Hamsocna* was, no doubt, the earlier form of burglary. ⁴ "Hamsocna quod domus invasionem Latine sonat fit pluribus modis. Hamsocna est si quis alium in sua vel alterius domo cum ⁵ haraido assalliauerit vel persequatur, ut portam vel domum sagittet vel lapidet vel colpum "[? culpam] ostensibilem undecunque faciat. Hamsocna est

¹ Here follow quotations from Jerome and the Bible.

² Alf. 64; Thorpe, i. 97.

³ Hen. I, lxxx. 4; Thorpe, i. 586, derived in Thorpe's *Glossary* from *fore*, before, and *stellan*, to leap or spring.

⁴ Hen. I, lxxx. 10; Thorpe, i. 587.

⁵ *Haraidum* = *heri reita*. The Bavarian laws took a distinction between *here reita* and *heimzucht*. For *here reita* there must be at least forty-two armed men. If there were less it was *heimzucht* (Thorpe's *Glossary*). In Ina's laws (13 Thorpe, 48) it is said, "Thieves we call as far as 7 men; from vii. to xxxv. a *hloth*; after that it is a *here*."

“ vel hame fare si quis premeditate ad domum eat ubi suum CHAP. III.
 “ hostem esse siet, et ibi eum invadat in die vel nocte hoc
 “ faciat; et qui aliquem in molinum vel ovile fugientem
 “ prosequitur hamsocna adjudicatur. Si in curiâ vel domo
 “ seditione orta bellum eciam subsequatur et quivis alium
 “ fugientem in aliam domum infuget, si ibi duo tecta sint
 “ hamsocna reputatur. Infihht vel insocna est quod ab ipsis
 “ qui in domo sunt contubernaales agitur.”

Of mischievous offences against property *bernet* or arson is ¹ several times mentioned, but with no detail.

Of fraudulent offences the only one of much importance or interest is coining. In nearly all the laws the offences of moneyers are referred to in general terms, and as if they were well understood.

Such were the crimes known to Anglo-Saxon law. The punishments appointed for them were either fines or corporal punishment, which was either death, mutilation, or, in some cases, flogging. Imprisonment is not, I think, mentioned in the laws as a punishment, though it is ² referred to as a way of securing a person who could not give security. The fines were called *wer*, *bot*, and *wite*. The *wer* was a price set upon a man according to his rank in life. If he was killed the *wer* was to be paid to his relations. If he was convicted of theft he had in some cases to pay the amount of his *wer* to his lord, or to the king. If he was outlawed his sureties (*borhs*) might have to pay his *wer*.

Bot was compensation to a person injured by a crime. It might be either at a fixed rate (*angild*), or at the market price of the stolen goods (*ceaf-gild*).

Wite was a fine paid to the king or other lord in respect of an offence.

Speaking generally, all crimes were, on a first conviction, punishable by *wer*, *bot*, and *wite*; the *wer* being sometimes the measure of the *bot*, or compensation, as where a man was murdered and compensation had to be made to his

¹ Hen. 1, lxxvi. 9; Thorpe, i. 570, and elsewhere.

² “ If a friendless man or a comer from afar be so distressed through want of friends that he has no *borh* (surety) at the *fiuntihhtle* (first accusation) let him then submit to prison, and there abide till he goes to God’s ordeal, and here let him fare as he may.”—Cnut, ii. 35; Thorpe, i. 397.

CHAP. III. relations; and at other times the measure of the *wite*, as when the thief, being outlawed, his sureties had to pay his *wer* to the king or lord. A great part of many of the laws is taken up by provisions fixing the amount of the *wer* of different classes of people, and the *bot* due in particular cases. ¹ The *wer* is mentioned both in the laws of the Conqueror and in the ² *Leges Henrici Primi*, and it also appears in ³ Henry I's Charter to the citizens of London.

After a previous conviction *bot* might no longer be made.

⁴ "At the first time let him make *bot* to the accuser, and to the lord his *wer*, and let him give true *borhs* that he will hereafter abstain from all evil. And at the second time let there be no other *bot* than the head."

A certain number of cases were *bot*-less or inexpiable—and the punishment for them was death or mutilation on the first offence.

A passage in the ⁵ *Leges Henrici Primi* gives a classification of crimes according to their punishment. The laws of Cnut say: ⁶ "Housebreaking and arson, and open theft, and open-morth, and treason against a lord are by the secular law *bot*-less." ⁷ This is repeated in the *Leges Henrici Primi* with the addition of "effraccio pacis ecclesia vel manus regis per homicidium."

The punishment upon a second conviction for nearly every offence was death or mutilation. ⁸ In Ethelred's laws it is said of the accused when ultimately convicted—"let him be smitten so that his neck break."

The laws of Cnut lay down the principles on which punishment should be administered, and also regulate the practice of the court. The principle is thus stated: "Though any one sin,

¹ "De were ergo pro occiso soluto primo vidua x. sol. dentur et residuum liberi et consanguinei inter se dividant. Poterit autem quis in were solvendo equum masculum non castratum pro xx. sol. dare et taurum pro x. sol. et verrem pro v. sol." (Will. I, 7, 9; Thorpe, i. 471.)

² Hen. I, lxxvi. is headed "De precio cujuslibet," and begins thus: "Si homo occidatur sicut natus erit persolvatur." (Thorpe, i. 581.)

³ "Et homo hundoniarum non judicetur in misericordia nisi ad suam were scilicet ad c. solidos, dico de placito quod ad pecuniam pertineat."—Stubbs, *Charters*, 108.

⁴ Ethel. vi. 1; Thorpe, i. 281.

⁵ Hen. I, xii.; Thorpe, i. 522. ⁶ Cnut, ii. 65; Thorpe, i. 411. "Open morth" is a contradiction in terms, as the meaning of "morth" is secret killing. It may perhaps mean a murder after discovery.

⁷ Hen. I, xii.; Thorpe, i. 522.

⁸ Ethel. iii. 4; Thorpe, i. 295.

“ and deeply foredo himself, let the correction be regulated so
 “ that it be becoming before God and tolerable before the world. CHAP. III.
 “ And let him who has power of judgment very earnestly bear
 “ in mind what he himself desires when he thus says: ‘ Et
 “ ‘ dimitte nobis debita nostra sicut et nos dimittimus.’ And
 “ we command that Christian men be not on any account
 “ for altogether too little condemned to death; but rather
 “ let gentle punishments be decreed for the benefit of the
 “ people; and let not be destroyed for little God's handy-
 “ work, and His own purchase which he dearly bought.”

The practice of the courts is regulated by the following enactment:— “ That his hands be cut off, or his feet, or
 “ both, according as the deed may be. And if he have
 “ wrought yet greater wrong, then let his eyes be put out,
 “ and his nose, and his ears, and his upper lip be cut off,
 “ or let him be scalped; whichever of these those shall
 “ counsel whose duty it is to counsel thereupon, so that
 “ punishment be inflicted, and also the soul be preserved.”

Capital punishment would seem to have been common after Cnut's time, notwithstanding his cautions against the abuse of it, as William the Conqueror found it necessary to forbid it. His principles differed from Cnut's, though the practical result seems to have been much the same. ¹ He says: “ Interdicimus etiam ne quis occidatur vel suspendatur
 “ pro aliquâ culpâ sed enerventur oculi et abscindantur pedes,
 “ vel testiculi, vel manus, ita quod truncus remaneat vivus
 “ in signum prodicionis et nequitie suæ.”

II. EARLY ENGLISH CRIMINAL PROCEDURE.

The early English Criminal Procedure was of two kinds; namely, the law of infangthief, a procedure so summary as hardly to deserve the name, and the law of purgation and ordeal (*urtheil*), a system which formed the first step towards our modern law. It is natural to suppose that the more civilised system gradually encroached upon and superseded the other. In order to explain their relation, it should be remembered that in

¹ Will: 3, 17; Thorpe, i. 494.

CHAP. III. early times the really efficient check upon crimes of violence was the fear of private vengeance, which rapidly degenerated into private war, blood feuds, and anarchy. The institution of the *wer* in itself implies this. I have described it in connection with the subject of punishment, but it belongs properly to a period when the idea of public punishment for crimes had not yet become familiar; a period when a crime was still regarded to a great extent as an act of war, and in which the object of the law-maker was rather to reconcile antagonists upon established terms than to put down crimes by the establishment of a system of criminal law, as we understand the term.

A few authorities will show the importance of private war in reference to the laws of the early English. In the laws of Alfred it is enacted,¹ "That the man who knows his foe to be home-sitting fight not before he demand justice of him. If he have such power that he can beset his foe and besiege him within let him keep him within for seven days and attack him not if he will remain within." Several other delays having been provided for, the law proceeds, "if he will not deliver up his weapons then he may attack him." Liberal exceptions are allowed to the restrictions imposed by the law upon private war. "With his lord a man may fight *orwige* (*i.e.* without committing war) if any one attack the lord: thus may the lord fight for his man."

In nearly all the laws provision is made for the breach of the king's, the lord's, or the Church's peace or protection (*frith-bryce*, *mund-bryce*) in such a way as to show that peace was an exceptional privilege, liability to war the natural state of things. The King's Peace was extended to particular times and places, or conferred as a favour on particular persons. ²"Some time after the Conquest all these special protections were disused: but they were replaced by a general proclamation of the 'King's Peace,'

¹ Alf. 42; Thorpe, i. 91.

² Palgrave i. 285. A curious instance occurs in the laws of the Conqueror (xxvi.; Thorpe, i. 479). "In tribus stratis regis, id est Wateling Street, Ermonge Strete et Fosse" (the French version says "quatre chemins," adding "Hykenild") "qui hominem per patriam transeuntem occiderit vel insultum fecerit, pacem regis infringit."

“ which was made when the community assented to the
 “ accession of the new monarch: and this first proclamation
 “ was considered to be in force during the remainder of his
 “ life, so as to bring any disturber of the public tranquillity
 “ within its penalties. So much importance was attached
 “ to the ceremonial act of the proclamation that even in the
 “ reign of John, offences committed during the interregnum
 “ or period elapsing between the day of the death of the
 “ last monarch and the recognition of his successor were
 “ unpunishable in those tribunals whose authority was
 “ derived from the Crown.”

CHAP. III.

When trial by combat was introduced by William the Conqueror the language used expressly treats it as a modified form of private war. ¹ “ Si Anglicus homo compellet aliquem Francigenam per bellum, de furto, vel homicidio, vel aliquâ re pro qua bellum fieri debeat vel iudicium inter duos homines, habeat plenam licentiam hoc faciendi.” Indeed trial by battle was only private war under regulations.

Strongly as these instances illustrate the importance of crime, and the space which it filled in early times, I am not sure that the same inference may not be drawn even more plainly from some isolated rules of the early laws. The laws of Ina establish what we should call a presumption of law as follows: ² “ If a far-coming man or a stranger journey through a wood out of the highway, and neither shout nor blow his horn, he is to be held for a thief, either to be slain or redeemed.” Several of the laws provide that if a stranger stayed three days in his host's house the host was to be answerable for him, ³ “ Nemo ignotum vel vagantem, ultra triduum absque securitate detineat.” These rules are precisely analogous to the ⁴ ancient identification between a stranger and an enemy as “ hostes.”

THE LAW OF SUMMARY EXECUTION OR INFANGTHIEF.—
 A single step, but still a step, however short, from private

¹ “ Carta Regis Willelmi de appellatis pro aliquo maleficio. Franco vel Anglico.” (Will. 3, 1; Thorpe, i. 488.)

² Ina, 20; Thorpe, i. 117.

³ Hen. 1, viii. 5; Thorpe, i. 516.

⁴ “ Hostis enim apud majores nostros is dicebatur quem nunc peregrinum dicimus.”—*Cicero de Officiis*, i. 12. “ Hostis ” was itself a euphemism for “ perduellia.”

CHAP. III. — war and blood feuds is made when people are invested by law with the right of inflicting summary ¹ punishment on wrongdoers whose offences injure them personally. To recognise the right of the injured husband, or owner of property, to put the adulterer or thief to death there and then, is a nearer approach to law than to leave them to fight out their quarrel subject to a compulsory arbitration ending in the payment of a prescribed sum.

Of this right of summary execution the Saxon laws are full, as the following extracts show: "If a thief be seized let him perish by death, or let his life be redeemed according to his *wer*," say the laws of ² Ina, meaning apparently that the thief's fate was to be in the discretion of his captor. ³ Another of Ina's laws says, "He who slays a thief must declare on oath that he slew him offending 'not his gild brethren.'" A very obscure law of Ethelstan's begins thus: ⁴ "That no thief be spared who may be taken *hand-hæbbende* above xii. years and above eight pence." The rest of the law implies that in some cases the thief may be imprisoned. Another law of the same king ⁵ implies that the natural and proper course as to thieves was to kill them. "If any thief or robber flee to the king or to any church and to the bishop, that he have a term of nine days. And if he flee to an ealdorman, or an abbot, or a thane, let him

¹ A curious modern example of this is to be found in Burnes's *Travels into Bokhara*: "In one of our rides about Peshawur" (then, in 1831, an Afghan city) "we had a specimen of justice and Mohammedan retribution. As we passed the suburbs of the city we discovered a crowd of people, and on a nearer approach saw the mangled bodies of a man and woman, the former not quite dead, lying on a dunghill. The crowd instantly surrounded the chief and our party, and one person stepped forward and represented, in a trembling attitude, to Sultan Mohammed Khan that he had discovered his wife in an act of infidelity, and had put both parties to death; he held the bloody sword in his hands, and described how he had committed the deed. The chief asked a few questions, which did not occupy him three minutes; he then said, in a loud voice, 'You have acted the part of a good Mohammedan, and performed a justifiable act.' He then moved on, and the crowd cried out 'Bravo' (*Afreen*). The man was immediately set at liberty. We stood by the chief during the investigation, and when it finished he turned to me and carefully explained the law. 'Guilt,' added he, 'committed on a Friday is sure to be discovered.'"—Burnes's *Travels into Bokhara*, i. 93, 94.

² Ina, 12; Thorpe, i. 111.

³ Ina, 16; Thorpe, i. 113.

⁴ These obscure words are supposed by Mr. Thorpe to mean that the slayer must not himself be a thief ("Thieves we call as far as vii. men," says Ina, 13). The slayer must not be one of the other six.

⁵ Ethelr. 1; Thorpe, i. 199.

⁶ Ethel. iv. 4; Thorpe, i. 223.

“ have a term of three days. And if any one slay him within that term then let him (*i.e.* the slayer) make *bot* the *mund-byrd* of him whom he before had fled to” (*i.e.* pay a fine for the breach of the protection of the person to whom the thief had fled). “ And flee he (the thief) to such *soen* as he may flee to” (*i.e.* in whatever jurisdiction he takes refuge) “ that he be not worthy of his life but as many days as we here above have declared, and he who after that harbours him (the thief) let him (the harbourer) be worthy of the same that the thief may be, unless he can clear himself that he knew no guile nor any theft in him.”

¹The *Judicia Civitatis Lundonice* begin by declaring “ that no thief be spared over xii. pence, and no person over xii. years whom we learn according to folkright that he is guilty and make no denial; that we slay him and take all he has.” Many provisions are made as to following thieves and tracking them, and in the 7th rule it is provided “ that he who should kill a thief before other men that he be 12 pence the better for the deed and for the enterprise from our common money.” There are to be monthly meetings, at which the persons present are to dine together, and if it then happened that any men be so strong and so great “. . . that they refuse us our right, and stand up in defence of a thief . . . that we all ride thereto, and avenge our wrong and slay the thief, and those who fight and stand with him, unless they be willing to depart from him.”

²In the laws of Edward the Confessor elaborate provisions are made for trying the question whether a person killed as a thief “ *injuste interfectus sit, et injuste jacet inter latrones.*” If it appears that this is the case the body is to be taken up and reburied “ *sicut Christianum,*” with proper ecclesiastical ceremonies.

The law of *infangthief* comes very near to this. It may indeed be viewed as a particular case of summary execution.

¹ See on this document some curious and interesting remarks of Mr. Coote, intended to show that it contains some rules of a Roman collegium, the object of which was the recovery of stolen stock and slaves, and the indemnification of the owners if they could not be recovered.—*Romans in Britain*, 394, &c. For the document, see Thorpe, i. 229—243.

² Edw. Conf. xxxvi.; Thorpe, i. 460.

CHAP. III. It was one of the franchises usually conceded to the lords of townships, and is thus defined in the laws of Edward the Confessor: ¹ "Justicia cognoscentis latronis sua est, de homine suo si captus fuerit super terram suam." ² *Infangthief* long survived the Conquest, though the exertion of the right was put under restrictions. ³ In the Hundred Rolls which record the results of an inquiry into the whole state of government in England at the beginning of the reign of Edward I. a return is made of the franchises exercised by lords of manors in most of the counties in England, hundred by hundred. These returns show that at that time the franchise of *infangthief* was common. It soon, however, disappeared. Sir Francis Palgrave says, ⁴ "In England the records and annals of the law have not furnished any instances of the exercise of *infangthief* after the reign of Edward III., except in one northern borough, Halifax, where a judicature grounded upon the Anglo-Saxon custom subsisted until a comparatively recent era." Of these modes of punishing crime, Sir F. Palgrave well observes, ⁵ "Perhaps the name of legal procedure can scarcely be given with propriety to these plain and speedy modes of administering justice: they are acts deduced from the mere exercise of the passions natural to man, and the law consists only in the restrictions by which the power of self-protection and defence were prevented from degenerating into wanton and unprovoked cruelty."

POLICE ORGANISATION, PURGATION, ORDEAL.—⁶ Side by side with the rough, indeed barbarous, institutions just described, the early laws contained provisions which formed the foundation on which a more enlightened system was gradually constructed. The best order in which to consider them will be to speak first of

¹ Ewd. Conf. xxii.; Thorpe, i. 452. ² Palg. i. 210. ³ See *infra*, p. 125.

⁴ Palg. i. 213.

⁵ Palg. i. 211.

⁶ The whole subject of the early English courts and the territorial divisions of the country has been examined with so much labour and with such a profusion of learning by Mr. Stubbe, that I have felt it safer as well as easier to adopt his conclusions upon the matters treated of in this section than to undertake the arduous task of examining the original authorities for myself. Though he has added much to what is stated in the earlier works of Palgrave, Hallam, and Kemble, I do not think he has altered their principal conclusions.

the local distribution of the country for purposes of police, and also for the purposes of criminal jurisdiction, and then to pass to the modes of trial, and to the infliction of punishment in cases in which punishments proper in our sense of the word were inflicted.

¹The territorial divisions known to the early English, and bearing on the subject of the administration of criminal justice, were the kingdom, the shire or county, the hundred or *wapentake*, and the tithing, which it does not seem easy to distinguish from the township or parish. The greater townships were called *burhs*. The administration of justice was one of the great prerogatives of the king. For each shire there was an earl or alderman, and a sheriff or viscount. Whether there was or was not a chief officer for every hundred is doubtful; but such officers did exist in some cases. Each township or tithing was on all occasions represented by a body of five principal inhabitants, namely, the reeve and four men.

²Under the later kings, and in the days of William the Conqueror and his sons, laws were enacted whereby "all men were bound to combine themselves in associations of ten," each of whom "was security for the good behaviour of the rest," and had to produce him if he were charged with any offence, and if they failed to do so to make good any mischief he had done. These associations were called tithings or *frith-borhs*, or frank-pledges. How far they were connected with the local tithings is not clear.

³"The 'view of frank-pledge,' the business of seeing that these associations were kept in perfect order and number, and of enforcing the same by fine was one of the *agenda* of the local courts, and became ultimately, with the other remunerative parts of petty criminal jurisdiction, a manorial right exercised in the courts-leet, where it still exists."

Besides the tithings and hundreds there were also liberties or franchises within which prevailed all or some of the privileges comprised under the words "*Sac* and *soc*, *toll* and *team*, and *infang-thief*." These were simply hundreds or tithings

¹ Stubbs, i. 101.

² *Ib.* 87.

³ *Ib.* 88.

CHAP. III. granted as a privilege to private persons, and standing outside the general organisation.

This organisation still exists in name. We have still shires with their sheriffs (the earl's office having become merely titular), hundreds which till 1869 had their high bailiffs, chief constables, or other officers; and parishes, townships, and tithings which till 1872 had their parish constables, borsholders, and tithing-men, though the police functions of these officers had within living memory been superseded by more modern arrangements. We have still also liberties with their ancient names. The Soke of Peterborough may stand as one amongst many instances.

In early times these institutions formed the police system of the country, and in that capacity had various duties, of which the most important was that of raising in case of need the hue and cry, and tracking thieves and stolen cattle. The early laws are full of provisions on this subject, the substance of which is that if the track of stolen cattle is followed into land it must either be followed out or paid for. In the *Judicia Civitatis Lundoniæ* the following passage occurs: ¹“And if any one trace a track from one shire to another, let the men who there are next take to it, and pursue the track till it be made known to the reeve; let him then with his *manuncy* (the people of his district) take to it and pursue the track out of his shire if he can, but if he cannot let him pay the *angylæ* (the fixed price analogous to the *were*) of the property, and let both reeveships have the full suit in common, be it where-ever it may, as well to the north of the march as to the south, always from one shire to another, so that every reeve may assist another for the common *frith* (peace) of us all by the king's *oferhyrnes*” (*i.e.* under pain of being guilty of a neglect of duty, and so liable to a fine).

Upon the whole the early police may be thus shortly described. The sheriffs of counties, the bailiffs of hundreds, the reeves and four men of townships, were its officers. Their duty was to arrest criminals and recover stolen property. In this they were assisted by the institution

¹ Thorpe, i. 237.

of frank-pledge, which made every one accountable for all his neighbours. CHAP. III

The next step in tracing out the early procedure is to describe the Courts of Justice. ¹In the later period of our early history the administration of justice was regarded as the great prerogative of the king, who, after a long series of struggles, had become ²“the source of justice, the “lord and patron of his people, the owner of the public lands.” Though he occasionally discharged this office either personally or by the officers in immediate attendance upon him, the regular and stated method of doing so was through the local courts which were held before his officers, ³the ealdorman, and the sheriff, or before landowners to whom he had granted jurisdiction (*sax* and *soc*) in their own bounds. These officers may roughly be described as the judges of the courts, though it is probable that there was little in common between their duties and those of a judge of the present day. The courts themselves corresponded to the police organisation, and were as follows:—

(1) The township officers, who could scarcely be said to form a court, but were rather the executive officers of the superior courts.

(2) The Hundred Courts.

(3) The County Courts.

(4) The Courts of Franchises, which were, so to speak, hundreds in themselves.

Each of these Courts was in the nature of a public meeting, attended by specified “suitors,” or members, just as the Courts of Quarter Session in our own days are meetings of the county magistrates, and form a court of which the magistrates might be called the suitors. The suitors at the hundred court were the parish priest, the reeve, and the four men of each township in the hundred; at the county court the same persons from each township in the county, all lords of lands, and all public officers were also suitors. Each court had jurisdiction in both civil and criminal cases. On the criminal side the court was called the

¹ Stubbs, i. 90.

² Stubbs, i. 207.

³ The bishop also sat in the County Court, but I shall refer to this part of the subject elsewhere.

CHAP. III. Sheriff's *tourn* (or circuit). There appears to have been no distinction for purposes of criminal jurisdiction between the hundred court and the county court, as the sheriff's *tourn* was simply the county court held in and for a particular hundred.

¹The court consisted of the suitors collectively, but "a representative body of twelve seem to have been instituted as a judicial committee of the court."

Such were the early courts. The next question is as to their procedure. ²According to Sir Francis Palgrave it was wholly oral. The court was summoned by verbal messages sent through the district, or perhaps by a token. "All the proceedings in these assemblies participated of their native rudeness and simplicity. Scribes, or registrars, were not required to attend the meeting of the hundred or the shire: the memorials of the court were entrusted to the recollections of the *Witan*, the judges by whom the decrees were pronounced . . . Legal archives, in the proper sense of the words, did not exist among the Anglo-Saxons. On rare occasions the verdicts of the hundred or the shire might be written in the blank leaves of the missal belonging to some neighbouring minster; but though this mode of preserving the history of the transactions might be adopted, the document had no legal effect. It could not be pleaded, and the strict and proper mode of legal proof was by appealing to living testimony. If evidence was required of judicial transactions, the proof was given by the hundred or shire, in its corporate capacity, the suitors bearing witness to the judgments which they or their predecessors had pronounced."

The procedure itself appears to have consisted of accusation and trial.

³Accusation might be made either by the committee mentioned above, who possibly may have been the predecessors of the grand juries of later times, or by the four men and the reeve of the township, or lastly by a private accuser. This appears as to the twelve thanes from the laws of ⁴Etheldred:—

¹ Stubbs, i. 103. See more particularly *Leges Henrici Primi*, v. De cansarum prepretatibus. Thorpe, i. 505. ² Palg. i. 143.

³ *Ib.* 213.

⁴ Ethel. iii. 3; Thorpe, i. 294-295.

“and that a gemōt be held in every wapentake, and the twelve senior thanes go out, and the reeve with them, and swear on the relic that is given to them in hand, that they will accuse no innocent man, nor conceal any guilty one.”

That the four men and the reeve had also a power of accusation is inferred by Sir Francis Palgrave from a passage in the laws of Cnut:—¹ “And if any man be so untrue to the hundred, and so *tih̄t-bysig* (ill-famed), and three men together then accuse him, let there be no other (course) but that he go to the threefold ordeal;” also from one of the laws of William the Conqueror:—² “Si quis in hundredo inculpatus fuerit et a iv. hominibus rettatus (accused) purget se manu xii.” Several passages in the laws seem to show that a single person could accuse another. The most important occur in one of the laws of ³Ina, which is interesting because it implies that a person accused might be bailed, and if he could not get bail, be imprisoned till trial:—“When a man” (A) “is charged with an offence, and is compelled to give pledge, but has not himself aught to give for pledge, then goes another man” (B) “and gives his pledge for him, as he may be able to arrange, on the condition that he” (A) “give himself into his” (B’s) “hands until he” (A) “can make good his” (B’s) “pledge. Then again a second time he” (A) “is accused and compelled to give pledge; if he will not continue to stand for him who before gave pledge for him” (if B will no longer go bail for A) “and if he” (the last accuser) “then imprison him” (A), “let him” (B) “then forfeit his pledge who had before given it for him” (A). This wilderness of pronouns seems to have the following meaning:—A is accused of a crime, B gives bail upon condition that A will put himself into B’s custody till A appears to answer the accusation. A second accusation is then made against A. B refuses to give further security, and A is imprisoned by his second accuser. B forfeits the security he gave for A’s appearance on the first charge. This must refer to charges before two different courts. A is accused in London, and B gives bail for his appearance in London. If A is accused and imprisoned in

¹ Cnut, 30; Thorpe, i. 393. ² Thorpe, i. 437. ³ Ina, 62; Thorpe, i. 141-142.

CHAP. III respect of that accusation at Bristol, B forfeits his recognisance in London, if by reason of the imprisonment at Bristol A does not appear in London.

¹Several forms of the oaths of accusation taken by individual accusers are still preserved, which implies that private accusations were common:—"By the Lord before whom this relic is holy, I my suit prosecute with full folk right, without fraud and without deceit, and without any guile, as was stolen from me the cattle N, that I claim, and that I have attached with N. By the Lord I accuse not N either for hatred, or for envy, or for unlawful lust of gain; nor know I anything so other, but as my informant to me said, and I myself in sooth believe that he was the thief of my property."

The form of the oath would no doubt vary according to the nature of the crime imputed.

The mode in which the trial was conducted can still be traced with reasonable distinctness from the enactments of ²several kings which repeat each other with variations, the most complete types being those of Ethelred and Cnut.

The accused person denied in general terms and upon oath what was imputed to him. ³His oath was:—"By the Lord I am guiltless, both in deed and counsel of the charge of which N accuses me."

This being done, the question of his guilt was to be decided, according to the character of the accused, by the *lad*, *i.e.* by compurgation, or by ordeal. If he was of good character he was entitled to the *lad*, or "oath-worthy." If the *lad* failed, or in the expressive words of the law, "if the oath burst," or if he was *tiht bysig*, *i.e.* a man of bad character, he was obliged to go to the ordeal.

The first question accordingly at the trial was as to his character, which was decided by the system of *borhs* or sureties, which was as follows:—

⁴"Ethelstan enacted that the lord or the lord's steward should answer for all his men." "Omnis homo" (obviously

¹ Thorpe, i. 179-185.

² Ethelred, i. 1; Thorpe, i. 283; Cnut, ii. 30; Thorpe, i. 393; Hen. 8, xli. 6; lix. 6; lxiv. 9; lxxv. 3; Thorpe, i. 515-541.

³ Th. i. 181.

⁴ Ethelstan ii.; Thorpe, i. 217.

every lord) "teneat homines suos in fidejussione suâ contra CHAP. III.
 "omne furtum. Si tunc sit aliquis qui tot homines habeat
 "quod non sufficiat omnes custodire præponat sibi singulis
 "villis præpositum unum qui credibilis sit ei, et qui concre-
 "dat hominibus. Et si præpositus alicui eorum hominum
 "concredere non audeat inveniatur xii. plegios cognationis suæ
 "qui ei stent in fidejussione."

"That every freeman have a true *borh*, that the *borh*
 "may present him to every justice if he should be accused."

² Cnut enacted, "We will that every freeman be brought
 "into a hundred and into a tything who wishes to be entitled
 "to *lad* or *wer* in case any one shall slay him after he is
 "twelve years of age. Let him not afterwards be entitled
 "to any free rights be he *heath-fæst* ³(living in his own
 "house), be he follower. And that every one be brought
 "into a hundred and in *borh*, and let the *borh* hold
 "and lead him to every plea. Many a powerful man will
 "if he can and may defend his man in whatever way it
 "seems to him that he may the more easily defend him,
 "whether as a freeman or a *theoir*. But we will not
 "allow that injustice." Later enactments developed this
 into the law of frank-pledge (*frith-borh*—peace-pledge) already
 referred to.

The accused then being "led to the plea" by his *borh*,
 the *borh* had to swear that the accused had not been
 convicted since a certain period. The oath to be taken
 under Ethelred's law was ⁴"that he has not failed neither
 "in oath nor ordeal since the gemot was at Bromdun."
 In ⁵Cnut's time, "since the gemot was at Winchester."
 Under each of these laws the oath was to be made not
 only by the lord of the accused (if he had one,) but by
 "two true thanes of the hundred or the reeve," who were
 also to swear that the accused had not paid *thief-gild*.
 This being done the accused was entitled to choose whether
 he would have a "single ordeal" or a "pound-worth oath
 within the three hundreds for above xxx. pence." ⁶The

¹ Ethelred, i. 1; Thorpe, i. 281.

³ Thorpe's note.

⁵ Cnut. ii. 30; Thorpe, i. 393.

² Cn. ii. 20; Thorpe, i. 387.

⁴ Ethelred, i. 1; Thorpe, i. 281.

⁶ Edgar, 9; Thorpe, i. 261.

CHAP. III. — single ordeal was handling a piece of red-hot iron of a pound's weight or plunging the hand up to the wrist into boiling water. ¹How many witnesses were "a pound-worth" does not appear, nor do I think that it appears clearly how it was determined who the witnesses were to be, and in particular whether the accused might call whom he would, or whether the sheriff summoned the persons whom he believed to be most likely to know the facts, subject to some right of challenge on the part of the prisoner; but however this may have been the *lad* or compurgators swore not to particular facts, but in general terms to their belief in the innocence of the accused. This appears from the form of the oath, which is as follows:—"His" (the accused) "companion's oath who stands with him" (the accused)—"By the Lord, the oath is clean and unperjured "which N has sworn."

Whether any evidence at all was given of particular facts, and if so, at what stage of the proceedings, and in what manner, it is now impossible to say. It is hardly conceivable that the necessity for it should not have been perceived at a very early time, and it is not unlikely (though this is of course a mere conjecture) that the compurgators might have a right to have witnesses to facts examined before, to use an expression which often occurs in the laws, they "dared" to swear. All that can be positively affirmed is, that ²witnesses are mentioned in the laws of Henry I. and that ³a form of oath has been preserved, which implies that evidence in our sense of the word, was, or might be, given at some stage of the proceedings. "How he shall swear that stands with "another in witness. In the name of Almighty God as I "here, for N in true witness, stand unbidden and unbought, "so I with my eyes oversaw, and with my ears overheard that "which I with him say."

¹ In many parts of the laws there are provisions about the relative value of the oaths of people of different ranks and professions, e.g. "A mass priest's oath and a secular thane's are in English law reckoned as of equal value, "and by reason of the seven church degrees that the mass priest, through the "grace of God, has acquired, he is worthy of thane right." "A twelf-hynde man's oath stands for six ceorls' oaths, because if a man should avenge a "twelf-hynde man he will be justly avenged on six ceorls, and his *wer-gild* "will be six ceorls' 'wer gilds.'"—Thorpe, i. 183.

² Hen. 5, i.; Thorpe, i. 505.

³ Thorpe, i. 181.

However this may have been, if the oath succeeded the accused was acquitted. If it failed or "burst," that is, if the witnesses could not be found, or would not swear, or if the accused were a man of bad character, he had to go to the triple ordeal (*urtheil*), that is ¹to handle red-hot iron of three pounds weight, or to plunge his arm into boiling water to the elbow.

It is unnecessary to give a minute account of the ceremonial of the ordeals. They were of various kinds. The general nature of all was the same. They were appeals to God to work a miracle in attestation of the innocence of the accused person. The handling of hot iron, plunging the hand or arm into boiling water unhurt, were the commonest. The ordeal of water was a very singular institution. Sinking was the sign of innocence, floating the sign of guilt. As any one would sink unless he understood how to float, and intentionally did so, it is difficult to see how any one could ever be convicted by this means. Is it possible that this ordeal may have been an honourable form of suicide, like the Japanese happy despatch? In nearly every case the accused would sink. This would prove his innocence, indeed, but there would be no need to take him out. He would thus die honourably. If by any accident he floated, he would be put to death disgracefully.

If the ordeal failed, the accused was convicted, the consequences of which were provided for as follows:—
²Ethelred says, "If he be guilty at the first time, let him make *bot* to the accuser twofold, and to the lord his *wer*, and let him give true *borhs* that he will thereafter abstain from every evil. And at the second time let there be no other *bot* than the head. But if he run away and avoid the ordeal, let the *borh* pay to the accuser his *ceap-gild* (the market price of the thing stolen) ³and to the lord his *wer* who is entitled to his *wite*. If any one accuse the

¹ Edgar, 9; Thorpe, i. 261. The fullest description of an ordeal by fire is in the laws of Ethelstan, iv. 7; Thorpe, i. 227.

² Ethelred, i. 1, Thorpe, i. 282-283; and Cnut, ii. 30, Thorpe, i. 393-394.

³ i.e. the *were* of the offender is to be paid to the lord who is entitled to the *wite* (or fine) due in respect of the offence. The *were* meant both the price to be paid to a person's relations if he was killed, and the price to be paid in respect of him if he committed an offence.

CHAP. III. — “lord that he (the man) ran away by his (the lord’s) counsel
“and that he (the lord) had previously acted unlawfully, let
“him (the lord) take to him five thanes and be himself the
“sixth, and clear himself thereof. And if the purgation
“succeed, let him (the lord) be entitled to the *wer*. And if
“it do not succeed let the king take the *wer* and let the
“thief be an outlaw to all people.” The law of Cnut is
to the same effect, but the punishments differ, as I have
already said.

CHAPTER IV.

THE ORDINARY CRIMINAL COURTS—QUEEN'S BENCH DIVISION
OF THE HIGH COURT, THE COURTS OF ASSIZE, THE COURTS
OF QUARTER SESSIONS, COURTS OF SUMMARY JURISDICTION,
FRANCHISE COURTS, WELSH COURTS.

¹ CRIMINAL justice is in the common course of things administered in the present day by the Queen's Bench Division of the High Court of Justice, the Assize Courts, the Central Criminal Court, and the County and Borough Courts of Quarter Sessions. I propose to relate the history of these courts and that of the courts which they superseded in the present chapter. I shall relate in other chapters the history of Parliament considered as a court of criminal jurisdiction, the history of the criminal jurisdiction of the Privy Council and that of the Court of Star Chamber. ²The history of the Admiralty Jurisdiction will be considered under a different head. CHAP. IV.

In a very few words the history of the ordinary courts is as follows: Before the Conquest the ordinary criminal court was the County or Hundred Court, but it was subject to the general supervision and concurrent jurisdiction of the King's Court. The Conqueror and his sons did not alter this state of things, but the supervision of the King's Court and the exercise of his concurrent jurisdiction were much increased both in stringency and in frequency, and as time went on narrowed the jurisdiction and diminished the importance of the local court. In process of time the King's Court developed itself into the Court of King's Bench and the Courts of the Justices of Assize, Oyer and Terminer and Gaol Delivery,

¹ For the constitution of the existing criminal courts stated systematically, see *Dig. Crim. Proc.* pp. 9-16. ² See *post*, Ch. XVI. Vol. II. p. 1.

CHAP. IV. or to use the common expression, the Assize Courts; and the County Court, so far as its criminal jurisdiction was concerned, lost the greater part of its importance.

These changes took place by degrees during the reigns which followed the Conquest, and were complete at the accession of Edward I.

In the reign of Edward III. the Justices of the Peace were instituted, and they, in course of time, were authorised to hold Courts for the trial of offenders, which are the Courts of Quarter Sessions. The County Court, however, still retained a separate existence, till the beginning of the reign of Edward IV., when it was virtually, though not absolutely, abolished. A vestige of its existence is still to be traced in Courts Leet.

The Courts of summary jurisdiction have been established within the last few years.

The courts above mentioned formed and form the regular provision for the administration of criminal justice throughout England, but besides them the right of administering justice within particular local limits was granted by way of franchise to particular persons, either in their individual or in their corporate capacity. The leading features of their history are shortly these: The judicial authority annexed to manors has long since dwindled to almost nothing, though some traces of it may be discovered. A few of the greatest of all the franchises (especially the Courts of the Counties Palatine, Chester, Durham, and Lancashire), were annexed to the Crown and survived as mere names till very modern times.

The franchise of the City of London was merged in the Central Criminal Court established in 1834. The franchises of the other cities and towns corporate were of an extremely varied character. Most of them were regulated as far as the question of criminal jurisdiction is concerned by the Municipal Corporations Act of 1834, and many others to which that Act did not apply have become obsolete and are forgotten, although they have never been formally abolished.

Lastly, Wales became a part of England by several successive steps, from the reign of the Conqueror, downwards.

This is the outline of the history which I now propose to relate more fully.

THE COUNTY COURTS.

Nothing can be more definite than the image which the words "court of justice" raise in our minds. We associate with the expression a large room arranged in a particular way. The proceedings follow a well-known prescribed routine, and terminate in a definite result. CHAP. IV.

Such associations would be misleading if they were allowed to influence our conception of the courts of the early kings, and their subjects and officers. The courts of those days supplied the means by which every kind of business was transacted, and had probably a greater resemblance to a public meeting than to a court of justice in the modern sense of the term. This was true of all courts whatever, but especially of the County Court, which was in the earliest times of our history, and continued to be down to the reign of Edward I., if not later, ¹"the Folkmoot, " or general assembly of the people," in which were transacted all the more important branches of public business, judicial, financial, and military. ²The sheriff was in early times "the king's steward and the judicial president" of the shire, the administrator of the royal demesne, and "the executor of the law." It is impossible to determine precisely the relation which he bore to the Ealderman, and the extent to which the Bishop took part in or controlled his proceedings. Such questions have in a practical point of view no importance, as from the Conquest at all events the Ealderman's office merged in the titular dignity of an earl, and the Bishop acquired a separate court with a jurisdiction of its own by the charter of William I. It is equally difficult to give a perfectly clear account of the nature of the sheriff's functions in criminal trials. He convened the court. He no doubt had considerable influence over its decisions, ³ but the suitors and not the sheriff were, properly speaking, the judges. Whatever his functions may have been and whatever may

¹ Stubbs, ii. 205.² *Ib.* i. 113.³ *Ib.* 393-4.

CHAP. IV. have been the nature of the procedure observed, the court itself appears to have been a representative assembly composed of the lords of lands in the county or their stewards, the parish priest, and the reeve and four men from each township. The character of the court, its great importance, and the fact that the king and his officers had concurrent jurisdiction in it with the sheriff, its ordinary president, may be gathered from the few remaining reports of its proceedings.

¹ "The great suit between Lanfranc as Archbishop of Canterbury, and Odo as Earl of Kent, which is perhaps the best reported trial of the Conqueror's reign, was tried in the County Court of Kent, before the king's representative Gosped, Bishop of Coutances, whose presence, and that of most of the great men of the kingdom, seem to have made it a Witenagemot. The Archbishop pleaded the cause of his Church in a session of three days on Pennenden Heath; the aged South-Saxon Bishop Ethelric was brought by the king's command to declare the ancient customs of the laws, and with him several other Englishmen, skilled in ancient laws and customs. All these good and wise men supported the Archbishop's claim, and the decision was agreed in, and determined by, the whole county."

Of course the cases which present features of exceptional interest or solemnity, are those which are reported by historians. It is only by accident that we can get a glimpse at the common course of business, by which ordinary thieves or murderers were brought to justice. I have however been fortunate enough to be referred to what may stand for a report of the trial of a common thief, in the reign of Henry II. It occurs in the *Materials for the Life of Thomas Becket*,² and is one of an immense number of stories of miracles, said to have been worked by his intervention after his murder. It probably has the same sort of relation to actual fact as an account of a trial by a modern novelist would have to what actually passes in courts of justice. It relates to the miraculous cure of one Ailward, whose eyes

¹ Stubbs, i. 277.

² Published by the Master of the Rolls, i. 155-7. My friend Mr. Froude directed my attention to this curious story. It is also printed in Mr. Bigelow's *Placita Anglo-Normannica*.

and other organs were said to have been reproduced after he had been mutilated by the sentence of the County Court of Bedford. The story is as follows: "Ailward's neighbour owed Ailward a debt, and when he was asked to pay it, refused; whereupon Ailward, in a rage, broke open the house of his debtor, which his debtor, ¹who had gone to the public house, had left fastened with a lock hanging down outside. Ailward took, as a security, the lock, a whetstone hung from the roof of the house, a gimlet and tools, and went away. The children who were playing in the house, where they had been locked up by their father, told him how the house had been broken open, and how the thief had carried off the things. The father followed him, caught him, and, wresting the whetstone from his hand, as he sauntered, wounded his head with it. He then drew his knife, stabbed him through the arm, and taking him to the house into which he had broken, bound him ²as an open thief, with the stolen goods upon him. A crowd collected, one of whom was Fulco the apparitor, who suggested, that as a man cannot be mutilated for stealing under the value of a shilling, the stolen goods should be increased by other goods alleged to be stolen. Accordingly there were laid by the prisoner, a bundle, a *pellium*, linen, gowns, and the iron tool commonly called *volgonum*.

"Next day he was taken with the aforesaid bundle, which was hung round his neck, before one Richard the sheriff and other knights. Lest however, in a matter of doubt, the sentence should be hurried, judgment was deferred. He was kept for a month in the prison at Bedford."³

¹ "Ad tabernam digressus."

² "Quasi furem manifestum cum concepto furto." The use of the technical terms of the Roman law is noticeable.

³ The account of the way in which he passed his time in prison is curious, though not relevant to the matter in hand. "Interim clam vocato pagano presbytero suos excessus omnes ab ineunte etate confessus est, et monitus est suffragia beate Mariæ sanctorumque omnium, et maxime beati Thomæ quem Dominus virtutum et signorum indicis glorificare dignatus est suppliciter implorare, omnem iram et incentivum odiorum ab animo secludere, de Dei misericordiâ non diffidere, et quicquid pati cogeretur æquanimitè in remissionem peccatorum continere, et eo attentius quod vigilia Pentecostes ipse parvulus regeneratus aquâ submergi vel igne cremari non posset sicut vulgaris habuit opinio, si judicium alterutrum subi-

CHAP. IV.

After this, "it happened that he was taken to Leighton Buzzard where the magistrates met (*magistratibus convenientibus*). There he demanded to fight Fulco his accuser, or to undergo the ordeal of fire, but ¹with the assent of Fulco who had received an ox for it (*ob id ipsum bovem acceperat*) he was condemned to the ordeal of water, so that he might by no means escape. Thence he was taken back to Bedford, where he passed another month in prison. The judges met there (*convenientibus iudicibus*), and when he was given up to be examined by the ordeal of water, ²he received the melancholy sentence of condemnation, and being taken to the place of punishment, his eyes were pulled out and he was mutilated, and his members were buried in the earth, in the presence of a multitude of persons." The rest of the passage describes their miraculous restoration.

This story sets in a vivid light the procedure of the old County Court in a common case of theft. The thief is arrested with the goods in his possession. He is taken before the sheriff and other knights, and committed to Bedford gaol. Two tours or adjournments of the County Court are held in successive months, one at Leighton, the other at Bedford. They are described as a meeting of magistrates or judges. The words "magistratus" and "iudices" being probably used in a popular way, and no doubt denoting the stewards and other persons of local importance who were present at the County Court. The defendant claims the trial by combat, but, ³(no doubt

"turus esset, virgamque dedit quâ quinquies in die susceptâ disciplinâ Dei misericordiam in se provocaret. Qui monita libenter audiens circumducto filo corpori suo martyri se devovit, emendationem vite promittens, timens que sibi panniculos suos diripi in dextro humero calido ferro signum crucis impressit."

¹ Perhaps at the suggestion *annuente Fulcone*. It is difficult to understand why Fulco should require a bribe to consent to his enemy being sent to the kind of ordeal which appears to have been regarded with most fear.

² "Damnationis suæ tristem excepit sententiam." This probably means that the ordeal went against him. Can it mean that he shrank from the ordeal and pleaded guilty? The whole passage implies that the ordeal of water was more dreaded than that of fire, probably because it gave less opening for fraud.

³ The chronicler obviously wishes to make the best of his hero at the expense of the apparitor Fulco and the person robbed, but we have not their

because his guilt was considered to be obvious), is adjudged to the ordeal of water. Hereupon he is either found guilty or confesses his guilt, and is there and then blinded and mutilated. When we remember that at the County Courts or meetings held in this manner all sorts of financial and military business was transacted, that it was in them that ¹ charters were read, and other proclamations made, that in them, ² the military orders of the sheriff were published, and the obligations incident to military tenure enforced, and finally, that in them, the local assessment and collection of taxation took place, it is obvious that the sheriffs who presided over them were at the head of the two great branches of government, namely, the financial and the judicial branch, and that if they had been altogether independent of the king and his representatives, they would have been petty kings, each in his own county.

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In the reigns of the Conqueror and his sons they seem in fact to have held some such position, as ³ there are many instances in which the office of a justiciary of the King's Court was united with that of the sheriff of a county. This led to abuses both by way of oppression and corruption which caused the ⁴ "Inquest of the Sheriffs" held in 1170 by the orders of Henry II. On that occasion all the sheriffs in England were displaced and an inquiry was made into their conduct by a body of justices specially appointed for that purpose. This however was only an isolated measure, and does not appear to have changed the legal position of the sheriffs.

The judicial authority of the old county courts has been so completely superseded by other tribunals that it is difficult to form a clear notion of the manner in which it was exercised, nor has the inquiry any practical importance. It seems however that the court was held monthly for general purposes, probably at the county town, and twice a year under the name of the sheriffs' tourn or circuit in every hundred of the county for criminal trials. It also appears that by royal grants many districts such as

account of the matter, and if the prisoner really was innocent, it is not easy to understand the extreme penitence ascribed to him.

¹ Stubbs, 576.

³ Stubbs, i. 192, 3.

² Stubbs, ii. 212, 3.

⁴ Stubbs, *Charters*, 147.

CHAP. IV. towns, manors, &c., were exempted from the tourn and provided with a tourn of their own called the leet, which was held not before the sheriff but before the lord of the franchise or his steward. Many of these leets are still in existence, and their proceedings perhaps give a better notion of the ancient criminal procedure than is to be got from books. I shall return to them in connection with that subject.

The steps by which the criminal jurisdiction of the County Court became all but obsolete can still be traced with fair completeness. In the very earliest times the kings when they granted jurisdiction, reserved to themselves particular classes of cases. Such at least is the interpretation put by ¹Mr. Stubbs on a law of Cnut's. ²"These are the rights which the king enjoys over all men in Wessex that is *mund-bryce* (breach of the king's peace or special protection), and *ham-soen* (burglary), ³*forstal* (premeditated assault), *flymena-firth* (outlawry), and *fyrð-wite* (fines for neglect of military duty), unless he will more amply honour any one and concede to him this worship." Mr. Stubbs supposes these were the original "pleas of the Crown." However this may be, it is certain that when Glanville wrote (in the days of Henry II.) the distinction between the pleas of the Crown and the pleas of the sheriff was well known. He states it at the beginning of his first book.

⁴"Placitorum aliud est criminale, aliud civile. Item placitorum criminalium aliud pertinet ad Coronam domini Regis, aliud ad Vicecomites provinciarum." He then enumerates the pleas of the Crown as treason, concealment of treasure trove, breach of the king's peace, homicide, arson, robbery, rape, crimen falsi, "Et si quæ alia sunt similia: quæ scilicet crimina ultimo puniuntur supplicio aut membrorum truncatione." The crime of theft (although punished by death or mutilation) belongs to the sheriffs, and to them also it appertains to take cognisance of frays (*medletis*) strokes and wounds "*pro defectu dominorum*" (I suppose this means where there is no franchise), "unless the accuser lays the offence to be against the king's peace."

¹ Stubbs, i, 187.

² Thorpe, i, 333; Cnut, *Secular Laws*, 12.

³ *Ante*, p. 58.

⁴ Glanville, p. 1.

By the assize of Clarendon ¹it was provided that when any one was accused before the sheriff of being a "robator vel murdrator vel latro vel receptor eorum" he should be sent to be finally disposed of before the justices or if the justices were not soon to come into the county, then the sheriffs were to send word to the nearest justice, and send the prisoners to such place as the justice should appoint.

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The 12th article of the assize of Northampton ²(A.D. 1176) also provides that a thief (*latro*) when taken is to be in the custody of the sheriff, or, in his absence, of the nearest *castellanus*, but the justices are to take assizes "de latronibus iniquis et malefactoribus terræ" (art. 7). The language of the rest of the assize seems to imply that the justices were to try prisoners accused of all serious offences except "minutis furtis et roberiiis quæ facta fuerunt tempore guerræ sicut de equis et bobus et minoribus rebus." These provisions lay down no distinct proposition as to the powers of the sheriff, but they imply that the most important cases were reserved for the justices.

The 24th article of Magna Charta is as follows:—"Nul-
lus vicecomes constabularius coronatores vel alii ballivi
nostri teneant placita coronæ nostræ." What the "placita
coronæ" meant, in 1215, it is impossible to say precisely.
They must, at least, have meant serious crimes, and this
enactment cannot have had a less effect than that of depriving
the Sheriff's Court of all criminal jurisdiction of importance.
The sheriff's tourn, however, was not expressly abolished by
Magna Charta. It was held for centuries; not for the sake
of trying prisoners, but for the sake of taking indictments
which were anciently presented before the sheriff in his
tourn in the way in which an inquisition is now made before
a coroner. A man can, as the law still stands, be put on his
trial for murder or manslaughter on a coroner's inquisition.
Long after the sheriffs had ceased to be judges they con-
tinued to be the presidents of a number of small local courts
which could accuse though they could not try. Indeed, till
justices of the peace were established, the sheriffs and coroners,
and the grand juries at the courts of the justices, must have

¹ Stubbs, *Charters*, p. 143.

² *Ib.* 157.

CHAP. IV. discharged the duties of committing magistrates. Several traces of their proceedings in this respect are to be found in the Statute Book. Thus, by the Statute of Westminster 2nd, 13 Edw. 1, c. 13 (1285), it is enacted, that whereas sheriffs have frequently extorted money by imprisoning persons not lawfully indicted before them in their tourns on the pretence that they were so indicted, such indictments shall, for the future, be taken by lawful men, and by twelve, at least, who are to put their seals to the inquisition. By the statute 1 Edw. 3, st. 2, c. 17 (1330), it is provided that the indictments are to be in duplicate, "so that the indictments shall not be embezzled as they have been in times past, and so that one of the inquest may show the one part of the indictment to the justices when they come to make deliverance."

In the course of the following century the jurisdiction of the sheriffs both as judges and as committing magistrates, having been practically altogether displaced by the Courts of the Justices of Assize and Quarter Sessions, and by the justices of the peace, the tourns became a mere engine of extortion. "Inordinate and infinite indictments and presentments as well of felony, trespasses, and offences as of other things," were taken before sheriffs and their subordinates "at their tourns, or law days," which indictments were "oftentimes affirmed by jurors having no conscience, and little goods, and often by the said sheriff's menial servants and bailiffs." The persons indicted were then arrested and imprisoned, and "constrained to make grievous fines and ransoms" to procure their liberty, and then the indictments were withdrawn. To remedy these evils the sheriffs and their bailiffs were forbidden to arrest any person on any such indictments or presentments, and were required to carry them before the next Court of Quarter Sessions.

From this time the sheriff's tourn became practically obsolete, as it could neither try nor accuse, and the only remnant of the ancient criminal jurisdiction of the County Court which still survived was to be found in the leet, already referred to.

I now pass to the courts by which the County Court was

¹ 1 Edw. 4, c. 2.

superseded, and which still continue to administer the Criminal Justice of the country in all common cases. These are the High Court of Justice, and especially the Queen's Bench Division of it; the Courts of Assize; and the Courts of Quarter Sessions. CHAP. IV.

THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE.

The kings of England had, from a period much earlier than the Conquest, claimed and exercised the prerogative of being the fountain of justice, and their courts had been the centres in which all the most important of the national affairs were transacted. In particular, in one way or another, the whole administration of justice was derived from the royal authority. As has been shown above, the king sat, or appointed special representatives to sit for him, in the County Courts whenever he thought proper to do so, and in granting judicial powers to particular courts or persons, he made such reservations as to particular classes of cases as he thought fit. ¹ "In the later laws," says Mr. Stubbs, "the king specifies the pleas of criminal justice which he retains for his own administration and profit; such a list is given in the laws of Canute; breach of the king's protection, house-breaking, assault, neglect of the 'fyrd' (military service), and outlawry. These were the original pleas of the Crown, and were determined by the king's officers in the local courts."

Under the Norman kings the importance and influence of the King's Court, the Curia Regis, was greatly increased. It seems to have contained the germ of all the great institutions of our present system of government, though, as yet, they were not distinguished from each other. In order to form a distinct conception of the Curia Regis as it was under the Norman and Angevin kings, we must bear in mind two points in which it differed widely from more modern institutions known to us as courts, whether the word is applied to courts of justice or courts held for purposes of State.

¹ Stubbs, *Charters*, 147.

CHAP. IV. The first point is that the Curia Regis was the great centre not only of business but of society. In an often quoted passage, the author of the *Saxon Chronicle* says of the Conqueror: ¹"Thrice he wore his crown each year, as oft as he was in England. At Easter he bare it in Winchester, at Pentecost at Westminster; at midwinter at Gloucester; and there were with him all the rich men over all England, archbishops and diocesan bishops, abbots and earls, thanes and knights."

The following description of the Curia Regis is given by Madox, ²who has collected from various sources nearly every notice which can be found of the Court and its proceedings:—

"At the King's Court, and more especially at some solemn times of the year he held his great councils, and ordinarily transacted such affairs as were of great importance or required pomp and solemnity according to the custom of the times. There he was attended by his barons and knights who were to accompany him in his wars and expeditions. There coronations, marriages, and knighthoods of the king's children, and solemnities of great festivals were celebrated. There was placed the throne or sovereign ordinary court of judicature, wherein justice was administered to the subjects either by the king or his high justicier. There was the conference of the nobility and prelates who used to be near his royal person; and there the affairs of the royal revenue were managed by the king himself or (most usually) by his justicier barons and prelates employed therein by his command.

¹ p. 294. The following passage from an early chronicler gives a vivid picture of the social side of a Court:—"Henricus Rex Junior" (the son of Henry II.) "ad natale fuit a Bur Juxta Baiocum, et quia tunc primum tenebat curiam in Normanniâ voluit ut magnifice festivitas celebraretur. Interfuerunt episcopi, abbates, comites, barones, et multa multis largitus est. Et ut appareat multitudo eorum qui interfuerunt, cum Willermus de Sancto Johanne Normanniæ procurator et Willermus Filius Hermonis senescallus Britanniæ qui venerat cum Gaufrido duce Britanniæ domino suo comederunt in quâdam camerâ, prohibuerunt ne quis miles comederet in eadem camerâ, qui non vocaretur Willermus, et ejectis aliis de camerâ remanserunt 117 milites qui omnes vocabantur Willermi exceptis plurimis aliis ejusdem nominis qui comederunt in aulâ cum rege." (R. de Monte, 520.) See too Froissart's account of the Court of the Count of Foix in the third volume of the *Chronicles*.

² *Hist. Exch.* i. p. 1-153, chapters i. ii. iii. See also Stubbs, *Cons. Hist.* i. xi.

" This may serve for one view of the King's Court. To
 vary the prospect, let us take a view of it another way. The
 realm of England was anciently deemed one great seignury
 or dominion, of which the king was sovereign or chief lord ;
 having under him many barons or great lords, and many
 knights and military tenants, besides soccagers, burgesses,
 and others. In order to survey the court of this chief lord
 of the regnum, or terra Angliæ, we may consider him as
 residing in his palace and surrounded by his barons and
 officers of state. The baronage attending on his royal person
 made a considerable part of his court. They were his
 homagers. They held their baronies of him. He was
 their sovereign or chief lord, and they were his men as to
 life, limb, and earthly honour. They were called Pares or
 Peers, as they were peers or convassales of his court, peers
 to one another, and all of them liege-men to their chief lord
 the king. As peers they had an immediate relation to his
 court. In that respect they are styled his *fideles* and *fumi-*
liares, his liege-men and domestics, and *barones curiæ regis*.
 With them the king consulted in weighty affairs, and did
 many solemn acts in their presence and with their concur-
 rence. They or such of them as ordinarily attended in the
 King's Court, by his command were (together with some
 of the bishops and prelates) concerned in managing the
 affairs of the revenue and in distributing public justice in
 causes brought into the King's Court : and came in process
 of time to be called the *conciliarii* or *concilium regis*, the
 King's Council, and some of them held and executed the
 respective *ministeria*, or great affairs of the King's Court."

Another point which ought not to be forgotten in relation
 to the King's Court is its migratory character. The early
 kings of England were the greatest landowners in the country,
 and besides their landed estates ¹they had rights over nearly
 every important town in England, which could be exercised

¹ "In Hereford in the time of Edward the Confessor, for instance, when
 the king went to hunt, one person went from each house to the stand-or
 station in the wood. Other tenants not having entire masures found three
 men to guard the King when he came into the city." "Six smiths made
 120 nails from the King's iron." There were seven moneyers, and "when
 the King came to the city they were bound to coin as much of his silver
 into pence as he demanded."—Ellis's *Introduction to Domesday*, ii. 195.

CHAP. IV. only on the spot. They were continually travelling about from place to place, either to consume in kind part of their revenues, or to hunt or to fight. ¹ Wherever they went the great officers of their court, and in particular the Chancellor with his clerks, and the various justices had to follow them. The pleas, so the phrase went, "followed the person of the king," and the machinery of justice went with them.

Two remarkable illustrations of this feature in the old courts and of their consequences to suitors may be given. Sir Thomas Hardy has prepared from the Patent Rolls an ephemeris of King John's reign, from which it appears that between May 23 and the end of December, 1213, his movements were as follows:—May 23, Ewell; 26, Wingham; 28, Dover; 30, Wingham; June 3, Chilham; 5, Ospring; 6, Rochester; 10, Ospring; 11, Chilham; 13, Battle; 16, Porchester; 17, Bishopstoke; 21, Corfe; 25, Camford; 27, Beer Regis; 29, Corfe; 30, Bishopstoke. In July he was in Dorchester. In August, amongst other places, at Marlborough, Clarendon, Winchester, and Northampton. In September at Nottingham, Southwell, York, Darlington, Durham, Knaresborough and Pontefract. In October at Westminster Rochester, and Clarendon, and in the course of November and December at Oxford, Gloucester, Reading, Guildford, St. Albans, Waltham, and the Tower. On Christmas Day he was at Windsor. He was then at the Tower again, and on the 30th December again at Waltham.

The effect of this mode of life upon the suitors and the administration of justice is shown by the ² history of the plea of Richard d'Anesty in the King's Court. It begins "These are the costs and charges which I, Richard de Anesty bestowed in recovering the land of William my uncle," and it proceeds to enumerate the various journeys which he took to get writs, to get "days" given him by the king and the justices, and to keep the days so given. The history fills

¹ So late as the year 1300 it was enacted (28 Edw. I, c. 5) that the Chancellor and the Justices of the King's Bench should "follow him so that he may have at all times near unto him some sages of the law which be able only to order all such matters as shall come unto the Court at all times when need shall require." Indian magistrates and commissioners on tour in their districts and divisions are at times followed by pleas like the early English kings.

² Palgrave, *Commonwealth*, ii. ix.—xxvii.

nearly nineteen 4to pages. The litigation lasted more than five years (1158-1163). It involved journeys by d'Anesty and others to the following amongst other places, Normandy, Salisbury, Southampton, Ongar, Northampton, Southampton, Winchester, Lambeth, Maidstone, Lambeth, Normandy, Canterbury, Avinlarium (supposed by Sir F. Palgrave to be Auvilar on the Garonne), Mortlake, Canterbury, London, Stafford, Canterbury, Wingham, Rome, Westminster, Oxford, Lincoln, Winchester, Westminster, Rumsey,¹ Rome, London, Windsor, and at last Woodstock. The principal question in d'Anesty's case was whether a marriage was void by reason of a precontract. This was regarded as a matter of ecclesiastical cognisance, and involved questions in the spiritual courts and an appeal to Rome, but the different steps in the case strongly illustrate the meaning of "following" a plea. Here is a specimen of the narrative.² "After I had fined with the King, my Lord Richard de Lucy by the king's precept gave me a day for pleading at London at mid-Lent; and there was then a Council; and I came there with my friends and my helpers; and because he could not attend to this plea on account of the king's business I tarried there for four days and there I spent fifty shillings. From thence he gave me a day on the clause of Easter, and then the King and my Lord Richard de Lucy were at Windsor; and at that day I came with my friends and helpers as many as I could have. . . . And because my Lord Richard de Lucy could not attend to this plea on account of the plea of ³Henry de Essex, the judgment was postponed until the King should come to Reading, and at Reading in like manner it was postponed from day to day until he should come to Wallingford. And from thence because my Lord Richard was going with the King to Wales, he removed my plea into the court of the Earl of Leicester at London; and there I came . . . and because I could not

¹ The Pope had directed his first writ to the Bishop of Chichester and the Abbot of Westminster, of which the King disapproved, requiring one directed to himself. D'Anesty sent a messenger for it, "and in that journey the messenger spent fifty shillings."

² P. xxii.

³ This is the trial of Henry de Essex for treason. It is referred to in Mr. Carlyle's *Past and Present*.

CHAP. IV " get on at all with my plea I sent to the Lord Richard in
 " Wales to the end that he might order that my plea should
 " not be delayed; and then by his writ he ordered Ogerus
 " Dapifer and Ralph Brito that without delay they should
 " do justice to me: and they gave me a day at London. I
 " kept my day. . . . From thence my adversaries were sum-
 " moned by the king's writ and also by the Lord Richard's
 " writ that they should come before the king: and we came
 " before the king at Woodstock and there we remained for
 " eight days, and at length, thanks to our lord the king and
 " by judgment of his court, my uncle's land was adjudged
 " to me." The history concludes with an account of the money
 which Anesty had to borrow from Jews for the expenses—
 mostly travelling expenses—of his plea, usually at the rate
 of a groat a week for the pound, which is nearly 87 per cent.
 per annum.

The King's Court which led this wandering life, and which at intervals brought together all the most powerful and brilliant members of the community, had its standing officers and organisation. It was divided into two great departments, the Curia Regis and the Exchequer, which may be compared to the different sides or departments of one court. In the Curia Regis justice was administered, matters of state were debated, and public ceremonials of all kinds were celebrated. In the Exchequer were managed all affairs relating to the revenue. ¹It seems to have been stationary, at least many of its officers were stationary, and the treasure itself was kept in one place. The Exchequer had an organisation of its own which I need not describe. The two departments however were intimately connected. All the great officers of the Curia Regis had seats in the Exchequer and were described as Barons of the Exchequer. Moreover the administration of justice, particularly the functions of the Justices in Eyre, not only contributed largely to the revenue by fines and amercements but were the means by which some branches of the revenue were collected. Hence the Curia Regis and the Exchequer, though separate in name, and to some extent

¹ See the *Dialogus de Scaccario*, printed in Madox, vol. ii., and also in Stubbs's *Select Charters*.

different in their functions may be considered as forming CHAP. IV. collectively one great institution.

¹ The great officers who held the most conspicuous places both in the Exchequer and in the Curia Regis were seven in number, namely the Chief Justiciar, the Constable, the Marshal, the High Steward, the Chamberlain, the Chancellor, and the Treasurer. Besides them there were an indeterminate number of justices distinguished by no particular title.

“The Chief Justiciar was the first and greatest officer of the King’s Court.” “When the king was beyond sea he governed the realm like a viceroy.” “Next to the king he presided in the Curia Regis as chief judge both in criminal and civil causes.” “He presided likewise in the King’s Exchequer, having the superior care and guidance of the Royal Revenue.”

This great office was held by ²Odo of Bayeux and William Fitz Osborne under the Conqueror, by ³William Flambard (for many years) under William Rufus, by Roger of Salisbury under Henry I., by Richard de Lucy under Stephen and Henry II., and by Ranulf de Glanville also in Henry II.’s time. The last of the Chief Justiciars was Hubert de Burgh in the reign of Henry III.

In the Curia Regis the Norman kings exercised as well in criminal as in civil cases, the original and appellate jurisdiction which had been perhaps the greatest of the prerogatives of their predecessors, and many trials of the greatest importance took place in it. For instance, ⁴Waltheof was condemned to death at the court held at Westminster by the Conqueror at Christmas 1074.

⁵In 1096 William Rufus held his court at Windsor. There Godfrey Bainard accused William de Ou, the king’s kinsman, of treason and vanquished him in single combat; whereupon the king commanded William de Ou to be blinded and otherwise mutilated, and his dapifer (one William by name) to be hanged; and there Euda, Count

¹ Madox, *Hist. Exch.* chap. ii. pp. 80—80.

² *Ib.* p. 31.

³ *Ib.* p. 32.

⁴ Stubbs, i. 371.

⁵ Mad. i. 89, quoting Hoveden and Saxon Chronicle.

CHAP. IV. "of Champagne, the king's son-in-law, and many others
 "were deprived of their lands, and others were taken to
 "London and there executed." ¹In the reign of Henry I.
 the famous Robert Belesme was tried in the King's Court
 upon no less than forty-five charges of outrages of various
 kinds.

²In 1184 (30 Hen. 2) Gilbert de Plumtun Knight was
 accused before the king by Glanville the high justiciary of a
 rape, and, according to Hoveden, would have been hanged if
 the king had not pitied him, suspecting Glanville's motives.

Other instances are to be seen in Madox of the exercise
 of the jurisdiction of the Curia Regis. I will now pro-
 ceed to trace the steps by which nearly all the most im-
 portant of our existing courts of justice were derived from
 it. The industry of Madox ³has collected evidence that the
 expression "Common Bench" or "Bank" is older than
 the reign of King John, and it is highly probable that
 some distribution of the business of the Curia Regis whereby
 civil actions might be assigned to one division of the court
 might take place during the reign of Henry II., when its busi-
 ness increased so much, and when the spirit of judicial and ad-
 ministrative reform was so active; but however this may be,
 there is no doubt that a great and indeed decisive step in this
 direction was made by the 17th Article of Magna Charta
 in 1215, which is in these words, "Communia placita
 "non sequantur curiam nostram sed teneantur in aliquo loco
 "certo." The reasons of this enactment, and the evils which
 it was intended to remedy are sufficiently illustrated by the
 account already given of the plea of de Anesty and of the

¹ Mad. i. 93; Stubbs, i. 371. Robert de Belesme is one of the most pro-
 minent characters in the history of Ordericus Vitalis, and his career supplies
 an excellent specimen of the sort of disorders which the royal power had at
 that time to deal with.

² Eodem anno cum Gilbertus de Plumtun miles nobili prosapia ortus
 ductus esset in vinculis usque Wigorniam et accusatus esset de raptu coram
 Domino Rege a Ranulfo de Glanvilla Justiciario Angliæ, qui eum condem-
 nare volebat, injusto judicio judicatus est suspendi in patibulo, &c. Rex
 pietate commotus consilioque suorum præcepit sic (custoditum) eum manere
 donec ipse aliud de eo fieri præcepisset. Sciebat enim quod per invidiam
 fecerat hæc illi Ranulfus de Glanvilla, qui eum morti tradere volebat propter
 uxorem suam, &c. Sic itaque miles ille a morte liberatus usque ad obitum
 regis fuit incarceratus per R. de Glanvilla. Hoveden, quoted by Madox,
 i. 20.

³ *Hist. Eccl.* vol. i. chap. xix. pp. 787—801.

travels of King John. This was the origin of the Court of Common Pleas which from that day to this (1882) has been held in Westminster Hall.¹ CHAP. IV.

The Court of Exchequer was always, as I have already observed, to some extent separate from the rest of the Curia Regis, and was also to some extent stationary. It gradually became a separate court.

The Court of King's Bench represented so much of the ordinary jurisdiction of the Curia Regis as was not appropriated to the Common Pleas and the Exchequer. It had no definite known beginning as a separate institution, but the following points in relation to it may be noticed. The name "Curia Regis" begins, according to Madox, to cease to be used in the Records after the enactment of Magna Charta, and the pleas which would have been described as being held in the *Curia Regis* are said to be held *coram ipso rege*. This form of expression corresponds to the style which belonged to the Judges of the Court of Queen's Bench down to its abolition, "the Justices of our Lady the Queen assigned to hold pleas before the Queen herself." It also corresponds to the singular ² legal fiction which supposed the king to be in some mystical way personally present in the Court of Queen's Bench (it may be in all the superior courts) which was the reason assigned for the extreme severity with which contempts of such courts might be punished.

It is also to be observed that Hubert de Burgh, the famous minister of Henry III., was the last person who held the office of Chief or High Justiciar. The powers of the office

¹ Madox observes that even after Magna Charta there were some exceptions to the rule which it laid down, but these are of no practical importance.

² "However, it is certain that by the common law which continues to this day, striking in Westminster Hall, where the king is only present as represented by his judges and by their administration, distributing justice to his people, is more penal than any striking in another place in his actual presence; for the latter is not punished with the loss of hand unless some blood is drawn, nor even then with the loss of lands or goods; but if a person draw his sword on any judge in the presence of the Court of King's Bench, Chancery, Common Pleas, or Exchequer, or before the justices of assize, or oyer and terminer, whether he strike or not; or strike a juror, or any other person with or without a weapon, he shall lose his hand and his goods, and the profits of his lands during his life, and suffer perpetual imprisonment, if the indictment lay the offence as done *coram domino rege*." 1 Hawkins, p. 62 (edition of 1824), and see on this subject R. v. Lord Thanet and others. 27 *State Trials*, 822.

CHAP. IV. indeed were so exorbitant that they were too great for a subject, and it is a not improbable conjecture (though there seems to be a complete absence of positive historical evidence on the matter) that the offices of Lord Chief Justice of the King's Bench, Lord Chief Justice of the Common Pleas, and Lord Chief Baron of the Exchequer were instituted in order to discharge the different duties which had formerly belonged to the Chief Justiciar. The exact date at which these changes were made is uncertain,¹ but the three courts were distinguished from each other before the accession of Edward I. The lists of the Chief Justices of the King's Bench and the Common Pleas, go back to the beginning of the reign of that king. The lists of the Lord Chief Barons to the middle of the reign of Edward II.

We have thus arrived at the Court of King's Bench. From the reign of Edward I. to the year 1875 it continued to be the Supreme Criminal Court of the Realm, with no alterations in its powers or constitution of sufficient importance to be mentioned except that during the Commonwealth it was called the Upper Bench.

In 1875 the Judicature Act of 1873 was brought into operation, and the Courts of Common Law and of Equity, all of which had been originally derived from the Curia Regis, or the powers of one of its members, the Lord Chancellor, were reunited under the name of the High Court of Judicature. The Court of Queen's Bench thereupon lost its ancient title, which however survives in the name of the Queen's Bench Division, and its Chief Justice became the Lord Chief Justice of England, a title which almost literally reproduces that which was borne by Lucy, Glanville, and de Burgh. The High Court of Judicature, and more particularly the Queen's Bench Division of that Court, is thus the representative of the Curia Regis in its capacity of a Court of Criminal Justice. It will be interesting to enumerate shortly the particulars of the jurisdiction which it thus inherits.

In the first place the Curia Regis had original jurisdiction in all cases whatever. The same is the case with the High

¹ Stubbs, *Cons. Hist.* ii. 266-7.

Court of Judicature. There is no offence, from the most serious to the most trivial, from high treason to a petty assault, which the High Court is not competent to try. CHAP. IV.

In the second place the High Court has succeeded to what I have described in general terms as the appellate jurisdiction of the Curia Regis. This jurisdiction is of two kinds. The High Court may issue, hear, and determine (subject to a further appeal to the House of Lords) writs of error. A writ of error is an order for the production of the record of proceedings before an inferior court founded upon an allegation on the part of a person aggrieved, that the record will show that the proceedings were erroneous, for which reason they ought to be quashed. This proceeding in the present day affords a mode of trying questions of law relative to procedure, but not questions as to the correctness of the judge's direction to the jury or as to the admissibility of evidence, or as to errors of fact committed by the jury.

In the third place the High Court may in its discretion issue a writ of *certiorari*, by which it can direct any inferior court to send to the High Court any indictment which may be found before the inferior court, in order that it may be tried either before the High Court or before a judge of the High Court either in London or on the circuit. This power is in some particular cases regulated by statute, but it is perfectly general, and is in continual use in cases in which for any reason a trial in the ordinary course appears likely to be unsatisfactory.

The writ of error and the writ of *certiorari* are both as old as the common law, and their very form and the nature of their contents distinctly show that they are the stated established way of exercising that superintendence over inferior courts, which, as I have pointed out, formed one of the most important branches of the Royal Prerogative ages before the Norman Conquest, and was exercised by the Curia Regis after that event and down to the time of the institution of the Court of King's Bench.

It is a curious question, though perhaps the solution would not be worth the trouble necessary to arrive at it, how far, at different periods of its history, the Court of King's Bench was

CHAP. IV. in practice as well as in theory a court for the trial of common criminal cases. Till the year 1872 the grand jury of Middlesex used to be summoned every term, but indictments were so very seldom preferred before them, that in that year an Act (35 & 36 Vic. c. 52) was passed providing that it should no longer be necessary to summon the grand jury unless the master of the Crown Office has notice of bills to be sent before them, in which case they may still be summoned. It has been usual to present such bills in cases of great public interest and importance only. The last instance of the kind which occurs to me was the prosecution of Governor Eyre, in 1866, for misdemeanour in sending Mr. Gordon for trial to Morant Bay, in Jamaica, in order that he might be tried before a Court-martial. Criminal cases are not very unfrequently removed by *certiorari* into the High Court, and tried at the sittings at Nisi Prius; but these are almost always misdemeanours partaking more or less of the character of private wrongs, as indictments for libel, conspiracy to defraud, or the like. Proof, however, still exists that in ancient times the criminal business of the Court was exceedingly important, and came from all parts of England. In the Second Appendix to the Third Report of the Deputy Keeper of the Public Records (Sir F. Palgrave) are a considerable number of calendars and records, showing the amount of criminal business done in the Court of King's Bench in various terms between 1477 (17 Edw. 4) and 1547 (37 Hen. 8). It appears from these that the Court was largely occupied at that time by trying all sorts of criminal cases arising in every part of the country. To give a few instances. In Trinity Term, 1477 (April 29 to June 20), sixteen writs of *certiorari* issued, to bring up for trial cases which had occurred in other parts of England. Of these four were murders from Stafford, Warwick, Nottingham, and London; respectively. There were five cases of robbery, two complicated with forcible entry; two forcible entries; a conspiracy; two thefts, and two assaults. In Easter Term, 1501 (16 Hen. 7), twelve cases were brought into court by *certiorari*, including cases of theft, burglary, riot, and forcible entry. It thus appears that the criminal trials held in the Court in those

days must have formed a considerable branch of its business. Those trials which were held in the term were as they still are called trials at Bar. Those which were held after term and put in a list with civil causes were said to be tried at *Nisi Prius*.

CHAP. IV.
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¹ THE COURTS OF ASSIZE.

I come now to consider the history of the Courts of Assize. These courts are not so much derived from, as of equal antiquity with the *Curia Regis*, and appear to me to be the means by which the king exercised that concurrent jurisdiction with the County Courts which, as I have already observed, formed one of the most important and ancient branches of his prerogative. This concurrent jurisdiction seems from the very first to have been exercised most frequently not by calling the suitors to the King's Court, but by sending representatives of the King's Court to preside in the local tribunal. The king himself in very ancient times, as appears from the instances already given, sat on particular occasions in the County Court, but it is natural to suppose that he would more frequently delegate such a function to others. Sufficient evidence to show that in fact he did so is still in existence. ²Mr. Stubbs mentions many persons besides the chief Justiciars who acted as "*Justiciarii*," during the reign of Henry I. and other instances are mentioned by Madox. ³Thus:—"In the year 1124, the King (Henry I.) being in Normandy between St. Andrew and Christmas, Ralf Basset and the King's thanes held a council of the nobles at Hundhoge in Leicestershire and caused execution to be done on many malefactors." The Pipe Roll of 1130 mentions (according to Mr. Stubbs) ten justices of whom Ralph and another Basset were two. These, however, are matters which need not detain us, as Bracton in his third book gives an account of the office of the justiciar

¹ *Dig. Crim. Proc.* art. 23.

² Stubbs, *Cons. Hist.* ii. 388-9.

³ Madox, i. 12. Quoting from Hoveden, "*suspenderunt ibi tot fures quot antea nunquam scilicet in parvo temporis spatio omnino quatuor et quadraginta viros, sex item viros privarunt oculis et testiculis, admodum gravis fuit hic annus.*"

CHAP. IV. in the reign of Henry III. so full and precise as to render any other authority superfluous.

¹ He mentions as distinct the "Aula regia," and its "Justitios capitales qui proprias causas regis terminant," and the "curiam et justitios in banco residentes," but upon the whole it appears from his work that whatever special titles they might have on particular occasions, the justices were a body of royal officers of uncertain, or at least, of unspecified number, who were capable of being and habitually were employed upon a great variety of different duties according to the commissions directed to them from time to time. After giving many different forms of writs he concludes thus: ² "Et infiniti sunt casus et formæ infinitæ quibus constituantur justitii, secundum quod inferius videri poterit in multis locis. Sed hæc ad præsens sufficiant exempli causâ." He gives many forms of the commissions which were issued to particular justices in particular cases. The king, he says, ³ "Habet justitios itinerantes de comitatu in comitatum quandoque ad omnia placita, quandoque ad quædam specialia, sicut assisas novæ disseisinæ et mortis antecessoris capiendas, et ad gaolas deliberandas, quandoque ad unicam vel duas et non plures" (causas). In another place he says that the power of the justices depends on their commission, but that it is complete in regard to the whole of the cause or causes to which the commission extends down to judgment and execution. Various forms of writs are given which invest the justice with a jurisdiction more or less extensive according to circumstances. ⁴ In one case the words are, "Ad itinerandum per comitatum talem, vel comitatus tales A. de omnibus assisis et placitis tam coronæ nostræ quam aliis." In another the power is limited to the pleas, "quæ emergerint postquam justitii nostri ultimo itineraverunt in comitatu illo." In some cases the commission would authorise a goal delivery, in others not.

¹ See Bracton, *De Legibus*, iii. (*De Actionibus*) vii. 2 (*De diversitate Justitiorum*) vol. ii. pp. 160—207 in Sir H. Twiss's edition. ² P. 206.

³ P. 160, and see p. 180, where this is repeated in substance.

⁴ "Est autem eorum potestas quod ex quo lis commissa est causa una vel plures licet simpliciter extenditur eorum jurisdictione ad omnia sine quibus causa terminari non potest, quantum ad iudicium et executionem iudicii." —P. 182. ⁵ P. 184.

It is, I think, commonly supposed that the Court of the Justices in Eyre, first brought into prominence by Henry II. though not originally established by him, was a special institution differing in kind from the courts of the other justices.¹ I think that this view is mistaken, and that it has introduced an appearance of confusion and obscurity into what is really a simple matter. There was never any standing institution, known as the Court of the Justices in Eyre or the Court of the Justices of Gaol Delivery. The difference lay in the commissions which the king issued in different terms to the same persons as occasion required. From the very earliest period of English history the king exercised his prerogative of justice locally by the agency of commissioners authorised to try particular causes or classes of causes in particular places. The cases to be tried and the local limits of the jurisdiction were determined by the terms of the commission. These commissions were issued by the Conqueror and his sons, and by Henry II. his sons and grandson to their "justitiiarii," just as they are issued by Her Majesty in the present day to the Judges of the High Court of Judicature. At the present day the judges act under three commissions (Assize and Nisi Prius, Oyer and Terminer, and Gaol Delivery) if Civil as well as Criminal business is to be taken at the Assizes; under two only (Oyer and Terminer and Gaol Delivery) if all criminal business is to be taken; and under one only (Gaol Delivery) if a particular gaol is to be delivered, but prisoners on bail are not to be tried. In the days of Henry I., Henry II., and Henry III., the authority of the justice was limited by the extent of his commission in precisely the same manner. As to the eyre, every justice deputed to a particular place was "in eyre," or as we should say, "on circuit." No doubt there were justices who by way of pre-eminence were described as the Justices in Eyre, and there can also be no doubt that Henry II. first systematised

¹ See *e.g.* fourth *Institute*, ch. 27, 28, 30, 33, 34. There is a full history of all matters connected with the Courts of Assize in the judgment of Willes J., *ex parte Fernandez*, 10 C.B., N.S. 42-57.

CHAP. IV. these eyres, and divided the country into circuits each of which was allotted to one set of judges, and he may thus be described as the founder of the system of circuits. He was not, however, the founder of the system of the local administration of justice by Royal Commissioners appointed to take Assizes, to hear and determine pleas, and to deliver gaols. This system was probably as old as the doctrine that the king is the fountain of justice. That it was older than the establishment of the circuits is certain. The establishment of the circuits is usually dated from 1176, ¹when Henry II. divided the country into six parts and appointed eighteen itinerant justices for them, but ²Madox quotes from the Exchequer Rolls a long series of the names of justices errant from 1170, of whom some were appointed "for pleas of the Crown or common pleas, and for imposing "and setting the assizes or tallages on the king's demesns," and others "for pleas of the Crown and common pleas" only. Moreover the language of the Assize of Clarendon (1166) implies that in all parts of England justices either came (no doubt on circuit and with commissions of gaol delivery or oyer and terminer), or were accessible at short intervals. After providing for the arrest of robbers and murderers, the Assize goes on to say, that when persons are arrested for robbery or murder, "if the justices are not to come soon "into the county in which the prisoners are in custody, the "sheriffs are to send to ³the nearest justice by some intelligent "person to say that they have taken such prisoners, and the "justices are to send back to the sheriffs to say where they "wish the prisoners to be brought before them, and the "sheriffs shall bring them before the justices." This implies that even if it was not intended to send justices into any given county at a particular time, there would always be a justice in the neighbourhood, and this implies that at least ten years before the institution of regular circuits, the practice

¹ "Communi omnium concilio divisit regnum suum in sex partes; per "quarum singulas tres justitios itinerantes constituit quorum nomina hec "sunt, &c."—Hoveden, quoted in Madox, *Ec.* i. 18, and see 1 Stubbs, *Cons. Hist.* 602.

² i. 123-140.

³ The words are *propinquiori justitie* (in the singular) in this phrase.

of issuing commissions for the local administration of criminal justice by the king's justices was common. CHAP. IV.

The great peculiarity of the circuits, established by Henry II., and continued for a great length of time after his death, was the multiplicity of business imposed upon the justices. They were not only to dispose of the civil and criminal litigation of their circuit, but to preside over many branches of the king's revenue, and see to the enforcement and preservation of all his rights. This is clearly shown by the articles of the general summons given in Bracton, whose¹ treatise "*De Coronâ*" may be regarded as the foundation to a considerable extent of English criminal law. ²A general summons to sheriffs of the counties on the circuit was issued, requiring them to summon by good summoners all archbishops, bishops, abbots, priors, counts, barons, knights, and freeholders of their entire bailiwick, and of each vill four lawful men and the reeve, and of each borough twelve lawful burgesses "*et omnes alios qui coram justitiariis itinerantibus venire solent et debent.*" In a word, the sheriff was to convene the full county court for the transaction of all the business committed to the justices. The first business done was the criminal business, according to a mode of procedure which I shall describe fully hereafter. After this, inquiry was to be made as to the king's wards, as to marriages, advowsons, escheats, serjeanties, purprestures (encroachments), measures, wines, franchises, Christian usurers, the chattels of Jews slain, coinage, outlaws, markets, new tolls, and a great many other particulars relating to the revenue and other rights of the king. ³Their enumeration fills several pages of Bracton, and I think the only adequate way of describing them is by saying that their collective effect is to require the justices to undertake a general review of the whole administration of the country. The articles apparently were varied from time to time and to suit particular circumstances.

⁴Thus Bracton gives the form of a summons, convening a Court at Shipwey, before justices for the liberty of

¹ 2 Bracton, by Twiss, p. 284-581.

² See the form, 2 Bracton, 188.

³ Pages 241-53 (half of them are an English translation by Sir T. Twiss).

⁴ ii, 253.

CHAP. IV. the Cinque Ports. It authorises them to inquire, amongst other things, "de navibus captis in guerra et traditis, per
 " ¹ Wil. de Wroteham, et quis illas habeat vel quid de illis
 " actum sit."

What further process was to be had upon the returns made by the justices I am unable to say, as Bracton is silent on the subject; but probably the records of the eyre would be made up and forwarded to the exchequer, and form the basis, or at all events part of the materials, for the strict account which, as appears from the *Dialogus de scaccario*, the sheriff of every county had to pass every year. This, however, does not fall within my subject.

It is enough for me to point out that, on the circuits instituted by Henry II., and commonly distinguished as "eyres" by way of pre-eminence, the administration of criminal justice was treated, not as a thing by itself, but as one part, perhaps the most prominent and important part, of the general administration of the country, which was put to a considerable extent under the superintendence of the justices in eyre. Nor is this surprising when we consider that fines, amercements, and forfeitures of all sorts were items of great importance in the royal revenue. The rigorous enforcement of all the proprietary and other profitable rights of the Crown which the articles of eyre confided to the justices was naturally associated with their duties as administrators of the criminal law, in which the king was deeply interested, not only because it protected the life and property of his subjects, but also because it contributed to his revenue.

The transition from the eyres, described by Bracton, to the assize courts of our own days may still be traced. As I have already shown, the commissions under which civil and criminal justice was administered were distinct from the articles of the eyre, and were probably much more ancient. The eyres were converted into circuits, in our sense of the

¹ Sir T. Twiss says that he was a famous sea-captain and Keeper of the King's ports, who died in the second or third year of Henry III. He had been Archdeacon of Taunton in 1204, and was Keeper of the King's Galley during the reign of King John. Sir T. Twiss supposes the writ to have been the first issued to the barons of Hastings after the conclusion of the general war at the commencement of Henry III.'s reign.

word, simply by confining the commissions issued to the justices to those which are still issued (assize and nisi prius for civil business, oyer and terminer and gaol delivery for criminal business), and by dropping the financial and administrative matters contained in the articles of eyre. It would be a waste of labour to attempt to ascertain precisely by what steps this change was carried out, but the nature and reasons of the process are obvious in themselves and have left traces by which they are sufficiently explained.

It is obvious that such an inquiry as would be necessary to execute fully the articles of eyre given in Bracton would be cumbrous in the extreme, and would be burdensome to the public in direct proportion to the degree in which it was profitable for the Crown. So obvious was this that the eyres became septennial early in the thirteenth century, and continued to be so throughout the reign of Henry III. and into that of Edward I. In the Parliament Rolls a variety of references to the subject occur, which prove that the holding of the eyre was regarded as a great public burden. Edward III. and Richard II. upon the petition of the Commons agreed to suspend it on various occasions for a greater or less period. The following references suffice to prove this:—In A.D. 1348 (22 Edw. 3), the Commons make it a condition of an aid for the war in France that “Eyres des justices en le meen temps, si bien des forestes come des communes Pleez et general enquerrez par tote la terre cesse.” The petition connected with this grant marks the distinction between financial and judicial business. “Que nul Eyre des Forestes le roi ni de la roigne, ne de prince soit duraunt la guerre, ne autres Eyres, n’Enquerrez fors la justice de la pees en chescun pays de mesme le pays d’oyer et terminer come au drein parlement estoit priez.” The petition is continued on the same page. “Prie la commune que les commissions de generals Enquerrez et tous maners des Eyres des justices cessent de tut durant les trois aunz tan que l’eide a vous a ceste parlement grauntez soit levez.” (Answer.) “Il semble eue conseil que tieux Enquerrez cessent en eese du poeple s’il plect au roi, si sodeigne necessite ne surveigne.”

¹ 2 *Rot. Par.* 200, a.

CHAP. IV. ¹In 1371 (45 Edw. 3), a petition was granted that the king would issue no commission of eyre or trailbaston during the war, "fors qe en horrible cas." ²There is a similar petition in 1377 (1 Rich. 2), that there may be no eyre nor trailbaston for the war, or for twenty years, but this was refused, ³and another in 1382 (6 Rich. 2) which was granted for two years. The fullest and most instructive notice of the subject which I have found in the Parliament Rolls occurs in the ⁴Parliament Roll of 1362 (36 Edw. 3). The Commons had asked for a general pardon of "all manner of articles" of eyre except pleas of land, quo warranto, treason, robbery, "and other felonies punishable by loss of life or member." The Council had said that they regarded the petition as prejudicial to the king, and the Commons thereupon explain that they did not wish the king to give up anything which would injure his Crown permanently, such as "escheats, wardships, marriages, fees, advowsons, serjeanties, rents, services, lordships," and many other matters, but that they wished him to pardon "trespasses, misprisions, negligences, and ignorances" committed before the then parliament, and all "articles of eyre, the punishment of which would involve fine or ransom or other money punishments, amercements of counties and towns, and charges upon the heirs of coroners, sheriffs, and other royal officers." ⁵A general pardon, of all such articles of eyre was granted in 1397 (21 Rich. 2).

I have not taken the trouble to try to ascertain precisely the history of the gradual disuse of these commissions. In Coke's ⁶fourth *Institute*, they are spoken of as things of the past, and in the first *Institute* it is said that ⁷"as the power of the justices of assize by many acts of parliament and other commissions increased, so these justices itinerant by little and little vanished away." I think it much more probable that, as the king came to depend more and more upon parliamentary grants of money, and less and less on his land revenue and casual profits, the commissions of Oyer and Terminer, gaol

¹ 2 *Rot. Par.* 305, a.

² *Ib.* 138, b.

³ 3 *Rot. Par.* 369.

⁷ *Co. Litt.* 514.

⁵ 3 *Rot. Par.* 24, a, and see pp. 90-96.

⁴ 2 *Rot. Par.* 272, a, b.

⁶ *Fourth Inst.* 184.

delivery, assize and *Nisi Prius* superseded the commissions containing fiscal articles. CHAP. IV.

The history of the commissions of gaol delivery is as follows: Their origin is matter of conjecture. They are probably as ancient as the gaols¹ themselves, and as the local administration of justice by royal officers. At all events they are repeatedly mentioned by Bracton. The systematic periodical issue of such commissions was, however, a consequence of the establishment of the periodical issue of Commissions of Assize. The word "Assize" was used in a great variety of senses. In some cases it meant a law, as in the expressions "The Assize of Clarendon," "The Assize of Jerusalem." It also meant a jury, as in the expression "The Great Assize," which is employed by Glanville, and to which I shall have to return. It also meant the form of action in which trial by a jury took place, as in the expression, "The Assize of Novel Disseisin," "The Assize of Mort d'Ancestor." These actions, which were mostly for the recovery of land or rights connected with land formed the most important part of the litigation of early times, and the first Commissions of Assize were commissions for the trial of such actions. They formed an independent part of the business of the justices in eyre, and were to be held much more frequently. ²It was provided by the 18th Chapter of Magna Charta, that the king or in his absence abroad his Chief Justiciar should send two justices into every county four times a year to take assizes of novel disseisin, mort d'ancestor, and darrein presentment. This, says ³Mr. Stubbs, was in the following year altered to once a year. I am not aware of any enactment in very early times as to the degree of frequency with which assizes were to be held, but it was enacted by 13 Edw. 1, c. 30 (A.D. 1285), ⁴that they should be held three times a year at most. And in 1299, it was enacted by 27 Edw. 1, c. 3, that justices

¹ A gaol, properly speaking, is a cage. See 2 Palgrave's *Commons*, clxvi. The Assize of Clarendon (ch. vii.) provides for the making of gaols where they do not exist, the wood being provided out of the royal forests. See Stubbs's *Charters*, p. 144.

² Stubbs, *Charters*, 299.

³ *Jb.* 141.

⁴ "Capiant assisas predictas et attinctas ad plus ter per annum."

CHAP. IV. appointed to take assizes should also "deliver the gaols of
 " the shires as well within liberties as without of all manner
 " of prisoners after the form of gaol deliveries of those
 " shires beforetime used." This statute shows that com-
 missions of gaol delivery were well known in 1299; and it
 would secure their being issued as often as the Commissions
 of Assize were issued according to the 13 Edw. 1, that is to
 say, not more than three times a year.

The next statute relating to them is 2 Edw. 3, passed
 in 1328, which provides that "good and discreet persons,
 " others than of the places, if they may be found sufficient
 " shall be assigned in all the shires of England to take
 " assizes, juries, and certifications, and to deliver the gaols,
 " and that the said justices shall take the assizes, juries, and
 " certifications, and deliver the gaols at the least three times
 " a year, and more often if need be."

From that time to the present commissions of gaol delivery
 have regularly been issued, and form one of the authorities
 under which the Judges of Assize now execute their office.

The commissions of Oyer and Terminer are found in exist-
 ence at the same time as the commissions of gaol delivery,
 though I am not prepared to cite, either from Glanville or
 from Bracton, any instance in which the expression is used.

The first express mention of them with which I am ac-
 quainted is in the statute 13 Edw. 1, c. 29 (A.D. 1285), which
 taken in connection with some subsequent authorities throws
 considerable light on their nature. They were either general
 or special. General when they were issued to commissioners
 whose duty it was to hear and determine all matters of a
 criminal nature within certain local limits, special when the
 commission was confined to particular cases. Such special
 commissions were frequently granted at the prayer of par-
 ticular individuals. They differed from commissions of gaol
 delivery principally in the circumstance that the commission
 of Oyer and Terminer was "ad inquirendum, audiendum, et
 " terminandum," whereas that of gaol delivery is ¹"ad gaolam
 " nostram castri nostri de C. de prisonibus in eâ existentibus
 " hac vice deliberandam," the interpretation put upon which

¹ Fourth Inst. 161, 167.

was that justices of Oyer and Terminer could proceed only upon indictments taken before themselves, whereas justices of gaol delivery had to try every one found in the prison which they were to deliver. On the other hand, a prisoner on bail could not be tried before a justice of gaol delivery, because he would not be in the gaol, whereas if he appeared before justices of Oyer and Terminer he might be both indicted and tried. CHAP. IV.

These differences, however, seem so slight and technical that I am inclined to think that the commission of Oyer and Terminer must originally have been used rather for special than for general purposes, and that it was granted in particular cases to particular persons who had been injured by some special offence by an offender not arrested by the public guardians of the peace. It would be natural to give a general commission of this kind to justices of gaol delivery, in order that any such cases not brought before them in their other capacity of justices of gaol delivery might be disposed of at the same time. In later times such cases were usually dealt with by the Court of Star Chamber.

This is suggested both by the statute 13 Edw. 1, c. 29, and by some later authorities. The words of the statute are "a writ of trespass, to hear and determine, from henceforth shall not be granted before any justices, except justices of either bench and justices in eyre, unless it be for an heinous trespass where it is necessary to provide speedy remedy, and our lord the king of his special grace hath thought it good to be granted." This of course implies that the practice had previously been different. The exception made in the statute left in existence if it did not introduce great abuses. This appears from a petition in the Parliament Rolls of 1315 (thirty years after the statute.)

The petition says: ¹ "Great evils and oppressions against law are done to many people by granting commissions of Oyer and Terminer more lightly and commonly than is proper against the common law. For when a great lord or powerful man wishes to injure another, he falsely accuses him of a trespass" (*il forge trespass vers luy*), "or maintains some one else on whom he" (his enemy) "has trespassed,

¹ 1 Rot. Par. 290, a.

CHAP. IV. " and purchases commissions of Oyer and Terminer to people
 " favourable to himself and hostile to the other side, ¹ who
 " will be ready to do whatever he pleases, and will fix a day
 " of which the other side will either receive no notice from
 " the sheriff and his bailiffs (who are procured to take part
 " in the fraud), or else such short notice that he cannot
 " attend; and so he is grievously amerced, namely £20, or
 " 20 marcs, or £10, at the will of the plaintiff. ² And then
 " he has another day appointed him in some upland incon-
 " venient village in which his adversary is so powerful that
 " the defendant dares not go there for danger of his life, and
 " can have no counsel for fear of the same power. And thus
 " he is ³ fined three or four times the value of his chattels,
 " that is to say, a common man, ⁴ £26 for a day, or 100 marcs,
 " or £40, more or less according as the plaintiff is urgent "
 "(positive). " And if the defendant keeps his day, he will
 " either receive bodily harm, or he will have to agree to do
 " more than is in his power, ⁵ or a jury from distant parts will
 " be procured which knows nothing of the trespass, by
 " which the defendant will be convicted of the trespass,
 " though he may not be guilty, and the damages taxed at the
 " will of his adversary, that is to say, for a trespass for which
 " ⁶ 20*d.* would be enough at £200, £400, sometimes 1,000
 " marcs. And if the party convicted is caught " (*trapee*), " he
 " will be imprisoned, and remain there till he has paid every
 " penny, or till he agrees to sell his land; or till his friends
 " pay, if he is ever to get out. And if he cannot be taken
 " he will be put in exigent and exiled for ever " (by being
 outlawed).

The answer to this petition is: " As for writs of Oyer and
 " Terminer they shall for the future be granted only for
 " enormous trespasses " (*pro enormis transgressionibus*) " ac-
 " cording to the form of ⁷ the statute, and for this shall be
 " assigned justices sworn discreet and not suspected."

¹ " Se dorront a faire tut ceo qil voet."

² " Et avera aultre jour en ville Duppelond ne mie convenable."

³ " Mis as issues," fined for non-appearance and entered by the Sheriff on the roll, which led to the issue of a writ of distringas. See 2 Madox, 234.

⁴ xxvi. li.

⁵ " Ou serra procure une jure d'estrange pays qui rien soit du trespas."

⁶ "xx sontz." Perhaps shillings. ⁷ i. e. 13 Edw. 1, c. 29.

This petition sets in a striking light the occasional individual character of the administration of justice even at so late a period as the reign of Edward II., and the great oppressions incidental in those days to trial by jury. It clearly shows that the septennial eyres and the more frequent commissions of gaol delivery did not provide sufficiently for the administration of criminal justice, especially as regarded offences which were regarded (to use the language of our own day) rather as torts than crimes.

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The subject is so curious that it may be well to illustrate it further by a few specimens of the cases in which after the petition referred to private commissions of Oyer and Terminer were issued.

In the same Parliament in which the petition was presented ¹ certain persons were appointed justices of Oyer and Terminer, as to "all complaints which any one wished to make of prises, ²carriages, and other trespasses done by John de Segrave and his servants by reason of his custody of the forest beyond Trent, and the castles of Nottingham and Derby."

A similar commission ³ was issued at the same time to different persons with reference to the conduct of Gerard de Salveyn, as escheator beyond Trent and sheriff of Yorkshire.

In 1320 ⁴ (14 Edw. 2), Ralph de Draiton, the parson of the parish of Luffenham, asked for a commission of Oyer and Terminer, to inquire into the conduct of Robert de Veer, Simon de Draiton, and John de Clifton, who, he said, by the orders of Gilbert de Middleton, Archdeacon of Northampton, imprisoned him till he resigned his living, and took and carried away his goods and chattels, and cut out the tongue and pulled out the eyes of one Agnes de Aldenby, and he said that a commission had already been issued on the subject at York. The answer is that the petitioner must produce the former commission in the Chancery where he will be answered.

⁵ In the year 1321 or 1322 Robert Power asks for a com-

¹ 1 *Rot. Par.* 325, a.

² Taking supplies and compelling people to carry.

³ 1 *Rot. Par.* 325, b.

⁴ *Ib.* 376, a.

⁵ *Ib.* p. 410, a.

CHAP. IV. mission of Oyer and Terminer against various persons who, during the siege of Tickhill Castle, came to take him prisoner, and hold him to ransom, and destroyed a quantity of his property. The answer is "Adeat legem communem."

Various other instances are given in the Parliament Rolls.

The abuse complained of in the petition above quoted still continued, as appears from¹ a petition presented in 1328 (2 Edw. 3) complaining of the irregular and illegal conduct of one Robert de Scoresburgh, who was a Commissioner of Oyer and Terminer at Scarborough, on the writ of one Ali-sandr' de Berwiz. The petition was granted, and the result was the statute of 2 Edw. 3, c. 2, which enacts "that the Oyers and Terminers shall not be granted but before justices of the one bench or the other, or the justices errants, and that for great hurt or horrible trespass, and of the king's special grace, after the form of the statute thereof ordained in time of the said grandfather, and none otherwise."

The result of this statute was that the criminal jurisdiction of the justices of assize and *Nisi Prius* was put on its present footing. They were to be commissioners of gaol delivery under 27 Edw. 1, and might be commissioners of Oyer and Terminer under 2 Edw. 3. The practice now is to issue both commissions to the judges on each circuit, though occasionally commissions of gaol delivery only are issued.

Besides the ordinary commission of Oyer and Terminer a commission which, according to Coke, was a species of Oyer and Terminer, and which bore the odd name of ²Trailbaston, was issued under Edward I., and some of his successors. Its form is given in 1 *Rot. Par.* 218-9 (35 Edw. 1, A.D. 1306). It tells us nothing except that certain justices were to "entendre les busoignes de traillebaston" on five circuits, including 38 counties. Certain articles are annexed to the commission, which look as if they were intended to define the duties of the justices. They read like a short abridgment of the articles of the eyre.

¹ 3 *Rot. Par.* 28, b.

² Sir Francis Palgrave says that the word refers rather to the crime than to the court. A "trailbaston" was a clubman, one who carried a bludgeon—the Indian "latthiar"—from "lathi" a club.

“Et qe vostre poyné aide et conseil a tot vostre poair
 “dorrez et mettrez as droitures le Roi et de la Corone garder
 “meinténir sauver et repeler par la ou vous purroz sanz tort
 “faire. Et la ou vous sarez les choses de la Corone et le
 “droitz ‘le Roy concellez, ou a tort alienez, ou soustrez, qe
 “vous le frez saver au Roi. Et que la Corone arrestez a
 “votre poair et en loais manere.’”

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The Commission says nothing of criminal jurisdiction, but Coke asserts that the Commissioners possessed it, and instances might be cited from the Parliament Rolls which support this. In 1347, ¹(25 Edw. 3), the Commons petition that
 “comunes Trailbastoneries ne courgent come autre foitz fut
 “assentuz en Parlement; car eles furent tout a destruction
 “et anientissement du Poeples et a moult petit ou nul amende-
 “ment de la ley ou de la Pees ou punissement des felons
 “ou tresspassours.”

The commissions of Trailbaston are mentioned in most of the passages already cited as to the remission of the eyres for a longer or shorter time, and the two were probably more or less closely connected. Whatever their nature may have been they have long since become obsolete, and inquiries into their nature have only an antiquarian interest. We have thus arrived at the establishment of the second of the ordinary superior criminal courts, the courts of the Justices of Assize. They can hardly be said to have had any later history. Some small variations in the number of the circuits, and as to the places in which they were to be held, have been made especially within the last few years, but the circuits have altered but little, and the constitution of the Courts has hardly altered at all since the reign of Edward III.

THE COURTS OF QUARTER SESSIONS.

I now come to the history of the Courts of Quarter Sessions for counties. In order to explain their origin and constitution it is necessary to refer shortly to the origin of

¹ 2 Rot. Par. 174.

CHAP. IV. the office of Justices of the Peace. ¹ Keeping the peace was one of the chief prerogatives of the Crown, and it was exercised both by some of the great officers of the Crown throughout England, and by sheriffs, coroners, and constables in their various counties and smaller districts. ²The judges of the Court of King's Bench were, and the judges of the High Court of Justice are, conservators of the peace all over England, and though a judge in the present day seldom if ever acts as a justice of the peace, it was customary for them to do so for centuries. When the Supreme Courts were first established in India, the judges were expressly made justices of the peace, and they used to sit as such regularly. Besides those who were conservators of the peace by virtue of their offices, there were evidently others who were elected for particular districts as coroners now are. At the beginning of the reign of Edward III., and no doubt in order to enable him, or rather his mother, Queen Isabel, and her advisers to keep order and support their authority, it was enacted in 1327 (1 Edw. 3, c. 16) that "in every county good men and lawful which be no maintainers of evil or barretors in the country should be assigned to keep the peace." This put an end to the election of conservators, and was the beginning of the legislation relating to the officers who afterwards became justices of the peace. At first their authority was simply executive, being limited probably to suppressing disturbances and apprehending offenders, so that they were little more than constables on a large scale. Three years afterwards, in 1330, it was enacted (4 Edw. 3, c. 2) that there should be three gaol deliveries in every year, and that at the time of the assignment of the keeper of the peace "mention shall be made that such as shall be indicted or taken by the said keepers of the peace shall not be let to bail or mainprise by the sheriffs," and that the justices of gaol delivery should

¹ Lambard, *Eirenarcha*, pp. 3-22. Lambard is the foundation of Blackstone (Book 1. c. 9) and other writers. See also *Dig. Crim. Proc.* chap. v. arts. 28-36.

² Lambard, fo. 13. As to judges acting as justices, see Campbell's *Chief Justices*, iii. 11 (life of Holt); and see Spencer Cowper's case, in which Holt took depositions, 13 *State Trials*, 1142. As to India, see 13 George 3, c. 63, s. 33. In Sir William Jones's *Life*, mention is made of his holding evening sittings as justice of the peace for Calcutta.

deliver the gaols of the persons indicted or taken by the keepers of the peace. The powers of the keepers of the peace at this time therefore extended to receiving indictments. CHAP. IV.

In 1344 (18 Edw. 3, st. 2, ch. 2) it was enacted that "two or three of the best of reputation in the counties shall be assigned keepers of the peace by the King's Commission, and at what time need shall be the same with others wise and learned in the law shall be assigned by the King's Commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably." This was the first act by which the Conservators of the Peace obtained judicial power. Apparently some of them were to be associated with the Commissioners of Oyer and Terminer and Gaol Delivery, but they were not themselves to form a complete court.

In ¹ 1350 the Statute of Labourers required the justices to hold sessions four times a year to enforce that statute.

After a further interval of ten years, namely, in 1360, a statute was passed (34 Edw. 3, c. 1) which not only authorised the keepers of the peace to arrest offenders, but gave them authority to "hear and determine at the King's suit all manner of felonies and trespasses done in the same county." Lambard conjectures that it was upon the passing of this statute that the Conservators of the Peace first acquired the higher title of Justices. He also says that some words in the beginning of the statute, "In every county in England shall be assigned," &c., had the effect of providing a separate Commission for every county, a Commission for several counties having, at all events in earlier times, been given to particular persons. This statute is still the foundation of the jurisdiction of the Courts of Quarter Sessions for counties.

In 1388 a further statute was passed fixing the number of justices at six for every Commission of the Peace, besides the Justices of Assize. They were to keep their sessions four times a year for three days if need be. The statute adds that if a judge of either bench or a serjeant-at-law is in the Commission, he is not to be required to sit as the other Commissioners, the which be continually dwelling in

¹ 25 Edw. 3, st. 1, c. 7; and see 2 *Rot. Par.* 234.

CHAP. IV. the country, but that "they shall do it when they may best attend." Several later statutes are to much the same effect, though they have been interpreted as removing the restriction as to the number of justices. They are 13 Rich. 2, st. 1, c. 7, 2 Hen. 5, st. 2, c. 1 and c. 4, which last statute again prescribes the dates at which the sessions are to be held.

Many statutes have been passed relating to various matters connected with justices of the peace, but the constitution of the Court of Quarter Sessions has never been materially altered from its first establishment to the present day. The time at which it is to meet is now regulated by 11 Geo. 4, and 1 Will. 4, c. 70, s. 35.

The jurisdiction of the Court depends partly on statute and partly on the Commission issued under the earlier statutes, ²the form of which was first settled in Michaelmas Term, 1590, by Lord Chief Justice Wray and the other judges, and which has been in use ever since, though some of its terms are sufficiently antiquated. ³It provides that the justices are to "hear and determine all felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, engrossing, and extortions, and all other crimes and offences of which such justices may or ought lawfully to inquire," subject to this caution, "that if a case of difficulty shall arise they shall not proceed to give judgment except in the presence of some justice of one of the benches or of assize."

The jurisdiction of the Court of Quarter Sessions thus extended nominally to all felonies and indeed to all crimes except treason, subject only to the condition that in cases of difficulty a judge of the superior courts ought to be present.

All through the sixteenth century the Quarter Sessions did in fact sentence to death large numbers of people, who were executed upon their sentence. This appears from Mr. Hamilton's *History of the Quarter Sessions*, compiled from records at Exeter Castle; but they seem to have confined themselves principally to cases of theft and the like. As time went on their jurisdiction was in practice greatly narrowed, and

¹ *Dig. Crim. Proc.* p. 23, ch. vi.

² *Lanb. Com.* p. 48; ² *Stephen's Com.* 646.

³ *Chitty*, 138.

Chitty, writing in 1826, says, "It is now the common practice "to try only petty larcenies and misdemeanours in this "court." It was not thought proper that they should deal with capital offences even when they were entitled to the benefit of clergy. It was a singular indirect effect of the old law as to capital punishment that it thus came to narrow and cripple the powers of the Court of Quarter Sessions. Their jurisdiction as regards crimes is now determined by 5 & 6 Vic. c. 38, passed in 1842, soon after the law relating to the punishment of death had been reduced nearly, though not quite, to its present condition. This Act provides negatively that the Court shall not try prisoners accused of treason, murder, or any capital felony, or for any felony for which on a first conviction an offender may be sentenced to penal servitude for life, nor for any one of eighteen other specified offences, which include all the offences in relation to which legal or constitutional questions of importance are likely to arise. All offences except these they can try under the statute above referred to, and under the terms of their Commission.

The only point which remains to be noticed in connection with the Quarter Sessions for counties is the local limits of their jurisdiction. This depends upon the Commissions by which the justices are appointed, and which assign the limits within which they are to act. ² There are in England and Wales the following Commissions:—

One for each county in England and Wales,	
except York and Lincoln	50
One for each Riding of the county of York	3
One for each of the three parts (Lindsay, Holland, and Kesteven) of the county of Lincoln	3
One for each of the following Liberties:—	
Cawood, Cinque Ports, Ely, Haverfordwest, Peterborough, Ripon, St. Albans, Tower of London, Westminster	9
	65

² There have been one or two small variations by subsequent legislation.
³ My friend, Mr. Godfrey Lushington, was so good as to obtain from the Home Office this information for me.

CHAP. IV. There are also separate Commissions for each of the
 —————¹eighteen counties of cities and towns, and for many
 municipal boroughs.

²BOROUGH QUARTER SESSIONS.

I now pass to the Borough Quarter Sessions, the history of which is more complicated than that of the Quarter Sessions for counties.

The history of the growth of towns in England has been considered from a constitutional point of view by³ many writers of high authority. It is enough for my present purpose to observe that from the time when Henry I. granted its first existing charter to the City of London down to our own days, charters of incorporation have been granted to a great number of towns and [cities. These charters, from the earliest times, contained grants of courts of various degrees of importance. The mayor and aldermen were, in some cases, made magistrates *ex officio*, and authorised to hold Courts of Quarter Sessions; and these grants were accompanied or not, as the case might be, by a clause called the "non intromittant clause," which ousted the jurisdiction of the county magistrates. In some cases towns were made counties of themselves. Such towns usually appointed their own sheriffs. Occasionally particular officers were to be put upon all commissions of Gaol Delivery and Oyer and Terminer issued for such counties of towns. For instance in London, by a series of charters from the days of Henry I. downwards, the Lord Mayor, the Aldermen, and the Recorder, were to be put into all commissions of Gaol Delivery for the gaol of Newgate, and all commissions of Oyer and Terminer for the City of London. In some cases there was no limitation at all upon the extent of the town jurisdiction. They might

¹ Bristol, Canterbury, Chester, Coventry, Exeter, Gloucester, Lincoln, Lichfield, Norwich, Worcester, and York, and the towns of Caermarthen, Haverfordwest, Hull, Newcastle-on-Tyne, Nottingham, Poole, and Southampton (5 & 6 Will. 4, c. 79, s. 61, and see Schedule A).

² *Dig. Crim. Proc.* aris. 31, 33, 41.

³ Hallam, *Middle Ages; Cons. Hist.*; Brady, *History of Boroughs*; Stubbs, *Const. Hist.*

try all crimes and inflict any punishment up to death. In other cases they were confined within narrower limits. I am not aware of any case in which the grant ousted the concurrent jurisdiction of justices of Gaol Delivery or commissioners of Oyer and Terminer appointed for the county in which a corporate town not being a county of itself was situated, or in which it prevented the king from issuing such a Commission to his own justices to be executed within the limits of a county of a city or town corporate. In nearly every instance in which any such charter was granted, the corporation were authorised to appoint a judicial officer, generally a recorder, who held his office during good behaviour, and acted as judge in the criminal court, and usually in the civil court also, if there was one.

CHAP. IV.

The counties of cities and towns, the boroughs, and the towns corporate continued to exercise the jurisdiction thus conferred upon them from the date of their respective charters and according to their tenor down to the year 1834. In that year a Commission was issued to inquire into their various constitutions. It made several reports, the first of which was printed in 1835. These reports give in minute detail an account of every charter known to have been granted to every town in England and Wales. They formed the basis upon which was founded the ¹Municipal Corporations Act (5 & 6 Will. 4, c. 76). The effect of this measure would hardly be apparent to any one who read it without reference to other matters, particularly to the reports of the Commissioners, but it was as follows:—

The Commissioners “found satisfactory reasons for believing that there were in England and Wales” in all 246 corporate towns. Of these 178 are mentioned in two schedules to the Act, and to them only the Act applies. The 178 do not include either the City of London on the one hand, or on the other 88 small places which had been incorporated at various times, but had declined in importance. Other towns of very great importance are also absent from the list (*e.g.*,

¹ On January 1, 1883, the Municipal Corporations Act of 1882 (45 & 46 Vic. c. 50) is to come into force. It repeals, re-enacts, and consolidates all the older Acts.

CHAP. IV. Manchester and Birmingham), because at the time when the Act passed they were not incorporated. Manchester and Birmingham, and a considerable number of others, have since been incorporated, either under 17 Will. 4, and 1 Vic. c. 78, s. 49, or under 40 & 41 Vic. c. 69, by which the enactment previously mentioned is repealed and re-enacted in a more elaborate form, and to all boroughs so incorporated the provisions of the Municipal Corporations Act are, I believe, extended.

The English towns may thus be classified as follows :—

1. London.
2. Eighty-eight small corporate towns not affected by the Municipal Corporations Act.
3. The 178 towns to which the Municipal Corporations Act applies.
4. The towns which have been incorporated since the Municipal Corporations Act, but to which its provisions have been extended.

Upon each of these classes separate observations arise :—

1. London is, by charter, a county of itself; and by various charters, the Lord Mayor, the Recorder, and the Aldermen, were entitled to be put upon all commissions to deliver the gaol of Newgate, and all commissions of Oyer and Terminer for the City of London. By what precise authority they tried Middlesex prisoners also, I am unable to say, and it is now of no importance, but, in fact, they did try them. Under their charters they hold Quarter Sessions both for the City of London and for the Borough of Southwark.

²The provisions of the charters by which they sat as Commissioners of Oyer and Terminer and Gaol Delivery, are now merged in the Central Criminal Court, which was established by 4 & 5 Will. 4, c. 36. This Court consists of the Lord Mayor for the time being, the Lord Chancellor, all the Judges of the High Court, ³the Judge of the Provincial Courts of

¹ In the preamble to 45 & 46 Vic. c. 50, it is stated that the act of 1835 applies to all the bodies constituted after it passed. Sec. 210 of the act of 1882 is now substituted for 40 & 41 Vic. c. 69.

² *Dig. Crim. Proc.* art. 25.

³ I suppose this is the effect of the Judicature Act of 1873. Before that

Canterbury and York, the Aldermen of the City of London, the Recorder, the Common Serjeant and the Judge of the Sheriff's Court, and of every one who has held the office of Lord Chancellor, Lord Keeper, or a Judge of the High Court, and of such other persons as Her Majesty appoints. In practice, the judicial duties of the Court are discharged by the Judges of the Queen's Bench Division and the three judicial officers of the City. CHAP. IV.
—

A Commission of Oyer and Terminer as to all offences committed within the district of the Central Criminal Court and a Commission to deliver the gaol of Newgate issues from time to time to the persons above mentioned. The district over which the court has jurisdiction, includes the City of London, the County of Middlesex, and certain parts of the Counties of Kent, Essex, and Surrey. The Court has also Admiralty jurisdiction.

2. The small towns which were not affected by the Municipal Corporations Act are numerous, but in a large number of cases their jurisdiction has become obsolete. In some cases it extended, and still extends, theoretically, to the infliction of capital punishment. ¹Several small villages in Kent have charters by which they might, apparently, still try people for their lives, but as the county justices and the assizes had always concurrent jurisdiction, the power has been forgotten and has become, practically, obsolete. A considerable number of these small towns have either no criminal jurisdiction at all, or a very small one, and many have no recorders.

3. The 178 towns which are mentioned in the two schedules to the Municipal Corporations Act are divided into two

Act passed the judges of the Courts of Equity were not judges of the Central Criminal Court. The Judge of the Court of Admiralty and the Dean of the Arches were members of it. Under 37 & 38 Vic. c. 85, s. 85, the judge appointed under the Public Worship Regulation Act is *ex officio* Dean of the Arches.

¹ This seems to be the effect of s. 107, taken in connection with the interpretation of the word "Borough" in s. 142. By s. 107 it is enacted that after May 1, 1836, all jurisdiction to try treasons, capital felonies, and all other criminal jurisdictions whatever, granted or confirmed by any law, &c., or charter, &c., to any mayor, &c., "in any borough" shall cease. By s. 142 "borough" shall be construed to mean city, borough, port, cinque port, or town corporate, named in one of the schedules (A and B), i.e. the 178 places referred to.

CHAP. IV. classes. The first class (Schedule A) contains 128 towns, as to which it is enacted, that they are to have separate commissions of the peace. The second class (Schedule B) are to have separate commissions of the peace if the Crown is pleased, upon the petition of the Council thereof, to grant them.

¹ Every borough, whether in Schedule A or Schedule B which wished to have a separate Court of Quarter Sessions was to petition for one, stating what salary they were willing to pay their recorder, and the Crown was empowered to grant that a separate Court of Quarter Sessions should be thenceforward held in and for the borough. The right to appoint the recorder which had previously been vested in most cases in the Corporation was by this Act transferred to the Crown. ² The recorder is to hold his court four times a year or oftener, if he thinks fit, or if the Crown thinks fit to direct him to do so; ³ and he is the sole judge of the court. In all cases in which a separate Court of Quarter Sessions is granted to a borough in either schedule, the jurisdiction of the county justices is excluded if the borough was exempt from their jurisdiction before the passing of the act. In scheduled boroughs in which a separate Court of Quarter Sessions was not granted before May 1, 1836, the county justices are to have concurrent jurisdiction, although there may be a separate commission of the peace.

It would not be worth while to ascertain the precise effect of these curiously qualified provisions, but by comparing the list of recorders given in the *Law List* with the list of 128 boroughs in Schedule A, it appears that eighty-five have recorders, and that forty-three have not. Of the fifty towns in Schedule B, forty-one have not, and nine have, recorders.

By s. 107, all the towns in both schedules which have not a separate Court of Quarter Sessions have lost all their criminal jurisdiction, and even if they have a

¹ s. 103. As to borough courts and recorders, see 45 & 46 Vic. c. 50, part viii. ss. 154-169.

² s. 105.

³ s. 111. Even in cases where he used to be assessor only. See 7 Will. 4, and 1 Vic. c. 78, s. 34.

separate commission of the peace (which all the towns in Schedule A have), the county justices have concurrent jurisdiction. CHAP. IV.

No town in either schedule can have a separate Court of Quarter Sessions unless it has both a separate commission of the peace and a recorder, but the converse is not true. Many towns have recorders which have no separate Court of Quarter Sessions, and I think that some towns have both a recorder and a separate commission of the peace, and yet no separate Court of Quarter Sessions. In such cases the recorder's office is merely honorary.

Upon the whole, I think it will be found that about 85 of the 178 boroughs specified in the Municipal Corporations Act have separate Courts of Quarter Sessions.

4. In the course of the forty-three years which have passed since 1836, a considerable number of new charters have been granted; some to towns of the first importance, as for instance to Manchester and Birmingham. In some of these cases a separate Court of Quarter Sessions and a separate Commission of the Peace has been granted, and in others not.

The intricacy of all this, and the difficulty of spelling it out from the acts of parliament and other authorities relating to the matter, is a good instance of some of the causes which make our law obscure and repulsive. ¹No one could understand the true nature and effect of the Municipal Corporations Act without acquiring a great deal of knowledge as to which the act itself does not even contribute a suggestion; and even when that knowledge is acquired, the application of it to the wandering arrangement and clumsy phraseology of the act is a matter of much difficulty.

The jurisdiction of the Borough Quarter Sessions over crimes is the same as that of the County Quarter Sessions.

¹ Since this was in type, all the acts on the subject have been consolidated by 45 & 46 Vic. c. 50, which is much better drawn and arranged, but a knowledge of the history of the subject is still necessary to understand it.

COURTS OF A SUMMARY JURISDICTION.

CHAP. IV. The last set of criminal courts still existing are the courts of a summary jurisdiction. Their history is short, but it is highly characteristic.

From the first institution of justices of the peace to our own times a number of statutes have been passed authorising sometimes one justice, and in other cases two, to inflict in a summary way penalties of different kinds upon a great variety of offenders. These penalties have in most cases consisted in the infliction of fines of a greater or less amount, and sometimes in imprisonment, and occasionally in setting the offender in the stocks. Most of the offences created by legislation of this sort have consisted in the violation of rules laid down for some administrative purpose, and so belong rather to administrative law than to criminal law as usually understood. The Statute of Labourers was the first act of the sort, and the Poor Laws supply another illustration. Sometimes, however, the offences subjected to summary punishment were offences properly so called—acts punished not in order to sanction any part of the executive government, but because they were regarded as mischievous in themselves. Nearly the oldest act of this sort still in force (though, I believe, it is practically obsolete) is 19 Geo. 2, c. 21 (1745-6), "An Act more effectually to prevent profane cursing and swearing." This act empowers and requires justices of the peace to fine profane swearers. If the offender does not pay, he may be sent to the house of correction with hard labour for ten days, or, if he is a common soldier or sailor, set in the stocks.

The next act, 19 Geo. 2, c. 27, supplies another illustration. It enables justices to inflict a penalty of £5 to 50s. on masters of ships who throw out ballast in such a way as to injure ports or navigable rivers. Many acts (which, I believe, have never been expressly repealed) punish workmen in various trades who dishonestly appropriate to themselves ("purloin" is a word frequently used) goods entrusted to them in their trade in a manner not amounting to theft at common law.

Speaking very generally, it may, I think, be said that the general character of statutes giving summary jurisdiction to magistrates was for a great length of time to enable them to deal with matters of small importance, more particularly with offences in the nature of trifling nuisances or disturbances of good order, jurisdiction in cases of serious crime being reserved for juries. Besides this, it was the common characteristic of these acts to leave the subject of procedure unprovided for, or provided for only in a very general and insufficient manner. For instance, the 19 Geo. 2, c. 21, says nothing of the right of the defendant to defend himself, or even to have the evidence given in his hearing. Nor does it contain any provision as to the way in which the defendant is to be "caused to appear" before the magistrate, nor as to the attendance of witnesses, or a variety of other matters essential to the regular administration of justice. It was probably considered best to leave all such questions to the discretion of the justice. This vagueness led in course of time to a variety of questions both as to the jurisdiction and as to the procedure of the magistrates. These were raised upon writs of certiorari, which issued from the Court of King's Bench, to call up and quash convictions, and many convictions were quashed accordingly. It became usual in consequence to put into acts giving summary jurisdiction to magistrates¹ a clause taking away the writ of certiorari, but new questions arose as to the effect of such enactments and the cases to which they applied. A variety of acts which need not be specifically mentioned were passed which affected the procedure in such cases, but the subject was at last comprehensively dealt with by 11 & 12 Vic. c. 43, which, though open to various objections, may by a combination of study and practice be understood, and by this act, and others amending it, the procedure before magistrates has been regulated since the year 1848.

The procedure was thus reduced to system before the courts to which it applied were formally constituted as courts. The magistrates acting under these statutes formed in fact criminal courts, though they were not so described by statute till very lately. But the extent of their jurisdiction

¹ e.g. 24 & 25 Vic. c. 97, s. 69, but innumerable examples might be given.

CHAP. IV. — was increased by modern legislation and as a formal procedure was established they came to be invested with the name of courts of summary jurisdiction. The following is the history of the gradual introduction of the name and of the reasons which led to its introduction.

In 1828 the Courts of Quarter Sessions were authorised by ¹ 6 Geo. 4, c. 43, to divide their counties into divisions for holding special sessions.

In 1847 justices "in petty sessions assembled and in open court" were empowered to try offenders under fourteen years of age for simple larceny. The expression "petty sessions" must at that time have been rather popular than legal, as the preamble of 12 & 13 Vic. c. 18 (1849), recites that "certain meetings of the justices called petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales called petty sessional divisions," and that important duties have lately been assigned to the justices attending at such petty sessions. It then goes on to enact that "every sitting and acting of justices of the peace or of a stipendiary magistrate shall be deemed a petty sessions of the peace, and the district in which the same shall be holden shall be deemed a petty sessional division." Enactments follow to the effect that places shall be provided for holding such petty sessions out of the county or borough rate.

The summary powers of magistrates in cases of serious crime were considerably enlarged by several later acts. The first of these was 18 & 19 Vic. c. 126, commonly known as the Criminal Justice Act, 1855, which (as amended by 31 & 32 Vic. c. 116) gives justices summary jurisdiction over theft and embezzlement of things of the value of less than five shillings if the party accused consents, and power, if they think fit to do so, to take a plea of guilty in cases where the value of the property exceeds five shillings. This was followed by the Criminal Law Consolidation Acts of 1861, each of which (except the Forgery Act) contains many provisions conferring jurisdiction on justices in what would

¹ Amended by 6 & 7 Will. 4, c. 12.

commonly be described as criminal cases, such jurisdiction being in some cases (as, for instance, in the case of an assault) concurrent with that of the superior courts, and in other cases supplementary to it. CHAP. IV.

Ten years later the Prevention of Crimes Act, 1871¹ (34 & 35 Vic. c. 112), conferred upon justices many powers in connection, amongst other things, with the system of police supervision then established, and introduced (I am not sure whether for the first time) the expression "Court of Summary Jurisdiction,"² defining it for the purposes of the act only. It may have been used in some later acts, but however this may be, the courts of summary jurisdiction are now regularly constituted and their jurisdiction is defined, and their procedure prescribed by the Summary Jurisdiction Act, 1879 (42 & 43 Vic. c. 49).³ Under the provisions of this act a "court of summary jurisdiction means any justice " of the peace or other magistrate, by whatever name called, " to whom jurisdiction is given by or who is or are authorised " to act under the Summary Jurisdiction Acts, or any of " such Acts." These acts are defined as being 11 & 12 Vic. c. 43, the Summary Jurisdiction Act itself, and all acts past or future amending either of them.

⁴ The courts may try all children under twelve for any offence except homicide, unless the parent or guardian objects.

⁵ They may try persons between twelve and sixteen, if they consent, for larceny, and cognate offences, and adults, if they consent, for a somewhat more restricted class of crimes.

⁶ They may also receive a plea of guilty from an adult for an offence for which a person between twelve and sixteen might plead guilty.

The limit of their power of inflicting punishment is in most cases three months' imprisonment and hard labour. In the case of adults pleading guilty, it is six months' imprisonment and hard labour. In the case of children under

¹ This replaced a similar Act, 32 & 33 Vic. c. 69, the Habitual Criminals Act, 1868.

² See s. 17. The definition is very elaborate.

³ s. 50.

⁴ s. 10 (1).

⁵ s. 11 (1).

⁶ s. 13.

CHAP. IV. twelve, one month's imprisonment, and in the case of boys under sixteen and twelve, whipping to the extent of twelve and six strokes of a birch respectively.

THE COURTS OF THE FRANCHISES.

I now pass to the courts of which the interest is only historical. From the earliest period of English history, the King claimed and exercised the right of granting jurisdiction of greater or less extent to his subjects. It would be impossible in such a work as this to treat the subject of the extent and nature of this branch of the prerogative fully, or to give anything like a detailed history of the manner in which it has in fact been used. It will be sufficient for my purpose to refer to three principal classes of franchises; that is to say (1) grants of courts to manors, castles, &c., and grants of courts leet; (2) grants of Jura Regalia and Counties Palatine; and (3) Forest Courts.

The way in which in the very earliest times property in land was accompanied by jurisdiction is fully treated (amongst other writers) by Sir Francis Palgrave and Mr. Stubbs, and I will content myself with a reference to their writings on the subject. Whatever may have been the precise nature and origin of manors and manor courts, there can be no doubt that they formed an important element in the judicial institutions of the country before and at the time of the formation of the common law. The following passage from Bracton gives a full account of the state of the franchise courts in his time. "There are certain barons and others who have "franchise, to wit, sock and sack, toll and team, infangenthef, "and utfangenthef. They may judge in their court if any "one is found within their liberty in actual possession "of stolen goods; ¹that is to say (*sicut*), handhabend or "hakkarend, and if he is pursued by the ²saccabor" (the person entitled to the goods), "for if he is not in actual "possession of the goods, although he may be followed as a

¹ "Seysitus de aliquo latrocinio manifesto." ² 1 Stubbs, *Cons. Hist.*

“ thief ” (probably by hue and cry), “¹it shall not pertain to the court (*i.e.* the franchise court), to take cognizance of such a theft, or to inquire by the country, whether the person not so possessed was guilty or not.”

CHAP. IV.

“ Now *infangenthef* means a thief taken on the ground of another, ²being one of his own men, and being in actual possession of the stolen property. *Utfangenthef* is a foreign thief coming from elsewhere from the land of another, and taken in the land of the lord of the franchise. But it does not follow that he (the lord) can bring back into his franchise his own man taken out of his franchise and there judge him by reason of such franchise. For a man must abide the law of the place where he offends. The lords of franchises may judge their own robbers and foreign robbers taken in their franchise. They can also take cognizance of medleys and assaults and woundings, unless felony or breach of the king's peace or the sheriff's is charged.”

It so happens that we have the means of measuring with accuracy the nature and extent of these franchises. The troubles of the reign of Henry III. led to the assumption by the nobility of all sorts of authority, and especially to the exercise by them of an immense amount of criminal jurisdiction. Edward I., on his return from the crusade in the second year of his reign, issued a commission to justices, in the nature of justices in eyre, to inquire into the state of the demesnes, the rights and revenues of the Crown, the conduct of the sheriffs, and in particular into all franchises. The articles drawn up for their guidance are very similar to those which were issued to the justices in eyre. One of them which has special reference to franchises is thus

¹ “ Non pertinebit ad curiam hundreda vel wapentakia cognoscere de hujusmodi furtis.” I do not understand the words *hundreda vel wapentakia*. Sir Horace Twiss translates it “ shall not pertain to the court, nor the hundred, nor the wapentake, to take cognizance,” &c. This can hardly be right, as it would imply that a thief within a franchise not taken in possession of the goods would not be liable to be tried at all. Besides, this does not seem to be the meaning of the words. Can it mean “ it does not appertain to the court in the hundred or wapentake, *i.e.* acting as a hundred court, to take cognizance,” &c.?

² “ De hominibus suis propriis,” Sir H. Twiss translates “ by his own men,” which I think is not consistent with what follows.

CHAP. IV. worded, "Qui etiam alii a rege clamant habere retornum
 "brevium et qui teneant placita de vetito namio, et qui cla-
 "mant habere wreccum maris quo waranto et alias libertates
 "regias ut furcas assisas panis et cerevisiæ et alia quæ ad
 "coronam pertinent et quo tempore."

The commissioners went through every county in England, and took inquisitions as to every hundred showing in detail, in reference to each what franchises existed in it and under what warrant they were claimed. Their returns are called the *Rotuli Hundredorum*, and they furnish as complete and authentic a picture of one part of English life in the years 1275-8, as *Domesday Book* affords of another about two centuries earlier.

The returns made by the Commissioners were the occasion of the ¹Statute of Gloucester, the effect of which was to declare that all who claimed franchises must appear before the king or the justices in eyre and prove their title to them, and that if they failed to do so the franchises should be seized into the king's hands. ²This statute creates the writ *Quo Warranto*, which still affords a remedy for excesses of jurisdiction of whatever nature.

The Hundred Rolls deserve a far more careful examination than could properly be given to them in this place, but I will give a few illustrations of that part of their contents which bears upon the history of the courts granted by charter. The general impression which they convey is that the usur-

¹ 6 Edw. 1 (1278).

² The note made by Coke in his second *Institute* (p. 280) on the Statute of Gloucester, quotes from Polydore Virgil a passage treating the Act as most tyrannical. "The king wanting money," says Coke, paraphrasing his authority, "there were some innovators in those days that persuaded the king that few or none of the nobility, clergy, or commonwealths that had franchises of the grants of the king's predecessors had right to them, for that they had no charter to them for the same, for that in troth most of their charters, either by length of time, or injury of wars and insurrections, or by casualty, were either consumed or lost: whereupon (as commonly new inventions have new ways) it was openly proclaimed that every man that held those liberties or other possessions by grant from any of the king's progenitors should before certain selected persons thereunto appointed show 'quo jure quove nomine illi retinerent,' &c. Whereupon many that had long continued in quiet possession were taken into the king's hands. Hereat the story says, 'Visum est omnibus edictam ejusmodi post homines natos longe asperrimum: qui fremitus hominum? quam irati animi? quanto in odio princeps esse repente cepit.'" Perhaps if Coke had been acquainted with the Hundred Rolls (which he does not mention) he would have been of a different opinion.

pation of franchises had gone to an extraordinary length. In every county there are numerous entries of "*habet furcas*;" "he has a gallows." Thus in Bedfordshire there were eight, in Berkshire thirty-five, of which no less than twelve are mentioned in the hundred of Newbury alone, nor were these "*furcæ*" left idle, as the following entry (there are many others) sufficiently shows: ¹"Hundr', de Toltyntre. The Archbishop of Canterbury has return of writ, wreck of the sea, gallows, assize of bread and beer, and pleas of wrongful distress, they (the jurors) knew not by what warrant. Also Lord William de Monte Canis has a gallows at Swaneschamp in his barony, and there three thieves were hung, and the monks hospitallers took them to the monastery where one of them was found to be alive, and he stayed in that church as long as he pleased, and left it when he pleased, and is still alive. Also they say that nine years ago Adam Toxemale was hung in the same place, on an oak, by the judgment of the court of Hertleye, and he was taken there by the suitors of the whole court, and they found the gallows fallen down and they will not put it up. The jurors knew not by what warrant."

The following illustration of the same right is found in the ²Parliament Rolls. In 1290 (18 Edw. 1), "Bogo de Knowell the King's bailiff of Montgomery complains that whereas one of the King's men of Montgomery slew one of the men of the Bishop of Hereford and fled to the land of Edmund Mortimer of Wigmore,—Edmund though often asked by Bogo to give up the said felon to be tried in the King's Court tried him on the suit of the relations of the slain man in his own court at Wigmore, and hanged him to the injury of the franchise of the said castle of Montgomery." Mortimer confessing the fact, the liberty of Wigmore was adjudged to be forfeited, but the King allowed him to retain it on condition "*quod idem Edmundus in signum restitutionis libertatis Domini Regis prædictæ, reddat predicto Bogoni Ballivo Domini Regis, quandam formam hominis nomine et loco prædicti felonis. Et præceptum est eidem Ballivo quod formam illam admittat et loco prædicti*

¹ 1 *Rot. Hund.* 220.

² 1 *Rot. Par.* 45.

CHAP. IV. "felonis suspendere faciat, et suspens', quam diu poterit
 — "pendere permittat," &c. Mortimer made difficulties about
 delivering the effigy, and his franchise was seized till he
 did so.

Innumerable entries in the Rolls show the nature of the franchise courts and the reason why they were so much valued. They were a regular source of income to the lord of the franchise, and were by him farmed out to bailiffs or stewards who made their profit by fines and amercements, which were often exorbitant and must always have been vexatious. The power to hold courts frequently, to require the attendance at them of all who owed suit and service, and to levy fines for every default must have been extremely liable to abuse. The effect of it was to establish in every liberty a person who was at once a common informer and a judge in his own cause. ¹In regard to the town of Pontefract for instance, the return is that the Earl of Lincoln and his bailiffs abuse their franchise by forcing the suitors to attend daily or weekly, and to ²swear as often as they please, and if any one objects they imprison him and keep him imprisoned till he answers any sort of plea.

The bailiffs, moreover, had many ways of extorting money by the abuse of their power. ³In the hundred of Tenterden the jurors present that one Hugo de Wey, who was probably bailiff or chief constable, "took of Josiah de Smaldene 12*d.*, for removing him from an assize. Also he "impounded the mare of Gunnilda de M'skesh'm by virtue of "his office, and would not give her up till he got half a marc, "which was not due to him. Also, by virtue of his office, he "took ten shillings from Henry Miller, falsely alleging that a "prisoner who had been attached in Tenterden hundred had, "by Miller's means escaped. Also he forced Joseph Askelin "of Emsiden, and William his son and his daughter to come "to the house of William de la Feld, in the same hundred, "and they came. And because they had been bound by "robbers in their own houses in the hundred of Ralwinden "and could not say by whom they were bound he took from

¹ 1 *Rot. Hund.* 119.

² *i.e.* to serve on juries.

³ 1 *Rot. Hund.* 217.

“ them half a marc. Also Hugh took a marc unjustly from
 “ Henry Smith of Tenterden, because the said Henry threw out
 “ of his own close a linen gown and towels which a female
 “ neighbour of his hung there without his knowledge and on
 “ an unlawful (*falsa*) occasion. Also Hugo charged the said
 “ Henry, while he lay ill in bed, with being an usurer, whereby
 “ the said Henry promised the said Hugh twenty shillings and
 “ paid him, and paid forty shillings for the use (*ad opus*) of
 “ Lord William de Hevre, the then sheriff, that he might have
 “ an inquisition from seven hundreds to see whether he was a
 “ usurer or not, which inquisition acquitted him. And, by
 “ virtue of his office he (*de Wey*) took one Nicholas Mason of
 “ the parish of Lamberhurst on account of a quarrel which
 “ Mason’s sister, Beatrix, had against him, to wit, that she had
 “ lent Nicholas £20 of her money which he would not pay
 “ her. And Hugh kept the body of the said Nicholas in the
 “ hundred of Tenterden till he unjustly received the aforesaid
 “ money and kept it for himself, and Beatrix has got, and
 “ can get, none of it,” &c.

The hundred of Tenterden, which was in the king’s hands, paid the king, with seven other hundreds, £10 a year at Dover Castle. De. Wey’s extortions came in ¹ all to £27 4s. 4d. or nearly three times as much as had to be paid to the king.

The Hundred Rolls supply various illustrations of the spirit which these local jurisdictions fostered, one of which I will quote. ² In the wapentake of Stayncliff, in Yorkshire, the return says: “ Gilbertus de Clifton ballivus de Stayn-
 “ cliff” (which was in the hands of the Earl of Lincoln by
 “ grant from Henry III.), “ verbis turpissimis (*sic*) insultavit
 “ Willielmum de Chatterton Justiciarium assignatum ad istas
 “ inquisitiones capiendas et minas intulit pro eo quod sug-
 “ gessit juratoribus patriæ quod non omittent veritatem dicere
 “ de ballivis comitis Lincolnæ propter aliquem timorem et
 “ dictus Gilbertus dixit ei quod si præsens fuisset ubi hæc
 “ verba predicasset ipsum traxisset per pedes, et adjecit quod
 “ ante dimidium annum nolisset inquisitiones istas fecisse
 “ pro totâ terrâ suâ.

¹ I have omitted several for the sake of brevity.

² *1 Rot. Hund.* 111.

CHAP. IV. "Item cum Reginald Blanchard de Wadinton comparuisset
 " coram duodecem juratores istius wapentakie ostensus
 " transgressionibus sibi et aliis de patria per ballivos comitis
 " Lincolnie illatas, dictus Gilbertus hæc percipiens cepit
 " averia sua ; et retinuit nec propter mandatum justiciari-
 " orum ad inquisitiones illis partibus capiendas assignatos ea
 " deliberare curavit, sed dixit quod si ipsi infra libertatem sui
 " domini venissent corpora eorum et omnia bona sua arestasset
 " nisi venisse se ¹ ——— nomine comitis domini sui."

² The use made of these inquisitions seems to have been that after the passing of the Statute of Gloucester, the inquisitions or copies of them were given to the justices on their next eyre, and in every case in which the return "nesciunt quo warranto" appeared on the Hundred Roll, the person in possession of the franchise was required to show his title, and if he failed to do so was deprived of it.

These proceedings must have struck a heavy blow at the Franchise Courts, but it appears from the Parliament Rolls that the practice of granting out hundreds to private persons continued long afterwards. The effect of this was that the fines and amercements of the Hundred Court went to the grantee for his own use, subject to a fixed payment to the king. The practice however was avowedly a bad one. In ³ 1306 (35 Edw. 1), the following entry appears on the Parliament Roll: "The king has said and commanded that after the grant which he has made to the Earl of Lincoln to have return of writs in two hundreds for his life, he will grant no such franchise to any one else as long as he lives, except his own children. And the king's will is that this be enrolled in the Chancery, the Wardrobe, and the Exchequer."

In 1328, by the Statute of Northampton (2 Edw. 3, c. 12), it was enacted that hundreds and wapentakes let to farm should be rejoined to the counties to which they belonged, and not be so let in future.⁴

¹ There is here an abbreviation which I cannot read ; the word must mean "proved," or the like.

² See Mr. Illingworth's introduction to the *Rotuli Hundredorum*.

³ 1 *Rot. Par.* 111.

⁴ In 1376 (50 Edw. 3) there occurs an entry on the Parliament Roll which shows that this statute was not always observed, and which illustrates in detail the effect of the grant of a hundred. 2 *Rot. Par.* 349.

The decline in the importance of the Hundred Courts, and the effect of the writ of *Quo Warranto* and of the Statute of Northampton, must have been to put an end to a large number of the Franchise Courts, though as I have already said, the courts leet, which are still attached to particular manors or other places, still remain as a vestige of them.

A minute inquiry into the history of all the Franchise Courts would, of course, be out of the question on this occasion, but I may refer shortly to a few of the most important of them which survived in name till very lately, though they had for a long time been practically absorbed into the general system.

The most important of these courts were the courts of the three Counties Palatine, Cheshire, Durham, and Lancashire.

According to ¹Coke the County Palatine of Chester being a County Palatine by prescription, was "the most ancient and "most honourable County Palatine remaining in England" in his time. It was originally granted by the Conqueror to his nephew Hugh Lupus, and came afterwards to be one of the honours of the Prince of Wales.

The County Palatine of Durham came next in antiquity. There are several records in the Parliament Rolls which set out its history and privileges at considerable length.

In the Rolls of Parliament, 21 & 22 Edw. 1 (A.D. 1292), there is a curious record of a presentment, made under the Statute of Gloucester, as to the privileges of the Bishop of Durham, from which it appears that the Bishop "solet per "ballivos suos obviare justic' itineratur' hic in adventu suo "infra com' istum apud Chylewell vel apud Fourstanes vel "apud Quakende brigge, videlicet per quam illarum partium "contingeret justic' venire. Et postea venire coram eis hic "apud Novum Castrum primo die itineris et tam in obviacione "justic' quam hic petere a præfatis justic' articulos coronæ "placitandos hic in itinere." It also appears, however, that the Bishop had "Cancellarium suum et per brevia sua et "justiciarios suos proprios placitat" in certain parts of the county. The later history of the County Palatine may be collected from a record in the Parliament Rolls, iv. 426—

¹ *4th Inst.*, p. 211.

CHAP. IV. 31, 11 & 12 Hen. 6, A.D. 1433. In this record Durham is said to have been a County Palatine before the Conquest. The subject is also discussed at length in the preface to *Registrum Dunelmense*, published by order of the Master of the Rolls and edited by Sir T. D. Hardy. The County Palatine was vested in the Bishop of Durham in the year 1836, when by ¹6 & 7 Will. 4, c. 19, the palatine jurisdiction of the Bishop of Durham was transferred to the Crown.

As to the County Palatine of Lancaster, Coke says:—"In full parliament a^o. 50^o Edw. 3 (1376), the king erected the county of Lancaster a County Palatine, and honoured the Duke of Lancaster (John of Gaunt) therewith for term of his life," and he quotes from the Patent Rolls a grant to that effect, saying that the Duke was to hold as freely as the Earl of Chester. The Duchy was held by Henry V. and Henry VI., and was the subject of a remarkable act, in 1 Edw. 4 (1461), ²by which it is "ordeigned and stablished" that certain lordships, &c., said to be forfeited "by Henry late called King Henry the Sixt make and be called the said 'Duchie of Lancaster Corporate' and be called the 'Duchy of Lancaster,' and that the County of Lancaster be a County Palatine, with a real chancellor, judges, and officers there for the same, and over that another seal called the seal of the Duchy of Lancaster." The Duchy was by this act permanently annexed to the Crown.

Anciently ³"the power and authority of those that had Counties Palatine was king-like, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of eyre, justices of assize, of gaol delivery, and of the peace. And all original and judicial writs, and all manner of indictments of treason and felony and the process thereupon were made in the name of the person having such Counties Palatine. And in every writ and indictment within any County Palatine it was supposed to be *contra pacem* of him that had the County Palatine."

¹ See also 21 & 22 Vic. c. 45.

² 5 Rot. Par. 478.

³ 4th Inst. 204.

These powers were greatly diminished by the act 27 Hen. 8, c. 24 (A.D. 1535), which enacted that no one but the king should have power to make any justice of assize, of the peace, or of gaol delivery, in any County Palatine or other liberty, and that all writs and indictments should be in the king's name and laid as against the king's peace. It was, however, provided that commissions to the county of Lancaster should be under the king's usual seal of Criminal Courts of Lancaster. This put the Durham and Lancashire Assizes and Quarter Sessions on the same footing as those of the rest of the country, except that the Lancashire commissions were under a different seal. Chester had till 1830 a local Chief Justice and Second Justice, who, however, were appointed by the Crown. These offices were abolished, and it was enacted that Assizes should be held in Chester and in Wales, in the same way as in other places, by 11 Geo. 4, and 1 Will. 4, c. 70, ss. 14 and 20. Lastly, it was provided by the Judicature Act of 1873 (36 & 37 Vic. c. 66, s. 99), that "the Counties Palatine of Lancaster and Durham shall respectively cease to be Counties Palatine as regards the issue of Commissions of Assize or other like commissions but no further."

Thus all the greater Franchise Courts have by degrees been turned into Courts of Assize and Quarter Sessions like the rest.

THE FOREST COURTS.

The Courts of the Forests were at one time important, and their procedure was curious. A forest was one of the highest of royal franchises. It was thus defined by ¹Manwood: "A forest is a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls, fowls of forest chase and warren, to rest and abide in the safe protection of the King." Within these territories the forest laws prevailed, and were administered by the Forest Courts. It must not be supposed that the forests were mere wildernesses, or that the soil was the king's property. On the contrary, the soil was private property, and

¹ *Forest Laws*, p. 40.

CHAP. IV. the population might be considerable, and these were the circumstances which made the forest laws so great a hardship as they undoubtedly were. The principal object of the forest laws was to subordinate within the forests all the rights of the proprietors to the exercise of the King's right of hunting. "The laws of the forest do restrain every man from cutting down of his woods within his own freehold in the forest" is the general title of ch. viii. 2, of *Manwood*, and though this rule was subject to exceptions it must have acted most harshly; for instance, ¹ an owner wishing to cut down a wood had to "repair to the Lord Chief Justice of the Forest and show his honour what his request is," and get "a writ of *ad quod damnum*" addressed to the Warden of the Forest, who was to summon a jury, who were to certify to the King in Chancery upon oath "these ten points following." Many other acts of ownership, *e.g.* ² ploughing up ancient meadows amounted to waste, which was a forest offence. ³ An "assart" was worse than a waste. It was where a man cut down woods and tilled the ground. A ⁴ *purpresture* or encroachment was even worse than an assart, and many other offences might be committed,—by keeping dogs, by surcharging the forest, by poaching, or by unauthorised taking of various casual profits.

The system of courts by which these offences were dealt with was elaborate. The officers of the forest were the Verderers, elected like the Coroner in the County Court; the Regarders; the Foresters. The foresters resembled constables; the regarders were inspectors who from time to time visited the forest; and the verderers were the judges of the local courts and heads of the forest to which they were attached. Above all these was the Lord Chief Justice in Eyre of the Forests. There were three separate courts by which the forest law was enforced. Once in every forty days was held a court of attachment; three times a year a Court of Swanimote (the mote or meeting of the swains); and at uncertain intervals a Court of Justice Seat, presided over by the Lord Chief Justice in Eyre of the Forests. When an offence was committed and came to the knowledge of the

¹ *Forest Laws*, viii. 3.

² *Ib.* viii. 5.

³ *Ib.* ix. 2.

⁴ *Ib.* xi.

forester, it was his duty to attach the suspected offender, *i.e.*, to take steps to secure his appearance to answer for his offence. ¹This might be done according to circumstances, either by seizing "his cows, his horse, or any other goods that he had within the forest," or (if he was "taken with the manner" "trespassing in vert") by attaching his body subject to the right of being bailed or mainprised, or if taken in the manner in certain other cases, by attaching his body without bail or mainprise, *i.e.*, by imprisoning him. At the Court of Attachments all such attachments were presented and enrolled under the direction of the verderers, and both things and persons so attached might be replevied. ²At the Court of Swanimote, held three times a year, the verderers were judges, and they and all the officers of the forest, and four men and the reeve from every township in the forest, had to attend and receive indictments for forest offences, especially in respect of the persons attached by the foresters at the Courts of Attachment. The Swanimote Court either convicted or acquitted as it seems on their local knowledge. ³Manwood says: "All the presentments of the foresters for any offence in the forest, either in vert or venison, are there delivered to the jury which are sworn for that purpose to inquire the truth of those matters; and if the jury do find those presentments that the foresters have presented be true, then the offender against whom they are presented doth stand convicted thereof in law, and shall not per assisas forestæ traverse any such indictment."

The Court of Swanimote, however, could not give judgment. This power was vested exclusively in the Court of Justice Seat, which was held, when the King issued a commission for that purpose, by an officer of great dignity, called the Lord Chief Justice of the Forest in Eyre. The charges given at the Swanimote and at the Court of Justice Seat ⁴are printed in Manwood, and enumerate all the offences which could be committed, either against the forest laws by the public, or by officers of the forest against the public. They are most elaborate, the first containing forty-five, and

¹ *Forest Laws*, xxii. 5.

³ *Ib.* xxiii. 6.

² *Ib.* xxiii. 2.

⁴ *Ib.* xxiii. 7, and xxiv.

CHAP. IV. — the second eighty-four heads. The Court of Justice Seat passed judgment on the offenders presented at the Court of Attachments and convicted at the Court of Swanimote, and from its decision there was no appeal. ¹“The Lord Chief Justice of the Forest hath an absolute authority appointed unto him to determine of offences that are committed and done within the King’s Majesty’s forests, either in vert or venison, and the same offences are to be determined before him, and not before any other justice.” Of these courts Blackstone says: “These Justices in Eyre were instituted by Henry II. A.D. 1184,” “and their courts were formerly very regularly held; ²but the last Court of Justice Seat of any note was that holden in the reign of Charles I. before the Earl of Holland; the rigorous proceedings of which are reported by Sir William Jones. After the Restoration another was held, *pro formâ* only, before the Earl of Oxford, but since the era of the Revolution in 1688, the forest laws have fallen into total disuse, to the great advantage of the subject.”

THE WELSH COURTS.

So far I have considered the criminal courts of England. The same system now prevails in Wales, but the Welsh courts have a history of their own.

It consists of four stages. (1) The institutions of Edward I. (2) The jurisdiction of the Lords Marchers. (3) The institutions of Henry VIII. (4) The changes made in the reign of William IV.

Edward I., after the conquest of the greater part of Wales, passed an act known as the *Statutum Wallie* (12 Edw. 1, 1280), which is one of the most remarkable monuments still remaining of the methods by which in that age justice was administered. It may be described as a code of criminal and revenue procedure prepared specially for Wales, and may be compared to the codes prepared under the direction of Lord Lawrence for the government of the Punjab on its annexation,

¹ Manwood, p. 489.

² On this, see Gardiner’s *Fall of the Monarchy*, i. 71, and referring to personal government of Charles I., ii. 73, 76, 172, 182.

or to the regulations which having been already enacted for Lower Bengal were re-enacted for what are now known as the North-West Provinces upon their conquest in 1801. To borrow the language of Indian administration, the *Statutum Walliæ* converted a considerable part of Wales into a regulation province. It recites that Divine Providence has annexed and united the land of Wales, which had previously been subject to the King by feudal law, to the Crown of England as part of the body of the same. It also recites that Edward had inquired into the laws and customs of Wales, allowed some, amended others, and made some additions, and it then goes on to enact that they are to be held and observed in the manner under written.

The statute lays down a complete scheme of government setting forth first the divisions of the country, then the powers of the courts and officers, especially the sheriffs and coroners by whom it was to be governed, and then giving the forms of writs in all actions to be brought. This last enactment of course introduced into Wales the English Common Law of which the writs in question are the foundation.

The part of this memorable document which concerns the present purpose is that which relates to the organisation of the Courts. It provides as follows: "We provide and decree that the justice of Snowdon (*Snaudon*) shall have the custody and rule of our royal peace in Snowdon and our adjacent lands of Wales, and shall administer justice to all according to the royal original writs, laws and customs under written."

"We also will and ordain that there be sheriffs, coroners and bailiffs of ¹ commotes in Snowdon and in our lands in those parts." It then proceeds to provide that there shall be a sheriff for each of six counties, namely, Anglesea, Caernarvon, Merioneth, Flint, Caermarthen, and Cardigan.

The effect of this was to introduce a justice, sheriffs, coroners, and courts similar to those of England into the six counties above named. The remainder of Wales, which till the reign of Henry VIII. included Monmouthshire and

¹ The commote was a division like a hundred. It was a sub-division of a cantred.

CHAP. IV

part of the present counties of Shropshire, Hereford, and Gloucester, was then, and till the reign of Henry VIII., continued to be, divided into districts called "Lordships Marchers," which were subject to the authority of hereditary rulers called Lords Marchers. These Lords Marchers exercised what can hardly be described otherwise than as a despotic authority; though by 28 Edw. 3, c. 2 (1354) it was "accorded and established that all the Lords of the Marches of Wales shall be perpetually attending and annexed to the Crown of England, as they and their ancestors have been at all times past, and not to the principality of Wales, in whose hands soever the principality be or hereafter shall be." ¹ Lord Herbert of Cherbury in his history of Henry VIII. gives the following account of the Lordship Marchers: "As the Kings of England heretofore had many times brought armies to conquer that country (Wales), defended both by mountains and stout people, without yet reducing them to a final and entire obedience, so they resolved at last to give all that could be gained there to those who would attempt it, whereupon many valiant and able noblemen and gentlemen won much land from the Welsh, which as gotten by force was by permission of the kings then reigning held for divers ages in that absolute manner as *Jura Regalia* were exercised in them by the conquerors. Yet in those parts which were gotten at the King's only charge (being not a few) a more regular law was observed. Howsoever, the general government was not only severe, but various in many parts; insomuch, that in about some ² 141 Lordships Marchers which were now gotten many strange and discrepant customs were practised." Lord Herbert's statement is no doubt true as to parts of South Wales, especially the counties of Pembroke and Glamorgan, but a large part of the Lordships Marchers must have been in the hands of native Welsh princes, who had never been conquered at all, but represented the original rulers of the country.

A full account of the jurisdiction of the Lords Marchers

¹ P. 369. When I was at the Bar I was once asked to advise upon certain claims of a gentleman of very ancient family, who believed himself to be the last Lord Marcher.

² In 27 Hen. 8, c. 26, 137 lordships are enumerated.

is to be found in ¹Coke's entries. In the precedents of proceedings by way of *Quo warranto* he gives at length the pleadings in a proceeding on a *Quo warranto* in the 42 Eliz. (1600) against Thomas Cornewall of Burford, in Shropshire. The information alleges that Burford without warrant uses in the manor of Stapleton and Lugharneys in the county of Hereford, the franchise of taking the goods and chattels of felons.

To this the defendant pleaded that before and up to the statute of 27 Hen. 8, and from the time of legal memory ²Wales was governed by Welsh laws and Welsh officers in all matters, whether relating to lands and tenements, or to life and limb, and all matters and things whatever. Also at the passing of the statute of 27 Hen. 8, divers persons were seized of divers "several lordships, called in "English Lordships Marchers in Wales, and held in them "royal laws and jurisdiction as well of life and limb as of "lands and tenements and all other things, and they could "pardon and had full and free power . . . of pardoning all "treasons, felonies, and other offences whatever, and also "to do and execute all things whatever within their separate "lordships aforesaid, as freely and in as ample a manner and "form as the King may in his aforesaid dominions; and that "moreover the King ought not and could not interfere in "any of the said Lordships belonging to any other person for "the execution of justice." The plea further states that the Lords Marchers were entitled to all forfeitures, goods of felons, deodands, &c., according to the laws and customs of Wales without any grant. It was further pleaded that up to the date of the statute the King's writ did not run in the Lordships Marchers. The plea then goes on to aver that the manors in question were Lordships Marchers, to which Cornewall and his ancestors had been entitled at the passing of the statute 27 Hen. 8, c. 26, and that neither that

¹ Coke's *Entries*, 549-551, No. 9, *Quo Warranto*.

² "Dominium Wallie ac omnia dominia . . . ejusdem fuerunt ordinat' et gubernat' per Wallias leges . . . ac omnes Principes Wallie inde seistiti existentes tenuerunt eadem secundum leges Wallias, ac usi fuerunt in eisdem per sepeales officarios suos eorundem dominiorum leges Wallias eorundem dominiorum et nullas Anglicanas leges," &c.

³ "Regales leges et jurisdictiones."

CHAP. IV. — statute, nor the statute of Philip and Mary, c. 15, deprived him of the particular franchise in question, but confirmed it to him. To this plea the Attorney-General demurred, thereby admitting the truth of its averments. Shortly, the pleadings came to this, that so much of Wales as had not been brought under the *Statutum Walliæ* by Edward I. continued till the 27 Hen. 8 (1535) to be governed by a number of petty chiefs called Lords Marchers—chiefs who might be compared to the small Rajahs to whom much of the territory of the Punjab and the North-West Provinces still belongs.¹

In 1535 and 1543 two Acts were passed by Henry VIII. (27 Hen. 8, c. 26, concerning the laws to be used in Wales, and 34 & 35 Hen. 8, c. 26, an Act for certain ordinances in the King's dominion and principality of Wales) which were the complements of the *Statutum Walliæ*, and introduced the English system for the administration of justice with some slight modifications into every part of Wales. The first of these Acts (27 Hen. 8, c. 26) abolishes (s. 1) all legal distinctions between Welshmen and Englishmen, and after reciting the disorders arising from the Lordships Marchers enacts that some of the said Lordships shall be annexed to adjacent English counties and others to adjacent Welsh counties, and that the remainder shall be formed into five new counties, namely, Brecon, Radnor, Montgomery, Denbigh, and Monmouth, the first four of which are to be Welsh counties and the last an English county. The Act then proceeds to give the details of this arrangement (ss. 4–19 inclusive). It provides (s. 26) for a commission to divide all Wales except Anglesea, Flint, and Carnarvon, into hundreds, and (s. 37) empowers the King to erect such Courts of Justice in Wales as he thinks proper.

The second Act (34 & 35 Hen. 8, c. 26, A.D. 1543) com-

¹ There are a number of small states in the neighbourhood of Simla which might well be compared to Lordships Marchers in point of size and importance, though the government of India exercises much more careful supervision over their proceedings, especially in the matter of the administration of justice, than the English kings from Edward I. to Henry VIII. exercised over the Lordships Marchers. See *Punjab Administration Report*, 1878-9, p. 29, and Mr. Lepel Griffin's *Chiefs of the Punjab*. One of these petty chiefs, the Rajah of Sirmur, sent 200 men to the war in Afghanistan, and many others offered contributions in money, camels, &c.

CHAP. IV.
 pletes the provisions of the first. ¹ It enacts (s. 2) that thenceforth there shall be twelve shires in Wales, whereof eight (² Glamorgan, Caermarthen, ² Pembroke, Cardigan, Flint, Caernarvon, Anglesea, and Merioneth) are old, and four (Radnor, Brecknock, Montgomery, and Denbigh) were new, the latter having been formed out of such of the Lordships Marchers as were not annexed to other English or Welsh counties. The limitations of the Hundreds made under commission were confirmed (s. 4). It was enacted that there should be great sessions to be called "the King's Great Sessions in Wales," held twice a year in each of the twelve shires, as follows:—

The Justice of Chester	}	Denbigh.
(s. 6).		Flint.
		Montgomery.
³ The Justices of North Wales	}	Caernarvon.
(s. 7).		Merioneth.
		Anglesea.

¹ "And forasmuch as there are many and divers Lordships Marchers within the said country or dominion of Wales lying between the shires of England, and the shires of the said country and dominion of Wales, and being no parcel of any other shires where the laws and due correction is used and had, by reason whereof hath ensued and hath been practised, perpetrated, committed, and done manifold and divers detestable murders, burnings of houses, robberies, thefts, trespasses, &c., &c., the offenders making their refuge from Lordship to Lordship were and continued without punishment or correction," &c. (s. 3.)

² These shires are not mentioned in the Statutum Wallie. The county of Glamorgan is the most ancient county in Wales. One of the companions of William the Conqueror, Fitz Hamon, originally conquered the district and established there a Lordship Marcher which was a county in itself, containing eighteen castles and thirty-six and a half knights fees. He had his own Chancery and Exchequer in Cardiff Castle, and there were eleven other Lordships Marchers, each of which was a member of the county.

As to Pembrokeshire William the Conqueror authorised Arnulf Montgomery, son of the Earl of Shrewsbury, to conquer what he could, and he conquered Pembroke and some of the neighbouring districts. "Neither he nor his immediate successors appear to have held their possessions with such ample powers as were exercised by the Lords Marcher for the King's writs issuing out of the courts at Westminster were current in the conquered territory of Pembroke." Parts of Pembroke (in particular Tenby and Haverfordwest) were colonised by Flemings under Henry I. In 1109 Gilbert de Clare, surnamed Strongbow, was created Earl of Pembroke by Henry I., and in 1138 he was invested with all the powers of a count palatine over the country from which he derived his title, so that Pembroke became a county palatine. Its character as such, however, seems to have been taken away by 27 Hen. 3, c. 26, s. 37, which added certain towns and districts to it. See Lewis's *Topographical Dictionary of Wales*, articles "Glamorgan" and "Pembroke," and as to Pembroke, *4th Inst.* 22.

³ These I suppose had replaced the "justice of Snowdon," mentioned in the *Statutum Wallie*.

CHAP. IV. —	A person learned in the law of the realm of England to be appointed by the King to be Justice of these shires (s. 8).	{ Radnor. Brecknock. Glamorgan.
	Another such person (s. 9).	{ Caermarthen. Pembroke. Cardigan.

The jurisdiction of the Justices was to include all matters civil and criminal which were disposed of by the English Superior Courts (ss. 11-52), and there were in addition to be Courts of Quarter Sessions, held by Justices of the Peace, who were to be appointed in the same manner as in England (ss. 53-60), and Sheriff's tourns (s. 75) and other County and Hundred Courts as in England (s. 73). ¹ By s. 119 the King received an unlimited power of legislation for Wales. This section, though afterwards alleged to have been personal to the King himself, whose successors are not mentioned in the Act, was repealed by 21 Jas. 1, c. 10, s. 4.

Of this statute ² Barrington (himself a Welsh judge) observes that it was so well drawn "that no one clause of it has ever occasioned a doubt or required an explanation," though Serjeant Runnington points out a few limitations upon this remark. At all events the Courts established by this statute continued to administer justice in Wales till the year 1830, when the Welsh Courts and Judges and the Palatine Jurisdiction of the County of Chester were abolished. An additional judge was added to each of the three superior Courts at Westminster, and it was provided that their jurisdiction should be extended to Wales and Chester, and that assizes should be held there in the same manner as in other parts of the country.³

¹ Compare the power vested by various Acts of the Government of India in the Governor-General, and even in some cases in Lieutenant-Governors, to declare what laws should be in force in particular non-regulation districts. The validity of such legislation has been doubted, but was affirmed in *R. v. Burah* L. R. 5 Ind. App. 178.

² See Hale's History of the *Common Law*, by Runnington (ed. 1779). p. 208, quoting Barrington's observations, 324-329.

³ 11 Geo. 4, and 1 Will. 4, c. 70, ss. 1 and 2, and ss. 13-34.

CHAPTER V.

¹ THE CRIMINAL JURISDICTION OF PARLIAMENT AND OF THE COURT OF THE LORD HIGH STEWARD.

HAVING described the history of the courts in which the common routine of criminal justice is carried on, I come to the courts which are called into activity only on rare occasions and for special purposes. These are the High Court of Parliament and the Court of the Lord High Steward. CHAP. V.

The criminal jurisdiction of Parliament is probably derived from the powers of the Curia Regis. Speaking of the reign of John Mr. Stubbs says, ²“As a high court of justice they had heard the complaints of the king against individuals, and had accepted and ratified his judgments against high offenders.” Speaking of Henry III.’s time he says, ³“Their judicial power was abridged in practice by the strengthened organisation of the royal courts, but it remained in full force in reference to high offenders and causes between great men; the growth of the privileges of baronage gave to the national council as an assembly of barons the character of a court of peers for the trial and amercement of their fellows.”

The character of the judicial functions of Parliament in Edward I.’s reign may be gathered from the “Placita coram ipso domino rege et concilio suo in Parlamento” printed in the first volume of the Parliament Rolls. It is not however my object to enter upon this subject further

¹ *Dig. Crim. Proc.*, arts. 16-21. ² Stubbs, ii. 236, 237. ³ Stubbs, ii. 37.
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CHAP. V. than is necessary to trace the history of the present law as to impeachments.

That law may be stated as follows :—

1. The House of Lords is a court of justice in which peers may be tried for any offence, and commoners for any offence not being ¹ treason or felony upon an accusation or impeachment (*impetitio*) by the House of Commons, which is the grand jury of the whole nation.

2. When such an impeachment is once made it is not abated either by a prorogation or by a dissolution of Parliament, but must go on from session to session and from parliament to parliament till it is determined.

3. A pardon by the Crown cannot be pleaded in bar of an impeachment.

This is the net result of a long process, the nature of which can be understood only by a study of the judicial proceedings of successive parliaments.

The earliest case to be referred to is one which perhaps hardly deserves the name of a parliamentary proceeding at all. This was the trial of David the brother of Llewellyn for treason against Edward I. The trial took place at Shrewsbury at a sort of parliament which met Sept. 30, 1283. ² "The sheriff of each county was to return two elected knights, and the governing bodies of twenty cities and boroughs were to return two representatives for each. Eleven earls, ninety-nine barons, and nineteen other men of note, judges, councillors, and constables of castles, were summoned by special writ." "At Shrewsbury accordingly David was tried, condemned, and executed; his judges were a body chosen from the justices of the Curia Regis under John de Vaux; the assembled baronage watched the trial as his peers, and the Commons must be supposed to have given a moral weight to the proceedings."

A few years later, 21 & 22 Edw. 1 (A.D. 1291), a prosecution occurred which is recorded in the Parliament Rolls.

³ The Archbishop of York was "coram ipso domino rege et

¹ There may be some doubt as to treason. See note in 8 *St. Tr.* 236, in FitzHarris's case. ² 1 Stubbs, 116.

³ 1 *Rot. Par.* 120. The archbishop denied the purchase of the debt, but admitted that its existence came to his knowledge when he visited a monastery

"consilio suo arrenatus" for buying a debt due to a Jew who had been banished and whose debts had been forfeited to the king. In 33 Edw. 1 (A.D. 1304) Nicholas de Segrave was accused in parliament by the king of having brought an accusation against John Crumbwell whilst both were serving in the army against the Scotch, of having waged battle against Crumbwell, of having afterwards "adjourned" Crumbwell before the King of France, and of having gone to France to prosecute Crumbwell leaving, for that purpose, the king's army whilst still in danger and against the king's express command, thereby "subjiciens et submittens dominium regis et regni Angliæ subjicioni domini regis Franciæ." To this charge Segrave pleaded guilty, and the king required the advice of parliament or rather of his great Council ("volens habere avisamentum Comitum Baronum Magnatum et aliorum de Consilio suo") as to the punishment to be inflicted. They replied, "quod hujus modi factum meretur pœnam amissionis vitæ,¹ &c." Segrave however was pardoned on the terms of giving security to go to prison "ubi et quando et quotiens dominus rex voluerit."

In 4 Edw. 3 (1350) a remarkable though anomalous proceeding took place in regard to Sir Thomas Berkeley, charged with the murder of Edward II. ²The record throws light not only on the functions of parliament but on its procedure and on the early form of trial by jury. It is as follows: "Sir Thomas de Berkeley came before the king in full parliament and being asked" (*allocutus de hoc*)

at Burlington, from which it was due, and that he told the prior and convent, "Quod pecuniam illam sana conscientia retinere non possent, et quod sic facerent quod animas suas salvarent, sed quod nunquam eis injunxit quod pecuniam illam sibi aut alii nomine predicti Judei solverent." He further owned that he had seen the Jew at Paris, who begged him for God's sake to get him his money. The archbishop was amerced because he concealed the existence of the debt, and because "contra fidem quam Regi tenetur injunxit præfato Priori et conventui quod animas suas salvarent; quod tantum valuit quantum si dixisset quod Judeo satisfacerent." This seems to admit that the proclamation which required the debtors of Jews to pay their debts to the king could be obeyed only at some risk to the debtor's soul.

¹ The "&c." probably means forfeiture.

² 1 *Rot. Par.* 172. In the pleadings mention is made of "Nicholas de Warrewyk qui sequitur pro ipso domino rege," the style of the Attorney-General of later times. ³ 2 *Rot. Par.* 57.

CHAP. V. how he could acquit himself of the death of Edward II. who had been delivered to his custody and to that of John Maltravers, and had been murdered in the castle of Berkeley? he said he did not consent to it or know of it till this parliament. He was asked how he could excuse himself, seeing that the castle was his, and the king was delivered to him for safe custody? He replied that the castle was his, and that the king was delivered to him and Maltravers for safe custody, but that at the time of the murder he was lying so ill at Bradley that he could remember nothing (*quod nichil ei currebat memoriæ*). He was then asked how he could excuse himself when he had guards and officers under him? He replied that he put under him guards and officers in whom he trusted as he did in himself, and that they with Maltravers had charge of the king, and that he was in no way guilty of the death of the king or of being accessory to or procuring it. Then follows, "et de hoc de bene et malo ponit se super patriam. Ideo venerunt inde jurat' coram domino rege in parlamento suo." Then follow the jurors' names, and their finding, "Dicunt quod predictus Thomas de Berkle in nullo est culpabilis" . . . "et dicunt quod tempore mortis ejusdem Domini Edwardi Regis patris domini Regis nunc fuit ipse tali infirmitate gravatus apud Bradeleye extra castrum suum predictum quod de vitâ ejus desperabatur. Ideo idem Thomas inde quietus."

The record implies, First that in this instance at least jurors were introduced into parliament. Next that the accused was questioned till a specific defence resting on a particular alleged fact was set up by him; and lastly, that the jurors gave their verdict on the special defence as well as generally on his guilt or innocence.

Towards the end of the reign of Edward III. in what was known as the Good Parliament (50 Edw. 3, A.D. 1376) occurred a celebrated series of proceedings which are regarded both by Hallam and by Mr. Stubbs as the earliest impeachment in the full sense of the word known in English history. This is no doubt true if by an impeachment is meant a trial by the Lords upon an accusation made by the

Commons, though, as the cases already referred to show, criminal proceedings in parliament were of much greater antiquity. The persons impeached were Richard Lyons, William Ellis of Yarmouth and John Peake of London (the agents and accomplices of Lyons) William Lord Latimer and John Lord Neville. ¹All of these were charged with different kinds of frauds and malpractices connected with the revenue. There is a petition in the Parliament Roll of this parliament which throws some light on the character of these proceedings and to some extent anticipates points long afterwards decided. ²The Commons prayed that all articles of impeachment with the matters put forward by the Commons which had not then been tried for want of evidence (*par défaut de prove*) or any other cause should be heard and determined by commission by the judges and other lords in London and other suitable towns (*autres lieux busoignables*). The king promised to assign suitable justices.

³In the following parliament the result of one proceeding under this clause is recorded. A petition sets forth that Hugh Fastolf had "by malice and hatred of some of his "neighbours both by bills previously delivered and by clamour "made at the end of the last parliament" been impeached for various oppressions and misdeeds, that a commission of Oyer and Terminer had accordingly been sent to Suffolk and Norfolk "et les copies des ditz Billes issint baillez en "Parlement si furent envoiez a mesmes les justices souz "le grant seal." Fastolf was tried by no less than seventeen inquests and acquitted by all of them.

This shows that in Edward III.'s time the theory of impeachment as afterwards understood was far from complete. It never would have occurred to the parliament which impeached Warren Hastings that at the end of the session the case might be sent before a special commission and tried by a jury.

In the reign of Richard II., criminal proceedings in Parliament were frequent and important. Thus, in the

¹ 2 Rot. Par. 323—326, and 329.

² *Ib.* 385.

³ 51 Edw. 3 (1376—7), 2 Rot. Par. 375.

CHAP. V. beginning of the reign ¹ several persons were impeached for losing towns and other military misconduct in France. ²In 1386 Michael de la Pole, Lord Chancellor, was impeached for misconduct in his office, and judgment was given that certain grants made to him should be set aside, and charters and letters patent declared void. There is nothing on the face of any of these proceedings which calls for special remark. The accusations are specific, and so are the answers, which sometimes go into great detail; and it appears that in particular cases witnesses were called and fully examined.

The most remarkable instance of this is to be found in the case of ³Alice Perrers, who was accused on the part of the King, and not, as far as appears, by the Commons, for breaking an ordinance by which women in general and she in particular had been forbidden to do business for hire and by way of maintenance in the King's Court. The charge was that she nevertheless had persuaded Edward III. to countermand the appointment of Sir Nicholas Dagworth to go on a certain commission to Ireland, and had persuaded him to pardon Richard Lyons as to part of his punishment. Dagworth was to go to Ireland to inquire into the official conduct there of William of Windsor the husband of Alice Perrers, and she objected to this on the ground that Dagworth was Windsor's enemy. Many witnesses were examined on the subject, one of whom said, "he never heard Dame Alice speak to the King on the subject, but he had heard her greatly complain in the King's palace and say that it was neither law nor reason that Dagworth, who was William de Windsor's enemy, should go to Ireland and inquire and do justice against him." Twenty witnesses in all were examined on the occasion, and the principal depositions are entered on the Roll.

¹ Case of John de Gomenys and William Weston, 3 *Rot. Par.* 10—12 (1377); Cressingham and Spykesworth, p. 153 (1383); Bishop of Norwich, p. 153 (1383); Elmham and others, p. 156 (1383).

² 3 *Rot. Par.* 216—219.

³ *Ib.* 12. "Alice Perrers fuist fait venir en mesme le Parlement devant les prelates et seigneurs pur y repondre sur certains choses queelles pur lors serroient surmises envers elle de par le Roi. Monsr. Richard le Scrop Chivaler seneschal de l'hostel nre S^e le Roi y rehercea en Parlement," &c.

The most remarkable feature in the criminal proceedings in parliament in the time of Richard II. is that it was the regular course for private persons, even persons who were not members of parliament, to bring accusations of a criminal nature in parliament, upon which proceedings were had. ¹ Thus, for instance, in 1384, one John Cavendish, a fishmonger of London, impeached Michael de la Pole, the Chancellor, for taking a bribe, namely, £40, three yards of scarlet cloth, worth thirty-two shillings, given to Otter the Chancellor's clerk, and a quantity of herring, sturgeon, and other fish, delivered free at his house. The Chancellor swore that he was absolutely innocent, that whatever took place between Cavendish and Otter was without his knowledge, and that he ordered the fish to be paid for as soon as he heard they were delivered. After examining witnesses the Lords acquitted the Chancellor, and Cavendish was convicted of defamation.

² So, in 1381, Clyvedon brought a bill of appeal or accusation in Parliament against Cogan for a riot at Bridgewater, and for forcing the master of the Hospital of St. John there to pay money and execute deeds. The bill concludes by saying that if Cogan denies the charge Clyvedon is ready to prove it by his body according to the law of arms or as the court pleases, otherwise than by jury (*sinoun per verdit des jurrours*) "for he says, the said William (Cogan) is rich and he poor, whereby he could never make a jury go against the said William although his cause is as true as that God is in heaven."

Cogan said he would put himself on a jury, and the parties were left to the course of the common law.

These cases throw some light on the memorable proceedings which took place in the later part of the reign of Richard II., and which appear not only to have caused his deposition, but to have established the law of impeachment on its present basis. I refer to the three sets of "appeals"

¹ 3 *Rot. Par.* 168. "Johan Cavendish de Londres pessonner soi pleignast " en le Parlement premerement devant la Coe en leur assemble en presence " d'aucuns Prelatz et Seignrs temporelx illocoes lors estant et puis apres " devant tous les Prelatz et Seignrs estantz en ce Parlement."

² *Ib.* 106.

CHAP. V. or accusations brought against each other by the ministers of Richard II.

¹The first set of appeals took place in 1387-8, when the Duke of Gloucester (the King's uncle) and several other "lords appellants" accused the Archbishop of York, Robert de Vere Duke of Ireland, the Earl of Suffolk, Tressilian Chief Justice, and Sir Nicholas Brember, Lord Mayor of London of high treason. The substance of the charge against them was that they had led Richard II. to misgovern in various ways, and in particular that they had induced him to resist or evade an act passed in 1386 which practically put the Royal Power in commission, and that they had procured an opinion from five judges and a serjeant-at-law that the commission so issued was void, and that those who procured it were liable to be punished as traitors. This was elaborated into thirty-nine charges. ²The king referred the charges "to the judges, serjeants, and other sages of the law of the realm" (i.e. of the common law) "and also to the sages of the civil law, who were charged by the king to give their opinion to the Lords of Parliament, to proceed duly in the cause of the said appeal. The said judges, serjeants, and sages of the common law and also of the civil law took the matter into consideration, and avowed to the Lords of Parliament that they had seen and heard the tenor of the appeal, and that it was not made according to the requisitions of either law. Upon which the Lords of Parliament considered the matter, and with the assent of the king, and by their common assent, it was declared that in so high a crime as is alleged in this appeal which touches the person of our lord the king and the state of his whole realm, and which is said to be committed by peers of the realm and others, the cause must not be decided elsewhere than in parliament, nor by any other law than the law and course of parliament, and that it appertains to the Lords of Parliament and to their franchise

¹ 3 *Rot. Par.* 229—244.

² P. 236. This passage is quoted by Mr. Stubbs. I think he overlooks the opposition between the common and the civil or Roman law. He seems to take "civil" in the sense of ordinary law as opposed to parliamentary privilege. I do not think this can be the meaning of the passage.

“and liberty by the ancient custom of parliament to be
 “judges in such cases, and to adjudge them with the king’s
 “assent. And that so it shall be done in this case by award
 “of parliament because this realm of England never was and
 “it is not the intent of the king or the lords that it ever
 “should be ruled or governed by the Civil Law. Moreover
 “they do not mean to rule or govern so great a case as this
 “appeal, which as aforesaid is not to be tried or determined
 “out of parliament, by the course, process and order used in
 “any inferior court or place in the realm, which courts and
 “places are only to execute the ancient laws and customs of
 “the realm and the ordinances and establishments of par-
 “liament.” The appeal was accordingly held good, and
 fourteen out of the thirty-nine charges contained in it were
 held to amount to treason. The appellees were convicted,
 and some executed as traitors, and others banished for life
 and deprived of their property. Other persons besides the
 original appellees were implicated in the matter, and in
 some cases condemned and executed, but this belongs rather
 to the general history of the time than to the history of im-
 peachments. ¹A sum of £20,000 was voted to the lords
 appellants for their costs and charged on the subsidy granted
 at the end of the session.

After an interval of ten years, the king’s party in their
 turn, appealed or accused of treason by “accroaching” the
 royal power, the Duke of Gloucester, and the Earls of
 Arundel and ²Warwick. The Earl of Arundel was con-
 victed and executed. The Duke of Gloucester was murdered
 at Calais, and the Earl of Warwick was tried and sentenced
 to be hung, drawn, and quartered, though his sentence was
 changed into one of imprisonment for life in the Isle of Man.
 The principal point urged against him was, that on the
 trial of Sir Simon Burley and others, who were appealed
 by the original Lords Appellants, “Warwick with others,

¹ 3 *Rot. Par.* 245. “Vint mille livers de meme le subside, pur lour
 “custages, travaux et despenses faites a devant pur l’onour profit, et salvation
 “de Roi et de tout le roialme.” The costs were principally military, as the
 Lords Appellant had raised troops to support their cause. See Stubbs, *Cons.*
Hist. ii. 476—482, 494—497, and iii. 19, 20, on the transactions here referred
 to. ² *Ib.* 377.

CHAP. V. "made the king come to a secret place at Westminster," and there forced him against his own judgment to say that Burley was guilty, though he thought, and had previously said, he was not. This looks as if on these trials, at all events, the king personally acted as one of the judges.

In the course of another two years, Richard was deposed, and in the first parliament of Henry IV. (1399), the second set of appellants ¹were impeached by the Commons for their appeal. They were accordingly questioned about the appeals, and gave answers which threw light on the nature of the proceeding. They all said that they acted under compulsion, and one of them (the Earl of Gloucester) gave a lively account of his conduct. He said that, "on St. Oswald's day, as the late king sat at meat in the great hall of Nottingham Castle, and he, the Earl, also sat at meat at a side table in the same hall, the late king sent him a message to get up and come to him. Thereupon the Earl went to his room in the keep of the said castle, and put on a habergeon and his sword, and took with him about six men (*vadlets*), supposing he would have to arrest some one; and when he came outside the gate, he found there the other appellants, and amongst them William Le Scrop, reading the bill of appeal, the greater part of which was read before he came, and just then the late king sent to tell them to come on, and asked why they waited so long. And thus came the name of the Earl of Gloucester to be put into the appeal, but he heard nothing of it from any person; but for fear of death, he durst not oppose the orders of the late king as to the prosecution of the appeal."

Sir William Thyrning, the Lord Chief Justice, made a speech which is entered ²in the Parliament Rolls, to the effect that the proceedings of the appellants had been so irregular, that the common law had made no provision for them, and that their misdoings must accordingly be

¹ 3 *Rot. Par.* 449. "Les Communes du Parlement monstrerent au Roy," &c.

² *Ib.* 451. It is in English, and is a curious specimen of the transition state of the language. "The Lords . . . deme and ejuggen and decreen that the Dukes of Aumarle, Surr, and Excestre, that bene here present lese and forgo fro hem and her heirs," &c.

dealt with specially by the king in parliament. He then declared the judgment of parliament to be, that they should be degraded from their rank, and incur other forfeitures. These proceedings took place on the 6th October, 1399.

¹ On the 3rd November, ² the Commons by a petition, "showed to the king, that judgments in parliament belong only to the king, and the Lords, and not to the Commons unless the king, of his special grace, pleases to show them the judgment," (this they said) "for their ease, that no record should be made in parliament against the Commons, that they are or shall be parties to any judgments given, or to be given afterwards in parliament. To which it was answered by the Archbishop of Canterbury by command of the king, that the Commons are petitioners and demanders" (plaintiffs or accusers), "and that the king and the Lords from all time have had, and still have by right judgment in parliament as the Commons have shown. But in making statutes, and granting aids and subsidies and such things for the common profit of the realm, the king's special will is to have their advice and consent; and this order is to be observed for all time to come."

In the same parliament was passed, ³ the statute 1 Hen. 4, c. 14, which provides, that all appeals of things done in the realm, shall be tried and determined by the laws of the realm (*i.e.*, at common law), that all appeals of things done out of the realm, shall be tried by the constable and marshal, and "that no appeals be from henceforth made, or anywise pursued in parliament in any time to come."

I have noticed these proceedings in detail because they throw light upon the manner in which the present theory of the power of parliament as to impeachments came to be legally settled—a point which historians more interested in political events than in legal history have not I think altogether cleared up. Told shortly the history seems to be this.

¹ "Le Lundy en le Fest de Sainte Feye la Virgine." 3 *Rol. Par.* 449.

² *Ib.* 427.

³ This statute was repealed by the Statute Law Revision Act, 1863 (26 & 27 Vic. c. 125). I think that a great constitutional and historical landmark might have been spared. The Act is only fourteen lines in length. The repeal, however, does not revive the power of appealing in Parliament, as all appeals in criminal cases were abolished by 59 Geo. 3, c. 46.

CHAP. V. The judicial powers of the Curia Regis survived when parliament assumed its present character. They were exercised in no very regular way throughout the reigns of Edward I. and Edward III. In the later part of the reign of Edward III. the House of Commons by assuming the position of accusers imposed a severe check on the proceedings of what we should now describe as ministers of state, but concurrently with this development of their powers there arose a practice of "appeal" or private accusation which enabled any one to bring any one else to trial for any offence before parliament. In some cases this practice appears to have worked worse than the unlimited power of private accusation which exists at the present day, and in the hands of a fierce and turbulent feudal nobility who could enforce their accusations by armies of retainers it became an abuse which largely contributed to the revolution by which Richard II. was deposed and Henry IV. set on the throne. This in its turn led to the Wars of the Roses, the destruction of the feudal nobility, and the establishment of the semi-despotic authority of the Tudors. It is not surprising that this should have been the case when we read the account given in the Parliament Rolls of the principles on which Parliament proceeded in such cases. The Lords in 1388 distinctly repudiate the authority of all law whatever except "the Law of Parliament" a phrase for that which parliament judging *ex post facto* might consider reasonable. In other words their claim was to be at once accusers, judges, and *ex post facto* legislators with regard to the exigency, real or supposed, of the particular case before them. The practical effect of this was that in the course of ten years accusers and accused changed places, the survivors and representatives of those who had been put to death for accroaching royal power, succeeding in putting to death for the same offence those who had destroyed their predecessors.

The statute 1 Hen. 4; c. 14, put an end to this great evil, and went a great way towards establishing the later view of parliamentary impeachment according to which there must be an accusation by the Commons and a trial before the Lords. From that time there is a marked change

in the character of the prosecutions which took place in parliament. Several such proceedings occurred, some of which cannot be reckoned as impeachments in the full and proper sense of the word. ¹ Thus in 1404 Thomas Erpyng- ham accused the Bishop of Norwich of some offence, it does not appear what, but the King ordered them to be reconciled, forgiving the Bishop, who he said had erred negligently, and thanking Erpingham and assuring him that he believed him to have acted from zeal to his service. It is not at all unlikely that the King thought that the proceeding was opposed to the statute of the previous year. In the case of the Percies (7 & 8 Hen. 4, A.D. 1406) for the rebellion in the north, ending with the Battle of Shrewsbury, there was a question as to the manner in which proceedings were to be taken, and the peers upon deliberation determined that they should be "*solonc la ley et usage d'armes.*" The record then sets forth the offences charged, proclamations made for the appearance of the parties, and the non-appearance of ² Henry Percy and Bardolf, and proceeds to convict them of treason and subject them to the penalties for that offence.

In ³ 1450 the Duke of Suffolk was impeached for high treason, and one ⁴ Tailboys for an attempt to murder Ralph Lord Cromwell. ⁵ Lastly, in 1459 Lord Stanley was impeached for not sending his troops to the Battle of Blorebeath.

All these impeachments appear to have been conducted according to what would now be recognised as the regular course of proceeding. I may, however, observe that in 1399 or 1400 a case occurred which contradicts the principle subsequently established as to pardons. ⁶ It appears

¹ "Le Roi seant en son see Roiale de son bouche propre monstra et dist a "dit Mōns Thomas coment meme celuy Mōns Thomas devant ces heures "avoit baillez a nre dit Sr le Roy une Bille de certaines empeschemenz "touchantz le dit Evesque, du quel fait meme nre Sr le Roy remercia le dit "Mōns Thomas et dist qu'il savoit bien q̄ ceo q̄ meme celuy Mōns Thomas "avoit fait a cell temps feust fait par les grantz zele chierite et tendresse "queux il avoit a sa persone," &c. The record ends by saying that the arch- bishop took the hands of the bishop and Erpingham, and "les fist prendre "l'un l'autre par la magne et leur baiser ensemble en signe d'amour perpetnel "entre eux en tout temps advenir." 3 *Rot. Par.* 456. Compare Shakspeare's mention of Erpingham in *Henry V.*

² Thomas Percy was killed at Shrewsbury but his father survived the battle for three years.

³ 5 *Rot. Par.* 176. This is Shakspeare's Suffolk in *Henry VI.*

⁴ *Ib.* 200.

⁵ *Ib.* 369.

⁶ 3 *Rot. Par.* 458.

CHAP. V. from a petition of 1400 that one Bagot had been impeached by the Commons of "pleuseurs horribles faits et mesprians." He was put to answer before the Lords and produced a "chartre generale de pardon" on which the Lords considered "q le dit Monr^s William ne deust estre empesche "ne mys a response par la loie."

It appears from all this that, with insignificant exceptions, the present law and practice as to parliamentary impeachments was established as the result of the transactions above referred to, which took place in the latter part of the reign of Edward III. and the reign of Richard II.

From 1459 to 1621, a period of 162 years, no impeachment appears to have taken place, at least none is mentioned either in the Parliament Rolls or the Lords Journals, so far as appears from the elaborate ¹indices to those collections. It is not quite easy to give a full explanation for this, though some of the reasons are obvious. The greatly increased judicial power of the Privy Council which was vested in the Star Chamber affords one reason. Such cases as those of Cogan were no doubt more easily and speedily dealt with there than by an impeachment.

The immense increase of royal power during the Tudor period would supply another reason. It was not till parliament reasserted itself under James I. and Charles I. that it became natural or perhaps possible to use impeachments for the punishment of ministers considered corrupt or oppressive. If the King himself wished to punish a minister a bill of attainder was more convenient than an impeachment because it superseded the necessity for a trial; and though our accounts of the earlier impeachments are imperfect, enough remains to show that in many cases at least witnesses were examined and some proceedings in the nature of a trial had.

Whatever the reasons may have been the fact is that the next ²regular impeachment to Lord Stanley's, in 1459, was that of Sir Giles Mompesson in 1621. From that date to the present day there have been fifty-four impeach-

¹ The index to the Parliament Rolls is a folio volume of 1036 pages. The calendar to the Lords' Journals fills two folios.

² Articles of accusation were presented in Parliament in the cases of Wolsey, Lord Seymour of Sudeley, and perhaps some others.

ments, so far as I have ascertained from the calendar to the Lords' Journals. A list of them will be found in the footnote.¹ The proceedings under some of them have been amongst the most memorable events in our general history, but little need be said of them in reference to our judicial history. They represent for the most part the

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1621.	1678.
Sir Giles Mompesson. Lord Bacon. Sir F. Mitchell. Sir H. Yelverton.	Lord Stafford and four other Roman Catholic lords. Lord Danby.
1625.	1680.
The Earl of Middlesex.	Edward Seymour. Sir W. Scroggs. Earl of Tyrone.
1626.	1681.
The Earl of Bristol. The Duke of Buckingham.	Fitz-Harris.
1640.	1689.
The Earl of Strafford. The Lord Keeper Fynch. Sir R. Barkly and other judges.	Sir A. Blair and others. Lord Salisbury. Earl of Peterborough.
1641.	1695.
Sir G. Ratcliffe.	Duke of Leeds.
1642.	1698.
Archbishop Laud. Dr. Cosens. Bishop Wren. Daniel O'Neale. Sir E. Herbert. Sir E. Dering. Mr. Strode. Mr. Spenser. Nine Lords. Sir R. Gurney. Mr. Hastings. Marquis of Hertford. Lord Strange. Mr. Wilde. Mr. Broccas.	John Goudet and others.
1661.	1701.
Mr. Drake.	Lord Portland. Lord Somers. Lord Halifax.
1666.	1709.
Lord Mordaunt.	Dr. Sacheverell.
1667.	1715.
Lord Clarendon.	Lord Oxford. Lord Bolingbroke. Duke of Ormond. Earl of Strafford. Lord Derwentwater.
1668.	1724.
Sir W. Penn.	Lord Macclesfield.
	1746.
	Lord Lovat.
	1787.
	Warren Hastings.
	1805.
	Lord Melville.

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working of a regular and well understood institution. Twice in the reign of Charles I. attempts were made to break in upon the established theory of impeachment, once in the case of the Earl of Bristol, whom the king attempted to accuse of treason in the House of Lords without any impeachment by the Commons or any indictment found by a grand jury, and once in the famous case of the five members. The list given in the note shows that the really important period, in the modern history of impeachment, was the seventeenth century, and particularly the reign of Charles I. The power of impeachment was the weapon by which the parliament fought their battle from 1640 to 1642. In the eighteenth century its importance declined, and it became a subject rather of constitutional and antiquarian curiosity than of practical importance. ¹The impeachment of Warren Hastings is, I think, a blot on the judicial history of the country. It was monstrous that a man should be tortured, at irregular intervals, for seven years, in order that a singularly incompetent tribunal might be addressed before an excited audience by Burke and Sheridan, in language far removed from the calmness with which an advocate for the prosecution ought to address a criminal court. The acquittal of the defendant shows conclusively that if a guilty man did not escape, an innocent man was cruelly oppressed.

It is hardly probable that so cumbrous and unsatisfactory a mode of procedure will ever be resorted to again. The full establishment of popular government, and the close superintendence and immediate control exercised over all public officers whatever by parliament, make it not only unlikely that the sort of crimes for which men used to be impeached should be committed, but extremely difficult to commit them.

In order to complete what I have to say on the subject of the criminal jurisdiction of Parliament I ought to notice bills of attainder and of pains and penalties. Such a bill is an

¹ Pitt's India Bill, 24 Geo. 3, sess. 2, c. 25 (amended by 26 Geo. 3, c. 57), provided a special court for the trial of offences committed in India. It was to be composed of three judges, five members of the House of Lords, and seven members of the House of Commons. The court has never sat. It was constituted before Warren Hastings was impeached, and indeed before his return from India. I suppose the act was considered not to be retrospective, or Hastings might have been tried under it.

act of parliament for putting a man to death or for otherwise punishing him without trial in the usual form. I am unable to say what was the first act of this kind, but the first that I am prepared to refer to is the ¹act of attainder of the Duke of Clarence, passed in 1477 (17 Edw. 4). It is very long and oratorical, and after setting out at length the offences imputed to Clarence, enacts "that the said George Duke of Clarence be convicted and atteynted of high treason." The act is followed by the appointment of the Duke of Buckingham as lord high steward for that occasion to do execution. Bills of attainder were, in the reign of Henry VIII., used instead of impeachments; as for instance in the cases of Wolsey, Thomas Cromwell, Queen Katharine Howard, the Duke of Norfolk, and the Earl of Surrey. They have occurred occasionally in our later history. The most memorable case is that of Lord Strafford. Other instances are those of Lord Danby, the Duke of Monmouth, and Sir John Fenwick. As instances of a bill of pains and penalties I may refer to the bill against Bishop Atterbury, and to the bill against Queen Caroline, which will probably long continue to be referred to as the last instance of such legislation.

Thus far I have considered the extent of the criminal jurisdiction of Parliament, when set in motion by an impeachment by the Commons who are said to be, for that purpose, the grand jury of the whole nation. I proceed now to consider the special criminal jurisdiction which the House of Lords possesses over Peers of Parliament. It extends only to felonies, for in cases of misdemeanour a peer may be tried like a commoner. When Parliament is sitting the tribunal is the House of Lords, which is usually, though not necessarily, presided over by a Lord High Steward appointed for the purpose. In this case the peers themselves are the judges, the Lord High Steward being only the president of the court.

If Parliament is not sitting the court is the Court of the Lord High Steward, who is the only judge of it, such other peers as may attend the court acting as a jury, under the name of the "Lords Triers."

¹ 6 *Eol. Par.* 193.

CHAP. V. These courts are of the most remote antiquity, and may indeed be regarded as remnants of the old Curia Regis, which have survived without material alteration the vicissitudes of eight centuries. The courts can hardly be said to have any history, though it will be worth while to mention a few points connected with them.

I have sufficiently illustrated the judicial functions and powers of the Curia Regis itself. ¹ The famous passage in Magna Charta about the "*legale iudicium parium suorum*" appears to me to refer to the trial of peers in the King's Court rather than to trial by jury. The 21st Article of Magna Charta has a similar expression: "*Comites et barones non amercentur nisi per pares suos et non nisi secundum modum delicti.*" I do not think that the expression "trial by jury" would have been used, or would have been intelligible, in King John's time. It would have been described rather as the taking of an inquisition by an assize, or by lawful men, and is I think referred to by the words "*vel per legem terræ.*" These would include not only inquests taken by jurors on the execution of commissions of eyre, gaol delivery and oyer and terminer, but also trials by combat or by ordeal, each of which was part of the *lex terræ* at the date of Magna Charta. In short, I should be inclined to construe "*nullus liber homo*" distributively—

¹ "*Nullus liber homo capiatur vel imprisonetur aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ.*" Stubbs, *Charters*, 361. The following observation on this passage is made in the *Report on the Dignity of the Peer* (i. 450). "The right to the *iudicium parium* asserted by that charter was probably the ancient law of the kingdom, and therefore when a person of rank was accused of any offence for which the law required trial by his peers, it was necessary that the King should summon to the Court of Justice by which the person accused was to be tried the peers of the accused. The persons attending on such occasions are sometimes described by the general words '*proceres*, or '*magnates*,' and sometimes more particularly as Archbishops, Bishops, Abbots, Priors, Earls, and Barons, with the addition also sometimes of the general words '*proceres*, or '*magnates*.' It is probable that many persons answering the several descriptions attended on extraordinary occasions which required their presence." This most elaborate report is occupied almost entirely with the legislative functions of the peerage, and says hardly anything of their judicial functions. The expression "*iudicium parium*" is however older than Magna Charta. In the *leges Henrici Primi* xxxi. 7 (Thorpe i. 534), this passage occurs: "*Unusquisque per pares suos iudicandus est, et ejusdem provincie.*" This however appears from xxix. i. to apply to "*barones comitatus.*" See too in reference to this matter the trial of Hugo in 1303, p. 260, *post*.

"no free man shall be taken, &c., except (if he is one of the "vassals of the King's Court) by the lawful judgment of his "peers, or (if he is not such a vassal) by the law of the land, "i.e. the ordinary course of justice." However this may have been, the right of the peers to be tried by their peers for treason or felony has never at any period of English history been either questioned or invaded, or modified in any way, with some slight exceptions.

I will give one or two instances of its solemn recognition. ¹In 1322 Thomas of Lancaster was put to death in a summary way by Edward II. In 1327 the judgment against him was reversed upon a writ of error, one of the principal errors assigned being "quod cum predictus Thomas comes "fuisset unus Parium et Magnatum regni, et in Magna "Cartâ de Libertatibus Angl' contineatur quod" (the well-known passage is here quoted) "predictus Thomas comes . . . " . . . morti adjudicatus est absque arenamento seu responsione seu legali iudicio parium suorum." ²In 4 Edw. 3 (1330) Roger Mortimer and his accomplice Simon de Bereford were charged in Parliament with treason. The "earls, "barons, and peers" examined the articles alleged against Mortimer, convicted him of treason, and sentenced him to death. As to Bereford, "our lord the King charged the "said earls, barons, and peers, to give right and lawful "judgment as appertains to them on Simon de Bereford, "Knight" . . . "And the earls, barons, and peers returned to the King, and said all with one voice that the "said Bereford was not their peer, wherefore they were not "bound to try him as a peer; nevertheless, as he was a "notorious traitor, they sentenced him to be drawn and "hung."

The right of peers to be tried in Parliament was affirmed by ³statute in the year 1341 (15 Edw. 3), which recited that peers of the realm had been arrested, imprisoned, subjected to forfeitures, and in some cases to death without judgment of their peers, and enacted that for the future

¹ 2 Rot. Par. 5, 6.

² *Ib.* 53. See some remarks on the irregularity of this proceeding in *Report on Dignity of a Peer*, i. p. 299, and further remarks on the case of Berkeley (mentioned above) at p. 301.

³ *Ib.* 132.

CHAP. V. "no peer of the realm, officer, or other, on account of his office, or for things touching his office," should be liable to be tried or punished "except by award of the said peers in Parliament;" and that if any peer submitted to be judged or to answer elsewhere, that was not to prejudice the rights of other peers or his own rights on other occasions.

This statute was repealed in 1343,¹ but with this singular reservation: "as some of the articles comprised in the statute are reasonable and in accordance with law and reason, those articles and the others agreed upon in this Parliament are to be made into a new statute." Whatever may have been the effect of the repeal, it does not affect the recognition of the principle made by the statute. It must be observed, however, that the statute went far beyond what has ever since been recognised as the law, for it applies to all offences whatever, and is not confined to treason and felony. I am unable to give the history of the limitation of the privilege of peers to cases of treason and felony. It is, however, apparently as old as 1442, for in that year an act (20 Hen. 6, c. 9) was passed, which recites that although Magna Charta provides that "nullus liber homo" shall be punished except by judgment of his peers, "n'est my mention fait coment femmes, dames de graunde estate par cause de leurs barons peres de la terre covertez or soulez," are to be tried upon indictments of treason or felony, and it provides that they shall be tried like other peers of the realm. It seems clear from this that a peer was not at that time entitled to be tried by his peers for a misdemeanour.

The Court of the Lord High Steward is probably a remnant of the Curia Regis, which has survived unimpaired from the Conquest at least, and probably from earlier times. The Lord High Steward was one of the great officers of the Curia Regis, and in ²Madox may be seen a collection of a great number of records and notices by historical writers relating to the different holders of the office, and to similar offices in Normandy, France, and Spain. The steward of Arragon had "a great judicial power, for he had cognizance of all causes and quarrels, except in certain cases reserved to the King's

¹ 2 Rot. Par. 139.

² 1 Hist. Exch. 48.

“own cognizance, and when he was present in any city or town whatever, all causes before any other judge were to cease, if he so commanded.” The judicial officer in all the manor courts was, as indeed he still is, called the Steward. CHAP. V.

According to ¹ Coke the office of High Steward was hereditary till the time of Henry IV., after which it was granted *hæc vice* when an occasion arose for the services of such an officer either at the trial of a peer or at a coronation.

The only legislative enactment which has taken place in relation to these courts is 7 & 8 Will. 3, c. 3, which provides that upon the trial of any peer or peeress for treason or misprision, all the peers who have a right to sit and vote in Parliament shall be duly summoned, twenty days at least before every such trial, to appear at every such trial, and that every peer so summoned, and appearing at such trial, shall vote in the trial.

The object of this statute was to remedy an abuse which formerly existed in the case of trials before the Court of the Lord High Steward. The Lord High Steward summoned such and so many Lords Triers as he thought fit, and no one who was not so summoned had a right to take part in the trial.

Indictments upon which the House of Lords or the Court of the Lord High Steward proceed may be and are found, like other indictments, either in the Queen's Bench division or on circuit, and I suppose they might be found at the Quarter Sessions, if a peer committed an offence cognizable there. When so found they are removed by certiorari into the Court before which they are to be tried.

There have been four trials of peers in the House of Lords since the end of the reign of George II., viz., Lord Ferrers for murder in 1760; Lord Byron for murder in 1765; the Duchess of Kingston for bigamy in 1776; and Lord Cardigan in 1841. The trial of Lord Delamere for treason in 1686, before Jeffreys, is, I believe, the last instance of a trial in the Court of the Lord High Steward.

¹ Coke, *4th Inst.* 58. The derivation of the office according to Coke was thus:—The Earls of Leicester were High Stewards till Simon de Montfort forfeited the office to Henry III. Henry granted the office and the earldom to his second son, Edmond, whence it descended to Henry of Bolingbroke, son and heir of John of Gaunt, and afterwards Henry IV.

CHAPTER VI.

THE CRIMINAL JURISDICTION OF THE PRIVY COUNCIL.

CHAP. VI. THE growth of the Courts of Equity forms one of its most important chapters in the history of our law. These courts supplied the defects of the crude and meagre system which constituted the common law, by the introduction of remedies unknown to it, and by the enforcement of obligations which it did not recognize. To describe the steps by which this was done does not fall within the scope of this work, but it illustrates an analogous process with reference to the criminal law, which, after making much progress, was brought to an abrupt conclusion by the legislature in consequence of the way in which it was abused. I refer to the criminal jurisdiction of the Council as exercised by the famous Court of Star Chamber. Several other analogous courts exercised a similar jurisdiction in particular places. The most important of these were the Court of the President of the North and the Court of the Marches of Wales. They have not, however, left such traces either in the law itself or in history as to make it worth while to treat of them at length. The case is different with respect to the judicial authority of the Privy Council. Not only did its decisions leave deep traces both on our law and on our history, but it is closely connected with the body which to this day holds the position of the Supreme Court of Appeal in all criminal cases arising in any of Her Majesty's dominions beyond the seas—the Judicial Committee of the Privy Council. ¹The history is as follows:—

¹ The authorities for what follows are Hallam, *Middle Ages*, iii. 138-147 (ed. 1855); Hallam, *Const. Hist.* i. 48-55, 280-283, &c., and ii. 29-31, &c.;

I have already described the constitution of the Curia Regis and the manner in which the Courts of Common Law were derived from it. Its relation to Parliament has been traced by others, and need not be mentioned here. It also (as I have said) falls outside of my subject to give any account of the origin or gradual development of the judicial authority of the Lord Chancellor, who was one of its great officers; but I must add to what has already been said that, after throwing off the great branches already enumerated the Curia Regis still continued to occupy a position corresponding to that of the Cabinet or rather of the Ministry of our own day, but of greater importance, as it had judicial as well as executive functions. In this capacity it was called the Council, and as time went on three several bodies so called came to be distinguished by different titles, namely (1) the Great Council of the Nation or Parliament; (2) the Council; (3) the Privy Council. It is a matter of great difficulty to distinguish these three bodies from each other in the early stages of their history. I need say nothing as to the difficulty of distinguishing between councils and parliaments; nor is it necessary to my present purpose to go beyond a mere mention of the difficulty of discriminating between the body called the Council and the House of Lords on the one hand, and the Privy Council on the other. A full collection of all that is known on these subjects will be found in the works of the writers already referred to.

The leading points in the history of the judicial authority of the Council are these: It took from the earliest times a part in the administration of justice, which was viewed with great suspicion by Parliament, and was made the subject of remonstrance by them on various occasions in the course of

Palgrave's *Essay on the Original Authority of the King's Council*; Hudson's "Treatise on the Star-Chamber," in *Collectanea Juridica*, vol. ii. The passages referred to in Hallam are little more than an abstract of what is said by Palgrave and Hudson. A note in the last-mentioned treatise says that a MS. copy of it contains a memorandum purporting to be signed by J. Finch, Chief Justice of the Court of Common Pleas, and afterwards Lord Keeper, which says, "This Treatise was composed by William Hudson, of Gray's Inn, Esquire, one very much practised, and of great experience in the Star Chamber, and my very affectionate friend." The note in question also refers to a reference made to it by Lord Mansfield in Wilkes's case, 4 Burr. 2554. The treatise is singularly well written and full of curious information.

CHAP. VI. the fourteenth and fifteenth centuries. Notwithstanding these remonstrances, and also notwithstanding the provisions of several statutes on the subject, the jurisdiction of the Council continued and increased, and it ultimately established itself as one of the recognised institutions of the country.

The Council when acting in its judicial capacity¹ "held its sittings in the 'Starred Chamber,' an apartment situated in the outermost quadrangle of the palace, next to the bank of the river, and consequently easily accessible to the suitors, and which at length was permanently appropriated to the use of the Council. The 'lords sitting in the Starred Chamber' became a phrase . . . and we can hardly doubt that this circumstance contributed to assist the Council in maintaining their authority."

The Court of Star Chamber had become an established institution by the reign of Henry VII. Early in that reign a statute was passed (3 Hen. 7, c. 1), which, though it did not, as has been sometimes supposed, create the court, conferred special powers on some of its members.

The court rose to the height of its influence under Elizabeth. It was regarded under James I. and Charles I. as oppressive, and was finally abolished in 1640, by 16 Chas. 1, c. 10. This celebrated Act recites the different statutes bearing on the subject, declares that the proceedings, censures, and "decrees of the court have by experience been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government," and enacts that the Court of Star Chamber, and all similar courts, and particularly the Courts of the Council of the Marches of Wales, the President and² Council of the North, the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester, shall be abolished, and that no similar court shall be established for the future.

¹ Palgrave, 58.

² The words of the Act (s. 4) are: "The like jurisdiction now used and exercised in the courts named shall be also repealed and absolutely revoked and made void." The Court of Star Chamber was dissolved (s. 3), but the other courts were not dissolved in terms. The "Court holden before the President and Council of the Marches of Wales" seems to have survived for forty-eight years, as it was abolished in 1688 by 1 Will. & Mary, c. 27.

It is unnecessary to dwell in this place upon events which fill so large a space in the general history of the country, but the earlier history of the Council is less well known than the events which led to its fall. CHAP. VI.

¹ "It seems," says Sir F. Palgrave, "that in the reign of Henry III. the Council was considered as a Court of Peers within the terms of Magna Charta; and before which, as a court of original jurisdiction, the rights of tenants holding *in capite*, or by barony, were to be discussed or decided; and it unquestionably exercised a direct jurisdiction over all other the King's subjects." "Great transgressions against the public peace were heard before the Council." In a note to this passage Sir F. Palgrave refers to the arraignment of Segrave, Constable of the Tower, for permitting the escape of Mortimer, and quotes a curious record, in which Sir John Dalton is summoned, "sub forisfacturâ vitæ et membrorum et omnium aliorum quæ nobis forisfacere poteris" to bring before the Council one Margeria de la Beche, the wife of Gerard De L'Ile, whom Dalton had forcibly abducted, and to do and receive (*ad faciendum et recipiendum*) such orders as the Council shall give.

No opposition appears to have been made to this jurisdiction till the 25th Edw. 3 (1350), when the ²Commons petitioned "qe nul franc homme ne soit mys a respondre de son franc tenement ne de riens que touche vie et membre fyns ou redemptions par apposailles (informations) devant le conseil nre seignur le Roi, ne devant ses ministres quecumques sinoun par proces de ley de ceo en arere use." The answer is, "Il plest a nre seignur le Roi q̄ les leies de son Roiaume soient tenuz et gardez en lour force, et q̄ nul homme soit tenu a respondre de son fraunk tenement sinoun par processe de ley; mes de chose que touche vie ou membre contemptz ou excesse soit fait come ad este use cea en arere."

This seems to be an express recognition of the fact that for at least 135 years after Magna Charta the criminal jurisdiction of the Council was undisputed. ³Either in the

¹ P. 34.

² 2 Rot. Par. 228, and see Palgrave, 25.

³ 2 Rot. Par. 239.

CHAP. VI. same or in the next Parliament a similar petition was granted without any reservation, and this led to the statute printed as 25 Edw. 3, st. 5, c. 4. Similar statutes were passed in 1354 (28 Edw. 3, c. 3) and in 1368 (42 Edw. 3, c. 3).¹ On two occasions in the reign of Richard II., three in the reign of Henry IV., two in the reign of Henry V., and one in the reign of Henry VI., petitions were made by Parliament with a view to limit the powers of the Council, but none of them passed into a statute, the answers given by the King being either unfavourable or qualified. Some of these petitions and the answers show that the ground on which the jurisdiction of the Council was defended was the difficulty in many instances of obtaining redress for injuries at the common law. ² Thus in 1399 (1 Hen. 4) the Commons petition that personal actions between party and party may not be tried by the Council, to which the answer is, "Soit l'Estatut ent fait tenuz et gardez, la ou l'une partie est si graunt et riche, et l'autre partie si povre qu'il ne purra autrement avoir recoverer." The word "except" (supplied by ³Sir F. Palgrave after "gardez") appears to be wanted.

Upon the whole, the legal position of the Court of Star Chamber in 1640 seems to have been this. It had existed for 135 years after Magna Charta without being supposed to be illegal or to be in any way opposed to Magna Charta. In 1350, 1354, and 1368, three successive acts of Parliament were passed, which, at first sight, seem to be intended to abolish it. From 1368 to 1640 (272 years) it continued to exist, notwithstanding parliamentary petitions which did not become statutes, the last of which was made in 1422, 218 years before 1640. On the other hand, the statute 3 Hen. 7, c. 2, if it did not exactly recognise the powers of the old court, at all events established a new one composed of several of its members and with a jurisdiction which, as far as it went, was identical with it.

It would seem natural under such circumstances to suppose that some other interpretation ought to be put upon the statutes of Edward III. than that which was given to them

¹ See too 11 Rich. 2, c. 10.

² 3 *Rot. Par.* 446.

³ p. 47.

in 1640. ¹Hudson suggests "that these statutes did not "extinguish the power of the court, but the abuse of apprehending men's persons to answer suggestions." The words of the statutes are "no man shall be put to answer before the King or his Council without presentment before his justices, matter of record, or writ original according to the ancient laws." ²Hudson argues that the letter of privy seal, by which proceedings were, at least in many cases, commenced before the Star Chamber was an original writ, and that the abuse intended to be remedied was the arrest of a defendant by a pursuivant on a bare suggestion by a plaintiff. The phrase "no man shall be put to answer before the Council, unless" certainly seems to imply that there was some legal way of proceeding before that body. Be this as it may, it is to be observed that even the Act of 1640 did not declare the Court to be in itself illegal and its powers to be usurped. On the contrary, it recites that the matters examinable there are all capable of being duly remedied at common law, and that "the reasons and motives inducing the erection and continuance of that court do now cease."

I shall have to return to the subject of the Star Chamber in connection with the history of the definitions of crimes and the history of legal procedure. I will conclude what I have to say at present by some observations on the general character and functions of the court.

The praises of trial by jury as a bulwark of individual liberty are a familiar topic. It is less commonly known, but it is certainly no less true, that the institution opened a wide door to tyranny and oppression by men of local influence over their poorer neighbours. ³In feudal

¹ P. 12.

² P. 4; see too Coke, *4th Inst.* 63.

³ Sir F. Palgrave (pp. 103, 289, &c.) gives some curious illustrations of this. The following are verses from a "ballad or libel" of the time of Edward I. :—

" *Mes le male doeymes dount Dieu n'est ja pieté,
Parrui lur fauce bouches me ont enditée,
De males robberies e autre mavestée,
Qe je n'ose entre mes amis estre receptée.*

" *Si ces maveis jurours ne se vueillent amender,
Qe je pus a mon pais chevalcher e aller,
Si je les pus ateindre la teste lur froi voler,
De touz lur manaces ne dorroi un denier.*

CHAP. VI. times the influence of a great landowner over the persons who were returned as jurymen to the assizes was practically almost unlimited, and the system of indictment by a grand jury which merely reported on oath the rumours of the neighbourhood might, and no doubt often did, work cruel injustice. The offence which was long known to the law as maintenance, or perverting justice by violence, by unlawful assemblies and conspiracies, was the commonest and most characteristic offence of the age. One of its commonest forms was the corruption and intimidation of jurors. Signal proof of this is supplied by the repeated legislation against this offence. The nature of the offence itself, and the

“ Vous qui estes endité je lou venez ci moi,
Cit vert bois de Belregard, la n’y a nul ploy,
Forsque beste sauvage e jolyf umbroy,
Car trop est dotouse la commune loy.

The following passage is from the *Dance of Death*, and gives a conversation between Death and a juror :—

“ Master jurrou, which that at assizes,
And at sheres quests didst embrace
Deper didst lond like to thy devises,
And who most gave most stood in thy grace,
The poor man lost both lond and place,
For gold thou couldest folk disherite,
But now let see with thy pale face,
Tofore the judge how caust thee quite !”

The jurrou maketh answer :—

“ Whilom I was cleped in my countrey,
The belweather, and that was not alight ;
Nought loved but drad of high and low degree,
For whom the best by craft I could endite,
Hengen the true and the thef respite,
All the countrey by my word was lad,
But I dare sein shortly for to write,
Of my death many a man is glad.”

The case of Cogan, quoted above, from the Parliamentary Rolls is an illustration of the same thing. He offered to make good his case in any way, “sinoun par verdit de jurrou.” I cannot say, however, that the introduction of such phrases into popular ballads proves very much. The writers may have been great rogues. In my youth a ballad used to be sung which was said to be a genuine product of the hulks. It began—

“ My curse rest on you, Justice Bayley,
And gentlemen of the jury also,
For transporting me from the arms of my Polly,
For twenty long years as you know.”

This is very like the “males doseynes dount Dieu n’est ja pieté.” The defects of trial by jury in early times rest, however, on better evidence than this.

manner in which it was to be corrected by the Court of Star Chamber, are fully described in the preamble and first section of 3 Hen. 7, c. 1, "The King our said sovereign lord remem-
 " bereth how by unlawful maintenance, giving of liveries, signs,
 " and tokens, and retainders by indentures, promises, oaths,
 " writings, or otherwise embraceries of his subjects, untrue
 " demeanings of sheriffs in making of panels and other un-
 " true returns, by taking of money by juries, by great riots
 " and unlawful assemblies, the policy and good rule of this
 " realm is almost subdued, and for the not punishing of these
 " inconveniences, and by reason of the premises, little or
 " nothing may be found by inquiry" (*i.e.* by inquests or
 " juries), "whereby the laws of the land in execution may take
 " little effect, to the increase of murders, robberies, perjuries,
 " and unsurities of all men living, and losses of their lands
 " and goods to the great displeasure of Almighty God."
 "Therefore it is ordained for Reformation of the Premisses
 " by authority of the said Parliament, that the Chancellor
 " and Treasurer of England for the time being, and Keeper
 " of the King's Privy Seal, or two of them, calling to them
 " a bishop and a temporal lord of the king's most honour-
 " able Council, and the two chief justices of the King's
 " Bench and Common Pleas for the time being, or two other
 " justices in their absence, upon bill or information put to
 " the said Chancellor for the king or any other against any
 " person for any misbehaviour before rehearsed, have authority
 " to call before them by writ or by Privy Seal the said misdoers,
 " and them and other by their discretion, by whom the truth
 " may be known, to examine, and such as they find therein
 " defective to punish them after their demerits, after the
 " form and effect of statutes thereof made, in like manner
 " and form as they should and ought to be punished as if
 " they were thereof convict after the due order of the
 " law."

It is extremely difficult to say what was the precise object or effect of this statute. Coke seems to attribute to it no other effect than that of varying the procedure of the Star Chamber by enabling them to examine defendants, but this seems impossible, both because (according to Hudson)

CHAP. VI. such was the regular procedure of the Court, and because that procedure does not appear to have been confined after the statute to cases which fell within it.

¹ Hudson refers to the subject in such a way as to show that at one time it was a moot point whether the Council had any criminal jurisdiction other than that which this statute conferred upon them, but that the court held that it had. ² Lord Bacon says of the statute that "the authority of the Star Chamber which before subsisted by the ancient common laws of the realm was confirmed in certain cases by it." A very indefinite remark, accompanied by no explanation of the reasons for such an enactment. ³ Mr. Hallam's opinion, founded upon an elaborate examination of the authorities, is as follows:

1. The Court erected by the statute of Henry VII. was not the Court of Star Chamber.

2. The Court by the statute subsisted in full force till beyond the middle of Henry VIII.'s reign, but not long afterwards went into disuse.

3. The Court of Star Chamber was the old concilium ordinarium, against whose jurisdiction ⁴ many statutes had been enacted from the time of Edward III.

4. No part of the jurisdiction exercised by the Star Chamber could be maintained on the authority of the statute of Henry VII.

On so very obscure a subject it is impossible now to go beyond conjecture. My conjecture, offered with very little confidence, is that the statute was meant to give an indis-

¹ P. 80. "It is a received opinion that the court should meddle with no other causes than are expressed in the statute 3 Hen. 7, and I well remember that the Lord Chancellor Egerton would often tell that in his time, when he was a student, Mr. Serjeant Lovelace put his hand to a demurrer in this court for that the matter of the bill contained other matters than were mentioned in the statute 3 Hen. 7, and Mr. Plowden, that great lawyer, put his hand thereto first, whereupon Mr. Lovelace easily followed. But the cause being moved in court, Mr. Lovelace being a young man, was called to answer the error of his ancient Mr. Plowden, who very discreetly made his excuse at the bar that Mr. Plowden's hand was first unto it, and that he supposed he might in anything follow St. Augustine. And although it were then overruled, yet Mr. Serjeant Richardson, thirty years after, fell again upon the same rock, and was sharply rebuked for the same." See also the case of Chambers, 3 St. Tr. 380.

² *History of Henry VII.*, Bacon's works, by Spedding, vi. 85.

³ *Cons. Hist.* i. 55, note.

⁴ This is rather an overstatement.

putable statutory authority to that part of the Star Chamber jurisdiction which appeared at the date of the statute most important, but that as it was found that the wider authority of the old court was acquiesced in, the statute fell into disuse. This conjecture is strengthened by the circumstance that the statute of Henry VII. is silent as to the jurisdiction of the court over several offences which, at the end of the fifteenth century, were probably of comparatively little importance, but which in the sixteenth and the beginning of the seventeenth century gave the court its principal value in the eyes of the government. Of these, libels are the most important.

Whatever may be the true explanation of these matters there can be no doubt at all as to the nature and functions of the court itself. The jurisdiction of the Chancellor in civil matters, and the jurisdiction of the Council or Star Chamber in criminal matters, grew up side by side. Lord Bacon, after mentioning the common law courts,¹ says, "There was nevertheless always reserved a high and pre-eminant power to the king's counsel in causes that might in example or consequence concern the state of the Commonwealth; which if they were criminal, the counsel used to sit in the chamber called the Star Chamber; if civil, in the White Chamber or White-hall. And as the Chancery had the prætorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital."

² In early times the Council was accustomed to grant to individuals the special commissions of Oyer and Terminer under the Privy Seal, which I have already referred to. When such commissions were forbidden by statute, the Council heard such cases themselves, they compelled appearance by ³ writs of premunire, and afterwards by the writ of ⁴ subpœna, which was invented in Edward III.'s time by Sir

¹ Works, vi. 85.

² Palgrave, pp. 27-38.

³ "Edwardus, &c., Vice comitibus London, salutem. Quibusdam certis de causis vobis mandamus firmiter injungentes quod præmunire faciatis "H. C. &c., quod . . . sit . . . coram consilio nostro, &c." Palgrave, note 11, p. 131.

⁴ "Edwardus, &c., R. S. salutem. Tibi præcipimus quod sis coram consilio nostro, &c. Et hoc sub pœnâ centum librarum nullatenus omittas." Palgrave, p. 41.

CHAP. VI. John de Waltham (afterwards Bishop of Salisbury). Sir Francis Palgrave compares the authors of these writs to the forgotten inventors of the writs of ¹Latitat and Quo Minus, by which the Courts of King's Bench and Exchequer usurped civil jurisdiction. The Star Chamber proceeded by bill and answer, and administered interrogatories to the accused party, whom they examined upon oath. ²Hudson gives several instances in which, without exactly trying people for common offences, such as treason and murder, they inflicted heavy penalties for acts which might have been punished at common law under those denominations. The Earl of Rutland, for instance, was fined £30,000 for being concerned in the Earl of Essex's insurrection. ³"And there are above a hundred precedents where persons that gave countenance to felons were here questioned." In cases "pending upon felony" the party was not examined upon oath.

These, however, were not the cases which commonly employed the Star Chamber. They are thus enumerated by ⁴Hudson: Forgery, perjury, riot, maintenance, fraud, libelling, and conspiracy. Besides these ⁵he ascribes to the court power to punish offences not defined or punishable at common law, and ⁶he enumerates some instances in which jurisdiction was conferred on the court by statutes long since forgotten.

To some of these matters I shall have to return in another part of this work. It is enough for the present to say that the tyrannical proceedings for political offences which ultimately caused the abolition of the court ought not to make us forget the great services which it rendered, not only to the cause of good order but to the law of the country.

¹ The writ of Latitat affirmed that the defendant ought to be in the custody of the Marshal of the King's Bench, to answer for a trespass, suggested in what was called a Bill of Middlesex, instead of which he "latitat et discurrit" in some county other than Middlesex. The writ of Quo Minus stated that the defendant being a Crown debtor owed money to the plaintiff, whereby he was less able than he would have been to pay his debt to the Crown—a matter for the Exchequer. (3 Black. Com. 284-286.)

² P. 62.

³ P. 64.

⁴ P. 71. Bacon (vi. 85) mentions four "forces, frauds, crimes various of stellionate, and the inchoation or middle acts towards crimes capital or heinous not actually committed or perpetrated."

⁵ P. 107.

⁶ P. 113.

The common law was in all ways a most defective system. It was incomplete. Its punishments were capricious and cruel. Its most characteristic institution, trial by jury, was open to abuse in every case in which persons of local influence were interested. Juries themselves were often corrupt, and the process of attain, the only one by which at common law a false verdict could be impeached or corrupt jurymen be punished, was as uncertain and as open to corrupt influences as other forms of trial by jury. ¹“When a corrupt jury,” says Hudson, “had given an injurious verdict, if there had been no remedy but to attain them by another jury, the wronged party would have had small remedy, as is manifested by common experience, no jury having for many years attained a former. As also at this day in the Principality of Wales, if a man of good alliance have a cause to be tried, though many sharp laws have been made for favourable panels, yet it is impossible to have a jury which will find against him, be the cause never so plain: or if arraigned for murder he shall hardly be convicted, although the fear of punishment of this court carries some awful respect over them.”

According to our modern views, the proper cure for such defects would be intelligent and comprehensive legislation as to both crimes and criminal procedure, but for many reasons such an undertaking as a criminal code would have been practically impossible in the Tudor period. In these circumstances, the Star Chamber, not merely exercised a control over influential noblemen and gentlemen which put a stop to much oppression and corrupt interference with the course of justice, but supplied some of the defects of a system which practically left unpunished forgery, perjury, attempts and conspiracies to commit crimes, and many forms of fraud and force.

In the later stages of its history no doubt the Court of Star Chamber became a partisan court, and punished with cruel severity men who offended the King or his ministers. Nothing can be said in excuse of such proceedings as those against Prynne or Lilburne; but it is just to observe that the

¹ P. 14.

CHAP. VI. real objection made was to the punishment of the acts themselves, rather than to the cruelty of branding or whipping. The punishments inflicted by the common law were in many cases more cruel than those of the Star Chamber, yet they seem to have excited no indignation. There is also some reason to believe that the cruel punishments inflicted under Charles I. were at least to some extent an innovation on the earlier practice of the court.

It is curious to observe the degree to which the Court of Star Chamber impressed the imagination of several observers, one of whom at all events was unlikely to flatter it at the expense of the courts of common law, though it may certainly be observed of all that they seem to protest too much to be quite sincere. Bacon¹ describes it as "one of the sagest and noblest institutions of this kingdom." Coke says, "It is the most honourable court (our parliament excepted) that is in the Christian world, both in respect of the judges of the court, and of their honourable proceeding according to their just jurisdiction, and the ancient and just orders of the court." . . . "This court, the right institutions and ancient orders thereof being observed, doth keep all England in quiet." Hudson becomes quite enthusiastic on the subject. "Since the great Roman senate so famous to all ages and nations as that they might be called *jure mirum orbis*, there hath no court come so near them in state honour and judicature as this; the judges of

¹ *Works*, vi. 85.

² *4th Inst.* p. 65.

³ P. 17. His enthusiasm is displayed in an amusing way in his discussion of the origin of the name of the court (p. 8). "I confess I am in that point a Platonist in opinion that '*nomina naturæ sunt potius quam vagæ impositione*,' for assuredly Adam before his fall was abundantly skilful in the nature of all things; so that when God brought him all things to name he gave them names befitting their natures. And so I doubt not but Camera Stellata . . . is most aptly named; not because the Star Chamber is so adorned with stars gilded, as some would have it, for surely the chamber is so adorned because it is the seal († seat) of that court; . . . and it was so fitly called because the stars have no light but what is cast upon them by the sun, by reflection being his representative body; and as his royal majesty himself was pleased to say,"—in short he said that he was the sun and the judges the stars, but his majesty and Hudson between them spin out this conceit much as Lady Margaret Bellenden spun out the history of Charles II.'s breakfast at Tillietudlem. The favourite derivation of the name of the court is from the stars or Jewish charters anciently kept there. (See Madox, *Exch.* i. 237.) The Jews were expelled in Edward I.'s reign, and the meaning of the word "stara" would naturally be forgotten, though the name might survive.

“this court being surely in honour, state, and majesty, learning, understanding, justice, piety, and mercy equal, and in many exceeding the Roman senate by so much, by how much Christian knowledge exceedeth human learning.” After giving a long and curious account of the authority of the Chancellor as chief judge of the court, ¹he says: “As concerning the great and eminent officers of the kingdom, the Lord Treasurer, Privy Seal, and President of the Council, their places or voices in this court when the superior sitteth are of no more weight than any other of the table; so that the displeasure of a great officer cannot much amaze any suitor, knowing it is but one opinion, and the court is not alone replenished with noble dukes, marquises, earls, and barons, which hereby ought to be frequented with great presence of them, but also with reverend archbishops and prelates, grave counsellors of state, just and learned judges, with a composition for justice, mercy, religion, policy, and government, that it may be well and truly said that Mercy and Truth are met together, Righteousness and Peace have kissed each other.” He adds that in the reigns of Henry VII. and Henry VIII. the number of members present was at times thirty or even forty, as also in the time of Elizabeth, “but now much lessened since the barons and earls not being privy counsellors have forborne their attendance.” He also remarks that in the time of Henry VII. and Henry VIII. the punishments were far less severe than afterwards, the fines being imposed with due regard to the “*salvo contentamento suo*” of Magna Charta, and ²“the slavish punishment of whipping” not having been introduced “till a great man—of the common law and otherwise a worthy justice forgot his place of session, and brought” (? it) “in this place too much in use.”

This curious passage seems to show that under the Tudors the Star Chamber was a numerous and comparatively mild

¹ P. 35.

² The words in the printed book are “the slavish speech of whispering,” which is nonsense. Hallam makes the emendation given in the text upon the authority of a MS. in the British Museum. (See Hallam, *Const. Hist.* ii. p. 34, ed. 1855.)

CHAP. VI. body, resembling in its constitution and proceedings a deliberative council rather than an ordinary court of justice, and that the proceedings which led to its abolition and made its name infamous were carried on at a time when it had come to consist of a small number of what we should call cabinet ministers, who abused its powers to put down opposition to their policy. It is unnecessary to refer in detail to the well-known instances of this abuse which led to the abolition of the court, though I have noticed some of them ¹ elsewhere.

Although the Court of Star Chamber, and with it the most important judicial powers of the Council, were abolished in 1640, one degree of criminal jurisdiction still remained in and is actually exercised at this day by the Privy Council. Whatever may be the law as to the power of the sovereign to establish new courts of justice in England by charter—a power which if it exists is never exercised or likely to be exercised except under the provisions of acts of parliament (as for instance, when a borough is created with a new Court of Quarter Sessions under the statutory provisions already referred to), it is the undoubted prerogative of the crown to establish courts of justice in any possessions which it may acquire beyond the realm, either by conquest or by settlement, and an appeal lies from such courts to the sovereign, unless it is taken away either by statute or charter. An appeal to the King also lay from all ecclesiastical courts, and from the Court of Admiralty. These last mentioned appeals were made by virtue of 25 Hen. 8, c. 19, and 8 Eliz. c. 5, to “the King’s Majesty in the King’s Court of Chancery,” and were heard by a body of delegates named by commission for that purpose. By 2 & 3 Will. 4, c. 92, the appeal in such cases has to be made to the King in Council, and by 3 & 4 Will. 4, c. 41, all such appeals, and also all appeals “from various Courts of Judicature in the East Indies, and in the plantations, colonies, and other dominions of his Majesty abroad” were to be heard before a body called the Judicial Committee of the Privy Council, which was constituted by the act

¹ See p. 328, *post*.

in question in place of a committee of the whole of the Privy Council, before which it had up to that time been customary (as the act recites) to hear such appeals. CHAP. VI.

The right to hear appeals in criminal as well as in civil matters from all Her Majesty's dominions beyond the seas, in all cases in which that right has not been expressly taken away, has been solemnly affirmed and exercised in a series of very modern cases. The principle is laid down in the case of ¹ *R. v. Bertrand* in which Sir J. T. Coleridge in delivering judgment said: "Upon principle and reference to the decisions of this committee it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and on all proper occasions the duty of the Queen in Council to exercise an appellate jurisdiction. . . . But the exercise of this prerogative is to be regulated by a consideration of circumstances and consequences; and interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience that in them the crown will be very slow to entertain an appeal by its officers on behalf of itself or by individuals. The instances of such appeals being entertained are therefore very rare." Many cases are referred to in this report, by which the conclusion quoted is fully established. It is remarkable that the ² earliest of them was decided so lately as in the year 1835, and it does not appear from the report that the question, Whether the court had any such jurisdiction or not was raised on that occasion; the jurisdiction has been exercised sparingly no doubt, but on several very recent occasions.³ This jurisdiction is so narrowly limited, and so rarely exercised that it has been little noticed by writers

¹ L.R. 1 P.C. 529. In this case the question was discussed whether a new trial in cases of felony could be granted at common law.

² *Pooneakhoty Modeliar v. The King*, 3 Knapp, 348.

³ See *e. g.* *R. v. Burah*, L.R. 3-App. Cases, 889, in which the question was as to the extent of the legislative powers of the government of India; *R. v. Mount*, L.R. 6 P.C. 283, in which the question was as to the sentence to be passed by an Australian court in its Admiralty jurisdiction.

CHAP. VI. on criminal procedure. In a historical point of view it is one of the most remarkable parts of the whole system, for it connects the common administration of justice in our own days with the Curia Regis through the Court of Star Chamber.

In a few words the result of the history just related at length is as follows:

From the most remote antiquity the administration of justice was the highest or one of the highest prerogatives of the sovereigns of this country, and his council or court was the organ by which that prerogative was exercised.

The original council or court was divided in course of time into the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer, each of which had originally its own peculiar province but each of which contrived to intrude to some extent upon the province of the other two, the three between them administering the known and well recognised law of the land.

By the side of this comparatively well-defined jurisdiction, grew up by degrees the equitable jurisdiction (as it came to be called) of the Lord Chancellor, and the judicial authority, both civil and criminal, of the Council itself or Court of Star Chamber. The jurisdiction of the Chancellor being by experience found to be beneficial, and being wisely and justly used, was the foundation of the great Court of Chancery and of that part of our law or jurisprudence which goes by the name of equity. The judicial authority, civil and criminal, of the Council or Star Chamber being used oppressively for political purposes, was destroyed. After its destruction, however, the authority of the sovereign extended itself over a vast empire, including the whole of India, a great part of North America, Australia, New Zealand, the Cape, and many other places. ¹The ancient prerogative of

¹ The extreme difficulty of saying precisely how far the prerogative of the sovereign as fountain of justice extends, and at what point the power of the King to erect courts of justice ends, is well illustrated by the discussions which arose some years since as to the validity of those clauses in the patents of certain colonial bishops, which purported to give some of them jurisdiction over others. The question was fully argued before the Judicial Committee of the Privy Council in the matter of the Bishop of Natal. One point raised during that argument was as follows: It was urged that the view contended for by

the crown as the fountain of justice was held to vest in it the ultimate appeal in all cases, civil and criminal, from all courts in these vast territories, and a committee of the Privy Council, which is the direct descendant of the old Curia Regis, is to this day the organ by which that prerogative is administered. CHAP. VI.
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In concluding this account of the criminal jurisdiction of the Privy Council I must mention their powers as committing magistrates. From the earliest times they have exercised the power of inquiring into criminal charges and committing suspected persons for trial. "The power of the Privy Council," says Blackstone,² "is to inquire into all offences against the government and to commit the offenders to safe custody, in order to take their trial in some of the courts of law." For a great length of time this was the common course in regard to all political offences, but now it is usual to send even political offenders before a magistrate to be dealt with in the ordinary way. When Oxford shot at the Queen he was examined in the first instance before the Privy Council, but was afterwards sent before a police magistrate. Maclean, who committed the same offence in 1882, was not brought before the Privy Council at all, but was committed in the common way by the borough magistrates at Windsor.

the counsel for the Bishop of Natal involved the absurd conclusion that he was subject to no jurisdiction at all. To this his counsel answered that the crown could issue a commission to try him. It was replied that this would be contrary to the statute (16 Chas. 1, c. 11, s. 5) by which the High Commission Court was abolished and the foundation of similar courts forbidden for the future. It was rejoined that such a construction of the statute would involve the absurd result that if the Archbishop of Canterbury were to commit an ecclesiastical offence he could not be tried at all, for he could not try himself in his own court, and there was no other to try him, unless the Queen could issue a commission for that purpose. The counsel against the Bishop of Natal attempted to rebut this argument in different ways. Sir Robert Phillimore suggested that in such a case the archbishop might be tried by a general council of the church (which was directly opposed to the royal supremacy) and Lord Cairns (then Sir Hugh Cairns) suggested that he might be impeached in parliament, which again seems a singular mode of proceeding in an ecclesiastical case, though no doubt there were precedents for it in the reign of Charles I.

² 1 Black. Com. 280.