CHAPTER VII.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE.—PROCEDURE DOWN TO COMMITTAL FOR TRIAL OR BAIL.

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HAVING in the last chapter traced the history of the courts of a criminal jurisdiction, I now proceed to the history of the procedure followed for the punishment of criminals. I shall give the history of each step in the procedure separately, and I intend in the present chapter to treat of the procedure from the arrest of the offender to his discharge or committal for trial. This consists of two stages, namely, the apprehension of the offender, closely connected with which is the law as to the suppression of offences, and the preliminary investigation before a magistrate, which results in the discharge, or committal for trial, or bailing of the supposed offender.

In each case, the law itself was as a matter of fact subsequent to the establishment of the officers or courts by which it was carried into execution. Also, in each case, after the practice of the officers or courts had gradually formed the law, alterations were made by statute both in the law itself and as to the officers and courts by whom it was to be administered.

[1] THE APPREHENSION OF OFFENDERS AND SUPPRESSION OF OFFENCES.

I have described above the system for the apprehension of offenders and the prevention of crime which existed down to the time of William the Conqueror and his sons.

The foundation of the whole system of criminal pro-

[1] As to existing laws of arrest, see *Dig. Crim. Proc.* ch. xii. arts. 96-98.

cedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, "The King's Peace," the legal name of the normal state of society. This prerogative was exercised at all times through officers collectively described as the [1] Conservators of the Peace. The King and certain great officers (the chancellor, the constable, the marshal, the steward, and the judges of the King's Bench) were conservators of the peace throughout England, but the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace, the constable, each in his own district. During the reigns of Henry II., Richard I., John, Henry III., and Edward I., the system administered by these authorities (with the exception of the justices of the peace, who were not established till the reign of Edward III.) was elaborated and rendered more stringent than it had been before the Conquest by a long series of enactments.

The first of these was the [2] Assize of Clarendon issued by Henry II. in 1166, just 100 years after the Conquest. It was re-issued as the [3] Assize of Northampton in 1176, in the form of instructions to the six "committees of judges who "were to visit the circuits then marked out." The provisions of the Assize of Clarendon bear more directly on the present subject than those of the Assize of Northampton.

[4] The Assize provided that the sheriffs and justices should make inquiry upon the oath of twelve men from every hundred and four men from every township whether any man in any township was [5] a robber, murderer, or thief, or a receiver of robbers, murderers, or thieves; that every person so accused should be taken and brought before the sheriffs and by them before the justices, and that no lord of a franchise [6] "nec in "honore etiam de Wallingeford" should interfere to prevent the sheriff from entering his franchise either to arrest accused

[1] On the conservators of the peace, see FitzHerbert, *Justices of the Peace*, 6 B.; Coke, *2nd Inst.* 538; a large collection of authorities in Burn's *Justice*, title "Justices of the Peace;" Hawkins, *Pleas of the Crown*, bk. ii. ch. viii. vol. ii. p. 38, edition of 1814; but the best and most instructive account of the matter is to be found in the celebrated judgment of Lord Camden in Entick *v.* Carrington (the case of the seizure of papers), 19 *St. Trials*, 1030. See also *ante*, p. 110, &c.

[2] Stubbs, *Charters*, 140-146. [3] *Ib.* 150-153. [4] Arts. 2, 4.

[5] "Robator vel murdrator vel latro." [6] Arts. 9-11.

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persons or to examine the frank pledges and see that every one was a member of a frank pledge. The Assize of Northampton [1] enacts amongst other things that every robber on being taken is to be delivered to the custody of the sheriff, and in his absence to be taken to the nearest "castellanus" to be kept by him till he is delivered to the sheriff. The Assize also provides (art. 2) that no one is to be allowed to entertain any guest in his house, either in a town or in the country (neque in burgo neque in villâ), for more than a night unless the guest has some [2] reasonable excuse which the host is to show to his neighbours, and when the guest leaves, he must do so in the presence of neighbours and by day.

By the [3] Assize of Arms, issued in 1181, every one was bound to have certain arms according to his property. The justices, on their eyre, were to make the representatives of all hundreds and towns swear to give in a return showing the property of all persons in the neighbourhood, and which of them had the arms which, according to their property, they were bound to have. Those who had not such arms were to be brought before the justices to swear to have them by a given day, and "justitiæ facient "dici per omnes comitatus per quos ituræ sunt, quod qui "hæc arma non habuerint secundum quod prædictum est, "dominus rex capiet se ad eorum membra et nullo modo "capiet ab eis terram vel catallum."

The main object of these provisions no doubt was to provide a military force; but they were also intended to give the local authorities the means of suppressing violent crimes, for the persons so armed formed the power of the county (*posse comitatus*), which it was the duty of the sheriff in case of need to raise by hue and cry.

This is set in a striking light by a [4] passage in Bracton, which describes the steps to be taken on opening a commission of eyre by the justices in eyre. The representatives of the county having been convened, the justices were to make

[1] Art. 12; Stubbs, *Charters*, 152.
[2] "Essonium," this is the technical word for the excuses given for not taking a step in procedure, *e.g.* for not appearing on being summoned in an action.
[3] Stubbs, *Charters*, 154.
[4] Bracton, iii. 1, vol. ii. p. 235-237 (Twiss's edition).

a speech to them. "In the first place, concerning the peace "of our Lord the King, and the violation of his justice by "murderers, robbers, and burglars, who exercise their malice "by day and by night, not only against men travelling from "place to place, but against men sleeping in their beds, and "that our Lord the King orders all his faithful subjects, by "the faith which they owe to him, and as they wish to "preserve their own, to give effectual and diligent counsel "and aid to the preservation of peace and justice and to the "taking away and repression of the malice of the aforesaid." The principal persons are then to be taken apart, and are to be privately informed "that all persons of fifteen years of "age and upwards, as well knights as others, must swear "that they will not receive outlaws, murderers, robbers, or "burglars, nor consent to them, nor to those who receive "them, and that if they know of such persons, they will "cause them to be attached, and give information to the "sheriffs and bailiffs, and, if hue and cry is raised upon "them, will, as soon as they hear the cry, follow with their "households and the men of their land." If the criminal is not taken on the spot, he is to be tracked. "Let them "follow the track through their own land, and at the end "of their own land show it to the lord of the next land, and "thus let pursuit be made from land to land" (township to township) "with all diligence till the criminals are taken, "and let there be no delay in following the track unless a "difficulty arises by the coming on of night, or by other "reasonable cause, and they must, according to their power, "arrest those whom they suspect without waiting for the "orders of the justice or the sheriff, and must inform the "justices and sheriffs of what they have done. They must "also swear that if any one comes into any village or town "or elsewhere to buy bread or beer or other victuals, and is "suspected of doing so for the use of criminals, they will "arrest him and deliver him, when he is arrested, to the "sheriff or his bailiffs. They must also swear that they "will take in no one as a guest in their houses by night, "unless he is well known, and that if they entertain any "unknown person they will not permit him to leave on the

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Bracton wrote in the reign of Henry III. In the time of Henry's son and successor the system embodied in these enactments reached its highest point of strictness. This appears from the provisions of the Statute of Winchester (13 Edw. I, st. 2, c. 1, 2, 4, 5, 6), passed in 1285. [1] This statute enacts (ch. 2) that when a robbery is committed the hundred shall be answerable unless the robbers are apprehended within forty days, that in all walled towns the gates shall be shut from sunset to sunrise, that a watch should be set at each gate, and " that no man do lodge in " suburbs from nine of the clock until day without his host " will answer for him." All strangers passing the watch at night are to be arrested till morning. All roads are to be cleared, " so that there be neither dyke, underwood, nor " bush whereby a man may lurk to do hurt" within 200 feet on each side of the road. Lastly, every man is to " have in " his house harness to keep the peace after the ancient assize" (the Assize of Arms). The arms were to be viewed twice a year by constables chosen for that purpose, who were to present defaulters to the justices. The sheriffs and bailiffs were to follow the cry with proper horses and armour whenever it might be raised.

By this time frank pledge must have become obsolete. The Statute of Winchester makes no mention of it, nor does the Statutum Walliæ, nor indeed does any other statute with which I am acquainted treat it as an actually existing institution for keeping the peace. The name indeed continued and still exists. The view of the frank pledge, that is to say, the verification of the fact that the frank pledges were in full efficiency, and that every one belonged to such a body, was anciently one of the most important duties of the county and hundred courts and the courts leet. Hence, as the county and hundred courts

[1] This enactment was followed by others, *e.g.* 9 Geo. 1, c. 22, s. 7 (the Black Act), which in particular cases rendered the hundred liable for damages inflicted by criminals. They were all repealed by 7 & 8 Geo. 4, c. 27. There are, however, still one or two cases in which such a liability is imposed by 7 & 8 Geo. 4, c. 31. These relate to damages caused by rioters.

were disused, the expression "the view of frank pledge" came to be synonymous with "court leet." The chief business transacted in these views of frank pledge or courts leet was the presentment of petty nuisances, and especially the "assiza panis et cerevisiæ," violations by bakers and brewers of rules as to the quality of their bread and beer. It is in this sense that frank pledge is referred to in the [1]Parliament Rolls, and that the expression is used by Coke. The "Statute for View of Frank Pledge" (18 Edw. 2, A.D. 1325) specifies thirty-four such articles as to which stewards were to inquire in their leets.

Shortly the system just described was as follows. Upon the commission of a felony any one might arrest the offender, and it was the duty of any constable to do so. If the offender was not arrested on the spot, hue and cry might and ought to be raised. The sheriff and constables from the earliest times, the justices of the peace from the beginning of the reign of Edward III., were the officers by whom the cry was to be raised. In order to render the system effective, every one was bound to keep arms to follow the cry when required, all towns were to be watched and the gates shut at night, and all travelling was put under severe restrictions.

The Assize of Arms and the [2]Statute of Winchester fell into disuse, but the right of summary arrest in cases of felony continues to this day to be the law of the land, and though the sheriff's personal intervention in the matter has practically fallen into disuse, the justices, and the constable are still the authorities by whom the system is worked.

One great alteration was made in the system just described between the fourteenth and the seventeenth centuries. During that period, summonses and warrants superseded

[1] See *e.g.* a petition in 1377 (1 Richard II.): "Item supplient les ditz com-"muns q les Srs qui ount letters et viewe de frank plegg' q'ils faient due "punissement as Taverners de vins si avant come des autres vitailles." The answer is, "Il n'est mye article de veue de frank plegge mais en soit usee "come ad estee fait resonablement avant ces heures." 3 *Rot. Par.* 19; and see *4th Inst.* 261.

[2] The Statute of Winchester is not mentioned in Coke's *2nd Institute*, and though it was not repealed till 1828, it had for centuries before that time been greatly neglected. See Barrington's *Observations on the Statutes*, p. 146.

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the old hue and cry which practically fell into disuse. The history of this substitution is curious.

Justices of the peace were first instituted in 1326. Their duties were described in the most general terms. They were by 1 Edw. 3, c. 16, "assigned to keep the peace." By 34 Edw. 3, c. 1 (1360), they were empowered "to take and "arrest all those they may find by indictment or suspicion "and put them in prison." But neither in these nor any other early statute with which I am acquainted is there any provision which enables them directly to take an information as to the commission of a crime and issue a summons or warrant for the apprehension of the suspected person.

The statutes above quoted give them no other authority for the apprehension of offenders than was by the common law inherent in every constable and indeed in every private person. By degrees, however, the practice of issuing warrants came into use. The general authority of the justices in all matters relating to crime and indeed to the whole internal government of the country was firmly established by a great variety of statutes, and it would be natural that their directions should be taken when a crime was committed. It would also be more natural for the justice to authorise the constable to undertake the actual arrest of the offenders than to do it himself, and it might often be convenient, if a suspected person was to be searched for in more directions than one, to give written authority to various persons for the purpose.

This would be specially convenient in the case of a hue and cry. If offenders were to be followed from township to township, the different constables of each being required to join, a written authority from a known public officer like a justice of the peace would be a great convenience. The phrase [1] "grant a hue and cry" was apparently in common use in the seventeenth century for granting a warrant, but the granting of warrants was afterwards recognised by [2] various

[1] "At eleven o'clock the same night, as I was going into bed, Mr. Thynne's "gentleman came to me to grant a hue and cry" (on his master's murder by the friends of Count Coningsmark).—*Sir J. Reresby's Memoirs*, p. 235 (edition of 1875).

[2] See *e.g.* 9 Geo. 1, c. 7, s. 3; 13 Geo. 3, c. 31; 44 Geo. 3, c. 92.

statutes, and was finally set upon an [1]indisputable statutory foundation in 1848 by 11 & 12 Vic. c. 42, ss. 1, 2, 8, &c. The effect of these provisions is that, where a complaint is made to any justice that any person has committed any indictable offence, the justice may issue a summons to such person, or, if he thinks it necessary, and if the charge is made on oath, and in writing, a warrant for his apprehension.

The power of the justices to issue such process was however disputed for centuries. In [2]Hawkins's *Pleas of the Crown*, many authorities upon the subject are referred to, and a very qualified and hesitating conclusion is reached, that "perhaps "it is the better opinion at this day that any constable or "private person to whom a warrant shall be directed from a "justice of the peace to arrest a particular person for felony "or any other misdemeanour within his jurisdiction may law-"fully execute it, whether the person mentioned in it be in "truth guilty or innocent, and whether he were indicted of "the same offence or not, and whether any felony "were in truth committed or not." This hesitation is explained by the difference of opinion between Coke and Hale upon the subject. [3]Coke maintained that, before the statutes of Philip and Mary authorising justices to examine witnesses when a person was arrested for felony, "a justice of the peace "could not make a warrant to take a man for felony unless he "be indicted thereof." He also maintained that the only warrant which the statutes of Philip and Mary could be taken to authorise by implication (they say nothing at all about warrants) were warrants to constables to see the king's peace kept upon the occasion of the apprehension of the person suspected by the person having suspicion. Coke goes so far as to maintain that upon such a warrant the constable would not be justified in breaking open a door, "for it is in law the "arrest of the party that hath the knowledge or suspicion."

[4]Hale referring to this passage, says that Coke "hath "delivered certain tenets which, if they should hold to be "law, would much abridge the power of justices of the peace,

[1] *Dig. Crim. Proc.* arts. 99-108.
[2] Bk. ii. ch. xiii. vol. ii. pp. 129, 130, edition of 1824.
[3] *4th Inst.* 176, 177.
[4] 2 *P. C.* 107-110.

CH. VII. "and give a loose to felons to escape unpunished in most "cases." He then proceeds to refer to the statutes of Edward III., and argues in substance that as at common law a private person might and a constable ought to arrest supposed felons upon suspicion without warrant, the justice might do so *à fortiori*, in virtue of the general terms of the statutes, and that he might also "issue a warrant, to appre- "hend a person suspected of felony though the original "suspicion be not in himself, but in the party that prays his "warrant, and the reason is because he is a competent judge "of the probabilities offered to him of such suspicion." This opinion prevailed in practice long before any necessity arose for inquiring whether it was well founded in theory. That it was highly expedient that justices of the peace should act judicially in issuing warrants admits of no question at all. That it was intended that they should do so when the statutes under which they were first appointed were enacted seems to me unlikely. If such had been the intention of the legislature, it is probable that they would have been authorised and indeed required to proceed in the same manner as coroners, namely, by summoning inquests; but, however this may be, the whole subject is now set on a perfectly plain foundation by the statutes already referred to.

Whilst the duties of private persons, constables, and justices were being gradually ascertained, the law as to the circumstances which would justify an arrest for felony was being elaborated. In an earlier chapter I have given some illustrations of the manner in which all sorts of criminals, and especially all thieves, were regarded in very early times as enemies to be put to death almost like wild animals. It would not be worth while to trace minutely the steps by which this general and crude view of the subject was gradually reduced to the shape in which it now stands. Questions continually arose as to whether a person who had killed another in resisting apprehension was guilty of any offence at all, and, if guilty, whether the offence of which he was guilty amounted to murder or manslaughter. These cases were decided from time to time according to a variety of distinctions suggested by the circumstances of each particular case, a long

detail of which may be found in [1] Hale's *Pleas of the Crown* which is still the leading authority as to the general principles of the subject, though subsequent decisions and enactments have to some extent modified Hale's conclusions. [2] The result of his inquiry may be thus stated :—

1. Any person may arrest any person who is actually committing or has actually committed any felony.

2. Any person may arrest any person whom he suspects on reasonable grounds to have committed any felony, if a felony has actually been committed.

3. Any constable may arrest any person whom he suspects on reasonable grounds of having committed any felony, whether in fact any such felony has been committed or not.

The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

As to the degree of force which may be used in order to arrest a criminal, many questions might be suggested which could be answered only by way of conjecture. Two leading principles, however, may be laid down with some confidence, which are also to be collected from Hale. The first is [3] that if a felon flies or resists those who try to apprehend him, and cannot otherwise be taken, he may lawfully be killed. [4] The second is that a person who makes an arrest because it is his legal duty to do so is more readily justified in using violence for the purpose than a person who is under no such duty.

[1] 2 Hale, 72-105.

[2] As to present law of summary arrest, see *Dig. Crim. Proc.* ch. xii. arts. 96-98.

[3] 1 Hale, 481, 489; and see Foster, 271. This rule seems to overlook the distinction between taking a man prisoner and taking possession of his dead body, for it is difficult to see in what sense a pickpocket can be said to be taken if he is shot dead on the spot. The rule would be more accurately expressed by saying that a man is justified in using any violence to arrest a felon which may be necessary for that purpose, even if it puts, and is known and meant to put, his life in the greatest possible danger, and is inflicted by a deadly weapon, and does in fact kill him. [4] 1 Hale, 490; Foster, 418.

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If A kills B, whom he suspects on probable grounds of having committed a felony, though in fact he has not, and whom he cannot otherwise arrest, it appears probable that A is guilty of manslaughter if he is a private person, but if A is a constable following a hue and cry, his act is justifiable because he acts in the discharge of a legal duty.

The common law as to the arrest of prisoners remained substantially unaltered for a great length of time. It is indeed in force at this day with some few modifications, to be stated immediately; but since it reached the state of development just described, changes of the greatest importance have been made in the position of the officers by whom it is put in force. These changes I now proceed to notice.

From the earliest times to our own days, there were two bodies of police in England, namely, the parish and high constables, and the watchmen in cities and boroughs. [1]The parish constables, under various names (borsholders, headboroughs, tithingmen, chief pledges, &c.), were probably the successors of the old reeves, who with their four men represented the township on all occasions at the beginning of our legal history. In each hundred and in many franchises there were also high constables, or similar officers with other names, who were to the hundred or franchise what the parish constables were to the township. These officers continued to be appointed till within the last few years. The duties of the high constables came to be almost nominal, consisting principally in issuing various notices under different statutes, and they were relieved of them almost entirely in 1844 by the 7 & 8 Vic. c. 33, ss. 7 & 8. The office itself was practically abolished in 1869 by 32 & 33 Vic. c. 47. The parish constables continued to be appointed till 1872, when their appointment was rendered unnecessary (except in some special cases) by 35 & 36 Vic. c. 72; but from the time when the Statute of Winchester and the Assize of Arms became obsolete till the year 1829, they were the only body of men, except the watchmen in cities and boroughs, charged with the duty of apprehending criminals and preventing crimes.

[1] Dalton's *Justice*, p. 3; Burn's *Justice*, title "Constable." A tithingman seems to have been subordinate to the constable.

The watchmen in towns were first established by the Statute of Winchester, and the powers of the town magistrates depended originally upon their charters, which were often silent on the subject of watchmen. At a time which I am not able to fix with precision, but which from [1] expressions in the Report of the Municipal Corporation Commission I think must have been in the latter part of the last century, it became customary to pass Local Improvement Acts, by which the management of matters connected with the police of towns was usually vested in a body of trustees or commissioners distinct from the corporation itself. There were great differences in the manner in which these powers were allotted. The following passage occurs in the report already quoted:— [2] "In a very great number of towns there are no watchmen "or police officers of any kind except the constables, who are "unsalaried officers. They are sometimes appointed at a "court leet, more frequently by the corporate authorities. "The police, and the powers conferred by local acts for "paving, lighting, and watching the town, are seldom ex- "clusively in the jurisdiction of the corporation; sometimes "they are shared by the corporate authorities and commis- "sioners; sometimes they are vested in commissioners alone." A striking illustration of the confusion thus produced is given in [3] Colquhoun's *Treatise on the Police of the Metropolis.* He observes:—"At present the watchmen destined to guard "the lives and property of the inhabitants residing in near "8,000 streets, lanes, courts, and alleys, and about 152,000 "houses, composing the whole of the metropolis and its "environs, are under the directions of not less than above "seventy different trusts, regulated by perhaps double the "number of local acts of parliament (varying in many shades "from one another), under which these directors, guardians, "governors, trustees, or vestries, according to the title they "assume, are authorised to act, each attending only to

[1] 1st Report, p. 17. [2] P. 29.

[3] Published in 1796. In the *Report of a Select Committee on the Police of the Metropolis*, published in 1838, the Committee says of this work, "The "merit of being the first to point out the necessity and practicability of a "system of preventive police upon an uniform and consistent plan is due to "Mr. Colquhoun, the author of the treatise *On the Police of the Metropolis.*"

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Nothing could exceed the inefficiency of the constables and watchmen. Of the constables, Dalton (in the reign of James I.) observes that they "are often absent from their "houses, being for the most part husbandmen, and so most "of the day in the fields." The charge of Dogberry shows probably with no great caricature what sort of watchmen Shakespeare was familiar with. In the work already quoted, [1] Colquhoun observes of the watchmen of his time that the pay was so bad that "the managers have no alternative but "to accept of such aged and often superannuated men living "in their respective districts as may offer their services." . . . "What can be expected from such watchmen? Aged in "general; often feeble; and almost on every occasion half "starved from the limited allowance they receive, and "without any claim upon the public or the least hope of "reward held out even if they performed any meritorious "service" . . . "and, above all, making so many parts of "an immense system, without any general superintendence, "disjointed from the nature of its organisation, it is only a "matter of wonder that the protection afforded should be "what it really is."

The defects of this state of things were slightly, but very slightly, mitigated by the institution of a number of small bodies of constables under the direction of particular magistrates. In the year 1796 there were eight such constables at Bow Street (known as Bow-Street runners), and six others at each of seven other police offices in London, making in all fifty constables who gave their whole time to their business. There were also sixty-seven mounted police, forming what was called the horse patrol, who patrolled the roads near London for the suppression of highwaymen. Probably there may have been arrangements more or less resembling these in other large towns. This system continued practically unaltered till the year 1829, although [2] various parliamentary inquiries into

[1] Colquhoun, p. 232.

[2] Parliamentary committees reported on the subject in 1816, 1817, 1818, 1822, and 1828. The evidence given before them fills several bluebooks, and is curious and instructive.

the subject took place. In 1829 was passed the first of a series of acts which put the administration of the law as to the apprehension of offenders upon quite a new footing. This was the 10 Geo. 4, c. 44. Under this act, as amended by the [1]later acts referred to in the notes, the following system was established, and still exists, in the neighbourhood of London. The city of Westminster and certain parts of the counties of Middlesex, Surrey, Hertford, Essex, and Kent are constituted into a district called "The Metropolitan Police District." [2] Her Majesty is empowered to appoint a "Commissioner of the Police of the Metropolis," with two Assistant Commissioners, who in certain cases may act as his deputies and in other cases act under his orders.

[3]The Commissioner and assistants are during their tenure of office justices of the peace for Middlesex, Surrey, Hertford, Essex, Kent, Berkshire, and Buckinghamshire, but they must not sit at quarter sessions, nor act except for the preservation of the peace, the prevention of crimes, the detention and committal of offenders, and the execution of the acts by which they are appointed.

[4] A sufficient number of fit and able men are from time to time by the direction of the Home Secretary to be sworn in before the Commissioner to act as a police force for the whole district, and throughout the counties of Middlesex, Surrey, Hertford, Essex, Kent, Berkshire, and Buckinghamshire, and [5]on the Thames, and the members of the force are throughout those counties to have all the powers which constables duly appointed have within their constablewick at common law.

[6]The Commissioner may, subject to the approbation of the

[1] 10 Geo. 4, c. 44, s. 4. The schedule to the act constitutes certain parts of Middlesex, Surrey, and Kent into the Metropolitan Police District. S. 34 gives the Secretary of State power to extend it to places within twelve miles of Charing Cross, and this is extended to fifteen miles by 2 & 3 Vic. c. 47, s. 2.

[2] There were at first two justices, 10 Geo. 4, c. 44, s. 1. They were to be called Commissioners of Police by 2 & 3 Vic. c. 47, s. 4. One Commissioner and two Assistant Commissioners were substituted by 19 & 20 Vic. c. 2.

[3] 10 Geo. 4, c. 44, s. 1; 2 & 3 Vic. c. 47, s. 4; 19 & 20 Vic. c. 2, s. 1.

[4] 10 Geo. 4, c. 44, s. 4.

[5] 2 & 3 Vic. c. 47, s. 5.

[6] 10 Geo. 4, c. 44, s. 5.

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Home Secretary, frame orders and regulations for the government and regulation of the force.

[1]The expenses of the force are paid by a rate not exceeding 8*d.* in the pound which the Commissioner is empowered to lay upon parishes in the Metropolitan Police District, and which is to be collected with the poor rate. [2]It is received and administered by an officer called the Receiver for the Metropolitan Police District, who receives, expends, and accounts for the moneys in a manner prescribed in the various acts referred to below. [3]A sum not exceeding £20,000 a year may be contributed by the Treasury to the expenses of the Thames police.

These provisions are the essential part of the acts by which the metropolitan police were established. They contain besides numerous important provisions as to police courts and police offences.

The next general measure relating to the appointment of police constables was embodied in the [4]Municipal Corporations Act. By this act the councils of the boroughs were empowered to appoint a sufficient number of their own body to be, together with the mayor, the watch committee of the borough. The watch committee are to appoint a sufficient number of fit men (to be sworn in before a borough justice) as constables. The constables are to act as such, not only within the borough, but also within the county in which such borough or part of it is situated, and also within every county within seven miles of any part of the borough. The watch committee are to make such rules as they think expedient for preventing neglect or abuse and for rendering the constables efficient in the discharge of their duties.

These provisions were, I believe, generalised from those which were usually inserted in the Local Improvement Acts already referred to, [5]and it was accordingly provided that, as

[1] 10 Geo. 4, c. 44, s. 23.

[2] 10 Geo. 4, c. 44, ss. 10-17, 25-29; 2 & 3 Vic. c. 71, ss. 7, 8, 47; 20 & 21 Vic. c. 64, ss. 13-15; 24 & 25 Vic. c. 124; 34 & 35 Vic. c. 35.

[3] 2 & 3 Vic. c. 47, s. 5.

[4] 5 & 6 Will. 4, c. 76, ss. 76-86; see also 45 & 46 Vic. c. 50, ss. 190-200.

[5] S. 84. This section does not appear to have been re-enacted by 45 & 46 Vic. c. 50. Improvement Acts are still passed for towns and populous districts which are not incorporated, and in order to provide generally for such cases

soon as constables have been appointed by the watch committee, and a notice given as specified in the act, other acts relating to the subject shall cease.

The expenses of the borough police are payable out of the borough rate.

The next step towards the provision of a general system of police was taken in 1839 by the Act 2 & 3 Vic. c. 93. This act permitted a body of police to be established for a county, with the consent of [1] the Secretary of State for the Home Department, on a representation from the magistrates at quarter sessions. [2] The Home Secretary makes rules as to the government, pay, clothing, and accoutrements of the constables. [3] The justices appoint for the county a chief constable or in certain cases more chief constables than one. [4] The chief constable (subject to the approval of at least two justices in petty sessions) appoints the other constables for the county, and a superintendent to be at the head of the constables of each division of the county, and can dismiss all or any of them at pleasure. He has the general disposition and government of the constables so appointed, subject to such lawful orders as he receives from the justices in sessions, and to the rules established for the government of the force.

[5] The constables have all the powers of a constable at common law throughout every part of their own and of all adjoining counties, [6] and are subject to the same provisions as to notice, neglect of duty, and the like, as those which have been already noticed in reference to the metropolitan police.

[7] The expenses are paid by a police rate made by the justices and received and expended by the county treasurer; [8] but one fourth of the expense of the pay and clothing of the constables is, if they are certified by the Secretary of

an act called "The Town Police Clauses Act, 1847" (10 & 11 Vic. c. 19) was passed, which contains provisions similar to those already referred to, and is usually embodied by reference in the special acts.

[1] In all these acts the expression is "one of her Majesty's principal Secretaries of State." In practice this means the Secretary of State for the Home Department.

[2] 2 & 3 Vic. c. 93, s. 3.
[3] 2 & 3 Vic. c. 93, s. 3, and see 20 Vic. c. 2.
[4] 2 & 3 Vic. c. 93, s. 60.
[5] S. 8.
[6] 2 & 3 Vic. c. 93, ss. 10-14.
[7] 3 & 4 Vic. c. 88, ss. 3-13, 25.
[8] 19 & 20 Vic. c. 69, s. 16.

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State to be in a state of efficiency in point of numbers and discipline, to be paid by the Treasury out of the general taxation of the country.

[1]The Secretary of State for the Home Department has power to appoint three inspectors to inquire into the state and efficiency of the county and borough police and to see that the provisions of the Police Acts are properly carried out.

In 1856, after an experience of seventeen years in the working of the Act 2 & 3 Vic. c. 93, an act (19 & 20 Vic. c. 69) was passed which made compulsory the establishment of county police in all parts of England in which they had not been already established.

The result is that a disciplined force in the nature of a standing army for the suppression of crime and the apprehension of offenders has been provided throughout every part of England by four successive steps, namely, (1) the establishment of the metropolitan police in 1829, (2) that of the borough police in 1836, (3) the partial establishment of the county police by the permissive act of 1839, and (4) its complete establishment by the compulsory act of 1856.

Extensive additions to the powers of summary arrest which were vested in constables by common law have been made with respect to particular offences. I do not propose to enter at length upon this subject, but the [2]references given below will enable any one to do so who is so disposed.

SUPPRESSION OF OFFENCES BY MILITARY FORCE.—So far I have dealt with the provision made by law for the apprehension of offenders in common cases, but there are other cases which occur less frequently, and for which it is necessary to make special provision as they arise.

These are offences committed by large numbers of persons and with the strong hand. They may vary in gravity from

[1] 19 & 20 Vic. c. 69, s. 15.

[2] See 14 & 15 Vic. c. 19, as to persons committing indictable offences at night; 24 & 25 Vic. c. 96, s. 103, as to persons found committing offences against the Larceny Act; s. 104, as to arrest of persons found loitering in yards, &c.; 24 & 25 Vic. c. 97, s. 57, as to offences against the malicious injuries to Property Act; 24 & 25 Vic. c. 100, s. 66, as to offences against the person; 24 & 25 Vic. c. 99, as to offences relating to the coinage; 5 Geo. 4, c. 83. s. 4, as to offences against the Vagrant Act, and in 34 & 35 Vic. c. 112, s. 15, which amends it. As to police offences in the metropolis see 2 & 3 Vic. c. 47. s. 55. See too *Dig. Crim. Proc.* arts. 96 98.

an ordinary riot up to high treason by waging war against the Queen, and they may either be suppressed immediately or may grow into civil wars. The law on this subject has considerable historical and constitutional interest.

The definition of the various crimes by which the peace may be disturbed will be considered hereafter, but I propose at present to state the effect of the law as to their suppression.

The common law right and duty not only of the conservators of the peace but of all private persons (according to their power), to keep the peace and to disperse and, if necessary, to arrest those who break it, is obvious and well settled, but it is also obvious that it can hardly be discharged to advantage without special statutory power. In the earlier stages of our history the power and turbulence of the nobility was so great that private war was all but continual, and the preservation of the peace by force of arms was the first duty of all rulers. Violence in all its forms was so common, and the suppression of force by force so simple a matter, that special legislation did not appear necessary in very early times. [1] The earliest express recognition by statute of this state of things to which I can refer occurs in the Statute of Treasons. After defining treason positively, the statute proceeds to say what shall not be held to be treason. "And "if percase any man of this realm ride armed covertly" (it should be translated "openly," the French is "descovert") "or secretly with men of arms against any other to slay "him, or rob him, or take him, or retain him till he hath "made fine or ransom for to have his deliverance, it is not "the mind of the king nor his council that in such case it "shall be judged treason, but shall be judged felony or "trespass according to the laws of the land of old time "used and according as the case requireth." In other words, private war, whatever else it may be, is not treason.

The first definite legislation as to the suppression of riots dates from 1393 (17 Rich. 2, c. 8).

This statute recites that, notwithstanding the prohibition

[1] See, however, 7 Edw. 1, st. 1, A.D. 1279, as to coming armed to Parliament, and 33 Edw. 1, st. 2 (1304), a definition of conspirators.

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of riots which had been made twelve years before (in 1381, the date of Wat Tyler's insurrection), great disturbances had been made in Chester, Lancashire, and elsewhere (probably in connection with the Lollards), and enacts that in cases of riot the sheriffs are, "with the strength of the county and "counties to set disturbance against such malice with all "their power and shall take such offenders and them put in "prison." This act was supplemented by many others. By 13 Hen. 4, c. 7 (A.D. 1411), it is enacted that, when a riot happens, two justices at least and the sheriff or under-sheriff "shall come with the power of the county and shall "arrest them," and shall have power to record "that which "they shall find so done in their presence," and either try the offenders within a month or "certify the deed and "circumstances thereof" to the king and his council, "which "certificate shall be of like force as the presentment of "twelve," and the offenders are to be punished according to the discretion of the king and his council. By the 2 Hen. 5, st. 1, c. 8, it was added that, if the sheriffs and justices made default, any party aggrieved might have a commission from the chancellor to the coroners to inquire both into the riot and into the default of the justices and sheriffs. The justices suppressing the riots were, on the other hand, to be paid their expenses. The next chapter (ch. 9) of the same statute provides that, if the rioters fly, they may be proclaimed, and shall be liable to conviction if they do not come in upon the proclamation. [1]Under the Tudors, acts were passed which made it felony for twelve persons or upwards to continue together riotously for an hour after they had been ordered by a justice to disperse, but none of these acts provided any special force beyond the power of the county which could be used by the sheriff or justices.

Throughout the seventeenth century, [2]Parliament was little disposed to legislate against riots, but at the beginning of the eighteenth century was passed the famous Act, 1 Geo. 1, st. 2, c. 5, still in force and commonly known as the Riot Act. It increases the severity of the Tudor Acts (which expired at

[1] 3 & 4 Edw. 6, c. 5; 1 Mary, sess. 2, c. 12; 1 Eliz. c. 16.
[2] See, however, the act for suppressing seditious conventicles, 22 Chas. 2, c. 1.

the death of Elizabeth) by making it felony without benefit of clergy, for twelve rioters to continue together for one hour after the making by a magistrate of a [1] proclamation to them to disperse. It then requires the magistrates to seize and apprehend all persons so continuing together, and it provides that, if the persons so assembled, or any of them, "happen to "be killed, maimed, or hurt in dispersing, seizing, or appre- "hending, or endeavouring to disperse, seize, or apprehend "them," the magistrates and those who act under their orders shall be indemnified. As a standing army had come into existence before this act passed, the effect of it was that after making the proclamation and waiting for an hour the magistrates might order the troops to fire upon the rioters or to charge them sword in hand. To say so in so many words would no doubt have given great offence, but the effect of the indirect hint at the employment of armed force given by the statute was singular. It seems to have been generally understood that the enactment was negative as well as positive; that troops not only might be ordered to act against a mob if the conditions of the act were complied with, but that they might not be so employed without the fulfilment of such conditions. This view of the law has been on several occasions decided to be altogether erroneous. The true doctrine on the subject was much considered, both in the case of Lord George Gordon's Riots in 1780, and in the case of the Bristol Riots in 1831. It may be shortly stated as follows. The fact that soldiers are permanently embodied and subjected by the Mutiny Act to military discipline, and bound to obey the lawful orders of their superior officers, does not in any degree exempt them from the obligation incumbent on all her Majesty's subjects to keep the peace and disperse unlawful assemblies. On the contrary, it gives them special and peculiar facilities for discharging that duty. In a case of extreme emergency they may lawfully do so

[1] "Our sovereign Lady the Queen chargeth and commandeth all persons "being assembled immediately to disperse themselves and peaceably to depart "to their habitations or to their lawful business, upon the pains contained "in the Act made in the first year of King George for preventing tumults "and riotous assemblies. God save the Queen." The making of this proclamation is commonly, but very incorrectly, called reading the Riot Act.

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The result of this view of the subject is to put soldiers acting under the orders of their military superiors in an awkward position. By the ordinary principles of the common law they are, speaking generally, justified only in using such force as is reasonably necessary for the suppression of a riot. By the Mutiny Act and the Articles of War they are bound to

[1] 5 C. & P. 261, &c.

execute any lawful order which they may receive from their military superior, and an order to fire upon a mob is lawful if such an act is reasonably necessary. An order to do more than might be reasonably necessary for the dispersion of rioters would not be a lawful order. The hardship upon soldiers is, that if a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than was reasonably necessary has to be decided by a jury, probably upon a trial for murder; whereas, if he disobeys his officer's orders to fire because he regards them as unlawful, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier for disobeying orders, and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity and therefore as to the lawfulness of such an order.

I do not think, however, that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully considered and determined. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good grounds for ordering them to fire into a disorderly crowd which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of

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unoffending civilians in time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law and on the other the discipline of the army.

Happily the employment of military force for the suppression of a riot is a matter of rare occurrence in this country. When there is reason to fear any tumult with which the common police establishment cannot deal, the course usually taken is to swear in special constables. [1] The acts now in force for that purpose authorise any two justices for any county, &c., on being satisfied upon the oath of any one witness, that any tumult, riot, or felony has taken place, or may be reasonably apprehended within their jurisdiction, to nominate as special constables any persons willing to act as such, and to administer to them an oath to do their best to cause the peace to be kept, and offences to be prevented. Such persons have all the powers of constables. If necessary, all persons may be required to act as special constables, and are liable to be fined £5 if they refuse to serve or to appear when summoned to be sworn in.

These provisions are older than the acts by which police were established throughout the country, and are now seldom resorted to, as bodies of undisciplined men are apt to do more harm than good in cases of riot. On one memorable occasion, however (April 10, 1848), the swearing in of a vast number of special constables in London and elsewhere, as an answer to threats of revolutionary disturbance, was of much use, as a proof to demonstration of the fact that the great bulk of the population were at that time opposed to any resort to violence for political objects.

[1] 1 & 2 Will. 4, c. 41, amended by 5 & 6 Will. 4, c. 43. See also 1 & 2 Vic. c. 80, as to special constables on railroads, canals, and public works, and 5 & 6 Will. 4, c. 76, s. 83 (the Municipal Corporations Act).

MARTIAL LAW.—The extreme remedy which can be employed in the case of rebellion is a proclamation of martial law and operations consequent upon it. The law upon this subject was much discussed in reference to the cases of General Nelson and Mr. Eyre, who were prosecuted for murder in causing Mr. Gordon to be executed by martial law for his alleged complicity in an insurrection of negroes which took place in 1865 at Morant Bay in Jamaica. The opinion of the late Mr. Edward James and myself was taken as to the legal meaning and effect of a proclamation of martial law. I drew the opinion and we both signed it. Nothing which took place in the proceedings which followed altered my view, and I may add that the charge delivered by Lord Chief Justice Cockburn to the grand jury at the Central Criminal Court followed almost precisely the statement of the law given in this opinion. [1] I accordingly reprint the material part of it with a few slight changes as representing what, upon the fullest inquiry, I believe to be the law upon this subject.

[2] The expression "martial law" has been used at different times in four different senses, each of which must be carefully distinguished from the others:—

1. In very early times various systems of law co-existed in this country—as the common law, the ecclesiastical law, the law of the Court of Admiralty, &c. One of these was the law martial, exercised by the constable and marshal over troops in actual service, and especially on foreign service.[3]

2. The existence of this system in cases of foreign service or actual warfare appears to have led to attempts on the part of various sovereigns to introduce the same system in time of peace on emergencies, and especially for the punishment

[1] Lord Blackburn charged the Grand Jury of Middlesex in one of the proceedings against Mr. Eyre on the subject in terms which, so far as they relate to the common law of England, do not greatly differ from what is here stated (see Mr. Finlason's report of R. *v.* Eyre, 68-73). I am not sure, however, that I should altogether agree with the view taken by Lord Blackburn of the effect of the Petition of Right.

[2] The case and opinion will be found in Forsyth's *Constitutional Law*, p. 551. Mr. Finlason published a *History of the Jamaica Case*, and other works connected with the subject.

[3] As to this see the "Statutes and Ordinances to be keped in time of Warre."—*Black Book of the Admiralty*, i. 282, &c. See also an essay on the "Laws of War," by Professor Mountague Bernard, in the *Oxford Essays* for 1856.

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of breaches of the peace. [1] This was declared to be illegal by the Petition of Right, as I shall show more fully immediately.

3. When standing armies were introduced, the powers of the constable and marshal fell into disuse, and the discipline of the army was provided for by annual Mutiny Acts, which provided express regulations for the purpose. These regulations are now contained in the Army Discipline Act, 1879 (42 & 43 Vic. c. 33), amended by 44 & 45 Vic. c. 57, and annually brought into force. [2] They form a code, which is sometimes called martial, but more properly military, law.

4. Although martial law in sense (1) is obsolete, and in sense (2) is declared by the Petition of Right to be illegal, the expression has survived, and has been applied to a very different thing, namely, to the common law right of the Crown and its representatives to repel force by force in the case of invasion or insurrection, and to act against rebels as it might against invaders.

The provisions of the Petition of Right (3 Chas. 1, c. 1) upon Martial Law are contained in ss. 7, 8, 9, 10. These sections recite that commissions under the Great Seal had lately been issued to certain persons to proceed in particular cases "according to the justice of martial law;" and that thereby persons had been put to death who, if deserving death, ought to have been tried in the ordinary way, whilst others, pleading privilege, had escaped. Such commissions are then declared to be "wholly and directly contrary to the said laws and "statutes of this your realm," and it is provided that henceforth no commissions of like nature may issue forth to any person or persons whatsoever.

The commissions themselves explain the nature of the system which the Petition of Right prohibited. Three, which were issued shortly before it passed, are given in 17 Rymer's *Fœdera* (pp. 43, 246, 647). They are dated respectively 24th November, 1617; 20th July, 1620; 30th December, 1624. The first is a commission to certain persons for the government of Wales and the counties of Worcester,

[1] See Hallam's *Constitutional History*, vol. i. p. 240, seventh edition, ch. v. near the beginning. See Vol. III. p. 109.

[2] Grant *v.* Gould, 2 H. Blackstone, 69.

Hereford, and Shropshire. It directs them to call out the array of the county, and then proceeds to direct them to lead the array—

"As well against all and singular our enemies, as also "against all and singular rebels, traytors, and other offenders "and their adherents, against our Crown and dignitie, within "our said principalitie and dominions of North Wales and "South Wales, the marches of the same, and counties "and places aforesaid, and with the said traytors and rebells "from tyme to tyme to fight, and them to invade, resist, "suppresse, subdue, slay, kill, and put to execution of death, "by all ways and means, from tyme to tyme, by your "discretion.

"And further to doe, execute, and use against the said "enemies, traytors, rebells, and such other like offenders "and their adherents afore-mentioned, from tyme to tyme "as necessities shall require, by your discretion, the law "called martiall lawe according to the law martial, and of "such offenders apprehended or being brought into subjection, "to save whom you shall think to be saved, and to slaye, "destroye, and put to execution of death, such and as many "of them as you shall think meete, by your good discretion, "to be put to death."

The second empowers Sir Robert Maunsell to govern the crews of certain ships intended for the suppression of piracy, and gives him "full powers to execute and take away their "life, or any member, in form and order of martial law."

The third is a commission to the Mayor of Dover, and others, reciting that certain troops, then at Dover, were licentious, and empowering them—

"To proceed according to the justice of martial law against "such soldiers with any of our list aforesaid, and other dis-"solute persons joining them, or any of them, as during "such time as any of our said troops or companies of "soldiers shall remain or abide there, and not be transported "thence, shall, within any of the places or precincts afore-"said, at any time after the publication of this our com-"mission, commit any robberies, felonies, mutinies, or other "outrages or misdemeanours which, by the martial law,

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" should or ought to be punished with death, and by such " summary course and order as is agreeable to martial law, " and as is used in armies in time of war, to proceed to the " trial and condemnation of such delinquents and offenders, " and them cause to be executed and put to death according " to the law martial, for an example of terror to others, " and to keep the rest in due awe and obedience."

The distinctive feature in all these commissions is, that they authorise not merely the suppression of revolts by military force, which is undoubtedly legal, but the subsequent punishment of offenders by illegal tribunals, which is the practice forbidden by the Petition of Right. The course taken by a lieutenant-general and his provost-marshal in the reign of Queen Elizabeth illustrates this. In 1569 the Earls of Northumberland and Westmoreland had risen and besieged and taken Barnard Castle, and committed other acts of open treasonable warfare. The rising took place and was suppressed in the course of the month of December. The Earl of Sussex received from the Queen a commission, evidently similar to the one already cited, and appointed Sir George Bowes his provost-marshal. Sir George Bowes made a circuit through Durham and Yorkshire, between the 2nd and 20th January, 1589, and executed at various places 600 persons.[1]

As to the legal character of such punishments, Lord Coke observes (*3rd Inst.* c. 7, p. 52), " If a lieutenant, or other that " hath commission of martial authority in time of peace, hang " or otherwise execute any man by colour of martial law, this " is murder, for this is against Magna Charta, c. 29."[2]

These authorities seem to show that it is illegal for the Crown to resort to martial law as a special mode of punishing rebellion.

Some authorities look in the other direction. In 1799, an act of the Irish Parliament (39 Geo. 3, c. 11) was passed, the effect of which was to put the parts of the country which were still in rebellion under military

[1] Sharpe's *Memorials of the Rebellion*, No. 1569, pp. 99, 113, 121, 133, 140, 143, 153, 163.

[2] See too Hale, *Hist. Common Law*, 34.

command, according to a system therein described. The preamble states that the rebellion had already been suppressed, and it sets forth that on the 24th May, 1798, Lord Camden did, by and under the advice of the Privy Council, issue his orders to all general officers commanding his Majesty's forces, to punish all persons acting, ordering, or in any way assisting in the said rebellion, according to martial law, either by death or otherwise, as to them should seem expedient, and did by his proclamation ratify the same. It further goes on to recite, that "by the "wise and salutary exercise of his Majesty's undoubted "prerogative in executing martial law for defeating and "dispersing such armed and rebellious force, and in bringing "divers rebels and traitors to punishment in the most speedy "and summary manner, the peace of the kingdom has been "so far restored as to permit the course of the common law "partially to take place," &c. And in the body of the Act (section 6) there is contained a proviso that "nothing in "this Act shall be construed to abridge or diminish the "undoubted prerogative of his Majesty for the public "safety to resort to the exercise of martial law against open "enemies or traitors."

There is a similar recital in the act known as the Insurrection Act, 3 & 4 Will. 4, c. 4 (A.D. 1833); s. 40 of this act provides that none of its provisions "shall be construed "to take away, abridge, or diminish the undoubted pre-"rogative of his Majesty for the public safety to resort "to the exercise of martial law against open enemies or "traitors."

It is impossible to suppose that such declarations as these should operate as a repeal of the Petition of Right as regarded Ireland, though the language of the two Acts appears to be conflicting. As, however, it merely declares an "un-"doubted prerogative of the Crown," it cannot refer to what the Petition of Right expressly denied to exist, and therefore it must probably be construed to mean only that the Crown has an undoubted prerogative to attack an army of rebels by regular forces under military law, conducting themselves as armies in the field usually do. This construction is strength-

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ened by the fact that traitors are coupled with open enemies. Now, the force used against an invading army is used for the purpose, not of punishment, but of conquest, and thus the words in the Irish Act would mean only that the Crown has an undoubted prerogative to carry on war against an army of rebels as it would against an invading army, and to exercise all such powers as might be necessary to suppress the rebellion and to restore the peace and to permit the common law to take effect.

As soon, however, as the actual conflict was at an end it would be the duty of the military authorities to hand over their prisoners to the civil powers. This was affirmed by the case of [1] Wolfe Tone, who, having been captured when the French surrendered, was sent up to Dublin barracks, tried by court-martial and sentenced to death. The Court of King's Bench immediately granted a habeas corpus, and directed the sheriff to take into custody the provost-marshal and officers in charge, and to see that Mr. Tone was not executed. No doubt many military executions took place during the Irish rebellion, but an Act of Indemnity was passed in respect to them, and it must always be remembered that by the laws of war (which are a branch of morals rather than of law proper, and prevail not over soldiers, but only between contending armies) many severities may be justified, such as refusal of quarter and the putting to death of soldiers who have surrendered at discretion; and thus, in a war like that of 1798, much might be done which might pass under the name of martial law, but which in reality would be no more than incidents of ordinary warfare conducted with unusual rigour.

Another argument is drawn from the Annual Mutiny Acts. They contain a declaration that "no man can be forejudged "of life or limb, or subjected to any punishment within this "realm by martial law, in time of peace." This has been construed to imply that in times of war or disturbance martial law is legal. As to this, however, it must be remembered that in its original meaning, the phrase "martial "law" included what we now understand by military law,

[1] 27 *St. Tr.* 624, 625.

and that one principal object of the commissions, declared to be illegal by the Petition of Right, was the creation of military tribunals without Parliamentary authority. Hence the words "in peace," which were not in the first Mutiny Act, probably mean that standing armies and military courts were, in time of peace, illegal, except in so far as they were expressly authorised by Parliament.

The whole doctrine of martial law was discussed at great length before a Committee of the House of Commons, which sat in the year 1849 to inquire into certain transactions which had taken place at Ceylon. Sir David Dundas, then Judge Advocate-General, explained his view at length, and was closely examined upon it by Sir Robert Peel, Mr. Gladstone, and others. The following answers, amongst others, throw much light on the subject :—

"5437. The proclamation of martial law is a notice, to "all those to whom the proclamation is addressed, that there "is now another measure of law and another mode of pro- "ceeding than there was before that proclamation.

"5459. If a governor fairly and fully believes that the "civil and military power which is with him, and such "assistance as he might derive from the sound-hearted part "of the Queen's subjects, is not enough to save the life of "the community and to suppress disorder, it is his duty "to suppress by this (*i.e.* by martial law) or any other "means.

"5476. *Q.* (Sir Robert Peel). A wise and courageous man, "responsible for the safety of a colony, would take the law "into his own hands, and make a law for the occasion rather "than submit to anarchy? *A.* I think that a wise and "courageous man would, if necessary, make a law to his "own hands, but he would much rather take a law which "is already made; and I believe the law of England is, that "a governor, like the Crown, has vested in him the right, "where the necessity arises, of judging of it, and being "responsible for his work afterwards, so to deal with the "laws as to supersede them all, and to proclaim martial "law for the safety of the colony.

"5477. (In answer to Mr. Gladstone). I say he is

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" responsible, just as I am responsible for shooting a man on " the king's highway who comes to rob me. If I mistake " my man, and have not, in the opinion of the judge and " jury who try me, an answer to give, I am responsible.

" 5506. My notion is, that martial law is a rule of necessity, " and that when it is exercised by men empowered to do " so, and they act honestly, rigorously, and vigorously, " and with as much humanity as the case will permit, in " discharge of their duty, they have done that which every " good citizen is bound to do."

Martial law has, accordingly, been proclaimed in several colonies, viz. at the Cape of Good Hope, in Ceylon, in Jamaica, and in Demerara.

The views thus expressed by Sir David Dundas appear to me to be substantially correct. According to them the words " martial law," as used in the expression " proclaiming martial " law," might be defined as the assumption for a certain time, by the officers of the Crown, of absolute power, exercised by military force, for the purpose of suppressing an insurrection or resisting an invasion. The " proclamation " of martial law, in this sense, would only be a notice to all whom it might concern that such a course was about to be taken. I do not think it is possible to distinguish martial law, thus described and explained, from the common law duty which is incumbent on every man, and especially on every magistrate, to use any degree of physical force that may be required for the suppression of a violent insurrection, and which is incumbent as well on soldiers as on civilians, the soldiers retaining during such service their special military obligations. Thus, for instance, I apprehend that if martial law had been proclaimed in London in 1780, such a proclamation would have made no difference whatever in the duties of the troops or the liabilities of the rioters. Without any such proclamation the troops were entitled, and bound, to destroy life and property to any extent which might be necessary to restore order. It is difficult to see what further power they could have had, except that of punishing the offenders afterwards, and this is expressly forbidden by the Petition of Right.

I may sum up my view of martial law in general in the following propositions:—

1. Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority.

2. The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly or criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts of justice can be reopened.

The principle by which their responsibility is measured is well expressed in the case of [1] Wright *v.* Fitzgerald. Wright was a French master of Clonmel, who, after the suppression of the Irish rebellion in 1798, brought an action against Mr. Fitzgerald, the sheriff of Tipperary, for having cruelly flogged him without due inquiry. Martial law was in full force at that time, and an Act of Indemnity had afterwards been passed, to excuse all breaches of the law committed in the suppression of the rebellion. In summing up, Mr. Justice Chamberlain, with whom Lord Yelverton agreed, said:—

"The jury were not to imagine that the legislature, by "enabling magistrates to justify under the Indemnity Bill, "had released them from the feelings of humanity, or per- "mitted them wantonly to exercise power, even though it "were to put down rebellion. They expected that in all cases "there should be a grave and serious examination into the "conduct of the supposed criminal, and every act should show "a mind intent to discover guilt, not to inflict torture. By "examination or trial he did not mean that sort of examination "and trial which they were now engaged in, but such ex- "amination and trial—the best the nature of the case and "existing circumstances should allow of. That this must "have been the intention of the legislature was manifest from "the expression 'magistrates and all other persons,' which

[1] 27 *St. Tr.* 765.

CH. VII. " provides that as every man, whether magistrate or not, was " authorised to suppress rebellion, and was to be justified " by that law for his acts, it is required that he should not " exceed the necessity which gave him that power, and that " he should show in his justification that he had used every " possible means to ascertain the guilt which he had punished; " and, above all, no deviation from the common principles of " humanity should appear in his conduct."

Wright recovered £500 damages, and when Mr. Fitzgerald applied to the Irish Parliament for an indemnity, he could not get one.

3. The courts-martial, as they are called, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War. On the other hand, if they do so proceed, they are not protected by them as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War.

[1] PRELIMINARY INQUIRY.

Before the establishment of justices of the peace, cases of public importance were inquired into before the Privy Council, as I have already observed; but there seems to have been no preliminary inquiry at all in regard to common offences, except in the single case of the coroner's inquest. The justice of the peace was at first little more than a constable on a large scale, whose power even to issue a warrant for the

[1] For the present law on this subject, and on incidental procedure, see *Dig. Crim. Proc.* ch. xiii.—xvii., arts. 99-140.

apprehension of suspected persons was acquired by practice, and was not derived from express parliamentary authority. In early times the formal accusation was often, perhaps usually, the first step in the procedure, and the prisoner was not arrested until after he had been indicted. This may still occur under the existing law, but such an occurrence is not usual. In almost every case in the present day a suspected person appears before a justice. Witnesses are then examined, he is either discharged, bailed, or imprisoned till trial, and is then indicted and tried.

The earliest instance that occurs of any sort of preliminary inquiry into crimes with a view to subsequent proceedings is the case of the coroner's inquest. Coroners, according to [1]Mr. Stubbs, originated in the year 1194, but the first authority of importance about their duties is to be found in Bracton. [2]He gives an account of their duties so full as to imply that in his day their office was comparatively modern. The Statute de Officio Coronatoris (4 Edw. 1, st. 2, A.D. 1276) is almost a transcript of the passage in Bracton. It gives the coroner's duty very fully, and is to this day the foundation of the law on the subject. The following are its main provisions:—"A coroner of our Lord "the King ought to inquire of these things if he be certified "by the King's bailiffs or other honest men of the country; "first he shall go to the places where any be slain, or "suddenly dead, or wounded, or where houses are broken, or "where treasure is said to be found, and shall forthwith "command four of the next towns, or five, or six [*i.e.* the "reeve and four men from each] to appear before him in "such a place: when they are come thither the coroner "upon the oath of them shall inquire in this manner, that "is, to wit, if they know where the person was slain, whether "it was in any house, field, bed, tavern, or company, and

[1] *Const. Hist.* i. 505. For present law, see *Dig. Crim. Proc.* ch. vii. arts. 43-60, as to appointment and removal of coroners, as to inquests, procedure, &c., arts. 207-232.

[2] Bracton, lib. iii. (*De Corona*) ch. v. Sir T. Twiss discusses the question whether Bracton copied from the statute or the statute from Bracton, and gives reasons in support of the latter view in the introduction to vol. ii. of his edition of Bracton, p. lxi. The Statutum Walliæ contains provisions substantially identical with those of 4 Edw. 1.

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" who were there. Likewise it is to be inquired who were " culpable either of the act or of the force, and who were " present, either men or women, and of what age soever " they be, if they can speak or have any discretion, and how " many soever be found culpable in any of the manners " aforesaid, they shall be taken and delivered to the sheriff, " and shall be committed to the gaol."

If any one is found guilty of the murder, the coroner is immediately to value his property [1] "as if it were to be " immediately sold," and is to deliver it to the township which is to answer for it to the justices.

The statute contains important provisions as to appeals which I pass over for the present. It is silent as to the course to be taken where houses are broken, though the opening words of the statute refer to such cases. In practice the coroner's duties have been confined to cases of suspicious death and treasure trove.

The coroner's duties in respect of inquiries into the cause of suspicious deaths have hardly varied at all from the days of Edward I. to our own, except as regards the method of summoning jurors, and witnesses, and other details. The statute book contains a variety of provisions as to matters of secondary importance connected with inquests. The only ones which need here be mentioned are the statute of Philip and Mary (1 & 2 Phil. & Mary, c. 13, s. 5, 1554), which required a coroner to " put in writing the effect of the evidence " given before him being material," and to bind over the witnesses to appear at the trial of the person accused. This act remained in force till 1826, when it was superseded by 7 Geo. 4, c. 64, s. 4, which provides that every coroner upon any inquisition before him taken whereby any one is indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind over the witnesses to give evidence at the trial, and certify and return the depositions and inquisition to the court before which the person indicted is to be tried. The inquisition

[1] "Sicut statim vendi possunt."

of the coroner always was and still is a formal accusation of any person found by it to have committed murder or manslaughter, or to have found and concealed treasure, and a person may be tried upon such an inquisition without any further accusation.

It is singular that, with the law as to coroners in full operation since 1276, no duties of the same sort should have been imposed on the justices of the peace appointed forty-eight years afterwards, in 1324.

Whatever may have been the reason, the fact is certain that no allusion is made to the holding of any sort of preliminary inquiry by justices in any statute passed before the statutes of Philip and Mary already casually referred to. It is probable, however, that from the very earliest times magistrates would make a more or less formal inquiry before they took steps towards the arrest or bail of a suspected person, and it is not at all improbable that the two statutes in question may have given legal sanction to a practice which had grown up without express statutory authority. The statutes were as follows. By the 1 & 2 Phil. & Mary, c. 13 (1554), it is enacted that, when any person arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by the law, is brought before any two justices, they are "to take the examination of the said prisoner and "information of them that bring him of the fact and cir-"cumstances thereof, and the same or as much thereof as "shall be material to prove the felony shall be put in writing "before they make the bailment." The examination and bailment are to be certified to the court, and "all such as do de-"clare anything material to prove the said murder" (murder is not mentioned in the earlier part of the act), "manslaughter, "offences, or felonies, or to be accessory or accessories to the "same as is aforesaid" (it is remarkable that the word "witnesses" is not used) "are to be bound over to appear "to give evidence at the court of gaol delivery." This act was confined to the case of prisoners admitted to bail. It was followed in the next year (1555) by an act (2 & 3 Phil. & Mary, c. 10), which recites that it "does not extend to such "prisoners as shall be brought before any justice of peace

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" for manslaughter or felony, and by such justices shall be " committed to ward for the suspicion of such manslaughter " or felony and not bailed, in which case the examination " of such prisoner and of such as shall bring him is as " necessary or rather more than where such prisoner shall " be let to bail." The act then goes on to re-enact, with respect to cases in which the prisoners are committed, the provisions of the act of the preceding year as to prisoners bailed.[1]

These statutes continued to be in force till the year 1826, when they were repealed, and re-enacted, and extended to misdemeanour by 7 Geo. 4, c. 64, ss. 2 & 3, and this act was in its turn repealed and re-enacted in a more elaborate form, with some important variations, by 11 & 12 Vic. c. 42 (1848), which is known as Sir John Jervis's Act.

The important provisions of Sir John Jervis's Act upon the subject of the preliminary inquiry are these. [2]The witnesses are to be examined in the presence of the accused person, and he is to be at liberty to cross-examine them. The depositions are to be written down and signed by the magistrate and by the witnesses. After all the witnesses have been examined, the justice is to say to the accused, " Having heard the evidence, " do you wish to say anything in answer to the charge? You " are not obliged to say anything unless you desire to do so, " but whatever you say will be taken down in writing and " may be given in evidence against you at your trial." Whatever he says is then taken down and returned with the depositions. [3]The accused person is then to be asked whether he wishes to call any witnesses, and if he does, they must be examined and cross-examined, and their depositions must be taken in the same manner as those of the witnesses for the prosecution. [4]If the evidence is in the opinion of the justices not sufficient to put the accused person on his trial, they are to discharge him. If they think it " raises a strong " or probable presumption of" his "guilt," they are to commit him for trial or admit him to bail. [5]The accused is

[1] The historical reason for these enactments will be found below, p. 236.
[2] 11 & 12 Vic. c. 42, s. 17. See *Dig. Crim. Proc.* art. 109, &c.
[3] 30 & 31 Vic. c. 35, s. 3. [4] S. 25. [5] S. 27.

entitled to copies of the depositions, and his right to be represented by counsel or by a solicitor is incidentally assumed in [1]one section of the act, and is, I believe, never disputed in practice.

A comparison of these provisions with those of the acts of Philip and Mary shows several changes of the utmost importance in one of the most important parts of criminal procedure.

Speaking generally, the difference between the procedure established in the sixteenth century and the procedure of the nineteenth is that under the first the magistrate acts the part of a public prosecutor, whereas under the second he occupies the position of a preliminary judge. This appears in every detail. Under the acts of Philip and Mary the accused person is to be examined. This meant that he was to be fully questioned as to all the circumstances connected with his supposed offence. Under the act of Victoria he can be asked no questions at all, though he is invited to make any statement he pleases, being cautioned that it will be taken down and may be given in evidence against him. Under the statutes of Philip and Mary the examination of the witnesses and the recording of their depositions was intended only for the information of the court. The prisoner had no right to be, and probably never was, present. Under the statute of Victoria the witnesses are to be examined in the prisoner's presence, and may be cross-examined by him, his counsel, or his attorney. Under the statute of Philip and Mary the depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them. Under the statute of Victoria he is entitled to a copy of them. In all these particulars the change is uniformly in the same direction. The object of the earlier statute is to expose and detect a man assumed to be guilty. In the later statute, the object is a full inquiry into his guilt or innocence.

One circumstance must here be mentioned, which makes a distinction of considerable importance between the preliminary criminal procedure of our own country and that of all the countries which used the civil law. I refer to the absence

[1] S. 17.

CH. VII. of the use of torture as a means of collecting evidence whilst the prisoner was in custody. It was never recognised as a part of the law of England, and its illegality was made the subject of much boasting by some of the earliest panegyrists of English institutions, and in particular Fortescue, Smith, and Coke. There is, however, proof that it was practised for the purpose of obtaining evidence under Henry VIII. and his three children, and also during the reigns of James I. and Charles I., and that not only in political cases but also in the case of common crimes. The proof of this is given in Jardine's *Reading on Torture*, in the appendix to which work there are printed fifty-five letters taken from the Council books, the first dated 5th November, 1551, and the last 21st May, 1640, authorising or otherwise relating to the use or the threat of torture in a variety of instances. In how many cases it may have been used without such authority, and when the practice began, no one can now even guess with any plausibility. Why torture was not employed in this as well as in other countries it is difficult to say. Probably the extremely summary character of our early methods of trial, and the excessive severity of the punishments inflicted, had more to do with the matter than the generalities of Magna Charta or any special humanity of feeling. People who, with no sort of hesitation, hanged a man who could not read, or who being able to read had married a widow, simply because twelve of his neighbours, reporting the village gossip, said he had stolen a dress worth two shillings, cannot be called scrupulously humane. If their conscience had declined to hang him till they had tortured him into a confession capable of being verified independently, they would perhaps have been a little more humane, though this certainly admits of a doubt.[1]

However this may be, it is still possible to give evidence of the manner in which the old system of preliminary investigations worked. In several of the trials reported under the Stuarts, the justice who had got up the case

[1] The subject is fully described in Mr. Lea's *Superstition and Force*, Philadelphia, 1878, 371-522. According to Mr. Lea, torture was gradually introduced throughout the Continent in the course of the fourteenth, fifteenth, and sixteenth centuries. It was connected with the revival of the Roman law.

was the principal witness against the prisoner, and detailed at length the steps which he had taken to apprehend him. The following are instances:—

[1] In 1664 Colonel Turner was tried for a burglary, together with his wife and three of his sons. The principal witness was Sir Thomas Aleyn, an alderman of the city. He said: "Mr. Francis Tryon" (the person robbed) "put me "on the business to examine it. I went and examined the "two servants—the man and the maid. Upon their examina- "tion I found they had supped abroad at a dancing-school and "had been at cards." . . . "The man confessed he had been "abroad twenty or thirty times at Colonel Turner's house at "supper about a year since. The maid denied they had "been there at all; but it is true the man's saying he supped "there (though it was false) was the first occasion of sus- "picion against Colonel Turner. When I had examined "these two, I went to the examination of Turner, where he "was all that day, where at night? He told me at several "places and taverns, and in bed at nine of the clock, and "was called out of his bed; but having myself some suspicion "of him, I wished him to withdraw. I told Tryon that I "believed, if he was not the thief, he knew where the things "were." Aleyn afterwards charged Turner; "but he denied "it, but not as a person of his spirit, which gave me some "cause of further suspicion." He afterwards searched Turner's house unsuccessfully; but next day received information from one of the other aldermen which enabled him to track Turner into a shop in the Minories, where he found him in possession of money which he believed to be part of the stolen property. He pressed him to account for it, took him to Tryon, managed matters so as to induce him to admit to Tryon, upon Tryon's engaging not to prosecute, that he knew where the property was, and, after all sorts of manœuvres, got him to cause his wife to give up a number of Tryon's jewels, and finally committed him and her to Newgate. In short, he acted throughout the part of an exceedingly zealous and by no means scrupulous detective armed with the authority of a magistrate. [2] He detailed in

[1] 6 *St. Tr.* 619, 630. [2] *Ib.* 572-575.

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court the whole of his proceedings, which were very expeditious. "Thursday," said one of the judges, "was the "robbery, Friday he was examined, Saturday the money was "brought, and that night the jewels were brought and he "committed."

In the famous case of [1] Count Coningsmark and his alleged agents, who were tried for the murder of Mr. Thynne, a similar part was taken by Sir John Reresby, the committing magistrate. Just as he was going to bed, "Mr. Thynne's "gentleman came to me to grant a hue and cry, and soon "after the Duke of Monmouth's page to desire me to come "to his master at Mr. Thynne's lodging, sending his coach "to fetch me." Reresby immediately went to Mr. Thynne's and granted warrants to search for several suspected persons. At last a Swede was brought before him who confessed that he served a German captain who had had a quarrel with Thynne. Upon information obtained from the Swede, "having searched "several houses till six o'clock in the morning, having been "in chase almost the whole night, I personally took the "captain at the house of a Swedish doctor in Leicester "Fields, I going first into the room." Other suspected persons being afterwards arrested were brought to this house and [2] examined, and finally were committed for trial to the Old Bailey, after being examined on several occasions before the King in Council.

Other cases are mentioned in Reresby's memoirs in which he took a similar part. [3] For instance, under the date of 6th of July, 1683, after referring to the Rye House Plot, he says: "Six Scotchmen being stopped at Ferry Bridge, by "directions from the Secretary, coming from London towards "Scotland, and being but slightly examined by the justice "of the peace, I caused them to confess much more to me, "which I transmitted to the Secretary, as also the examina-"tion of another of that nation, who was sent to York Castle, "and proved a very dangerous rogue."

[4] In 1681, George Busby was tried at Derby assizes for being

[1] 9 *St. Tr.* 1, and the *Memoirs of Sir John Reresby*, pp. 235-241.
[2] 9 *St. Tr.* pp. 122-124.
[3] *Memoirs*, p. 281.
[4] 8 *St. Tr.* 525.

a Popish priest. The chief witness against him was Mr. Gilbert, a magistrate of the county, who gave a long account of the manner in which he went on several occasions to the house where he suspected Busby to be. On one occasion he took "a crimson damask vestment, wherein was packed a "stole, a maniple of the same (as the Papists call them), an "altar-stone, surplice, and a box of wafers, mass books, and "divers other Popish things." All these he took to Derby assizes and showed them to the judge, who directed them to be burnt, but Mr. Gilbert "entreated his favour that I might "send them again to the same place for two or three days to "make the priest more confident." He went back accordingly and made a most elaborate search, having a singular series of conversations with people in the house, till at last he took the prisoner in a curiously contrived hiding-hole, near some chimneys, and carried him to Derby, "where after "I had taken his examination, I made a mittimus and com-"mitted him to Derby gaol."

I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warning, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into court to be tried.

This is set in a strong light by the provisions of the celebrated act "for regulating of trials in cases of treason and misprision of treason" (7 & 8 Will. 3, c. 3), and those of [1]s. 14 of the Act of Union with Scotland (7 Anne, c. 21). The first of these acts provides that every person accused of high-treason shall have a true copy of the whole indictment delivered to him five days at least before he is tried. The second extends the time for the delivery of the copy of the indictment to ten days before the trial, and enacts that at the same time that the copy of the indictment is delivered

[1] In the Revised Statutes. In other editions it is s. 11.

CH. VII. "a list of the witnesses that shall be produced on the trial "for proving the said indictment, and of the jury, mentioning "the names, professions, and place of abode of the said "witnesses and jurors, be also given." This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the state trials held under the Stuarts, it did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of parliament that trials for political offences should not be grossly unfair, but they were comparatively indifferent as to the fate of people accused of sheep-stealing, or burglary, or murder.

It is probable, however, that the practice of the magistrates varied, and that where there was no particular reason, political or otherwise, for keeping a prisoner in the dark, he was allowed, during the interval between the commitment and trial, to see his friends and make such preparation for his trial as he could. In some remarks [1] by Sir John Hawles (Solicitor-General in the reign of William III.), on the trial of Colledge, the Protestant joiner, it is said that in murder and all other crimes, the prisoner is always permitted to advise with counsel before his trial, and that all persons are allowed in such cases to have free and private access to him, and the usage followed in the political trials of the seventeenth century is strongly reflected upon. This irregular and unsystematic good nature may have been sufficient in practice to prevent the infliction of gross injustice upon persons capable of making their complaints heard, but till the year 1849 prisoners certainly had no legal right to know beforehand what evidence was to be given against them. I will give a single illustration of this, and in giving it, I may observe that it is not so easy as it might be expected to be, to discover accounts of

[1] 8 *St. Tr.* 723-726, 732.

routine proceedings which are not recorded, and do not become the subjects of judicial decision, though they are more important than many others of which this cannot be said.

John Thurtell was tried on the [1] 6th and 7th Jan. 1824, and executed on the 9th, for the murder of William Weare, on the 24th Oct. 1823. In the *Times* newspaper, Oct. 31, 1823, there is a statement that the magistrates' investigation commenced at 10.30 p.m. "The prisoners were not brought "into the room, it being thought best to keep them ignorant "of the entire evidence against them, at least for a short time." Thurtell was then called in and asked many questions by Mr. Noel, the solicitor for the prosecution. Hunt (Thurtell's accomplice) was afterwards separately examined, which led to his making a full confession. The examinations taken before the magistrates were published in the newspapers, and [2] Mr. Justice J. A. Park made the following observations upon the subject in his charge to the grand jury:—

"These depositions he understood (for he repeated he knew "nothing of the fact himself) had already appeared very "copiously and even with notes and comments in the public "press. Now it appeared to him that the first fault (and he "had no doubt it was most unintended, and in noticing it he "did not mean to wound the feelings of any individual)—it "appeared to him that the first fault originated with the "magistrates in allowing any persons to enter into their "private apartments for the purpose of taking notes of their "proceedings. He held there was a vast difference between "the inquisitorial and the judicial power of the magistrates "where the magistrate was acting judicially his conduct was as "open to the inspection and judgment of the public as that of "himself and that of his learned brothers on the bench; to "such publicity he had no objection, for he could wish every-"thing he said as a judge to be heard and fairly canvassed "by the public. [3] He knew he erred sometimes, because h

[1] Mr. Chitty moved in arrest of judgment that the proceedings were void because part of the trial took place on the Feast of the Epiphany.

[2] The charge is published in the *Times*, Dec. 5, 1823, also in two printed accounts of the trial which appeared at the time, one of which is in the Inner Temple library. Both of them appear to be in substance reprints from the *Times*.

[3] This observation is too characteristic to have been invented, and so guarantees the authenticity of the report.

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"was human, and nothing that was human could escape "without error. But when a magistrate was acting inquisitorially, when he was taking an inquisition for blood, were "these proceedings fit to be known and published to the "world? He was bound to investigate and inquire—ought "his inquiries and investigations to be conducted in a "private or public manner? The statute law of the land "prescribed the course to be pursued upon such an occasion for more than 200 years" (269 years). "There was "a statute of Philip and Mary which stated that depositions before magistrates should be taken in writing in "order that they might be transmitted to the judges "who were to try the offence under the commission of "oyer and terminer for the county. He appealed to the "experience of every gentleman who heard him, and he "knew what his own experience as judge had taught him, "whether the constant course was not to transmit them "to the judge, taking care that the accused should not "have an opportunity of seeing them. The prosecutor or "his solicitor might have access to them, but not the party "accused. For what would be the consequence if the "latter had access to them? Why, that he would know "everything which was to be produced in evidence against "him—an advantage which it was never intended should "be extended towards him."

The first alteration made in this state of things was effected in 1836 by the Prisoners' Counsel Act (6 & 7 Will. 4, c. 114, s. 4), which provided that all persons under trial should at their trial have a right to inspect all depositions taken against them. In 1849, by 11 & 12 Vic. c. 42, s. 27, it was provided that the accused should be entitled to a copy of the depositions. This change was probably due to a growing sense of the unfairness of the law. Probably, too, the establishment of a regular police force by the steps already detailed may have put the magistrates in a new position in fact before the change was embodied in the statute law. As a regular force was established, first in the towns and then in the country by which charges of crime were investigated, however imperfectly, the magistrates would naturally assume a

more and more judicial position. The inquiry before the magistrates is now essentially judicial. It may indeed admit of a doubt whether it is not too judicial, and whether it does not tend to become a separate trial. This tendency was certainly encouraged by the power given by 30 & 31 Vic. c. 35, to the prisoner to call witnesses before the magistrates, and to have them bound over to appear at the trial and to have their expenses allowed. The power was conceded because it was thought hard that a man should be prevented by poverty from producing witnesses. This may have been a good reason for the act, and it has had some collateral advantages, but it has made the law more elaborate than it was.

In the course of the last century a change has taken place in the position of magistrates parallel to and closely connected with the change in the position of constables.

The management of local public business of all kinds, and especially of that part of it which consists in the administration of justice, has happily been at all times, as it still continues to be, a matter of honourable ambition and interest to large numbers of persons well qualified for the purpose by education and social standing. No one, however, can be expected to devote the whole of his time to the duties of a magistrate unless he is paid for it, and in places where the population is very dense, there is so much business that it cannot be efficiently done except by persons who give their whole time to it. Moreover, as the law becomes more and more elaborate, and the standard of judicial proof rises, special knowledge is continually becoming more and more necessary for the proper discharge of the duties of a magistrate.

The force of these considerations has been recognised by slow degrees, and so strong are the attractions of the voluntary system, that up to this time the magistrates are unpaid in nearly all the counties, and in most of the cities and boroughs. But a different system has been introduced in the metropolitan district, and in some other parts of the country, by the following steps.

Throughout a great part of the eighteenth century the

CH. VII. business of magistrates in that part of London which was not included in the City was carried on by magistrates who were paid almost entirely by fees. What the fees precisely were, and by what law their exaction was justified, I am not able to say, nor is it worth while to inquire. One or two curious memorials of the state of things which then existed will be worth mentioning by way of introduction to the later legislation on the subject.

Writing in 1754, [1] Henry Fielding says of his career as a magistrate: 'By composing instead of inflaming the quarrels "of porters and beggars (which I blush when I say has not "been universally practised), and by refusing to take a "shilling from a man who most undoubtedly would not have "had another left, I reduced an income of about £500 a "year of the dirtiest money upon earth to little more than "£300, a considerable proportion of which remained with "my clerk; and indeed, if the whole had done so, as it "ought, he would be but ill paid for sitting almost sixteen "hours in the twenty-four in the most unwholesome as well "as nauseous air in the universe, and which hath in his case "corrupted a good constitution without contaminating his "morals."

He observes in a footnote: "A predecessor of mine used "to boast that he made £1,000 a year in his office, [2] but how "he did this (if indeed he did it) is to me a secret. His "clerk, now mine, told me I had more business than he had "ever known there; I am sure I had as much as any man "could do. The truth is, the fees are so very low when any "are due, and so much is done for nothing, that, if a single "justice of peace had business enough to employ twenty "clerks, neither he nor they would get much by their labour. "The public will not therefore think I betray a secret when "I inform them that I received from the government a "yearly pension out of the public service money."

He afterwards says that he resigned the office to [3] his

[1] Introduction to *Journal of a Voyage to Lisbon*, *Works*, xii. p. 230, edition of 1775.

[2] This reads like an insinuation that he took bribes.

[3] This brother was John Fielding, well known for many years as the blind justice. Henry Fielding's son, William Fielding, was also a London magis-

brother, who had always been his assistant. It was by a rare accident indeed that such a man as Fielding found himself in such a position. Men of genius are exceptions everywhere, but a magistrate ought at least to be, as in these days he is, a gentleman and a man of honour. It was not so in the last century in London. [1]A characteristic account of the "trading justices" was given to the Committee of 1816, by Townsend, a well-known Bow Street runner, who at that time had been in the police thirty-four years or more, *i.e.* since 1782: "At that time before the Police Bill took "place at all, it was a trading business; and there was "Justice This and Justice That. Justice Welch in Litch-"field Street was a great man in those days, and old Justice "Hyde, and Justice Girdler, and Justice Blackborough, a "trading justice at Clerkenwell Green, and an old iron-"monger. The plan used to be to issue out warrants and "take up all the poor devils in the street, and then there "was the bailing of them, 2*s.* 4*d.*, which the magistrates "had; and taking up 100 girls, that would make, at "2*s.* 4*d.*, £11 13*s.* 4*d.* They sent none to gaol, the bailing "them was so much better."

These scandals led to the statute, 32 Geo. 3, c. 53, which authorised the establishment of seven public offices in Middlesex and one in Surrey, to each of which three justices were attached. The fees were to be paid to a receiver. No other Middlesex or Surrey justices were to be allowed, under heavy penalties, to take fees within the jurisdiction of the new magistrates. The justices were to be paid by a salary of £400 apiece.

This experiment proved highly successful. The numbers, the salaries, and the jurisdiction, both in point of locality and in point of authority, of the metropolitan stipendiary magistrates have been repeatedly raised. They are now regulated by the [2]acts referred to in the note; the effect of which is that the Queen has power to establish in the

trate. He gave evidence before a Commitee of the House of Commons in 1816, when he said he had been fifty years in the commission for Westminster.

[1] Report of 1816, pp. 139, 140.

[2] 2 & 3 Vic. c. 71, ss. 1 & 3; 11 & 12 Vic. c. 42, s. 31; 38 & 39 Vic. c. 3 (as to salary).

CH. VII. Metropolitan District [1]thirteen police courts, with any number of magistrates up to twenty-seven, the chief magistrate with a salary of £1,800 a year, and the others with salaries of £1,500. They must be barristers of seven years' standing. Each is a magistrate for Middlesex, Surrey, Kent, Essex, and Hertfordshire, and the chief magistrate is also a magistrate for Berkshire. The success of the experiment in London led to the introduction of a similar state of things in other large towns.

Stipendiary magistrates may be appointed ([2]under 5 & 6 Will. 4, c. 76, s. 99) in any borough on a bye-law, to be made by the Council and approved by the Secretary of State, fixing the amount of salary which the magistrate is to receive. Similar powers are given, by 26 & 27 Vic. c. 97, to local boards having authority over a district containing more than 25,000 inhabitants.

Even in towns, however, the majority of the magistrates are unpaid. In the City of London the Mayor and Aldermen are magistrates by charter, and there are also magistrates by charter in the 88 small corporations not brought under the Municipal Corporations Act. In boroughs under the Municipal Corporations Act [3](5 & 6 Will. 4, c. 76) the mayor for the time being is a justice of the peace *ex officio*, as also is the recorder (s. 104), if there is one; (s. 57) and the Queen has power (s. 98) to nominate as many other justices as she thinks fit from persons resident within seven miles of the borough.

The general result is that the business of holding the preliminary inquiry and committing or bailing the prisoner is, in the metropolitan district and in many large towns and populous districts, in the hands of trained lawyers, who act as preliminary judges; that in municipal boroughs it is in the hands of the mayor, an elected officer, and a number of other justices nominated by the Crown, but unpaid; that in

[1] There are at present eleven, viz.: 1, Bow Street. 2, Clerkenwell. 3, Lambeth. 4, Marlborough Street. 5, Marylebone. 6, Southwark. 7, Thames. 8, Westminster. 9, Worship Street. 10, Hammersmith and Wandsworth. 11, Greenwich and Woolwich.

[2] After January 1, 1883, under 45 & 46 Vic. c. 50, s. 161.

[3] After January 1, 1883, 45 & 46 Vic. c. 50, s. 155.

the City of London it is vested by charter in the Mayor and Aldermen; in boroughs not under the Municipal Act in a variety of officers appointed under the provisions of charters and private acts; and that in the rest of the country it is in the hands of the local gentry, appointed by the Crown and exercising their office gratuitously.

DISCHARGE, [1] BAIL, OR COMMITTAL.

The next step to the preliminary inquiry held by the magistrates is the discharge, bail, or committal of the suspected person. Little need be said of the law as to the discharge or committal of the suspected person. It is obvious that, as soon as justices of the peace were erected into intermediate judges, charged to decide the question whether there was or was not ground for the detention of a suspected person, they must have acquired, on the one hand, the power of discharge, and, on the other, the power of committal. The whole object of the preliminary inquiry was to lead to the one or the other result, and the history of the preliminary inquiry is in fact the history of the steps which led to the determination of this question in a judicial manner. The law of bail has a separate independent history.

The right to be bailed in certain cases is as old as the law of England itself, and is explicitly recognised by our earliest writers. When the administration of justice was in its infancy, arrest meant imprisonment without preliminary inquiry till the sheriff held his tourn at least, and, in more serious cases, till the arrival of the justices, which might be delayed for years, and it was therefore a matter of the utmost importance to be able to obtain a provisional release from custody. The right is recognised in curt and general terms by Glanville. [2] He says: "Cum quis itaque de morte regis "vel de seditione exercitus infamatur aut certus apparet "accusator aut non. Si nullus appareat certus accusator "sed fama solummodo publica accusat; tunc ab initio salvo "accusatus attachiabitur vel per plegios idoneos, vel per "carceris inclusionem." If there is a determinate accuser—

[1] *Dig. Crim. Proc.* arts. 136-140.

[2] Lib. xiv. c. 1.

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" is qui accusatur ut prædiximus per plegios salvos et secu-
" ros solet attachiari aut si plegios non habuerit in carcerem
" detrudi. In omnibus autem placitis de feloniâ solet accu-
" satus per plegios dimitti præterquam in placito de homi-
" cidio ubi ad terrorem aliter statutum est." [1]Bracton refers to bail in many places, but the most general passage in his treatise *De Corona* which I have noticed[2] is to the effect that the sheriff ought to exercise a discretion in regard to bailing accused persons, having regard to the importance of the charge, the character of the person, and the gravity of the evidence against him.

These very ancient authorities are somewhat general in their language, but it is still possible to trace the history of the law relating to bail from the beginning of the reign of Edward I. to our own days.

The sheriff was the local representative of the Crown, and in particular he was at the head of all the executive part of the administration of criminal justice. In that capacity he, as I have already shown, arrested and imprisoned suspected persons, and, if he thought proper, admitted them to bail. The discretionary power of the sheriff was ill defined, and led to great abuses, which were dealt with by the Statute of Westminster the First (3 Edw. 1, c. 12, A.D. 1275). This statute was for 550 years the main foundation of the law of bail. It recites that sheriffs and others " have taken and kept " in prison persons detected of felony, and incontinent have let " out by replevin such as were not replevisable, and have kept " in prison such as were replevisable because they would gain " of the one party and grieve the other." It also recites, that before this time it was not determined which persons ' were replevisable and which not, but only those that were ' taken for the death of man [3]or by commandment of the " king, or of his justices, or for the forest." It then proceeds to enact that certain prisoners shall not be replevisable either " by the common writ or without writ;" that others shall

[1] In cases of treason, ii. 261; homicide, ii. 283; treasure trove, ii. 287; rape, ii. 289; wounding, ii. 288; and see 293. [2] P. 302.

[3] Coke labours to show that this means " by a court of justice," through which alone the king can act (*2nd Inst.* p. 186), and see 2 Hale, *P. C.* 131. This may be very sound constitutional doctrine, but it seems to make nonsense of the alternative " or of his justices."

" be let out by sufficient surety, whereof the sheriff will be " answerable, and that without giving ought of their goods."

The persons not to be bailed (apparently in addition to the four classes referred to in the recital) are (1) prisoners outlawed; (2) men who had abjured the realm (and so admitted their guilt); (3) approvers (who had confessed); (4) such as be taken with the manour; (5) those which have broken the king's prison; (6) thieves openly defamed and known, and such as are appealed (accused) by approvers; (7) such as are taken for felonious arson; (8) or for false money; (9) or for counterfeiting the king's seal; (10) or persons excommunicate taken at the request of the bishop; (11) or for manifest offences; (12) or for treason touching the king himself. On the other hand, the persons to be bailed are (1) persons indicted of larceny by inquests taken before sheriffs or bailiffs by their office, *i.e.* at sheriffs' tourns or courts leet; (2) or of light suspicion (I suppose wherever indicted); (3) or for petty larceny that amounteth not above the value of 12*d.* if they were not guilty of some other larceny aforetime; (4) guilty of receipt of felons, or of commandment, or of force, or of aid in felony done (*i.e.* accessories before or after a felony); (5) guilty of some other trespass for which one ought not to lose life nor member, *i.e.* misdemeanours in general; (6) a man appealed by a prover after the death of the prover (if he be no common thief nor defamed). The statute does not say distinctly whether persons arrested on suspicion (for instance by hue and cry) were to be bailed or not. It applies to persons [1] "rettes" (which is translated "detected") of felony, as having been wrongfully let out by the sheriffs. Whether the word implied that the prisoner had been indicted, or whether it meant only in a general sense charged, or whether its use invested the sheriffs with a discretion, I cannot say.

The way in which the later statutes are framed seems to favour the supposition that the justices at all events could in the first instance admit to bail only persons indicted before

[1] Mr. Stubbs, in his glossary, says, "*Retare, Rettare,* to accuse, from the "Norse *rett,* an imputation or accusation." It soon ran into *rectatus* from a reminiscence of *rectum.*

CH. VII. them in their sessions. However this may have been, the Statute of Westminster determined what offences were bailable or not for five centuries and a-half. The last statute which regulates the sheriffs' power of bailing is 23 Hen. 6, c. 9 (A.D. 1444). This statute requires the sheriffs in certain cases to bail, in terms which seem to imply that their refusal to do so had become a well-known abuse. It should be read in connection with c. 7 of the same statute, which recites many statutes forbidding persons to hold the office of sheriff for more than a year, states that they have been frequently disregarded, confirms them, and renders a sheriff liable to a penalty of £200 to be sued for by a common informer if he disobeys its provisions.

Between 1275 and 1444, however, the sheriffs' powers had been to a great extent transferred to the justices of the peace in whom the power of admitting prisoners to bail was vested by a series of statutes. The 4 Edw. 3, c. 1 (1330), provided that persons indicted or taken by the keepers of the peace should not be let to mainprise by the sheriffs. The statute of 34 Edw. 3, c. 1 (1360), gave the justices power to bail in very general terms. The statute 1 Rich. 3, c. 3 (1485) recites that many persons have been daily arrested and imprisoned, some for malice and "sometimes of a light suspection," and accordingly empowers "every justice of the peace to let such "persons to bail and mainprise in like form as though the "said person were indicted thereof of record before the same "justices in their sessions." This looks as if the statute of Edward III. applied only to persons indicted at the sessions. The statute of Richard III. remained in force for three years only. By 3 Hen. 7, c. 3 (1486), it was recited that persons not mainprisable were "oftentimes let to bail and mainprise by "justices of the peace against due form of law, whereby many "murderers and felons escaped." It was enacted therefore that the power of bailing should be exercised only by two justices, who should let prisoners to bail till the next sessions or gaol delivery, and "certify the same at the next general sessions "of the peace, or next general gaol delivery." By the same statute it was provided that "every sheriff, bailiff of franchise, "and every other person having authority or power of keeping

"of gaol or prisoners for felony," should certify the names of all prisoners in their custody to the next court of gaol delivery, "there to be calendered before the justices." These measures formed a part of the rigorous administration of justice by which Henry VII. restrained the disorders arising from the Wars of the Roses. They are contained in the statute of which the act relating to the Star Chamber (3 Hen. 7, c. 1), already noticed, formed a part. They show how great was the power committed to the justices, and what grievous consequences might follow from its abuse. Under the earlier law, any one justice of the peace might let any offender to bail on any security, and as there was nothing to warn the courts of oyer and terminer that this had been done, the result might be, and often was, the complete impunity of the offender. To require the presence of two justices on the occasion was probably some, though no very great, security.

The system established by the statute of Philip and Mary already referred to (Phil. & Mary, c. 13), was much more stringent. It was, in fact, the origin of the preliminary inquiry which has come to be in practice one of the most important and characteristic parts of our whole system of procedure, but it was originally intended to guard against collusion between the justices and the prisoners brought before them. It recites that until the making of the statute of Henry VII. "one "justice of the peace in the name of himself and one other of "the justices his companion not making the said justice party "nor privy unto the case wherefore the prisoner should be "bailed hath oftentimes by sinister labour and means set at "large the greatest and most notable offenders such as be not "replevisable by the laws of this realm; and yet the rather "to hide their affections in that behalf have signed the cause "of their apprehension to be but only for suspicion of felony "whereby the said offenders have escaped unpunished." It then provides that, whenever a prisoner is bailed, the depositions of the witnesses are to be taken and returned to the court. Justices omitting this duty are to be fined.

The fact that this act was intended primarily as a security against malpractices of the justices, and that the improvement which it introduced into the administration of justice was

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not its principal object, even if it was distinctly intended, explains some singularities in the act. It explains the circumstance that the first statute was confined to cases in which prisoners were bailed. If a man was committed to prison, there was no fear of the justices unduly favouring him; and therefore no need for special precautions against such favour. It also explains the circumstance that London and other corporate towns and the county of Middlesex were excepted from the act. In a great town where there were aldermen or other magistrates by charter, and a considerable population, the danger of collusion would be less than in the country.

[1]These statutes assume that the question who is bailable and who not is settled by the statute of Edward I. though there are some inconsistencies between them, especially as to bail in cases of homicide, to which I need not refer. [2]Numerous statutes, relating to particular offences, were passed in the seventeenth and eighteenth centuries, but no general provision on the subject was made till 1826, when the statute of 7 Geo. 4, c. 64, was passed, being one of the first attempts to consolidate the criminal law. It repealed all the statutes above referred to, so far as they relate to bail, and made other provisions on the subject which were in their turn superseded by those of 11 & 12 Vic. c. 42, s. 23, which are now in force. [3]This enactment provides that the committing justice may in his discretion, admit to bail (or commit to prison without bail, though the alternative is not expressly mentioned) any person charged with felony, or with [4]any one of the

[1] 2 Hale, *P. C.* 138-140.

[2] For them see 7 Geo. 4, c. 64, s. 32, the repealing clause.

[3] Under this act a single justice may act. Under the Act of 7 Geo. 4, c. 64, a complicated arrangement was made, not necessary to be noticed.

[4] 1. Assault with intent to commit felony.
2. Attempt to commit felony.
3. Obtaining or attempting to obtain property by false pretences.
4. Misdemeanour in receiving property stolen or obtained by false pretences.
5. Perjury or subornation of perjury.
6. Concealment of birth of a child.
7. Wilful or indecent exposure of the person.
8. Riot.
9. Assault in pursuance of a conspiracy to raise wages.
10. Assault upon a police officer in the execution of his duty.
11. Neglect or breach of duty as a peace officer.
12. Any misdemeanour for the prosecution of which costs may be allowed

misdemeanours mentioned in the note. The short result is that the justice may in his discretion either bail or refuse to bail any person accused either of felony or of any common misdemeanour except libel, conspiracies other than those named, unlawful assembly, night poaching, and seditious offences. In these cases, and in misdemeanours [1] created by special acts, bail cannot be refused. [2] In cases of treason no bail may be taken except by order of a Secretary of State or by the High Court. The statute contains a series of provisions,[3] to which a general reference is sufficient, as to admitting to bail, after committal, persons who, in the opinion of the committing magistrate, ought to be bailed if they can find sufficient sureties.

Such is the history of the existing state of the law as to the bailing by justices of persons accused or suspected of crimes, but in order to make the history complete, it is necessary to mention shortly a branch of law which has

out of the county rate. The principal statute in force on the subject of costs at the time when 11 & 12 Vic. c. 42 was passed (*i.e.* in 1848) was 7 Geo. 4, c. 64, s. 23, which empowered the court to allow costs in cases of prosecution for ten specified misdemeanours, viz. all those mentioned in 11 & 12 Vic. c. 42, s. 23, with the exception of concealment of the birth of a child. Probably, therefore, there were in 1848 some provisions in force enabling the court to give costs in cases of misdemeanour other than those mentioned in 11 & 12 Vic. c. 42, s. 23.

I have not, however, thought it worth while to examine into this minutely. In any event, I suppose the words under consideration contained in 7 Geo. 4, c. 64, are meant to apply to all misdemeanours, the costs of which may be allowed by the court under the law in force for the time being, though they do not say so distinctly. Several statutes have been passed since 1848 which have this effect. By 14 & 15 Vic. c. 55, s. 2, the act of George IV. is extended to the following misdemeanours:—

1. Unlawfully and carnally knowing and abusing any girl being above the age of ten (now twelve) and under the age of twelve (now thirteen) years.
2. Abduction of girls under sixteen.
3. Conspiring to charge any person with felony or to indict any person of felony.
4. Conspiring to commit any felony.

By 24 & 25 Vic. c. 96, s. 121 (larceny), c. 97, s. 77 (malicious injuries to properties), c. 98, s. 54 (forgery), c. 100, s. 77 (offences against the person), the court may allow the expenses of prosecutions for misdemeanours punishable under those acts. There is a more special provision of the kind in the Coinage Act, 24 & 25 Vic. c. 99, s. 42.

[1] This subject will be treated hereafter. Great numbers of misdemeanours are created by way of sanction to the provisions of particular administrative measures, such as the Lunacy Laws, the Merchant Shipping Acts, &c.

[2] 11 & 12 Vic. c. 47, s. 23 (at the end).

[3] Ss. 23 & 24. The act is a most useful one, but it is drawn in a manner calculated to drive the reader to despair. The principle on which its arrangement is based is that of the accidental association of ideas, and the style is to the last degree verbose and drawling.

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become obsolete. In our own time there is practically no reason to fear that justices under a legal duty to admit a man to bail will refuse to do so. It was otherwise with the sheriffs of earlier times. Not only did the vagueness of the law itself leave a wide and ill-defined discretion in their hands, but their power was so great that even in plain cases they were often disposed to set it at defiance. Hence royal writs requiring them to do their duty were necessary; and of these there were several, the most important of which were the writ *de homine replegiando*, the writ *de manucaptione*, and the writ *de odio et atiâ*. These writs issued out of the chancery to the sheriff or coroner. If the first writ was not obeyed, a second writ, which was called an "alias," was issued, and if that was not obeyed, a third, called a "pluries." The final remedy was an attachment under which the sheriff or other officer was imprisoned for his disobedience. He might be fined for delaying till an "alias" and "pluries" issued. [1] The writ *de homine replegiando* was confined (at least after 3 Edw. 1) to cases in which a person was imprisoned before trial for an offence bailable under the Statute of Bail (3 Edw. 1), though it also applied to cases in which a person was unlawfully detained by any one not having legal authority to detain him. In such cases the sheriff might return that the person detained had been "eloigned" (*elongatus*, carried to a distance where he could not be found), and upon such a return a writ might issue requiring the sheriff to take the captor "in withernam," that is, to imprison the captor till he produced the person so detained. The writ "de manucaptione" (of mainprise) was appropriated to cases in which a person had been taken on suspicion of felony and had tendered "manucaptors" or "mainpernors" who had been refused. The difference between bail and mainprise is long since obsolete. It is thus described by Hale: [2] "Bail and mainprise are used promiscuously often-"times for the same thing, and indeed the words import "much the same thing, for the former is *traditus J. S.* and

[1] There were various forms of it, one for common offences, another for forest offences. See FitzHerbert, *De Naturâ Brevium*, and see also 2 Hale, *Pleas of the Crown*.

[2] 2 Hale, *P. C.* 124.

" the other is *manucaptus per J. S.* But yet in a proper and CH. VII.
" legal sense they differ. 1. Always mainprise is a recog-
" nizance in a sum certain, but bail is not always so. 2.
" He that is delivered per manucaptionem only is out
" of custody; but he that is bailed is in supposition of
" law still in custody, and the parties that take him to
" bail are in law his keepers, and may reseize him to
" bring him in." The difference between the use of the two writs is described in [1]Hale, but is to me very obscure.

The writ *de odio et* [2]*atiâ* was confined to cases of homicide, and has an odd history, as it was in itself a singularly clumsy procedure. When a person was imprisoned on a charge of homicide, says [3]Bracton, "Fieri
" solet inquisitio utrum hujusmodi imprisonati pro morte
" hominis culpabiles essent de morte illâ vel non, et
" utrum appellati essent odio vel atya." If the person imprisoned was found guilty, he was not to be admitted to bail. If, however, the inquest said, "quod per odium et
" atyam, et contineatur causa in inquisitione quo odio vel
" qua atya diligenter erit causa examinanda, cum sint plures,
[4]" &c., et ballivi qui non sine causæ cognitione in hujusmodi
" inquisitionibus prætendunt non causam ut causam, et si
" sufficiens fuerit causa per ballium dimittatur." This curious passage seems to imply that even in the infancy of our law questions arose as to malice similar to those which have given so much trouble in our own days. It obviously was not every sort of hatred or malice in the prosecutor which would entitle the prisoner to be bailed. The cause of it was to be considered. It is probable that the "causa" which was to be diligently examined was the evidence of the guilt of the accused man, and that "odium et atya" were mere legal figments by which the presence or absence of reasonable cause of suspicion was obscurely denoted. If a man hated another because he had been seen committing a murder, his hatred would be no reason why he should not prosecute the criminal.

[1] 2 Hale, *P. C.* 140.
[2] Malice. "Ex Anglo-Saxonico forte 'hatung' unde Anglis 'hate' et "Germanis 'Haet' . . . vel potius a Greco ἄτη" (Ducange).
[3] Bracton, ii. pp. 292-296.
[4] I suppose sheriffs and coroners.

CH. VII. If the prosecutor was unable to assign any cause for the prosecution, it would be not unnatural to say that he must hate the person imprisoned. If there was evidence malice was immaterial. If there was no evidence malice was inferred. Hence, the sufficiency of the evidence, being the real point, was inquired into under pretence of inquiring into the malice. But, however this may have been, it is at all events clear that the effect of the writ was to cause a preliminary trial to take place in cases of homicide, the result of which determined whether the accused should be admitted to bail or imprisoned till he was finally tried. If he was found to have been accused by malice, he was admitted to bail on finding twelve sureties,[1] "qui manucapiant habendi "eum ad primam assisam et coram justitiariis nostris ad "respondendum de morte B."

The writ *de odio et atiâ* is referred to in [2]Magna Charta. Foster is of opinion (upon grounds which to me seem just) that it was abolished by 6 Edw. 1, c. 9 (the Statute of Gloucester), in 1278. Coke says in one place that it was abolished by the general words of 28 Edw. 3, c. 9, and revived by 42 Edw. 3, c. 1, in which I think he was mistaken; elsewhere he contradicts this opinion, saying that it was abolished by the Statute of Gloucester. At all events it has been obsolete for centuries.[3]

These writs, which issued to the sheriff and the coroner, can never have been of the first importance, and must have gone into disuse at an early period ([4]though there are a few instances of them in comparatively modern times), as from the earliest times [5]the superior courts and the lord

[1] Bracton, ii. 295-297.

[2] "Nihil detur vel capietur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedetur et non negetur."—Stubbs, *Charters*, p. 301. Magna Charta, art. 36.

[3] See on this writ, 2 Hale, *P.C.* 148; Coke, 2*nd Inst.* 421, on Magna Charta, c. 26, p. 315, on the Statute of Gloucester, c. 9. See also Foster, 284-285.

[4] See *e.g.* the case of Witmore for kidnapping in 1682, 8 *State Trials*, 1347, and two records of *de homine replegiando* printed at pp. 1350-1385. See also some remarks in Selden's argument in the case of the writ of *habeas corpus* moved for on behalf of Hampden and others, 3 *St. Tr.* 95. In the case of Lord Grey of Werke, a writ *de homine replegiando* was issued to force him to produce his sister-in-law, Lady Henrietta Berkeley, whom he had seduced. See 9 *St. Tr.* 184.

[5] The Courts of Common Pleas and Exchequer had originally to issue the writ under a fiction to the effect that the person requiring it was privileged

chancellor had the right of issuing the writ of habeas corpus, which answered in a simpler and more direct way all the purposes of the other writs.

The history of the writ of habeas corpus, regarded as a protection against wrongful imprisonment, hardly falls within the scope of a history of the criminal law. It is well known, and is associated with the most stirring period of our history. I need not therefore refer to it on the present occasion. The power of the superior courts to bail in all cases whatever, even high-treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times. The only matters connected with it which need be noticed here are some of the provisions in the Habeas Corpus Act of 1679 (31 Chas. 2, c. 2). This act provides that any person committed to prison "for any crime unless for treason "or felony plainly expressed in the warrant of commitment," may obtain a writ of habeas corpus from the lord chancellor or any judge of the common-law courts. The writ being served on the gaoler, and certain conditions being complied with it as to expenses, a return must be made to the writ within three days. Upon the return, the judge is required to admit the prisoner to bail.

In the 11 & 12 Vic. c. 42, no notice is taken of the Habeas Corpus Act, so that it seems that, although in many cases of misdemeanour the committing magistrate may refuse bail, a judge who knows nothing of the case is absolutely required to bail any misdemeanant who takes out a writ of habeas corpus. There is indeed an obscure proviso which perhaps might be held to meet such a case as the end of s. 2, but the act is as ill-drawn as it is celebrated.

or was to be sued in the court from which the writ issued. See 2 Hale, *P.C.* 144; but by 16 Chas. 1, c. 10, s. 6, the Common Pleas obtained original jurisdiction in the matter and by 31 Chas. 2, c. 2, all the three courts are empowered to grant the writ.

CHAPTER VIII.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—FORMS OF ACCUSATION AND TRIAL—APPEALS—ORDEALS—TRIAL BY JURY.

CH. VIII. THE subject of the present chapter is the history of the methods of accusation and trial which have prevailed in England. These are private and public accusations, and trial by battle, by ordeal, by jury, and by the Star Chamber and similar courts of which I have [1] already spoken.

ACCUSATION BY A PRIVATE ACCUSER—APPEALS.

Accusation and trial are so closely connected that for practical purposes they are most conveniently considered together.

Since the Norman Conquest there have been [2] three modes of trial in criminal cases, namely, trial by ordeal, trial by battle, and trial by jury; and there have been also three modes of accusation, namely, appeal or accusation by a private person, indictment or accusation by a grand jury, and informations which are accusations either by the Attorney-General or by the Master of the Crown Office.

[1] *Supra*, ch. vi.

[2] If compurgation is counted there have been four, but compurgation in criminal cases hardly survived the Norman Conquest, though some traces of it remained in the hundred and manor courts. In the ecclesiastical courts it lasted till 1640, as will appear hereafter. In the form of "wager of law" in civil cases it maintained a nominal existence till the year 1834, when it was abolished by 3 & 4 Will. 4, c. 42, s. 13. Probably the last case in which it was actually put in force was King *v.* Williams (2 B. and C. 538, 1824). In this case on an action of simple contract the defendant prepared to bring eleven "compurgators, but the plaintiff abandoned his action." Much information on this subject is to be found in Pike's *History of Crime*. The references are collected in the Index.

The history of these modes of accusation and trial may be conveniently related under one head.

The history of appeals or accusations by a private person and trial by battle go together, as trial by battle was an incident of appeals.

The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation. In very early times this showed itself in the circumstance that the law of appeals formed the most, or nearly the most, important and prominent part of the criminal law. An elaborate account of the procedure connected with them fills a large part of the book of Bracton, *De Corona*, and also a considerable part of the first book of Britton, which relates mainly to the same subject. Each of these authors, but particularly Bracton, goes into the subject with great minuteness, Bracton in particular having a separate chapter upon each different kind of appeal and mixing it up with definitions of the various offences as to which appeals might be brought, forms of writs to sheriffs, and much other matter which has now altogether lost its interest.

The following was the substance of the process according to which appeals might be made in cases of treason, homicide, breach of the peace and wounding (*de pace et plagis*), mayhem, breaches of the peace by false imprisonment, robbery, arson, and rape. The appeal was made before the coroner or before more coroners than one. The appellor was required to make a minute and strictly formal statement before the coroner as to the nature of the offence, [1] setting forth a great variety of particulars as to the time, place, and circumstances of the offence, in order that the appellee might be enabled to defend himself. This statement was enrolled by the coroner, and the appellor appears to have been held

[1] Brac. 424-33.

CH. VIII. to it strictly in all subsequent stages of the proceedings. The next step was to secure the appearance of the appellee, the process for which was to publish the appeal at five successive county courts. If he did not appear at the fifth the consequence was outlawry. There were elaborate rules as to this, and as to the counter process of inlawry, by which the effect of outlawry was taken off, and the appellee was permitted to defend himself.

If the appellee appeared before the justices he might avail himself of any one of a great variety of pleas or exceptions, which are detailed at great length in Bracton. [1] He states the following as "ista generalis exceptio et prima":—"Si "secta non fuerit bene facta, quia qui appellare voluerit et "bene sequi, debet ille, cui injuriatum erit, statim quam "cito poterit hutesium levare, et cum hutesio ire ad villas "vicinas et propinquiores et ibi manifestare scelera et in-"jurias perpetratas." There were, however, many other exceptions, one of which is introduced in the middle of the chapter without any special notice, but which must, if it really prevailed, have made appeals comparatively unimportant. [2] "Cadit appellum ubi appellans non loquitur de "visu et auditu," but there is reason to think that if this was the law in Bracton's time it ceased to be so afterwards.

[3] If the appellee did not plead, or not adequately, battle was waged between the parties, but the judges were bound, *ex officio*, to inquire (it is not clearly stated how) into the circumstances of the case, and not to allow the battle if the case was such that there were against the appellee [4] "pre-"sumptiones quæ probationem non admittunt in contrarium, "ut si quis cum cultello sanguinolento captus fuerit super "mortuum, vel a mortuo fugiendo, vel mortem cognoverit "coram aliquibus qui recordum habeant, et hujusmodi tales." If the appellee was defeated before the stars appeared he was hanged. If he was victorious or defended himself till the stars appeared he was acquitted of the appeal, [5] but inasmuch as the appeal was considered to raise a presumption of his guilt he was to be tried by the country as if he had been indicted.

[1] Bracton, ii. 425. [2] *Ib.* p. 434. [3] *Ib.* p. 442.
[4] *Ib.* p. 452. [5] *Ib.* p. 448.

There are some variations from this in [1] Britton's *Account of Appeals*, which was written about 1291, in the time of Edward I., and no doubt the practice must have varied, but it would not be worth while to go minutely into the subject. [2] In Hawkins's *Pleas of the Crown* is to be found an elaborate account of the law as it stood when all but practically obsolete. I may however observe that the plea of want of fresh suit was taken away by the Statute of Gloucester (6 Edw. 1, c. 9) in 1278, which allowed the appellor to sue within a year and a day.

The principal points in the history of appeals are as follows:—Appeals in cases of treason were properly (it seems) brought in Parliament. I have already given an account of them and of the manner in which they came to be abolished by statute, 1 Hen. 4, c. 14. That statute applies only to appeals of treason within the realm. Appeals for treasons done out of the realm were not affected by it, but were to be brought before the constable and marshal. [3] Such an appeal actually was brought by Lord Rea against David Ramsey in the year 1631, and combat was ordered upon it, but the king revoked his letters patent to the constable and marshal, and the matter came to an end.

Appeals in cases which were not capital, and in particular appeals for blows, for wounds, and false imprisonment, merged in actions of tort for damages for those causes. Appeals of mayhem lingered a little longer, but became obsolete.

Appeals of robbery and larceny lasted longer, because at Common Law the restitution of property feloniously taken could be awarded only when the thief or robber was convicted on an appeal, but this was altered by 21 Hen. 8, c. 11, which gave a writ of restitution to the true owner upon the conviction of the felon on an indictment.

Appeals of arson seem to have been discontinued at a very early time.

[1] 1 Britton (by Nicholls), 97–125.

[2] Bk. ii. ch. xxiii. vol. ii. p. 223–281, ed. 1824. The book was written early in the eighteenth century.

[3] 3 *St. Tr.* 483–519. Some other cases of trial by combat in civil cases are referred to in the notes to this case. One of the combatants in the last case of trial by battle in a civil action was Lilburn, the father of John Lilburn, known under Charles I. and Cromwell as "Free-born John."

CH. VIII.

Of appeals of rape it is only necessary to say that they seem to have differed less than other appeals from indictments, and that the offence at which some early statutes on the subject were levelled seems to have included what we should describe as abduction with intent to marry as well as what we describe as rape.

Hence the only appeals which can be said to have had any definite history and to have formed a substantial part of the criminal procedure of the country were appeals of murder. It seems that appeals continued to be the common and established way of prosecuting murder till the end of the fifteenth century. Indeed, they were viewed with so much and, according to our notions, such strange and unmerited favour that in 1482 (22 Edw. 4) they were made the subject of an act of judicial legislation of an almost unexampled kind. [1] FitzHerbert has this note on the subject: "Note that all the justices of each bench say that "it is their common opinion that, if a man is indicted of the "death of a man, the person indicted shall not be arraigned "within the year for the same felony at the king's suit, and "they advise all legal persons (touts hōēs de ley) to execute "this point as a law without variance, so that the suit of "the party may be saved." This resolution, in which the judges, openly and in the plainest words, assumed legislative power, was apparently acted upon to the great injury of the public, and it was found necessary six years afterwards to repeal it by statute. This appears from the recitals and provisions of 3 Hen. 7, c. 1, to which I have already referred in connection with the Court of Star Chamber. This act recites that "murders and slayings of the king's "subjects do daily increase, that the persons in towns where "such murders fall to be done will not attach the murderer" as by law they ought, and that "it is used that within the "year and a day after any death or murder had or done the "felony should not be determined at the king's suit for "saving of the party's suit" (the appeal), "wherein the "party is oftentimes slow, and also agreed with, and by the "end of the year all is forgotten, which is another occasion of

[1] Corone, No. 44, H. 22 Edw. 4.

"murder. And also he that will sue any appeal must sue in "proper person, which suit is long and costly that it maketh "the party appellant weary to sue." As a remedy it is provided that indictments for murder shall be tried at once, and that an acquittal on an indictment shall be no bar to an appeal.

The effect of this provision seems to have been that the indictment, which did not involve trial by battle, was usually tried first, and its result was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the parties concerned. This state of things continued till the year 1819, though the resort to an appeal became less and less common as time went on. [1] There are, however, some specimens of appeals of murder reported in the *State Trials*, [2] and an attempt to abolish them by statute was successfully resisted in the years 1768 and 1774. The last appeal of murder ever brought was the case of [3] Ashford *v.* Thornton. Thornton, being strongly suspected of having murdered Mary Ashford, was tried for that offence and acquitted at Warwick Assizes, and an appeal was brought by her brother. On the 2nd November, 1818, the appellant read his count (the equivalent of an indictment) in the Court of King's Bench, charging Thornton with his sister's murder. Thornton then pleaded, "Not guilty, and I am "ready to defend the same with my body;" "and thereupon "taking his glove off he threw it upon the floor of the court." The appellant then counter-pleaded that Thornton ought not to be permitted to wage battle, because the circumstances (which are set out in detail in the counter-plea) were such as to show that he was guilty. The appellee replied, setting out circumstances which he regarded as establishing an alibi in his favour. To this there was a demurrer. Upon this issue was joined, and an argument took place, in which [4] all

[1] In Spencer Cowper's case, 13 *St. Tr.* 1190, as also the cases of Bambridge and Corbet, 17 *St. Tr.* 395-7. In Bigby *v.* Kennedy, 5 *Bur.* 2643, a careful report is given of the proceedings in an appeal on account of their rarity.

[2] See an account of this in Horne Tooke's defence on his prosecution for libel in 1777. 20 *St. Tr.* 716, 717.

[3] 1 Bar. and Ald. 405.

[4] Mr. Chitty and Sir N. Tindal argued the case. It will be found that practically Bracton is the great authority.

CH. VIII. the authorities on the subject are reviewed. The Court decided that the result of the authorities was that the appellee had a right to wage his body, unless circumstances practically inconsistent with his innocence appeared, and that such did not appear from the matter put upon the pleadings to be the case. The result was that no further judgment was given, the appellant not being prepared to do battle. The proceedings ended by Thornton's arraignment on the appeal, to which he pleaded *autrefois acquit*.

This proceeding led to the statute 59 Geo. 3, c. 46, by which all appeals in criminal cases were wholly abolished.

It is probable that the commonest and most important form of appeal was that of appeal by an approver. The nature of this proceeding was as follows:—[1] If a person accused of any crime, but especially of robbery, chose to plead guilty and to offer to give up his accomplices he was handed over to the coroner, before whom he confessed his guilt and accused a certain number of other persons, and the king might "grant him life and limb if he would deliver the "country from a certain number of malefactors either by his "body" (*i.e.* by killing them upon battle waged) "or by the "country" (*i.e.* convicting them before a jury), "or by "flight." If he failed to fulfil the conditions imposed on him he was hanged on his own confession. If the person accused was a man of good character, the conditions of the proceeding were made less favourable to the approver than they otherwise would have been.

If the approver fulfilled the stipulated condition and disposed of the prescribed number of accomplices he had to abjure the realm [2] "in regno remanere non poterit etiam si "velit plegios invenire."

ACCUSATIONS BY PUBLIC REPORT—ORDEALS—TRIAL BY JURY.

I have already described the manner in which public accusations were made before the Conquest. I now come to the procedure subsequent to the Conquest.

[1] Bracton, 523, &c. [2] *Ib.* 532.

Glanville mentions the subject very slightly. [1] In his short chapter on criminal proceedings he describes the procedure adopted in the case of each particular crime separately, but he seems in all cases to recognize the distinction between an accusation by a definite accuser and an accusation by public report alone.

The silence of Glanville upon this subject is, however, of the less importance, because we have still [2] the text of the Assize of Clarendon (1164) and that of the Assize of Northampton (1176), which constitute the legislation of Henry II. upon this subject. The Assize of Northampton was a republication of the Assize of Clarendon, with some alterations and additions intended to make the system established by it more rigorous. Its provisions are as follows:—"If any "one is accused before the justices of our Lord the King of "murder or theft or robbery, or of harbouring persons com- "mitting those crimes, or of forgery or of arson, by the oath of "twelve knights of the hundred, or, if there are no knights, "by the oath of twelve free and lawful men, and by the oath "of four men from each township of the hundred, let him go "to the ordeal of water, and if he fails let him lose one foot. "And at Northampton it was added for greater strictness of "justice" (*pro rigore justitiæ*) "that he shall lose his right "hand at the same time with his foot, and abjure the realm, "and exile himself from the realm within forty days. And "if he is acquitted by the ordeal let him find pledges and "remain in the kingdom unless he is accused of murder or "other base felony by the body of the country and the lawful "knights of the country; but if he is so accused as aforesaid, "although he is acquitted by the ordeal of water, neverthe- "less he must leave the kingdom in forty days and take his "chattels with him, subject to the rights of his lords, and he "must abjure the kingdom at the mercy of our Lord the "King. This assize is to apply from the time of the Assize "of Clarendon to the present time, and from the present "time as long as our Lord the King pleases in cases of "murder and treason and arson, and in all the aforesaid

[1] Glanville, book xiv.
[2] Stubbs, *Charters*, 143, 150.

CH. VIII. "matters, except small thefts and robberies done in the time "of war, as of horses and oxen, and less matters."

The system thus established is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction subject to the chance of a favourable termination of the ordeal by water. If the ordeal fails, the accused person [1] loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation therefore was equivalent to banishment at least.

We have still some evidence as to the kind of cases in which the ordeal was inflicted. It is to be found in the *Rotuli Curiæ Regis* for the reigns of Richard I. and John, said by Sir F. Palgrave to be the oldest judicial records in existence. The following illustrations (amongst others) are published by Sir F. Palgrave in his [2] *Proofs and Illustrations.*

"*Roll of the Iter of Stafford in* 5 *John.*—One Elena is "suspected by the jurors because she was at the place where "Reinalda de Henchenhe was killed, and because she was "killed by her help and consent. She denies it. Let her "purge herself by the judgment of fire; but as she is ill, let "her be respited till she gets well."

"Andrew of Bureweston is suspected by the jurors of the "death of one Hervicus because he fled for his death, there-"fore let him purge himself by the judgment of water."

"*Roll of the Iter of Wiltshire,* 10 *Rich.* 1.—The jurors "say that Radulphus Parmentarius was found dead with his "neck broken, and they suspect one Cristiana, who was "formerly the wife of Ernaldus de Knabbewell, of his death, "because Radulphus sued Cristiana in the ecclesiastical court "for breach of a promise of marriage she had made to him, "and after the death of her husband Ernaldus, Reginald, a "clerk, frequented her and took her away from Radulphus, "and Reginald and Cristiana hated Radulphus for suing her,

[1] This was the common punishment for robbery in India under native rule. I have myself seen men in Lahore whose hands (as they said themselves) had been cut off by Runjeet Singh for theft. In the *Life of Thomas*, a Baptist missionary at Calcutta, there is an account of the punishment of fourteen dacoits in the neighbourhood of Calcutta, each of whom had his hand and foot cut off on the 15th February, 1789, on the western bank of the Hooghly, opposite Calcutta.—Lewis's *Life of Thomas*, p. 18.

[2] Palgrave, clxxxv.—clxxxviii.

"and on account of that hatred the jurors suspect her and "the clerk of his death. And the country says it suspects "her. Therefore it is considered that the clerk and Cristiana "appear on Friday, and that Cristiana purge herself by fire."

It is impossible to say how long the system of ordeals lasted. In the *Mirror* there is a list of 155 abuses in the law of which the author complains. The 127th is—"It is "an abuse that proofs and purgations be not by the miracle "of God where other proof faileth." [1] The *Mirror* was written in the reign of Edward I., so that it appears probable that ordeals fell into disuse in the course of the thirteenth century, [2] probably in consequence of the decrees of the Lateran Council of 1216.

The system of accusation which led up to, and to use a modern legal expression "sounded," in ordeal, was the origin of the grand jury of later times, and of our own days. In my chapter on the History of the Criminal Courts, [3] I have given Bracton's description of the justices' eyre, as it existed in the time of Henry III., and have shown that the accusation of suspected persons was only one of its multifarious duties, which were of such magnitude and variety that they may properly be said at that time to have consisted of a general superintendence over all the local details of the executive government. By degrees the old system of convening something like a county parliament, in which every township was represented by its reeve and four men, fell into disuse, and the sheriffs fell into the habit of summoning only a sufficient number of *probi et legales homines* to form a grand jury and as many petty juries as might be needed for the trial of the civil and criminal cases to be disposed of. The law upon the subject of the number and qualifications of the men to be

[1] Palgrave, cxiii.

[2] The last reference to the system which I have met with is in one of the trials for the Popish Plot. Gavan, one of the five Jesuits who were tried and executed upon the evidence of Oates in 1679, begged to be allowed "to put "himself upon the trial of ordeal" (7 *St. Tr.* 383), alleging that "in the be-"ginning of the Church it was a custom, and grew to a constant law," that a person accused of a capital offence should be allowed to do so when there was only the accuser's oath against his denial. It is odd that Gavan should have supposed that judgment by ordeal was a specially ecclesiastical mode of proceeding, when, in fact, its abolition was due to the ecclesiastical legislation on the subject.

[3] *Supra*, p. 102.

CH. VIII. put upon the pannels formerly was, and to some extent still is, singularly vague. In practice at the assizes the grand jury for counties is always composed of the county magistrates, whose names are called over by the officer of the court until twenty-three at most have appeared. The magistrates, however, have no special legal right or duty in the matter. Any "good and lawful men" of the county may serve, no special qualification being required, though there are some disqualifications.[1] There is no historical interest in the enactments which have been made upon this subject. The grand jury to the present day accuses every person who is put on his trial before any court of criminal jurisdiction which tries prisoners by a jury. The most interesting point connected with their operations is to trace out, if possible, the manner in which the powers of the petty jury grew up, and the way in which they were exercised.

The origin of petty juries seems now to be pretty clearly determined. Various institutions having more or less resemblance to petty juries are to be found in different ages and countries, but the following points connected with their history in England are clear beyond dispute, and are those which it really concerns us to know.

When trial by ordeal was abolished and the system of accusation by grand juries was established, absolutely no mode of ascertaining the truth of an accusation made by a grand jury remained. Trial by battle could apply only in cases where there was an individual accuser, in other words in cases of appeals; and thus an accusation by a grand jury became practically equivalent to a conviction. This led to the introduction of trial by jury as we understand it, by the following steps. In the first place, the usual mode of determining questions of fact known to and practised by the Normans was the inquest. An inquest was a body of persons representing a certain number of townships or other districts. The township being represented by the four men and the reeve. They were convened by the representative of the

[1] The law relating to petty juries is now regulated by statute in most though not in all particulars (see 6 Geo. 4, c. 50, and some later acts, especially 33 and 34 Vic. c. 77). As to grand juries, see *Dig. Crim. Proc.* ch. xxii. arts. 184-188.

royal authority, such as a justice, a sheriff, or a coroner, as the case might be, and answered upon oath the particular matters proposed to them. The most important instances of inquests which can be cited are those by whose report were drawn up Domesday Book and the Hundred Rolls, to which I have already referred.

The manner in which the inquests informed themselves of the particular facts to which they swore has not been recorded. Probably they would be warned beforehand of the matters to which they were to depose, and would make local inquiries. Possibly they took evidence on the spot. [1] In one of the passages I have quoted from the Hundred Rolls for another purpose, a complaint is made of the misbehaviour of a local noble, who threatened a person in order to deter him from giving evidence before the inquest, but upon these matters we are left to conjecture, and it is probable that different methods would be employed on different occasions and for different purposes. Be this however as it may, one point is clear. The inquest were the witnesses in contemplation of law. It was by their oath, and not by the oath of their informants, that the fact to be proved was considered to be established, and the only form of perjury known to the law of England as a crime till comparatively modern times was that form of perjury which was committed by giving a false verdict, and which was punished by the process known as an attaint.

The introduction of the inquest into the administration of justice took place apparently by steps. It was first introduced in what were in earlier days the commonest and most important of civil causes, namely, trials held in order to determine the right to land. In these cases, as in private accusations of crime, the mode of trial after the Norman Conquest was by battle, but in the reign of Henry II. was introduced what was called the "Great Assize." This form of trial is thus described by [2] Glanville: "Now the Great "Assize is a royal benefit indulged to the people by the "clemency of the prince on the advice of the nobles, whereby "life and property are so wholesomely cared for that men

[1] *Ante*, p. 130.

[2] Glanville, ii. 7, p. 35.

CH. VIII. "can avoid the chance of the combat and yet keep what-
"ever right they have in their freeholds. And thereby they
"can avoid the last penalty of unexpected and premature
"death, or at least of that perpetual infamy, that horrible
"and shameful word (craven) which sounds sadly in the
"mouth of the conquered. This constitution arises from
"the highest equity, for the right which can scarcely be
"proved by battle after many and long delays is more con-
"veniently and speedily acquired by the benefit of this
"constitution. The Assize does not admit of as many
"essoigns as the combat, as will immediately appear, and by
"this both the labour of men and the expense of the poor
"are spared. Besides, this institution has in it more equity
"than trial by combat in proportion as more weight is to be
"allowed in judgment to many fit witnesses than to one
"alone."

In the following chapters the nature of the institution is described:—[1] The defendant "put himself on the assize," whereupon trial by combat was stayed, [2] and four knights were summoned to return twelve knights of the vicinage to say (ad recognoscendum) by their oaths [3] which of the parties had most right to the land. These recognitors were obviously witnesses, as appears from the [4] account given of their proceedings when they met. Upon their assembly it is said either all will know where the right is, or some will and others will not, or all will not. If some or all are ignorant, and say so on their oaths, they are to be excluded. If some are on one side and some on the other, "adjiciendi sunt alii "donec duodecim ad minus in alterutram partem acquieverint." It is also said that they were to swear to matters within their own knowledge, or "per verba patrum suorum et per talia "quibus fidem teneantur habere ut propriis." [5] Severe punishment was provided for those who swore falsely. [6] If the claimant could not find twelve persons to swear to his right he was thrown back on the remedy by combat.

Even before the abolition of ordeals it seems to have been

[1] Glanville, c. 8. [2] *Ib.* c. 11.
[3] "Quis eorum scilicet an tenens an petens majus jus habeat in suâ de-"mandâ" (Glanville, c. 14).
[4] *Ib.* c. 17. [5] *Ib.* c. 19. [6] *Ib.* c. 21.

not very unusual for persons accused of crimes by what answered to the present grand jury to purchase from the king the privilege of going before a petty jury, which was to determine finally on his guilt or innocence. [1] Sir F. Palgrave gives several instances of this. When ordeals were discontinued it is probable that petty juries would come into general use, and such appears to have been the case.

Bracton's account of the proceedings before justices is exceedingly full, but it is so discursive that it is by no means easy to be sure as to its meaning. It appears, however, to be as follows: [2] First, the justices are to give a charge to the persons appearing before them, and after various consultations and explanations a kind of grand jury, consisting of four knights from each hundred, is to be sworn to answer to what is required of them. They are to give a schedule of suspected persons, whom the sheriff is forthwith to seize and cause to appear before the justices "ut justitiarii de iis "faciant justitiam." After stating this Bracton goes to other subjects, but returns at last to the question of public accusations. [3] In a passage too long to extract at length he gives the following account of the procedure:—[4] When a man is indicted the justice is to examine the twelve who indict him (this must mean the grand jury) as to their means of knowledge. Whereupon "Dicet forte aliquis vel major pars "juratorum quod ea quæ ipsi proferunt in veredicto suo "didicerunt ab uno ex conjuratoribus suis," and this being followed up the report may at last be traced, "ad aliquam "vilem et abjectam personam et talem cui non erit fides "aliquatenus adhibenda." What is to happen in this case is not stated, but it is observed that on account of the possibility of false and malicious accusations the accused person may object to individuals or townships. At last twelve persons are to be sworn and [5] "secundum eorum veredictum

[1] *Proofs and Illustrations*, clxxvi., clxxvii., and clxxxvi., No. 17. A person appealed of robbery, "affert domino regi unam marcam argenti pro habendâ "inquisitione per legales milites utrum culpabilis sit inde necne . . . oblatio "recipitur. Juratores dicunt quod revera contencio fuit inter gardinarium "prædicti Roberti, Osmund nomine, et quosdam garciones, sed Ranulfus" (the prisoner) "non fuit ibi nec malecredunt eum de aliquâ roberiâ vel de aliquo "malo facto eidem." [2] Bracton, ii. 234-241.

[3] *Ib.* c. xxii. pp. 450-462. [4] *Ib.* p. 454. [5] *Ib.* p. 456.

CH. VIII. " aut sequitur deliberatio aut condemnatio." "The justices " are to observe this form of inquisition by the country " generally in all inquests to be made of the death of a man, " when any one puts himself on the inquest either willingly " or from caution, or by necessity, in all crimes greater or less ; " but the justices can, if they think it expedient on a neces- " sary cause, and if a great crime lies hid, and the jurors wish " to conceal the truth from love, or hatred, or fear, separate the " jurors from each other and examine them separately to " disclose the truth sufficiently."

The difficulty is to ascertain from these passages whether they speak of two juries or of only one. I am disposed to think that they refer to two, as two distinct occasions are mentioned in which the jurors swear. It must be admitted that the matter is left in great doubt, but whatever may have been the truth on this subject, it is obvious that in Bracton's time the jury were not only witnesses, but witnesses who might be and habitually were examined and cross-examined by the justices.

Bracton's work is supposed by Sir H. Twiss to have been written before 1258. Britton, who took Bracton's work to a great extent as a foundation for his own, [1]wrote, it is supposed, about 1291-2. In his time there certainly were two juries, and each was composed of witnesses. [2] The proceedings of the grand jury are first described much as Bracton describes them, though more succinctly. [3] The persons indicted are then to be called upon, and if necessary compelled, to put themselves on their country or to plead guilty. Then comes [4] a passage obviously founded upon the one just quoted from Bracton, which leaves no doubt as to the functions of the petty jury: "And afterwards let the " jurors be charged of what fact they are to speak the truth, " and then go and confer together and be kept by a bailiff." . . . "If they cannot all agree in one mind let them be " separated and examined why they cannot agree; and if the " greater part of them know the truth and the other part " do not, judgment shall be according to the opinion of the

[1] Nicholls' *Britton*, lxix.
[2] Britton, 22-26.
[3] *Ib.* 26-31.
[4] *Ib.* 31, 32.

"greater part. And if they declare upon their oaths that "they know nothing of the fact, let others be called who do "know it; and if he who put himself on the first inquest "will not put himself on a new jury, let him be remanded "back to penance till he consents thereto. We will also "that if any man who is indicted of a crime touching life "and limb and perceives that the verdict of the inquest on "which he has put himself is likely to pass against him, "desires to say that any one of the jurors is suborned to 'condemn him by the lord of whom the accused holds his "land, through greediness of the escheat or for other "cause by any one else, the justices thereupon shall carefully "examine the jurors whether they have reason to think that "such slander is true. And often a strict examination is "necessary, for in such case inquiry may be made how the "jurors are informed of the truth of their verdict; when "they will say by one of their fellows, and he peradventure "will say that he heard it told for truth at the tavern or "elsewhere by some ribald or other persons unworthy of "credit, or it may be that he or they by whom the jurors "have been informed were intreated or suborned by the "lords or by the enemies of the person indicted to get him "condemned, and if the justices find this to be the fact, let "such suborners be apprehended and punished by imprison-"ment and fine. And if the jurors are in doubt of the matter "and not certain, the judgment ought always in such case to "be for the defendant."

There is, however, evidence that though the jurors were themselves the witnesses by whose evidence the prisoner's fate was decided, other witnesses might be and sometimes were called upon criminal trials. [1] Witnesses are expressly mentioned in the *Leges Henrici Primi* as taking part in trials. Moreover [2] one of the entries reprinted by Sir F. Palgrave from the records of the eyre of Gloucester in the fifth year of Henry III. is as follows: "William, son of Matilda, "was taken and imprisoned at Gloucester for the death of "William Blund, whom he killed; and Nicholas Church, John,

[1] *Leges H. P.* v. "*De Causarum Proprietatibus.*"—Thorpe i. p. 505.
[2] Palgrave, *Proofs and Illustrations*, clxxxvii. 21.

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"the son of Melisent, Walter de Havena, Walter Smith, and "Richard de Herdeshelt, and several others who were present "when he was killed, testified that they saw when he killed "him, and that they immediately upon the fact took him "still holding in his hand the stick with which he killed "him, and besides the four next townships testify to the "same thing; and besides . . . . and Dionysia, the wife of "William Blund, appealed him of the aforesaid death as seen "by her; and besides twelve jurors say that he is guilty. "And he defends himself against all. But because he was "taken still holding the stick in his hand with which he "killed him, and all with one voice say he is guilty, it is "adjudged that he cannot defend himself, and therefore let "him be hanged."

In this case there were five witnesses, four townships, and a jury, by all of whom the accused was said to be guilty.

It is not my intention to try to trace out in detail the history of trial by jury. The authorities already given show with sufficient clearness how it originated, but the steps by which the jury ceased to be witnesses and became judges of the evidence given by others cannot now be traced without an amount of labour out of proportion to the value of the result. I will, however, state the very little which I am able to say upon the subject. As appears by the passage quoted above from Glanville, the process which took place when a jury said that they, or some of them, were ignorant on the matter to which they were to swear, was what was called "afforcement." That is, new witnesses were added until the number required was made up. This process was well exemplified by the [1] practice, which was followed when deeds or charters which had been attested by witnesses were to be proved. The witnesses were, it seems, a kind of assessors to the jury, and this was the origin of what, till very modern times indeed, was an inflexible rule of evidence that the attesting witnesses to a written document must in all cases be called or accounted for. As the juries became less

[1] Bracton, i. 298-300; *Fortescue de Laudibus*, ch. xxxii., and Selden's note; Brooke's *Abridgment Testmoignes*. As to the modern law, see my *Digest of the Law of Evidence*, articles 66 and 67, and note xxviii.

numerous and transactions more complicated, this clumsy system would naturally lead up to the system now in use, by which the jury judge of the evidence of the witnesses.

One step which would naturally conduce to this result has left behind it traces which are still distinguishable. The juries in early times seem to have been accustomed not only to give general verdicts of guilty, or not guilty, but to answer questions as to specific facts from which the judgment followed as a legal consequence. A remarkable instance occurs in the [1] *Year-book*, 30 & 31 Edw. 1 (1303). "It was "presented by the twelve of Y, that Hugo" committed a rape. Hugo was brought to the bar by Brian and Nicholas. The justice (his name is not given) told them to stand back, as the prisoner could not have counsel against the king, wherefore "præcipimus ex parte regis quod omnes narra- "tores qui sunt de consilio vestro recedant." Hugo was then asked what he had to say to the charge against him? He replied that he was a clerk. The justice replied that he, having married a widow, was "bigamus," and had so lost his privilege. Hugo said that his wife was not a widow when he married her. "*Justiciarius:* Hoc debet statim sciri, et hone- "ravit duodecim si Hugo, &c., qui dixerunt quod ipsa fuit "vidua quando dominus Hugo contraxit cum eâ. Sed notan- "dum quod, &c." (*i.e.* the jurors), "de novo non fuerunt "jurati quia prius jurati." Hugo was then required to answer further. He objected that he was a knight and his jurors were not his equals, not being knights. "Et nomina- "bantur milites." He was asked if he challenged any of them. He said he would not consent. The judges could take what inquest they pleased. The justice said in that case he must be put to his penance, and he had better plead. Hugo then asked to have his challenges heard. The justice agreed, but Hugo said he could not read, and asked for counsel. [2] The justice asked how he could claim clergy if he could not read? He was refused counsel, but allowed to be prompted by a person who could read. He then made

[1] Published by direction of the Master of the Rolls in 1863. The case referred to is in Appendix ii. p. 529–532.

[2] Upon this, "Hugo stetit inpace quasi confusus. *Justiciarius:* Non sitis "stupefacti, modo est tempus loquendi."

CH. VIII. his challenges, which were allowed. The justice then repeated the charge to the jury, ending thus: "Ideo vobis injungimus "in virtute sacramenti utrum dominus Hugo dictam mu- "lierem rapuit vel non nobis dicatis. *Duodecim:* Nos "dicimus quod ipsa rapiebatur vi per homines domini "Hugonis. *Justiciarius:* Fuitne Hugo consentiens ad "factum vel non? *Duodecim:* Non. *Justiciarius:* Cogno- "verunt ne eam carnaliter. *Duodecim:* Sic. *Justiciarius:* "Muliere invitâ vel consentiente? *Duodecim:* Consentiente. "[1] Credo quod deberet hic quod tamen post defuit. *Justi-* "*ciarius:* Domine Hugo quia ipsi vos acquietant nos vos "acquietamus."

In the case of Berkeley, tried in Parliament for the murder of Edward II., [2] already referred to for another purpose, the jury were questioned in like manner in detail, and gave specific answers. Other instances of the same kind might be alleged.

It is obvious that if the same jury had to answer to facts which might have no connection with each other (as whether Hugo was *bigamus*, and whether he had committed rape), they would have to rely upon evidence given by others, and not upon their own knowledge, and it is also obvious that when a variety of questions arose, more or less connected with and dependent upon each other, it would be the most convenient course to explain to them how the law stood, and to take from them a general verdict. In such a case as Hugo's, for instance, a modern judge would say, "before you "can return a verdict of guilty, you must be satisfied not "only that the fact took place, but that the woman did not "consent; if you are not satisfied as to either point you will "acquit the prisoner." Whenever this stage was reached our present system would be established in principle.

[3] I have found one case in which an inquest of office set forth the reasons which led them to find that one of the king's tenants was a minor at a given date. The reasons are that several knights and squires on the inquest remem-

[1] This seems to be a remark of the reporter, indicating that something was left out.

[2] *Ante*, p. 147.

[3] 2 *Rot. Par.* 291*a*, 292*b* (1366).

bered the child's father coming to the siege of Calais, and saying, he had just had a son born; that the then abbot of St. Augustine at Canterbury was about a month before his death godfather to the child; and that the date of the abbot's death was fixed by the date of the *congé d'élire* to the Chapter for a new abbot, and that a Sir Johan Freebody, who was treasurer to Thomas Daldon, the other godfather of the child, charged Daldon, in an account bearing a certain date, with a silver cup and ewer for a christening present to the child. In this instance the inquest acted partly on their own knowledge and partly on facts proved by witnesses.

Whatever inferences may be drawn from the scattered illustrations and broken hints which are to be found on the subject in the Rolls and the Year-books, it is abundantly clear that trial by jury as we now know it, was well established, at least so far as civil cases were concerned, in all its essential features, in the middle of the fifteenth century. This is put beyond all question by the full account given of the subject in Fortescue, *De Laudibus Legum Angliæ*, which must have been written between 1460 and 1470. After describing at full length the preliminaries of the trial, he says that the record and the issue having been read to the jury, [1] "Each of the parties by themselves, or their counsel in "presence of the court, shall declare and lay open to the jury, "all and singular, the matters and evidences whereby they "think they may be able to inform the court concerning the "truth of the point in question, after which each of the parties "has a liberty to produce before the court all such witnesses "as they please or can get to appear on their behalf, who "being charged upon their oaths shall give in evidence all "that they know touching the truth of the fact concerning "which the parties are at issue." He afterwards speaks of the jurors themselves as "well acquainted with all the "facts which the evidences depose, and with their several "characters." [2] In reference to criminal trials Fortescue does not mention witnesses at all. He dwells upon the power of the prisoner to challenge thirty-five jurors peremptorily.

[1] Fortescue, c. xxvi. p. 89 (Amos's edition). [2] *Ib.* c. xxxvii. p. 92, 93.

CH. VIII. An innocent man need fear nothing, because "none but "his neighbours, men of honest and good repute, against "whom he can have no probable cause of exception, can find "the prisoner guilty." Nor can a guilty person escape. "Such a man's life and conversation would be restraint and "terror sufficient to those who should have any inclination "to acquit him." [1] The prince argues with his chancellor in such a way as to imply that though the jury were witnesses, other witnesses were or might be called. "Wit-"nesses cannot even bring about such a wicked device" (as a conviction based on perjury), "when what evidence "they give in must be in open court, in the presence and "hearing of a jury of twelve men, persons of good character, "neighbours where the fact was committed, apprised of "the circumstances in question, and well acquainted with "the lives and conversations of the witnesses, especially as "they be near neighbours, and cannot but know whether "they be worthy of credit or not. It cannot be a secret to "every one of the jury what is done by or amongst their "neighbours. I know of myself more certainly what is "a-doing at this time in Berry where I reside, than what is "doing in England, neither do I think it possible that such "things can well escape the observation and knowledge of "an honest man as happen so near to his habitation, even "though transacted with some kind of secrecy."

[2] Further on the prince objects that he fears the law of England as to juries is repugnant to Scripture. "It is "written in your law that the testimony of two men is true." "That in the mouth of two or three witnesses every word "may be established." [3] The chancellor replies to this, that in various obvious cases the rule supposed to be laid down in Scripture cannot apply, and that the prince misapprehends it, but his most important remark is that "the "law of England never decides a cause only by witnesses "when it can be decided by a jury of twelve men."

These passages show, I think, with sufficient clearness that

[1] Fortescue, c. xxviii. p. 100. The work is in the form of a conversation between Fortescue and Prince Edward, the son of Henry VI.
[2] *Ib.* c. xxxi. p. 111, &c. [3] *Ib.* c. xxxii.

by the middle of the fifteenth century the fundamental principles of trial by jury in criminal cases had been established to a great measure, though not entirely.

It is always difficult to find definite illustrations of the working of rude and obsolete institutions, but I am able to offer two which I think will throw some light upon the nature of trial by jury in its early and rude form.

The first is taken from a curious tract, called [1]*Halifax and its Gibbet-law*, which contains not only a full account of the gibbet-law of Halifax (said by Sir F. Palgrave to be the last vestige of the law of infangthief), but also what purports to be a report of the last case in which it was put in force.

Halifax, it is stated, is part of the duchy of Lancaster and the manor of Wakefield, and lies within the forest of Hardwick. It has an ancient custom "that if a felon be taken "within their Liberty with goods stolen out of or within the "Liberty or Precincts of the said Forest either handhabend, "backberand, or confessand, cloth or any other commodity of "the value of thirteen-pence-halfpenny, that they shall after "three markets or meeting-days within the town of Halifax "next after such his apprehension, and being condemned he "shall be taken to the gibbet and there have his head cut off "from his body." This statement is intelligible though not very grammatical. [2]The author justifies the wisdom and humanity of the custom at length on grounds which are not convincing, but his account of the details of the

[1] *Halifax and its Gibbet-law placed in a true light, together with a description of the town, the nature of the soil, the temper and disposition of the people, the antiquity of its customary law, and the reasonableness thereof, with* (many other things); Halifax (no date, but apparently published about the middle of the last century. In the catalogue of the bookseller from whom I bought it, it is said to be written by "Dr. Samuel Midgley." The report of the trial is a hundred years subsequent to the trial, but it is hardly likely to have been forged.

[2] Here is one of his arguments. "It is a received maxim that the common "law is grounded upon reason, and so is undeniable. Now by the common "law it is felony and death for any person to steal a thing which is above the "value of twelvepence, on a verbal proof: surely then it must needs pass "undeniable that it ought to be felony and death to him that steals anything "above the value of thirteen-pence-halfpenny, more especially ought it to be "so where the person is remarkably known and taken in the fact, that the "goods are brought in for evidence against him" (the bricks are there to this day, therefore deny it not), "and the truth thereof confirmed by his own "confession; this is a matter of fact which cannot be denied by any prudent "and considering person."

CH. VIII. procedure is extremely curious, and carries us back to remote antiquity. There were seventeen townships and hamlets in the liberties, who chose the most wealthy and best-reputed men for their juries. When a felon was arrested, he was brought before the bailiff of the lord of the manor of Wakefield. The bailiff had a gaol in which he detained the prisoner. He then issued a summons to the constables of four several towns to require four frith burghers from each of those towns to attend at a time and place fixed. "At which "time of appearance both the felons and the prosecutors are "brought before them face to face, and the thing stolen "produced to their view," . . . "and if upon examination they "do find that the felon is not only guilty of the goods stolen, "but also do find the value of the goods stolen to be of the "value of thirteen-pence-halfpenny or above, then is the "felon found guilty by the said jury: grounding that their "verdict upon the evidence of the goods stolen and lying "before them, together with his own confession, which in "such cases is always required, and being so found guilty "is by them condemned to be beheaded according to ancient "custom." After conviction the felon was sent to prison for a week or thereabouts. There were three market-days in every week, and he was exposed publicly at each in the stocks with the goods on his back or by him, after which he was executed by the gibbet, a primitive guillotine, of which a cut is given in the frontispiece. It seems that the rule that the prisoner must be taken "confessand" was considered to be satisfied if he could not give a satisfactory account of his possession of the stolen goods, "and doth refuse when asked "to tell where he found it or how he came by the same; nor "doth produce any witness to testify for him how he came "by such things, but seeks to evade the truth of the matter "by trivial excuses, various reports, and dubious stories."

In illustration of the custom there is given "a true and "impartial narrative of the trials of Abraham Wilkinson, "John Wilkinson, and Anthony Mitchell," in April, 1650, which was the last instance in which the custom was put in force.

At the complaint and prosecution of Samuel Colbeck, John

Fielden, and John Cutforth, "these above-said felonious per- "sons" were, "about the latter end of April," 1650, taken into the custody of the chief bailiff of Halifax, who forthwith issued his summons to the constables of Halifax, Sowerby, Warby, and Kircoat, requiring them to attend, each with four men from his constabulary, at the high bailiff's house in Halifax, on the 27th April, "to hear, examine, and determine," the cases.

Sixteen jurors (the names are given) accordingly came to the bailiff's house, where "in a convenient room" they were brought face to face with the prisoners and the goods. The bailiff then delivered a short charge in these words: "Neigh- "bours and friends, you are summoned hither according to "the antient custom of the forest of Hardwick, and by virtue "thereof you are required to make diligent search and inquiry "into such complaints as are brought against the felons "concerning the goods that are set before you, and to make "such just, equitable, and faithful determination betwixt "party and party as you will answer it to God and your own "consciences," which said, the several informations were brought in and alleged against them in manner and form following:—

"The information of Samuel Colbeck of Warby.

"The informant saith and affirmeth that upon Tuesday, "the 19th of April, 1650, he had feloniously taken from "his tenters by Abraham Wilkinson, John Wilkinson, and "Anthony Mitchell, sixteen yards of russet-coloured kersey, "part of which cloth you have here before you, and of which "you are to inquire of its worth and value, and take their "confession here before you."

The information of Cutforth related to the colts; and the information of Fielden to certain cloth as to which he said (*inter alia*) that one Mrs. Gibson said that Abraham Wilkinson delivered it to her. To this Wilkinson said that "he "did not confess the aforesaid piece to Gibson's wife, but "saith that he was by and present when John Spencer, a "soldier in Chesterfield, did deliver the said piece unto "Gibson's wife."

"Thereupon some debates arising amongst the jurymen

CH. VIII. "touching Abraham Wilkinson's reply to the last information, "after some mature consideration the jury, as is customary "in such cases, did adjourn themselves unto the 30th day of "April, resolving that day fully to give in their verdict. And "accordingly on the said 30th of April they met together "again at the bailiff's house, together with the informers, "felons, and stolen goods, some whereof were placed before them "in the room, and the rest in such convenient places where "the jury might view them. And after a full examination "and hearing of the whole matter, they with united consent "gave in their verdict in writing in the words following :—

"An inquisition taken at Halifax, the 27th and 30th days "of April, 1650, upon certain informations hereunto annexed.

"To the complaint of the said Samuel Colbeck, &c.

"We, whose names are hereunto subscribed, being sum- "moned and empanelled according to ancient custom, do find "by the confession of Abraham Wilkinson of Warby, within "the liberty of Halifax, being apprehended and taken, that "he, the said Abraham Wilkinson, took the cloth in the in- "formation mentioned, with the assistance of his brother, "John Wilkinson." They then describe the cloth, and value it at nine shillings.

The information of Cutforth as to the colts is dealt with in a similar way. It begins: "We, the aforesaid empanelled "jury, do find by the free confession of Anthony Mitchell that "John Wilkinson did take the black colt of John Cutforth's "from Durker Green, and that himself and Abraham Wilkin- "son were there present at the time, and also that Anthony "Mitchell himself did sell the aforesaid colt to Simeon "Helliwell." . . . . "Likewise, we find by the confession of the "aforesaid Anthony Mitchell that Abraham Wilkinson did "take the grey colt of Paul Johnson's from off Durker Green "aforesaid, and that John Wilkinson was with his brother "Abraham Wilkinson when he took him, and that the said "Anthony Mitchell was by and present when Abraham "Wilkinson did stay and bridle the grey colt. Also he con- "fesseth that himself and John Wilkinson did leave the said "colt with George Harrison." The colts were valued at forty-eight shillings and three pounds respectively.

After these proceedings follows "the determinate sentence," which recites the principal matters found, and then goes on: "By the ancient custom and liberty of Halifax, whereof the "memory of man is not to the contrary, the said Abraham "Wilkinson and Anthony Mitchell are to suffer death by "having their heads severed and cut off from their bodies "at Halifax gibbet, unto which verdict we subscribe our "names, the 30th April, 1650."

They seem to have been executed accordingly.

I have given a full account of this strange proceeding, not only on account of its great curiosity, but because its details illustrate many obscure points in the ancient law. This trial took place, it must be recollected, under the Commonwealth, and only three years before a comprehensive scheme for reforming the law, to be hereafter noticed, was brought before the Barebones Parliament; but at every point it displays traces of the earliest form of our judicial institutions. The townships are represented each by four men, who are brought up by the constable, who represented and succeeded to the reeve. The bailiff charges them to inquire, much as a justice might have charged the inquest in Bracton's day. Obviously they must have questioned the prisoners in order to "take their confes-"sions." When Abraham Wilkinson contradicts a statement ascribed to him, they adjourn for three days, probably to make local inquiries. After the adjournment they talk it all over again with the prisoners and get further confessions. Probably they may have gone in the interval to Durker Green and questioned Simeon Helliwell and George Harrison, and seen other places and persons, and it seems that in some way or other their inquiries were favourable to John Wilkinson, who seems to have been acquitted, notwithstanding Mitchell's confessions, which implicated him. Lastly, the juries not only find all the facts in detail, but they, like the suitors of the old County Courts, are the judges, and the bailiff merely registers their sentence. On the other hand, the informations and the inquest were obviously drawn up by a lawyer, who probably was the bailiff, and this shows how great an authority he might come to have over the deliberations of jurors, and also how the jury held that intermediate position between

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modern witnesses and modern jurors which I have tried to sketch. Lastly, the case shows how liberally the stewards and jurors of franchise courts would be likely to construe the restrictions laid upon the right of "infangthief" by the rule that the criminal ought to be handhabend or backberand, and even "confessand."

There is nothing whatever to show that either Abraham Wilkinson or Anthony Mitchell was taken "handhabend or "backbarend," unless those words include every case in which the goods were taken and produced before the jury, and in which there was evidence that the prisoner took them. As for "confessand," it seems probable that the prisoner's confessions consisted only in unsatisfactory answers and alleged admissions to persons other than the jurors.

The second illustration is taken from an institution still in full vigour—the Court of the Liberty of the Savoy, the proceedings of which will help us to realize the nature of the ancient trial by jury, and to understand how they dispensed with witnesses. The manor and honour of the Savoy lies immediately to the west of the place where Temple Bar formerly stood, and extends for some distance westwards along the bank of the river, as far (I believe) as the middle of Cecil Street. It is divided into four wards, and has a court leet which meets twice a year, within a month after Easter, and a month after Michaelmas. Special courts can be held if required. The court consists of the [1] steward, who presides, and eight burgesses, two from each of the four wards of the manor. A jury for the year, consisting of sixteen, is annually elected at the court. The steward fixes the day, and the bailiff summons the burgesses and the jury, as well as a proper number of residents to be sworn in as jurymen for the year following. The jury are called over, and absentees, if any, having been fined, are sworn; the form of oath being the same as that which is administered to a grand jury at Assizes and Quarter Sessions. They then make their presentments, which are in writing, and are signed by the

[1] My old and valued friend, Mr. S. B. Bristowe, Q.C., formerly M.P. for Newark, and now Judge of the Nottingham County Court, is the steward, and to him I owe the curious information in the text.

jury. These presentments are brought about as follows:— If any inhabitant thinks that a neighbour's house is unsafe, or that a house is disorderly, or the like, he complains verbally or otherwise to the foreman of the jury for the time being. The foreman calls the jury together, and they satisfy themselves in any way they please as to the matter complained of. They then give notice to the party complained of, and if the nuisance is not abated to their satisfaction the matter is embodied in the form of a presentment, which is given in at the court day to the steward. The steward inspects the presentment to see if it is in proper form and relates to a matter within the jurisdiction of the court, and if he approves of it (he informs me that he never has occasion to disapprove) and if the jury think that the party presented ought to be fined, four of their number are appointed affeerers, and they "affeer" or settle the fine. The finding of the jury is thus conclusive upon the facts, although they hear no evidence, examine no witnesses, and go through nothing in the nature of a trial. The leet jury thus represents that stage in the history just related at which ordeal and purgation had fallen into disuse, and the substitute for them had not been discovered.

I have been favoured with a copy of the presentments at a court held on the 26th April, 1880. The most important of them states in language of the simplest and most untechnical kind, that in October, 1879, the attention of the jury was called to a certain disorderly house kept by a person named, that thereupon they gave that person notice to discontinue her business within a week, that she did so, but afterwards returned and carried on the same business. The jury accordingly present that the woman named does carry on the business in question and that her house is a common nuisance, and they "therefore amerce the said —— in the "sum of £50," which said "amercement is affeered by A. B. "C. and D."

This instance actually existing amongst us appears to me to throw great light upon the manner in which trial by jury originated. It is an institution fit for a small precinct where every one knows every one and can watch and form an opinion upon what goes on. In the few streets which form the liberty

CH. VIII. of the Savoy, such an institution is, I have no doubt, as useful and efficient as it is curious. If it were extended to a large town or county it obviously could not be worked at all.

Even in the Savoy it would probably not be permitted to continue if it involved a result more serious than a money fine, or was applied to offences less easy of proof than keeping disorderly houses, and other common nuisances or petty offences. In the case in question the steward made an estreat directed to the bailiff requiring him to raise the £50, and the bailiff returned that the person concerned had no goods within the jurisdiction.

If after this she continued her misconduct, she would have to be indicted at the Quarter Sessions, when she might be imprisoned, though on the other hand she would be entitled to trial by a petty jury.

CHAPTER IX.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—LEGAL INCIDENTS OF A CRIMINAL TRIAL.—INDICTMENT AND INFORMATION.—ARRAIGNMENT, TRIAL, AND VERDICT.

HAVING in the last chapter given an account of the various forms of accusation and trial which have finally merged into trial by jury, I propose in the present chapter to give an account of the legal incidents of a criminal trial. These are the indictment or information, the arraignment of the prisoner, and his trial down to the verdict and judgment.

INDICTMENTS.—The indictment was originally an accusation presented by the grand jury upon their own knowledge, whereby some person was charged with a crime. This, however, has long ceased to be the case, and indictments are now drawn and proved in the following way:—

When a person is committed for trial, some one, as often as not a police-constable, is bound over by the magistrate to prosecute, and the depositions are sent to the clerk of assize if the case is to be tried at the assizes, or to the clerk of the peace if it is to be tried at the Quarter Sessions. A solicitor is in practice almost always employed by the prosecutor, and he as a rule instructs the clerk of assize or clerk of the peace to draw the indictment, the depositions serving as instructions. The prosecutor, however, may, if he prefers it, have his indictment drawn by counsel or by his own solicitor, and counsel are often instructed for this purpose if the case presents any peculiarity. The indictment being drawn has

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endorsed upon it the names of the witnesses, and the solicitor for the prosecution takes it and them to the grand jury-room, to which he is admitted or not as the grand jury think proper. The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted. The name of each witness examined before the grand jury is initialled by the foreman; and when they have heard enough to satisfy themselves that a *primâ facie* case is or is not made out against the prisoner, they endorse upon the indictment "a true bill," or "no true bill," as the case may be (in the days of law Latin the endorsements were "Billa Vera," or "Ignoramus"), and come into court and hand the indictments to the clerk of assize or clerk of the peace, who says, "Gentlemen, you find "a true bill," or "no true bill" as the case may be, "against "A. B. for felony or misdemeanour." If the finding is "no true bill," the matter drops and the prisoner is discharged, though he is liable to he indicted again. If the finding is "a true bill," the trial proceeds and the "bill" becomes an indictment. As an indictment must be found by a majority of the grand jury, and as it must also be found by twelve grand jurors at least, grand juries are generally composed of twenty-three persons, so that the smallest possible majority may consist of twelve. They may, however, consist of any number not less than twelve.

The indictment is the foundation of the record in all criminal cases, and is indeed the only document connected with the trial which in all cases is in writing. It is in the form of a statement upon oath by the grand jury that the prisoner committed the offence with which he is charged. This assertion in former times went a long way (as I have already shown), to his conviction. At present, however, it is a mere accusation. It is now a far simpler document than it would have been in early times, or even early in the present reign. I cannot say when it was first enacted that indictments should be in writing. [1] It is said by Reeve that a statute to that effect

[1] *Hist. of Eng. Law*, i. 424. The only act of the sort I can find is 13 Edw. 1, c. 13, which applies only to indictments taken by sheriffs in their tourns. See, too, 1 Edw. 3, s. 2, c. 17.

was passed under Edward I., but however this may be, I think it is clear that the form of indictments, and the extreme strictness with which rules respecting them have been observed, were derived principally from the laws relating to appeals. As I have already stated, the utmost strictness and particularity was required of the appellor in the statement of his case, which was enrolled before the coroners, and variances between the allegations so made and those made before the justices were fatal. Elaborate provisions are contained in Bracton for comparing the two sets of statements together, and for settling the relative authority of the rolls kept by different coroners if they varied, and of the rolls kept by the sheriffs.

The history of indictments is a branch of the history of the law of special pleading. It would extend this work beyond all limits if I were to attempt to enter upon this subject at length. It is enough to say that in all common cases the pleadings in a criminal trial have always consisted, and still consist, of an indictment engrossed on parchment, and a plea given by the accused person orally in open court, of guilty or not guilty. The requisites of an indictment at common law differed hardly at all from the earliest times till our own, indeed the only statutes which much affected them up to the year 1827 were what was called the Statute of Additions (1 Hen. 5, c. 5), which provided that the names of the defendants should be followed by a statement of "their estate or degree or mystery, and of the towns, "hamlets, or place, and counties, in which they were," and the 4 Geo. 2, c. 26, which enacted that all indictments should be in English. Subject to these alterations an indictment under George IV. was what an indictment under Edward III., and probably under Edward I., had been. Its requisites were, and subject to modern amendments, still are, as follows:—

It consists of a commencement, a statement, and a conclusion. The conclusion by recent legislation has ceased to be of importance, but the rules as to the venue and the statement are still important, and each is curious.

CHAP. IX. THE VENUE.—The venue is in this form—

Hampshire to wit; *or*, Central Criminal Court to wit; *or*, County of the Town of Nottingham to wit; } The jurors for our Lady the Queen upon their oaths, present, &c.

The object of this beginning is to show that the court has jurisdiction over the offence to be tried, and the venue accordingly refers to the local area over which, by the commission under which it sits, the court has jurisdiction. Thus in the three examples given, the first shows that the court is sitting under commissions of Oyer and Terminer and gaol delivery for one of the counties. The second, that the court is sitting for the district over which the Central Criminal Court has jurisdiction, extending over all Middlesex, the City of London, and parts of several neighbouring counties. The last, that the court is sitting under commissions of Oyer and Terminer and gaol delivery, for the county of the town of Nottingham. The jurisdiction of the court, and the knowledge of the grand jury by which it is informed are supposed to be co-extensive. The Queen sends her commissioners to learn what crimes have been committed in a given county. The grand jury from their local knowledge give the required information. It is true that the High Court of Justice and the courts by which peers are tried for felony have jurisdiction wherever the crime may have been committed, but their jurisdiction arises only upon an indictment found by a grand jury for the body of the county, or upon an impeachment in the nature of an indictment found by the House of Commons. The Queen's Bench Division of the High Court of Justice might sit in any county in England, or try at Westminster or elsewhere offences brought before it by *certiorari* from any such county, but in all cases it would have to try indictments found by a grand jury of the county in which the crime was committed. In short, the theory of trial by the neighbourhood (*vicinetum—visne—venue*) has been inflexibly adhered to, though it has

been subjected to many exceptions. It was originally carried out so far, that at common law, and down to the passing in 1548 of the statute 2 & 3 Edw. 6, c. 24, if a man was wounded in one county and died in another, the person who gave the wound was indictable in neither, "for that," to quote the preamble of the statute referred to, "by the custom "of this realm, the jurors of the county where such party "died of such stroke, can take no knowledge of the said "stroke, being in a foreign county," . . . . "ne the jurors "of the county where the stroke was given cannot take "knowledge of the death in another county." The preamble goes on to say, "And also it is a common practice amongst "[1]errant thieves and robbers in the realm, that after they "have robbed or slain in one county, they will convey their "spoil or part thereof so robbed and stolen, unto some of "their adherents into some other county," . . . . "who "knowingly receiveth the same, in which case, although the "principal felon be after attainted in one county, the acces-"sory escapeth by reason he was accessory in another county, "and that the jurors of the said other county by any law "yet made can take no knowledge of the principal attainder "in the first county." It is difficult to understand how such defects as these should have been permitted to continue as long as they did, but there were many others, which, if rather less obvious, were quite as discreditable. Thus, for instance, there are crimes as to which it is generally impossible to prove where they were committed. The county in which a man committed a forgery would usually be unknown. It would generally be extremely difficult to say where a conspiracy was formed, the existence of which was inferred from acts done in different places, and so of many other cases. [2]The result is that in a large number of statutes by which offences are defined, special provisions are made as to the place in which the venue may be laid. The only general interest attaching to these exceptions is that they prove that the general principle which requires so many exceptions must be wrong.

Other inconveniences of the general doctrine are shown

[1] This shows the meaning of the expression an "arrant rogue,"—a rogue who wandered about the country, a rogue, so to speak, in eyre.

[2] *Dig. Crim. Proc.* art. 244, and ch. ix. and x.

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by another class of exceptions, arising not from the nature of particular crimes, but from uncertainty as to the place where they are committed; such are crimes committed on a journey or on the boundary of a county. These cases are provided for by 7 Geo. 4, c. 64, ss. 12 and 13, under which a person charged with a crime committed during a journey in any conveyance by land or water, may be indicted in any county over which the conveyance passed during the journey, and a person charged with a crime committed within 500 yards of the boundary between two counties, may be indicted and tried in either.

In cases of theft the law of venue was found so inconvenient that a doctrine was invented before the time of [1] Hale, that if a man steals property and carries it from place to place he goes on stealing it as long as he keeps possession of it, and so may be indicted in any county into which he conveys it. This doctrine has been made the subject of several subordinate refinements, which it is unnecessary to mention.

A rule which requires eighteen statutory exceptions, and such an evasion as the one last mentioned in the case of theft —the commonest of all offences—is obviously indefensible. It is obvious that all courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offence was committed would be the most convenient place for the purpose.[3]

Before leaving this matter I may refer to a few statutes

[1] Hale, *P. C.* 507. [2] *Dig. Crim. Proc.* art. 82.

[3] In the Draft Code for 1879 provision was made for obtaining this object by section 504. "*Jurisdiction of Courts.*—Every court competent to try offences "triable in England or Ireland, as the case may be, shall be competent to try "all such offences wherever committed, if the accused is found or apprehended "or is in custody within the jurisdiction of such court, or if he has been com- "mitted for trial to such court or ordered to be tried before such court, or "before any other court the jurisdiction of which has by lawful authority "been transferred to such first-mentioned court under any act for the time "being in force: Provided that nothing in this act shall authorise any court "in England to try any person for any offence committed entirely in Ireland, "or any court in Ireland to try any person for any offence committed entirely "in England, or any court either in England or Ireland to try any person for "any offence committed entirely in Scotland. No proceeding before any "court shall be held invalid only because it took place in any other district "than the one in which the court ought to have sat, unless it is made to "appear affirmatively that the accused was actually prejudiced thereby."

by which the rules as to the local jurisdiction of the ordinary courts are varied.

[1] Many cities and towns are counties in themselves. Most, but not all, of these are also county towns in which the assizes are held for the county in which they are situated. For instance, York is a county in itself, and is also the county town for the East and North Ridings of Yorkshire. Hull is a county in itself, but no assizes are now or have for a great length of time been held there.

With regard to all cities and towns which are counties in themselves it is [2] enacted (1) that indictments for offences committed in them may be preferred before the grand jury of the next adjoining county, and (2) that indictments found by the grand juries of such counties of towns or cities, and inquisitions found by the coroners there, may be ordered by the court having jurisdiction to be tried in the next adjacent county.

Hull being adjacent to both Yorkshire and Lincolnshire, and Newcastle to both Northumberland and Durham, it is directed that for this purpose Hull shall be deemed to be adjacent to Yorkshire, and Newcastle-on-Tyne to Northumberland.

This act does not apply to London.

It is further [3] enacted, that when a person is committed for any offence not triable at Quarter Sessions to the gaol of any county of a city or town corporate for which no separate commission has been issued since [4] 1846, the trial should be

[1] The following is, I think, a complete list. The towns whose names are printed in ordinary type are also assize towns for the counties in which they are situated. The towns whose names are italicised are not. Of these Bristol is the only one for which separate commissions of Oyer and Terminer and gaol delivery are now issued. *Bristol*, *Canterbury*, Chester, *Coventry*, Exeter, Gloucester, Lincoln, *Litchfield*, Norwich, Worcester, York, Caermarthen, Haverfordwest, *Hull*, Newcastle-on-Tyne, Nottingham, *Poole*, *Southampton*. Before the act referred to in the text was passed, the separate jurisdictions of counties of cities was a great abuse, as commissions of gaol delivery for such counties were issued only at long intervals. This is noticed by Howard in his *State of the Prisons in England and Wales* (fourth edition, 1792, p. 15). He says that "at Hull they used to have the assize but once in seven years. Peacock, "a murderer, was in prison there near three years; before his trial the principal "witness died, and the murderer was acquitted. They now have it once in "three years."

[2] 38 Geo. 3, c. 52, ss. 2, 3, 9; and see 51 Geo. 3, c. 100, s. 1, and 5 & 6 Will. 4, c. 76, superseded by 45 & 46 Vic. c. 50, s. 188.

[3] 14 & 15 Vic. c. 55, s. 19.

[4] Five years next before the passing of this act, *i.e.* Aug. 1, 1851.

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at the next adjoining county, as defined in the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), Schedule C.

The Queen's Bench Division of the High Court of Judicature is said to have power at common law to order a change of venue if a fair trial cannot be had in the county where a crime is committed, but I do not think this power has ever been exercised in fact. On the occasion of the trial of the notorious William Palmer for poisoning, an act (19 Vic. c. 16, 1856) was passed enabling the Court of Queen's Bench to make an order for the trial of any indictment at the Central Criminal Court. The act is very elaborate. It is seldom put in force.

In 1862 a soldier shot his officer, I think at Aldershot, and various persons having contended that the minds of soldiers would be greatly impressed if the punishment of such offences were a little more speedy, an act (25 & 26 Vic. c. 65) was passed, drawn on the model of the act last mentioned. It provides that if any person subject to the Mutiny Act commits murder or manslaughter on any other such person he may be ordered to be tried at the next session of the Central Criminal Court.

This is a singular illustration of the capricious casual character of English legislation. I never heard of the act being put in force. It is elaborate enough to have set the whole law of venue on a rational footing five times over.

[1] THE STATEMENT.—The statement sets out all the ingredients of the offence with which the defendant is charged, namely, the facts, circumstances, and intent which constitute it. These matters must be set forth with certainty, and without repugnancy, and the defendant must be directly and positively charged with having committed the offence. The name of the defendant must be correctly set forth, also his rank in life and his occupation (by the Statute of Additions, but it does not matter whether they are or not). Moreover, the name of the party injured, and if the offence relates to property, the name of the owner of the property must be stated correctly, or if he is unknown the fact that he is

[1] See *Dig. Crim. Proc.* ch. XXX. arts. 242-253. The chapter referred to is somewhat differently arranged from the statement in the text. I have followed in the text the usual arrangement.

unknown must be stated. At common law, every material fact, that is every fact which formed an ingredient in the offence, had to be alleged to be done at a particular place and time. This was called the "special venue," and was usually effected by introducing the words "then and "there" after every averment subsequent to the first, and in very early times it was necessary that the special venue should show that the act to which it applied was done in the town, hamlet, or parish, manor, castle, forest, or other place whence the jurors were to come who were to try the case—a singular illustration of the extent to which the jurors were originally regarded as witnesses.

All the facts and the intent constituting the offence were also to be stated with certainty,—that is to say, with a degree of detail and specification regulated by circumstances. [1] Coke explains what is meant by certainty. There are three degrees of certainty:—Certainty to a certain intent in every particular. Where this is required the court will presume the negative of everything which the pleader has not expressly affirmed, and the affirmative of everything which he has not expressly negatived. In other words the pleader must expressly exclude every conclusion against him. The lowest degree of certainty is certainty to a common intent, and where this is required the court will presume in favour of the pleader every proposition which by reasonable intendment (*i.e.* according to the common use of language) is impliedly included in the pleading, though not expressed.

Between these there is a third degree of certainty, called "certainty to a certain intent in general," which cannot be otherwise described than by saying that it does not require quite so much explicit statement as certainty to a certain intent in every particular, and that it requires more than certainty to a common intent. It is this middling kind of certainty that is required in indictments. It is said that, where it is required, everything which the pleader should have stated, and which is not either expressly alleged or by

[1] Co. Litt. 303*a*, and see Long's case, 5 Rep. 121*a*. The explanation or expansion of Coke's language is given in Archbold, 57. *Dig. Crim. Proc.* arts. 242, 243.

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necessary implication included in what is alleged, must be presumed against him. Words, however, are in this case construed rather less artificially and technically than in the case of certainty to a certain intent in every particular.

As an illustration, written instruments had to be set out verbatim, and chattels had to be described correctly. If a man were charged with stealing a sheep, that would be held to mean a living sheep and not the dead body of a sheep. A boot must not be called a shoe, and money originally had to be described as so many pieces of the current gold or silver or copper coin of the realm called sovereigns, shillings, or pence, as the case might be.

There are besides certain technical words which must be used in charging certain crimes. The words "murder," "ravish," "steal, take, and carry away," or, in the case of cattle, "drive or lead away," and "burglariously" cannot be replaced by any equivalents.

There are some other rules as to the drawing of indictments, of which I need only mention one. Indictments must not be double. No one count ought to charge more than one offence.

THE CONCLUSION.—Formerly the rule was that the indictment must conclude, if it was for an offence at common law, with the words "against the peace of our Lady the "Queen," to which are always added, in fact, though they are not essential, "her crown and her dignity." If the offence was by statute the proper ending was "against the form of the statute (or statutes) in that case made or provided." When indictments were in Latin the form used always was "contra formam statut'," and it was held that "statut'" would do equally well whether it [1] ought to have been "statuti" or "statutorum." After the 4 Geo. 2, c. 26 (1730), which required indictments to be in English, this convenient ambiguity became unlawful, and it was necessary to say either "the statute" or "the statutes." At last it was enacted (14 & 15 Vic. c. 100, s. 24) that no objection should be

[1] This act came into force in 1733. It was repealed by 42 & 43 Vic. c. 59, schedule 1, but it has not been contended that the common law has revived, though none of the words in s. 4 (4) seems to meet the case quite plainly. I suppose, however, that the rule that indictments must be in Latin would in case of need be held to be an "usage," "practice," or "procedure."

taken on the ground that it ought to have been either "statute" instead of "statutes," or "statutes" instead of "statute." Indeed it is now unnecessary to have "a proper "and formal conclusion" at all.

These were, and to some extent still are, the leading requisites as to the contents of an indictment. In order to appreciate the matter fully it must be remembered that, subject to some [1] few exceptions, it is necessary to prove the averments of an indictment as they are laid, so that if a man is indicted for the murder of John Smith, and is proved to have murdered James Smith, this is a fatal "variance," and he is entitled to be acquitted, unless the defect is amended, though he might afterwards be indicted again for the murder of James. The effect of the two rules that an indictment must contain certain averments, and that each averment must be proved as laid, was, before late alterations, to introduce into the administration of justice an element of arbitrary uncertainty not unlike that which the Roman augurs introduced into Roman public affairs by their supposed knowledge of the omens. To give one instance where a thousand might be given. [2] A man who had from mere wantonness stabbed a lady whom he met in St. James' Street, was indicted under a statute of George I. (6 Geo. 1, c. 23, s. 11), for "maliciously assaulting her with intent to cut her clothes," which was then a capital felony. The indictment stated that on the 18th January, 1790, at, &c., Williams assaulted Ann Porter with intent to cut her clothes, and that Williams on the said 18th January, 1790, at, &c., did [*then and there* was here omitted] cut the clothes of the said Ann Porter, to wit, a silk gown and a pair of stays, and a silk petticoat and a linen petticoat, and a linen shift. It was objected that it did not appear from this that the assault

[1] It was never necessary to prove the special venue as laid, but it was enough if the fact stated was shown to have happened within the jurisdiction of the court. For instance, in an indictment against an Indian official for receiving presents, a fact which happened at, say, Madras, had to be alleged to have happened to wit, at Bow, in the County of Middlesex, but inasmuch as the court had by statute jurisdiction over acts done at Madras it was sufficient to prove that the offence really did happen at Madras and not at Bow.

[2] Williams's case, 1 Leach, 529 (A.D. 1790). The picturesque part of the story is to found in the *Newgate Calendar*, iii. 161, which contains an account of "Renwick Williams, commonly called the Monster." His peculiar title to infamy was his taste for stabbing in various places women whom he did not know.

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and the cutting the clothes were all one act, and that as far as the indictment went the assault might have been in the morning and the cutting of the clothes in the evening, which flaw would have been avoided by inserting the words "then and there," between "did" and "cut," and this objection was held to be fatal.

I do not think that anything has tended more strongly to bring the law into discredit than the importance attached to such technicalities as these. As far as they went their tendency was to make the administration of justice a solemn farce. Such scandals do not seem, however, to have been unpopular. Indeed, I have some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law.

There was a strange alternation in the provisions of the law upon this subject, by which irrational advantages were given alternately to the Crown and to the prisoner. In favour of the prisoner it was provided that the most trumpery failure to fulfil the requirements of an irrational system should be sufficient to secure him practical impunity for his crime.[1] On the other hand, in favour of the Crown, it was provided that the prisoner should not be entitled to a copy of the indictment in cases of felony, but only to have it read over to him slowly, when he was put up to plead, a rule which made it exceedingly difficult for him to take advantage of any defect. But then again, any person might point out such a flaw, and it was in a sort of way the duty of the judge as counsel for the prisoner to do so. On the other hand, some flaws were, and others were not, waived, by pleading to the indictment.

In short, it is scarcely a parody to say, that from the earliest times to our own days, the law relating to indictments was much as if some small proportion of the prisoners convicted had been allowed to toss up for their liberty.

In practice this system is to a great extent a thing of the past. Legally it is still in full force except so far as it has been relaxed by a few specific sections of acts of parliament.

[1] I say practical impunity because the chance of his being indicted a second time and of the prosecution being able to prove that the flaw in the first indictment was such that he had never been legally in peril, and so could not plead *autrefois acquit*, was not great.

The following are the practically important sections :—

By 7 Geo. 4, c. 64 (1826), ss. 14—18 inclusive, it is enacted that the property of a number of articles (as to which it is difficult to say to whom they belong), may in any indictment be laid in particular persons, *e.g.* the property in things provided for the repair of a county bridge, may by s. 15 be laid in the inhabitants of the county, and none of them need be named. These provisions have saved a great deal of petty trouble.

By s. 19 misnomers and wrong additions, or the want of an addition, are rendered practically unimportant.

By 9 Geo. 4, c. 15 (1828), variances between allegations in indictments as to the contents of documents written or printed, and the documents proved on the trial, may be amended in cases of misdemeanour, and are therefore rendered unimportant. This is extended to felonies by 11 & 12 Vic. c. 46, s. 4 (1848). The acts applied only to the superior courts, and their provisions were extended to the Courts of Quarter Sessions in 1849, by 12 & 13 Vic. c. 45, s. 10.

In 1851 an act was passed which went further in the way of removing technicalities, but it did so by an enumeration of them, so technical and minute, that no one could possibly understand it who had not first acquainted himself with all the technicalities which it was meant to abolish. This is 14 & 15 Vic. c. 100. Section 1 enables the court to amend many specified variances between the indictment and the evidence, and especially all variances in the descriptions of either persons or things, and in the ownership of property. The effect of this is, that if a man is indicted for stealing a sheep the property of James Smith, and is proved to have stolen a lamb the property of John Smith, the court may amend the indictment if it thinks it not material, *i.e.* if it thinks that the prisoner has not been misled. This has practically relaxed very greatly the rule about "certainty to a certain "intent in general," already referred to.

By ss. 5 and 18 it was provided that documents might be described by their common names without setting out copies, and that bank-notes might be described as money, and it was

CHAP. IX. provided that it should be no variance to prove a theft, &c., of coin in an indictment for stealing, &c., a bank-note. By s. 23 special venues were abolished. By s. 24 it was provided that indictments were not to be held bad for the want of any one of fifteen specified formal phrases such as "as appears by the record," "with force and arms," "against the peace," &c. Some of these are noticeable as matter of curiosity. For instance, the want of "the averment of any matter unneces-"sary to be proved," was in effect declared to be no longer a defect. This did away with the statements that the crime was committed by a person "not having the fear of God "before his eyes," and "at the special instigation of the "devil." By s. 25 it was provided that every objection in respect of any formal defect patent on the face of the indictment must be taken before plea, and the court was empowered to amend any such defect. The result of this was to make such defects unimportant, as they can now be noticed only under such circumstances that they can be at once amended.

[1] The effect of these complicated and narrowly guarded amendments was to leave the greater part of the law relating to indictments in a blurred half-defaced condition, like a slate the greater part of the writing on which has been half rubbed out. They added greatly in one sense to the intricacy of the law, for nothing can be more intricate than a system of unwritten rules qualified by numerous written exceptions. For instance, it was formerly enough to know what was meant by a special venue. Now, if the law is to be fully understood, you must both know what a special venue was, and what effect was produced by its abolition. It was once enough to know what is meant by certainty to a certain intent in general, and to know that it is required in all the averments in an indictment, but to this there ought now to be added a knowledge of the many exceptions to that rule introduced by statute. Practically no one takes the trouble to learn the law so elaborately. A general impression has been produced that quibbles about indictments have come to

[1] *Dig. Crim. Proc.* ch. XXX. gives as accurate a statement of this as I could make. See especially the rule as to certainty, art. 242, the exceptions, art. 243. The rules and exceptions as to descriptions in art. 246, as to ownership, art. 249, as to powers to amend, art. 250.

an end. It has ceased to be the fashion to make them, and if they are made they do not succeed. This is practically convenient, but, on the other hand, it is a very slovenly state of things.

Besides the provisions to which I have referred, a certain number of special provisions have been made as to indictments for particular offences. Thus, it was formerly necessary upon an indictment for murder, to set out in minute detail all the circumstances of the crime, and it was usual to vary the details in different counts, so as to meet possible variations in the proof. Thus, in one count it would be stated that A made an assault upon B with a knife which A held in his right hand, and gave B one mortal wound in the breast, of such a length and depth, of which B languished for so many days, "and languishing did live," and on such a day did die. Another count would vary this by alleging that the knife was held in the left hand. A third, that it was held in the hand without saying either right or left, and so on. These variations extended the indictment to an enormous length, and made it [1]grotesque beyond belief. By 24 & 25 Vic. c. 100, s. 6, re-enacting an earlier act, it was enacted that it should be sufficient in indictments for murder to charge generally that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased.

So in indictments for forgery, it used to be necessary not only to allege an intent to defraud, but to specify the person intended to be defrauded. This was often a matter of great difficulty, and numerous counts were introduced, each of which specified a different person as having been intended to be defrauded. Now by 24 & 25 Vic. c. 98, s. 44, it is enough to allege in general terms an intent to defraud. It would be foreign to my purpose, however, to enumerate every statutory provision of this sort. It is enough to say, that

[1] I have been informed that in the case of Daniel Good, who murdered a maidservant at Roehampton and burnt her body afterwards so as to leave the precise manner in which the crime was committed uncertain, the indictment contained nearly seventy counts, the last averring (which was no doubt true) that the woman was murdered by means to the said jurors unknown. It must be remembered in reference to this that the clerks of assize and other officers who drew indictments were paid by fees, and that each count in an indictment was charged for separately.

CHAP. IX. though a good many convenient exceptions to the old rigour of the law have been made, enough of it still remains to make criminal pleading intricate and technical to the last degree. I will give a few illustrations of this.

The rule of pleading which requires all the elements of a crime to be set out in an indictment, still in full force, in cases in which no statutory exception applies, causes extreme intricacy and elaboration in indictments. For instance, an indictment for perjury must set forth the following matters: First, the jurisdiction of a competent tribunal. Secondly, the taking by the defendant of an oath duly administered. Thirdly, that the truth of the matter deposed to became and was a question material to the decision of the matter before the court. Fourthly, that the defendant swore such and such matters relating to it (these averments are called assignments of perjury). Fifthly, that each matter assigned as perjury is false in fact. To give a copy of such an indictment would be tedious, but the following is a much abridged skeleton of one.

The jurors for our Lady the Queen present that at [1] to put it shortly) the assizes held on the 20th July, 1880, at York, before such a judge, B was indicted for the murder of C, which indictment came on to be tried before a jury duly sworn, and upon the trial thereof A "took his corporal oath "on the Holy Gospel of God," that the evidence which he should give should be the truth, the whole truth, and nothing but the truth, and upon the trial it became a material question whether at mid-day, on the 1st March, 1880, A saw B at Westminster Hall, in the City of Westminster, and A "falsely, corruptly, knowingly, wilfully, "and maliciously" swore that he did see B at mid-day, on the 1st March, 1880, at Westminster Hall, in the City of Westminster, whereas in truth and in fact, A did not see B at mid-day, or at any other hour on the said first day of March, 1880, at Westminster Hall, aforesaid, "and so the "jurors aforesaid, upon their oath aforesaid, say that the said "A, on the said 20th July, 1880, before the said Sir E. F.,

[1] A number of particulars as to the commission under which the court sits would in practice be set forth.

"so being such judge as aforesaid, by his own act and consent, "and of his own most wicked and corrupt mind, in manner "and form aforesaid, falsely, wickedly, wilfully, and corruptly, "did commit wilful and corrupt perjury against the peace of "our Lady the Queen, her crown, and her dignity."

This form tells one story three times over, namely, once in averring materiality, again in assigning perjury, and for a third time, in negativing the truth of the assignments of perjury. It adds nothing to what any one would learn from the following statement:—"The jurors for our Lady the "Queen present, that at the assizes held at York, before such a "judge, on such a day, B was indicted for the murder of C, "and that A upon the trial of that indictment committed "perjury by swearing that he saw B, at mid-day, on the "1st March, 1880, at Westminster Hall, in the City of West-"minster, which statement was material to the indictment "under trial, and was false to the knowledge of A."

An indictment for false pretences is also an intricate matter, as the nature of the pretence must be set out and its falsehood averred in such a way as to repeat the story twice: thus, "A did falsely pretend to B that A had been "sent to B by C for £5 which C wanted to borrow of B, by "means of which said false pretence A did obtain from B "£5, whereas in truth and in fact A was not sent to B by C "for £5 which C wanted to borrow of B or for any other sum "of money whatever." Moreover, the rule that averments must be proved as laid makes it necessary to vary the description of the false pretence in a variety of ways, so that one at least may correspond with the evidence. The operation of these rules frequently swells indictments for obtaining goods by false pretences to a length at once inconvenient and absurd.

Perjury and false pretences afford perhaps the commonest illustrations of the bad effects produced by the rules of special pleading still in force as regards indictments, but there is another rule which has never been made the subject of any statutory qualification, and which is the cause of much greater prolixity, obscurity, and expense. This is the rule that indictments must not be "double." That is that each

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count must charge one offence and no more. A policeman tries to apprehend a burglar who fires a pistol in his face and gives him a serious wound in the mouth, knocking out a front tooth. This act is an offence under 24 & 25 Vic. c. 100, s. 18, and might, though in practice it would not, be made the subject of the following counts:—

(1) Wounding with intent to maim.

(2) Wounding with intent to disfigure.

(3) Wounding with intent to disable.

(4) Wounding with intent to do some grievous bodily harm other than those above specified.

(5) Wounding with intent to resist lawful apprehension.

(6) Wounding with intent to prevent lawful apprehension.

(7) Wounding with intent to resist lawful detainer.

(8) Wounding with intent to prevent lawful detainer.

(9—16 inclusive) Causing grievous bodily harm with each of the eight intents before stated.

(17—24 inclusive) Shooting at the policeman with each of the eight intents before mentioned.

Another count might be added under s. 14 for shooting with intent to murder, and another under s. 15 for attempting to murder otherwise than in the five ways specified in s. 14. These would make in all twenty-six different counts for a single act.

This is an illustration of the principal cause of the enormous length and intricacy of indictments. Indictments for fraudulent misdemeanours sometimes consist of more than a hundred counts, differing from each other almost imperceptibly by minute shades of meaning and expression. No one ever reads them except the clerk who compares the draft with the engrossed copy. The draftsman draws one count as a pattern of the class, and directs the counts to be varied by a short note such as I have given. The judge never looks at the indictment unless his attention is directed to some particular point. The counsel look at abstracts like the one just given, which [1] show the sense of the indictment. No

[1] I have heard of a very eminent special pleader who, when he had drawn a specially long indictment, used to "shuffle his counts," so that his opponent might find it, humanly speaking, impossible to understand what the indictment did and did not contain. The short illustration I have given will

undefended prisoner would get the least information from it, and the document is of infinitely less use as a record of the transaction than a short and simple one would be.

To complete the specification of the causes why indictments are still intricate and technical documents, notwithstanding such efforts as have been made at their improvement, I must mention the [1] rule as to what is called the joinder of counts, that is as to including more charges than one in the same indictment. The rule is that you may theoretically join in the same indictment any number of counts for felony, and any number of counts for misdemeanour. But a count for a felony can in no case be joined with a count for a misdemeanour. One reason of this rule was that when felonies were in almost every case punishable by death it would have been absurd to join a charge which if established would involve capital punishment with a charge which would at most involve fine and imprisonment. Another reason is that the incidents of trials for felony and misdemeanour differ. It would be obviously inconvenient, if not impracticable, to indict a man for two offences for one of which he might challenge twenty jurors peremptorily, whilst he had no right to challenge on the other. There is, however, a further distinction. The right to charge any number of felonies in the same indictment is subject to the [2] doctrine of election—a doctrine introduced simply by the practice of the courts. This doctrine is that if it should appear, either upon the face of an indictment or when the evidence is given, that the different counts in an indictment for felony relate to more transactions than one, and are not different ways of describing the same transaction, the court will compel the prosecutor to confine his evidence to one of the transactions. No such rule applies to misdemeanours. The result of this is that counts charging any number of misdemeanours each charged in any number of different ways may be included in a single

show how confusing this would be. If, for instance, counts charging wounding with various intents, were mixed up just as it happened with counts charging causing grievous bodily harm and counts charging shooting, the patience of most men would break down before they had ascertained precisely what the indictment charged.

[1] *Dig. Crim. Proc.* arts. 236-241.

[2] *Ib.* art. 240.

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indictment, and this is the cause of the enormous prolixity of indictments for mercantile frauds and of the trials which ensue upon them. I have known cases in which indictments on the Fraudulent Debtors' Act have charged each of ten or twelve acts in each of ten or twelve ways.

The defects of this system need no remark, and as to the manner in which they might be removed, it will be enough to refer to the Draft Code prepared in 1878-9 by the Criminal Code Commissioners. An account of this and of some other proposals of theirs for the simplification of criminal procedure will be found [1] below.

An information differs from an indictment, so far as the rules of pleading are concerned, only in the circumstance that it is a formal statement made by the Attorney-General that the defendant is guilty of a misdemeanour instead of being a formal statement upon oath by a grand jury that the person accused is guilty of felony or misdemeanour.

[2] If a person is indicted when he is not in custody a certificate of the indictment may be procured by the prosecutor from the officer of the court before which the indictment is found, and upon the production of the certificate to a magistrate a warrant for the apprehension of the person accused must be issued, and upon his identification the person accused must be committed for trial. If he cannot be apprehended he may (in theory) be [3] outlawed, which in cases of treason and felony has the effect of a conviction. Outlawry, however, has gone completely out of use. The principal importance of it was that it involved, as indeed [4] it still involves, forfeiture, but forfeitures have not in practice been exacted (except in very exceptional cases) in modern times, and for other purposes outlawry is useless. The effect of extradition treaties is that a criminal can be arrested for most of the graver offences in almost any part of the world, and if a man is driven from his native country and cannot be found elsewhere there is no use in obtaining a formal conviction against him.

Notwithstanding all the pedantry and technicalities by

[1] Pp. 511-513.
[2] *Dig. Crim. Proc.* arts. 193-194.
[3] *Ib.* art. 233.
[4] 33 & 34 Vic. c. 23, s. 1.

which the law relating to indictments was disfigured, it ought to be said that they had at least one valuable feature. The rule that the indictment must set out all the elements of the offence charged, was some sort of security against the arbitrary multiplication of offences and extension of the criminal law by judicial legislation in times when there were no definitions of crimes established by statute, or indeed by any generally recognised authority. If, for instance, it had been lawful to indict a man in general terms, say for high treason, and if the judges had had to say what constituted high treason, the law might have been stretched to almost any extent. The necessity for setting forth that the prisoner imagined the death of the king, and manifested such imagination by such and such overt acts, was a considerable security against such an extension of the law, though, as the history of the crime of treason will show, it was not a complete one. The same principle was illustrated by indictments for libel in the latter part of the last century, and even in our own days instances may be found in indictments for conspiracy in which laxity of pleading might have had serious consequences to the accused. The fact is that looseness in the legal definitions of crimes can be met only by strictness and technicality in indictments, and that indictments may be reduced with safety to perfect simplicity as soon as the law has either been codified or reduced to certainty by authoritative writings which practically supply the place of a code.

In concluding the subject of indictments and informations, I must say something of the right to prefer them. Indictments, as I have already shown, are, properly speaking, accusations made by the grand jury, who are called together to acquaint the court before which they are assembled with the crimes committed in their district. Any one, however, may appear before them with a bill or draft indictment and witnesses to prove its truth. Theoretically, or at least according to the earliest theory upon the subject, the court does not look beyond the grand jury. The result is that in this country any one and every one may accuse any one else, behind his back and without giving him notice of his intention to do so, of almost any crime whatever. Till very lately

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the word "almost" ought to have been omitted, but in 1859 one of those small reforms was made which are characteristic of English legislation. In that year it was provided by [1] 22 & 23 Vic. c. 17, that no person should indict another for perjury, subornation of perjury, conspiracy, obtaining money by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, unless he is permitted to do so by a judge or the Attorney or Solicitor General, or unless he is bound over to prosecute by a magistrate. These provisions were extended to libels by 44 & 45 Vic. c. 60, s. 6. It is impossible to give any reason why the limitation so imposed on a dangerous right should not be carried much further, indeed it obviously ought to be imposed on all accusations whatever. It is a monstrous absurdity that an indictment may be brought against a man secretly and without notice for taking a false oath or committing forgery but not for perjury; for cheating but not for obtaining money by false pretences; and for any crime involving indecency or immorality except the three above specified, namely, keeping gambling houses, keeping disorderly houses, and indecent assaults. There are many such offences (rape, for instance, and abduction) which are quite as likely to be made the subject of vexatious indictments intended to extort money. The Criminal Code Commissioners of 1878-9 recommended that this act should be applied to all indictments whatever, and that the power of secret accusation, which came into existence only by an accident, should be altogether taken away.

[2] CRIMINAL INFORMATIONS.—The right to prefer a criminal information is restricted, both as regards the offences for which and the persons by whom it may be preferred. It may be preferred only for misdemeanours, and only by the Attorney or Solicitor General, or by the Master of the Crown Office acting under the orders of the Queen's Bench Division, upon a motion made in open court.

Two conflicting accounts are given of the origin of criminal informations. One view of the subject is stated in the case of [3] R. *v.* Berchet and others (1689), in

[1] See, too, 30 & 31 Vic. c. 35, ss. 1 & 2.
[2] For present law, see *Dig. Crim. Proc.* ch. xxiii. arts. 195-206.
[3] 1 Showers, 106-121.

an elaborate argument which Sir B. Shower intended to deliver on the question whether a criminal information would lie at the suit of a private person for a riot. The argument refers to a great number of records of informations from the reign of Edward I. to the Revolution which show that throughout the whole of that period the king's officers exercised the right of putting persons on their trial for all sorts of misdemeanours in the Court of King's Bench without any indictment by a grand jury. Such a course was certainly taken before the Council Board and the Court of Star Chamber, as I have already shown, and it thus appears that from the earliest times the king accused persons of offences not capital in his own court by the agency of his immediate legal representatives without the intervention of a grand jury.

The other view is advanced in [1] Earbery's case, which also contains an undelivered argument. According to this view criminal informations are only a vestige of one of the provisions by which Henry VII. increased the stringency of the administration of criminal justice at the beginning of his reign. In 1494 an act was passed (11 Hen. 7, c. 3) which authorised the Courts of Assize and Quarter Sessions, "upon information for the king to "hear and determine all offences and contempts (saving "treason, murder, and felony) committed by any person "against the effect of any statute made and not repealed." This act was the one under which Empson and Dudley earned their obscure infamy. It was repealed in the year 1509 (1 Hen. 8, c. 6). In the interval between 1494 and 1509 informations were common, but they were afterwards disused except in the Court of Star Chamber, till they were revived in the time of Charles I., when an information was filed against Elliot, Hollis, and others, for words spoken in Parliament, the object of that mode of procedure being to avoid the unpopularity of a Star Chamber prosecution. After the abolition of the Court of Star Chamber, it is said there was another interruption in the use of informations till the reign of Charles II., during which they were not

[1] 20 *St. Tr.* 856.

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very common. After the Revolution they became common, and were regulated by statute. It would be impossible to determine which if either of these accounts is true, without a full examination of the rolls; but for practical purposes the inquiry is of little importance, as no one in the present day would question the legality of criminal informations. For upwards of 200 years they have been in use, and they have been recognised and regulated by several acts of parliament. Whatever may have been its origin, the power to file criminal informations in the Court of King's Bench was used, not merely by the Attorney and Solicitor General in cases of public importance, but also by the Master of the Crown Office, who appears to have lent his name to any one who wished to use it. Thus all private persons were able to prosecute criminally any person who had offended them by any act which could be treated as a misdemeanour, without the sanction of a grand jury. This led to abuses in the way of frivolous malicious prosecutions, in which the defendants recovered no costs. This abuse was effectually remedied by 4 Will. & Mary, c. 18 (A.D. 1692), which enacts that the Master of the Crown Office shall file no criminal information "without express order to be given "by the said Court in open court" and upon certain conditions as to costs. The practical result of this statute has been to make a motion for a criminal information practically equivalent to a proceeding before magistrates in order to the committal of the accused. It is usually resorted to in cases of a grave public nature, as, for instance, where a person holding an official position is libelled and wishes to have, not only a speedy remedy for the wrong done to him, but the opportunity of justifying his conduct and character upon affidavit.

The power of the law officers of the Crown to file criminal informations is, or rather was, commonly exercised in the case of offences likely to disturb the public peace or the established order of things. Such offences are, however, now more frequently prosecuted by indictments. Throughout the latter part of the last and the beginning of the present century the hardships to which defendants were or were said to be exposed upon criminal informations were the subject

of frequent complaints, and [1] some legislation took place on the subject to which it is needless to refer in detail.

PLEAS.—The next step to the indictment is the arraignment, or calling of the accused person to the bar to plead to the charge made against him. There are now only four pleas in bar which an accused person can make, namely, not guilty, guilty, autrefois acquit, and autrefois convict. The only case in which a special plea can be pleaded is upon trials for libel, as to which some remarks will be made in reference to that offence. The plea of not guilty puts the prosecutor upon the proof of everything necessary to prove the prisoner's guilt. The plea of guilty admits everything and supersedes all further proceedings. The pleas of autrefois acquit and convict simply allege a previous acquittal or conviction for the same offence as the one charged in the indictment. A pardon might also be pleaded, and if a peer of parliament were arraigned for felony before any court other than the House of Lords or the Court of the Lord High Steward, or if a person were arraigned, *e.g.* for murder before a Court of Quarter Sessions, he might plead to the jurisdiction, but in practice such pleas are never heard of.

Nothing more need be said here of the effect of these pleas, but some matters of considerable historical interest are connected with the subject of pleading in criminal cases. For reasons which it is now difficult to represent clearly to the mind, it seems to have been considered in early times that criminals accused of felony could not be properly tried unless they consented to the trial by pleading and "putting themselves on the country." The prisoner was first required to hold up his hand, and having done so, or having otherwise owned himself to be the person indicted, the substance of the indictment was stated to him, and he was asked the question, "How say you, are you guilty or not "guilty?" If he said, "Not guilty," the answer was, "[2] Culprit, how will you be tried?" to which the prisoner had

[1] See 60 Geo. 3, and 1 Geo. 4, c. 4, "An Act to prevent delay in the administration of justice in cases of misdemeanour."

[2] Blackstone gives a curious account of the word "culprit." The word, he says, was coined out of two abbreviations used in taking notes in the indictment for making up the record, if necessary. When the prisoner pleaded

CHAP. IX. to reply, "By God and my country." Sacramental importance was attached for centuries to the speaking of these words. If a prisoner would not say them, and even if he wilfully omitted either "By God" or "by my country," he was said to stand mute, and a jury was sworn to say whether he stood "mute of malice" or "mute by the visitation of "God." If they found him mute by the visitation of God the trial proceeded. But if they found him mute of malice, if he was accused of treason or misdemeanour, he was taken to have pleaded guilty, and was dealt with accordingly. If he was accused of felony, he was condemned, after much exhortation, to the *peine forte et dure*, that is, to be stretched, naked on his back, and to have "iron laid upon him as much as he could bear and more," and so to continue, fed upon bad bread and stagnant water on alternate days, till he either pleaded or died. This strange rule was in force till the year 1772, when it was abolished by 12 Geo. 3, c. 20, which made standing mute in cases of felony equivalent to a conviction. In 1827 it was enacted, by 7 & 8 Geo. 4, c. 28, s. 2, that in such cases a plea of not guilty should be entered for the person accused. [1] A case in which pressing was actually practised occurred in 1726, when one Burnwater, accused at Kingston Assizes of murder, refused to plead, and was pressed for an hour and three quarters with nearly four hundredweight of iron, after which he pleaded not guilty, and was convicted and hanged. In 1658 Major Strangeways was pressed to death in about ten minutes, a wooden frame and weights being placed anglewise over his breast, and several [2] persons standing on the frame to hasten his death.

"not guilty," the clerk of assize wrote on the indictment the two words *non cul.*; for "*non*" or "*nient culpable*" not guilty. The officer of the court then joined issue on behalf of the king by saying that the prisoner was guilty and that he (the officer) was ready to prove it. The note which was made of this was "cul.," for "culpable," guilty; and "prit.," which was the abbreviation for "*paratus verificare*," the two abbreviations making "cul. prit." In the present day, for some reason which I do not pretend to understand, as soon as a prisoner pleads "not guilty" the clerk of assize writes on the indictment the word "puts." Does this mean "puts himself on the country," or can it in any way be connected with the old "prit"? The forms used in court are all very old and mostly extremely curious. They are preserved all the more carefully because they are mere forms the significance of which is not usually understood by those who use them. The derivation of "culprit" given in dictionaries is "culpatus." (See Johnson's *Dictionary* by Latham; Skeat's *Etymological Dictionary* and *Imperial Dictionary*.

[1] Pike's *History of Crime*, ii. 195, 288. [2] Were they guilty of murder?

The object of refusing to plead was that as in that case there was no conviction, no forfeiture took place, and the property of the accused person was thus preserved for his heir.

This practice of the "*peine forte et dure*," as it was called, is one of the most singular circumstances in the whole of the criminal law. [1] Its origin probably is to be found in the times when ordeals were abolished and petty juries introduced. As I have already observed, to be tried by an inquest instead of being tried by ordeal was at first an exceptional privilege, for which money was paid to the king. The ordeal being abolished, it is possible that it was thought hard to put a man to death upon a bare accusation without any kind of trial, and that it appeared to be contrary to the nature of an inquest to appoint a jury to try the prisoner unless he applied for it. If, therefore, an accused person said nothing at all, the court felt embarrassed. They could not put him to death upon what was felt with increasing distinctness to be a mere accusation. They could not make an inquest pass upon him without his consent. They determined accordingly to extort his consent.

Mr. Pike produces some evidence to show that in the early part of Edward I.'s reign, people who refused to put themselves on their trial were executed, but this practice was opposed to the statute 3 Edw. 1, c. 12 (A.D. 1275), which provided that "notorious felons" (*felouns escriez*), "and "which openly be of evil name and will not put themselves "in inquests of felonies that men shall charge them with "before the justices at the king's suit, shall have strong and "hard imprisonment, as they which refuse to stand to the "common law of the land. But this is not to be understood "of such prisoners as be taken of light suspicion." According to [2] Barrington this meant that the prisoner who refused to plead was to be starved till he did, but not tortured, and he quotes in proof of it a pardon granted in the reign of Edward III. to a woman who "pro eo quod se tenuit "mutam," was put "in arctâ prisonâ," and there lived without eating or drinking for forty days, which was regarded as a miracle. [3] The case which I have already

[1] This was pointed out, I think, for the first time in Pike's *History of Crime*, i. 210, &c.

[2] *Observations on the Statutes*, p. 83.

[3] *Year-Book*, 30 & 31 Edw. 1, p. 531. *Supra*, p. 260.

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referred to of the trial of Hugo for rape, in 1303, also favours this view, for when Hugo refused to plead the justice said to him, "Si vos velitis legem communem refutare vos portabitis "pœnam inde ordinatam. Scilicet uno die manducabitis "et alio die bibebitis; et die quo bibitis non manducabitis, et "e contra; et manducabitis de pane ordeaceo et non salo et "aqua, &c." Nothing seems to have been said about pressing to death. There is a passage in [1] Britton to the same effect. Indeed the rule as to eating and drinking on alternate days implies that pressing was an innovation. A man could not be subjected to such a process for days together. The practice of pressing to death was, according to [2] Barrington, introduced in the reign of Henry IV., the object being to get on with business, which would be impossible if the Assize Court had to go on sitting till an obstinate prisoner was tired of bread and water on alternate days. The practice was afterwards supplemented by tying the thumbs with whip-cord, a milder form of torture which might render pressing unnecessary.

The whole law of England presents no more characteristic incident than this. It exemplifies the extreme scrupulosity of its founders, their occasional and rather capricious indifference to the infliction of pain, the power of tradition and practice to vary even the plain meaning of a statute, and the astonishing tenacity of legal forms. Ordeals were abolished about 1215, yet the question of the officer of the court, "Culprit, how will you be tried?" and the prisoner's answer, "By God and my country," preserved the memory of them down to the year 1827. "By God" no doubt once meant "by ordeal," "my country" always meant the inquest or jury, and the "and" marks the period at which "by God" became a merely conventional phrase, preserving, though used in a different sense, the memory of an extinct institution.

[1] 1 Britton, 26 (by Nicholls). "Et si il ne se veulent aquitter si soint mis a "leur penaunce jekes autant qe il le prient. La penaunce soit tele qe et "soint dechancez et saunz ceinture et saunz chaperon en pyer liu de la "prisoun sur la neuve terre assiduelment jour et nuyt et qe il ne mangeusent "for qe pagn de orge ou de bien et qe il ne beyvent mie le jour qe il mange-"runt et le jour qe il beyvent ne mangerunt mie et qe il ne beyvent for qe "del eur et il soint en fyrges" (*i.e.* fers).

[2] P. 84. A man was compelled to plead by having his thumbs tied at the Old Bailey in 1734.

There must have been a time when the prisoner answered, "by God," if he had not bought a licence to have a jury, and meant to go to the ordeal, and "by my country" if he had, and so avoided the ordeal.

[1] IMPANNELING THE JURY.—The prisoner having pleaded, the next step is that of impanneling the jury by whom he is to be tried. It follows from what I have already said as to the origin of trial by jury that the impanneling of the jury was in very ancient times equivalent to the choice of the witnesses by whom matters of fact were to be determined. The old law of evidence consisted perhaps mainly, at all events largely, of rules by which certain classes of witnesses were rendered incompetent, and the rules, whatever they were, as to challenging jurors, must have been in fact rules whereby the parties were enabled to exclude testimony, though we cannot now say how far the fact that a man was successfully objected to as a juryman operated to prevent him from giving those who were sworn the benefit of any evidence he might have it in his power to give.

The right of challenge is mentioned by Bracton incidentally and in very general terms. In the passage already commented upon he says, [2] "Cum igitur procedendum sit de hujusmodi "ad inquisitionem ut ad judicium securius procedatur, et ut "periculum et suspicio tollatur justitiarius dicat indictato "quod si aliquem ex duodecim juratoribus suspectum habeat "illum justa ratione amoveat. Et illud idem dicatur de "villatis ut si capitales inimicitiæ fuerint inter aliquos ipsorum "et indictatum vel si ob cupiditatem terræ habendæ, ut "predictum est, qui omnes amovendi sunt ex justâ suspicione "ut inquisitio absque omni suspicione procedat."

There are also references to challenges of jurors in the passages already quoted from Britton. Without following out the subject minutely, the following may be stated as the broad final result: The prisoner was allowed to challenge peremptorily, *i.e.* without showing cause, any number of jurors less than thirty-five, or three whole juries. When or why he acquired this right it is difficult to say. Neither Bracton nor Britton mention it, and it is hard to reconcile it

[1] *Dig. Crim. Proc.* arts. 274-282. [2] ii. 454.

CHAP. IX. with the fact that the jurors were witnesses. A man who might challenge peremptorily thirty-five witnesses could always secure impunity. It probably arose at a period when the separation between the duties of the jury and the witnesses was coming to be recognised. The earliest statute on the subject, 33 Edw. 1, st. 4 (A.D. 1305), enacts "that "from henceforth, notwithstanding it be alleged by them "that sue for the king that the jurors of those inquests, "or some of them, be not indifferent for the king, yet such "inquests shall not remain untaken for that cause, but if "they that sue for the king will challenge any of those "jurors, they shall assign of the challenge a cause certain." This says and implies nothing at all as to the party's right of peremptory challenge, but implies that before that time the king had an unlimited right of peremptory challenge, and this, though it may seem harsh, is intelligible when we remember that the jurors were witnesses. It would obviously be right that the prosecutor should choose his witnesses, otherwise the jury might know nothing of the matter.

Be this how it may, a right to challenge thirty-five jurors peremptorily did undoubtedly, before Fortescue wrote, accrue to prisoners accused of felony, for he describes and boasts of it, and that right remained unaltered till 25 Hen. 8, c. 3 (1533), when the number was limited to twenty in all cases except treason. The acts of Edward I. and Henry VIII. were repealed and re-enacted by 6 Geo. 4, c. 50. s. 29, which is still in force.

There were at one time considerable doubts, which were not finally decided till our own time, as to the manner in which the rights of the Crown and the prisoner were to be regulated. The effect of various decisions on the subject is this: When, which rarely happens, the right of peremptory challenge is to be exercised in the strictest way, the following course is taken: The officer of the court calls over the whole pannel, so that both parties may know what jurymen answer to their names. The jurors who answer are then called, and the prisoner, as "each comes to the book to be "sworn," must challenge him either peremptorily or for cause. If the prisoner does not challenge the juror the

Crown may direct him to stand by without assigning any cause. When the whole pannel has been gone through, if twelve have not been sworn, the men ordered to stand by must be recalled, and if the prisoner does not challenge either peremptorily or for cause, the Crown must show its cause of challenge. In other words, the prisoner has twenty peremptory challenges, and the Crown has none, but the prisoner may be compelled to exhaust all his challenges before the Crown is called upon to show cause for its challenges. [1] If a very large number of jurors is returned, the effect of this is to give the Crown what is nearly equivalent to a right of peremptory challenge. This, speaking practically, is a matter of hardly any importance in quiet times in England. In the course of my experience I do not remember more than two occasions on which there were any considerable number of challenges.

When a challenge is made its truth is tried either by two persons named by the sheriff, or if any jurymen have been sworn, then by the two last sworn.

A challenge to the array is also possible, though very uncommon. It occurs when it is alleged that the sheriff has made up the pannel unfairly.

[2] THE HEARING.—The jury being sworn, the trial proceeds. It consists of the following steps. The prisoner is given in charge to the jury by the officer of the court. The counsel for the Crown states his case and calls his witnesses to prove it. If the prisoner calls no witnesses, or calls witnesses to character only, the counsel for the Crown may (unless the prisoner is undefended by counsel) at the end of his evidence sum up its effect to the jury. The prisoner, or his counsel, then makes his defence, and calls his witnesses. If he calls witnesses, the counsel for the Crown has a right to reply, and if the Attorney or Solicitor General prosecutes in person, he has a right to reply whether the prisoner calls

[1] Suppose, *e.g.* 150 jurymen are on the pannel. The prisoner challenges twenty peremptorily. The Crown makes 130 stand by. The 130 are then called, and the prisoner challenges for cause. It is hardly likely that he will be able to allege a definite cause of challenge against more than a few; say, however, that he challenges twenty more for cause. There still remain 110 as to whom the Crown must show cause. The Crown shows no cause, and the first twelve are sworn. Obviously ninety-eight remain whom the Crown has practically challenged peremptorily.

[2] *Dig. Crim. Proc.* arts. 283-300.

witnesses or not. The judge then sums up the evidence. The jury return their verdict. If they acquit the prisoner, he is discharged. If they convict him, he is asked in cases of felony what he can say why judgment should not be passed upon him, and unless he says something in arrest of judgment, he is sentenced.

Criminal trials as we know them, are the result of a long series of changes which occurred between the reign of Queen Mary, when the earliest trials of which we have detailed accounts took place, and down to our own time. These changes can be understood only by a study of the trials themselves, and by experience of the proceedings of the existing courts of justice. I have thought it best to treat this matter apart from the legal incidents of a trial; and, accordingly, what I have to say upon it will be found in Chapters XI. and XII., the first of which traces the development of criminal trials through a period of about 200 years, whilst the second describes contemporary trials. I mention the matters above referred to here in order to preserve the continuity of this chapter.

THE VERDICT.—In relation to the verdict of the jury two matters only require notice, namely, the rule that the jurors must be unanimous, and the right of the jury to return whatever verdict they think right without being subject to be punished at the will of the court.

The rule which required unanimity is, I think, easily explained historically, and easily justified on grounds of expediency. The historical explanation appears from the passages already quoted from Bracton, Britton, and other early authorities. The jurors were required to be unanimous because they were witnesses, and the rule was that twelve witnesses, or persons taken as witnesses, must swear to the prisoner's guilt before he could be convicted.

The justification of the rule, now that the character of the jury has changed from that of witnesses to that of judges of fact, seems to me to be that it is a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this condition has been fulfilled so long as some

of the judges by whom the matter is to be determined do in fact doubt? It has been often suggested that after a certain time the verdict of a minority should be taken, as for instance, that the verdict of eleven should be taken after one hour, and that of nine after three hours. Such proposals appear to me to be open to the objection that they diminish the security provided by trial by jury in direct proportion to the occasion which exists for requiring it. If a case is easy you require unanimity. If it is difficult you accept a small majority. If very difficult a still smaller one. My own opinion is that trial by jury has both merits and defects, but that the unanimity required of the jurors is essential to it. If that is to be given up, the institution itself should be abolished. There is a definite meaning in the rule that criminal trials are to be decided by evidence plain enough to satisfy in one direction or the other a certain number of representatives of the average intelligence and experience of the community at large, but if some of the members of such a group are of one opinion and some of another, the result seems to be that the process has proved abortive and ought to be repeated. If the rule as to unanimity is to be relaxed at all, I would relax it only to the extent of allowing a large majority to acquit after a certain time.

It is a remarkable illustration of the vagueness of the criminal law upon points which one would have thought could not have remained undecided, that till very modern times indeed it was impossible to say what was the law as to cases in which the jury could not agree, and it was possible to maintain that it was the duty of the presiding judge to confine them without food or fire till they did agree. It was, however, solemnly determined in 1866 in [1] the case of Winsor *v.* R. that in any case regarded by the judge as a case of necessity the jury may be discharged and the prisoner committed and tried a second time, and that a judge is justified in regarding a case in which the jury are unable to agree after a considerable length of time as a case of necessity. One result of this decision has practically been to

[1] L. R. 1 Q. B. 289, and Cam. Sc. 390.

CHAP. IX. obviate the objections usually made to the rule requiring unanimity in jurors, all of which turned on the notion that the law required the jury to be starved into giving a verdict. Every authority bearing on the subject is referred to in the argument. [1] By the Jurors Act of 1870, juries may be allowed when out of court a fire, and refreshments to be procured at their own expense.

The right of the jury to return a verdict according to their own consciences, and without being subjected in respect of it to any penal consequences was finally established by [2] Bushell's case in the year 1670. In some earlier instances and particularly in the celebrated case of Sir Nicholas Throckmorton in 1554, the jurors were imprisoned and heavily fined for acquitting the prisoner. This, however, was regarded as a great stretch of power even in those days. Sir Thomas Smith says—[3] "If they" (the jury) "do pronounce "not guilty upon the prisoner against whom manifest witness "is brought in the prisoner escapeth; but the twelve not "only rebuked by the judges but also threatened of punish-"ment, and many times commanded to appear in the Star "Chamber or before the Privy Council for the matter. But "this threatening chanceth oftener than the execution thereof, "and the twelve answer with most gentle words they did "it according to their consciences and pray the judges to be "good unto them as they did as they thought right and as "they accorded all, and so it passeth away for the most part." He then refers to cases in which the jurors had been fined—no doubt having in his mind Throckmorton's case, and adds, "But these doings were even then of many accounted very "violent, tyrannical, and contrary to the liberty and custom "of the realm of England."

Anciently, it may be, though the contrary seems as probable, jurors who returned a corrupt verdict in criminal cases were liable to what was called an attaint at the suit of the

[1] 33 & 34 Vic. c. 77, s. 23.

[2] 6 *St. Tr.* 999. In a case very similar to Bushell's, which happened a few years before, Kelyng, C.J., fined the jury. His account of the matter is long and very curious. See edition of 1878, pp. 69-75. This matter was not printed in the old edition.

[3] *Commonwealth of England*, p. 211.

king, though not at the suit of the party. The attaint was a remedy for a corrupt verdict in civil cases, and was tried by a jury of twenty-four, who, if they thought proper, might convict the first jury of a false verdict. The first jury were thereupon subjected to what was called the [1] "villain judgment," namely, imprisonment, infamy, and various forfeitures. This is referred to with applause by [2] Fortescue in the middle of the fifteenth century. It is spoken of by [3] Smith late in the sixteenth century as being in his time hardly known. Hale says somewhat faintly, speaking late in the seventeenth century of perverse acquittals in criminal cases: [4] "I think in such "cases 'the king may have an attaint.'" And [5] Lord Mansfield said in 1757, "The writ of attaint is now a mere "sound in every case." In 1825, attaints were abolished by 6 Geo. 4, c. 50, s. 60.

The attaint (whether it ever really applied to criminal cases or not) deserves notice as one of the many proofs which may be given of the fact that jurors were originally witnesses. Perjury by a witness was not a crime known to the law of England till the reign of Queen Elizabeth. The only form of that offence which was punished in the early stages of our legal history was the perjury of jurors, which made them liable to an attaint.

JUDGMENT.—The verdict of the jury is followed by the judgment of the Court, which may be either that the prisoner be discharged or that he suffer punishment. This matter I do not propose to consider at length in this place, the importance of the subject of legal punishments and their history being such as to deserve separate consideration.

[1] 3*rd Institute*, 222.
[2] Ch. xxvi.
[3] Bk. iii. ch. 2. "Attaints be very seldom put in use."
[4] 2 Hale, *P. C.* 310.
[5] Bright *v.* Eynon, 1 Burr. 393. See, too, Barrington on the *Statutes*, 100, 459.

CHAPTER X.

HISTORY OF THE LAW OF CRIMINAL PROCEDURE CONTINUED.—[1] PROCEEDINGS BY WAY OF APPEAL.

CHAP. X.

HAVING in the preceding chapters described the proceedings connected with a criminal trial from the apprehension of the suspected person to the judgment, I proceed to give an account of the manner in which the judgment of the court may be called in question.

It is a characteristic feature in English criminal procedure that it admits of no appeal properly so called, either upon matters of fact or upon matters of law, though there are a certain number of proceedings which to some extent appear to be, and to some extent really are, exceptions to this rule.

The first of these exceptions is a writ of error. It is a remedy applicable to those cases only in which some irregularity apparent upon the record of the proceedings takes place in the procedure.

In order to explain this it is necessary to describe what is meant by the record. As I have already observed the only document connected with a trial necessarily put into writing is the indictment. Upon this the clerk of assize or other officer of the court makes certain memoranda, showing the plea of the prisoner and the verdict of the jury. He also keeps a minute book in court in which he makes a note of the names of the jurors by whom different sets of cases are tried, an abstract of the indictments, and a memorandum of pleas, verdicts, and sentences. This is a mere private memorandum book having no legal authority, and kept merely for the purposes of the officer who keeps it. He is under no obligation to

[1] *Dig. Crim. Proc.* arts. 301-315.

keep it. No form is prescribed in which it is to be kept, and it never becomes in any way a public record. In all cases, however, except an infinitesimally small number, it is the only record kept of criminal trials, and nothing more meagre, unsatisfactory, and informal can well be conceived. If, however, it becomes necessary (to use the technical expression) "to make up the record," it becomes the foundation of a history of the proceedings, set out with pedantic and useless minuteness and detail. The record in cases of felony, says [1] Chitty, "states the session of Oyer and Terminer, the "commission of the judges, the presentment by the oath of "the grand jurors by name, the indictment, the award of the "capias or process to bring in the offender, the delivery of the "indictment into Court, the arraignment, the plea, the issue, "the award of the jury process, the verdict, the asking the "prisoner why sentence should not be passed upon him, "and the judgment."[2] All this matter is stated with the utmost elaboration and detail, and the special matter which is of real importance and on which error is to be assigned comes in in its place in the midst of a quantity of matter which is of no sort of practical use. As the record takes no notice either of the evidence or of the direction given by the judge to the jury the grossest errors of fact or of law may occur without being in any way brought upon the record, and as the writ of error affirms that there is error *on the record*, no error which is not so recorded can be taken advantage of by those means.

The history of writs of error in criminal cases is given by Lord Mansfield in [3] Wilkes's case. It is shortly this. Till the third year of Queen Anne writs of error in all such cases were issued entirely as a matter of favour, and were the means by which the Crown when so minded caused a conviction to be reversed. The defendant brought his writ of error. The Attorney-General admitted that there was error. The court accepted his admission and the conviction was set

[1] 1 *Cr. Law.* 719.

[2] In Orton's case the main question was whether cumulative punishment could be awarded for two offences charged in separate counts of the same indictment. The record was a parchment roll of monstrous size, setting forth together with much other wholly unimportant matter, every order made by the court for the adjournment of the trial to the next sitting.

[3] 4 Burr. 2550.

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aside. But in the third year of Queen Anne's reign the court held, on the one hand, that in cases of misdemeanour writs of error ought to be granted as a matter of justice if there was probable ground to think that there actually was any error in the proceedings, and that if the Attorney-General refused to grant his fiat for the issue of such a writ they would direct him to grant it: they held on the other hand, that when the writ was issued they would not be contented with the Attorney-General's admission of error, but would judicially determine whether error existed or not. In cases of felony and treason, however, the issue of a writ of error was and always continued to be exclusively matter of favour. In more modern times this distinction has practically passed into oblivion. A writ of error still issues upon the fiat of the Attorney-General, but it is never refused when any point which can be regarded as arguable arises, whether in cases of felony or of misdemeanour, and when such a case does arise it is always judicially decided as a matter of course, whether error exists or not.

Writs of error are for the reasons above given so limited in their application that they are but rarely used.

[1] Besides writs of error motions for new trials are permitted in some cases of misdemeanour, namely, cases of misdemeanour tried before the Queen's Bench Division in the exercise of its original jurisdiction, or sent down by that division to be tried at the Assizes on the Nisi Prius side. If a misdemeanour is tried before Commissioners of Oyer and Terminer at the Assizes or at the Quarter Sessions, the Queen's Bench Division will not after verdict remove the case by *certiorari*, with a view to granting a new trial. If the parties wish to have the possibility of applying for a new trial, or to have a special jury, their course is to apply for a *certiorari* before the case comes on to be tried. If the court is satisfied that questions of difficulty are likely to arise they will issue a *certiorari*, and either have the case tried before the Queen's Bench Division at Westminster, or send it down to be tried as a Nisi Prius record at the Assizes or in the City of London. When the

[1] Chitty, *C. L.* 653—660.

case is so tried a new trial may be moved for on the ground of misdirection, that the verdict was against the evidence, or on other grounds on which new trials are moved for in civil cases. According to Chitty, the first instance of such a new trial was in the year 1655.

[1] One case only has occurred in which a new trial was granted for felony, and that case was afterwards disapproved of and not followed by the Judicial Committee of the Privy Council in R. *v.* Bertrand (L. R. 1 *P. C.* 520). It is very remarkable that in the argument upon R. *v.* Scaife, no notice was taken of the novelty of the proceeding.

[2] When the jury return an imperfect special verdict in any criminal case a new jury may be summoned and the matter reheard (by a proceeding called a *venire de novo*). Special verdicts are verdicts in which the jury not wishing to decide upon the law find the facts specially, referring it to the court to say whether upon those facts the prisoner is or is not guilty of the crime for which he is indicted.

Special verdicts have now gone almost entirely out of use, having been superseded by the establishment of a court called the Court for Crown Cases Reserved. The history of this court is as follows. From very early times a practice had prevailed that a judge before whom any criminal case of difficulty arose at the Assizes or elsewhere, should respite the execution of the sentence or postpone judgment, and report the matter to the other judges. The question reserved was argued before the judges by counsel, not in a court of justice but at Serjeant's Inn of which all the judges were members. If they thought that the prisoner had been improperly convicted he received a free pardon. If not, the sentence was executed or judgment was passed. No judgment was delivered and no reasons were given in such cases, the whole proceeding being of an informal kind. When a case was tried at the Quarter Sessions no means for questioning the result existed. [3] In 1848 this informal tribunal was erected into a court called the Court for Crown Cases Reserved. It consists of all the judges; but five, of whom

[1] R. *v.* Scaife, 17 Q. B. 238 (1851).

[2] Chitty, *C. L.* 654.

[3] 11 & 12 Vic. c. 78.

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the [1] Lord Chief Justice must be one, are a quorum. If, however, the five judges differ, the minority are not bound by the decision of the majority, but any one of them may require the matter to be referred to the whole body of fifteen. This course was taken in the well-known case of R. *v.* Keyn. It is obviously extremely inconvenient, and it may be doubted whether those who framed the statute intended it to be taken. Any judge or chairman, or recorder of a Court of Quarter Sessions, may state a case for the opinion of the court "as to any question of law "which shall have arisen at" any "trial," either committing or bailing the prisoner in the meanwhile. The court hears the case argued, delivers judgment, and may either reverse the judgment (if any) or confirm it, or direct the court by which the case was stated to give judgment. This court can determine questions of law arising at the trial, but cannot take notice of questions of fact, and it is absolutely in the discretion of the presiding judge at a trial whether he will or will not reserve a point for its decision.

The result of the whole is that a provision, sufficient though intricate and technical, is made for the decision of questions of law arising at the trial by courts in the nature of appellate tribunals; but it must be added that the criminal law is now for the most part so well settled and understood that this is a matter of little practical importance. Writs of error [2] are of rare occurrence, and the Court for Crown Cases Reserved sits only three or four times a year for a day, or more often half a day, at a time, and probably does not determine twenty cases a year.

It is a much more important circumstance that no provision whatever is made for questioning the decision of a jury on matters of fact. However unsatisfactory such a

[1] Till the abolition of those offices the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron of the Exchequer, or the Lord Chief Justice of the Queen's Bench, was to be one of the judges.

[2] The writ of error in Orton's case, decided in March, 1881, and the writ of error in Bradlaugh *v.* R. in 1878, are the only writs of error in criminal cases which have been decided for a considerable time. I could never understand upon what ground it was thought necessary to grant a writ of error in Orton's case. No one of the three courts before which the matter came felt the smallest doubt upon any of the points raised in it.

verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious, but it is difficult to find a satisfactory remedy. The matter has been the subject of frequent discussion, and it was carefully considered by the Criminal Code Commission of 1878—9. I have nothing to add to the following observations which occur in their *Report* as to the reforms which seem to be required in regard to the whole matter of appeals in criminal cases.

After describing the different forms of appeal now in use much as I have described them above, though in other words,[1] the *Report* proceeds: "It seems to us that in order to form "a complete system these various forms of proceeding ought "to be combined. For this purpose we propose, in the first "place, to constitute a single Court of Criminal Appeal "closely resembling the Court for Crown Cases Reserved, "but with two important differences. We propose that, as "in other courts, the minority should be bound by the "majority. A court composed of fifteen judges is incon- "veniently large. If on a point of importance a court of

[1] Pp. 38—40.

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"five should be divided, it might be desirable that a further "appeal should be possible. We accordingly propose that "the court should have power to permit an appeal to the "House of Lords.

"We do not interfere with the present practice as to trials "in the Queen's Bench Division, and we propose that in the "case of such trials the Queen's Bench Division should be "the Court of Appeal, and that it should have power to give "leave to appeal to the House of Lords.

"As to the power to appeal and the cases in which an "appeal should lie, the Draft Code proposes to make consider-"able changes in the existing law as regards both matter of "law and matter of fact. With regard to matter of law, the "judge has at present absolute discretion as to reserving or "not reserving questions which arise at the trial and do not "appear on the record. This we think ought to be modified. "We propose accordingly that the judge shall be bound to "take a note of such questions as he may be asked to "reserve, unless he considers the application frivolous. If "he refuses to grant a case for the Court of Appeal, the "Attorney-General may in his discretion grant leave to the "person making the application to move the Court of Appeal "for leave to appeal, and the court may direct a case to be "stated. The court on hearing the case argued may either "confirm the ruling appealed from, or grant a new trial, or "direct the accused to be discharged; in a word, it may act "in all respects as in a civil action when the question is one "of law, and that on the application of either side. This in "some ways is favourable, and in others unfavourable, to "accused persons. By the existing law the prisoner's right "to appeal on a point of law is, generally speaking, subject "to the absolute discretion of the judge; but if he is per-"mitted to appeal, and if the court above decides in his "favour, the conviction is quashed, although in a civil case "he would gain nothing but a right to a new trial. Under "section 542 the prisoner would be able to appeal, with the "leave of the Attorney-General, against the will of the "judge, but if he succeeded he would in many cases only "obtain a new trial. If the matter appealed upon was a

"mere irregularity, immaterial to the merits of the case, the "Court of Appeal would have power to set it right. All "this would diminish the value of the right of appeal to "prisoners, though it would increase its extent. It must be "observed, too, that the right of appeal on questions of law "is given equally to both sides. The Commissioners as a "body express no opinion on the expediency of this. If it "is thought proper to confine the right to the accused, the "alteration of a few words in the section would affect that "object. In dealing with appeals upon matter of law little "is wanted beyond an adaptation of the existing law.

"It is more difficult to provide in a satisfactory way for an "appeal upon matters of fact. It is obvious that the only "practicable means of giving such an appeal is by permitting "convicted persons to move under certain circumstances for a "new trial, either on the ground that the verdict was against "the evidence, or on the ground that the verdict has been "shown to be wrong by facts discovered subsequently to the "trial. If the ground on which a new trial is sought for is "that the verdict was against the evidence, the case is com-"paratively simple. In such cases the judge before whom "the case was tried ought to have power to give leave to "the convicted person to apply to the Court of Appeal for a "new trial. If the convict had an absolute right to make "such an application, it would be made whenever the convict "could afford it. By making the leave of the judge who "tried the case a condition for such an application, such "motions would be practically confined to cases in which the "judge thought the jury had been harsh towards the prisoner. "However, when the application was made the Court of "Appeal could deal with it as in civil cases.

"A much more difficult question arises in relation to cases "which occur from time to time, where circumstances throw-"ing doubt on the propriety of a conviction are discovered "after the conviction has taken place. It these cases it was "provided by [1] the bill that the Secretary of State should "have power to give leave to the person convicted, to apply

[1] This was a Draft Code prepared by me, and introduced into Parliament by Sir John Holker in 1878.

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"to the Court of Appeal for a new trial. Upon the fullest "consideration of the subject we do not think that such an "enactment would be satisfactory. In such a case the Court "of Appeal must either hear the new evidence itself, or have "it brought before it upon affidavit. In the former case the "court would substantially try the case upon a motion for a "new trial, and this is opposed to the principle of trial by "jury. In the latter case they would have no materials for "a satisfactory decision. It is impossible to form an opinion "on the value of evidence given on affidavit and *ex parte* "until it has been checked and sifted by independent inquiry. "Such duties could not be undertaken by a Court of Appeal. "If the Secretary of State gave leave to a convict to move "the Court of Appeal for a new trial on evidence brought "before the court by affidavit, the only well-ascertained fact "before the court would be that the Secretary of State "considered that there were grounds for such an application. "This would make it difficult to refuse the application. The "Secretary of State would be responsible only for granting "leave to move the court for a new trial. The court, in "granting a new trial, would always in fact take into account "the opinion indicated by the Secretary of State's conduct. "It must also be remembered that a court of justice in de- "ciding upon such applications would, in order to avoid "great abuses, be obliged to bind itself by strict rules, "similar to those which are enforced in applications for new "trials in civil cases on the ground of newly-discovered "evidence. Such applications cannot be made at all after "the lapse of a very short interval of time, and are not "granted if the applicant has been guilty of any negligence; "and this stringency is essential to the due administration of "justice and to the termination of controversies. It would "be unsatisfactory to apply such rules to applications for new "trials in criminal cases. No matter at what distance of "time the innocence of a convicted person appeared probable, "—no matter how grossly a man (suppose under sentence of "death) had mismanaged his case, it would be impossible to "refuse him a fresh investigation on the ground of such lapse "of time or mismanagement. Cases in which, under some

"peculiar state of facts, a miscarriage of justice takes place, "may sometimes though rarely occur; but when they occur it "is under circumstances for which fixed rules of procedure "cannot provide.

"Experience has shown that the Secretary of State is a "better judge of the existence of such circumstances than a "court of justice can be. He has every facility for inquiring "into the special circumstances; he can and does, if neces- "sary, avail himself of the assistance of the judge who tried "the case, and of the law officers. The position which he "occupies is a guarantee of his own fitness to form an "opinion. He is fettered by no rule, and his decision does "not form a precedent for subsequent cases. We do not see "how a better means could be provided for inquiry into the "circumstances of the exceptional cases in question. The "powers of the Secretary of State, however, as to disposing "of the cases which come before him are not as satisfactory "as his power of inquiring into their circumstances. He "can advise Her Majesty to remit or commute a sentence; "but, to say nothing of the inconsistency of pardoning a man "for an offence on the ground that he did not commit it, "such a course may be unsatisfactory. [1] The result of the "inquiries of the Secretary of State may be to show, not "that the convict is clearly innocent, but that the propriety "of the conviction is doubtful; that matters were left out of "account which ought to have been considered; or that too "little importance was attached to a view of the case the "bearing of which was not sufficiently apprehended at the "trial; in short, the inquiry may show that the case is "one on which the opinion of a second jury ought so be "taken. If this is the view of the Secretary of State, he "ought, we think, to have the right of directing a new trial "on his own undivided responsibility. Such a power we "accordingly propose to give him by section 545.

"With respect to the materials to be laid before the Court "of Appeal we propose to abolish the present record. It "is extremely technical and gives little real information.

[1] As an illustration of these remarks, see the case of Smethurst at the end of Vol. III.

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"Instead of it, we propose that a book to be called the Crown "Book should be kept by the officer, which should record in "common language the proceedings of the court. In prac- "tice the record is hardly ever made up, and if it is necessary "to make it up, the officer's minute-book affords the only "materials for doing so. Our proposal is practically to "substitute the original book for the record which is made "up from it, and is merely a technical expansion of the "original.

"We also propose that the Court of Appeal should have "power to call for the judge's notes, and to supply them if "they are considered defective by any other evidence which "may be available,—a shorthand writer's notes for instance. "We consider the statutory recognition of the duty of the "judge to take notes as a matter of some importance. Upon "the subject of appeal there is not much difference between "the Draft Code and the Bill. The provisions of the former "are more simple."

CHAPTER XI.

HISTORY OF CRIMINAL TRIALS IN ENGLAND FROM 1554—1760.

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IN the earlier chapters I have given the history of each of the steps in the prosecution of criminals from the first moment when a person is suspected down to the final conclusion of the proceedings. I have, however, intentionally omitted all but the most cursory notice of the actual trial by which the guilt or innocence of the suspected person is determined. In attempting to relate its history I shall adopt a somewhat different method from that which I have hitherto followed. Instead of treating separately the history of the opening speech of the counsel for the Crown, the prisoner's defence, the examination of the witnesses, and the judge's summing up, I shall give an account of characteristic trials or groups of trials from the reign of Queen Mary, when the earliest trials of which we have detailed reports took place, till the reign of George III., when the system now in force was established in all its main features.

It may be said that the matter of which I now propose to treat belongs rather to history proper than to law; but the great interest of English criminal law lies in the circumstance that it has been closely connected with several of the turning-points of English constitutional history, and the proceedings have been recorded in the *State Trials* with such completeness and authenticity as to give to [1] that great

[1] The *State Trials* contain thirty-three volumes, royal 8vo., averaging, I suppose, from 600 to 700 pages, in double column and small type. The collection extends from the earliest times to the year 1822, the last trials reported being those of Thistlewood and his associates for the Cato Street Conspiracy. I

CHAP. XI. collection the character of a judicial history of England. The principal groups of trials of which accounts have been preserved illustrate the gradual development of the system which at present exists. They will be found to throw light on every part of it.

One large class of cases, namely, trials for heresy and other ecclesiastical offences, I pass over for the present, as I propose to notice some of them in a separate chapter. I may observe, however, that the reports of some of them are the earliest detailed reports which we possess of any criminal proceedings.

BAGA DE SECRETIS.

By way of introduction to the first group of trials of which we have detailed reports, I will say a few words of the traces which still exist of those which occurred during the preceding seventy-seven years, namely, between 1477 and 1544. There are no reports, properly so called, of criminal trials during this period, but a remarkable, though in some respects disappointing, document exists, which I refer to on account rather of its curiosity than on account of any positive information upon criminal procedure which it contains. It is a translation of part of the contents of the *Baga de Secretis* for the reigns of Edward IV., Henry VII., and Henry VIII. The contents of this bag consist of indictments for a great variety of offences tried in the Court of King's Bench in the years mentioned, the earliest occurring 19th May, 1477, and the latest 13th January, 1547. In our own times the names of the witnesses always appear on the back of the bill, but this practice was not then adopted, and the documents referred to contain no other indication of the nature of the evidence, or of the management of the trial, than can be

think no more important addition to the materials for the history of our own times could be made than a continuation to the present day. The great trials which have occurred during the last sixty years have been unequalled in excellence, and, to say the least, have been equal in interest to any of those of former times. The trials of the Bristol rioters, the trial of O'Connell in 1844, the trials for treason-felony in England and Ireland in 1848, many of the trials for conspiracy, the trial of Bernard for the Orsini plot, the various proceedings against Governor Eyre, the Fenian trials subsequent to 1865, and very many more, are parts, not only of the legal, but also of the political and general history of England which ought to be carefully preserved.

found in the terms of the indictments. These, however, are not quite so barren as such documents would be at present. Some of them are so detailed and circumstantial as to show that evidence must have been carefully taken before the indictment was sent before the grand jury, and the contents of these are very curious. For instance, part of [1] the indictment against Lord Warwick for high treason, by conspiring with Perkin Warbeck in the Tower against Henry VII., runs as follows:—"The Earl and Cleymound, on the said 2nd "August, 14 Henry VII., being in the chamber of the Earl "in the Tower of London, the said Cleymound, in order to "comfort the said Peter, then being in a chamber in the "Tower under their chamber, by assent of the said Earl "knocked upon the vault of the said chamber to the intent "that the said Peter might hear the Earl and Cleymound, and "Cleymound said to the said Peter, 'Perkin, be of good "'cheer and comfort,' and further showed to him that he "had a certain letter, directed to the said Peter, which he "had received from one James, a clerk of Flanders, which "letter he, Cleymound, would, as he promised, deliver to the "said Peter the following day," and so on, with many further details.

[2] The indictment against the Duke of Buckingham, 13th May, 1521, is even more detailed and circumstantial. Here is a specimen:—"The Duke, in order to carry his inten-"tion" (to depose the King) "into effect did, on the 24th "day of April, 4 Henry VIII., lead one John Delacourt, late "of Thornbury, in the county of Somerset, to one Nicholas "Hopkins, a monk of the Carthusian Priory of Henton, who "pretended to have knowledge of future events by certain "revelations which he feigned to have had, in order that the "Duke might have further knowledge thereof from the said "Nicholas." It then proceeds to set out the particulars of various negotiations between the Duke and Father Nicholas.

There is one case in which it is still possible to compare the indictment with the evidence given at the trial. This is the case of Sir Thomas More, who was tried on the 1st July, 1535, for denying the King's supremacy. A report of the

[1] *Baga de Sec.* p. 216. [2] *Ib.* p. 230.

CHAP. XI. trial itself is given in the *State Trials*. It is taken principally from the *Life of Sir Thomas More* by his great-grandson, but it contains some matter which is not to be found either in that work or in Hall's *Chronicle*, or in Lord Herbert's *Life of Henry VIII.*, which works are also referred to. In particular the account in the *State Trials* says (I know not who is supposed to be speaking, but I suppose More, the great-grandson):—"The indictment was very long, "but where to procure a copy of it I could never learn; "it is said in general it contained all the crimes that "could be laid to the charge of any notorious malefactor, "and Sir Thomas professed it was so long that he could "scarce remember the third part of what was objected "therein against him." To judge from the abstract, which fills a folio page, the indictment was not at all long. It began by setting forth the substance of 26 Hen. 8, c. 1, which enacts that Henry VIII. and his successors, kings of this realm, "shall be taken, accepted, and reputed the "only supreme head on earth of the Church of England." It then sets out the substance of c. 13 of the same statute, which makes it high treason "if any person maliciously hath wish or "desire, by words or writing, to deprive the king of his "dignity, title, or name of his royal estate." It then avers that More, traitorously imagining and attempting to deprive the king of his title as supreme head of the Church, did, when examined before Cromwell and others, whether he accepted the king as supreme head on earth of the Church of England, refuse to answer directly, saying: "I will not "meddle with any such matters, for I am fully determined to "serve God, and to think upon his passion, and my passage "out of this world."

Further, it sets out a letter written by More to Fisher, and a statement made by More upon examination at the Tower, in each of which he said that the statute was like a two-edged sword, that if he answered one way he should offend his conscience, and if he answered the other, lose his life.

Lastly, it sets out a conversation between More and Rich, the king's Solicitor-General, in which, after some introductory matter, More said that if a statute made the king supreme

head of the Church, the subject cannot be obliged, because his consent cannot be given for that in Parliament. In the report in the *State Trials* it is said that Rich swore to the conversation as laid in the indictment. To this it is said Sir Thomas replied: "If I were a man, my lords, that had no regard "to my oath, I had had no occasion to be here at this time, as "is well known to everybody, as a criminal; and if this oath, "Mr. Rich, which you have taken be true, then I pray I may "never see God's face, which, were it otherwise, is an impre-"cation I would not be guilty of to gain the whole world." The account proceeds: "More, having recited in the face of "the court all the discourse they had together in the Tower "as it truly and sincerely was," added bitter reproaches against Rich, saying, amongst other things: "You always lay under "the odium of a very lying tongue, a great gamester, and of "no good name and character either here" (in Westminster Hall) "or at the Temple." More was convicted and executed.

[1] Lord Campbell has spoken in terms of almost passionate indignation of this trial. He adopts absolutely, and with no evidence whatever, More's statement that Rich committed perjury. It is impossible to have any decided opinion as to the details of a conversation held nearly 350 years ago; but even assuming the correctness of the partial and unlawyerlike report of the proceedings which remains, there are some reasons to think that Rich's evidence was substantially true. First, the reporter does not give More's own account of the conversation. This looks as if it differed only in detail from Rich's. Secondly, More's oaths and his vehemence against Rich look as if Rich had, at all events, told some truth. Thirdly, there can be no doubt that More did think the Act of Supremacy wrong, and beyond the competency of Parliament, for in arrest of judgment he said that the indictment "is founded upon an Act of

[1] Campbell's *Chancellors*, ii. 59—63. This delightful writer, and most powerful and impressive of judges, seems to me to be in his biographies as impressible by topics of prejudice as a common juryman. More's genius and the beauty of his character make it impossible for Lord Campbell to see anything but perjury and oppression in his trial; yet, after all, why is it unlikely that he should have unintentionally expressed an opinion which he held so strongly that the terms in which he moved in arrest of judgment were an act of high treason within the statute?

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"Parliament directly repugnant to the laws of God and his "Holy Church." Fourthly, More laid great stress upon the argument that, even if Rich spoke the truth, "it cannot in "justice be said that they were spoke maliciously." As far as the law goes, I think the word "malicious" in the statute could mean no more than seriously—meaning what was said—the meaning being regarded by the legislature as in itself bad. Whether it was, under all the circumstances of the time, expedient to make the denial of the king's supremacy high treason is a question on which I have no opinion for want of study; but I cannot see that More's trial was in itself unfair, though no doubt it was grossly indecent that the principal witness should also act as counsel for the Crown, as Lord Campbell says Rich did, though the fact is not mentioned in the report to which he refers.

[1] The indictment against Anne Boleyn is more concise, but the charges in it are specific and pointed, though [2] they do not enter into details. They alleged that she committed adultery with five specified persons on five separate occasions, time and place being assigned in each instance. As to the proceedings at the trial itself, nothing appears beyond a formal record of the verdict. The indictments against Katharine Howard and her various adulterers enter into greater detail. There are six indictments, relating to offences committed in Yorkshire, Middlesex, Lincolnshire, the City of Lincoln, Surrey, and Kent, respectively. One only (the Yorkshire indictment) is fully abstracted. It enters into a certain amount of detail, especially as to Lady Rochford's acting as a "common procuress" between them.

I.—1554—1637.

The first group of trials which I shall consider are those which took place betweeen 1554 and 1637, the first being the

[1] *Baga de Sec.* p. 244.

[2] I have not referred to the original, but the abstract suggests a possibility that it may contain some details omitted from the abstract from regard to decency. It says that the Queen "did falsely and traitorously procure, by "means of indecent language, gifts, *and other acts therein stated*, divers of "the King's doctors and familiar servants to become her adulterers."

trial of Sir Nicholas Throckmorton, and the last being the proceedings in the Star Chamber which led to its abolition. [1] The report of the trial of Throckmorton is the earliest which is full enough to throw much real light on the procedure which then prevailed. All the trials which took place during this period seem to have followed much the same course, and to have been conducted in the same manner.

The cases of which reports remain were, for the most part, of great political importance, and were accordingly, during the early stages of the procedure, under the charge not of the justices of the peace, but of the Privy Council, and especially of the judges who were members of it, and the law officers of the Crown. The suspected person, having been arrested, was kept in confinement more or less close according to circumstances, and was examined in some cases before the Privy Council, in some cases by the judges, and in some instances by torture. The evidence of other persons, and more especially the evidence of every one who was suspected of being an accomplice, was taken in the same manner. When the case was considered ripe for trial the prisoner was arraigned and the jury sworn, after which the trial began by the speeches of the counsel for the Crown. There were usually several counsel, who, in intricate cases, divided the different parts of the case between them. The prisoner, in nearly every instance, asked, as a favour, that he might not be overpowered by the eloquence of counsel denouncing him in a set speech, but, in consideration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was, that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was that, during the period in question, the examination of the prisoner, which is at present scrupulously, and I think even pedantically, avoided, was the

[1] 1 *St. Tr.* 395.

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very essence of the trial, and his answers regulated the production of the evidence; the whole trial, in fact, was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning. The judges occasionally took part in the discussion; but, in the main, the debate was between the parties. As the argument proceeded the counsel would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.* the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions. When the matter had been fully inquired into by this searching discussion, the presiding judge "repeated" or summed up to the jury the matters alleged against the prisoner, and the answers given by him; and the jury gave their verdict.

I will give an account of a few of the most remarkable trials as specimens.

Sir N. Throckmorton was tried for high treason in 1554, [1] the charge against him being that he compassed and imagined the Queen's death, and levied war against her, and adhered to her enemies; the alleged fact on which the charge was founded being a conspiracy with Wyat before his rising.

The trial took place on the 17th April, 1554. [2] The Court sat probably from 8 A.M. till 2, or, at any rate, some time before 3 P.M., as at their rising they adjourned till 3, and the jury gave their verdict at 5. The trial would seem accordingly to have lasted altogether for about six hours. It consisted almost entirely of a verbal duel between Throckmorton and the counsel for the Crown, namely, Serjeant Stanford, who, I suppose, may have been the author of Stanford's *Pleas of the Crown*, and Griffin, the Attorney-General. [3] Stanford took by

[1] The copy of the indictment is very imperfect. 1 *St. Tr.* p. 869.
[2] In Fortescue's time the judges usually sat from 8 to 11.
[3] He was probably the Prime Serjeant, who, if there were such a personage

far the most conspicuous part in the proceedings. He began by asking Throckmorton if he had not sent Winter to Wyat in Kent to confer about taking the Tower of London and about Wyat's rising? Throckmorton said he had told Winter that Wyat wanted to speak to him; but that he said nothing on the matters stated, and challenged Stanford to prove what he alleged. Stanford read Winter's "confession," and offered to call Winter to swear to it. Throckmorton said that, for the sake of argument, he would admit the "confession" to be true, and pointed out that certain parts of it were highly favourable to him, and that no part of it showed anything criminal on his part. Some matters he explained in answers to questions from the judges and the Attorney-General.

Stanford then read the confession of Cuthbert Vaughan, which, if true, proved that Throckmorton had given Vaughan much information as to the designs of Wyat's confederates. The Attorney-General offered to produce Vaughan to swear to his confession. To which Throckmorton replied, "He that "hath said and lied will not, being in this case" (*i.e.*, under sentence of death), "stick to swear and lie." Vaughan, however, was called, swore to the truth of his confession, and, in answer to a question from Throckmorton, said he was only a common acquaintance, and that Wyat had given him a letter of introduction to Throckmorton. Upon this Throckmorton said, "If you have done with Vaughan, my lord, I pray you "give me leave to answer." The Chief Justice replied, "Speak, and be short." Throckmorton thereupon insisted on the improbability of his placing so much confidence in a common acquaintance, and appealed to Sir R. Southwell (one of the Commissioners by whom he was tried, and before whom, as a Privy Councillor, Vaughan had been examined) to confirm him in saying that Vaughan had varied in his evidence, and in particular that he had vouched a witness who had not been examined and a document which had never been produced. He also insisted that Vaughan ought not to be believed, because his only hope of escape from his

in these days, would take precedence of the law officers. In most of the cases referred to the Prime Serjeant is leading counsel for the prosecution.

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own sentence of death was to accuse some one else. The judges hereupon asked if he meant to say that Vaughan's deposition was totally false. Thereupon Throckmorton admitted that much of it was true; but he denied the specially damaging parts of it, and explained a variety of matters which were specifically pointed out to him. Throckmorton's own "confession" was then read by Stanford. It admitted in substance that he had discussed with several persons the scheme of the marriage between Queen Mary and Philip II., of which he and they strongly disapproved; but it went no further. A deposition of the Duke of Suffolk was next read, on which Throckmorton remarked that it stated only what the Duke said he had heard from his brother, Lord Thomas Grey, who "neither hath said, can say, nor will say "anything against me." Certain statements, very remotely connected with the subject, made by one Arnold, were then referred to. They mentioned a man named FitzWilliams. Throckmorton, seeing FitzWilliams in court, desired that he might be sworn as a witness. FitzWilliams offered himself to be sworn, but, upon the Attorney-General's application, the Court refused to hear him, and ordered him out, one of the judges saying, "Peradventure you would not be so ready in a "good cause." Finally it was said that Wyat had "grievously "accused" the prisoner, to which Throckmorton replied, "Whatsoever Wyat hath said of me in hope of his life, he "unsaid it at his death." One of the judges owned this, but added that Wyat said that all he had written and confessed to the Council was true. Throckmorton replied, "Master Wyat said not so. That was Master Doctor's "addition." On this another Commissioner observed that Throckmorton had good intelligence. He answered, "God "provided that revelation for me this day, since I came hither; "for I have been in close prison these fifty-eight days, where "I heard nothing but what the birds told me which did fly "over my head,"—an assertion which was probably false. After this Throckmorton objected, that his case was not brought within 25 Edw. 3, as no overt act of compassing the Queen's death was proved against him; but at the most, procurement by words only of levying war. The judges put

various difficulties in his way, refusing to have the statutes read, and, [1] in at least one instance, misconstruing their language grossly when Throckmorton quoted them. They held however, certainly in accordance with all later authorities, that in treason there are no accessories, all being principals. Nothing can exceed the energy, ingenuity, presence of mind, and vigour of memory which Throckmorton showed, or is reported to have shown, throughout every part of the case, and especially in the legal argument. The Attorney-General is reported to have appealed to the Court for protection. "I pray you, my lords that be "the Queen's Commissioners, suffer not the prisoner to use "the Queen's learned counsel thus. I was never interrupted "thus in my life, nor I never knew any thus suffered to talk "as this prisoner is suffered. Some of us will come no more "to the bar, an we be thus handled."

The Chief Justice summed up, "and," says the reporter (who, no doubt, was very favourable to Throckmorton), "either for want of good memory or good will, the prisoner's "answers were in part not recited, whereupon the prisoner "craved indifferency, and did help the judge's old memory "with his own recital." After the summing up, Throckmorton made to the jury a short, earnest, pathetic address, full of texts. He begged the Court to order that no one, and in particular none "of the Queen's learned counsel be "suffered to repair to them." Whereupon two serjeants were sworn to attend them for that purpose. After a deliberation of two hours the jury acquitted him. They were committed to prison for their verdict, and eight of them (four having submitted and apologised) were brought before the Star Chamber in October (six months and more after the trial), and discharged on the payment by way of fine of £220 apiece, and three, who were not worth so much, of £60 apiece. "This rigour was fatal to Sir John Throckmorton, who was "found guilty upon the same evidence on which his brother "had been acquitted."

[1] "Proveably attainted by open deed by *people of like condition*." People of like condition, according to Bromley, C.J., means "your accomplices in "treason—traitors like yourself"—which Throckmorton naturally called "a "very strange and singular understanding."

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The next trial to which I will refer is that of [1] the Duke of Norfolk in 1571. He was tried for high treason by imagining the death and deposition of Queen Elizabeth; the overt act being an endeavour to marry Mary, Queen of Scots, knowing that she claimed title to the Crown as against Queen Elizabeth. He was also charged with being concerned in various other treasonable enterprises, which are set out at great length in the indictment. The case was tried before the Court of the Lord High Steward, consisting of twenty-six Lords Triers. The proceedings, though not so animated as those in Throckmorton's case, followed much the same course. Serjeant Barham conducted the greater part of the prosecution. After opening the case, he urged the Duke to confess that he knew that Mary claimed the crown of England. He admitted that he knew it, "but with circumstance," that is, subject to explanation. Barham contested the value of the explanation, and many depositions were read, on the bearing of which the Duke on the one side, and Barham on the other, argued, questioned each other, and exchanged explanations at great length. Here is a single specimen :—

"*Serjeant*: Now for the matter of taking the Tower. "*Duke*: I deny it. *Serjeant*: Was it not mentioned unto "you in the way when you came from Titchfield, by one that "came to you and moved you a device between you and "another for taking the Tower? *Duke*: I have confessed "that such a motion was made to me, but I never assented "to it. *Serjeant*: You concealed it; and to what end "should you have taken the Tower but to have held it against "the Queen by force?" &c.

After Barham had finished the part of the case which he was to manage, other charges were enforced in the same way by the Attorney-General, and others again by the Solicitor-General. After which "Mr. Wilbraham, the Attorney of "the Wards," made a speech ending with a burst of patriotic eloquence as to how under circumstances the English would have beaten certain Walloons. On this the reporter observes, "This point Mr. Attorney spoke with such a grace, such "cheerfulness of heart and voice, as if he had been ready to

[1] 1 *St. Tr.* 957—1042.

"be one at the doing of it, like a hearty true Englishman, a "good Christian, a good subject, a man enough for his "religion, prince, and country." After this Wilbraham, like his leaders, had an argument at length with the prisoner, who was thus expected to deal successively with no less than four eminent counsel.

Some of the Duke's observations throw much light on the position of a prisoner in those days. At one point he said, "There is too much for me to answer without book; "for my memory is not so good to run through everything, "as they do that have their books and notes lying before "them. Therefore, I pray you, if I forget to answer to any-"thing, remind me of it." The Duke, like Throckmorton, argued with much reason that no overt act of compassing the Queen's death had been proved against him, and quoted some authorities, and in particular Bracton. The Attorney-General was indignant at his audacity. "You complained "of your close keeping that you had no books to provide for "your answer: it seemeth you have had books and counsel; "you allege books, statutes, and Bracton. I am sure the "study of such books is not your profession." The Duke humbly said, "I have been in trouble these two years; think "you that in all this time I have not had cause to look for "myself?" The Duke was convicted and executed.

Many other trials in Queen Elizabeth's time were conducted in the same way. I may mention those of [1] Campion and other Jesuits in 1581, those of [2] Abington and others in 1586, that of [3] Lord Arundel in 1589, and a very remarkable one of [4] Udale, for felony in writing the libel called Martin Marprelate in 1590. In Udale's case there was really no evidence, or hardly anything which could by courtesy be called evidence, except the fact that when examined before the Privy Council he would not deny having written the book; and that when the judge who tried him offered to direct an acquittal if he would only say he did not write it, he refused to do so.

Under James I. the character of the procedure remained

[1] 1 *St. Tr.* 1049—1088. [2] *Ib.* 1141—1162. [3] *Ib.* 1253.
[4] *Ib.* 1271—1315.

CHAP. XI. unchanged, as may be seen by reference to the cases of [1] Raleigh in 1603, the trials for the [2] Gunpowder Plot in 1606, and those of [3] Overbury's murderers in 1615. The trials of [4] Lord Somerset and [5] Sir Jervase Elwes are perhaps the best illustrations of the old procedure. Each affords a striking instance of the importance which then attached to the examination of the prisoner. [6] The argument between Lord Somerset and the different counsel and members of the court is exceedingly curious and minute, but its effect cannot be given shortly. Elwes, who was Lieutenant of the Tower, and had delivered the Countess of Somerset's poisons to Overbury, defended himself on the ground that he did not know what they were, though he admitted that he knew that at one time one of the subordinate agents had thoughts of committing the crime. [7] He defended himself with so much energy and skill that he might perhaps have escaped had not Coke, the presiding judge, cross-examined him as to some expressions in his letters which he was unable to explain, [8] and (which is even more at variance with our modern views) produced against him, after his defence had been made, a "confession" by one Franklin, who had made the confession privately and not even upon oath before Coke himself, at five o'clock that morning, before the court sat. The "confession," if true, no doubt proved Elwes's guilt beyond all doubt, but put upon him as it was at the very last moment, when he had no opportunity to inquire about it, or even to cross-examine Franklin without inquiry, it is not surprising that "he knew "not what to answer." If Elwes's dying speech is rightly reported, he confessed his guilt at the gallows, and, without making any complaint on the subject, ascribed its discovery to Coke. [9] "I displeased God, being transported "with over-much pride of my pen; which obsequious quill "of mine procured my just overthrow upon the knitting of "my Lord Chief Justice's speech at my arraignment, by "reason of two or three passages at the bottom of my

[1] 2 *St. Tr.* 1—60. [2] *Ib.* 159—359. [3] *Ib.* 911—1022.
[4] *Ib.* 965—1022. [5] *Ib.* 936. [6] *Ib.* 992—994.
[7] *Ib.* 939—940. [8] *Ib.* 941. [9] *Ib.* 946.

"letter subscribed with my own hand, which I utterly had "forgotten, because I felt not my sin." CHAP. XI.

Of all the trials which I have mentioned, however, that of Raleigh is by far the most remarkable. He was accused of treason by conspiring with Lord Cobham to make Arabella Stuart Queen of England through the agency of the Archduke of Austria and his ambassador. The whole evidence against Raleigh was a "confession" or examination of Cobham before the Privy Council, and a letter which he wrote afterwards. Both in the confession and in the letter, Cobham charged Raleigh with this plot by obscure allusions and implications, and with no details. Some few trifling bits of hearsay were proved, I suppose by way of corroboration. For instance,[1] Dyer, a pilot, swore that he accidentally met some one in Lisbon, who said that Cobham and Raleigh would cut King James's throat before he could be crowned. The extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court of justice, except perhaps in those in which Jefferies presided.[2] The trial is extremely curious, but its great interest in a legal point of view lies in the discussion which occupied most of it on Raleigh's right to have Cobham called as a witness. He knew that Cobham had retracted his confession, and he had actually received from him a letter saying, "I protest upon my salva-"tion I never practised with Spain by your procurement. "God so comfort me in this my affliction as you are a good "subject, for anything I know." For these reasons, and also

[1] 2 *St. Tr.* 25.

[2] *Ib.* 26:—"*Att.*: Thou art the most vile and execrable traitor that "ever lived. *Raleigh*: You speak indiscreetly, barbarously, and uncivilly. "*Att.*: I want words sufficient to express thy viperous treasons. *Raleigh*: "I think you want words, indeed, for you have spoken one thing half a dozen "times. *Att.*: Thou art an odious fellow. Thy name is hateful to all the "realm of England for thy pride. *Raleigh*: It will go hard to prove a measur-"ing cast between you and me, Mr. Attorney. *Att.*: Well I will now make "it appear that there never lived a viler viper upon the face of the earth "than thou." In the case of Wraynham before the Star Chamber for slander-ing Lord Bacon, Coke said, "Take this from me, that what grief soever "a man hath, ill words work no good, and learned counsel never use them." —2 *St. Tr.* 1073. As to Raleigh's trial viewed historically, see Gardiner's *Hist. of Eng.* i. 93-109.

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because as he said he felt sure that Cobham would not venture to state openly and on oath what he had confessed before the Council, Raleigh earnestly pressed for his production. He put his demand partly on two statutes of Edward VI. (1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 11). The first act provides that no one is to be indicted, arraigned, or convicted of treason unless he be accused by two sufficient and lawful witnesses. The second act is to the same effect, but uses the words "lawful "accusers," which [1] Coke himself afterwards interpreted as meaning witnesses, "for other accusers have we none in "the common law." It also provides that the accusers shall, at the time of the arraignment, be brought in person before the accused. Of these statutes Coke declares that they were grounded on the common law, which "herein is grounded upon the law of God, expressed "both in the Old and New Testament 'in ore duorum vel "'trium testium,' &c." [2] In Raleigh's trial, Coke insinuated that these statutes were no longer in force, and [3] Chief Justice Popham expressly said that they were repealed, adding, "It sufficeth now if there be proofs made either "under hand or by testimony of witnesses, or by oaths." As for having Cobham produced in court, Lord Salisbury (Robert Cecil) said that the commissioners ought to know from the judges whether Raleigh had a right to demand his production, or whether it was matter of favour? Upon this the following remarkable statements were made :—

[4] "*Lord Chief Justice:* This thing cannot be granted, for "then a number of treasons should flourish: the answer "may be drawn by practice whilst he is in person. *Justice* "*Gawdy:* The statute you speak of concerning two wit- "nesses in case of treason is found to be inconvenient; "therefore by another law it was taken away. *Raleigh:* "The common trial of England is by jury and witnesses. "*Lord Chief Justice:* No, by examination: if three con- "spire a treason and they all confess it, there is never a "witness, yet they are condemned. *Justice Warburton:* "I marvel, Sir Walter, that you, being of such experience

[1] *3rd Inst.* 25—26. [2] 2 *St. Tr.* 14. [3] *Ib.* 15. [4] *Ib.* 18.

"and wit, should stand on this point: for so many horse-
"stealers may escape, if they may not be condemned without
"witnesses. If one should rush into the king's privy chamber
"whilst he is alone and kill the king (which God forbid), and
"this man be met coming with his sword drawn all bloody,
"shall not he be condemned to death? My Lord Cobham
"hath perhaps been laboured in that, and to save you, his old
"friend, it may be that he will deny all that he hath said?"

The result was that Cobham was not produced, and that Raleigh was convicted and executed on the 29th October, 1618, just fifteen years after his trial. The avowed reason for keeping back Cobham was that, if called, he would have withdrawn what he had said. It is right, however, to observe that in the letter which he wrote he made one charge against Raleigh which may probably have been true. "Raleigh," he said, "was to have a pension of £1,500 a year for which he "promised that no action should be against Spain, the Low "Countries, or the Indies, but he would give knowledge "beforehand." The Chief Justice asked Raleigh what he said to this. Raleigh replied, "I say that Cobham is a base, "dishonourable, poor soul;" and he then produced the letter already quoted, in which Cobham withdrew all his accusations. He did not, however, deny the charge about the pension.

Of Coke's share in this matter nothing need be said except that it was infamous; but the observations of the judges as to the right of the prisoner to have the witness produced before him face to face, and their assertion that the statutes of Edward VI. had been repealed, and that the trial at common law was by examination and not by a jury and witnesses, are extremely curious. That the judges of that time were subservient to the Crown must be admitted; that they would venture to put forward as undoubted law and ordinary practice that for which there was no sort of colour of law is most improbable. The explanation which I should be inclined to put upon the opinions just quoted is as follows. The meaning of the assertion that the statutes of Edward VI. had been repealed was, that by a statute of Philip and Mary (1 & 2 Phil. & Mary, c. 10) it was enacted that for the future all trials for treason "shall

CHAP. XI. "be had and used only according to the due order and course "of the common law." The statutes requiring two witnesses in treason were regarded as an innovation upon the common law, and were thus considered as being repealed implicitly by the Act of Philip and Mary. The rule as to the two witnesses seems to have been construed as referring to the trial by witnesses as it existed under the civil law, which seems to have been regarded in England as a trial in which two eye or ear-witnesses to the fact constituting the crime itself were required—a condition so difficult of fulfilment that it was in practice supplemented by torture, a confession so obtained being regarded as sufficient for a conviction. With this trial by witnesses trial by jury was frequently contrasted (as, for instance, by [1] Fortescue, *De Laudibus Legum Angliæ*); and the opinion seems to have prevailed that if a trial by witnesses according to all the rigour attributed to the civil law was not to be insisted upon, the only alternative was that the jury should form their opinion as they could, whether upon their own knowledge or upon any sort of materials which might be supplied to them, of which materials the examination of the accused would probably be the commonest and most natural. It should be observed that the remarks of the judges, and especially the illustration given by Judge Warburton as to a murder being proved by the fact that the prisoner was seen with a bloody sword in his hand leaving the room where the murder was committed immediately after the crime, show that the judges of that day recognised no distinction between different kinds of evidence, except the distinction between the evidence of an eye-witness to the actual crime and everything else. They seem to have thought that if the evidence of two such eye-witnesses was dispensed with, no other line could be drawn. There was no reason why the most remote and insignificant hearsay should not be admitted even as to the contents of written documents, or why the prisoner should not be convicted solely on the impression derived by the jury from the way in which he sustained his examination. The only rules of evidence as

[1] Chapters xxi.—xxvii. pp. 37—60; and see 28 Hen. 8, c. 15. As to the trial of pirates, *post*, Vol. II. p. 18.

to matters of fact recognised in the sixteenth century seem to have been the clumsy rules of the mediæval civil law, which were supposed to be based on the Bible. If they were set aside, the jury were practically absolute, and might decide upon anything which they thought fit to consider evidence. On the other hand, as the prisoner had no counsel, no books no means of procuring evidence, and no right to give it if he did procure it, the jury were practically in the hands of the court, especially as there was a possibility (as Throckmorton's case showed) of their being fined if they gave an unwelcome verdict."

Before leaving these trials I may make an observation on the judges. Most of the trials to which I have referred were before Commissioners of Oyer and Terminer. Such commissions are still addressed not only to the judges who are to go on circuit and to the Queen's Counsel who on occasion sit for them, but also to a number of distinguished persons who are probably not aware that they are included in the commission. This is a mere relic of what was once an important matter. In the sixteenth century the lay commissioners took a prominent part in the trials. In Raleigh's case, for instance, there were eleven commissioners, of whom four were judges and seven laymen. Lord Salisbury (Robert Cecil) and Lord Henry Howard, especially the former, took a prominent part in the trial. [2] Cecil in particular got into a dispute with Coke, who "sat down in a chafe, and would speak "no more until the Commissioners urged and entreated him."

I now pass from the proceedings before the Courts of Common Law to those which took place before the Star Chamber.

I have already given some account of the history and of the jurisdiction of that court. I will now notice some of the cases which led to its abolition. Its function as a criminal court was to try cases of misdemeanour which were not, or were supposed not to be, sufficiently recognised or punished at the common law. Its procedure was founded upon an information, generally by the Attorney-General, who drew up a charge like a Bill in Chancery against the defendant. The

[1] *Commonwealth of England*, 212.

[2] 2 *St. Tr.* 26.

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defendant put in his answer also in the form of an Answer in Chancery. He might be examined upon interrogatories, and was liable to be required to take what was called the *ex officio* oath. This was an oath in use in the Ecclesiastical Courts, by which the person who took it swore to make true answer to all such questions as should be demanded of him. The evidence of witnesses was given upon affidavit. When the case was ripe for hearing it came on for argument much in the way in which cases are argued in the Chancery Division of the High Court. The parties appeared by counsel; the information, answer, and depositions were read and commented upon; and finally each member of the court pronounced his opinion and gave his judgment separately—a point worth noticing because it stands in marked contrast to the practice of the modern Judicial Committee of the Privy Council, which in a certain sense represents the Star Chamber.

The Star Chamber proceedings reported in the *State Trials* leave a singular impression on my mind. As far as the mere management in court of the different cases went, it cannot be denied that they are for the most part calm and dignified, though the strange taste and violent passions of the time give them occasionally a grotesque appearance; but the severity of the "censures" or sentences is in these days astonishing. A few instances may be mentioned. In 1615 [1] Sir John Hollis and Sir John Wentworth were prosecuted "for traducing the public justice." Weston had been hanged for the murder of Sir Thomas Overbury, to whom he had administered poison. Wentworth and Hollis went to Weston's execution, where Wentworth asked Weston whether he really did poison Overbury, and pressed him to answer, "saying he desired to know, that he might pray with him." Hollis "was not so much of a questioner," but, "like a kind "of confessor, wished him to discharge his conscience and "satisfy the world." Hollis moreover, when the jury gave their verdict, said, "If he were on the jury, he would "doubt what to do." It is difficult to see how this could be regarded as in any sense criminal conduct; but it seems to have been thought that Wentworth's question

[1] 2 *St. Tr.* 1022.

and Hollis's remarks remotely implied that Weston's guilt might perhaps be not absolutely certain, notwithstanding his conviction. Lord Bacon (then Attorney-General) developed this view of the subject at length, and with characteristic grace, calmness, and power. The defendants excused themselves in a polite manner; Sir John Hollis observing that "Mr. Attorney had so well applied his "charge against him that, though he carried the seal of a "good conscience with him, he would almost make him "believe he was guilty." As for what he had said to Weston, he was there "carried with a general desire which he had to "be at the execution as he had done in many like cases "before." It was a common thing on such occasions to question the person about to be executed, and he had only followed his usual practice. Coke pronounced sentence. He referred to Abimelech, to cases of poisoning in the Year-books, as to which he remarked that "from Edward III. to 22 "Henry VII. (which was a great lump of time) no mention "is made of poisoning any man." As to going to executions, he said that "ever since he was a scholar and had read those "verses of [1] Ovid, *Trist.* iii. 5, 'Ut lupus et vulpes instant mori-"'entibus et quæcumque minor nobilitate fera est,' he did "never like it, and he did marvel much at the use of Sir John," to whom he applied, "with a little alteration," Virgil's line, "Et quæ tanta fuit Tyburn tibi causa videndi." Finally by way of "censure" Sir John Hollis was fined £1,000 and Sir John Wentworth 1,000 marks, and each was imprisoned a year in the Tower.

[2] In 1632 Mr. Sherfield was prosecuted before the Star Chamber for breaking a glass window in St. Edmond's Church in Salisbury. He admitted that he had done so, but justified his conduct on the ground that the window "was not a true re-"presentation of the Creation; for that it contained divers "forms of little old men in blue and red coats, and naked in "the head, feet, and hands, for the picture of God the Father, "and the seventh day he therein hath represented the like

[1] *Tristia*, iii. 5, 35, 36. The first line is both incorrect and imperfect. It is "Ut lupus et *turpes* instant morientibus ursi."

[2] 3 *St. Tr.* 519.

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"image of God sitting down taking his rest, whereas the "defendant conceiveth this to be false." The window contained many other inaccuracies. Eve, for instance, was represented as being taken whole out of Adam's side, whereas in fact a rib was taken and made into Eve. Besides, as to the days, "he placed them preposterously, the fourth before the third, "and that to be done on the fifth, which was done on the sixth "day." For these reasons the defendant made eleven holes in the window with his pikestaff, and, said one of the witnesses, "the staff broke and he fell down into the seat and lay "there a quarter of an hour groaning." For this, after a long and decorous discussion, Sherfield was fined £500.

[1] Mr. Richard Chambers, a merchant of London, who had a dispute with some under officers at the Custom House, was summoned before the Privy Council at Hampton Court, where he said to the Council, "that the merchants are in no part of "the world so screwed and wrung as in England; that in "Turkey they have more encouragement." For this little bit of grumbling, directed solely against under officers, he was fined £2,000, and required to make a written submission or apology, which he refused to do. For his refusal he was imprisoned for six years.

These proceedings, were sufficiently severe, but those which made the Court utterly intolerable and brought about its abolition were the sentences upon libellers, and the proceedings connected with them. The best known of these may be shortly noticed.

[2] In 1632 William Prynne was informed against for his book called *Histrio Mastix*. Prynne's answer was, amongst other things, that his book had been licensed, and one of the counsel, Mr. Holbourn, apologised, not without good cause, for his style. [3] "For the manner of his writing he is "heartily sorry, that his style is so bitter, and his impu-"tations so unlimited and general." The book certainly was a bitter and outrageous performance, and it is probable that a moderate sentence upon the author would, at the time, have been approved. His trial was, like the other Star Chamber proceedings, perfectly decent and quiet, but the

[1] 3 *St. Tr.* 373. [2] *Ib.* 561. [3] *Ib.* 572.

sentence can be described only as monstrous. He was sentenced to be disbarred and deprived of his university degrees; to stand twice in the pillory, and to have one ear cut off each time; to be fined £5,000; and to be perpetually imprisoned, without books, pen, ink, or paper. One of the Court, [1] Lord Dorset, was as brutal in his judgment as Prynne in his book. "I should be loth he should escape with his ears, for he may "get a periwig which he now so much inveighs against, and "so hide them, or force his conscience to make use of his un-"lovely love-locks on both sides; therefore I would have "him branded in the forehead, slit in the nose, and his ears "cropt too."

Five years after this, in 1637, Prynne, Bastwick, and Burton, were tried for libel, and were all sentenced to the same punishment as Prynne had received in 1632, Prynne being branded on the cheeks instead of losing his ears.

The procedure in this case appears to me to have been as harsh as the sentence was severe, though I do not think it has been so much noticed. In cases of treason and felony no counsel were allowed to prisoners in the sixteenth and seventeenth centuries, indeed in cases of felony they were not allowed to address the jury for the prisoner till 1837. The rule was otherwise in misdemeanours, and by the practice of the Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information. Prynne's answer was of such a character that one of the counsel assigned to him refused to sign it at all, and the other did not sign it till after the proper time. Bastwick could get no one to sign his answer. Burton's answer was signed by counsel, but was set aside as impertinent. Upon the whole, the case was taken to be admitted by all the three, and judgment was passed on them accordingly. There is something specially repugnant

[1] 3 *St. Tr.* 585.

CHAP. XI. to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence. It ought, however, in fairness to be admitted that the course taken made no practical difference to the defendants, as they neither could, nor did they wish to deny that they were the authors of the books imputed to them, and the books spoke for themselves. They were asked at the final hearing whether they pleaded guilty or not guilty, although the Court took the matter of the information as admitted. I suppose this was to give them an opportunity of disavowing the publication, if they were so minded, but this is only a conjecture.

The last Star Chamber case to which I will refer is noticeable, amongst other reasons, because it illustrates the intense unpopularity of one of the principal points in the procedure, both of the Star Chamber and of the Ecclesiastical Courts, from which, the Star Chamber probably borrowed it. This was what was known as the *ex officio* oath, already mentioned. In the Common Law Courts [1] this oath is still in constant use without objection, in interlocutory proceedings, but in the old Ecclesiastical Courts and in the Star Chamber it was understood to be, and was, used as an oath to speak the truth on the matters objected against the defendant—an oath, in short to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim "*nemo "tenetur prodere seipsum*" was agreeable to the law of God, and part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad laws, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which

[1] Under the name of the "voir" (vrai) "dire." "You shall true answer "make to all such questions as shall be demanded of you."

they have afforded protection has come to be commonly admitted.

Be this as it may, the extreme unpopularity of the *ex officio* oath is set in a clear light by the case of John Lilburn. Lilburn wrote an account of the proceedings against him which is probably substantially accurate and is extremely lively and circumstantial. [1] He was committed to the Gatehouse "for "sending of factious and seditious libels out of Holland into "England." He was afterwards ordered by the Privy Council to be examined before the Attorney-General, Sir John Banks. He was accordingly taken to the Attorney-General's chambers, [2] "and was referred to be examined by "Mr. Cockshey his chief clerk; and at our first meeting "together he did kindly entreat me, and made me sit down by "him, put on my hat, and began with me after this manner. "Mr. Lilburn, what is your Christian name?" A number of questions followed, gradually leading up to the matter complained of. Lilburn answered a good many of them, but at last refused to go further, saying, "I know it is warrantable "by the law of God, and I think by the law of the land, that "I may stand on my just defence, and not answer your inter-"rogatories, and that my accusers ought to be brought face "to face, to justify what they accuse me of." He was afterwards asked by the Attorney-General to sign his examination, but refused to do so, though he offered to write an answer of his own to what might be alleged against him. [3] Some days after he was taken to the Star Chamber office that he might enter his appearance. He replied that he had been served with no subpœna, and that no bill had been drawn against him. "One of the clerks said I must first be examined and then "Sir John" (the Attorney-General) "would make the bill." Lilburn thought the object of the examination was to get materials for a bill, and accordingly when the head of the office tendered him the oath "that you shall make true answer "to all things that are asked you," he refused to do so, saying, first, "I am but a young man and do not well know what "belongs to the nature of an oath." Afterwards he said he was not satisfied of the lawfulness of that oath, and after

[1] 3 *St. Tr.* 1315—1368. [2] *Ib.* 1317. [3] *Ib.* 1320.

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much dispute absolutely refused to take it. After about a fortnight's delay he was brought before the Star Chamber, where the oath was again tendered to him and he again refused it on the ground that it was an oath of inquiry for the lawfulness of which he had no warrant. [1] Lilburn had a fellow prisoner, "old Mr. Wharton," said in one part of the case to have been eighty-five years of age. When asked to take the oath Wharton refused, and began to tell them of the bishops' cruelty towards him, and that they had "had him in five several prisons within these two years for "refusing the oath." On the following day they were brought up again. Lilburn declared, on his word and at length, that the charges against him were entirely false, and that the books objected to were imported by another person with whom he had no connection. [2] "Then," said the Lord Keeper, "thou art a mad fellow, seeing things are thus that thou "wilt not take the oath and answer truly." Lilburn repeated that it was an oath of inquiry and that he found no warrant in the word of God for an oath of inquiry. "When I named "the word of God the Court began to laugh as though they "had had nothing to do with it." Failing with Lilburn, the Court asked Wharton whether he would take the oath, whereupon getting leave to speak, "he began to thunder it out "against the bishops, and told them they required three "oaths of the king's subjects, namely, the oath of church-"wardenship, and the oath of canonical obedience, and the "oath *ex officio*, which, said he, are all against the law of "the land, and by which they deceive and perjure thousands "of the king's subjects in a year." "But the Lords, wonder-"ing to hear the old man talk after this manner, commanded "him to hold his peace, and to answer them whether he would "take the oath or no. To which he replied, and desired "them to let him talk a little, and he would tell them by "and by. At which all the Court burst out laughing; but "they would not let him go on, but commanded silence (which "if they would have let him proceed, he would have so pep-"pered the bishops as they never were in their lives in an "open Court of judicature)." As both absolutely refused to

[1] 3 *St. Tr.* 1322. [2] *Ib.* 1325.

take the oath they were each sentenced to stand in the pillory, and to pay a fine of £500, and Lilburn to be whipped from the Fleet to the pillory, which stood between Westminster Hall Gate and the Star Chamber. Lilburn was whipped accordingly, receiving, it was said, upwards of 500 lashes, and was made to stand in the pillory for two hours after his whipping. In May, 1641, the House of Commons resolved "that the "sentence of the Star Chamber given against John Lilburn "is illegal, and against the liberty of the subject: and also "bloody, cruel, barbarous, and tyrannical." CHAP. XI

It is difficult to say how far the cases reported in the *State Trials* can be regarded as fair specimens of the common course of the administration of criminal justice, as it is not unnatural to suppose that in cases in which the Government were directly interested prisoners might be treated more harshly than in common cases. The only report of a trial for a common offence given in the *State Trials* before the year 1640, is that of an appeal of murder tried at the King's Bench bar, in the 4th Charles I. (1628). The report is published in 14 *St. Tr.* 1342, from the papers of Serjeant Maynard. The evidence given seems to have been with one strange exception, similar to the evidence which would be given in the present day on a trial for murder. It was proved that one Jane Norkott was found lying dead in her bed in a composed manner, the bed clothes not disturbed, and her child in bed. Her throat was cut and her neck broken. There was no blood on the bed, but much at two distinct and distant places on the floor, and a bloody knife was found sticking in the floor, the point towards the bed and the haft from the bed. These facts clearly proved that the case was one of murder, and not (as was supposed at first) of suicide. Mary Norkott, the mother of the deceased, Agnes Okeman, her sister, and Okeman, her brother-in-law, deposed at the inquest that they slept in an outer room through which her room was entered, and that no stranger came in in the night. Upon this singularly weak evidence they were suspected of murder, though a coroner's jury at first returned a verdict of *felo de se*. After thirty days the body was disinterred and a second inquest held. Probably (though that is not stated) they found a

CHAP. XI. verdict of murder against the defendants, who were tried at Hertford assizes and acquitted. The judge, being dissatisfied with the verdict, recommended that the infant child should be made plaintiff in an appeal of murder against its father, grandmother, aunt, and uncle, and the appeal was tried accordingly. On the trial it was sworn that when the body was disinterred at the second inquest "the four defendants were "required, each of them, to touch the dead body. Okeman's "wife fell upon her knees and prayed God to show tokens of "her innocency. The appellant" (*sic*, but as the appellant was a baby this seems strange; probably it should be "appellees") "did touch the dead body, whereupon the brow of the dead, "which before was of a livid and carrion colour, began to "have a dew or gentle sweat arise on it, which increased by "degrees till the sweat ran down in drops on the face, the "brow turned to a lively and fresh colour, and the deceased "opened one of her eyes and shut it again; and this opening "the eye was done three several times; she likewise thrust "out the ring or marriage finger three times and pulled it in "again, and the finger dropped blood on the grass." These occurrences, which I believe (some allowance being made for exaggeration and inaccurate observation) are not unnatural effects of decomposition, seem to have excited the greatest astonishment in Court, but Serjeant Maynard does not say how the judge dealt with them in his charge or what was the result of the proceedings. If they are regarded as miraculous, they have the defect of being wholly uncertain in their meaning, for it is impossible to say whether they attested the innocence of Elizabeth Okeman or her guilt, or that of any, and if so of which, of the other persons concerned.

In the absence of reports of particular trials I may refer to a striking description of trials in general by Sir Thomas Smith, Secretary of State to Queen Elizabeth, which occurs in his *Commonwealth of England*, written during the author's embassy to France, with special reference to the difference between the institutions of France and England, and the Common and the Civil Law.

The following is his description of a trial at the Assizes:

[1] Smith's *Commonwealth*, ch. xxv. pp. 183—201.

Having described the preliminary proceedings and the fixing of the circuits he describes the Courts themselves. "In the "town house or in some open common place there is a tribu- "nal or place of judgment made aloft. Upon the highest "bench there sit the judges which be sent down in commis- "sion in the midst. Next them on each side the justices of "the peace according to their degree. On a lower bench "before them the rest of the justices of the peace and some "other gentlemen or their clerks. Before these judges and "justices there is a table set beneath, at which sitteth the "*custos rotulorum*, or keeper of the writs, the escheator, the "under sheriff, and such clerks as do write. At the end "of that table there is a bar made with a space for the in- "quests, and twelve men to come in when they are called, "behind that space another bar, and there stand the "prisoners which be brought thither by the gaoler all "chained together." The introductory proceedings, including the various proclamations and the taking of the pleas, the challenges and swearing of the jury, are next fully described. They are identically the same as those which now obtain, the very words of the proclamations having remained almost unchanged. The prisoner having pleaded not guilty, and the jury having been sworn, the crier "saith "aloud, If any can give evidence or can say anything against "the prisoner, let him come now, for he standeth upon his de- "liverance. If no man come in, then the judge asketh who "sent him to prison, who is commonly one of the justices of "the peace. He, if he be there, delivereth up the examina- "tion which he took of him" (under the Acts of Philip and Mary), "and underneath the names of those whom he "hath bound to give evidence: although the malefactor hath "confessed the crime to the justice of the peace, and that it "appear by his hand and confirmation, the twelve men will "acquit the prisoner, but they which should give evidence "pay their recognizances. Howbeit this doth seldom "chance except it be in small matters and where the justice "of the peace who sent the prisoner to the gaol is away." This curious passage gives a different impression from the reports of cases in the *State Trials*. The juries in the

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cases I have referred to showed little inclination to acquit prisoners who had confessed or had been accused by the confessions of others; but Sir Thomas Smith's account clearly implies that, if the witnesses did not appear, the examination of the prisoner was read, and he probably may (though this is not stated) have been further examined upon it. In such cases as Smith refers to, in the present day the judge would direct an acquittal.

To resume Smith's account, "If they which be bound to "give evidence come in, first is read the examination which "the justice of the peace doth give in" (it is likely that the prisoner would be questioned upon it, but this is not mentioned), "then is heard (if he be there) the man robbed, what he can "say, being first sworn to say the truth, and after the con- "stable, and as many as were at the apprehension of the "malefactors, and so many as can say anything being sworn "one after another to say truth. These be set in such a place "as they may see the judges and the justices, the inquest "and the prisoner, and hear them and be heard of them all. "The judge, after they be sworn, asketh first the party robbed "if he know the prisoner, and biddeth him look upon him: "he saith Yea. The prisoner sometimes saith Nay. The "party pursuyvant giveth good ensignes, *verbi gratiâ*, I know "thee well enough; thou robbedst me in such a place, thou "beatedst me, thou tookest my horse from me, and my purse; "thou hadst then such a coat, and such a man in thy company. "The thief will say No, and so they stand a while in alterca- "tion. Then he" (I suppose the prosecutor) "telleth all that "he can say: after him likewise all those who were at the ap- "prehension of the prisoner, or who can give any indices or "tokens, which we call in our language evidence against the "malefactor. When the judge hath heard them say enough, "he asketh if they can say any more. If they say No, then "he turneth his speech to the inquest. Goodmen (saith he), "ye of the inquest, ye have heard what these men say against "the prisoner. You have also heard what the prisoner can "say for himself. Have an eye to your oath and to your duty, "and do that which God shall put in your minds to the "discharge of your consciences, and mark well what is said.

"Thus sometimes with one inquest is passed to the number "of two or three prisoners. For, if they should be charged "with more, the inquest will say, My lord, we pray you charge "us with no more; it is enough for our memory. Many "times they are charged with but one or two." The jury then retire to consider their verdicts, and are confined "with "neither bread, drink, meat, nor fire. If they be in doubt "of anything that is said, or would hear again some of them "that gave evidence, to interrogate them more at full, or if "any that can give evidence come late, it is permitted that "any that is sworn to say the truth may be interrogated of "them to inform their consciences." Finally the verdict is returned; the prisoner, if found guilty, and his offence is clergyable, prays his clergy. If he can read he gets it. If not, or if his offence is not clergyable, the judge passes sentence: "Law is thou shalt return to the place from whence "thou camest; from thence thou shalt go to the place of "execution. There thou shalt hang till thou be dead. "Then he saith to the sheriff, Sheriff, do execution."

Several observations arise on this striking passage. Smith makes no mention of counsel; he says nothing explicitly of the prisoner's defence, and he seems to attach little or no importance to the judge's summing up. On the other hand, the whole account assumes that the common course was to call witnesses face to face, though [1] expressions occur which imply that depositions might be used instead; on what conditions is not stated. From the account given of the reading of the prisoner's examination as a first step, and of the "altercation" between him and the prosecutor, I should infer that the prisoner's defence was made, not in a set speech as at present, but by fragments in the way of argument and "altercation" with the prosecutor and the other witnesses. This would agree with and illustrate the reports in the State Trials already referred to. Upon this view the only difference

[1] "It will seem strange to all nations that do use the Civil Law of the "Roman Emperors that for life and death there is nothing put in writing "but the indictment only. All the rest is done openly in the presence of the "judges, the inquest, and the prisoner, and so many as will or can come "so near as to hear it, and all *depositions* and witnesses given aloud, that "all men may hear from the mouth of the *depositors* and witnesses what is "said."—P. 196.

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between the trials which are fully reported and the routine described by Smith would be that in the more important cases the examination of the prisoner would be conducted by counsel, whereas in less important cases it would usually consist of a debate between the prisoner and the prosecutor and the other witnesses, the judge of course interfering as he saw fit.

Upon the whole it may be said that the criminal trials of the century preceding the civil war differed from those of our own day in the following important particulars :—

(1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defence. He was examined, and his examination was taken down.

(2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced on his trial. He had no counsel either before or at the trial.

(3) At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced.

(4) The confessions of accomplices were not only admitted against each other, but were regarded as specially cogent evidence.

(5) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance. In later times they were not examined on oath, if they were called.

This last rule appears to us so extraordinary, that it is necessary to explain how it came about.

[1] Barrington, in his *Observations on the Statutes*, says, "The "denying a felon to make his defence by advocate, and the "not permitting his witnesses to be examined upon oath till "the late statute, seem to have been borrowed from the "Roman law, which is indeed the more severe upon the "criminal as he is not permitted to produce any witnesses in "his favour; and Montesquieu gives this as a reason why

[1] *Observations on the Statutes*, pp. 89, 90.

"perjury is a capital offence in France, though not in England." [1]Barrington quotes from the journals of the House of Commons, Thursday, June 4, 1607, a paper "delivered to and read by Mr. Speaker, declaring the manner "of proceeding in Scotland for point of testimony upon "trials in criminal cases, for satisfaction of some doubts.

"In criminal causes by the civil law there is no jury called "upon life and death, and therefore the judges admit witnesses in favour of the pursuer, but none in favour of the "defender, because in all cases (either criminal or civil) no man "can be admitted to prove the contrary of his own accusation, for it is his part who relevantly alleges the same to "prove it. As, if A accused B for breaking his stable and "stealing his horse such an hour of the night, the pursuer "may be well admitted to prove what he hath alleged; but "the defendant can never be admitted to prove that he "was alibi at that time, for that would be contrary to "the libel, and therefore most unformal. In Scotland we "are not governed by the civil law, but *ordanes* (ordinaries "probably), and juries are to pass upon life and death much "the same as here, which jury, as it comes from the neighbourhood where the fact was committed, are presumed to "know much of their own knowledge, and therefore they are "not bound to examine any witnesses except they choose to "do it on the part of the pursuer; but this is not lawful to "be done in favour of the defendant. It is of truth the "judge may either privately beforehand examine *ex officio* "such witnesses as the party pursuer will offer to him; and "then, when the jury is publicly called, he will cause these "depositions to be read, and likewise examine any witnesses "which the pursuer shall then desire, but never in favour of "the defender."

The same subject is discussed at length in [2]Hume's *Commentaries*. "Of old," he says, "the panel was confined to a very narrow and disadvantageous field by the "received maxim of the law against admitting any defence

[1] The paper is not printed in the *Journals*, but the House had then before it a question as to giving Scotch courts jurisdiction over Englishmen charged with border offences. See Gardiner, *Hist. of Eng.* i. 320-321.

[2] ii. 70 (edition of 1800).

CHAP. XI. "that was contrary to the averment of the libel—a maxim "which sounds strange in our ears, but is taught in the "writings of many foreign lawyers, and seems to have "found reception formerly into the practice of other nations "as well as ours. The meaning of it was this: for instance, "in a case of murder, if the libel charged that the panel "gave the deceased a mortal wound, of which wound he "languished for some days and thereof died, it was in vain "for the panel to allege, for he could not be allowed to "prove, that in truth the man died of some other ailment. "By the same rule, as little could the panel allege a casual "rencounter, or self-defence, or great and sudden provocation, "if the libel set forth that the slaughter was done by lying "in wait or on challenge to fight a single combat."

"The sort of argument, as far as I can collect it, by which "our lawyers justified so strange a restriction of the panel's "proof, was to this purpose, that the accuser had set forth "certain facts and qualities in his libel, and must establish "these with evidence to be used in his prosecution; that if "he failed to prove them the panel must be acquitted, of "course, for that reason only, though there were no evidence "on his part at all; and that, on the other hand, if the "prosecutor proved his libel, it could serve to no purpose, "but to occasion perjury, to admit a contrary proof on the "part of the panel, whose witnesses, if they contradicted "what had already been proved by those for the prosecution, "must be swearing falsely, which it was the business of the "Court to deny them an opportunity of doing. '*Quando* "'*delictum est plene probatum*' (says the commentator Baldus) "'*per testes affirmantes, non est admittenda contraria probatio* "'*per testes negantes.*' In like manner Sir George M'Kenzie, "'To admit contrary probations,' says he, 'were to open a "'door to perjury.' And much to the same purpose the "pleadings in cases which were actually under trial. 'This "'alledgiance being direct contrair to the libel cannot be "'admitted. Besides that the pursuer offering to prove the "'libel as it stands, his probation, as it has the preference "'to it, cannot be reargued by a contrary proof; for seeing "'the law both of God and man has so far established

" ' the credit of two witnesses to hold their concurring
" ' testimony undoubtedly true, there can no proof be ad-
" ' mitted of facts contrary to the nature of those established
" ' by their joint testimony. More especially considering
' ' that witnesses verifying a crime against a person accused
" ' thereof are less to be suspected (particularly at the instance
" ' of the public) of partiality than any that can possibly be
" ' adduced by the parties accused.' In short, the notion of
" a conjunct probation of the libel and defences before the
" assize was thought too dangerous to be admitted: the
" prerogative of proving, and the choice of the witnesses,
" were to be given to one of the parties only; and on the
" evidence taken by that party the issue was entirely to
" depend. To mention but one instance of so notorious a
" point of practice: in the case of William Sommerville, who
" was indicted for the murder of his mother" (in 1669), "a
" great part of the debate turns on this point,—To whom
" should the prerogative of probation be given? Should
" the prosecutor be allowed to prove that the woman died
" of the injuries libelled, or the panel to prove that she
" died from other causes. The Court were of opinion for the
" prosecutor; the defences were repelled, and the libel alone
" was remitted to an assize." In course of time it appears an exception was made as to alibis, though Sir George M'Kenzie did not altogether like it. He thought the judges ought to hold a preliminary inquiry about an alibi, and dismiss the libel if it was proved. Thus "contrary probations" would be avoided, and the plan of cutting one trial into two "seems to be our law, and more just and Christian than "*conjunct probations* are." This strange rule was not absolutely given up in Scotland till 1735. In France the same practice prevailed much later. Montesquieu, in *L'Esprit des Lois* (Book xxix. ch. xi.), comparing the law of France and England as to perjury, says, "En France l'accusé ne produit " point ses témoins, et il est très rare qu'on y admette ce " qu'on appelle les faits justificatifs. En Angleterre l'on " reçoit les témoignages de part et d'autre." Noticing that in England perjury was not, though in France it was, capitally punished, and that torture was practised in the one country

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and not in the other, he observes that the three things go together. "La loi Française ne craint pas tant d'intimider "les témoins; au contraire en cas on demande qu'on les "intimide; elle n'écoute que les témoins d'une part, ce "sont ceux que produit la partie publique, et le destin de "l'accusé dépend de leur seul témoignage."

I have quoted these passages at length, not only on account of their curiosity, but because they seem to me to throw much light on the spirit of the old criminal procedure. The true reason for the rule as to restricting the defence is obvious. It increased the power of the prosecution, and saved trouble to those who conducted it. It was in complete harmony with the other points in which the trials of the sixteenth century formed a contrast to those of our own day. In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts everything in issue, and the prosecutor has to prove everything that he alleges from the very beginning. If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous. It is, however, a question of degree, varying according to time and place, how far this generosity can or ought to be carried. Particular cases may well be imagined in which guilt, instead of innocence, would be presumed. The mere fact that a man is present amongst mutineers or rebels would often be sufficient, even in our own days, to cost him his life if he could not prove that he was innocent.

In judging of the trials of the period in question we must remember that there was no standing army, and no organised police on which the Government could rely; that the maintenance of the public peace depended mainly on the life of the sovereign for the time being, and that the question between one ruler and another was a question on which the most momentous issues, religious, political, and social, depended.

In such a state of things it was not unnatural to act on a different view as to the presumptions to be made as to guilt and innocence from that which guides our own proceedings.

Suspected people, after all, are generally more or less guilty, and though it may be generous, for the reason already given, to act upon the opposite presumption, I do not see why a Government not strong enough to be generous should shut their eyes to real probabilities in favour of a fiction. This principle must be admitted, and the procedure of the period in question must be judged in the light of it, before it can be fairly criticised. I think such criticism would not be wholly unfavourable to it. The trials were short and sharp; they were directed to the very point at issue, and, whatever disadvantages the prisoner lay under, he was allowed to say whatever he pleased; his attention was pointedly called to every part of the case against him, and if he had a real answer to make he had the opportunity of bringing it out effectively and in detail. It was but seldom that he was abused or insulted.

The general impression left on my mind by reading the trials is that, harsh as they appear to us in many ways, the real point at issue was usually presented to the jury not unfairly. In Raleigh's case, for instance, the substantial question was, Do you, the jury, believe that Raleigh was guilty because Cobham said so at one time, although it is admitted that he afterwards retracted what he said? In our days such evidence would not be allowed to go before a jury, and, if it were, no jury would act upon it; [1] but it is quite a different question whether, in fact, Cobham did let out the truth in what he said against Raleigh.

It is very questionable to me whether Throckmorton was not privy to Wyat's rising, and there can be no reasonable doubt that the Duke of Norfolk intrigued with Queen Mary in a manner which meant no good to Elizabeth, whether his conduct amounted technically to high treason or not. In a word, admit that the criminal law is to be regarded as the weapon by which a Government not very firmly established

[1] This matter is fully examined in Mr. Gardiner's *History of England*, i. pp. 96-108; see in particular pp. 106-7.

CHAP. XI. is to defend its existence, admit also that a person generally suspected of being disaffected probably is disaffected, and that, even if he has not done the particular matters imputed to him, he has probably done something else of the same sort, finally remember that the political contests of the sixteenth and seventeenth centuries turned upon the bitterest and the most deep-seated differences which exist amongst men, and that they appealed to the strongest of human passions, and the inference will be that the trials to which I have referred were conducted on intelligible principles, and that, the principles being conceded, their application was not unfair, though the punishments inflicted were no doubt extremely severe.

These trials should be compared not to the English trials of later times, but to those which still take place under the Continental system. It will appear hereafter that the criminal procedure of modern France cannot be said to contrast advantageously with that of the Tudors and early Stuarts, so far as concerns the interests of the accused, and the degree in which the presumption of his innocence is acted upon in practice.

Of course our modern English criminal procedure is greatly superior to that of our ancestors, but there is a common tendency to depreciate past times instead of trying to understand them. The consideration and humanity of our modern criminal courts for accused persons, are due in a great degree to the fact that the whole framework of society, and especially the Government in its various aspects—legislative, executive, and judicial, is now immeasurably stronger than it ever was before, and that it is accordingly possible to adjust the respective interests of the community and of individuals with an elaborate care which was formerly impracticable.

The part of the early criminal procedure which seems to me to have borne most hardly on the accused was the secrecy of the preliminary investigation, and the fact that practically the accused person was prevented from preparing for his defence and from calling witnesses. I am by no means sure that the practice of examining the prisoner pointedly and minutely at his trial was not an advantage to him if he was innocent; and I doubt whether the absence of all rules

of evidence, and the habit of reading depositions instead of having the witnesses produced in court, made so much difference as our modern notions would lead us to believe. The one great essential condition of a fair trial is that the accused person should know what is alleged against him, and have a full opportunity of answering either by his own explanations or by calling witnesses, and for this it is necessary that he should have a proper time between the trial and the preparation of the evidence for the prosecution. The management of the trial itself is really a matter of less importance. It will appear, as we go on, that the trial was improved first, and the preliminary procedure afterwards, and it will also appear that the improvement of the trial did little good whilst the preliminary procedure remained unaltered.

II.—1640—1660.

The trials which took place between the meeting of the Long Parliament and the Restoration illustrate that part of our history which, for obvious reasons, has aroused the strongest party feelings. The only matter on which I have to observe is the effect which it produced on the administration of criminal justice. With some obvious qualifications, this was almost wholly good. The qualifications are those which are inseparable from the administration of justice in a revolutionary period. The judicial proceedings of such a period cannot, in the nature of things, be regular, because no system of government can make provision for its own alteration by main force. A forcible revolution implies a new departure, and new institutions based upon the will of the successful party, and necessitates acts which involve a greater or less departure from legality. This was no doubt the case to a considerable extent in the English Civil Wars. In some of the impeachments which formed the turning-points in the struggle between the King and the Parliament, and particularly in the attainder of Strafford and the execution of Laud, the law was, to say the least, violently strained. The trial and execution of Charles I. was a proceeding which cannot be criticised at all upon strictly legal

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grounds. The establishment of the High Court of Justice which tried not only Charles I., but many of his adherents, without a jury, and sentenced them to death, was in itself a greater departure from the ordinary practice of English criminal justice than the Star Chamber. It supplies the only case (so far as I know) in English history in which judges sitting without a jury (other than the members of courts-martial) have been entrusted with the power of life and death. Nevertheless, after making every allowance on these points, it must be remarked that, from the year 1640 downwards, the whole spirit and temper of the criminal courts, even in their most irregular and revolutionary proceedings, appears to have been radically changed from what it had been in the preceding century to what it is in our own days. In every case, so far as I am aware, the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions. In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned, the prisoners usually refused to answer. The prisoner was also allowed, not only to cross-examine the witnesses against him if he thought fit, but also to call witnesses of his own. Whether or not they were examined upon oath I am unable to say.

These great changes in the procedure took place apparently spontaneously, and without any legislative enactment. This, no doubt, favours the view that the course taken in the political trials of the preceding century either really was or else was regarded as being illegal. If they were, the word illegal must have been construed in a sense closely approaching to unjust or immoral. I know of no precise, clear authority for the proposition that a prisoner is entitled to have the witnesses against him examined in his presence, or that he is entitled to call witnesses or examine them upon oath till long after the Revolution; and I have given my reasons for thinking that nothing of the kind was involved in the original institution of trial by jury, though it is probable that

in cases in which the Government were not directly interested, the practice may have come to prevail. Looking at the matter in a purely legal point of view, it is difficult to say that the one practice was more legal than the other; but there is no doubt that the later practice was not only more humane, but more conducive to the discovery of truth than the earlier one, and in the seventeenth century this was enough, not only to establish its legality, but also to establish the fact, supposed to be essential to its legality, that it formed a part of the "good old laws of England." The belief in a golden age of law in some indefinite past time has been common in this country from immemorial antiquity. After the Norman Conquest it was supposed to have existed under Edward the Confessor or King Alfred, and the halo which surrounded their names was afterwards transferred to "the common law of England," which was sometimes called by the more attractive title of "common right." It is impossible to study the proceedings of the seventeenth century without perceiving that the line between what was legal, in the strict sense of the word, and what was morally just was then far less strongly drawn than it is now. It was, indeed, impossible that it should not be so. The whole, or all but the whole, of the law relating to procedure was unwritten. Coke's Third Institute was the principal authority as to the criminal law, and the little which he says on the subject is fragmentary and incomplete. Besides this, the whole policy of the Parliamentary party was to represent their proceedings as being justified by law, and that of their opponents as being illegal and oppressive. That the law itself might be oppressive was an admission which they could never afford to make. As far as I can form an opinion as to what really was the law, I should say that some of its leading principles, especially the two well-known phrases of Magna Charta were on their side. On many other points, the law, properly so called, was either absolutely silent or vague and uncertain. In some it may have been opposed to them. Their case, accordingly, was that all express law, which they thought just, was law in a transcendent sense; that whatever they considered just, though not expressly

CHAP. XI. enacted, was also law; and that express laws which they considered unjust were to be explained away according to their views of justice. This way of looking at the subject is strikingly expressed by Keble, who acted as Lord President of the High Court of Justice at the trial of Love. [1] "There "is no law in England but is as really and truly the law of "God as any Scripture phrase, that is by consequence from "the very texts of Scripture: for there are very many con- "sequences reasoned out of the texts of Scripture: so is the "law of England the very consequence of the very Decalogue "itself; and whatsoever is not consonant to Scripture in the "law of England is not the law of England, the very books "and learning of the law: whatsoever is not consonant to "the law of God in Scripture, or to right reason which is "maintained by Scripture, whatsoever is in England, be it "Acts of Parliament, customs, or any judicial acts of the "Court, it is not the law of England, but the error of the "party which did pronounce it; and you, or any man else at "the bar, may so plead it."

I will now give a few illustrations of the points to which I have referred. [2] The proceedings upon the impeachment of Lord Strafford may stand as an example of the proceedings by impeachment, which were the great legal weapon of the Parliamentary party in their struggle. The most interesting questions connected with the trial I must pass over, but I may make a few remarks on its more technical aspects.

Strafford was accused on the 11th November, 1640. He was at once committed to custody, and on the 25th November twenty-eight articles of impeachment were delivered in against him. He delivered answers in detail to each charge, and each charge was heard severally and successively. The trial lasted from March 22nd to April 19th, when the impeachment was discontinued, and the bill of attainder substituted for it. The bill received Charles's assent on the 10th

[1] 5 *St. Tr.* 172. The grammar of this passage is not very plain, but its general sense is obvious. It would be easy to multiply illustrations.

[2] There is a compressed account of the proceedings in 3 *St. Tr.* 1381—1586, to which I refer as being sufficiently full for my purpose. The trial itself fills a folio volume in Rushworth. See too Mr. Gardiner's *Fall of the Monarchy*, ii. pp. 100-180.

May, and Strafford was executed on the 12th. The different charges were opened by different managers, and upon each charge witnesses were called, and the prisoner was heard in his own defence. The effect of this was that he underwent as many trials as there were articles in the impeachment. He does not appear to have been questioned directly and in set terms; but such a mode of procedure practically amounted to questioning, and the mode of procedure by articles and detailed written answers to each had the same effect.

I may here observe that the practice pursued in Strafford's case of putting in a detailed answer to detailed articles of impeachment was followed in most cases of Parliamentary impeachment down to and including the impeachment of Lord Macclesfield in 1724. [1] On the impeachment of Warren Hastings an answer to each charge was put in, and the reading of the charges and answers occupied two days. Hastings's counsel, [2] however, strenuously objected to the evidence on each charge being taken, and to the defence being made, separately, and they carried their point. In the case of Lord Melville,[3] the answer amounted merely to a general plea of not guilty, and the whole of the evidence against him was given before he was called upon for his defence.

So far as the mere procedure went, the management of Strafford's impeachment seems to have been conspicuously fair, though it must not be forgotten that he was tried before a tribunal (the House of Lords) which was far from being unfavourable to him, and which was at the time extremely jealous of any invasion by the Commons of their privileges. Every fact alleged against him was made the subject of proof by witnesses produced in court, some of whom [4] he successfully cross-examined. In some instances, also, rules of evidence were recognised and enforced. [5] Thus, one of the charges against him was, issuing a warrant to Savile to quarter soldiers upon the lands and houses of certain persons, in order to extort money from them. An attempt was made to prove this by the production of a copy of the

[1] See *Annual Register* for 1788.
[2] Mill's *History of British India*, v. 57.
[3] 29 *St. Tr.* 622.
[4] See *e.g.* 3 *Ib.* 1422.
[5] *Ib.* 1393 and 1434.

CHAP. XI. warrant. Strafford objected, alleging that the original ought to be produced. The Lords upheld this objection, but admitted secondary evidence of the original in a manner which would not at present be considered regular.

The most curious point in the proceedings in reference to evidence arose upon the notes of what was said to have passed at the Council Board (as taken by Sir Henry Vane the father). He deposed that Strafford had advised the King to bring over the Irish army to subdue England. No other person present on the occasion heard any such statement made, and Sir Henry Vane himself spoke with some slight hesitation. The original notes had been delivered up to Charles I. and had been destroyed by him. It was contended by and for Strafford, first, that Vane was mistaken, and, next, that if he spoke the truth, he was only a single witness. In consequence of this, Pym declared that he had a copy privately made by young Sir Henry Vane of the notes made by his father at the Council, which young Vane had copied when entrusted by his father for another purpose with the keys of his papers. These notes, it was maintained, when established by young Vane's evidence, would be equivalent to a second witness. According to our modern view, the utmost use to which the original notes, if produced, could have been put would have been to refresh the memory of the person by whom they were taken. The view suggested by Pym was not, however, insisted upon. In fact, this matter was the turning point of the trial. Legally, if the words were spoken, which must for ever remain in doubt, it seems to me that they could not upon any theory whatever amount to treason.

On the substantial merits of the conduct of Parliament towards Strafford it is not my intention to express any opinion. The bill of attainder clearly shows on the one hand a consciousness that the prosecutors had failed to prove that Strafford was guilty of treason, and, on the other, a determination to assert, or to go as near as they could to asserting, that he was guilty of that crime. It seems to me that the real question is, whether Strafford's conduct had been so criminal, and whether his life was so dangerous to the State,

that Parliament would have been justified in passing a bill enacting simply, and without any recital, that he should be put to death. If so, the introduction into the bill of recitals of a doubtful character (for I cannot call them absolutely and unquestionably false) ought to be regarded simply as an attempt to disguise the harshness of the proceeding. If not, the proceeding itself was unjustifiable. Hallam thinks that the fifteenth article of the impeachment approached more nearly to a charge of treason than any other. The article charges in substance that Strafford taxed certain towns in Ireland in an arbitrary way, and caused the sums to be levied by quartering troops on the inhabitants till they paid the money. This is described as treason by levying of war, and also as treason under two Irish Acts, one of the reign of Edward III. and the other of the reign of Henry VI. One of these Acts (7 Hen. 6) provides that "whosoever shall cess men of war in His "Majesty's dominions, shall be thought to make war against "the King," and be punished as a traitor. The Act of Edward III. is similar. The words of the Act of Henry VI. do undoubtedly cover Strafford's conduct, but each of these Acts appears to have been directed against the exactions and oppressions of private persons, and not against the oppressive execution of legal process by public authority; and Lord Strafford showed that it had been a common practice with his predecessors to levy taxes and enforce the execution of judgments as he had done. Besides this, it was very doubtful whether the Acts in question had not been repealed.

[1] Hallam lays little stress upon the Irish Acts, but contends that "it cannot be extravagant to assert" that if a military officer were to levy taxes by quartering troops on inhabitants "in a general and systematic manner, he would, according "to a warrantable construction of the statutes, be guilty of "the treason called levying of war against the King." He thinks, however, that there was no evidence that Strafford did act in a general and systematic way, and this, no doubt, is true. Whether such an interpretation "could be extra-"vagant" it is difficult to say, and it must be admitted that

[1] *Const. Hist.* ii. 107.

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it might be said to be "warrantable" by reference to some of the cases which have been decided upon the 25 Edw. 3; but, however that may be, I think it is at least equally clear that it would not be correct. The abuse of military power to the oppression of the subject is no more the same thing as an attempt to subvert the established Government by force, than perjury which misleads is the same thing as bribery which corrupts a judge.

The proceedings against King Charles I. form a remarkable illustration of the contrast which exists between the administration of justice before and after the Long Parliament and the Civil War. He was, as is known to every one, condemned principally for refusing to plead to the charges made against him by the High Court of Justice, and this was nearly the only step in the whole of his career in which he was not only well advised, but perfectly firm and dignified in his conduct. If he had pleaded he would, of course, have been convicted. The Court, however, did not put their sentence solely on that ground. They took evidence to satisfy their consciences, and there are few stranger documents than [1] the depositions of the witnesses who would have been called against him if he had pleaded, and whom the Court thought it necessary to hear. They prove his presence at the different battles, and the fact that people were killed there, just as witnesses in the present day would prove the facts about any common case of theft or robbery. For instance: "Samuel "Morgan, of Wellington, in the county of Salop, felt-maker, "sworn and examined, deposeth, that he, this deponent, upon "a Monday morning in Keynton field, saw the King upon the "top of Edge Hill, in the head of the army; . . . . and he "saw many men killed on both sides, at the same time and "place." "Gyles Gryce . . . saw the King in front of the "army in Naseby Field, having back and breast on." Also, he "saw a great many men killed on both sides at Leicester, "and many houses plundered."

The punctilious and almost pedantic formality of providing such witnesses for the purpose of proving such facts is characteristic, and shows how deeply men's minds had been

[1] *4 St. Tr.* 1101—1113.

impressed with the importance of proceeding upon proper and formal evidence in criminal cases.

None of the trials under the Commonwealth are more remarkable than two prosecutions of [1] John Lilburn, who had suffered so severely at the hands of the Star Chamber. The trial in 1649 was for publishing pamphlets denouncing the Parliament and Cromwell, in contravention of [2] acts of May and July, 1649, which made it treason to "maliciously and "advisedly publish by writing, printing, or openly declaring "that the said Government is tyrannical, usurped, or unlaw-"ful." That Lilburn had published the pamphlets, and that the pamphlets did in express words assert that the Government was tyrannical, was proved beyond all possibility of doubt; but he was acquitted; "which," says Clarendon, "infinitely "enraged and perplexed Cromwell, who looked upon it as a "greater defeat than the loss of a battle would have been." It is difficult to give an idea, in any moderate compass, of the trial which ended in this manner, but it was on many accounts remarkable. Lilburn, who had been nicknamed "Freeborn John" on account of his continual brags about freeborn Englishmen, Magna Charta, and the good old laws of England, entered, on each of his trials, into a regular battle with the Court, and appealed to the jury for protection. He began by refusing to plead, or even to hold up his hand, until he had made a [3] long speech upon all sorts of topics which the Court was weak enough to listen to without interrupting him. He then got into an almost endless discussion as to pleading not guilty. He meant to say that he did not wish by pleading to waive any objections which might lie to the indictment and that he did wish to have a copy of the indictment and counsel assigned to him, to see whether or not it

[1] Besides the Star Chamber prosecution already noticed Lilburn was tried for his life four times, namely (as he said), first in London in 1641, "before "the House of Peers;" next at Oxford for levying war against the King at Brentford (where he had been taken prisoner), when his life was saved by the Parliament's threat to treat the Cavalier prisoners as he might be treated; again for high treason in 1649, and again for felony in returning from banishment in 1653. Of his first and second trials on capital charges there are no reports. There is an account of the third trial in *4 St. Tr.* 1269, and of the fourth in *5 Ib.* 407. The last, which was written by Lilburn himself, is left incomplete.

[2] Printed in *4 St. Tr.* 1347—1351.

[3] *Ib.* 1270—1283.

CHAP. XI. was open to any objection. He urged these contentions with such pertinacity, and managed to introduce so many collateral topics into the discussion, that the whole day was spent in it. The Court showed, as it seems to me, little either of firmness or dignity in the manner in which they discussed the subject, and argued with the prisoner. They told him, time after time, that he was not entitled to what he demanded, but they shrank apparently from saying, as, the charge being treason, they undoubtedly might have done, that if he did not plead directly guilty or not guilty, they would pass judgment on him. One point in the discussion is curious enough to be noticed specifically. On one occasion, when he was pressed to plead, Lilburn said, "By the laws of England, I am not to answer "to questions against or concerning myself." To this Keble, who was first on the commission, replied, "You shall not be "compelled;" and he afterwards added, "The law is plain, "that you are positively to answer guilty or not guilty." To which Lilburn replied, "By the Petition of Right, I am not "to answer any questions concerning myself." I cannot understand what Lilburn can have been thinking of in this observation, for there is not a word in the Petition of Right which bears upon the subject, but his argument shows how strong the popular feeling was on the subject of questioning prisoners. After infinite wrangling Lilburn was got to plead not guilty, after which the trial proceeded with interruptions and wrangling at every instant. The printing of the books was proved, and the prisoner was asked on several occasions whether he owned them to be his. He uniformly replied that the Petition of Right taught him to answer no questions about himself,[1] "and I have read of the law to be practised by "Christ and his apostles." At last, after endless "struggling," as Lilburn calls it, he arrived at his defence, which, stripped of the innumerable quibbles and topics of grievance in which he wrapped it up, amounted to this, that the Act under which

[1] In answer to one question he said, "I am upon Christ's terms. When "Pilate asked him whether he was the Son of God, and adjured him to tell "him whether he was or no, he replied, 'Thou sayest it.' So say I, thou Mr. "Prideaux" (the Attorney-General), "sayest it, these are my books. But "prove it." Lilburn did not perceive what an astonishing saying he was putting into Christ's mouth, who, according to his view, refused to admit that he was the Son of God, and called upon Pilate to prove it. (4 *St. Tr.* 1342.)

he was indicted was bad and tyrannical, that he was a better patriot than those who prosecuted him, and had done and suffered much in the popular cause; and that [1] "The jury by "law are not only judges of fact but of law also; and you "that call yourselves judges of the law are no more but "Norman intruders; and in deed and in truth, if the jury "please, are no more but ciphers to pronounce their ver-"dict." This, no doubt, was the point which secured his acquittal.

Lilburn was afterwards banished by Act of Parliament, and it was provided that if he returned from his banishment he should be guilty of felony. He did return, and [2] his trial on that occasion was even more stormy than the earlier one. His own account of its "furious hurley burleys" is very curious, as far as it goes. He performed the feat which no one else ever achieved, of extorting from the Court a copy of his indictment in order that he might put it before counsel and be instructed as to the objections which he might take against it. His substantial defence on that occasion also was, that the Act applied to him was tyrannical, and that the jury were judges of the law apparently in such a sense, that they need not put it in force unless they approved of it. He was acquitted again, and [3] the jury were examined before the Council of State as to their reasons for their verdict. Many of them refused to answer, but several of them said that they regarded themselves as judges of the law as well as of the fact, whatever the judges might say to the contrary.

Such incidents as the acquittals of Lilburn are defeats which every revolutionary Government is exposed to if their proceedings are disapproved of by any considerable section of the community; and parallels to Lilburn's trial might be found in many of the political prosecutions which took place under Louis Philippe. When an ancient and well-established system of government has been overthrown by force, that which is established in its place can hardly expect to have its laws supported and carried into execution merely as law, and apart from the personal opinion which jurors may have of their justice. Even under the quietest and best-established

[1] 4 *St. Tr.* 1379. [2] 5 *Ib.* 407. [3] *Ib.* 445—450.

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Governments it not unfrequently happens that a jury will refuse to enforce the law if they think it hard in a particular case. Instances of this have occurred even in our own times.

In further illustration of the remarks already made as to the character of the trials under the Commonwealth, I may refer to the [1] trial of Colonel Morris, for treason, at the York Assizes, in 1650, and to the trial [2] of Love, for treason, by the High Court of Justice. An unfair advantage is said to have been taken of Morris in disallowing one of his challenges on a very technical ground, but, otherwise, each trial is fair and patient enough, and conducted in a manner closely resembling our modern practice.

Few trials are reported in the *State Trials* during the Commonwealth for offences not connected with politics, but I may mention one on account of the way in which it illustrates the absence of rules of evidence in the seventeenth century. [3] In 1653, Benjamin Faulconer was tried for perjury before the Commissioners for sequestrations and compositions of the Royalists' estates. He had made statements the effect of which was that the estates of Lord Craven were sequestrated. Upon this he was [4] indicted for perjury by the Craven family, in the Upper Bench, as the Court of King's Bench was then called. Many witnesses were called to prove the falsehood of the matter sworn, after which [5] others were called to show that Faulconer was a man of bad character. They testified to his having drunk the devil's health in the street at Petersfield; to his having used bad language and been guilty of gross immorality; and, lastly, to his having been committed on suspicion of felony and having "a common "name for a robber on the highway." As Faulconer's evidence had been accepted and acted upon by Parliament, it is unlikely that he should have been treated at his trial with any special harshness. It would seem, therefore, that at this time it was not considered irregular to call witnesses to prove a prisoner's bad character in order to raise a presumption of his guilt.

[1] 4 *St. Tr.* 1250. [2] 5 *Ib.* 43. [3] 4 *Ib.* 323.

[4] It is remarkable that the indictments do not aver the materiality of the matter sworn.

[5] 4 *St. Tr.* 354—356.

III.—1660—1678.

The reigns of Charles II. and James II. form perhaps the most critical part of the history of England, as the whole course of our subsequent history has been determined by the result of the struggles which then took place. At every critical point in those struggles a leading part was played by the courts of criminal justice, before which the contending parties alternately appeared, charged by their adversaries with high treason, generally on perjured evidence, and before judges who were sometimes cowardly and sometimes corrupt partisans.

The history of the most important of these proceedings has been so often related that I should not feel justified, even if my space allowed me, in attempting to go into their circumstances minutely; but there is still room for some observations upon them from the merely legal point of view. I do not think that the injustice and cruelty of the most notorious of the trials—the trials for the Popish Plot, or those which took place before Jeffreys—have been in any degree exaggerated. The principal actors in them have incurred a preeminent infamy, in mitigation of which I have nothing to say, but I am not sure that their special peculiarity has been sufficiently noticed. It may be shortly characterised by saying that the greater part of the injustice done in the reigns of Charles II. and James II. was effected by perjured witnesses, and by the rigid enforcement of a system of preliminary procedure which made the detection and exposure of perjury so difficult as to be practically impossible. There was no doubt a certain amount of high-handed injustice, and the disgusting brutality of Jeffreys naturally left behind it an ineffaceable impression; but, when all this has been fully admitted, I think it ought in fairness to be added that in the main the procedure followed in the last half of the seventeenth century differed but little from that which still prevails amongst us; that many of the trials which took place—especially those which were not for political offences—were

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perfectly fair; and that even in the case of the political trials the injustice done was due to political excitement, to individual wickedness, and to the harsh working of a system which, though certainly defective in admitting of the possibility of being harshly and unjustly worked, was sound in many respects.

The number of the trials reported during these reigns is so great (they fill seven volumes of the *State Trials*) that it is necessary to notice them in groups, and to pass over unnoticed many curious details.

The first set of trials after the Restoration are [1] those of the regicides in 1660, to which may be added the trial of Sir H. Vane the younger in 1662. Of the trials of the regicides there is little or nothing to be said from the legal point of view. That they had compassed and imagined the death of the King, and had (as the indictment averred) displayed that compassing and imagination by cutting off his head, admitted of no doubt at all, and it was equally plain that this was treason within the 25 Edw. 3. Their real defence was that Charles had in fact ceased to reign, and that they acted under the authority of those who, for the time being, were in fact the rulers of the country; but the very point of the Restoration and of the prosecution was that this defence was not sufficient, that the civil war had been a successful rebellion, that the proceedings of the part of the House of Commons which exercised the powers of Parliament in 1649 were, so to speak, a rebellion upon a rebellion, and that the execution of Charles was a combination of treason and murder. As a practical proof of this, Denzil Hollis and the Earl of Manchester—who had been two of the six members arrested by Charles I.—and Annesley, who was a member expelled by Pride, were members of the Commission of Oyer and Terminer, which tried Charles's judges. Hollis and Annesley took an active part in the proceedings. [2] Hollis in particular rebuked Harrison vehemently when he alleged the authority of Parliament for what he had done.

[1] 5 *St. Tr.* 947—1384.

[2] *Ib.* 1078. "You do very well know that this that you did, this "horrid, detestable act which you committed, could never be perfected by "you till you had broken the Parliament. . . . Do not make the Parliament

The facts were so plain, and the views of the subject, taken by the Court and the prisoners respectively, so diametrically opposed to each other, that the legal interest of the trials is small. The prisoners did not dispute the facts; many of them avowed and justified what they had done, particularly Harrison, Scroop, and Carew. [1]Cook, who had been Solicitor-General at the King's trial, defended himself elaborately and ignominiously, on the ground that, though excepted by name from the Act of Oblivion, he had not within its true meaning "been instrumental" in taking away the life of Charles. The words were, "sentencing, signing, or being instrumental," which, he argued, must mean being instrumental in the same way as a person who sentenced or signed. "Observe it is "not said being any other ways instrumental." "I have "been told," he said, "that those that did only speak as "counsel for their fee, who were not the contrivers of it, the "Parliament did not intend they should be left to be pro-"ceeded against." .... "I must leave it to your" (the jury's) "consciences, whether you believe that I had a hand in the "King's death, when I did write but only that which others "did dictate unto me, and when I spoke only for my fee."

By this mean line of defence he had no chance (as he ought to have known) of saving his life, and he only exposed himself to the crushing and unanswerable retort of Sir Heneage Finch (his successor in the office of Solicitor-General), [2]"He "that brought the axe from the Tower was not more "instrumental than he."

The least intrinsically important of the trials of the regicides, that of [3]Hulet, has some legal interest, as it shows how loose the rules of evidence then were. Hulet was accused of having been the actual executioner of Charles. He was tried, I think, quite fairly; but was convicted on such insufficient evidence that the judges procured a reprieve for him. The evidence against him consisted almost entirely of hearsay, and of evidence of his own admissions. On the other hand, he was allowed to call several persons who said

"to be the author of your black crimes." Annesley said something to the same effect, though in gentler language, to Carew.—Pp. 1056, 1057.

[1] *5 St. Tr.* 1077—1115 (see especially 1097, 1098).

[2] *Ib.* 1100.

[3] *Ib.* 1185—1195.

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In the case of the trials of the regicides, as in several subsequent cases, the judges held a consultation, at which [2] the law officers of the Crown were present, in which they came to a number of resolutions as to points of law which might arise upon the trial. One of these has some general interest. "It was resolved that any of the King's counsel "might privately manage the evidence to the Grand In- "quest, in order to the finding of the bill of indictment, "and agreed that it should be done privately: it being "usual in all cases that the prosecutors upon indictments are "admitted to manage the evidence for finding the bill, and "the King's counsel are the only prosecutors in the King's "case, for he cannot prosecute in person." One of the resolutions deserves to be reprinted on account of its extraordinary pedantry. "The compassing of the King's death "being agreed to be laid in the indictment to be 29th "January, 24 Car. I., and the murder on the 30th of that "same January, it was questioned in which king's reign the "30th of January should be laid to be,—whether in the reign "of King Charles I. or King Charles II.; and the question "grew because there is no fraction of the day; and all the acts "which tended to the King's murder until his head was "actually severed from his body were in the time of his own "reign, and after his death in the reign of Charles II. And "although it was agreed by all except Justice Mallett that "one and the same day might in several respects and as to "several acts be said to be entirely in two kings' reigns .... "yet because Justice Mallett was earnest that the whole day "was to be ascribed to King Charles II., therefore it was "agreed that in that place no year of any king should be "named, but that the compassing of the King's death should "be laid on the 29th January, 24 Car. I., and the other

[1] See Stobart *v.* Dryden, 1 M. & W. 615.

[2] *i.e.* the Attorney and Solicitor-General and their King's counsel, "there "being then no King's serjeant but Serjeant Glanvil, serjeant to the late "King, who was then old and infirm."—Kelyng's *Reports*, quoted in 5 *St. Tr.* 971—983. I think that after the Civil War the King's serjeants, in England at least, were entirely superseded by the Attorney- and Solicitor-General.

"acts tending to the murder and the murder itself laid to be "'*tricesimo mensis ejusdem Januarii*,' without naming the year "of any king, which was agreed to be certain enough."

The [1] trial of Sir Henry Vane in 1662 appears to me to have been a cruel and revengeful proceeding, as the treason alleged and proved against him [2] consisted exclusively in his having acted in the ordinary routine of government, and especially as a member of the Council of State from the execution of Charles downwards, and in particular in his having kept Charles II. out of possession of his kingdom. These acts were clearly within the spirit of the famous act of 11 Hen. 7, c. 1, and it was difficult to bring them within the letter of the 25 Edw. 3. It is remarkable that in this case the Court held that no bill of exceptions can be tendered in criminal cases—a memorable resolution, the effect of which has been to restrict anything in the nature of an appeal in criminal trials to those few and rare instances in which some error has taken place in the procedure which would be entered on the record.

Between the trials of the regicides and the trials for the Popish Plot (1660–1678) several trials of great constitutional importance took place. One of them was the case of Messenger and others, who were tried at the Old Bailey for high treason in levying war against the King. I shall refer to it in connection with the history of the law of treason. Another and a far more important one was [3] the trial of Penn and Meade for a tumultuous assembly, and the proceedings which arose out of it against Edward Bushell. The tumultuous assembly consisted in Penn's preaching a sermon in Gracechurch-street. The account of the trial was written by the prisoners, and naturally gives them the best of the argument on every occasion. If the account is correct, they both showed remarkable presence of mind and vigour of language; but I cannot help thinking that a good many of

[1] 6 *St. Tr.* 119—202. Vane's real offence was no doubt his conduct at Strafford's trial.

[2] *Ib.* 148, 149.

[3] *Ib.* 951. This trial was in 1670. A similar case in which the jury were fined and questioned by Kelyng, C.J., is reported in Kelyng, p. 69, first edition of 1873.

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their retorts were recollections of what they ought to have said. Whether actually made or not, the remarks of Penn and Meade throw light on the temper of their time and class on several legal subjects. The meeting having been sworn to, the Recorder asked Meade if he was there, to which [1]Meade replied, "It is a maxim in your own law, '*Nemo tenetur* "'*accusare seipsum*,' which, if it be not true Latin, I am sure "it is true English, that no man is bound to accuse himself. "And why dost thou offer to ensnare me with such a ques- "tion? Doth not this show thy malice? Is this like unto "a judge that ought to be counsel for the prisoner at the "bar?" Afterwards Penn asked the Recorder, "Let me "know upon what law you ground my indictment. *Re-* "*corder:* Upon the common law. *Penn:* Where is that "common law? *Recorder:* You must not think that I am "able to run up so many years and over so many adjudged "cases which we call common law to answer your curiosity. "*Penn:* The answer, I am sure, is very short of my question; "for if it be common law it should not be so hard to pro- "duce." The Court and the prisoners by degrees got into a dispute so hot that [2] the Lord Mayor is said to have told Meade he "deserved to have his tongue cut out," and both he and Penn were removed into the "Bale Dock," which they describe as "a stinking hole," out of court. The jury would find no other verdict than that Meade was not guilty, and Penn "guilty of speaking in Gracechurch-street." According to Penn, the jury were shamefully reviled and locked up for the night, "till seven o'clock next morning (being the 4th "instant), vulgarly called Sunday." Ultimately they returned a verdict of not guilty as to both, though not (if the report is correct) till the Recorder had expressed his admiration for the Spanish Inquisition, and the Mayor had said he would cut Bushell's (the foreman's) throat as soon as he could. The jury were fined forty marks apiece for their verdict, and sentenced to be imprisoned till they paid it. Bushell and his fellow-jurors obtained a writ of *habeas corpus*. The return to the writ was that they were imprisoned for con-

[1] 6 *St. Tr.* 987.

[2] The trial was before the Mayor, the Recorder, and five aldermen.

tempt of court in acquitting Penn and Meade "contra legem "hujus regni Angliæ, et contra plenum" (*sic*) "et manifestum" (*sic*) "evidentiam, et contra directionem Curiæ in materia "legis." But the judges who heard the argument (ten out of twelve) decided that the discretion of the jury to believe the evidence or not could not be questioned, and the jurymen were accordingly discharged from custody without paying their fines. This is the last instance in which any attempt has ever been made to question the absolute right of a jury to find such a verdict as they think right. I am not certain, however, that the case of a jury persisting in convicting a prisoner without evidence, or on evidence clearly insufficient in law to sustain the conviction, might not, if it ever arose, give rise to considerable difficulty.

A trial which has been little noticed, but which, if it had been treated as a precedent, would have been of momentous importance, took place at Aylesbury assizes in 1665, before Lord Chief Justice Hyde. [1] One Keach, of Winslow, in Buckinghamshire, wrote a tract containing what were then known as Anabaptist doctrines. It maintained that infants ought not to be baptized, that Christ would reign on earth permanently for a thousand years, and some other matters. For this he was indicted for "maliciously writing and publishing "a seditious and venomous book, wherein are contained damn-"able positions contrary to the Book of Common Prayer." Keach was convicted, and sentenced to a fortnight's imprisonment and to stand twice in the pillory. The judge's conduct on the bench, as reported, was in every respect disgraceful. The indictment is not given in the report. It might have been drawn under the Licensing Act (13 & 14 Chas. 2, c. 33, s. 2), which provides that no person shall presume to print any heretical book or pamphlet, wherein any doctrine or opinion is asserted or maintained contrary to the Christian faith, or the doctrine or discipline of the Church of England. This would make such a publication a misdemeanour. Whether the indictment was at common law or under the statute does not appear. If the book was treated as a libel indictable at common law, and not as, at most, an ecclesiastical offence, the

[1] 6 *St. Tr.* 701.

case was an unheard-of extension of the criminal law. I am not aware that this bad example was ever followed.

A considerable number of trials for ordinary crimes unconnected with politics are reported in the *State Trials* during this period. I may particularly refer to [1] the trial of Colonel Turner, his sons and his wife, for burglary and robbery, in 1664, [2] that of Hawkins, for theft, in 1669; the trials for murder of [3] Lord Morley, in 1666, and [4] Lord Pembroke, in 1678, and the trial of [5] the witches in Suffolk, in 1665.

The trial of the Turners is extremely curious as an [6] illustration of the manners of the time; but in a legal point of view its chief interest depends on its forming a very perfect illustration of the way in which, at that time, a complicated trial for a common offence was conducted. It is indeed the earliest instance, so far as I know, of a full report of such a trial.

No counsel seem to have been employed; at least none are mentioned. The first witness called was the magistrate who had investigated the case and committed the prisoner (Sir Thomas Aleyn, an alderman). Being asked in general terms to "tell his knowledge to the jury," he made a speech describing all his proceedings and inquiries, and stating the information he had received from various people of whom he made inquiries; far the greater part of what he said would by the present rules of evidence be inadmissible. The gist of it was, that suspecting Turner he examined him the day after the robbery, and having received further information next day (all of which he stated at full length), examined him further, searched his house, and, partly by promises of favour, got him to restore a great deal of the stolen property (£1,000 in cash, and jewels worth £2,000 and upwards). The prosecutor and various other witnesses to the facts were then called, and in particular Sir Thomas Chamberlain, another alderman, who had been concerned in inquiring into the case. When all the evidence had been given, Lord Chief

[1] 6 *St. Tr.* 566. [2] *Ib.* 922. [3] *Ib.* 770. [4] *Ib.* 1310. [5] *Ib.* 647.

[6] Turner was an old Cavalier officer. His speech at the scaffold lasted two hours. It is an extraordinary performance, full of an infinity of things which he said to spin out the time, in hopes of the arrival of a pardon. He said, for instance, "I was a constant Churchman; it is well known to my parishioners I never durst see a man in the church with his hat on. It troubled me very much."—6 *St. Tr.* 626.

Justice Hyde shortly and very clearly [1] summed up the whole matter to Turner, saying, "I would propose this to you, to "make your defence touching your charge;" and he ended by saying, "Laying all this together, unless you answer it, all the "world must conclude that you are one that did this robbery." Turner [2] made a long speech in answer to this, and called witnesses. He was questioned at intervals, and [3] on one occasion at considerable length, on his statement, in such a way as to set in a clear light its glaring improbability, but not, as it seems to me, harshly or unfairly. The questioning, in short, was no longer what it had been in the days of Elizabeth and James I.,—the very essence of the trial. It was used as the natural way of getting at the truth, and was by no means in all cases a disadvantage to the prisoner. It served rather to call his attention to the matter against him, and so to bring out his defence, if he had one.

The defence was followed by the summing-up of the judges. Lord Chief Justice Hyde said, amongst other things, to the jury, [4] "You take notes of what hath been delivered" (which seems as if he did not). "I have not your memories: you are "young." If fully reported, the summing-up was not very remarkable in any way.

The trials of Hawkins for theft, and of the Suffolk witches, are the only cases in the *State Trials* tried by Hale. I cannot say that either of them justifies his extraordinary reputation. Hawkins was a Buckinghamshire clergyman, accused by an Anabaptist parishioner of stealing two rings, an apron, and £1 19*s.* in money. The report is by the prisoner himself. If correct, it shows that the charge against him was the result of the grossest perjury and conspiracy founded upon base personal malice. In the case itself there is nothing very remarkable, except that the prosecutor (who

[1] 6 *St. Tr.* 593—594. This summary gives the history of the case, which is very intricate, in a very few words.

[2] His wife interrupted him in a very grotesque way (603—604). He apologized for her, observing for one thing that he had had "twenty-seven "children by her—fifteen sons and twelve daughters."

[3] 6 *St. Tr.* 605—610, and especially 610.

[4] *Ib.* 612. The practice of taking notes, now universal amongst the judges, was of slow growth. See Colledge's case, 8 *St. Tr.* 712; Cornish's case, 11 *Ib.* 437; the Annesley case, 17 *Ib.* 1419, *note*. A passage already referred to in Throckmorton's case is to the same effect.

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seems to have acted as counsel, there being no counsel for the Crown) was allowed to give evidence to show that Hawkins had committed two other thefts wholly unconnected with the one for which he was being tried, which, [1] said Hale, "if true, would render the prisoner now at the bar "obnoxious to any jury." Hale, after expressing his opinion that the case was perfectly clear, and the prosecutor "a very "villain,—nay, I think thou art a devil," and after the jury had declared they were fully satisfied of Hawkins's innocence, appears to have given an elaborate charge to the jury.

[2] The trial of the Suffolk witches, in 1665, is curious, not only as one of the last specimens in England of an odious superstition, but because it seems that rules of evidence founded, one would have thought, on the most obvious common sense were altogether unknown to, or at least unrecognised by, the most famous judge of his time.

Two women, Rose Cullender and Amy Duny, were indicted for bewitching several children, who were considered too young to be called as witnesses. The evidence came in substance to this—that each of the women had a quarrel with some of the parents of the children said to be bewitched; that afterwards the children had fits; that in their fits they threw up crooked pins, and declared that the two prisoners were tormenting them, and that they saw their apparitions. Some other incidents were alleged, almost too puerile to relate, *e.g.* "a "little thing like a bee flew upon the face" of one of the children, whereupon she "vomited up a twopenny nail with "a broad head," and said, "The bee brought this nail and "forced it into her mouth." This was proved, not by the child, but by her aunt, who seems not to have been asked the most obvious questions, such as whether when she saw the bee it was carrying the nail, and, if so, how, and as to the child's opportunities of getting the nail and putting it in her mouth. A quantity of nonsense of this sort having been proved, it is satisfactory to find that [3] "Mr. Serjeant "Keeling" (probably as *amicus curiæ*) "seemed much un-"satisfied with it, and thought it not sufficient to convict "the prisoners; for, admitting that the children were, in

[1] 6 *St. Tr.* 950. [2] *Ib.* 687. [3] *Ib.* 697.

"truth, bewitched, yet" (said he) "it can never be applied "to the prisoners upon the imagination only of the parties "afflicted; for, if that could be allowed, no person what-"soever can be in safety." This view of the matter was encountered by the famous Dr. Brown, the author of *Religio Medici*,[1] "who, upon view of the three persons in court, was "desired to give his opinion what he did conceive of them; "and he was clearly of opinion that the persons were be-"witched, and said that in Denmark there had been lately "a great discovery of witches, who used the very same way "of afflicting persons by conveying pins into them, and "crooked as these pins were, with needles and nails. And "his opinion was that the devil in such cases did work upon "the bodies of men and women upon a natural foundation "(that is) to stir up and excite such humours superabound-"ing in their bodies to a great extent, whereby he did in "an extraordinary manner afflict them with such distem-"pers as their bodies were most subject to, as particularly "appeared in these children; for he conceived that these "swooning fits were natural, and nothing else but that they "call the mother, but only heightened to a great excess by the "subtlety of the devil cooperating with the malice of those "we term witches, at whose instance he doth these villanies."

Fortunately, perhaps, for Dr. Brown, the art of cross-examining experts was in those days uninvented. Some slight experiments were tried with the children, who professed to be insensible, but to know when one of the witches touched them. They performed this feat successfully in court; but, some persons being sceptical, the experiment was performed again in a different place, in the presence of several persons of distinction, chosen by the judge, of whom Serjeant Keeling was one. On this occasion one of the children was blindfolded, and the witch brought to her; but another person was made to touch her, "which produced the same "effect as the touch of the witch did in the court; whereupon "the gentlemen returned, openly protesting that they did "believe the whole transaction of this business was a mere "imposture." Hale, however, although he might, and I

[1] 6 *St. Tr.* 697.

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think ought, to have told the jury that there was nothing which could possibly be called evidence to connect the prisoners with the supposed offence, treated the matter not only with gravity, which indeed was his duty, but with that misplaced and misunderstood impartiality which is one of the temptations of a judge better provided with solemnity, respectability, and learning than with mother-wit. His obvious duty was, first, to see that the case was one in which two poor old women's lives were put in jeopardy by the stupid superstition of ignorant people; next, to save them from their danger by insisting on the point put forward by Keeling, and on the proof of fraud given by the experiment tried in court. He did neither of these things. He told the jury that [1] "he "would not repeat the evidence unto them, lest by so doing "he should wrong the evidence on the one side or the other. "Only this he acquainted them, that they had two things to "inquire after. First, whether or no these children be be-"witched? Secondly, whether the prisoners at the bar were "guilty of it? That there were such creatures as witches he "had no doubt at all; for, first, the Scriptures affirmed so "much; secondly, the wisdom of all nations had provided "laws against such persons, which is an argument of their "confidence of such a crime. And such hath been the judg-"ment of this kingdom, as appears by the Act of Parliament "which hath provided punishments proportionable to the "quality of the offence; and desired them strictly to observe "their evidence, and desired the great God of heaven to "direct their hearts in this weighty thing they had in hand; "for to condemn the innocent, and to let the guilty go free, "were both an abomination to the Lord." The poor old women were both convicted and hanged.

[2] A trial for witchcraft took place seventeen years afterwards (in 1682), before Judge Raymond, in which three poor old creatures confessed their guilt, and were hanged. [3] Roger North has some remarks on this, which do honour to his good sense and feeling. "These were two miserable old "creatures that one may say, as to sense or understanding, "were scarce alive, but were overwhelmed with melancholy

[1] 6 *St. Tr.* 700, 701. [2] 8 *Ib.* 1017. [3] *Lives of the Norths*, i. 266, 267.

" and waking dreams, and so stupid as no one could suppose " they knew either the construction or consequence of " what they said. All the rest of the evidence was trifling. " I, sitting in court the next day, took up the file of the " informations taken by the justices, which were laid out " upon the table, and against one of the old women read " thus: 'This informant saith he saw a cat leap in at her " ' (the old woman's) window when it was twilight. And this " ' informant further saith that he verily believeth the said " ' cat to be the devil, and further saith not.' The judge " made no such distinctions as how possible it was for old " women, in a sort of melancholy madness, by often thinking " in pain and want of spirits, to contract an opinion of them- " selves that was false;" . . . " but he left the point upon the " evidence fairly (as they call it) to the jury, and they con- " victed them both." He proceeds to give an account of the dexterity and quiet good sense with which Lord Keeper Guildford tried such a case, and procured the acquittal of a poor old man. One remark in it must not be omitted. "It " is seldom that a poor old witch is brought to trial on that " account, but there is at the heels of her a popular rage " that does little less than demand her to be put to death; " and if a judge is so clear and open as to declare against " that impious, vulgar opinion that the devil himself has " power to torment and kill innocent children, or that he is " pleased to divert himself with the good people's cheese, " butter, pigs, and geese, and the like errors of the ignorant " and foolish rabble, the countrymen (the triers) say their " judge hath no religion, for he doth not believe witches; " and so, to show they have some, hang the poor wretches. " All which tendency to mistake requires a very prudent, " moderate carriage in a judge, whereby to convince rather " by detection of the fraud than by denying authoritatively, " such power to be given to old women."

The impression made upon my mind by these trials is, that when neither political nor religious passions or prejudices were excited, when the matters at issue were very plain and simple, when the facts were all within the prisoner's knowledge, and when he was not kept in close

CHAP. XI. confinement before his trial, and was able to consult counsel, and to procure witnesses if he had any, trials were simple, fair, and substantially just, though little or no protection against perjury was afforded; but when any of these conditions was not fulfilled, the prisoner was at a great disadvantage. There were practically no rules of evidence. The witnesses were allowed to make speeches, in which they introduced every sort of irrelevant matter which might prejudice the jury against the prisoner. The prisoner had no counsel. He was, indeed, allowed to cross-examine, but cross-examination was hardly understood at all, and every one who has any experience of the matter knows that to cross-examine on bare speculation, and without previous knowledge of what the witness is going to say, is likely to do even a good case more harm than good. The result was that if the Court were prejudiced, if the prisoner was kept in close confinement up to his trial, and if perjured witnesses were called against him, he was practically defenceless. The character of the procedure is well illustrated by the argument constantly used by the [1] judges to justify the rule which deprived prisoners of counsel on matters of fact. It was, that in order to convict the prisoner, the proof must be so plain that no counsel could contend against it. In the very commonest and simplest cases there is some truth in this, if it is assumed that the witnesses speak the truth; but if the smallest complication is introduced, if the facts are at all numerous, if the witnesses either lie or conceal the truth, an ordinary man, deeply ignorant of law, and intensely interested in the result of the trial, and excited by it, is in practice utterly helpless if he has no one to advise him. A study of the *State Trials* leads the reader to wonder that any judge should ever have thought it worth while to be openly cruel or unjust to prisoners. His position enabled him, as a rule, to secure whatever verdict he liked, without taking a single irregular step, or speaking a single harsh word. The popular notion about the safeguards provided by trial by jury, if only "the good old laws of England" were observed, were, I think, as fallacious as the popular conception of those

[1] See *e.g.* Coleman's case, 7 *St. Tr.* 14.

imaginary good old laws. No system of procedure ever devised will protect a man against a corrupt judge and false witnesses, any more than the best system of police will protect him against assassination. The safeguards which the experience of centuries has provided in our own days are, I think, sufficient to afford considerable protection to a man who has sense, spirit, and, above all, plenty of money; but I do not think it possible to prevent a good deal of injustice where these conditions fail. In the seventeenth century, rich and powerful men were as ill off as the most ignorant labourer or workman in our own day; indeed, they were much worse off, for the reasons already suggested.

The importance of these remarks will be illustrated by the trials during the next period to which I have to refer.

IV.—1678—1688.

The ten years immediately preceding the Revolution are, perhaps, the most important in the judicial history of England. In them occurred the trials for the Popish Plot, the Meal Tub Plot, and the Rye House Plot, the trials connected with the Duke of Monmouth's rebellion, and the trials which led to the Revolution itself, of which the trial of the seven bishops was by far the most important. The proceedings of the criminal courts have never before or since been of so much general importance, and for the first time we have reports of the cases which appear to have been thoroughly well taken by [1] good shorthand writers. The result is that it is still possible to follow with minute accuracy every word of the proceedings.

Nearly every topic connected with the trials for the Popish Plot has been so fully discussed that it will be unnecessary to say more than a very few words by way of introduction to the subject.

The story of Oates, brought out by degrees as he gained experience of the public passion and credulity, was this:—

[1] The first instance I know of in which a shorthand writer's evidence appears to have been given is in the trial of Sir Patience Ward for perjury in 1683, when Blaney, a shorthand writer, was called to prove the words sworn. He was severely cross-examined by Jeffreys and others.—9 *St. Tr.* 317—320. He was called in many subsequent trials, *e.g.* in Oates's trial for perjury.

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The Catholics had for many years had a plan for introducing Popery into this country, and destroying Protestantism by force. The principal parties to this scheme were the Jesuits in Spain and France. They held a correspondence with Jesuits and others in England, Coleman being one of the chief correspondents. They also held "consults" at various places in order to concert measures for this purpose. One of these was held on the 24th April, 1678, at the "White Horse" tavern. It was there determined that Charles II. should be murdered by Pickering and Groves, or failing that, and failing also "four ruffians procured by Dr. "Fogarty," he was to be poisoned by Sir George Wakeman, the Queen's physician. A great army was also to be raised by some means, and introduced into England to massacre the Protestants; and a number of commissions, signed by "the "General of the Society of Jesus, Joannes Paulus d'Oliva, by "virtue of a brief from the Pope, by whom he was enabled," were brought over to England, and were distributed by Mr. Langhorn, a barrister in the Temple, to a number of distinguished persons, who, upon the success of the scheme, were to receive all the high offices of State. This scheme was known to a number of influential Catholics, who held "consults" on it in different parts of the country.

The following dates are material.

[1] On the 29th September, 1678, Oates made his first discoveries to the Council. [2] The same evening a warrant was issued by the Council to seize Coleman's papers; and they were accordingly seized by Bradley, their officer.

[3] On the 12th October, 1678, Sir Edmundbury Godfrey was murdered.

[4] On the 28th November, 1678, Coleman was tried for high treason, and convicted.

On the 17th December, 1678, Ireland, Pickering, and Grove were tried for treason.

On the 5th February, 1679, Green, Berry, and Hill were tried for the murder of Sir E. Godfrey.

[1] Extract from Burnet, printed in 6 *St. Tr.* 1408.
[2] Evidence of Bradley in Coleman's case, 7 *Ib.* 33.
[3] Trial of Green, Berry, and Hill, for his murder, *Ib.* 189, &c.
[4] *Ib.* 1.

On the 13th June, 1679, Whitehead and four other Jesuits were tried for treason.

On the following day Langhorn was tried for treason.

On the 18th July, 1679, Sir G. Wakeman was tried for treason.

On June 23, 1680, Lord Castlemaine was tried for treason.

Finally, on the 30th November and the following days, 1680, Lord Stafford was tried for treason.

Other trials of minor interest were connected with the subject, but these were the most important. They ranged, as will be seen, over a little more than two years.

It would be superfluous to discuss minutely the value of Oates's statements. No one accustomed to weighing evidence can doubt that he and the subordinate witnesses, Bedloe, Dugdale, Turberville, and Dangerfield, were quite as bad and quite as false as they are usually supposed to have been. Their evidence has every mark of perjury about it. They never would tie themselves down to anything, if they could possibly avoid it. As soon as they were challenged with a lie by being told that witnesses were coming to contradict them, they always shuffled and drew back, and began to forget. Great part of what they said was in itself monstrous and incredible, and as they succeeded in one murder after another they assumed an air of self-complacent arrogance which rouses indignation even after the lapse of two centuries. The cowardice of Scroggs, who allowed such a wretch as Oates to assume an air of authority in the Court of King's Bench, without reminding him that, if his story was true, he was himself a traitor, liar, and hypocrite, who ought not to dare to look honest men in the face, is almost as disgusting as the impudence which brought that cowardice to light. In short, the common judgment on the whole subject appears to me right; but something remains to be said on the light which these transactions throw on the administration of criminal justice both then and now.

That the trials for the Popish Plot resulted in a dreadful series of failures of justice may be taken as admitted. The important questions are, Who or what was to blame for them? How far is it possible to guard against the recurrence of such

CHAP. XI. failures of justice? and To what extent are we secured against them now? In order to answer these questions I will enter a little more fully into the evidence and procedure upon these trials. The general state of affairs is described in a few words, as follows, by [1]Mr. Green:—"The treaty of Nime-"guen not only left France the arbiter of Europe, but it left "Charles the master of a force of 20,000 men levied for the "war he refused to declare, and with nearly a million of "French money in his pocket. His course had roused into "fresh life the old suspicions of his perfidy, and of a secret "plot with Lewis for the ruin of English freedom and "English religion. That there was such a plot we know; "and the hopes of the Catholic party mounted as fast as the "panic of the Protestants."

Such was the state of feeling when Oates told his story. Immediately after it had been told, the papers of Coleman (the secretary of the Duchess of York) were discovered. [2]They consisted of drafts, in Coleman's own writing, of letters sent in 1675 to Père la Chaise (Louis XIV.'s confessor), which Coleman had the incredible folly to preserve or overlook when he destroyed other papers, thus giving every one the impression that these were the least important parts of his correspondence. The letter contained the following passages:—"We have here a mighty work upon our hands, "no less than the conversion of these kingdoms, and by that, "perhaps, the utter subduing of a pestilent heresy which has "domineered over a great part of this northern world a long "time. There were never such hopes of success since the "death of our Queen Mary as now in our days. When God "has given us a prince who has become (may I say a miracle?) "zealous of being the author and instrument of so glorious "a work." . . . . . "That which we rely upon most, "next to God Almighty's providence and the favour of "my master the Duke, is the mighty mind of his most "Christian Majesty." A few days after this, Sir Edmundbury Godfrey was murdered, probably (as Lord Macaulay

[1] *Short History of the English People*, 635.

[2] As to their seizure, see evidence of Bradley, Boatman, and Lloyd, 7 *St. Tr.* 33—35. The letters are printed in full, 35—58. The passage quoted is at p. 56.

thinks) by Papists. It was in this state of things that the [1] trial of Coleman for high treason took place. His conviction was, beyond all question, caused mainly by the letter quoted, and by other letters of a similar character; but partly also by the panic produced by Godfrey's murder, which was about a fortnight after Coleman's arrest, and about six weeks before his trial. The two witnesses, who by this time were universally admitted to be necessary in cases of treason (the views which prevailed in Raleigh's case having become inconsistent with the whole course of the procedure), were found in [2] Oates and Bedloe. Oates said (amongst many other things) that Coleman was, in his hearing, informed of the determination of the Jesuits to kill the King, and that he (Oates) [3] discussed with Coleman the project of bribing Wakeman to poison Charles; that Coleman took copies of certain instructions given by Ashby (a Jesuit) as to murdering the King and raising an insurrection, in order to forward copies all over the country; and he was allowed to say unreproved, [4] "I could give other evidence, but will not, "because of other things which are not fit to be known "yet." [5] Cross-examination in those days was very imperfectly understood; but Oates was obliged to admit that when he first saw Coleman before the Council he did not know him, and it seemed extremely doubtful whether he ever really charged him before the Council with the matters to which he swore at the trial. [6] Bedloe swore to a variety of treasonable speeches of Coleman's, and to having himself carried letters, which he said were treasonable, from Coleman to Père la Chaise. Coleman's defence was feeble in the extreme, as was the case with most of the prisoners. He said that Oates and Bedloe were great liars. He also said that, as Oates would not fix himself to particular days, he would not contradict him by proving an *alibi*. He apologised for his letters. He began in a feeble way to make some remarks on the improbabilities of the charge; on which Scroggs rudely interrupted him:—[7] "What a kind and way of talking is

[1] 7 *St. Tr.* 1—78.
[2] Oates's evidence, p. 18; Bedloe's, p. 30. They were frequently recalled.
[3] 7 *St. Tr.* 21. [4] *Ib.* 21. [5] *Ib.* 25. [6] *Ib.* 31—33. [7] *Ib.* 60.

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The [1] trial of Ireland, Pickering, and Grove took place on the 17th December. They were the persons who were said to have undertaken to murder Charles II. The evidence against them was that of Oates and Bedloe, wholly uncorroborated by any other witnesses whatever. They repeated what they had said before, fixing the prisoners with the scheme of murdering Charles. Bedloe [2] swore that there was a meeting, at which Ireland was present, "at the end of "August or beginning of September," to consult as to the assassination; but, guessing that he was to be contradicted, he refused to pledge himself as to the time, beyond saying that it was "in August." Ireland had probably heard that something to this effect had been stated at Coleman's trial, and had done what he could to provide witnesses to show that through the whole of August he was in Staffordshire. [3] He did call one or two such witnesses, but he said that his imprisonment had been so short that he could send for no one; and on calling his first witness he observed, "It is a "hundred to one if he be here, for I have not been permitted "so much as to send a scrap of paper." All the prisoners were convicted and executed.

The next of the trials was [4] that of Green, Berry, and Hill, for the murder of Godfrey. This was a very curious trial. The principal witness was Prance, who described in minute detail how the prisoners enticed Godfrey into a yard adjoining Somerset House (then the palace of Queen Catharine); how he was murdered there, and how his body was concealed, first in a neighbour's house, and afterwards in Somerset House itself, until it was carried into the fields where it was afterwards found. [5] According to his own account, Prance was consulted before the murder, was present

[1] 7 *St. Tr.* 79—143. [2] *Ib.* 109.

[3] *Ib.* 121, &c. On Oates's second trial for perjury in 1685, Ireland's absence from London through August and part of September was proved by a great number of witnesses, who traced all his movements from day to day, giving, by the way, a singularly vivid and authentic account of the life of country gentlemen in the Long Vacation in 1678. [4] 7 *St. Tr.* 159.

[5] *Ib.* 169. As to his recantation, see pp. 176, 177, 209.

at the completion of the murder, though not at the whole of it, and helped to conceal the body. Prance, before giving his evidence, retracted and reasserted it more than once. In some circumstances of his story he was confirmed by independent witnesses. In one very important one, as to the temporary disposal of the body, he was contradicted. One of the persons accused gave somewhat confused evidence of an *alibi*. [1] Bedloe swore that he had been a party to a conspiracy of Jesuits to murder Godfrey, and that after the murder he saw the body dead in Somerset House. Upon two rather important collateral points Prance was corroborated. He said that Green, one of the prisoners, inquired for Godfrey at Godfrey's house, and this was corroborated by [2] Godfrey's servant; and he also gave [3] an account of a meeting he had at Bow with certain priests and two of the prisoners, which was [4] to some extent corroborated by witnesses and by the admissions of the prisoners when questioned. They were all convicted and executed.

The trial of the five Jesuits (Whitehead, the Provincial of the Jesuits in England, Harcourt, Fenwick, Gavan, and Turner) on the 13th June, 1679, and that of Langhorn, the barrister, on the following day, may be noticed together, as much the same facts were proved by the same witnesses. The witnesses in each case were Oates, Dugdale, and Bedloe. The substance of their evidence was that the Jesuits had been guilty of the treasonable conspiracy sworn to in the earlier cases, and that Langhorn was also a party to it, acting as a sort of registrar of their resolutions, and in particular receiving and distributing a number of commissions issued by the General of the Jesuits to a variety of persons of distinction in England.

In each case the witnesses were contradicted in several particulars. The principal contradiction was that, whereas Oates swore that he was at a "consult" of the Jesuits at the "White Horse" tavern on the 24th April, 1678, he was in truth on that day, and for a long time before and afterwards, at St. Omers. [5] As many as sixteen witnesses were called on

[1] 7 *St. Tr.* 179. [2] Elizabeth Curtis, *ib.* 186.
[3] *Ib.* 174, 175. [4] *Ib.* 187—191. [5] *Ib.* 359—379.

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this point; and there were some other contradictions quite as circumstantial, and nearly as important. The witnesses were faintly contradicted by [1] some witnesses who spoke of having seen Oates in London about that time, but much of their evidence was hearsay and uncertain. In each case the prisoners were convicted and executed. [2] Oates was afterwards (in 1685) convicted of perjury on much the same evidence. It is curious to contrast the manner in which Jeffreys spoke of his evidence on different occasions. As Recorder of London, he sentenced the five Jesuits in 1679. He then said:—[3] "Your several crimes have been so fully proved against "you, that truly I think no person that stands by can be in "any doubt of the guilt: nor is there the least room for the "most scrupulous man to doubt of the credibility of the "witnesses that have been examined against you; and sure I "am you have been fully heard, and stand fairly convicted "of those crimes you have been indicted for."

In 1685, as Lord Chief Justice, he ended his summing-up in Oates's trial for perjury thus:—[4] "And sure I am if you "think these witnesses swear true, as I cannot see any colour "of objection, there does not remain the least doubt but that "Oates is the blackest and most perjured villain that ever "appeared upon the face of the earth."

[5] The trial of Sir George Wakeman, the Queen's physician, and three other persons, Marshal, Rumney, and Corker, took place on the 18th July, 1679. They were charged with treason in taking part in the plot. Wakeman was to have poisoned the King; Marshal and Rumney were to have paid £6,000 towards the purpose of the plot; and Corker was to have assisted. On this occasion [6] Oates swore that he saw a letter from Wakeman to Ashby, a Jesuit, most of which was about "how he should order himself before he went to "and at the Bath;" but besides this, "in his letter Sir George "Wakeman did write that the Queen would assist him to "poison the King." Oates said that a day or two afterwards he saw Wakeman write another letter, which he perceived was in the same hand as the treasonable letter. He also

[1] 7 *St. Tr.* 396, &c. [2] 10 *Ib.* 1079. [3] 7 *Ib.* 488.
[4] 10 *Ib.* 1226. [5] 7 *Ib.* 591. [6] *Ib.* 619—621.

swore that being at Somerset House on treasonable business with several Jesuits, he stayed in an outer room whilst they went to see the Queen in an inner room, and that he heard "a woman's voice say that she would assist them in the pro-"pagation of the Catholic religion with her estate, and that "she would not endure these violations of her bed any longer. "and that she would assist Sir George Wakeman in the poisoning "of the King." Fortunately for himself, Sir George Wakeman had not written the letter for Ashby himself, but had dictated it to his servant, [1] Hunt. Ashby took it (apparently under the name of Thimbleby) to Chapman, an apothecary at Bath, who read it and tore off and kept the prescription. Hunt proved that the prescription was in his handwriting; and [2] Chapman proved that the body of the letter was in the same hand as the prescription, that it said nothing about murdering the King, and that so far from prescribing a milk diet, as Oates said it did, it prescribed a different kind of treatment; a milk diet he added would have been inconsistent with Bath water. [3] It was also proved that when Oates was before the Privy Council he had said upon hearsay that Wakeman had had a bribe to poison the King. Wakeman had denied it, and Oates had been asked whether he knew any more against Sir G. Wakeman; to which he replied, "God forbid that I should say anything against Sir G. "Wakeman, for I know nothing more against him." There was other evidence in the case which I need not notice. The prisoners were all acquitted.

[4] Lord Castlemaine (who, being an Irish peer, was tried in England as a commoner in the King's Bench) was tried June 23, 1680. Oates was the principal witness against him, and swore he had seen letters in the prisoner's handwriting about "the design," which, said Oates, meant the treasonable design he had deposed to on other occasions. Oates was to some extent corroborated by Dangerfield, a person if possible more infamous than himself. Dangerfield's competence as a witness was objected to on the ground of his infamy, he having been convicted of felony and burnt in the hand; but as he had been pardoned, he was admitted as a witness. The records,

[1] 7 *St. Tr.* 648. [2] *Ib.* 645—647. [3] *Ib.* 651. [4] *Ib.* 1067.

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however, were admitted against his credit, and [1] it appeared that he had been burnt in the hand for felony, pilloried as a cheat, and convicted on three indictments for coinage offences. A record was also produced which showed that Oates had accused a man at Dover of an odious offence, and that the prisoner had been acquitted. He was contradicted on another point besides. This so much shook the credit of the witnesses that Lord Castlemaine [2] was acquitted.

The last of the trials for the Popish Plot which I shall mention was that of [3] Lord Stafford before the House of Lords. It was much the longest (it lasted five days) and also much the fullest of all. The whole story of the plot was gone into at immense length. Stafford's participation in it rested principally on the evidence of one Turberville. He and the other witnesses were contradicted. The witnesses who contradicted them were contradicted, and the contradictions even went one step further. Thus Dugdale swore against Lord Stafford. Many witnesses were called by Lord Stafford to prove that Dugdale was unworthy of credit. Witnesses were called by the prosecution to set up his character, and especially Southall, a coroner and magistrate who received his evidence originally. Lastly, Lord Ferrers was called by Lord Stafford to testify that Southall "is counted a very pernicious man "against the Government." The prisoner was ultimately convicted by fifty-five votes against thirty-one. He was afterwards executed.

The result is that in two years, and in connection with one transaction, six memorable failures of justice, involving the sacrifice of no less than fourteen innocent lives, occurred in trials held before the highest courts of judicature under a form of procedure closely resembling that which is still in force amongst us. It is a matter of great importance to consider how far this is to be ascribed to individuals, how far it was due to defects inherent in the system under which it occurred, and how far the defects in the system have been remedied.

[1] 7 *St. Tr.* 1102.

[2] He was proceeded against for treason in 1689, in going as ambassador to Rome in James II.'s reign, 12 *St. Tr.* 897.

[3] 7 *Ib.* 1294.

The first point to be referred to is the influence of popular passion over the administration of justice. The effect of this may be traced more or less in all the trials for the Popish Plot, though it is fair to say in different degrees. That there actually was a Popish plot, in the sense of a conspiracy, of which the King was the principal member, to bring in the Roman Catholic religion, is undoubtedly true; indeed it is probable that, if the real relations between Louis XIV. and Charles II. had been known then as they are known now, the Revolution would have been antedated by ten years. It is, I think, highly probable that a certain number of desperadoes of infamous character did connect themselves with the Catholic party, and were in the habit of indulging in wild schemes and wild talk about the reestablishment of their religion. Worse men than Oates, Bedloe, Dugdale, Dangerfield, and Turberville never lived in the world; but all of them were more or less conversant with the Catholics, and Oates did pass a considerable time amongst the Jesuits both in Spain and in France. Lord Macaulay's reasons for believing that Godfrey was murdered by men of this stamp appear to me unanswerable. It ought, moreover, to be remembered that in April, 1679, [1] a desperate attempt to murder Arnold, a Monmouthshire justice who had made himself conspicuous by his anti-Popish zeal, was actually made in London by one Giles, and all but succeeded. The impression left on my mind by the trial of Green, Berry, and Hill certainly is that Prance, though an infamous liar (he afterwards pleaded guilty to perjury on this trial), was a party to the murder, though he put it upon innocent persons. I should think it not at all improbable that Oates himself was the murderer or the contriver of the murder. This would account for Prance's retractations, and for the extremely minute, coherent account he gave of the transaction. His knowledge of the circumstances, as to which he was corroborated, showed that he was connected with and knew the movements of priests and others whom, in the then state of public feeling, he could accuse with plausibility. In these circumstances it is not surprising that a panic should have been produced which

[1] See the trial of Giles, 7 *St. Tr.* 1129.

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predisposed juries to believe any revelations which might be made by pretended accomplices.

These considerations fully explain, and to a considerable extent palliate, the conduct of the jurors who convicted Coleman and the persons accused of the murder of Godfrey; and perhaps the same may be said of the jurors who tried Grove, Ireland, and Pickering, though this is more doubtful, as their guilt depended entirely on the evidence of accomplices as to words spoken. For the jurors who convicted the five Jesuits and Langhorn, in the face of the witnesses who contradicted Oates on the principal point in his evidence, it is difficult to admit any excuse whatever; for to say that their verdicts represented the furious bigotry which led the juries of that time to reject the evidence of all Roman Catholics is to condemn them. The acquittals of Wakeman and Lord Castlemaine were creditable as far as they went; but, in my opinion, the worst verdict given by any jury was a venial error in comparison with the injustice of the fifty-one peers who convicted Lord Stafford. The first panic had long subsided at the time of the trial. After his evidence on Wakeman's and Lord Castlemaine's trials, Oates ought never to have been believed again. The only witnesses who pretended to fix Lord Stafford with treason were, according to their own evidence (which in many points was contradicted), accomplices swearing to words spoken. To give a single illustration, [1] Dugdale swore that on the 20th or 21st September, 1678, Lord Stafford offered him £500 to kill the King. Lord Stafford called a witness who brought Dugdale to him on the occasion in question, explained every circumstance connected with the interview, and declared that he was present at the whole of it, and that nothing of the sort was said; and this witness was materially corroborated as to part of his evidence by another. The general accuracy of this evidence was not disputed, but it was suggested as possible that Lord Stafford and Dugdale might have been alone together for a moment, in which the offer might have been made. It is humiliating to think that English noblemen should have convicted one of their own number of high treason because a man who, by his

[1] 7 *St. Tr.* 1343—1346, and see 1386—1391 and 1500.

own account, was a traitor and a murderer in intention, charged him with having taken advantage of their being alone together for a moment to say, "I will give you £500 to kill the King."

Passing from the jurors to the judges and counsel, it must be admitted, in the first place, that Scroggs, who presided at all the trials, was guilty of some misbehaviour which compares unfavourably even with the brutality of Jeffreys. His summings-up in the cases of [1] Ireland, Pickering, and Groves, and in the trial of the five Jesuits, can be described only as infamous. The first is full of attacks on the Roman Catholics, disgusting in the mouth of a judge on a capital trial, and the second is such a speech for the prosecution as no counsel in the present day would make. Besides this, he continually checked and sneered at the prisoners when on their trial. I must, however, say in justice to Scroggs that, disgusting as his manner was, I am not prepared to say that he strained the law as it then stood. What strikes a modern lawyer as the most questionable thing done by him occurred on the trial of Ireland, Pickering, and Grove. Two leading Jesuits, Whitehead and Fenwick, were indicted with them and were given in charge to the jury and tried. [2] At the end of the case it appeared that there was only one witness against them. Upon this Scroggs discharged the jury of them and recommitted them; and they were afterwards tried and executed for the same treason. Whitehead urged that he had been given in charge once, and ought not to be tried again; but the whole Court held, without hesitation, that there was nothing in the objection. The whole law upon this subject was elaborately considered a few years ago, [3] in R. *v.*

[1] 7 *St. Tr.* 131—134 and 411—415. Here is a specimen of Scroggs's attacks on the Roman Catholics:—"This is a religion that quite unhinges all "piety, all morality, and all conversation, and to be abominated by all mankind. They eat their God, they kill their King, and saint the murderer."

[2] 7 *St. Tr.* 119, and see the subsequent proceedings at p. 315.

[3] L. R. 1 Q. B. 289. In 2 Hale, *P. C.* p. 295, the following passage occurs; after noticing some ancient authorities against the discharge of the jury, he says: "But yet the contrary course hath for a long time prevailed at "Newgate. Nothing is more ordinary than after the jury is sworn and "charged with a prisoner and the evidence given, yet if it appears to the "Court that some of the evidence is kept back, or taken off, or that there "may be a fuller discovery, and the offence notorious, as murder or burglary,

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Winsor, when it appeared, from many authorities, that the practice had fluctuated.

It should also be observed that, whatever may have been his motives, Scroggs did turn against Oates and Bedloe, and did powerfully help in their final exposure and discomfiture by the acquittal of Sir George Wakeman and Lord Castlemaine, to each of which results he contributed vigorously. This is usually attributed to subserviency to Charles II., but it was conduct good in itself, and required courage. [1] He was, indeed, proceeded against both before the Privy Council and in Parliament on this subject, and ran a considerable risk of impeachment.

Some points connected with the conduct of the judges in these cases deserve more notice than, so far as I am aware, they have received. Two of the trials connected with the plot were conducted with conspicuous fairness and decency. One of them was the trial of Giles for the attempt to murder Arnold, the Monmouthshire magistrate—an act extremely like the murder of Sir E. Godfrey, except in the point that it did not succeed. In this trial the presiding judge was Jeffreys, who sat as Recorder of London. The other was the trial of Lord Stafford. I do not think that even in our own times a prisoner could be treated with greater tenderness, consideration, and courtesy. The presiding judge was [2] Lord Nottingham, who acted as Lord High Steward on the occasion; yet this most courteous and humane proceeding ended in what I think must be regarded as by far the most inexcusable of all the verdicts given in connection with the Popish Plot.

I do not think much censure attaches to the counsel for the Crown for their conduct in these trials. They were undoubtedly zealous, and they did not abstain from the popular topics as to Roman Catholics, Jesuits, the doctrine of equivocation, and the like, but I know of no behaviour on the part

"and that the evidence, though not sufficient to convict the prisoner, yet "gives the Court a great and strong suspicion of his guilt, the Court may "discharge the jury of the prisoner, and remit him to the gaol for further "evidence; and accordingly it has been practised in most circuits of England, "for otherwise many notorious murders and burglaries may pass unpunished, "by the acquittal of a person probably guilty, where the full evidence is not "searched out or given."

[1] 8 *St. Tr.* 163.

[2] He was Lord Chancellor at the time, and his title was Lord Finch.

of any one of them which can be fairly compared to that of Coke on the trial of Raleigh.

One great leading cause of the result of these trials is, I think, to be found in the defects of the system of criminal procedure which was then in full vigour, and which, even to this day, is in force, theoretically though not practically, to a greater extent than is generally supposed to be the case. The prisoner was looked upon from first to last in a totally different light from that in which we regard an accused person. In these days, when a man is to be tried, the jury are told that it is their first duty to regard him as being innocent till he is proved to be guilty, and that the proof of his guilt must be given step by step by the prosecution, till no reasonable doubt can remain upon the subject. This sentiment is both modern and, in my opinion, out of harmony with the original law of the country. No one can be brought to trial till a grand jury has upon oath pronounced him guilty, as the form of every indictment shows. "The jurors "for our Lady the Queen, upon their oaths, present that A, "wilfully, feloniously, and of his malice aforethought, did kill "and murder B." Why should a man be presumed to be innocent when at least twelve men have positively sworn to his guilt? In former days, as I have already shown, the presentment of a grand jury went a long way towards a conviction, and a man who came before a petty jury under that prejudice was by no means in the same position as a man against whose innocence nothing at all was known. In nearly every one of the trials for the Popish Plot, and, indeed, in all the trials of that time, the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King, whose safety is far more important to the public than the life of such a questionable person as the prisoner. A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.

The following were the essential points in the proceedings

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which establish this view. First, the prisoner as soon as he was committed for trial might be, and generally was, kept in close confinement till the day of his trial. He had no means of knowing what evidence had been given against him. He was not allowed as a matter of right, but only as an occasional, exceptional favour, to have either counsel or solicitors to advise him as to his defence, or to see his witnesses and put their evidence in order. When he came into court he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him. Any one who has ever acted as an advocate knows what it is to be called upon to defend a man at a moment's notice. Under such circumstances, a modern barrister has usually at least a copy of the depositions. To defend a prisoner efficiently is a task which makes considerable demands on the readiness, presence of mind, and facility of comprehension of a man trained to possess and use those faculties. That an uneducated man, whose life is at stake, and who has no warning of what is to be said against him, should do himself justice on such an occasion is a moral impossibility. But this was what was required of every person tried for high treason in the seventeenth century. None of the prisoners tried for the Popish Plot, except Lord Stafford and Sir George Wakeman, defended themselves even moderately well. Langhorn, who was a barrister, lost his head so completely that he did not cross-examine Oates as to the arrangement of his chambers, which was said to be such that Oates could not possibly have heard and seen what he said he heard and saw there—a circumstance on which Scroggs afterwards relied as a justification of his conduct in disbelieving Oates. When an experienced lawyer defended himself so feebly, it is not surprising that inexperienced persons should have been utterly helpless.

That the prisoner's witnesses were not permitted to be sworn was even in those days considered as a hardship, and the jury were told in all or most of the trials to guard against attaching too much weight to it. The advantage which that state of the law gave to fraudulent defences, which might be set up without any risk of a prosecution for perjury, seems to have been stupidly overlooked. It was also a common

topic of complaint that prisoners had no copy of the indictment against them, or of the pannel of jurors; but I think the importance of these matters was overrated. A copy of the indictment would only have enabled prisoners to make little quibbles, which the judges would have overruled, and would have been right in overruling; and a copy of the pannel is of no real use to a prisoner. If the sheriff wishes to pack a jury, he must be very clumsy if he does not provide a sufficient number of partial jurors, free from any legal objection, to allow for thirty-five peremptory challenges. If, on the other hand, he is fair, one juryman is practically as good as another. The real grievance was keeping the prisoner in the dark as to the evidence against him. Theoretically this grievance still exists, though practically it has long since been removed. As the law still stands, a bill might be sent before a grand jury without notice to the person accused. The bill being found, the person accused might be arrested merely on proof of his identity; he would not be taken before a magistrate, and until he was put in the dock to take his trial he would have no legal right to know who were the witnesses against him, or what they had said, or even to have a copy of the indictment. CHAP. XI.

These defects in the system of trial in the seventeenth century, I own, strike me as being almost less important than the utter absence which the trials show of any conception of the true nature of judicial evidence on the part of the judges, the counsel, and the prisoners. The subject is even now imperfectly understood, but at that time the study of the subject had not begun. I do not think any writer of the seventeenth century has anything of importance to say about it. Hale tells a trifling anecdote or two about mistaken convictions, the result of which is that in trials for murder the body of the person murdered ought to be proved to have been seen after death; but he obviously knew nothing at all of the theory of the subject. It is stated in various places in the *State Trials* that people ought not to be convicted on hearsay, and it was an established rule, regarded as highly important, that there must be two witnesses in treason; but, subject to these small rules, the

CHAP. XI. opinion of the time seems to have been that if a man came and swore to anything whatever, he ought to be believed unless he was directly contradicted. The greater part of the evidence given in the trials for the Popish Plot consists of oaths by Oates, Bedloe, and others, that they heard this man or that say he would kill the King, or that they read letters to the same effect, which, upon mentally comparing them with letters written by the accused, they perceived to be in the same handwriting.

The remarks which in the present day would occur upon such evidence, and which seem to us almost too obvious to be made, are that it would be wholly unsafe to act upon it, even if it were given by witnesses who were not accomplices. To convict any man of treason simply because two persons swore that on two separate occasions he made separate treasonable overtures to them, there being no corroboration whatever of their statement, would put every honest man's life at the mercy of every pair of villains in the country. If the evidence were given by accomplices, the jury would be told to pay no attention to it unless it was corroborated by independent evidence; but this does not seem to have occurred to the judges and juries of the seventeenth century. The judges continually say that no doubt accomplices are bad men, but that if their evidence is not taken crimes will not be discovered; and the juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye- or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. This is strongly illustrated by the circumstance that the objections made by the accused persons to the evidence against them almost always took the form of objections addressed to the court to the competency of the witnesses and not of objections to their credit addressed to the jury. If the court regarded a man as "a good" (*i.e.* a competent) "witness," the jury seem to have believed him as a matter of course, unless he was contradicted, though there are a few exceptions. [1] In Lord Castlemaine's case, for instance, Dangerfield's evidence was left to the jury, though he had been previously convicted

[1] 7 *St. Tr.* 1110.

of "six great enormous crimes." They were, however, told they need not believe him, and they did not.

The most remarkable illustration of these remarks is to be found in the trial of the [1] five Jesuits. Fenwick objected that the evidence against him was entirely composed of accounts of the contents of letters not produced. "All the evidence that is "given comes but to this: there is but saying and swearing. "I defy them to give one probable reason to satisfy any "reasonable man's judgment how this can be." Upon this Scroggs observed: "Mr. Fenwick says to all this, here "is nothing against us but talking and swearing; but for "that he hath been told (if it were possible for him to learn) "that all testimony is but talking and swearing, for all "things, all men's lives and fortunes, are determined by an "oath, and an oath is by talking, by kissing the book and "calling God to witness to the truth of what is said."

I think that Fenwick was right as to what the law, or rather the practice of juries, ought to be, and that Scroggs was right as to what it actually was and, to a certain extent, still is. It is true that juries do attach extraordinary importance to the dead weight of an oath. It is also true, so at least I think, that a consideration of the degree to which circumstances corroborate each other, and of the intrinsic probability of the matter sworn to, is a far better test of truth than any oath can possibly be, and I should always feel great reluctance to convict a prisoner on the uncorroborated testimony of a single witness to words spoken, or to any other isolated fact which, having occurred, leaves behind it no definite trace of its occurrence.

The principle that the uncorroborated evidence of an accomplice is not to be acted upon, which is now well established, though it cannot be said to have the force of a positive rule of law, seems to have been unknown, and was at all events systematically disregarded and even disavowed in the seventeenth century. If observed, it would have prevented every one of the unjust convictions referred to.

The inference suggested by studying the trials for the

[1] Whitbread, Harcourt, Fenwick, Gavan, and Turner, 7 *St. Tr.* 311, 358, 411.

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In some matters to which the public would perhaps attach more importance than professional persons, the rules of evidence in the seventeenth century were administered in a way which might be regarded as more favourable to the prisoner than our modern practice. Evidence was not confined to the issue with anything like the modern strictness. For instance, prisoners were allowed to prove almost anything by way of discrediting a hostile witness. On the other hand, cross-examination to credit was practically unknown, though the judges appear to have varied and to have been at times partial in their practice in relation to this matter. When Oates was tried for perjury, he was stopped as soon as he asked a witness any question tending "to ensnare him." In our times this practice has been reversed. A witness may be cross-examined to his credit to any extent, but the rule is that his answer must be taken, and that if he swears falsely the remedy is to indict him for perjury. This, however, was not established till comparatively modern times.

I do not think that the power or danger of perjury has been by any means removed since Oates's time. I am not sure that it has been as much diminished as we are accustomed to believe. Cross-examination will no doubt defeat it in some cases. If Oates and the others had been cross-examined with what would now be considered even a moderate degree of skill, they could scarcely have been believed, and they must either have exposed themselves to contradiction or have forfeited all credit by forgetting everything upon which they could be contradicted; but practice and time are essential to the efficiency of cross-examination, and without proper instructions to the cross-examiner it is to the last degree dangerous to a prisoner's interests. In the seventeenth century the judges seem to have done most of the cross-examination; the prisoner could have no instructions,[1] and it was a rule that trials must be finished at a single sitting.

It must, however, be admitted that under particular circumstances no really effectual protection against perjury ever has been or ever can be devised. If all the circumstances except one are consistent either with guilt or innocence, and that one circumstance depends on the testimony of a single alleged eye- or ear-witness to an act done or words spoken, of which no assignable trace remains, it is impossible to prevent or detect perjury. [2] Suppose, for instance, there is a violent riot, and many persons are present merely as innocent bystanders, how

[1] Lord Stafford's trial before the House of Lords lasted for five days; but in Lord Delamere's trial before Jeffreys, as Lord High Steward, Jeffreys refused to adjourn for the night, saying that he greatly doubted whether or not he had power to do so. The right of the court to adjourn in cases of treason or felony was not fully established till the treason trials of 1794. In Scotland in 1765, in the case of Nairne and Ogilvie, the court sat forty-three hours (19 *St. Tr.* 1326), never rising. An objection was taken to the conviction on the ground that the jury rose for about half an hour for refreshment; this, however, was overruled.

[2] In the case of R. *v.* Lyons and eight others, tried at the Old Bailey, in February, 1863, for piracy and murder, the evidence showed that the prisoners, who were sailors on the ship *Flowery Land*, mutinied, murdered the captain and mate, scuttled the ship, and went off in a boat. When the captain was killed, the carpenter, Andersen, a Norwegian, was knocked down with a handspike. He swore that one of the prisoners, Marcelino, afterwards said to him, "Me strike you." This was the only evidence of Marcelino's connection with the crime. He was nevertheless convicted; but he afterwards received a free pardon, as it was thought that a Norwegian's impression of what a Spaniard said in broken English was not evidence sufficiently weighty to justify a capital conviction.—59 *C. C. C. Sessions Papers*, 275, 286.

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The observations which arose upon the trial for the Popish plot apply to the trials which took place between 1680 and 1688. All or most of them were conducted in the same way and upon the same principles of procedure, but they were in themselves so memorable that I will make a few observations upon some of the most important of them.

The first of the trials to be noticed is [1] that of Fitzharris, who was tried in 1681 for treason, in publishing a pamphlet accusing Charles II. and his brother of [2] "confederacy with "the Pope and the French to introduce Popery and arbitrary "government," and calling on the nation to "up all as one "man, look to your own defence e'er it be too late," with much other violent language to the same effect. He pleaded, first, that he was impeached for the same offence, and that the impeachment was still pending; but this plea was [3] overruled on argument, the Court giving no reasons. This proceeding was severely and, I think, justly criticised. He was then tried, convicted, and executed. About the facts there was no doubt. Fitzharris had made a proposal to one Everard to write the pamphlet. Everard invited Fitzharris to his chambers in Gray's Inn, to give him instructions, and concealed people there to hear what passed. Fitzharris gave instructions at one meeting and corrected the draft at a second. The object with which the pamphlet was written was, according to Everard, to stir up a civil war in England, which would enable Louis XIV. first to gain Flanders, [4] "and "then we shall make no bones to gain England too." Fitzharris's defence in substance was that the pamphlet was written by the orders of Charles II.; that he meant to send it to the leading men of the exclusionist party, and to have it found in their possession as evidence against them to be used on occasion. [5] This seems, on the whole, to have been what he meant to suggest by a number of witnesses whom he called,

[1] 8 *St. Tr.* 243. [2] *Ib.* 333, and see 357. [3] *Ib.* 326. [4] *Ib.* 345.
[5] See some remarks by Sir J. Hawles, pp. 439—440; and see 378 for Fitzharris's defence.

though he put the matter in rather a different way in his defence, alleging that he drew Everard on to write the pamphlet in order to give information against him. Fitzharris was executed. Hawles observes that both Whigs and Tories "agreed he deserved to be hanged. The first thought it for "their advantage to save him if he would confess; but the "last thought it was fit to hang him for fear he would confess." The question in respect of which his confession was hoped and feared was apparently the degree in which the King and other distinguished persons had really been his accomplices. The trial is confusing, as Fitzharris only hinted at his defence, and was obviously weak and timid. One point worth noticing in the case is the manner in which he was hampered in his defence. The Attorney-General (Sir R. Sawyer) strenuously objected to his [1] solicitor assisting him in any way, and indeed to his wife being by him. He had a copy of the pannel, with crosses to show whom he was to challenge, which gave special offence. Upon this [2] said Jeffreys, "God forbid but his "memory should be helped in matters of fact, as is usual in "these cases; but no instructions ought to be given him here." It was also remarked that Mr. Fitzharris "had a perfect formal "brief," and he was compelled after much discussion, as a sort of compromise, to give the papers to his wife, who, however, was allowed to stand by him.

[3] The trial of Stephen Colledge is next to be noticed. To do justice to it would require more space than I can afford. He was known as "the Protestant joiner," and was accused of high treason by Dugdale and others, by way of a counter-blast to the Popish plot. It was alleged that he had

[1] A solicitor occupied a low position in those days. "It is not the duty of "a solicitor to bring papers; he was only appointed by the court to run of "errands; he was not to advise or furnish with matter of defence" (p. 353), said the Solicitor-General. The solicitor was inferior to the attorney, who, as his name implied, represented his client. It is odd that "solicitor" should have been regarded of late years as the more honourable title.

[2] 8 *St. Tr.* 332. "*Jeffreys:* I see it is a perfect formal brief. *Mrs. F.:* Must "he have nothing to help himself? *F.:* In short, the King's counsel would take "my life away without letting me make my defence. *A.-G.:* I desire not to "take any papers from him if they be such as are permitted by law. *S.-G.:* "My lord, his innocency must make his defence, and nothing else. *Jeffreys:* "My lord, we are in your lordship's judgment, whether you will allow these "papers. *L. C. J.:* Let us see the papers. *F.:* My lord, I will deliver it to "my wife again. *L. C. J.:* Let it be so."

[3] 8 *St. Tr.* 549.

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proposed to Dugdale to murder the King, but the London grand jury threw out the bill against him. Hereupon the witnesses swore that at the time of the Oxford Parliament he said at Oxford treasonable words in pursuance of his design. The bill was found by the grand jury of Oxfordshire, and after a long and memorable trial Colledge was convicted before Chief Justice North, afterwards Lord Keeper. On his way to the trial he was taken into a house and deprived of all the papers provided for his defence, although he had been allowed the use of pen, ink, and paper, and the assistance of counsel and solicitor, and to see his friends, by the express orders of the King in council. The papers seem to have been examined by the King's counsel, who were enabled to manage their case accordingly, not calling certain witnesses whom Colledge could have contradicted or cross-examined. This was one of the most wholly inexcusable transactions that ever occurred in an English court, and leaves a stain on the Lord Keeper's character which the many amiable points in it cannot efface. It must be owned, however, that it carried the principle that counsel were not to be allowed to a prisoner to its logical result. Many of the papers were returned to Colledge; but one, which the judges considered [1] "a most seditious libellous speech "to spit venom upon the Government in the face of the "country," and also instructions as to examining the witnesses, were kept from him, as the Chief Justice observed that to let him have them would be "to give you counsel "in an indirect way."

The vigour with which Colledge under these difficulties asserted his rights and defended himself through a sitting of twelve or thirteen hours was admirable. The evidence was much the same as in the Popish plot cases. Dugdale and others swore that he made treasonable proposals to them, and [2] other witnesses proved that he had spoken unfavourably of Charles II., and justified the Long Parliament of 1640—language which it was absurd to describe as treasonable. A mass of contradictory and defamatory evidence was brought against the witnesses for the prosecu-

[1] 8 *St. Tr.* 585. [2] *Ib.* 616.

tion, and [1] Oates in particular contradicted Dugdale, getting into a shameful altercation with him, in which Dugdale committed a perjury which was afterwards detected, and which prevented his reappearance as a witness. The trial became a fierce dispute, made up of contradiction upon contradiction, till every one was tired out. The counsel for the Crown, however, and particularly the Solicitor-General (Finch) and Jeffreys, made elaborate speeches, having the last word. [2] The Chief Justice summed up very shortly, saying, "For me to "speak out of memory, I had rather you should recur to "your own memories and your own notes," showing clearly that he had taken no notes. Colledge, indeed, pressed him to refer to his notes, which he refused to do. Colledge was convicted and executed.

The trial of Colledge may, I think, be put on a level with that of Lord Stafford in regard of the iniquity of the result. The behaviour of the judges, though not brutal, was singularly unfair to the prisoner and weak as against the counsel for the Crown.

The long list of political prosecutions which occurred at this time is varied by a memorable trial for a private crime, namely, the [3] trial of Count Coningsmark for the murder of Mr. Thynne. Thynne was a very rich country gentleman, then lately married to Lady Ogle. He was shot dead in his coach in Pall Mall by Boroski, a Pole, acting under the orders and in the company of Lieutenant Stein and Captain Vratz, two German officers; all three being, so to speak, retainers of Count Coningsmark. The substantial question in the case was whether the Count was or was not an accessory before the fact, as there was no question as to the guilt of the other three. Charles was known to be favourably disposed to the Count, and he was accordingly tried with conspicuous humanity and favour. Perhaps the most remarkable

[1] P. 641. Oates's evidence in this trial was curious in many ways. He deposed for one thing that he went to the Crown Tavern with Colledge, when, "We did, to divert ourselves till dinner came up, enter into a philosophical "discourse with one Mr. Savage." . . . "It was concerning the existence of "God, whether that could be proved by natural demonstration, and whether "or no the soul was immortal." He said that on that occasion no treason was talked, though one Smith swore the opposite.—P. 646—647.

[2] 712—714.

[3] 9 *St. Tr.* 1.

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circumstance in the case is that the Lord Chief Justice (Pemberton), obviously as a favour to the prisoner, asked him [1] a long series of questions through the interpreter, drawing his attention to all the suspicious circumstances in the case, and asking how he explained them. The counsel complained that the interpreter acted as an advocate. The Court said that the case was an extraordinary one, as none of the prisoners could speak English. The Count was acquitted, it has usually been said unfairly. I have little doubt that he was guilty; but I am not quite sure that it was positively proved that his friends and their servant did not go beyond their instructions.

Passing over with a bare reference the various angry and obviously partisan trials [2] connected with the election of the sheriffs of London, in 1682, I pass to the celebrated trials of Lord William Russell and Algernon Sidney for treason. [3] That both of these eminent persons had been engaged in a conspiracy for an insurrection there seems to be little doubt. There is no evidence that they were privy to the Rye House plot—Rumbold's scheme for killing Charles and James on their way from Newmarket; but they scarcely denied their participation in a conspiracy to levy war against Charles II. The witnesses against them were accomplices, namely, Lord Howard and, in Lord William Russell's case, Ramsey, who, as Hallam remarks, was an unwilling witness. Lord Howard was certainly swearing to save his own life, and he was permitted, after the manner which prevailed for many years after the trial, to tell his story in his own way, the result of which was that he made a long and elaborate speech. [4] It was proved by several witnesses that Lord Howard had on other occasions denied that Lord W. Russell was concerned in the plot. [5] Howard's explanation was that

[1] 9 *St. Tr.* 60—64.

[2] Pilkington and others for a riot, 9 *St. Tr.* 187: Sir Patience Ward for perjury, *Ib.* 299. This last was a shameful case.

[3] Lord Macaulay's account of them is comprised in very few words. "Russell, who appears to have been guilty of no offence falling within the "definition of treason, and Sidney, of whose guilt no legal evidence could be "produced, were beheaded, in defiance of law and justice." Mr. Hallam is fuller, and I think fairer. See *Const. Hist.* ii. 457. Lord W. Russell's trial is in 9 *St. Tr.* 577.

[4] *Ib.* 619.

[5] *Ib.* 623.

on one occasion he did say what was alleged, out of regard to the Duke of Bedford. As to another occasion on which he was said to have sworn to what he said, he declared that what he swore to was, that he did not believe Lord W. Russell had any design to murder the King. In this he said he was "carrying his knife close between the paring and the apple." [1] The prisoner's defence was so weak and hesitating, that it is difficult to doubt that the charge made against him was substantially true. It is remarkable that he objected to the introduction of hearsay evidence as tending to prejudice him, an objection which in those days was seldom taken, and which, indeed, was opposed to the practice of the courts. The jury were told, as they always were, that the prisoner was not to be convicted on such evidence. The conduct of the judges in this trial was, I think, moderate and fair in general. The Chief Justice's direction to the jury was more favourable to the prisoner than, according to precedents which are still binding, it ought to have been. [2] He told them in substance that a conspiracy to levy war against the King was not an overt act of conspiring the King's death, unless the war to be levied was of such a nature as to expose the King to personal danger.

[3] The trial of Sidney much resembled that of Russell. He was indicted for compassing and imagining the King's death. Three overt acts were charged as displaying this intention, namely,—(1) holding consultations amounting to a conspiracy to levy war; (2) sending Aaron Smith to Scotland to invite certain Scotchmen to come and join in the conspiracy; (3) composing a treasonable libel, affirming amongst other things,

[1] "He once intended to have related the whole fact just as it was, but his "counsel advised him against it." . . . "He was a man of so much candour "that he spoke little as to the fact; for since he was advised not to tell the "whole truth, he could not speak against that which he knew to be true though "in some particulars it had been carried beyond the truth."—Burnet, *Own Times*, ii. 172, 178.

[2] "The question before you will be whether upon this whole matter you do "believe my Lord Russell had any design upon the King's life, to destroy the "King, to take away his life, for that is the material part here. It is used "and given you (by the King's counsel), as an evidence of this, that he did "conspire to raise an insurrection . . . and to surprise the King's guard, "which, say they, can have no other end but to seize and destroy the King, "&c."—9 *St. Tr.* 636. Cf. Foster's *Discourse on Treason*, p. 197, where a wider doctrine is laid down.

[3] *St. Tr.* 9813—1002.

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Lord Howard, if believed, proved the first, and less distinctly the second, overt act. He gave the same evidence as in Lord Russell's case, and was subjected to the same or similar contradictions. As to the third, the papers were undoubtedly found in the prisoner's study; [1] and three persons—Sheppard, who had seen him endorse bills; Cary, who knew his endorsements, and Cook, who cashed bills bearing his endorsement,—all proved his handwriting. This was evidence which in the present day, would be not only admissible, but practically conclusive. It seems, though it is not quite clear [2] on the report, that "some papers of his particular affairs" were produced for comparison. In later times, and down to 1854 (see 17 & 18 Vic. c. 125, s. 27, and 28 Vict. c. 18, s. 8), this method of proof was regarded as improper. But the law of evidence hardly existed in those days, and nothing can be more vague and loose than the way in which the matter was handled.

The most important points were these:—

(1) It was said that a conspiracy to levy war was not an overt act of treason by compassing the King's death. Much no doubt might be said in favour of this view; but the law was otherwise interpreted, not only before, but after, Sidney's time, particularly in the case of Lord Preston and Ashton, who were tried by Chief Justice Holt.

(2) It was said that there was only one witness, whereas there should have been two. I do not think this objection was accurately taken. Assuming the possession and writing of the pamphlet to be an overt act of treason, it was proved by at least four witnesses, namely, one who found it on the prisoner's table, and three who swore it was his handwriting.

(3) It was said that the possession of the writing was not an overt act of treason, as it appeared only that the paper was in the prisoner's study, and not that he had published it, or that he meant to publish it, in furtherance of his design, and this I think was true; but, regard being had to the then state of the law, I do not think that the illegality of permitting the jury to treat the possession of the

[1] 9 *St. Tr.* 854. [2] *Ib.* 354.

pamphlet as an overt act of treason was as clear as it would be at present. [1] In 1663, Twyn, a printer, was executed for treason, for printing a book much to the same effect as Sidney's pamphlet. In Twyn's case no doubt there was a much nearer approach to publication than in Sidney's; but [2] Jeffreys's summing up (which is not very clearly reported) seems to assume that the book was intended to be published in connection with the conspiracy to make war on the King. If it were so, I am not sure that it might not have amounted to an overt act of a conspiracy to levy war, which was itself held to be an overt act of imagining the King's death. By a statute then in force, 13 Chas. 2. c. 1, it was enacted in substance that any declaration by writing, printing, or speaking of an intention to compass the King's death, imprisonment, or restraint, or to depose him, or levy war against him, should be treason; but prosecutions were limited to six months after the offence. There was no proof at all as to the time when the pamphlet in Sidney's possession was written.

(4) Objections were taken to the indictment which I am inclined to think were properly overruled.

(5) It was said that Jeffreys treated the prisoner brutally, misled him as to the law, designedly interrupted him in his defence, and summed up more like an advocate than a judge. No doubt he disgraced himself; but I think he was right in many of his remarks, and that Sidney did not understand the law, and overrated the importance of various technicalities on which he relied. When you have on the one side a prisoner guilty of a crime which many people regarded, and still regard, as an act of virtue, and on the other a judge whose name is justly steeped in infamy, and when the judge has to try the prisoner according to a law full of fiction and uncertainty, obscure in some points, and irrational in others, it is almost hopeless to do strict justice between them, and it really is not worth the trouble to try to do so, for the questions which would have to be determined for that purpose have long ceased to have any interest or importance.

I may, however, observe that the [3] grounds on which the

[1] 6 *St. Tr.* 514, and see Kelyng's *Reports*, p. 57. [2] 9 *St. Tr.* 893.
[3] *Ib.* 695—696 and 996—997.

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attainders of Russell and Sidney were reversed seem to me doubtful. They were in each case refusal of the challenge of jurors for want of freehold, and "partial and unjust "constructions of law" (unspecified). Any one who will read the arguments as to the question of the jurors will, I think, agree with me in saying that the law upon the subject was at that time utterly uncertain, there being no direct authority upon it till the question was settled by the Bill of Rights (1 Will. & Mary, st. 2, c. 2). This Act converted many doubtful propositions into law by saying that they were "antient rights and liberties," when all that could truly have been said was that it would have been well to act upon that supposition in the past and that for the future the matters stated should be held to be law. With regard to the "partial and unfair con-"structions of law," I have already spoken. In Sidney's case it was also said that "there was produced a paper found in the "closet of the said Algernon, supposed to be his handwriting, "which was not proved by the evidence of any one witness to "be written by him, but the jury was directed to believe it "by comparing it with other writings of the said Algernon." This recital is directly contradicted by the report of the trial. It is remarkable that the far stronger ground that there was no proof that he meant to publish the paper, or that it had any connection with the plot imputed to him, is not referred to. Perhaps the recollection of the 13 Chas. 2, c. 1, in force at the time of the trial explains the omission.

The trials of Russell and Sidney were followed by others which I must pass over with a very few words. Oates's trial for perjury was not, I think, unfair. Jeffreys treated him in parts of his defence with brutality, but Oates undoubtedly tried to bully the Court as he had done on former occasions. I cannot say that I think the sentence upon him too severe. To be flogged to death would have been an appropriate end for him; but though there are crimes which would justify the infliction of death by torture, it is wrong to pass such a sentence under false pretences. Perjury was not a capital crime, and ought not to have been treated as one.

Of the trials on the western circuit, after Monmouth's insurrection, little need be said, as they throw no light on the

ordinary administration of justice. I may, however, make one or two remarks on the case of Lady Lisle. It was cruel, but legal, to sentence a woman to be burnt alive for harbouring two rebels for a night. The conviction was probably illegal on the ground that Hicks, whom she harboured, had not been convicted before her trial. Her attainder was reversed in Parliament upon this ground, and [1] Foster, relying on the authority of [2] Hale, treats this as good law. It can, no doubt, be supported by some strong arguments, though others in the contrary direction might be suggested; but the law was vague. Hale gives no authority for his statement, and indeed puts it forward in the second passage quoted only as his opinion—"It seems to me." [3] I think that this is another of the numerous instances in which there really was no definite law at all, and in which the fact that a particular course was taken by a cruel man for a bad purpose has been regarded as proof that the course taken was illegal. CHAP. XI

The conduct of Jeffreys in this trial has made his memory justly infamous; but there is one point in it on which a remark arises. The most disgraceful part of the trial, or rather the most notorious and glaring instance of brutality which occurred in it, is the way in which the judge treated the principal witness, Dunne, at whom he repeatedly [4] swore and railed. It ought, however, to be said that Dunne was a liar, and that, striking out the brutality and ferocity of his language, Jeffreys's cross-examination was masterly, and not only involved Dunne in lie after lie, but at last compelled him to confess the truth. He wished no doubt, to save his mistress's life, and kept back the essential part of the story till he could face it out no longer.

Many other trials of this period I pass over unnoticed, though they were of great interest. The case of Lord Delamere, who was tried for high treason before Jeffreys, sitting as Lord

[1] P. 346. [2] 1 Hale, *P. C.* 238, and 2 Hale, *P. C.*, 223.

[3] See Vol. II. p. 234-5.

[4] "Why, you impudent rascal." "But, you blockhead." "Why, thou "vile wretch." "Jesus God, there is no sort of conversation nor human "society to be kept with such people as these." "It seems that the saints "have a certain charter for lying," &c.—11 *St. Tr.* 325—360. See Dunne's confession of his falsehoods, 355—360. The whole passage deserves careful study on many grounds.

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High Steward with a jury of peers, deserves mention. The prisoner was clearly innocent, and proved his innocence, and was acquitted. The remarkable point in the case is that Jeffreys seems to have tried it with propriety and dignity. [1] A question arose on the trial whether the Court might adjourn till the next day. The lords triers obviously wished to do so. The judges, on being consulted on the lawfulness of an adjournment, refused to give an opinion; and Jeffreys moderately and calmly refused to adjourn, considering it doubtful whether he had a right to do so.

The last of the trials to be noticed before the Revolution is the memorable case of the seven bishops. [2] Lord Macaulay's account of it is fuller and more lawyer-like than most of his notices of trials at this period, and I need only refer to it for the historical and picturesque elements of the case. In a legal point of view, the trial can be described only as chaotic. The four judges not only differed, but were obviously frightened, and would have been glad to get rid of the case on the technical ground that no publication was proved in Middlesex. Wrangles about the evidence and its effect, quarrels between the counsel, and occasional differences between the judges made up the greater part of the trial, and exhibited the administration of justice in a contemptible light. There was a total want of order, regularity, and dignity in the whole proceeding. The most curious part of it is, that all sides appear to have agreed that the falsehood of the matter alleged (the non-existence of the dispensing power) and the malice of the defendants must be left to the jury. The four judges gave contradictory directions. Wright, C.J., said, "I do take it to be a libel." Holloway, J., said he thought the bishops ought to be convicted, if the jury were "satisfied there was an ill intention of sedition or the like." Powell, J., said, "I cannot see, for my part, anything of "sedition, or of any other crime, fixed upon these reverend

[1] 11 *St. Tr.* 560–564.

[2] 12 *St. Tr.* 183. I think Lord Macaulay makes a little too much of Finch's interruption of the case, and a good deal too much of Somers's speech. He only repeated in a condensed shape what his leaders had said over and over again, besides I do not think the report can be more than an abridgment of what was really said.

"fathers;" and Allybone, J. said, "The Government here "has published such a declaration as this that has been read, "relating to matters of government, and shall or ought any-"body to come and impeach that as illegal which the Govern-"ment has done? Truly, in my opinion, I do not think he "should or ought." He added, "I think these venerable "bishops did meddle with that which did not belong to "them. They took upon them in a petitionary to contradict "the actual exercise of the government, which, I think, no "particular persons or irregular body may do." The result is too well known to be noticed. Speaking merely as a lawyer, I can only say that the law of libel at that time was so vague, that it is difficult to say whether or not a perfectly modest and respectful expression of the opinion that the king had made a mistake was a libel. But I shall examine this matter fully hereafter.

I have now completed what I had to say on the administration of criminal justice under the Stuarts after the Restoration. The most general observation which it suggests to me is, that it brought to light and illustrated in the case of eminent persons defects both in the law itself and in the methods of procedure which must have produced a great amount of obscure injustice and misery. There must have been plenty of Oateses and Bedloes at the assizes and quarter sessions who have never been heard of, and no doubt scores or hundreds of obscure people suffered for common burglaries and robberies of which they were quite as innocent as Stafford was of the high treason for which he was convicted. There certainly was, however, a considerable improvement in the methods of trial during the seventeenth century. Prisoners were not tortured (as they were in every other part of Europe); witnesses were produced face to face, whom the prisoner could cross-examine. The rules of evidence were beginning to be, to some extent, though to a small extent, recognised and understood, and by the end of the century the evils of judicial corruption and subserviency, and the horrors of a party warfare carried on by reciprocal prosecutions for treason alternately instituted against each other, with fatal effect, by the chiefs of contending parties, had made so deep an impression on the

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public imagination, that a change of sentiment took place which from that time effectually prevented the scandals of the seventeenth century from being repeated. I have dwelt at length upon the second half of the seventeenth century because it was from its troubles and scandals that a better system arose, which has been by degrees improved into the one which is now administered amongst us.

V.—1688—1760.

The administration of criminal justice, after the Revolution, passed into quite a new phase. I should doubt whether much difference was made in the common course of justice, at the assizes and sessions, till very recent times; but from the Revolution to our own day political parties have been recognised parts of the body politic, and political differences have been treated as matters on which contending parties can differ without carrying their disputes to the deadly extremity of prosecutions for treason. There have been plenty of political trials since the Revolution, but from a variety of causes they have been conducted in most cases fairly, in some instances more or less unfairly, but never scandalously. The legislative result of the scandals of the seventeenth century upon criminal procedure was slight. The most important was the enactment that the judges should hold office, not at the pleasure of the Crown, but during good behaviour. This deeply affected the whole administration of justice. The changes in procedure were less important; and applied entirely to trials for high treason. As to them it was enacted, [1] in 1695, that persons indicted for high treason or misprision of treason should have a copy of the indictment five (afterwards extended to ten) days before trial, and be allowed to have counsel and witnesses upon oath; and that the treason should be proved by two witnesses, either both to one overt act, or each to one of two overt acts of the same kind of treason. [2] In 1708 the prisoner was also allowed to have a list of the witnesses and of the jury ten days before his trial. [3] In 1702 it was enacted that in cases of treason and felony

[1] 7 & 8 Will. 3, c. 3. [2] 7 Anne, c. 27, s. 14. [3] 1 Anne, st. 2, c. 9.

the prisoner's witnesses should be sworn, as well as the witnesses for the Crown. These were the only legislative changes which the scandals of the trials in the days of the later Stuarts produced; and nothing can set in a clearer light the slightness of the manner in which the public attention was then, or indeed till a far later time, directed to the defects of the criminal law.

Many of the trials which took place in the reigns of William III., Anne, George I., and George II. are deeply interesting on various accounts, and especially on account of the strong light which they throw, not only on the history, but still more on the manners of the time; but in a legal point of view they call for little remark. As time passes, the differences between our own days and those of the seventeenth century gradually pass away. From the first there is a complete absence of fierceness and brutality. At first there are [1] a few instances in which prisoners are questioned. For a considerable time the witnesses are allowed to tell their own story at length in their own way, and the restriction as to not swearing the prisoner's witnesses is kept up till the passing of the statute already referred to. I am not sure that the most striking feature in the political trials of the first part of the eighteenth century is not to be found in the fact that the reforms about giving prisoners indicted for treason a copy of the indictment, lists of jurors and witnesses, and the right to be defended by counsel, made in practice so very little difference. The truth is, that after the Revolution few, if any, prisoners were tried for high treason except people clearly proved to have committed what was held to be treason; and I do not think that counsel had learnt the art of defending prisoners zealously or impressively. For instance, a very poor defence was made in the famous cases of [2] Dammaree and others, who, for having taken part in a riot designed to pull down meeting-houses, were convicted of high treason by levying of war, though both the facts and the law were of such a nature as to give an opportunity for a great effort.

[1] See *e.g.* the trial of Harrison for the murder of Dr. Clench, in which the prisoner was questioned at some length by Holt, 12 *St. Tr.* 859.

[2] 15 *Ib.* 522—614.

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The private trials which took place during this period were of extraordinary interest, and set the manners of the time before the reader with an authenticity and life which, in my opinion, is more curious and entertaining than any romance ever written. To refer to a very few instances: the [1] trials for piracy, common down to the reign of George II., bring to light a chapter of history rapidly passing into oblivion; the trial of [2] Hathaway as a cheat and impostor marks the point at which witchcraft was coming to be recognised in its true light; [3] the trial of Beau Fielding for bigamy is a more grotesque specimen of the manners of the contemporaries of Swift and Addison and Steele than can be found in any of their writings; the [4] two trials of Lord Mohun for murderous duels, if indeed the first was not rather a premeditated assassination, illustrate another side of the life of the times. [5] A whole series of prosecutions of the officers of the Fleet Prison for the murder of prisoners by barbarous ill-usage throws light upon another dark side of the administration of justice in the eighteenth century. Some of the trials again are, to me at least, much more impressive than poetry or fiction; for instance, the [6] trial of Mary Blandy at Oxford, in 1752, for poisoning her father, and the [7] trial of a gang of smugglers at Chichester, in 1749, for the murder of certain revenue officers. In a legal point of view little is to be said of these proceedings. They were all conducted fairly enough, and in a manner not essentially different from that in which such trials would be conducted at present. One or two general observations, however, arise upon the subject.

Hardly a trial of importance before the Revolution is reported in which the Government is not interested directly or indirectly. Thus even in the case of Count Coningsmark,

[1] Major Stede, 15 *St. Tr.* 1231; Dawson, 13 *Ib.* 451; Green, 14 *Ib.* 1199; Captain Kidd and others, *Ib.* 147; Captain Quelch and others, *Ib.* 1067.
[2] *Ib.* 639. [3] *Ib.* 1327.
[4] In 1694 (12 *Ib.* 949) and in 1699 (13 *Ib.* 1033). This ruffian was killed in a duel with the Duke of Hamilton in 1712, as the readers of Swift's *Journal* and Mr. Thackeray's *Esmond* will remember.
[5] See the trials of Huggins, Bainbridge, and Aston, in 17 *St. Tr.* 298—626.
[6] 18 *Ib.* 1118. [7] Jackson and others, *Ib.* 1070.

whose crime had in itself no political importance, Charles II. let Reresby, the committing magistrate, see that he was favourable to the prisoner, and thus undoubtedly exercised a decisive influence upon the behaviour of the judges at the trial. But all through the period between 1688 and 1760 a feature presents itself in criminal trials which I believe to this day to be absolutely peculiar to this country and to countries which have sprung from it, and which has given its special colour and character to our whole method of procedure. In all other countries the discovery and punishment of crime has been treated as pre-eminently the affair of the Government, and has in all its stages been under the management of representatives of the Government. In England it has been left principally to individuals who considered themselves to have been wronged, the judge's duty being to see fair play between the prisoner and the prosecutor, even if the prosecutor happened to be the Crown. In my account of the growth of the system of criminal procedure I have given some of the reasons which account for this state of things, but I have little doubt that the scandals of the State trials before the Revolution, and the change in the position of the judges which was one of the consequences, were the principal historical causes of its prevailing.

A large proportion of the trials to which I have already referred might be cited as illustrations of this. I will mention by way of illustration some of the circumstances of two which are on other grounds very remarkable.

The first to be mentioned is the [1] trial of Spencer Cowper for the murder of Sarah Stout. Cowper was a man of rank and distinction. His brother, the first Earl Cowper, who was Chancellor in the reign of Queen Anne, was at the time of the trial member for Hertford, and his family were then, as now, one of the first in the county of Hertford. Spencer Cowper himself was made a judge in 1727, and at the time of his trial was a barrister on the home circuit. Sarah Stout was an unmarried Quakeress of twenty-six, the daughter of a wealthy father, who had died, leaving a widow, on whom,

[1] 13 *St. Tr.* 1105; and see Lord Campbell's *Life of Lord Cowper*.

CHAP. XI. however, the daughter was not dependent. She was intimate with both Spencer Cowper and his brother and their wives, who seem to have cultivated the society of the Stouts for electioneering purposes. The two Cowpers were both on the circuit, and Spencer Cowper at one time lodged with the Stouts. On the spring circuit of 1699 he intended to occupy lodgings which his brother had taken and would have to pay for, but having dined at the Stouts' was pressed by Miss Stout to sleep there, which he agreed to do. He afterwards supped there, and remained alone with her till near eleven. Miss Stout called in the servant, and in Cowper's presence ordered her to warm his bed, which she did. Whilst doing so she heard the house-door shut, and coming down found both Cowper and Miss Stout absent, and saw neither of them again though she sat up all night. Cowper soon afterwards, namely, at about eleven, called, according to several witnesses, at an inn about a quarter of a mile from the Stouts', and returned to his own lodgings a little after. Miss Stout was never seen alive again, but early next morning her body was found in a mill-stream entangled in some stakes. There was much evidence as to the exact position in which the body was found. All of it, to say the very least, is quite consistent with her having been washed down the stream for some distance and having been pressed slightly upwards by the force of the stream against the slope of the stakes. An inquest was held, and the jury returned a verdict that she had drowned herself whilst insane. It was proved that she had been in a melancholy state of mind.

Various rumours to the disadvantage of her character having got abroad, and the Quakers being dreadfully scandalised at the notion that one of their community should commit suicide under such circumstances, Cowper was indicted for murder, and tried at the following Hertford assizes. The case is extremely curious, both as supplying nearly the earliest instance of a trial depending largely on the evidence of experts, and as an early instance of the extent to which criminal trials in England are private litigations. The neighbourhood was divided into parties. The Stouts collected a body of doctors to establish the proposition thus

propounded by the counsel for the Crown:—"It is contrary to nature that any persons that drown themselves "should float upon the water. We have sufficient evidence "that it is a thing that never was: if persons come alive "into the water, then they sink; if dead, then they swim." There were also witnesses to prove the proposition that water must be found in the stomach of a person who died of drowning, and that its absence was inconsistent with death so caused. Miss Stout, it was said, floated, and her stomach contained no water. On these grounds, and indeed on these grounds only, it was asserted that she was murdered, and as Cowper was last seen with her, it was inferred that he must have murdered her. In our days such a case would not be allowed to go to the jury; but in 1699 it was pressed with the utmost vehemence and pertinacity, not only against Cowper, but against three other persons as to whom there was no evidence whatever, except that they were at an inn at Hertford that night, and were said to have had some conversation about Miss Stout which might be regarded as suspicious. Cowper defended himself with great tact and vigour. He contradicted the evidence of the experts in a way which still shows any one who reads the case that he was fighting with a perfectly idle and ignorant superstition. He also contradicted the evidence as to the position of the body when found. He also gave some, though I think not strong, evidence of an *alibi*; and above all he produced letters from Miss Stout to himself which seemed to show that she had fallen passionately in love with him, and he declared that when he refused her advances she rushed out, and, as he supposed, drowned herself. He called many witnesses to show the state of mind in which she was at the time.

The judge, Baron Hatsell, behaved with a languid indifference which even now raises a feeling of contempt. He continually grumbled at the length of the trial. [1] "Do not "flourish too much, Mr. Cowper." "Mr. Cowper, do you "mean to spend so much time with every witness?" He

[1] 13 *St. Tr.* 1151.

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[1] ingenuously confessed that he could make nothing of the medical evidence (which was quite easy if he had only given his mind to it), and he modestly concluded his summing up thus:—"I am sensible I have omitted many things; but "I am a little faint, and cannot repeat any more of the "evidence."

The prisoners were all acquitted, but the matter did not stop there. An appeal was brought, but it went off in a wrangle too technical to be worth noticing. The case excited great and widespread interest, and was the occasion of numerous pamphlets. It would be difficult to find a more remarkable specimen of the way in which a trial was then, and may be still, a battle between private persons, the one seeking with passionate earnestness the other's life, and the other as desperately defending it; the attitude of the representative of the public being one of dignified indifference, slightly tempered in this particular case by impatience and fatigue. On this last point I may observe that the rule which prevailed then and long afterwards of finishing all criminal trials in one day must often have produced cruel injustice. Many of the cases I have referred to were tried in a superficial, perfunctory way, and many of the judges played their parts little better than Baron Hatsell. Few judges are able to do justice to a complicated case after a sitting of much more than eight hours, and it is still more unusual for jurymen (quite unaccustomed to sustained attention, which involves a greater physical effort than those who have not tried it might suppose) to be able to attend to what is said, and to deliberate on it to any purpose, after ten hours.

Many other instances of the peculiarity of English criminal law, to which I am referring, might be given, but I will confine myself to one which is remarkable, amongst other reasons, because it has some resemblance to the famous case of

[1] "You have heard also what the doctors and surgeons said on the one side "and the other concerning the swimming and sinking of dead bodies in the "water; but I can find no certainty in it, and I leave it to your consideration. "The doctors and surgeons have talked a great deal to this purpose, and "of the water going into the lungs or the thorax; but, unless you have more "skill in anatomy than I, you would not be much edified by it."—13 *St. Tr.* 1188—1189.

Orton, namely the [1] trial of Elizabeth Canning for perjury, in 1754.

In 1753 Canning charged two women, Mary Squires and Susannah Wells, with having robbed her of her stays, and imprisoned her for a month in a house at Enfield Wash, to which house she was, according to her statement, taken by John Squires, the son of Mary, and another person unknown, the object being to induce her to become a prostitute. She escaped, she said, on the 29th January, and on the 31st went with a warrant to Enfield, where she found the prisoner and gave her in custody. In this story Canning was corroborated by one Virtue Hall, who said she was present on the occasion of the robbery, and saw John Squires bring Elizabeth Canning to his mother's house. Witnesses were called for Squires to prove that at the time in question she and her son John were at Abbotsbury, in Dorsetshire. The prisoners were convicted, and both were sentenced to death; but Virtue Hall recanted her evidence, and suspicion being aroused on these grounds as to the propriety of the verdict, Canning was prosecuted for perjury. Her trial excited the same sort of interest as that of Orton. Parties of Canningites and anti-Canningites were formed. The trial lasted seven days, which at that time was something unheard of. Numbers of witnesses were called, who traced the movements of Squires and the party of gipsies to which she belonged from place to place during the whole of the important period, giving vivid descriptions of every kind of country scene at which they had been present on their wanderings. They were traced on their travels through January, 1753, from South Parrot, in Dorsetshire, to Abbotsbury, Dorchester, Basingstoke, Bagshot, Brentford, and Enfield, which they did not reach till the 24th January. There they lodged with the woman Wells, and evidence was given that Wells's house and furniture were quite unlike the place in which Canning at first said she had been confined, though she pretended to identify them when it became necessary for her to fix upon some place as the scene of her alleged imprisonment.

[1] 19 *St. Tr.* 252. Fielding acted as committing magistrate in the case of Squires and Wells. He also advised upon the case as counsel—a strange mixture of functions according to modern ideas.

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Such, shortly, were the leading points in the case for the prosecution. They are stated with admirable skill and clearness in the opening of Serjeant Davy, followed by Mr. Morton. The defence has almost greater interest. It deserves to be read and studied by all who care for questions of evidence; but I could not describe it without entering into details too minute to be stated here. Canning was convicted, and transported for seven years. The case gave rise to a great number of pamphlets, and is remarkable not only for the reasons I have already given, but because it is perhaps the first specimen to be found of those elaborately conducted criminal trials in which no time or expense is spared on either side, and in which all the characteristics of English criminal law are seen at their best.

From the middle of the eighteenth century to our own time there has been but little change in the character of criminal trials, and it is unnecessary to give further illustrations of them. The most remarkable change introduced into the practice of the courts was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. A practice sprung up, the growth of which cannot now be traced, by which counsel were allowed to do everything for prisoners accused of felony except addressing the jury for them. In the remarkable case of [1] William Barnard, tried in 1758, for sending a threatening letter to the Duke of Marlborough, his counsel seem to have cross-examined all the witnesses fully, in such a way, too, at times, as to be nearly equivalent to speaking for the prisoner, "*e.g.*: "*Q.* It has been said he went away with a smile. Pray, "my Lord Duke, might not that smile express the conscious- "ness of his innocence as well as anything else? *A.* I shall "leave that to the Great Judge."

On the other hand, at the trial of Lord Ferrers [2] two years afterwards, the prisoner was obliged to cross-examine the witnesses without the aid of counsel and, what seems even harder, to examine for himself witnesses called to prove the defence of insanity which he set up.

Since the middle of the eighteenth century proceedings of

[1] 19 *St. Tr.* 815. [2] *Ib.* 839.

the highest importance, and involving momentous changes in the substantive criminal law, have been effected partly by legislation, partly, though to a much smaller extent, by judicial decisions. Of these I shall speak in my chapters on the different branches of the substantive law; but I do not think that the actual administration of justice, or the course of trials has altered much since the beginning of the reign of George III. Its general character has no doubt been affected to a considerable extent by the changes made in the law itself, by the course of thought on legal and political, religious and moral subjects, and by many other influences, but it can hardly be said to have had any history of its own, and apart from its connection with the current events of the time. The only change which has made any great difference between the trials of our own days and those of 120 years ago was made by[1] the Act which allowed prisoners accused of felony to make their full defence by counsel; and this, after all, has only put trials for felonies, such as robbery or burglary, on the same footing as trials for perjury, cheating, and other misdemeanours. Indeed, if we have regard to the powers of cross-examination which were conceded to counsel in the course of the eighteenth century, the change was less important than it may at first sight seem to have been.

The result of the history of the administration of criminal justice in England which I have thus sketched—for it is a slight though not, I hope, an incorrect sketch—may be thus shortly summarized:—

Criminal justice was originally a rude substitute for, or limitation upon, private war, the question of guilt or innocence, so far as it was entertained at all, being decided by the power of the suspected person to produce compurgators or by his good fortune in facing an ordeal. The introduction of trial by combat, though a little less irrational, was in principle a relapse towards private war, but it was gradually restricted and practically superseded many centuries before it was formally abolished.

Trial by jury originated in the adaptation to the purpose

[1] 6 & 7 Will. 4, c. 114, s. 1.

CHAP. XI. of the administration of justice of the process commonly in use in the eleventh and twelfth centuries for obtaining information as to matters of fact, namely, collecting an inquest or body of persons supposed to be acquainted with the subject and taking their sworn statement about it. The members of the inquest were originally witnesses, and, even if they derived their knowledge from other witnesses, they, and not their informants, were responsible for the truth of their verdict. By slow degrees they acquired the character of judges of fact informed by witnesses. This process lasted from the first origin of juries in the twelfth or thirteenth centuries down to the sixteenth century, when we have the first fairly trustworthy records of actual trials.

Side by side with trial by jury during this period, a system was developing itself in the Star Chamber, and similar courts, of a trial by written pleadings, bills, answers, interrogatories, and affidavits, like those which were afterwards in use in the Court of Chancery in civil cases. It exercised a strong influence over trial by jury, and its effect can be traced in all the criminal proceedings which took place under the Tudors, James I. and Charles I. The administration of criminal justice at this time was also affected to a considerable extent by the civil law trial by witnesses, though, on the one hand, it never thoroughly adopted torture, which was practically an essential part of that system, nor did it, on the other, admit, except in the one case of treason, the necessity for two witnesses, which rendered torture necessary in countries where it prevailed.

The Civil Wars broke down this system, and gave to trial by jury an undisputed supremacy, which has now lasted for more than two centuries, in the administration of criminal justice; but the experience of the reigns of Charles II. and James II. showed, first, that juries might be quite as unjust and tyrannical as the Star Chamber; next, that they were equally likely to be unjust on any side in politics; and, lastly, that the true theory of judicial evidence was at that time not understood, and that, so far as it was understood, it had little influence upon verdicts.

Lastly, after the Revolution, a decisive victory having been

won by one of the great parties of the State, the administration of criminal justice was set upon a firm and dignified basis, and so became decorous and humane; and as it was mainly left in the hands of private persons, between whom the judges were really and substantially indifferent, the questions which were involved came to be fully and fairly investigated, each party to the contest doing the best he could to establish his own view of the case in which he was interested. The rapid growth of physical science, and indeed of every branch of knowledge, which has been one great characteristic of the history of the last two centuries, naturally influenced the administration of justice as well as other things, and the final result of the long process which I have been trying to describe seems to be that in criminal trials questions of fact are investigated as nearly in the same spirit as other matters of fact as the differences inherent in the nature of the processes will admit. It would be interesting to trace the steps by which this came about, but such an inquiry belongs rather to the history of the rules of evidence than to the history of the administration of criminal justice. The last-mentioned history ends at the point at which the present forms are fully established, and at which the process carried on under them begins to develop itself, in accordance with the general intellectual movement of the age.