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Published under the auspices of the
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A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE

WITH SPECIAL REFERENCE TO FRANCE

BY

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OF NEW YORK

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I might instance in other professions the obligation men lie under of applying themselves to certain parts of History; and I can hardly forbear doing it in that of the Law, — in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and the most pernicious. A lawyer now is nothing more (I speak of ninety-nine in a hundred at least), to use some of Tully's words, "nisi leguleius quidem cautus, et acutus praeco actionum, cantor formularum, auceps syllabarum." But there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age true ambition, or the love of fame, prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the vantage ground (so my Lord Bacon calls it) of Science, instead of grovelling all their lives below, in a mean but gainful application of all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions. And whenever it happens, one of the vantage grounds to which men must climb, is Metaphysical, and the other, Historical Knowledge. HENRY ST. JOHN, Viscount BOLINGBROKE, *Letters on the Study of History* (1739).

Whoever brings a fruitful idea to any branch of knowledge, or rends the veil that seems to sever one portion from another, his name is written in the Book among the builders of the Temple. For an English lawyer it is hardly too much to say that the methods which Oxford invited Sir Henry Maine to demonstrate, in this chair of Historical and Comparative Jurisprudence, have revolutionised our legal history and largely transformed our current text-books. — Sir FREDERICK POLLOCK, Bart., *The History of Comparative Jurisprudence* (Farewell Lecture at the University of Oxford, 1903).

No piece of History is true when set apart to itself, divorced and isolated. It is part of an intricately pieced whole, and must needs be put in its place in the netted scheme of events, to receive its true color and estimation. We are all partners in a common undertaking, — the illumination of the thoughts and actions of men as associated in society, the life of the human spirit in this familiar theatre of coöperative effort in which we play, so changed from age to age, and yet so much the same throughout the hurrying centuries. The day for synthesis has come. No one of us can safely go forward without it. — WOODROW WILSON, *The Variety and Unity of History* (Address at the World's Congress of Arts and Science, St. Louis, 1904).

CONTINENTAL LEGAL HISTORY SERIES

GENERAL INTRODUCTION TO THE SERIES

"ALL history," said the lamented master Maitland, in a memorable epigram, "is but a seamless web; and he who endeavors to tell but a piece of it must feel that his first sentence tears the fabric."

This seamless web of our own legal history unites us inseparably to the history of Western and Southern Europe. Our main interest must naturally center on deciphering the pattern which lies directly before us, — that of the Anglo-American law. But in tracing the warp and woof of its structure we are brought inevitably into a larger field of vision. The story of Western Continental Law is made up, in the last analysis, of two great movements, racial and intellectual. One is the Germanic migrations, planting a solid growth of Germanic custom everywhere, from Danzig to Sicily, from London to Vienna. The other is the posthumous power of Roman law, forever resisting, struggling, and coalescing with the other. A thousand detailed combinations, of varied types, are developed, and a dozen distinct systems now survive in independence. But the result is that no one of them can be fully understood without surveying and tracing the whole.

Even insular England cannot escape from the web. For, in the first place, all its racial threads — Saxons, Danes, Normans — were but extensions of the same Germanic warp and woof that was making the law in France, Germany, Scandinavia, Netherlands, Austria, Switzerland, Northern Italy, and Spain. And, in the next place, its legal culture was never without some of the same intellectual influence of Roman law which was so thoroughly overspreading the Continental peoples. There is thus, on the one hand, scarcely a doctrine or rule in our own system which cannot be definitely and profitably traced back, in comparison, till we come to the point of divergence, where we once shared it in common with them. And, on the other hand, there is, during all the intervening centuries, a more or less constant juristic sociability (if it may be so called) between Anglo-American and Con-

tinental Law; and its reciprocal influences make the story one and inseparable. In short, there is a tangled common ancestry, racial or intellectual, for the law of all Western Europe and ourselves.

For the sake of legal science, this story should now become a familiar one to all who are studious to know the history of our own law. The time is ripe. During the last thirty years European scholars have placed the history of their law on the footing of modern critical and philosophical research. And to-day, among ourselves, we find a marked widening of view and a vigorous interest in the comparison of other peoples' legal institutions. To the satisfying of that interest in the present field, the only obstacle is the lack of adequate materials in the English language.

That the spirit of the times encourages and demands the study of Continental Legal History and all useful aids to it was pointed out in a memorial presented at the annual meeting of the Association of American Law Schools in August, 1909:

"The recent spread of interest in Comparative Law in general is notable. The Comparative Law Bureau of the American Bar Association; the Pan-American Scientific Congress; the American Institute of Criminal Law and Criminology; the Civic Federation Conference on Uniform Legislation; the International Congress of History; the libraries' accessions in foreign law, — the work of these and other movements touches at various points the bodies of Continental law. Such activities serve to remind us constantly that we have in English no histories of Continental law. To pay any attention at all to Continental law means that its history must be more or less considered. Each of these countries has its own legal system and its own legal history. Yet the law of the Continent was never so foreign to English as the English law was foreign to Continental jurisprudence. It is merely maintaining the best traditions of our own legal literature if we plead for a continued study of Continental legal history.

"We believe that a better acquaintance with the results of modern scholarship in that field will bring out new points of contact and throw new light upon the development of our own law. Moreover, the present-day movements for codification, and for the reconstruction of many departments of the law, make it highly desirable that our profession should be well informed as to the history of the nineteenth century on the Continent in its great measures of law reform and codification.

"For these reasons we believe that the thoughtful American lawyers and students should have at their disposal translations of some of the best works in Continental legal history."

And the following resolution was then adopted unanimously by the Association:

"That a committee of five be appointed, on Translations of Continental Legal History, with authority to arrange for the translation and publication of suitable works."

The Editorial Committee, then appointed, spent two years in studying the field, making selections, and arranging for translations. It resolved to treat the undertaking as a whole; and to co-ordinate the series as to (1) periods, (2) countries, and (3) topics, so as to give the most adequate survey within the space-limits available.

(1) As to *periods*, the Committee resolved to include modern times, as well as early and medieval periods; for in usefulness and importance they were not less imperative in their claim upon our attention. Each volume, then, was not to be merely a valuable torso, lacking important epochs of development; but was to exhibit the history from early to modern times.

(2) As to *countries*, the Committee fixed upon France, Germany, and Italy as the central fields, leaving the history in other countries to be touched so far as might be incidentally possible. Spain would have been included as a fourth; but no suitable book was in existence; the unanimous opinion of competent scholars is that a suitable history of Spanish law has not yet been written.

(3) As to *topics*, the Committee accepted the usual Continental divisions of Civil (or Private), Commercial, Criminal, Procedural, and Public Law, and endeavored to include all five. But to represent these five fields under each principal country would not only exceed the inevitable space-limits, but would also duplicate much common ground. Hence, the grouping of the individual volumes was arranged partly by topics and partly by countries, as follows:

Commercial Law, Criminal Law, Civil Procedure, and Criminal Procedure, were allotted each a volume; in this volume the basis was to be the general European history of early and medieval times, with special reference to one chief country (France or Germany) for the later periods, and with an excursus on another chief country. Then the Civil (or Private) Law of France and of Germany was given a volume each. To Italy was then given a volume covering all five parts of the field. For Public Law (the subject least related in history to our own), a volume was given to France, where the common starting point with England, and the later divergences, have unusual importance for the history of our courts and legal methods. Finally, two volumes were allotted to general surveys indispensable for viewing the connec-

tion of parts. Of these, an introductory volume deals with Sources, Literature, and General Movements, — in short, the external history of the law, as the Continentals call it (corresponding to the aspects covered by Book I of Sir F. Pollock and Professor F. W. Maitland's "History of the English Law before Edward I"); and a final volume analyzes the specific features, in the evolution of doctrine, common to all the modern systems.

Needless to say, a Series thus co-ordinated, and precisely suited for our own needs, was not easy to construct out of materials written by Continental scholars for Continental needs. The Committee hopes that due allowance will be made for the difficulties here encountered. But it is convinced that the ideal of a co-ordinated Series, which should collate and fairly cover the various fields as a connected whole, is a correct one; and the endeavor to achieve it will sufficiently explain the choice of the particular materials that have been used.

It remains to acknowledge the Committee's indebtedness to all those who have made this Series possible.

To numerous scholarly advisers in many European universities the Committee is indebted for valuable suggestions towards choice of the works to be translated. Fortified by this advice, the Committee is confident that the authors of these volumes represent the highest scholarship, the latest research, and the widest repute, among European legal historians. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

To the authors the Committee is grateful for their willing co-operation in allowing this use of their works. Without exception, their consent has been cheerfully accorded in the interest of legal science.

To the publishers the Committee expresses its appreciation for the cordial interest shown in a class of literature so important to the higher interests of the profession.

To the translators, the Committee acknowledges a particular gratitude. The accomplishments, legal and linguistic, needed for a task of this sort are indeed exacting; and suitable translators are here no less needful and no more numerous than suitable authors. The Committee, on behalf of our profession, acknowl-

edges to them a special debt for their cordial services on behalf of legal science, and commends them to the readers of these volumes with the reminder that without their labors this Series would have been a fruitless dream.

So the Committee, satisfied with the privilege of having introduced these authors and their translators to the public, retires from the scene, bespeaking for the Series the interest of lawyers and historians alike.

THE EDITORIAL COMMITTEE.

A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE

CONTENTS

PART I

HISTORY OF CRIMINAL PROCEDURE IN FRANCE FROM THE 1200s TO THE 1600s

INTRODUCTORY

GENERAL FEATURES OF THE EVOLUTION

TITLE I

THE CRIMINAL JURISDICTIONS IN ANCIENT FRANCE

TITLE II

THE PROCEDURE

CHAPTER I

THE ACCUSATORY PROCEDURE OF THE FEUDAL COURTS

CHAPTER II

THE ORIGIN OF THE INQUISITORIAL PROCEDURE AND ITS GROWTH DURING THE 1200s AND 1300s

CHAPTER III

FRENCH CRIMINAL PROCEDURE UNDER THE ORDINANCES OF THE 1400s AND 1500s

PART II

HISTORY OF CRIMINAL PROCEDURE IN THE LATE 1600s AND THE 1700s

TITLE I

THE FRENCH ORDINANCE OF 1670

CHAPTER I

THE DRAFTING OF THE ORDINANCE OF 1670

CHAPTER II

CHAPTER III

THEORY OF PROOF

CHAPTER IV

INFLUENCE OF THE ORDINANCE OF 1670 UPON THE ADMINISTRATION OF JUSTICE

TITLE II

CRIMINAL PROCEDURE IN EUROPE GENERALLY

CHAPTER I

CRIMINAL PROCEDURE IN OTHER COUNTRIES

CHAPTER II

CRIMINAL PROCEDURE AND PUBLIC OPINION IN THE 1600s AND 1700s

PART III

HISTORY OF CRIMINAL PROCEDURE SINCE THE FRENCH REVOLUTION

TITLE I

THE LAWS OF THE FRENCH REVOLUTION

CHAPTER I

THE AMENDMENTS TO THE ORDINANCE OF 1670

CHAPTER II

THE CODES OF THE INTERMEDIARY PERIOD

CHAPTER III

THE LAWS OF THE YEAR IX

TITLE II

THE FRENCH CODE OF CRIMINAL EXAMINATION, 1808

CHAPTER I

THE DRAFT OF THE CRIMINAL CODE

CHAPTER II

THE QUESTION OF THE JURY BEFORE THE STATE'S COUNCIL

CHAPTER III

THE ORDINANCE OF 1670 AND THE REVOLUTIONARY LAWS IN THE CODE OF CRIMINAL EXAMINATION

CHAPTER IV

CRIMINAL PROCEDURE IN FRANCE SINCE THE CODE OF 1808

TITLE III

CRIMINAL PROCEDURE SINCE 1800 IN OTHER COUNTRIES

APPENDICES

APPENDIX A

THE SCIENTIFIC LITERATURE OF CRIMINAL PROCEDURE

APPENDIX B

HISTORY OF THE CONTINENTAL SYSTEM OF EVIDENCE

EDITORIAL PREFACE

By William E. Mikell[1]

Nothing behooves us so much, in these days of reconsideration of the fundamentals in criminal procedure, as to consult experience, in the shape of the history of that subject. In no part of the law's framework are the scars of the past so deeply indented. No body of rules is so largely based on policies consciously adopted to safeguard against felt abuses. Nowhere in the law are the warnings of history more explicit and more valuable for our own generation. And the story of the process by which two systems of criminal procedure, starting as close together as the English and the Continental, diverged to become typical opposites, is fascinating in its interest.

The lack of material in English on the history of the Continental system has hitherto prevented any general familiarity with it. Indeed, in the Continental languages practically the only modern work of the kind is that of Professor Esmein, here presented.

Adhémar Esmein, born February 1, 1848, at Touverac (in Charente), received his first appointment as Fellow ("agrégé") in 1875; became professor of law at Douai, and then at Paris in 1879. He has since been elected a member of the Institute of France. He has also been a member of the Superior Council of Public Instruction, and is Professor in the Free School of Political Science, and Section President in the Practical School of Higher Studies. His work in a variety of fields of legal history has placed his name in the front rank of French legal scholars.[2]

[1] Professor of Criminal Law and Procedure in the University of Pennsylvania, member of the Editorial Committee for this Series.

[2] Among his principal works may be named: "Études sur les contrats dans le très ancien droit français," 1883; "Mélanges d'histoire du droit et de critique; Droit romain," 1886; "Cours élémentaire d'histoire du droit français," 1892, 5th ed. 1903; "Précis Elémentaire de l'histoire du droit français de 1789 a 1814; Révolution, Consulat, et Empire," 1909; "Eléments de droit constitutionnel français et comparé," 5th ed. 1909. He has also written a monograph on "Gouverneur Morris," and contributed largely to the legal journals.

The work here translated was first published in 1882, under the title " Histoire de la procédure criminelle en France, et spécialement de la procédure inquisitoire depuis le XIII° siècle jusqu'à nos jours." M. Dareste, the veteran professor of comparative law,[1] said of M. Esmein's book, in announcing the report of the Academy awarding to it the prize in a competition for which it was presented, "This work, well constructed and well written, is notable for the keen judgment and the accuracy of treatment shown throughout." It is marked by all the sterling qualities of French scholarship at its best; and this important subject is fortunate in receiving so thoroughly satisfying a treatment. The author has thoroughly revised it for this edition, making copious additions to the notes and occasional substitutions in the text.

Though the breadth of view in Professor Esmein's work would make it an adequate guide to the development of Continental criminal procedure in general, yet it was not composed for that purpose. To render the present volume, therefore, more comprehensive and serviceable to Anglo-American readers, who need a larger perspective by reason of their peculiar standpoint, the Editorial Committee has added a few chapters from other works. These chapters trace the general lines of development for the Continent generally, and fill out more of the details for Germany; the special history in Italy, the home of criminal law movements, will be treated in the volume of this Series on the History of Italian law. These added chapters (three at the beginning, on types of Procedure, Roman Procedure, and Primitive Germanic Procedure; and three at the end, on Continental Legislation of the 1800s, the Literature of Criminal Procedure, and the History of Law of Evidence) are from the pens of Professor Garraud and Professor Mittermaier.

François Garraud, Professor in the Faculty of Law of Lyon, is the leading authority in France on modern criminal law and procedure. The chapters here used are from his "Traité théorique et pratique d'instruction criminelle et de procédure pénale," 1907, 1909; of which the concluding volumes have not yet been published.[2]

Carl Josef Anton Mittermaier (born in 1787, died 1867), Professor of Law at Heidelberg after 1821, became the most famous criminal scientist of his day in Europe. His life and

[1] We have to lament his decease since this Preface was penned.

[2] Reviewed in vol. II of the Journal of the American Institute of Criminal Law and Criminology. His other principal work in criminal law is, "Traité théorique et pratique du droit pénal," 6 vols., 1898–1902.

labors are fully told in vol. II of the present Series, "Great Jurists of the World." The chapters of his here used (on Roman Procedure, Primitive, Medieval, and Modern German Procedure) are taken from his "Das deutsche Strafverfahren, in der Fortbildung durch Gerichtsgebrauch und Landesgesetzgebung und in genauer Fergleichung mit dem englischen und französischen Strafverfahren." This work, first published in 1827, went into its fourth and last edition in 1846; and has since remained the best exposition of the history of German criminal procedure; nor has any later German scholar (singularly enough) offered anyth ng so extensive in this field.

The translator of Professor Esmein's work and Professor Garraud's chapters is JOHN SIMPSON, of New York. Mr. Simpson is a contributor to the "American and English Encyclopedia of Law," a legal correspondent for numerous technical journals, and the translator of several masterpieces of French literature.

The translator of Professor Mittermaier's chapters is THOMAS S. BELL, formerly of the Tacoma Bar and Lecturer in the University of Washington, and now of Pasadena, California. Mr. Bell, after graduating from the University of Colorado, and going as Rhodes Scholar to Oxford, completed there a course in law and jurisprudence (B.C.L. 1908), and was afterwards Fellow in Jurisprudence at Columbia University.

Whatever the debt the student of English law owes to Sir William Blackstone, it must be said that to him in no small degree is due the lack of interest of the English and American lawyer of the past hundred years in the laws and legal institutions of other nations.

Blackstone never tired of giving thanks that the English law was not like other law. It has been a source of wonder to the youthful students of his pages how other nations preserved any semblance of civilization and freedom without the many great "palladia of liberty" possessed by the Anglo-Saxon. He never tired of drawing comparisons between the English law and the laws of other countries, always to the detriment of the latter. It may not be the result, but it is at least a coincidence, that with the cessation of the use of Blackstone's Commentaries as an entrance to the study of English law there is a growing demand for a knowledge of the legal systems of other countries.

From a practical point of view a knowledge of the criminal procedure of other countries is perhaps of less value than a knowledge of foreign law on any other branch of jurisprudence. Our own criminal procedure has been the avowed model for foreign countries. To the student of institutions, however; to him who

joys in watching the never ceasing battle between the forces of repression and liberty — the nice adjustment of which spells true civilization; to him who would see how a great people have worked out a great problem,— the study of the history of French criminal procedure offers a fascinating subject. Our own procedure is the result of a slow evolution. In the French criminal procedure we see the rare phenomenon of a combination of evolution and adoption and then of an evolution of the adoption, yet with all a constant tendency to a reversion to type.

Nothing could be more interesting than Esmein's study of this evolution of French criminal procedure from Roman, through Germanic, to Canon law; the play and counter-play of various forces for two centuries, making for the permanence first of the accusatory and then of the inquisitorial system.

The reader will here find set forth the struggle between the *enquête du pays* and the "inquest" of the Canon law. He will learn how the former lost to the latter at the same time that the English equivalent of the *enquête du pays* — the *inquisitio patriæ* — the grand jury — was triumphant in England.

The Ordinance of 1670 definitely fixed the inquisitorial procedure in French law for a century. The Revolution, however, will bring to the battle new forces, and the accusatory procedure of England will be bodily transplanted into French soil. Later, the need of strengthening the authority of the State will cause a reversion. The Code of Offenses and Punishments of the year IV will show a tendency to return to the secret examination of the inquisitorial system, a tendency that the law of the year IX will accentuate. Then a compromise will be effected by the Code of 1808, which will reënact in part the inquisitorial, while retaining in part the accusatory system. The adoption of the Code of 1808, however, only marks a pause in the battle, a battle that begins again every time the government undergoes a notable change.

In studying French criminal procedure, considering it both in its broad sweep and in detail, one cannot fail to be struck with the unity of history. Different in many respects as has been the history of French and English procedure, so different indeed that the two have, at certain periods, offered opposing types, we see that both began as one type — the accusatory. English procedure remained true to type, with a few unimportant aberrations, such as the Star Chamber afforded. In France, though for many centuries this type was abandoned, we now see it restored in almost its pristine vigor. In details we see the same unity. Torture runs

through both like a scarlet thread, though the thread is larger and the dye deeper in France. Shudder as we may at the institution of torture, it is something to know that the necessity for it was due, not to innate cruelty, but that it sprang from a regard for the innocent accused which demanded such perfect proof for conviction that nothing short of confession would satisfy it. The Frenchman's "house was his castle" even more than the Englishman's, for the former could not even be arrested in his home. In both countries the right of the accused to counsel, in serious crime, was first denied and then granted. The language of PUSSORT in the debate on the Ordinance of 1670 read like a modern political indictment of a "corporation lawyer." Pussort says: "We know how fertile these kinds of counsel are in finding openings to frame conflicts of jurisdiction, how they often scheme to discover nullities in the proceedings and to give birth to an infinitude of side issues. It is therefore peculiarly in the interests of the wealthy that counsel is granted." In both countries the right was granted by the judges before legal warrant by legislation.

In England the proof required to convict was always proof "beyond a reasonable doubt." In France the proof must be "clearer than the sun at noonday."

The doubts as to the necessity for a unanimous verdict; the right of the accused to be free from the necessity of incriminating himself,— these are a few of the many things the student of English law finds reproduced in France.

In law as in other sciences we have our recurring cycles of thought. The present-day alienist harks back to the ancient Greek where Homer ascribed guilt to Até. We are saying again the criminal is not so much a knave as a fool or a madman; his intellect is darkened. Simonides is quoted by Plato as saying, "A man cannot but be bad when the force of circumstances overpower him." The modern sociologist makes crime the product of environment. Humanism in the 1400s, on the Continent, inveighed against the theories and the technicalities of the Jurists. The social scientists of the 1900s are voicing the same cry — with this difference, that the Humanist cared nothing for the practical importance of the administration of the law; his interest, was in origins, and his effort, to take men's minds back to the purity of original sources. The present-day movement cares little for sources, its effort is directed to practical results.

In the French criminal procedure we may find many a precedent for provisions in our law which are anomalies with us.

Probably the most interesting feature of the building up of the French procedure is the struggle with the jury system. It is met at every turn in French legal history.

"The French inquest has in it the germ of all that becomes distinctly English in the English law of the later Middle Ages, the germ of trial by jury and of a hard and fast formulary system of actions which will be tough enough to resist the attacks of Romanism." Maitland has also told us how the fate of the inquest was still in the balance a century after the Conquest, and how Henry II, in the nick of time, by placing at the disposal of litigants in certain actions the "inquest of the country" which the Romans had brought from France, established trial by jury in England. Esmein shows us the steps by which this same "*enquête du pays*" lost in France in the struggle with the "inquest" of the Canon law. The jury early lost to France; imported as an alien institution in its entirety in 1791; its subsequent history, in which four times the fight for it was lost and won, won even against the opposition of Napoleon,—is treated with a masterly hand by our author.

Nothing could be more interesting to the American or English reader, to whom the jury is the "Palladium of Liberty," than to read the debates, set out at length by our author, on the value of, and the advisability of adopting, trial by jury in criminal cases. The recurrence of the argument that what has proved valuable among the English would not suit the "genius of the French people," reminds us of the phrase "un-American" which meets every effort at reform with us. Yet notwithstanding this "genius of the French people," the jury has won a permanent place in French law. As our author says: "A great civilized nation cannot renounce it without losing its rank. . . . It is indestructible . . . in spite of its defects."

Esmein's chapter on the function of the jury in criminal trials is well worth study. It has long been a mooted question with us whether the jury is legally bound to take the law from the court or is itself to be judge of the law as well as the facts in rendering a general verdict.

It is known to all who have eyes to see and ears to hear that there exists grave dissatisfaction with the administration of the criminal law in the United States. We used to be satisfied with the explanation that it was due to the fact that we were a new country, until we learned that the same phenomenon did not exist in newer countries than our own. The explanation that it was due to the immigrant is not weighty when we consider that our budget of crime is greater

than that of the countries from which the immigrant comes. Opinion is crystallizing into the belief that it is due to our procedure in prosecuting criminals, and the public mind is open as never before in our history to the adoption of practicable means for the reform of the procedure where it is shown to be archaic or otherwise inadequate. No student of our criminal jurisprudence can fail to be impressed with the efforts of our criminal courts with the machinery at hand to render more effective the administration of the penal law. Decisions are daily rendered upholding indictments, ignoring errors in instructions, and validating verdicts that a few years ago would have been regarded as a denial of some fundamental constitutional right. But the judges — anxious as the vast majority of them are to render effective the administration of the criminal law — cannot do all that is needed. The more drastic power of the legislature and of the constitutional convention are necessary for the cure of some evils. To the legislator this book may be commended — not perhaps as a study in direct legislation — but for its broadening effect in showing how a great nation has tried to work out the problem that confronts us.

It is a curious fact that during the last century opposite tendencies have been working and continue to work in French procedure on one hand and English and American procedure on the other. In France the tendency has been to ameliorate the severities of the law, to surround the accused with greater safeguards at the expense of the prosecuting power. In England and the United States there is a strong tendency to strengthen the hand of the state at the expense of the accused, by a process of elimination of the technical rules that covered the accused as with a coat of mail. Recently the old inquisitorial procedure has shown its head in America in the so-called "Third Degree." Whether this is sporadic and will remain extra-legal or will find recognition remains to be seen. It has already reached sufficient magnitude to call forth legislation. So far this legislation has been against it, and in the extra-legal way in which it is practised it is, undoubtedly, vicious. But it may well be that, protected as the criminal is in Anglo-American jurisprudence from the time of arrest to final judgment, surrounded as he is not only with all the presumptions and technicalities of the old English procedure, but also by the added constitutional safeguard of State and Federal constitutions, we may yet find it necessary to adopt something corresponding to the examination of the French *juge d'instruction;* in some States we have already followed France and practically abolished the grand jury.

Another matter that may well engage those who would reform criminal procedure is that of the necessity, for conviction, of unanimity among the jury. With this, as with most other fundamentals of criminal procedure, the French have not scrupled to experiment, and their experience is well worth study.

Payment of damages by the State to one who has been wrongfully convicted and suffered punishment, is a feature of French law that we are likely soon to adopt. Agitation for a "public defender" has begun. He would be rash who would predict the future of penal legislation in the United States. Is it too much to hope that in making the changes that are coming we will study the history of criminal procedure in France — the country which for four hundred years has been the laboratory for legislation on this branch of law?

INTRODUCTION

By Norman Maclaren Trenholme[1]

In an age of growing internationalism, law should become more international as well as more rational and scientific. Lawyers as well as legal historians and teachers of law should become acquainted with the legal history and procedure of other countries, and develop a broad comparative knowledge of the principles, practices, and procedure of the past and present. In bringing this about, books such as the present volume are most effective and absolutely necessary. It is their absence heretofore that has made the legal profession of America and England somewhat narrow and national in its outlook.

Criminal procedure to-day is so much a matter of ordinary legal training and knowledge that few lawyers realize what a wealth of historical and legal background it has. Its history has been neglected in large part as well by institutional historians who have preferred to deal with larger questions of governmental and legal development. The result of this double neglect is seen in the fact that there are but few books in foreign languages and, until the appearance of this volume, practically none in English, dealing in detail with the history of criminal procedure. In view of the vital importance of understanding the processes of development lying back of present practices and of comparing our methods of procedure with those of other countries, such lack of historical reference works is to be regretted. The appearance, therefore, of a comprehensive work such as this in the Continental Legal History Series, containing a survey of the historic forms and literature of European criminal procedure, even including England, is a most encouraging sign of legal-historical progress in America.

The work to which this is an Introduction, though mainly a translation of Esmein's "Histoire de la Procédure Criminelle en

[1] A.B. (McGill University); A.M., Ph.D. (Harvard University); Professor of History in the University of Missouri; author of "The Right of Sanctuary in England" (1903).

France,"[1] is made of broader application and greater value by the inclusion, in both the earlier and later parts, of portions of other treatises. The larger number of these additional and supplementary chapters are translated from M. Garraud's broad and scholarly work on French criminal procedure, a part of which forms the introductory chapter of our volume. This is an excellent general discussion of the *accusatory*, *inquisitorial*, and *mixed* types of procedure in criminal cases. The second chapter, however, draws on another work, that of the learned German legal historian of over half a century ago, Professor Mittermaier, the author of a well-known history dealing with German criminal procedure. From this work we have a concise and scholarly account of the Roman criminal procedure in which the various processes and practices of the Roman legislative system of procedure are described and the somewhat accusatorial character of the Roman system is brought out. The presence of inquisitorial features in later imperial procedure is noted, and we get a good general idea of the extent and character of the Roman background to later criminal procedure. The third chapter is also from Mittermaier's work and describes primitive Germanic criminal procedure with sufficient fulness and detail for the purposes of a general survey. The difference that is frequently apparent between French and German research and scholarship is well brought out by comparing Garraud's chapters with those from Mittermaier. The former has decided superiority of style and organization, while the latter excels in exactness and in proofs and references. Both these accounts are of great interest and value to students of the history of law.

Part One of the main work is devoted to the history of criminal procedure in France from the twelfth to the seventeenth centuries and Garraud is again drawn on for an introductory section. This describes and comments on the general features of the evolution of French criminal procedure and is a useful and valuable survey. It connects the past and present in a clear and interesting manner by showing how the criminal procedure in France to-day is of a mixed type rather than strictly inquisitorial and is the result of a long process of legal evolution and special legislation. Such a well-organized and philosophical introduction is of especial importance in a work intended for English and American readers

[1] Histoire de la Procédure Criminelle en France et spécialement de la procédure inquisitoire depuis le XIII[e] siècle jusqu'à nos jours, par A. Esmien, professeur agrégé à la faculté de droit de Paris. Ouvrage couronné par l'académie des sciences morales et politiques. Paris, 1882.

who may not be familiar with the peculiar characteristics of contemporary procedure in France. The meaning and importance of Esmein's more detailed account of the criminal jurisdiction of Old France (which is a better rendering of "L'Ancien France" than "Ancient France") is better appreciated and understood after knowing the present status.

The reader, having been furnished with a broad background of Roman and early Germanic criminal procedure and a perspective of general development from ancient times to the present, is prepared to follow the interesting story of the evolution of criminal procedure in France and other European countries from the later Middle Ages to the present. Professor Esmein's work, with some slight omissions and a number of important additions, furnishes an excellent basis for such a survey. Like many French and English monographs of great merit, Esmein's study was first presented as a prize essay in competition for the Bordin Prize in 1880. The subject proposed for competition was: "To make clear the history of the criminal Ordinance of 1670; to seek out what has been its influence on the administration of justice and on the legislation which followed it to the close of the eighteenth century." Esmein, who has then merely *agrégé* in the Faculty of Law at Paris, won the prize, by the unanimous decision of the judges, with an essay entitled: "Histoire de l'Ordonnance de 1670 et de la procédure inquisitoire en France." The young author ventured to go beyond the letter of the subject proposed by giving the historical and legal background to the Ordinance of 1670 and by carrying his treatise on criminal procedure in France beyond the limit of the eighteenth century up to his own time. This did not infringe on the spirit of the subject, however, but made Esmein's work of broader legal and historical value, for, as he says in his original preface: "The presentation of the history of a Law that has passed away should not merely tell how it was promulgated, applied, and later abrogated: it is necessary, in addition, to seek out the origin of the legal ideas it contained and to ask oneself if it has not transmitted something of value to the modern legislation that has followed it." With this spirit and viewpoint it is little wonder that Esmein produced a study of permanent value, and that the essay crowned by the Academy of Moral and Political Sciences should become the basis for the broad and scholarly work on the history of criminal procedure that we have in English translation in this volume.

Historical students will regret to some extent the omission in this volume of the first or introductory section of M. Esmein's

work consisting of two chapters on the early jurisdictions of France, because these chapters contain an interesting account of an historical-legal character of the seigneurial and royal justice of France, in the later Middle Ages. But their place has been well taken by the broader survey from Garraud already referred to and students of History can always go to Esmein's original work for the special information in the omitted chapters.

The first topic dealt with in the translation from Esmein, therefore, is that of early procedure in France, which was thoroughly accusatory in character, in connection with the feudal courts. Beaumanoir and the various collections of feudal customs, together with the leading modern authorities of France and Germany, are used as sources for this excellent treatment of the more important features of feudal procedure. The transition from the accusatory form to the inquisitorial is next brought out, and special emphasis is laid on the influence of the Church and on the growth of the royal power in bringing about the change. The introduction of torture to extort confessions and the appearance of the secret examination are noted as important factors in the new system.

The next step is the organization and control of criminal procedure by royal ordinances which began with the ordinances of 1498 and of 1539. The latter ordinance was especially important and evoked some spirited opposition on account of its arbitrary and severe character. Under the influence of these ordinances all other forms of criminal procedure either tended to disappear or were abolished. It was only natural that the seventeenth century in France should witness a tendency on the part of the strong monarchical government towards an elaborate codification of criminal procedure along inquisitorial lines. This was accomplished under Louis XIV in the form of the great Ordinance of 1670.

The Ordinance of 1670 was the result of many discussions and conferences on the part of the royal ministers, especially Colbert, and the leading jurists of the time. Like the Magna Charta, the Ordinance contained little that was really new, being a codification of the criminal procedure that had gradually developed during the three centuries previous to its enactment. It marked, therefore, the culmination of the process of transition from the oral and public accusatory system of the feudal period to the written and secret inquisitorial procedure of the early modern period. The result was that a code of criminal instruction was now definitely established which lasted down to the French Revolution and was rigidly followed in all its details of secret processes, variegated tortures,

and cruel punishments by all the courts of justice in France. Back of it lay the royal authority, which could be exercised arbitrarily against the subject, and it is little wonder that the French reformers of the eighteenth century regarded such a system as mediæval and irrational. Instead they professed admiration of the English system of the public accusatory type which involved trial by a jury and gave the defendant the benefit of being considered innocent until he was proved guilty and did not subject him to torture and secret examination. Esmein's account of the actual workings of the Ordinance of 1670 is particularly full and interesting and includes valuable material as to how the ordinance was regarded by leading jurists, philosophers, and political theorists in the eighteenth century.

Accompanying this discussion is an interesting survey of the criminal procedure which had grown up in other European countries such as Italy, Spain, Germany and the Netherlands, and England. This survey has been made completer and more valuable in its English form by the author's careful revision and the introduction (for the purpose of this translation) of considerable additional matter, especially in connection with England.

The third and final portion of Esmein's work is concerned with the legislation in regard to criminal procedure of the revolutionary period and of the Napoleonic era leading up to the Code of Criminal Instruction of 1808. An interesting account of the attacks on the old procedure contained in the *cahiers* of 1789 and of the first attempts at reform which were made by the Constituent Assembly is given, and the contest that raged between the advocates of jury trial and the upholders of a modified inquisitorial system is well brought out. This contest finally ended in a compromise by which a mixed accusatory and inquisitorial system of procedure was put into effect as a result of lengthy debate and discussion on the part of Napoleon's Council of State and of the leading jurists of the empire. The conclusions reached were embodied in the great Code of Criminal Instruction of 1808, which has served as the basis of modern criminal procedure in France although frequently modified by subsequent legislation. In this code the influence of the Ordinance of 1670 and of earlier criminal procedure is clearly seen in connection with the preliminary and secret examination by the magistracy, the severity of the restrictions on the defendant in a criminal case, and the system of written testimony and instruction. On the other hand, the influence of the reform element in favor of jury trial is seen in the provision for public trial and jury

decision, in the recognition of the courts of Cassation and of Assize, and in the provisions for allowing the accused person better facilities for defense. To further reform the criminal law of France an elaborate Penal Code was compiled and promulgated by imperial decree in 1810. Both the Code of Criminal Instruction and the new Penal Code went into full effect on and after January 1, 1811, after a reorganization of the French judiciary had been made.

The detailed account given by Esmein of the adoption and workings of the Code of Criminal Instruction is well worth careful study. This is especially true of the chapter dealing with the discussion on the adoption of the jury as a part of the procedure. There were a number of able and influential men who opposed jury trial, and Napoleon himself was against it, but in the Council of State there was a strong sentiment for its retention which finally triumphed. The Grand Jury or Accusation Jury was abolished, however, and its functions transferred to a special tribunal. But, on the whole, as Esmein observed: "In the great and long drawn out contest between procedure by juries and the Ordinance of 1670, the former gained a decisive victory. Posterity ought to give recognition to the men who, in the Council of State of the Empire, were able to resist the hardly disguised wish of the Emperor, and whose courageous efforts resulted in the retention of the jury in our laws." The student of history will find this phase of Napoleonic history ably treated and will gain added respect for the members of the Council of State.

The chapter on the question of the retention of the jury, though especially interesting to English readers, is really not more important than the long and detailed discussion on the incorporation of a large part of the Ordinance of 1670 and of the special legislation of the early part of the Revolution into the new code of procedure. It is impossible to go into this matter at all fully in this introduction, as it would involve a special description of modern French criminal procedure; but attention might be drawn to the mingling of the old formal ideas of inquisition and written evidence with the more liberal tendencies represented by *Rehabilitation* and *Revision*, which are ably discussed.

The chapter on criminal procedure in France since 1808 brings our knowledge of the subject up to date along topical lines of development. The progress in legislation of legal character is noted; the changes or modification in the procedure preceding the actual trial are treated of; the important changes in connection with the

preliminary examination are discussed and outlined in connection with the Laws of 1856, 1863, and 1865; the various projects of reform up to 1880 are taken up; and, in conclusion, the history of recent legislation affecting criminal procedure is recounted, especially the changes made by the Law of 1895 and introduced in the closing years of the last century.

Following the long survey of the history of criminal procedure in France, taken mainly from Esmein, the reader's attention is directed to a broad discussion on criminal procedure since 1800 in other countries of the world. This is a valuable and well-organized review of the whole field of modern criminal procedure taken from Garraud's work (already several times referred to). It forms a fitting conclusion to a volume devoted to European criminal procedure, emphasizing, as it does, the classification to systems and the internationalism of modern legal ideas. Information and viewpoint are admirably blended, and the adoption of a comparative method of treatment is justified by its results. Much the same can be said of the two scholarly appendices, A and B, both taken from Garraud's work. Appendix A is an interesting survey of the literature of criminal procedure from the Middle Ages to the present. The writers are organized as belonging either to the age before the Code of 1808 or after, and are further subdivided in accordance with their special characteristics, contributions, or nationality. Appendix B represents an admirable general sketch of the history of the continental European system of evidence. This is clearly organized into ethnic, religious, legal, and scientific phases of development or evolution, and into different systems and methods of proof, leading up to the present-day dominant but erroneous idea that the only convincing proof is "Jury Proof."

From such a volume as this, so comprehensive in its contents and so comparative in its methods, English-speaking students of law and history can derive much of value. To see how criminal procedure has originated and developed out of Roman, Teutonic, and Christian elements and ideas, how out of the practically uniform accusatory procedure of the feudal age in the various countries of western Europe there grew two divergent systems, those of England and France, one marked by the juries of indictment and trial, the other by secret inquisition, torture, and severity, is in itself fascinating. But even more interesting and significant than the story of the divergence of these systems is the story of their gradual reconciliation in the newer criminal procedure of Europe of to-

day. The so-called *mixed* type of procedure adopted by the leading continental European states is a recognition of the value and importance of the trial jury as an institution, of publicity in court proceedings, and of giving the accused person a better and juster defense against possible unwarranted conviction. The acceptance by continental jurists and governments of these principles of Anglo-Saxon procedure does them honor as well as furnishes them with a system of procedure probably containing the best features of both the old systems.

Perhaps after reading or looking over this volume the thought may arise that America could benefit by imitating to some extent the mixed type of criminal procedure now in use on the continent of Europe. Even should such a reform not be possible, however, the American legal profession needs to be awakened to the fact that criminal procedure in the United States is half a century or more behind that of Great Britain and continental Europe. Instead of the swift and sure justice that accompanies the administration and procedure of the British courts or the careful and thorough investigation and well-organized prosecution and trial of the continental European tribunals, we have a procedure clogged by archaic technicalities, influenced by the wealth of the defendant or his friends, twisted by adroit criminal lawyers, and full of long delays, mistrials, hung juries, and dismissed cases.

The spirit of legal reform is everywhere present in the United States and will bring about important changes in criminal procedure. These should be based on broad comparative study of existing systems such as can only be gained from a work like this. Let the chapters from Esmein, Garraud, and Mittermaier that follow be read with care and attention, and a cosmopolitan and international viewpoint of criminal procedure is bound to result and to react beneficially on national prejudices.

UNIVERSITY OF MISSOURI,
COLUMBIA, MISSOURI,
March 22, 1913.

INTRODUCTION TO THIS VOLUME

By William Renwick Riddell[1]

Common lawyers are apt to imagine that their science is something apart from the remainder of the realm of knowledge and thought, that the Common Law of England is something unique standing off by itself. To my mind the glory of the English Common Law is not diminished but enhanced by the recognition of the fact that it is not simply the creation of an isolated people, but is part of the juridical concept of the human race, and especially of nations with kindred origin. Speaking of a knowledge of law in the sense of knowledge of the sources and underlying philosophy of the law, as distinguished from a knowledge, however profound and accurate, of its existing precepts and their effect, the question may cogently be asked, "What do they know of English law who only English law know?"

And this applies not less to procedure than to substantive law.

This book contains a fascinating story of the evolution and development of Criminal Procedure on the Continent — an evolution and development which is of great interest both in its similarity to and in its difference from what appears in the history of the English procedure.

The first thing perhaps, which will strike the reader in this book, is the gradual but constant progress away from technicality and form.

Goldwin Smith used to say that to expect the lawyer to reform legal procedure would be to expect the tiger to abolish the jungle. He was giving a literary form to a thought underlying innumerable statements about lawyers — which lawyers have generally treated with the good-natured contempt which actuated the peasant to permit his wife to beat him, "It pleases she and don't hurt I." But the gibe is wholly unjust. The further back we go in the history of procedure the more technical we find the procedure — originally the procedure must be without "faute" —

[1] Justice of the Supreme Court of Ontario (Appellate Division).

and all the amendments have been the work of lawyers. I have before me a manuscript book of precedents for criminal indictments in the handwriting of a Judge who left our Bench about half a century ago. An indictment for murder covers three pages of foolscap. Nowadays it would not take three lines. The course of evolution has not in all cases been rapid, but it has always been in the same direction. To see and appreciate that this is so, not only in English-speaking countries but elsewhere as well, is to give the lawyer a higher estimate of human nature and of his profession.

The particular instances in which the procedure on the Continent agrees with that in England are not few, and are always interesting. The differences are equally so. In Rome, under the late Emperors, the Senate frequently asserted a jurisdiction over crimes, and by a summary procedure. This is quite analogous to the jurisdiction asserted by the Star Chamber, acting, as it not unfrequently did, not as a statutory body under 3 Henry 7, c. 1, but under the original common law jurisdiction of the Privy Council, and by a procedure quite as summary. The jurisdiction so exercised in England proved of great value to the country, although the Court itself got into disrepute and was abolished.

The great respect paid to trial by ordeal, and then its complete disappearance, are noticeable in France, as in England. The ordeal by fire or water was not peculiar to the Germanic races, but was perhaps more generally resorted to by them than by other peoples. Its final disappearance in France preceded by some centuries its disappearance from English jurisprudence. So, too, the wager of battle, which, at least in theory, lasted till a comparatively recent period in England, surviving for centuries the ordeal, but which became obsolete on the Continent very much earlier than in England. The same remark applies to compurgators.

One everywhere sees the evil case of him who had been taken in the act and consequently was more than half guilty.

The importance of an accused person putting himself "on the country" — a Canadian petit jury is still charged, "upon his arraignment he hath pleaded not guilty, and for his trial hath put himself upon his country, which country you are . . ." — is shown by the means taken to compel it, *e.g.* the "prison forte et dure" which, corrupted into "peine forte et dure" by English judges, had such a ghastly history. Giles Cory was not a solitary instance.

Another result of a refusal by an accused to put himself upon his country — *i.e.* outlawry — died a slow and lingering death.

Then consider the refusal of counsel to the prisoner, for which a theory was invented that the Judge was counsel for the accused. This it would have been difficult to persuade those to believe who were tried before Jeffreys and his like. The "State Trials" are witnesses to the falsity of the doctrine. But this was quite as reasonable, and displayed quite the same touching confidence in human nature, as the proposition that the Judges shall take care that the tortured are not crippled by their torturers. The torturers took the same care in this regard as Jeffreys did for Alice Lisle.

The wretched prisons, "cloacæ of infection," were universal, and neither Voltaire nor Howard brought about their complete abolition; and jailers' fees were too long an added infliction upon the unhappy mortal charged with crime.

The value of hearsay evidence, of presumptions, of confessions; the necessity of two witnesses, — all these have been matters of controversy in all civilized countries.

The arguments used a hundred years ago in France against the jury system are the same as those which influenced the Japanese jurists at a much more recent date. No doubt Britain — Home Country and Colony — the United States, all English-speaking countries, will go on with their firm faith in the jury system as the "palladium of civil liberty" — though it is being more and more felt that, however it may have been in the past, at the present time the jury has no more to do with the safety of civil liberty than the original Palladium had with the safety of Troy, and would be equally ineffective in a real crisis. And no doubt the "foreigner" will continue to wonder as did the French Canadians who, when in 1760–1763 the English law was introduced into Canada, marvelled that the English should leave the determination of their rights to tailors and shoemakers rather than to their Judges. But the jury in criminal matters seems to have made its way, even if jurors need not everywhere be unanimous.

All nations have gone through, or are going through, a stage in which there are imaginary crimes — witchcraft, sorcery; New England unhappily was no exception. It is but the other day that such crimes died out on this Continent — died an unnoted imbecile death.

These chronicles show that good sense constantly makes its appearance amid the most exigent technicality. The accused

is not to be called upon to answer anything but the exact charge contained in the "indictment." He is to be confronted with the witnesses against him. Free men are to have free access to the courts. Indignation is expressed that sometimes officers take notes only of what the accused says and write it out afterwards; (the Music Hall jest represents the London Police Magistrate as saying to an accused, "Have you anything to say? You are not required to say anything, but if you do, it will be taken down, altered, and used in evidence against you on your trial").

The capital presentation in this work of the history of English law could not easily be excelled in the space — it shows the extreme care taken to be accurate.

I do not intend to analyze the book, much less to pick out the plums; the gold seeker is best satisfied to find his own nuggets. But I cannot refrain from calling attention to the *vox clamantis in deserto* of Pierre Ayrault, of La Bruyère, of Dupaty. They were forerunners and prototypes of our own Samuel Romilly. Into his soul entered the terrible wrongs of the criminal, real and supposed; and the strain of his heroic labors to right those wrongs had no small part in overthrowing a mind as fine and subtle as it was noble and humane. Those were men of whom their world was not worthy — who are but now coming into their own.

To the lawyer who is a mere tradesman, desiring only to make money out of his trade and caring for nothing else, a perusal of this book would be worse than useless. All such *βάναυσοι* are warned off this ground. *Procul o procul este, profani.* But fortunately the profession of law is a liberal and a learned profession, not a mere trade — there is more in it than meat and raiment, than money-making — and the sympathies and interests of the true lawyer reach far beyond bread-and-butter.

I envy the student of legal history, and especially him who makes the study of legal history a recreation from an arduous practice of his profession, his first perusal of this book. He will find much to wonder at, much to condemn, much to approve, in the practice, past and present, on the Continent. He may find lessons for his own country, what to follow, what to avoid. He will with difficulty conceive of anything which has not been at least touched on before; for "there is no new thing under the sun." Even in the old, old Roman law "the people exercised a great influence . . . through the appeal to the people against the decrees of the magistrates."

AUTHOR'S PREFACE TO THIS TRANSLATION

By A. Esmein

This book is the first published work of mine. It was composed between 1877 and 1880; I began it at Douai and finished it at Paris. It received the prize, in a competition, from the Academy of Moral and Political Sciences, of which to-day I am a member.

I am very glad to see it translated into English; for I am an admirer and friend of the Anglo-Saxon race. I am glad to see this translation published in the United States, the greatest democracy of modern times, which has set us an admirable example in its magnificent efforts to develop among its people the highest intellectual culture.

Although this book first saw the light thirty years ago, in 1882, I can still let it go into this new edition almost in its original form. Neither the labors of French and of foreign scholars, nor my own later studies, have given me reason to change its conclusions on any material points. Nevertheless, in this new edition, I have given it a thorough revision, taking into account the critical editions of early texts appearing since 1882; so that the work now represents a brief, but (I am convinced) a faithful, account of French criminal procedure and its history to the present day. I have entirely rewritten the pages concerning the origin and development of the "processus per inquisitionem" in the Canon law, — the subject of a lecture course of mine at the School of Higher Studies. I have also rewritten the portion devoted to the history of criminal procedure in England, in the light of the admirable researches of Pollock and Maitland, Thayer, and Holdsworth.

Paris,
April, 1913.

PRELIMINARY TOPICS

CHAPTER I [1]

THE DIFFERENT TYPES OF CRIMINAL PROCEDURE

§ 1. **The Three Types of Criminal Procedure.** — The history of civilization, in its organization and procedure for the repression of crime, presents a limited number of variant types. These succeed each other in a chronological order corresponding very closely to the logical order of their appearance. Three fundamental types of procedure are, in effect, distinguishable, — the *accusatory* type, the *inquisitorial* type, and the *mixed* type. The criminal law of almost every nation has begun with the accusatory procedure, and has changed to the inquisitorial procedure.[2] An evolution in an opposite direction, however, is now apparent; everywhere there is a tendency to restore the essential safeguards of the accusatory system, *publicity* and *confrontation*. The only institution of the inquisitorial system which has defied criticism and which is probably more powerful and general than ever is that of the *public prosecutor*.

§ 2. **The Accusatory System.** — The accusatory system has two leading features. It agrees with the primitive idea of the penal action, which is, primarily, but a sham fight between two combatants, to which the judge puts an end by deciding against one or other of the parties. It implies, at the outset, the mixture of two procedures, criminal and civil, which, both induced

[1] [This Chapter I = § II of Professor GARRAUD's work on "French Criminal Procedure." For this author and work, see the Editorial Preface. — ED.]

[2] Primitive laws gave to the procedure the effectual form of a combat. As always happens, this simulation began as a reality, and it is by no means rash to affirm that the first methods of litigants were those which are nowadays the last arguments of the vulgar — blows. See *Beaudouin*, "La participation des hommes libres au jugement dans le droit français" (Revue historique du droit, 1887–1888, pp. 246–279); *Ihering*, "Esprit du droit romain," vol. I, p. 122, note 33.

by private action, originally pursue their course in the same forms, before the same judges, and seek to attain the same satisfactions. Little by little, no doubt, the difference between the ends aimed at leads, notwithstanding the identity of the parties engaged, to the gradual differentiation of the penal proceeding from the civil. In the accusatory system, however, the difference between these two actions is never absolute, and there is a continual reaction of punishment upon indemnity and of indemnity upon punishment.

The following principles form the basis of this system of procedure:

(1) The *accusation* is freely exercised by *every citizen;* but there is no penal action without an accuser, who takes the initiative in it and the responsibility for it. In this respect, however, the setting in motion of the procedure belongs, originally, to the injured party; later on, when the necessity for and the interest of society in repression become felt, and as the penal law breaks away from the civil law, there is recognized, in each member of the group to which the injured party belongs, the power to begin the prosecution in the name of the collective body. This is the system of the *popular accusation.*

When this period of judicial civilization is reached, it becomes obvious that the accusation is a social function. Permanent and official organs, however, have not been created to exercise that function. This evolution of juridical conceptions is the point of departure of the breach which will continue to widen between the criminal and civil procedures. Society is obviously interested in the institution and prosecution of criminal actions. Neither the victim of a wrong, nor his fellow citizens, without the aid of public constraint, have the power to prevent the malefactor, emboldened by impunity, from very soon committing new crimes. The exercise of the social or public action is therefore justified in criminal matters; though it would be useless or superfluous in civil matters. It is undoubtedly useful from a social point of view that the rights of property be respected, contracts fulfilled, and injuries indemnified; but the surest way to attain these results is to leave private individuals free, giving them access to the tribunals, there to debate and have their rights acknowledged.[1] The civil action is therefore carried on in

[1] The difference between the penal and the civil action in this respect has been well put in relief by *Tarde*, "Penal Philosophy," *Howell's* trans. "The Criminal Science Series," Little, Brown, & Co., Boston, 1912, pp. 423–429.

the name of private interest; the penal action in the name of the general welfare. In the first, the initiative of the action should belong exclusively to the party who complains of a personal wrong; in the second, to the representative of the general public. This distinction becomes fundamental in every system of procedure. Whenever this evolution is accomplished, criminal procedure presents the following characteristics: Detection and prosecution of wrongful acts by the representatives of society; Trial by the representatives of society; Public punishment. Before, however, attaining this conception, which is that of civilized nations, many halting places are successively passed by.

(2) Primitive customs have a minimum of exigency and of ideal; they are satisfied with avoiding, as far as possible, recourse to brute force. They are regarded as having gained a great victory over the instinct of individual vengeance when they have laid upon the offended party the obligation to respect certain forms and certain delays in the exercise of his right, and have constrained him, in case of doubt, to submit to an arbitrage.[1] The *judge*, originally, is really the *umpire of a personal combat;* he must be chosen, or at least accepted, by both parties.

We also find, among almost all the nations which practised the accusatory system, either the principle of trial by the peers of the accused, or the absence of a procedure by default.

(3) The first of these institutions, *trial by the peers of the accused*, by the men of his tribe and of his caste, has always been looked upon, in primitive societies, as the best guaranty of impartial justice. It brings the case before unbiassed arbiters, who try it without appeal from their decision, guided only by their reason and conscience. Of the two questions which present themselves in the penal action, one, that of ascertaining if the accused is the perpetrator of the crime, is in the nature of a question of fact; the other, that of ascertaining to what extent he is morally responsible for it, is a question of degree of culpability. Popular judges are able to decide both questions. Their solution really requires no special juridical learning.

(4) The necessity for the *personal presence of the parties* arises, originally, from the very nature of the action, which is a feigned combat. Every combat presupposes, in effect, the presence of two combatants. It matters little that this was but a symbol. The form prevails over the fact. Later on, another idea is joined with the first, and gives to this rule of primitive law a new jus-

[1] *Sumner Maine*, "De la codification d'après les idées antiques," p. 13.

tification. The judge is an arbitrator, and must be accepted, at least tacitly, in order to be regularly vested with his power. The great concern at this period is to constrain the accused to submit to trial; the outlawing of the reluctant defendant is the forcible procedure by which it is sought to achieve this purpose in default of any direct means of compulsion and in view of the impossibility of passing sentence. If the accused does not appear he is not sentenced, but is treated as an outlaw. [1]

(5) The judge, in the accusatory system, cannot proceed on his own initiative, either in taking jurisdiction, or in obtaining proof. His rôle consists in replying to the questions which are presented to him, examining the evidence brought before him, and deciding upon that evidence. He is present as a second in the duel. He superintends the combat, that it may be fair throughout. He announces who is the victor. But at no moment of the proceedings does he take an active part, either to prosecute or to inquire. The trial has thus three essential characteristics; it is confrontative, oral, and public. The adversaries are brought face to face in a contest which takes place in broad daylight. Each of them produces at his discretion his means of proof. The proceeding resembles a duel with equal and fair weapons.

(6) The proceedings employed to discover the perpetrator of a crime and to prove his guilt are in perfect harmony with the prejudices, or, if you will, the beliefs of the period.

The chief effort of the prosecution is directed towards the establishment of the very act. In primitive procedures capture in the act appears, indeed, to be the normal hypothesis of repression; the sentiment of vengeance which inspires the penal system is, in this case, stronger; the culpability, which it is necessary to establish, is then less doubtful. Except in the case of capture in the act, if the accused does not confess, it is for him, by an inversion of the proof, to show his innocence by taking the exculpatory oath and sustaining it by the number of oath-helpers which custom demands. This is the normal method of proof. It constitutes a right for the accused. But it may be set aside in certain cases and then *ordeals* are brought into play, by which appeal is made to the judgment of the deity. These ordeals are of two kinds. In some, only one of the parties takes an active part, usually the accused. To instance the most widespread, there is the ordeal of branding, that of boiling water, and that of cold water. In the others, both parties play an

[1] See *Molinier*, p. 18; *Du Boys*, "Histoire du droit criminel des peuples modernes," vol. I, p. 122.

active part, as in the judicial duel and the ordeal of the cross.[1] This system is by no means peculiar to the Germanic customs; it is characteristic, not of one definite race, but of a certain stage of civilization.[2] In the mythological stage of the human mind the deity was invoked upon the question of guilt or innocence just as it was invoked as to the fate of a battle. In this respect there is a connection between beliefs and legal institutions. The same attitude of mind which allows of divination by auguries and sorcerers leads to the practice and the diffusion of the criminal examination by ordeals[3] and the judicial combat.[4]

The accusatory system, precisely because it symbolizes and regularizes the primitive combat, comes first in the juridical history of civilization. Its origin is to be found in the eastern legislations. It is seen to take a precise form in those of Greece and Rome, then decline and disappear, with liberty, in the latter days of the Empires. After the fall of the Roman Empire, we find it employed in crude and clumsy forms, in the Germanic and feudal customs; and while, in modern times, it has disappeared from the European continent, it continues to exist in England and the United States.[5]

[1] In France the ordeals by boiling water, branding, and cold water, frequently resorted to under the Merovingians, become infrequent from the beginning of the second dynasty.

[2] The exculpatory oath and the ordeals are found in Greek antiquity (*Esmein*, "Mélanges," p. 240 *et seq.*; *Sophocles*, "Antigone," verse 264); among the Hindus ("Laws of Manu," translated by *Loiseleur-Deslongchamps*, vol. VIII, pp. 109, 413–416). This system is still in force among a large number of barbarous races (*Köhler*, "Studien über Ordalien der Naturvölker," in Zeitschrift für vergleichende Rechtswissenschaft, vol. V, p. 368 *et seq.* and vol. IV, p. 365 *et seq.*). See on the nature of ordeals in the customs, *H. d'Arbois de Jubainville*, "Etudes sur le droit celtique," vol. I, p. 50.

[3] See on this point, *Tarde*, "Penal Philosophy," *Howell's* trans. "Criminal Science Series," p. 430; *Esmein*, "Cours élémentaire d'histoire du droit français," p. 98.

[4] *D'Arbois de Jubainville* (*op. et loc. cit.*) has pointed out, however, that the conventional duel of the Celts, like that of the ancient Romans (the Horatian combat), and those in the "Iliad" (the duel between Ajax and Diomedes), and the epic of Thebes, is inspired by a very different conception from the judicial duel of the Middle Ages. Like the latter, it has a place in litigious matters, but the idea of divine justice is absent from it. Neither the Celts nor Homer's heroes, nor the Horatii or the Curatii, looked for the intervention of the divinity for the triumph of the right. To them the duel was merely an imitation of private war.

[5] *Cf. Seymour-Harris*, "Principii di diritto e procedure penale Inglese" (Bertole's translation), Verona, 1898; *Fournier*, "Code de procédure criminelle aux Etats-Unis de New York; Introduction sur la procédure criminelle aux Etats-Unis" (Paris, Larose, 1893). But there is a public prosecutor in the United States. The insecurity and impunity resulting, in a country new and composed of such diverse elements, from the English system of prosecution, which leaves repression to the initiative of the citizens, has taught the United States the necessity of committing to a special functionary the duty of prosecuting repression.

To England, from the end of the 1700s, Europe was to go (by a kind of ancestral reversion) to seek for and recover the type of this archaic procedure, to which were to be sacrificed some of the best creations of French genius, such as the public prosecutor.

§ 3. **The Inquisitorial System.** — The system of procedure called *inquisitorial* is more scientific and more complex than the accusatory system. It is better adapted to the needs of social repression. Its two predominant features are, the *secret inquiry* to discover the culprit, and the employment of torture to obtain his confession. But this type of procedure embraces a number of kindred institutions, which cannot be separated, because they throw light on and coördinate each other.

(1) The detection and prosecution of the culprit are no longer left to the initiative of private parties. The State proceeds "ex officio" to perform this double duty. It creates organs to investigate as well as to accuse. The institutions which correspond to these necessary phases of the penal action undoubtedly do not spring up in a day; their origin is as obscure as their development is uncertain. It is not proposed here to deal with anything more than the final stage of the juridical evolution; the change in the nature of the trial ("instruction"), and in that of the arrest.

(2) An interesting phenomenon of the social and political evolution appears first in the function of the judge. That which was the right and function of everybody becomes the right and function of a few; the power to try has a tendency to become specialized. It tends also to become mandatory. The primitive arbitrator changes character. The judge, appointed by the ruler and no longer chosen by the parties, is imposed on, and no longer proposed to, the delinquent. He becomes the representative of the ruler, who alone has the right to administer justice. His nature, therefore, changes in a double sense. He is an *officer of justice*, vested with a social function, and chosen, because of the scientific nature of the penal action, from among those who have studied the laws, the legists. He is also a *permanent functionary*, charged with the trial of all causes of the same kind. At first itinerant, the judges are subsequently settled in certain districts, which thus become seats of justice. This results, by means of their decisions, in the creation and development of a body of criminal sciences. At first, the customs are collected; then, fixed by being written down; then text-books of legal practice are compiled and serve as guides to the professional men; and thus the

science is established in the course of the development of the spirit of observation and criticism.

(3) The judge's investigation is not limited to the evidence brought before him. The magistrate proceeds of his own accord and according to certain rules, with the inquiry ("inquisitio"), that is to say, with every search for evidence allowed by the law. This inquiry, *written* and *secret*, is not confrontative. The open duel between the accuser and the accused is replaced by the insidious attack of the judge.

(4) A new method of examination, more cruel perhaps, but more logical, than the ordeals, *i.e.*, that of torture, enters the higher courts of justice and filters through these to the lower tribunals. The confession of the accused having acquired a preponderating influence, the method "par excellence" of extracting this proof is now seen to be torture, *e.g.*, by the wooden horse, the boot, or the water. Torture is an institution of Roman origin. Under the Republic, no doubt, and at the beginning of the Empire, Roman citizens escaped it. The only persons exposed to it then were the slave when he was accused (or simply called to court) and the provincial.[1] But in the early days of the Empire the custom was begun of subjecting to this process of examination the Roman citizen accused of treason. Then torture comes to be of such general application that the handbooks recommend judges not to begin the examination by that, but first to collect the evidence.[2] It is, therefore, not surprising that the diffusion of torture coincides, in modern history, with the revival of the half-forgotten Roman law by the criminalists of the Bologna school. The transformation of the procedure by the substitution of torture for ordeals really begins to manifest itself from the end of the 1100s. Since that time, no country of Europe has escaped the contagion.[3] At the end of the 1300s torture had become a general custom. It was, to some extent, one of the fundamental institutions of the old criminal procedure.

Two institutions, destined to limit the power of the judge, that of the appeal and that of "legal proofs," have their origin in the inquisitorial procedure, of which they form two characteristic features.

[1] *Esmein* ("Cours élémentaire d'histoire du droit français," p. 36) observes that "antiquity never admitted the testimony of the slave without controlling him by torture in the giving of it."

[2] L. 11, C. IX, 41.

[3] See *Tarde*, "Penal Philosophy," *Howell's* trans., "Criminal Science Series," p. 435. *Cf. Molinier*, "La torture" (Toulouse), 1879. Extract from the "Recueil de l'académie des sciences, inscriptions et belles-lettres de Toulouse."

(5) The *appeal* is the right to bring anew before a higher judge the cause already decided by the lower judge. The conception of the appeal is foreign to the idea of justice done by the peers of the accused. It is, at first, repugnant to the popular idea of judicial infallibility. If the first judge can be wrong, why not the second? It implies, moreover, a hierarchy of tribunals: while popular judges should be supreme, each within the limits of his cognizance. Thus the appeal, as we understand it nowadays, did not exist under the Roman Republic; it made its appearance under the Empire. This method of recourse was unknown either to the Germanic or the feudal procedures, both essentially based on popular customs.[1] But with the reconstitution of the sovereignty and the hierarchy for the benefit of royalty, the appeal was introduced into the secular jurisdictions under the growing influence of the Roman law and the Canon law.

(6) The inquisitorial and secret procedure led to the organization of a system of "legal proofs" as a necessary counterbalance, in the interest even of the defense. The judge, to convict, must have before him certain kinds and quantities of evidence, defined by law; but, on the other hand, if he has this evidence before him, he must of necessity convict. His personal belief is of little consequence on either hypothesis. This system, by making conviction more difficult, tends, as a fatal result, to weld more firmly the fetters of criminal procedure. There is here a double movement, which in certain respects aggravates, and in others ameliorates, the situation of the delinquent.

The inquisitorial system is contained, in embryo, in the latest institutions of the Roman Empire. It agrees well with a centralizing and despotic power. Torture, as a proceeding for detection and proof, was especially resorted to at this period; and later, the theatre of the contagion which was to pervade all Europe was a corner of Italy, whence, about the middle of the 1100s, the resuscitation of the Roman law brought disturbance as well as a new ideal into all the feudal tribunals.

The Church was able to furnish the secular courts with a lesson and a model, in the methods of its ecclesiastical tribunals. By its example it paved the way for the substitution, consummated in the 1500s, of the inquisitorial procedure for the accusatory procedure in every country of Europe.[2] In the latter half of the 1200s

[1] The appeal for denial of justice, "défaut de droit" and the appeal for wrong judgment, "faux jugement," are institutions peculiar to feudal procedure and are analogous to the modern appeal merely in name.

[2] This system, originally employed for prosecutions for heresy, afterwards for all crimes, became, under the name of "procédure à l'extraordinaire," the system of common law in force in the royal jurisdictions for the prosecution of serious crimes until 1789. See *Faustin Hélie*, *op. cit.*, vol. II, Nos. 206, 207, and 208; *Léo*, "Histoire de l'inquisition au moyen age" (translated by *Salomon Reinach*, Paris, 1900), book 1, ch. IX to XII t. I, p. 399 *et seq.*; *Tanon*, "Histoire de l'inquisition," *passim*.

the influence of the Roman law and of the Canon law led to the formation of this new procedure, which renounced the Germanic tendencies, and took its inspiration almost exclusively from these, the two learned legal systems of Europe.

Each of these two types of procedure, the accusatory type and the inquisitorial type, has its good qualities and its defects; neither contains, in itself, the safeguards necessary for the administration of criminal justice. In the accusatory procedure, the detection and the prosecution of offenses are left wholly to the initiative of private individuals — an initiative which may slumber through their inertia, fear, or corruption. The chances of impunity flowing from this system are still further enhanced both by the publicity which exists in all the phases of the procedure, and by the necessity which compels the judge to limit his investigation entirely to the evidence furnished him by the accuser. But, on the other hand, the inquisitorial procedure has very serious defects; under it, the prosecution and the detection of offenses are intrusted exclusively to the agents of the State; there is the atmosphere of secrecy and consequently of suspicion, in the midst of which the trial proceeds; and finally, there is the absence of any real confrontation between the prosecution and the defense.

Thus progress, in the path of juridical civilization, consists in borrowing from each of these types of procedure its best elements, and in forming a mixed type. One part of this composite type is taken from the inquisitorial system, the other part contains all the safeguards and good qualities of the accusatory system.

§ 4. **The Mixed System.** — This mixed type is characterized by the following features; they are to be found in the majority of the European systems of procedure, but the French Code of Criminal Examination of 1808 (the influence of which has been so great in Europe) systematizes them for the first time.

(1) The judges of guilt have no initiative in the proceeding; they cannot take cognizance themselves, of their own accord. It is, therefore, necessary that an accusation be brought; but this right of accusing is committed to special functionaries who thus act as *public prosecutors* and to whom the parties should, on principle, be merely auxiliaries.

(2) The *judgment* is rendered by magistrates and jurors. The method and conditions of the share of both of these in the administration of criminal justice vary, however, in the different countries.

(3) The proceeding is divided into two phases, the *preliminary examination,* intrusted to magistrates, and resulting in a preparatory decision, and the *final trial* before the court, which gives its judgment in the proceeding. The first has a double characteristic; it is neither confrontative nor public. The second admits both principles of confrontation and publicity.

(4) The judges are not called upon to state the *evidential basis* of their judgment. And although the search for and the furnishing of the evidence are subject to legal rules, its probative value is not measured beforehand and the outcome of the charge depends upon whether the judges are or are not thoroughly convinced.

Like every eclectic system, this procedure demands, in its application, a coöperation of effort and hearty support which it appears sometimes to have lacked. On the one hand, the magistrates, the professional men to whom the initiative and direction of the action were given, have manifested for the coöperation of the private citizens a sentiment of extreme distrust; and this has gone on increasing since 1810 at a rate which, for some years, has pointed to a return to the system of solely professional magistrates. On the other hand, with the desire of the magistracy to recover all its powers, there has unfortunately coincided the dislike of the majority of citizens for civic duties, and the steadfast wish to avoid them. Jury duty has been considered a bore by the very people best fitted to fulfil it. This state of affairs is not peculiar to France. It is apparent in every country into which this mixed system of procedure has been carried.

CHAPTER II [1]

ROMAN CRIMINAL PROCEDURE

§ 1. **General Characteristics.** — In every nation, the history of its criminal procedure stands in close relation to the evolution of its political conditions and the development of its views in regard to punishment. Wherever there has come into being a free constitution and an interest in public affairs, there has been an increasing demand that certain dangers to the freedom of the citizen be done away with, — namely, those dangers which frequently exist in the criminal procedure, because of those who wish to usurp power and would abuse the right of prosecution in order to attain political advancement. The more punishment bears the earmark of being a satisfaction of the party who has suffered a wrong, the more will the *accusatorial* procedure tend to predominate. But when the view becomes more prevalent, that punishment is necessary for the public interest as a means of upholding the law, *inquisitorial* methods gradually increase. The truth of these remarks is apparent in the criminal procedure of Rome.[2]

[1] [Chapters II and III=Chapters XIII and XV of Professor MITTERMAIER'S "Progress of German Criminal Procedure." For this author and work, see the Editorial Preface. — ED.]

[2] In regard to the Roman criminal procedure, the following writers may be consulted: *Sigonius,* "De judiciis" (the second and third books deal with the "publica judicia"); *Brissonius,* "Oper. minor," p. 32; *Ferratius,* "Epistol." (Patav. 1699); *Ayrault* (Ærodius), "L'ordre, formalité et instruction judiciaire, dont les anciens Grecs et Romains ont usé en accusations publiques" (Paris 1575, 1598). (Ayrault was himself "Criminal-lieutenant" in France. See *Niceron,* "Mémoires," tome XVII, p. 327. In regard to his life and his work, "Le Droit," 1884, No. 269, and as to the character of his work, see *Laboulaye,* "Essai," p. V.); "Lectii de public. judic." in *Otho* "thesaurus," I, p. 67; *Mathæi,* "De criminibus," especially the edition by *Nani* (Mediol. 1803); *Van der Hoop,* "De his qui antiquitus apud Roman. de crim. judic." (Lugd. 1723), in VIII Band of *Meermann*

Everywhere in the Roman criminal procedure there appears the peculiar characteristic that crimes are dealt with in certain categories.[1] Each category had its distinctive tribunal and rules of evidence, which varied with changing political conditions. The procedure in "perduellio"[2] was fundamentally quite different[3] from the procedure in "parricidium."[4] And again in cases in which judgment was passed against the accused with the formula "sacer esto"[5] there was also a special kind of procedure.

§ 2. **Early Tribunals.** — The judicial proceedings were either in the court of the kings,[6] who often passed judgment with the assistance of a council ("consilium"), — or before the quæstors[7]

"thesaurus," p. 608. Saxii "De ordin. judic. public. apud Romanos" (Traj. 1784); *Madihn*, "Vicissit. cognition. crim. apud Romanos" (Hal. 1772); *Invernizi*, "De publicis et crim. jud." (Rom. 1787); *Heyne*, "De judic. public. rat. et ordin. apud Romanos" (Goett. 1788); *Renazi*, "Diatr. de ord. et forma judic. crim." (at close of volume V of his "Elem. jur. crimin."); *Broquet*, "quinam fuit apud Romanos in crim. publ. procedendi modus" in Annal. Acad. (Gandav. 1820); *Schmiedicke*, "Histor. proc. crim. rom." (Vratislav. 1827); *Kennis*, "De crim. perduell. regum ætate" (Lovan 1828); *Rosshirt* in the "Archiv des Criminalrechts," Bd. XI No. 1, and No. 14; *Geib*, "Geschichte des rom. Criminalprocesses" (Leipzig 1842); *Platner*, "Quæst. de jure crim. Roman." (Marb. 1842); *Lebastard Delisle*, "De l'administration de la justice crim. chez les Romains" (Paris 1841); *Osenbruggen*, in the introduction to the work, "Ciceros Rede für Milo" (Kiel 1841); *Féréol Rivière*, "Esquisse historique de la législation criminelle des Romains" (Paris 1844); *Laboulaye*, "Essai sur les loix criminelles des Romains" (Paris 1845); *Hélie*, "Traité de l'instruction crim." (Paris 1843), Vol. I, pp. 34–173.

[1] *Mittermaier*, in "Archiv des Criminalrechts" (1843), p. 153.

[2] *Kostlin*, "Die Perduellion unter den röm. Königen" (Tübingen 1841); *Geib*, "Geschichte," p. 61.

[3] It is certain that the same crimes, *e.g.*, murder, were under different political conditions, sometimes dealt with as "perduellio" and sometimes as "parricidium," *e.g.*, in the trial of the Horatii. *Rubino*, "Unters. über röm. Staatsverf," p. 490; *Kostlin*, p. 10, 57; *Wöniger*, "das Sacralsystem," p. 244.

[4] In regard to the wider significance of "parricidium," see *Festus*. *Meister*, "Urtheile und gutachten," p. 461. Also *Diek*, "Historische Versuche über röm. Crim.," p. 9; *Dirksen*, "Vers. zur Kritik der Quellen des röm. Rechts," pp. 284 and 337; *Luden*, "uber Versuch des Verbr." p. 59; *Osenbruggen*, "Das altröm. Parricidium" (Kiel 1841).

[5] *Abegg*, "De antiquiss. roman. jur. crim." p. 44; *Dirksen*, "Civil Abhandl." p. 102; *Rosshirt*, in "Archiv etc." XI, p. 2 e; *Platner*, "De crimin. jure antiquo Roman." (Marsburg 1836), p. 26. Also see *Kostlin*, "von Mord und Todtschlag" (Stuttgart 1838), Part I, p. 59; *Rubino*, p. 475; *Kostlin*, "Von der Perduellion," p. 127; *Platner*, "Quæst. de jure crim. Roman," p. 27.

[6] *Kennis*, "Diss." pp. 34–41; *Dirksen*, "Civil Abhandl." p. 100; *Burkhardt*, "Die Criminalgerichtsbarkeit in Rom bis auf die Kaiserzeit" (Basel 1836); *Kostlin*, p. 20; *Geib*, p. 14; *Rubino*, p. 211; *Laboulaye*, p. 80; *Hélie*, I, p. 35.

[7] These early quæstors were not permanent officials but were specially appointed for the particular case. L. 2. No. 23. D. De orig. Juris. *Dirksen*, "Uebersicht der Versuche zur Kritik der XII Tafeln," p. 617 and especially p. 654; *Invernizi*, p. 31; *Kennis*, p. 48; *Rosshirt*, in "Archiv etc."; *Burkhardt*, pp. 6, 8, and 9; *Zacharia*, "Sulla," pp. 147, 148. More

(often the "quæstores parricidii"),[1] — or before the "duumviris perduelliones,"[2] who were themselves a special kind of quæstors. Popular courts had jurisdiction under the kings[3] only in so far as a case could be referred to the people through appeal ("provocatio").[4] After the expulsion of the kings the jurisdiction belonging to them passed to the consuls,[5] who often availed themselves of the coöperation ("consilium") of the senate.[6] There was in the Twelve Tables the well-known provision[7] that the people in the popular courts and in the "comitia centuriata" should pass judgment upon a complaint brought against a Roman citizen.[8] Thus also in the "comitia tributa," which gradually extended its power, there arose the custom of deciding crimes that had a political significance.[9] The people exercised a great influence over criminal proceedings through the appeal to the people against the decrees of the magistrates ("provocatio"),[10] — a right confirmed by many laws.[11]

§ 3. **The Quæstiones.** — There would often be appointed by the people, or by the Senate,[12] "quæstiones," as commissioners for the trial and decision of particular crimes.[13] The many inconveniences of an appeal to the popular courts and the increase of crimes brought about a change in the nature of these "quæstiones." They became standing tribunals for the trial and decision of crimes that were of frequent occurrence. Each "quæstio perpetua" established for this purpose was created by a special statute ("lex")[14] which specified the crime to which it had appli-

correct views are found in *Geib*, p. 52. *Cf.* with *Lebastard Delisle*, p. 9; *Rubino*, p. 322.

[1] *Geib*, p. 51.

[2] *Schmiedicke*, p. 16; *Kennis*, p. 43. The correct view in *Geib*, p. 59; *Köstlin*, p. 102; *Laboulaye*, p. 84.

[3] *Geib*, p. 30. [4] *Wöniger*, "Das Sacralsystem," p. 239; *Hélie*, I, p. 37.

[5] *Livius*, II, 5. L. 3. No. 16. D. De orig. Juris.; *Ivernizi*, p. 20; *Schmiedicke*, p. 31; *Geib*, p. 22.

[6] *Cicero*, "De legibus," III, 19; *Dirksen*, "Uber die XII Tafeln," p. 645; *Schmiedicke*, p. 42.

[7] *Geib*, p. 39. [8] *Geib*, p. 32; *Férol*, p. 11.

[9] *Geib*, p. 35. *Cf. Platner*, pp. 49–65.

[10] *Burchardt*, p. 4; *Huschke*, "Die Verfassung des Servius Tullius," p. 584; *Geib*, p. 152; *Wöniger*, "das Sacralsystem," p. 265.

[11] L. 2. No. 16, D. De orig. Juris.; *Sigonius*, "De jud," II, cap. 4; *Van der Hoop*, in *Meermann* "thesaurus" suppl. vol. p. 617; *Wirsinger*, "Resp. ad quæst. de differentia inter delicta, dolus et culpa" (Bruxelles 1824), p. 99.

[12] *Geib*, p. 48; *Laboulaye*, p. 112.

[13] In regard to "quæstiones" held for crimes for which no punishment was provided by a special statute, see *Platner*, p. 12, etc.; *Geib*, p. 68; *Laboulaye*, p. 126.

[14] *Burchardt*, pp. 17, 19; *Bach*, "Histor. juris." p. 80; *Schmiedicke*, p. 124; *Rosshirt*, in "Archiv etc." XI, pp. 373, 382; *Zachariä*, "Sulla," 2 Hft. p. 143. There were such "quæstiones" in regard to the crimes of

cation and a certain procedure appropriate thereto. The number of these "quæstiones perpetuæ" steadily increased.[1]

Along with these standing criminal courts, the popular courts, however, in which the entire people passed judgment, continued to exist.[2] There often existed even in the time of the Republic "quæstiones extraordinariæ"[3] for cases for which as yet no "quæstio perpetua" existed; or perhaps, on account of some peculiar developments of a case, a special commission would be appointed.[4] Since the magistrates presiding over the "quæstiones" were regularly some one of the prætors,[5] it came about that the prætor whose turn it was to preside over the "quæstio" was called "quæstor" or "quæsitor."[6] In addition, one finds early mention of a "judex quæstionis,"[7] who,[8] however, since he sat instead of the prætor, and was invested by him with the presidency ("præsidium") of the criminal court, had the same authority that the prætor would have had, if he had presided.[9]

"repetundarum, ambitus, majestatis, and peculatus"; see *Ferratius*, "Epistol." lib. I, epist. 15; *Rosshirt*, in "Archiv," p. 404; *Cicero*, "Brutus," cap. 27; *Birnbaum*, in "Archiv," VIII, p. 656. But see *Heineccius*, "Antiq. jur. rom." (Haubold's edition), p. 768; *Klenze*, "Ad leg. Serviliam prolegom." p. xii. See also *Geib*, p. 170. *Féréol*, p. 18.

[1] *E.g.*, "quæstio de falso, de sicariis, de parricidiis"; see *Hugo*, "Rechtsgeschichte," pp. 316, 633; *Livius*, I, 26; II, 35; XLIII, 8, 18; *Cicero*, "Pro Milone," 3; Especially *Van der Hoop*, "De his, qui antiq." cap. V.

[2] *Cicero*, "Pro Milone," 6. Also a "nova quæstio," *Cicero*, "Pro Milone," 5, 6; *Cicero*, "In Verr." I, 42; II, 25; "Philip." II, 9. See also *Cicero*, "Attic." I, 13, 14, 16; *Rosshirt*, p. 395; *Köstlin*, "Die Lehre von Mord," I. Thl., p. 97; *Burkhardt*, p. 20; *Geib*, p. 216.

[3] *Geib*, p. 219. As to whether the Centumviral courts also passed judgment "de criminibus," see *De Tigerstroem*, "De judic. apud Roman." (Berol. 1826), p. 216; *Huschke*, "Servius Tullius," p. 586; *Geib*, p. 233; *Féréol*, p. 34.

[4] *Birnbaum*, in "Archiv," VIII, pp. 674, 679; IX, pp. 399, 412; *Platner*, "Quæst." p. 85.

[5] *Cicero*, "In Brut." cap. 27; *Cicero*, "Pro Cœl." p. 13; "Pro Cluentio," 53; *Klenze*, p. 19; *Geib*, p. 178.

[6] *Cicero*, "In Verrem," II, c. 10; *Virgil*, "Æneid," VI, vers. 432; *Cicero*, "In Vatin." c. 14; "Pro Fontejo," c. 6; "Pro Plancio," c. 17; *Schmiedicke* on page 116 has the wrong view. For better view, see *Geib*, p. 184. In regard to the meaning of "quæstor," see especially *Laboulaye*, p. 45; *Hélie*, I, p. 59.

[7] *Cicero*, "Pro Cluentio," c. 54; "Pro Roscio," c. 4; "Cæcina," c. 10. L. 1. pr. and No. 1. D. "Ad leg. Corn. de sicar." L. 81. D. "De judic." *Köstlin*, "Lehre von Mord und Todtschlag," I, p. 99; *Osenbruggen*, "Oratio," p. 35.

[8] *Sigonius*, "De judic." II, 5; *Ayrault*, "Ordre etc." p. 233; *Ferratius*, I, 4; *Van der Hoop*, "De his, qui antiq." p. 630; *Cremani*, "Element. jur. crim." vol. III, p. 40. See also *Schulting*, "Jurisprud. antej." p. 728; *Invernizi*, p. 98; *Birnbaum*, in "Archiv," IX, p. 356; *Rosshirt*, in "Archiv," XI, pp. 380–383, 390; *Zachariä*, p. 154. In the "Collatio leg. Mosaic et rom." Tit. 1, No. 3, there is a reference to the "prætor judexve quæstionis." *Zachariä*, II, 158.

[9] *Geib*, pp. 188–193. *Cf. Féréol*, pp. 21, 22. In regard to the "judex quæstionis," see *Laboulaye*, p. 327; *Hélie*, I, p. 60.

It is also certain that the senate had a criminal jurisdiction in cases of conspiracy and also in cases of crime committed by foreigners. In these matters, the senate either undertook the investigation itself, or delegated it to a commission.[1]

§ 4. **The Judices.** — The rendition of judgment was in the hands of the "judices." The rules determining the class and rank from whom these were chosen reflect the contemporaneous status of political freedom.[2] In the beginning only senators were the judges. Later, after many changes, the knights ("equites"), then again both the knights and senators, and finally, persons of lower rank possessed this privilege.[3]

These "judices" were chosen each year, but the numerous statutes referring to the subject reveal a great diversity as to their number.[4] From among these "judices," just as is the case with modern juries, those passing judgment in each case were first designated by lot, and by the exercise of right of challenge ("recusation"). This ever increasing right of challenge belonged both to the accuser and the accused. Just as the crimes varied, so there was a diversity as to the number of judges necessary for a valid criminal judgment.[5]

§ 5. **"Judices" compared with Modern Jurors.** — It is improper (although many have done so[6]) to regard the modern English and French jurors as analogous to the Roman "judices."[7] The last mentioned rendered a general verdict as to the guilt of the accused without a separation of the questions of fact and law. But the

[1] *Dirksen*, "Civil Abhandl." I. Thl., No. 2, p. 135; *Rosshirt*, in "Archiv," XI, p. 31; *Geib*, p. 217.

[2] *Sigonius*, lib. II, cap. 6; *Krebs*, "De jud. rom. decir." (Lips. 1744). Here belong many of the "leges judiciariæ," especially the "lex Servilia." *Bach*, p. 61. *Haubold*, "Instit. rom. priv." p. 94. *Klenze*, "Diss." In regard to the "leges judiciariæ," *Laboulaye*, pp. 196–322. To this the "decuriæ judicum" also refers. *De Tigerstroem*, p. 163. *Zachariä*, p. 156, and p. 159 in regard to the changes which Sulla introduced. See especially: *Geib*, p. 213; *Laboulaye*, p. 263; *Hélie*, I, p. 61.

[3] Correctly treated in *Geib*, pp. 193–202. *Cf. Osenbruggen*, "Rede für Milo," p. 34.

[4] Here also belongs the "lex Servilia." See *Ascon*, "In Cicero Or. in Verr." c. 6; *Nes*, "De judiciis judic. jurator" (Traject. 1804), p. 15; *Rosshirt*, in "Archiv," XI, p. 385; *Osenbruggen*, p. 36; *Geib*, p. 307; *Laboulaye*, p. 354.

[5] *E.g.*, the "lex Servilia" required 50; according to *Cicero*, "Pro Cluentio," 30 were at one time necessary; according to "Orat. in Pison." cap. 40, 65 were necessary; and according to *Cicero*, "Epist. ad Attic." IV, 15, 28 judges were necessary. See especially *Geib*, p. 207.

[6] *Pentingal*, "An inquiry into the use and practice of juries among the Greeks and Romans" (London 1767), 3 vols.; *De Blankensee*, "De judic. jurat. apud Græcos et Rom." (Goett. 1812). See also *v. Oppen*, "Geschworne et Richter," p. 9; *Lebastard*, p. 25.

[7] *Geib*, p. 315; *Mittermaier*, in "Archiv" (1844), p. 151.

modern jury makes this separation, and (at least the French jury) has to pass judgment according to its innermost persuasion,[1] without any regard for rules of evidence. However, it cannot be denied, that the Roman "judices" and the modern jury are similar in this, — that both institutions rested upon the idea of popular courts, and that the "judices," like the jury, did not constitute a permanent tribunal, but were chosen by lot [2] for each particular case.[3] Also the extensive right of challenge (recusation), which belonged to the accused in respect to the "judices,"[4] as used against modern jurors, is a ground of similarity in both institutions. At least this was so in so far as there predominated therein the idea that the accused must submit only to judges whom he of his own free will acknowledges are wholly impartial.

§ 6. **Roman Procedure Accusatorial in its Nature.** — Roman criminal procedure, in accordance with the spirit of the Roman criminal law and the ideas prevailing in Rome, was regularly based upon the principle of a *formal accusation*, — not merely in the sense that only on the basis of a formal accusation could a criminal prosecution take place, but also in the sense that there was an issue only between the accuser and the accused, and that this issue was limited to the formal allegations of the accuser, who was obliged to furnish the evidence necessary for his case.[5]

Inquisitorial elements gradually developed in criminal procedure during the period of the Republic, when for the prosecution of the guilty in particular cases, extraordinary "quæstiones" would be appointed.[6] The procedure taking place before the "quæstors" and before the "pontifices" [7] had many peculiarities pointing to inquisitorial influences. Yet the foundation of procedure always remained accusatorial.[8]

[1] *Van der Does de Bye*, "Histor. judic. jurat." (Lugdun 1821), p. 29. In regard to the significance of the Roman jurors, *Laboulaye*, p. 337.

[2] "Sortitio." See *Ayrault*, p. 245; *Cicero*, "In Verrem," XI, 15; *Geib*, p. 308.

[3] There were special provisions for special crimes. Herewith in the "lex Licinia," were connected the "judices ædilitii." *Cicero*, "Pro Plane." 15, 17; "Pro Murena," 13; *Ayrault*, c. 1, p. 254.

[4] The reason for the challenge (causa recusationis) was not given. *Ayrault*, p. 240. The statute ("lex") also provided the disqualifications in respect to each crime. See *Cicero*, "Pro Cluent." 53; "In Vatin." c. 2. In regard to the influence of the "lex Licinia" see *Geib*, p. 313.

[5] *Ayrault*, "Ordre etc." p. 281; *Geib*, p. 98; *Laboulaye*, p. 134; *Hélie*, I, p. 70.

[6] *Geib*, p. 102; *Hélie*, I, p. 120.

[7] In regard to the procedure in the prosecution relative to the Bacchanalia, *Geib*, p. 107.

[8] *Mittermaier*, in "Archiv" (1843), p. 287.

In the popular courts the right to bring an accusation belonged only to those magistrates [1] who could call the "comitiæ" together and transact business with them,[2] while any citizen could bring an accusation before the "quæstiones."

Everywhere in the Roman institutions, there is apparent the effort to protect [3] the freedom of the citizen against the malice, plots, and indiscretion of the accuser, and at the same time an attempt to protect the interests of the State against the corrupt withdrawal of an accusation, through collusion or some partiality towards the guilty. The first attitude explains the laws relative to the "calumnia" of the accuser,[4] and the necessity of the "subscriptio in crimen." [5] The second gave rise to the provisions relative to "tergiversatio" [6] and "prævaricatio" [7] to which the "senatus consultum Turpillianum" refers.[8] The Romans also had the custom [9] (still used in modern English procedure) of using one of the guilty parties,[10] to whom immunity had been promised, as a witness against the others, *e.g.*, in crimes against the State. It is not settled to what extent there existed in the time of the Republic special officers whose duty it was,[11] in their official capacity, to investigate crimes and bring prosecutions, nor to what extent the "quadruplatores" [12] were such officers.

[1] *Rosshirt*, in "Archiv etc." XI, p. 397; *Geib*, p. 100.

[2] Private persons were obliged to bring their actions through the magistrate. As to the later law, No. 1, Inst. "De publ. jud." But *cf.* L. 30. Cod. "Ad leg. Jul. de adult." *Burchardi*, "Rechtssystem der Römer," p. 217; and in "Neues Archiv etc." VII, p. 465.

[3] *J. van Renesse*, "De coercitione accusatorium in Oelrichs" (diss. belg.), vol. I, Tom. II, pp. 561–632.

[4] The "lex Remnia" was important. See *Brencmann*, "Lex Remnia sive de legis Remniæ exitu cum diss. de fatis calumn." in *Otto*, "Thes." tom. III, p. 1561. Also *J. de Bye*, "De delicto calumniæ in public. judiciis." (Lugd. 1790); *Geib*, pp. 124, 291.

[5] L. 3. No. 2. 7. D. "De accus." L. 24. D. "Ad leg. Corn. de falsis." L. 2. Cod. "Ad SC. Turpill." L. 5. Cod. Theod. "De accus."; *Klenze*, "Ad leg. Servil." p. 13; *Birnbaum* in "Archiv etc." IX, p. 361. See *Brencmann*, c. 1. p. 1635; *Bye*, "Diss." pp. 4–16.

[6] L. 1. pr. D. "Ad SC. Turpill." See also: *Cicero*, "Pro Flacco," c. 20; "pro Plancio," c. 19.

[7] *Cicero*, "In partit." 36. L. 1. No. 6. D. "Ad SC. Turpill."

[8] *Nordkerk*, "De lege Petronia," c. IV, 3. 4.

[9] Called an "index." *Ascon.* "In Verrem," c. 11; *Cicero*, "Pro Cluentio," c. 7; "In Catil." IV, 3; *Tacitus*, "Annal." IV, 28; *Invernizi*, p. 60; *Geib*, p. 105.

[10] *Ayrault*, p. 291.

[11] *Adam*, "Handbuch der römischen Alterthümer" (Translation), I, p. 552, refers to *Cicero*, "Pro Rosc." 20; "De legibus," II, 47; and *Plin.* "Epist." III, 9. But on the contrary, see *Winssinger*, "De diff. inter etc." p. 102.

[12] As to "quadruplum" (fourfold), *Livius*, III, c. ult; *Ascon.* "In Divin." c. 7; *Cicero*, "In Verr." IV, 8; *Invernizi*, p. 80; *Geib*, pp. 106, 257.

§ 7. **Effect of Lack of a General Criminal System.** — The modern view of a criminal system embracing every variety of crime was unknown to the Romans.[1] Each law contained special provisions relative to the formal accusation, the proof, and the prosecution of the particular crime to which that law referred. Accordingly in each "quæstio" there could only be a trial and judgment in respect to that one crime, towards which the formal accusation in pursuance of the statute was directed.[2] This was important in cases where there was a question relative to a concurrence of crimes.[3]

The "Leges Juliæ Judiciariæ" [4] seem to have contained general provisions only in regard to single points relating to the appointment of judges and kindred subjects. In the majority of institutions having to do with procedure, one is obliged to distinguish whether the procedure came before the "quæstiones" or before the "comitiæ," — and if the latter, whether it came before the "comitia tributa" or before the "comitia centuriata." There is also the question whether the "judices" might apply only the penalties which the statute provides, or whether they might consider mitigating circumstances, — a question to be answered differently according to the kind of prosecution under consideration.[5] In the "quæstiones," the "judices" were strictly bound to the literal application of the statute.[6]

§ 8. **Acts Preliminary to Trial.** — The separation of procedure into a trial and a preliminary investigation existed in so far as the formal public session at which, under the direction of a "quæsitor" in the presence of the "judices," the case would be tried and decided, was preceded by a procedure in which the formal accusation would be first taken up, the evidence brought together, and an opportunity for preparation afforded the accused.

This separation of the preliminary investigation ("præjudi-

[1] *Ayrault*, "Ordre et formalité," pp. 5, 932; *Hugo*, "Röm. Rechtsgeschichte," p. 634; *Diek*, "Hist. Versuche über röm. Crim." p. 29. See also: L. 3. No. 5; L. 13. 18. D. "De testibus."
[2] *Geib*, p. 361.
[3] *Wafflaer*, "De concursu delictor." (Lovan 1823), pp. 33, 34; *Savigny*, "De concurs. delict. formal." p. 110; *Von Feuerbach*, "Ueber das Geschwornengericht," p. 227; *Plank*, "Die Mehrheit Rechtsstreitigkeiten," p. 95.
[4] *Bach*, "Histor. jur." p. 350; *Brissonius*, "Oper. minor." (edit. *Treekell*), p. 95. In regard to the appointment of judges under the later laws, see *Geib*, p. 207.
[5] *Besserer*, "De indole juris crim. Roman." II, pp. 22–49; *Rosshirt*, "Entw. der Grundsätze des Strafrechts," p. 71; *Geib*, p. 207.
[6] *Kostlin*, "Von Mord und Todtschlag," p. 194.

cium accusationis,"[1] "ordinatio causæ")[2] is explained by the fact that only that individual was designated "accusatus" or "reus"[3] against whom an accusation had been lodged as a foundation for the ensuing investigation in chief.[4] Thus the trial (in the modern sense) had to do with "crimen"[5] or "reatus."[6]

In popular courts, the accusation seems to have been immediately published by the magistrate. However, in the earlier period, there was only an announcement of the accusation, for which the day of hearing was set by the magistrate, who at the same time summoned the accused.[7]

The long intervals, the opportunity for the accused to attempt to influence the people, the requirement that the accusation be repeated three times[8] (with the necessary result that the people in the meantime became familiar with the matter to which the accusation referred) also constituted a kind of preliminary investigation.[9] Yet it is incorrect to think that there was that collecting of evidence by officials, which obtains in our time, or that there were hearings from which the accused was excluded. Such acts would be contrary to the nature of the accusatorial procedure and inconsistent with the conception that no attention was paid to procuring a confession.

A taking of security to insure the due appearance of the accused was necessary. Under some circumstances he could be temporarily imprisoned.[10]

§ 9. **Preliminary Investigation.** — In the "quæstiones perpetuæ"[11] various acts which were performed in regular order and preceded the formal arraignment in open court may be taken as corresponding to a preliminary investigation. The first of these acts was: the "postulatio rei,"[12] the formal prayer of the ac-

[1] *Quinctilian*, "Declam." 319.
[2] L. 1. Cod. "Ad. SC. Turpill." *Birnbaum*, in "Archiv etc." XI, p. 353.
[3] L. ult. Cod. "De accusat." "Archiv etc." IX, p. 352.
[4] Proof of this lies on the fact that in the classics a distinction is made between "postulo," "defero," and "accuso." See: *Forcellini*, "Lexicon," voce: "accusare," and *Cicero*, "Pro Roscio," c. 5. 10; "In Verrem," III, 16. L. 38. No. 10. D. "Ad leg. Jul. de adult." L. 3. Cod. "De plagiar." See also *Ayrault*, "Ordre etc." p. 303. In regard to the Roman preliminary investigation, see *Hélie*, I, p. 59.
[5] "Neues Archiv etc." IX, p. 340. [6] L. ult. D. "Ad leg. Jul. majest."
[7] "Dies dicebatur" *Cicero*, "De harusp." c. 4; "In Div. Verr." c. 21; *Quinctilian*, "Declam." 302; *Geib*, p. 116.
[8] *Cicero*, "Ad famil." XVI, 12; *Livius*, III, 35.
[9] In regard to the character of these preceding acts, see *Laboulaye*, p. 138.
[10] *Geib*, p. 117. [11] As to their character, see *Laboulaye*, p. 183.
[12] *Cicero*, "Ad Quinct. fratr." III, ep. 1; *Plautus*, "In Bacho," III, 3, 45; *Ayrault*, p. 305; *Brissonius*, "De formulis," p. 367; *Besserer*, p. 15; *Birnbaum*, in "Archiv etc." IX, p. 359; *Rosshirt*, in "Archiv etc." IX, p. 389; *Geib*, p. 266. L. 7. pr; *Laboulaye*, p. 342.

cuser to the presiding officer of the "quæstio" for permission to bring an accusation against some certain person, whereupon the presiding officer investigated the facts submitted by the accuser, and according to the circumstances granted or refused the permission. If he granted the permission, there ensued the "nominis," and also the "criminis delatio"[1] whereby the accuser made a formal and definite accusation,[2] which revealed the nature of the act, and the person of the accused. This regularly took place in the presence of the accused.[3] Thereupon followed the "inscriptio nominis"[4] ("subscriptio") or "criminis" as the formal notation of the accusation in a kind of court register, with the names of the accuser (who now formally declared himself as such) and the accused.[5] To this indictment ("libellus accusationis")[6] the accuser must limit himself in the ensuing trial.[7] The fact that the "magistratus" could sometimes refuse to place the name of the accused on the register[8] shows that he made a preliminary investigation of the accusation.

It was an established legal principle that more than one accuser could not prosecute the same accused;[9] thus a preliminary determination ("divinatio")—as to who might bring the complaint—was necessary.[10] It also appears (at least as a general rule) that one could not bring a charge against more than one person at a time in a "quæstio."[11] There is no mention of a preliminary investigation undertaken by the "magistratus" for the purpose of collecting evidence, or questioning certain persons; although an "inquisitio" is mentioned,[12] which seems to indicate such a

[1] In the old authorities, these two acts are often not clearly distinguished. *Cicero*, "Pro Cœl." 3; "Pro Cluentio," 8; "Divin." 20. L. 18. No. 9. D. "De quæst."; *Ayrault*, p. 306; *Birnbaum*, in "Archiv etc." IX, p. 358; *Geib*, p. 267; *Laboulaye*, p. 344.

[2] The "professio crimin." in L. 5. Cod. Theod., "De accus.," contains an example.

[3] *Geib*, p. 270.

[4] *Cicero*, "Pro domo," c. 20. L. 3. 7. pr. D. "De accus."; *Birnbaum*, p. 359 (*cf.* p. 263). In L. 3. D., referred to, a formula is given.

[5] *Geib*, p. 281.

[6] L. 2. No. penult. D. "Ad. leg. Jul. de adult." L. 2. D. "De accus."; *Birnbaum*, in "Archiv etc." p. 359, note 496.

[7] *Ayrault*, pp. 308–312.

[8] *Cicero*, "Divin." VIII, 8; *Laboulaye*, p. 346. [9] *Ayrault*, p. 819.

[10] The others, however, could support the chief accuser ("subscriptores"). *Cicero*, "Div." 20; *Gellius*, II, 4; *Geib*, p. 268; *Cicero*, "Div." 15; "Pro Muren." 24; "Ad Div." VIII, 8; *Birnbaum*, in "Archiv etc." IX, p. 361; *Geib*, p. 322.

[11] L. 12. D. "De accusat." L. 16. Cod. "De accus." See *Ayrault*, pp. 327–332. Relative to the course of the preliminary procedure, *Osenbruggen*, "Rede für Milo," p. 37. (Kiel 1841).

[12] *Cicero*, "In Verrem," IV, c. 4; "Pro Murena," c. 21; *Plinius*, "Epist." III, 9; V, 20.

preparation of the evidence. The "interrogatio" mentioned in the classics was also carried on by the accuser without the inquisitorial coöperation[1] of the "magistratus."[2] Here the accuser, by means of questions put to the accused, produced the exact foundation necessary for his complaint. However, the view that the criminal procedure was preëminently a reflection of the civil procedure, and that the "magistratus" must always first allow the filing of the complaint, before it was formally prosecuted, makes it seem probable that it was not until after the permission of the "magistratus" to allow the "judicium"[3] had been obtained, that the accuser made a formal complaint.

§ 10. **Trial.** — When all these preliminary acts had been finished, the indictment of the accused was complete, and there was, as it were, a joinder of issue.[4] The accused became "reatus"[5] or "crimen,"[6] and he would forthwith be placed in the list of persons against whom the filing of complaints had been allowed. Then as soon as the day of hearing ("dies") had been set by the "magistratus," there began the regular trial ("judicium publicum"), technically called "quæstio" or "crimen."[7] Herein every action was taken with the greatest possible publicity, and there is no trace of written pleadings. There is apparent in everything the greatest solicitude for the defense of the accused, — who, if he so desired, could choose a representative to defend him ("patronus," "advocatus").[8] The presence of the accuser, who prosecuted the complaint, was an essential condition of the beginning of the public trial,[9] and he could not be represented by an attorney ("procurator").[10] Nothing can be found indi-

[1] *Ayrault*, "Ordre etc." pp. 420–424. The "interrogatio ex lege" (*Brissonius*, "De formulis," p. 471; *Besserer*, "Diss." p. 15) refers to the accuser. *Rosshirt*, in "Archiv etc." XI, p. 390. As to the nature of this "interrogatio," *Geib*, p. 273. It seems that the "inscriptio," referred to above, came next after the "interrogatio." *Geib*, p. 281.

[2] That there was a more summary procedure against a criminal who had been caught in the act, see *Hugo*, "Rechtsgeschichte" p. 534 (based on passages in "Appian de Bello civ." 2 II, 6); *Nagell*, "De flagranti crimine" (Groning 1828).

[3] L. 25. D. "Ad SC. Sillan."

[4] "Litis contestatio." Also as to "crimen," there is mention of "contestari crimen." L. 15. No. 5. D. "Ad SC. Turpill." L. ult. Cod. "de jure fisci." It is to this that the "receptio nominis" refers. *Geib*, p. 283.

[5] L. 9. No. 1. Cod. "De bon. proscript."; L. ult. D. "Ad leg. Jul. majest."

[6] *Birnbaum*, in "Archiv etc." VIII, p. 438.

[7] *Ayrault*, "Ordre, etc." p. 316; *Hélie*, I, p. 76. [8] *Geib*, p. 320.

[9] L. 13. "De public. judic."; L. 15. Cod. "De accus."; L. 15. 17. Cod. Theod. "De accus."

[10] *Ayrault*, p. 478. The accuser also at times had with him his "patron," who supported him in the "deductio." *Ferratius*, "Epist." I, 6; *Rosshirt*, in "Archiv etc." XI, p. 392.

cating a uniform procedure for the opening of the trial.[1] Apparently the accuser, after a statement of the complaint, and often also after an opening speech, outlining the accusation, began with the production of witnesses.[2] This speech, and also the speech relating to the defense, preceded the taking of evidence. There is nothing to indicate that the presiding "magistratus" participated in the examination of the accused.[3] This would hardly accord with the spirit of a criminal procedure in which the burden of proof rested entirely upon the accuser. Moreover, there is nothing calculated to bring about a confession, — although of course, in case of a confession, the accuser rested his case, and need adduce no further evidence.[4] There is nothing to indicate, in cases where the accused immediately made a complete confession in open court, that the "quæstio" could be dispensed with, and judgment be entered immediately.[5] On the contrary, it seems rather as if judgment could not be entered against a "confessus" until after a formal trial. It is, however, true that in the earlier periods, there was no official examination of the truth of a confession. One hears nothing of the accused being compelled to plead to a complaint.[6] It is, however, conceivable that the accused damaged himself by a stubborn and inexcusable silence and strengthened the suspicion against him.[7]

The mention made of the "interrogatio" of the accused [8] has reference, both to the questioning by the accuser, and also to the questions which the accused in this production of evidence [9] could put to the accuser. In the time of the Republic, a free man would never be subjected to torture.[10] This would be applied only to

[1] L. 20. Cod. "De his, qui accus. non poss." mentions "Expositio criminum atque accusationis exordium." Also in regard to the different forms, see *Brissonius*, "De formulis."

[2] *Geib*, p. 318. Pompey, however, sought to reverse this arrangement, but the change introduced by him was not of long duration.

[3] *Ayrault*, "Ordre, etc." p. 479.

[4] *Cicero*, "In Verrem," V, 64; *Sallust*, "In Catilin." c. 52. Later the reliability of a confession was put to proof, and other evidence made use of. L. 1. No. 17. 27. D. "De quæstion." *Cf.* L. 8. Cod. "Ad leg. Jul. de vi," and *Niccolini*, "storia del principii per l' instruzione delle pruove," pp. 244–249.

[5] *Geib*, "De confessionis effectu in processo crimin. Romanorum" (Turic 1837); *Geib*, "Geschichte," p. 275.

[6] *Geib*, "Geschichte," p. 138. [7] L. 8. Cod. "Ad leg. Corn. de falsis."

[8] *Ayrault*, p. 490. [9] *Ayrault*, p. 479.

[10] *Grupen*, "Diss. prælim. observat. jur. crim. de applicat. torment." (Han. 1754); *Reitemeier*, "De orig. et rat. quæst. per tormenta apud Græc. et Rom." (Goett. 1683); *Westphal*, "Die Tortur der Griechen und Römer," (Leipz. 1785); *Wasserschleben*, "Hist. quæst. per torment." (Berol. 1836), No. 75.

slaves, if they were produced as witnesses, and even then with certain restrictions varying according to the character of the statutes ("leges").[1] A witness was examined by the party who had caused him to be summoned. If this party was the accuser,[2] then in the course of the evidence for the defense, the accused (or his attorney) could also put questions to the witness, — especially questions tending to discredit his testimony.[3] In like manner the accuser could interrogate witnesses advanced by the accused. Taken as a whole, the examination of witnesses was often similar to the system of direct and cross-examination which obtains in England.[4] The various statutes ("leges") dealing with the different crimes also varied in respect to the admissibility of witnesses.[5]

There is nothing to indicate that the "magistratus" could in the course of the "quæstio" put to a vote any matter relating to a single question,[6] *e.g.*, the admissibility of some of the grounds of discrediting witnesses. It has already been noted that the special speech in defense of the accused preceded the taking of evidence.[7] The extent to which the speakers availed themselves of all the subtle arts of oratory[8] is explainable when one considers that, especially in the popular courts, the people, not being bound by rules of evidence, easily confuse the office of the pardoner and the judge.[9] Moreover, in the "comitia," no postponement of judgment ("ampliatio") took place, and there could be only an immediate acquittal or conviction.[10] At the end of the trial there were no special closing arguments, such as obtain in the modern French procedure. The accuser and the accused, however, could expose briefly the weak points of the opposing argu-

[1] *Cicero*, "Top." 34; "Pro Milone," 22. L. 1. Cod. "De quæst."; *Geib*, "Geschichte," pp. 138, 330, 348.

[2] In the later period, the "magistratus" appears to have also asked some questions. L. 3. No. 3. D. "De testib."

[3] Passages concerning the methods of taking evidence, in *Brissonius*, "De formulis," p. 476. As to the examination, see *Geib*, p. 390.

[4] This principle of publicity seems to have been violated in the matter of the "recitatio" of the statements of absent witnesses. L. 3. No. 3. D. "De testib." See also *Brissonius*, p. 476. As to the extent to which written depositions were in use, see *Geib*, p. 342. As to the manner of the examination in Roman law, see *Laboulaye*, p. 367.

[5] L. 3. No. 5. D. "De testib." [6] *Ayrault*, p. 515.

[7] *Ascon.*, "Cæcin." 4, distinguishes four kinds of "defensores."

[8] *Cicero*, "Orator." I, 8. *Quinctilian*, "Inst." II, 16 and 17. See also *Cicero*, "Pro Sextio," 69. Here belongs also the "laudatores" (used as witnesses of character). *Rosshirt*, in "Archiv etc." XI, p. 393; *Geib*, p. 344.

[9] *v. Feuerbach*, "Betrachtungen über Oeffentlichkeit und Mundlichkeit" (Giessen 1824), I, p. 269. *Geib*, p. 103.

[10] *Geib*, p. 148; *Laboulaye*, p. 377.

ment, and reënforce their own favorable testimony.[1] The vote was taken in the "comitia" in the same manner as upon any other question presented to it for its consideration. On the other hand, in the "quæstiones perpetuæ," the vote was taken by ballot,[2] without questions being put to the judges, and without any separation of matters of law and fact. The verdict was rendered by a majority vote, and was at once made public, — except that in cases where "not proven" ("non liquet") was the verdict of the majority, the decision could be postponed ("ampliatio").[3] In the time of the Republic, the individual against whom judgment had been rendered could avail himself of an appeal ("provocatio") to the people, who kept watch over the administration of justice by the magistrates.[4]

§ 11. **Changes under the Empire.** — Under the emperors,[5] the gradual destruction of civic freedom necessarily affected the old Roman criminal procedure, while Christian ideas, due to the spread of Christianity, tended toward the protection of the innocent, and the promotion of justice.[6] Yet the despotism of numerous emperors resulted in their use of the criminal procedure as the tool of their power.[7] The distinction between the judicial and executive powers gradually disappeared as the emperor united in himself all functions of government. Consequently the old popular courts ceased to exist. Although the "quæstiones perpetuæ" still remained, yet their original significance was materially changed. The civil and criminal powers were united in one officer.[8] The "præfectus urbi"[9] and the "præfectus prætorio"[10] were the regular magistrates for the administration of criminal justice. A system of permanent courts was established.[11] Not infrequently the emperors took upon themselves the decision of

[1] These were the "altercationes," *Quinctilian*, "Institut." VI, 4. *Geib*, p. 326.; *Laboulaye*, p. 363.
[2] As to the manner of voting, *Geib*, p. 364.
[3] *Ascon.*, "In Verrem," III, "De prætur. urb." c. 9; *Erhard*, "De ampliat. judicor. publicor." (Lips. 1793). For the distinction of the "comperendinatio," see *Geib*, p. 369; *Spies*, "De comperendin." (Lips. 1728); *Ferratius*, "Epist." I, 9; *Geib*, p. 372. As to the forms of verdict, see much in *Brissonius*, "De formulis," p. 480.
[4] *Wöniger*, "Das Sacralsystem," p. 288. *Cf. Geib*, p. 387.
[5] As to the changed spirit of procedure, *Laboulaye*, p. 387.
[6] L. 22. Cod. "De episcop. audient." is important.
[7] *Faustin Hélie*, in the "Revue de législation" (1844), pp. 339, 349. Proof of many milder provisions introduced into criminal procedure.
[8] *Haubold*, "Instit. jur. rom. priv." p. 91; *Féréol*, p. 46.
[9] Tit. Dig. I, 12; *Malblank*, "Conspectus rer. judiciar. Roman. German." (Norimb. 1797), p. 59, and especially p. 62; *Geib*, pp. 399, 439; *Hélie*, I, p. 133.
[10] *Malblank*, p. 56; *Geib*, p. 431.
[11] *Niccolini*, p. 188.

criminal cases,[1] or delegated the investigation thereof to a special officer. The senate frequently asserted a jurisdiction over crimes, especially over all crimes against the State,[2] or conferred jurisdiction upon some officer.[3] The "quæstiones perpetuæ" probably ceased to exist as early as the first century A.D.; at any rate there is no trace of them after the time of Caracalla.[4] The "judex quæstionis,"[5] although existing until a late period, was really nothing more than a commissioner appointed by a magistrate.[6] With this decline of the ancient "quæstiones" and the popular criminal courts, there disappeared also the voting "judices." Consequently, the "judicium publicum"[7] entirely lost its old significance, and was finally abolished by special statute. The number of "crimina extraordinaria"[8] increased until at last all criminal courts could, from the standpoint of the ancient law, be regarded as "extraordinaria" inasmuch as the "cognitio" now also regularly belonged to the magistrate.[9] The "præfectus urbi," the "præfectus prætorio," and the "præsides" did not regard themselves as bound by the old statutes ("leges"), and thus there developed in their criminal courts a new procedure ("extra ordinem").[10] In the courts of the officers above mentioned, the controlling factor was a certain council ("consilium"),[11] the judges of which were chosen by the magistrates, and paid by the State.[12] These, however, did not vote, as did the old "judices," thus leaving it to a decision of the majority, but merely handed down their judicial opinion.[13]

The old name "judicium publicum," although used in a sense

[1] *v. Feuerbach*, I, p. 270; *Dirksen*, "Civil Abhandl." I, p. 175; *Geib*, p. 420; *Laboulaye*, p. 429.
[2] Their jurisdiction was not however limited to crimes against the State. *Geib*, pp. 398, 412; *Laboulaye*, p. 413.
[3] *Dirksen*, p. 189; *Rosshirt*, "Geschichte und System des deutschen Strafrechts" (Stuttgart 1838), I, p. 188.
[4] *Schulting*, "De reeus. judic." cap. VII, Nos. 1 and 2. See also L. 13. D. "De pœnis." L. 15. No. 1. D. "Ad SC. Turpill." As to the different views in regard to the abolition of the "quæstiones," *Geib*, pp. 394–397; *Hélie*, I, p. 127.
[5] L. 1. No. L. D. "Ad leg. Corn. de sicar." See also *Birnbaum*, in "Archiv etc." IX, p. 420; *Geib*, p. 396.
[6] *Schulting*, "Jurisprud. antejust." p. 728.
[7] L. 8. D. "De publ. judic."; *Geib*, p. 402.
[8] *Hugo*, "Rechtsgeschichte," p. 878; *Geib*, p. 404; *Platner*, "Quæst. de jure crim. Roman." p. 85.
[9] L. 1. D. "De offic. præf. urb."; L. 1. ult. D. "De pœn." See also *Birnbaum*, in "Archiv etc." VIII, pp. 676–679.
[10] *Geib*, p. 406.
[11] This consisted of the so-called "assessors."
[12] *Geib*, p. 442.
[13] *Geib*, p. 447. This brought it about, that the accused no longer had his former right of challenge. *Geib*, p. 600.

other than the original, was still applied to the criminal courts, when "levia delicta de plano" were being tried and decided.[1]

From the rules which in the case of most crimes were prescribed by the statutes ("leges"), there appears to have developed gradually a kind of procedure evolved from court custom,[2] which was based upon publicity.[3] Oral pleadings remained the rule, but even at this time, records of proceedings were kept and written testimony [4] of absent witnesses read.[5]

The fundamental form remained that of the *accusatorial* procedure. Hence a "libellus accusationis" was still necessary;[6] and on the part of the accuser there existed, as before, the "subscriptio in crimen." [7] But the nature of the underlying principles had already suffered considerable change. Through the development of the power of the State, the tendency towards centralization,[8] the gradually spreading influence of Christianity,[9] and a changed conception of punishment, there were necessarily introduced into criminal procedure more inquisitorial elements.[10] The judge in his official capacity[11] had to take a more active part in the discovery of the truth, even in the procedure based upon an accusation. The accused was now subjected to torture,[12] and the usual examination on the part of the magistrate [13] might now be directed more towards the procuring of a confession. Because of this growing official activity in the discovery of crime,[14] and the duty laid upon certain special officers of ridding the province of dangerous characters,[15] there necessarily developed a new procedure, governed by considerations of criminal jurisprudence and a regard for the exigencies of a system of police. Inasmuch as

[1] L. 6. D. "De accus." [2] *Ayrault*, p. 531; *Geib*, p. 509.
[3] *Rosshirt*, "Geschichte und System des deutschen Strafrechts" (Stuttgart 1838), p. 189. As to the development of the new procedure, *Laboulaye*, p. 409.
[4] Apparently with the purpose to furnish the appeal judge the requisite information. *Geib*, p. 503. The use of writing brought about changes in the preliminary investigation that were much to the disadvantage of the principle of publicity. "Revue de législation" (1844), p. 341.
[5] It appears from L. 3. No. 3. D. "De test." that Hadrian attached no weight to such evidence. *Geib*, p. 633; *Hélie*, I, p. 146.
[6] L. 3. D. "De accus."
[7] L. 2. D. "Ad S.C. Turpill." L. 10. Cod. "Qui accus., non poss."; *Brissonius*, "De formulis," p. 469.
[8] *Hélie*, p. 163. [9] *Hélie*, p. 173.
[10] *Geib*, p. 515. *Cf. Mittermaier*, in "Archiv etc." (1843), p. 433.
[11] L. 22. Cod. "Ad leg. Cornel. de falsis."
[12] *Hohbach*, "Beiträge zum Strafrecht," p. 2; *Geib*, p. 617.
[13] *Geib*, p. 614.
[14] "Publicæ sollicitudinis cura" as in L. 1. Cod. Theod. "De custod. reor."; *Geib*, p. 527.
[15] L. 13. D. "De officio præs."

minor officials, similar to our police, came more and more to be appointed for the searching out of dangerous characters, and the discovery of crime ("agentes in rebus," [1] "irenarchæ," [2] "stationarii" [3]) there arose, in cases where these officials [4] reported the crime, new methods for the institution of proceedings, which differed from those of the old accusatorial procedure.[5]

Many changes took place in the ancient forms, although the old names were retained; *e.g.*, the "nominis delatio." [6] Many of the old procedural steps seem to have been united into one.[7] Many of the early methods of procedure were changed by the new greatly developed power of the magistrate.[8]

The criminal procedure of the period of Justinian [9] retained everywhere remnants of the ancient forms,—of the accusatorial procedure, of publicity, and of oral pleadings. But the old spirit which gave significance to these institutions had vanished. Everywhere new forms arose. There even developed a certain theory of evidence,[10] since the accuser, in making out his accusation, and the judges, came to be directed by certain rules of evidence, developed through custom or decreed by the emperors.[11] It cannot, however, be authoritatively stated, that in order to mete out special punishments, more stringent requirements in the way of proof were exacted.[12] The extended jurisdiction of the magistrate also brought it about, that in cases where one act constituted more than a single crime, he was not bound as formerly by the allegations of the accusation, and moreover, in the infliction of punishment, the judges exercised a certain discretion.[13]

[1] *Ammian Marcellin*, XV, 3; *Augustinus*, "Confess." VII, 6; Cod. Just. lib. XII, Tit. 20–24.
[2] L. 6. D. "De custod. reor."; Tit. Cod. X, 75.
[3] L. 3. 4. D. "De fugitiv."; L. 1. D. "De offic. præf. urb."; L. 1. Cod. Theod. VIII, 5.
[4] The "advocatus fisci" (*Spartian*, "Vita Hadrian." c. 20; *Meister*, "Einleitung in den peinl. Proz." I, p. 179) cannot be regarded as a public accuser.
[5] *Mittermaier*, in "Archiv etc." (1843), p. 433.
[6] *Geib*, p. 548.
[7] *E.g.*, the "nominis delatio" and the "inscriptio," *Geib*, p. 558.
[8] *E.g.*, as to the questioning of witnesses. It appears from L. 3. No. 3. D. "De test.," that the emperor Hadrian proposed questions. This was gradually extended. *Geib*, p. 631.
[9] See for details, the criminal cases preserved by *Agathias* (translated by *Degen*), "Neus Archiv etc." VII, No. 22.
[10] *Post*, in the "Lehre vom Beweise." See also *Geib*, p. 610. Also the value attached by the Romans to circumstantial evidence will be discussed later.
[11] In regard to the later Roman procedure, see *Rosshirt*, "Zeitschrift für Civil- und Criminalrecht," 2d. Hft. p. 178.
[12] As might appear from L. 16. Cod. "De pœnis." But see *Geib*, p. 649.
[13] *Geib*, pp. 652–659.

CHAPTER III

PRIMITIVE GERMANIC CRIMINAL PROCEDURE

§ 1. **General Characteristics.** — In the Germanic law the development of criminal procedure [1] stands in close relation to the change of view as to punishment, and to the political conditions of the German nation. Not until the conception arose of the existence of crimes which were committed directly against the civic community, did the criminal procedure acquire a significance similar

[1] For the history of German criminal procedure the following may be consulted. *Gebauer*, "Vestigia juris german. ante." (Goett. 1766). Disp. 14, 15, 16; *Weisand*, "De re German. judiciar." Viteb. 1773); *Hofmann*, "De orig. progressu et natur. jurisprud. crim. ger." (Leipzig 1722); *Malblank*, "Geschichte der peinlichen Gerichtsordnung" (Nurnb. 1783); *Malblank*, "Conspectus rer. judiciar. röman. German." (Norimb. 1797); *Heineccius*, "Elem. jur. German. tum vet. tum hod." (Hal 1736), tom II, Tit. III; *Hauschild*, "Gerichtsverfassung der Deutschen" (Leipz. 1751); *Kopp*, "Nachrichten von der Verfassung der geistl. und Civil-Gerichte in Hessen." 2 Thle. (Cassel 1769); *Henke*, "Geschichte des peinlich. Rechts," 2 Thle. (Sulzbach 1809); *Meyer*, "Esprit, origine et progrès des instit. judiciaires" (la Haye 1819), (vol. VI, also the first part); *Rogge*, "Über Gerichtswesen der Germanen" (Königsberg 1820); *Raepsaet*, "Analyse raisonnée hist. et critiq. de l'origine et progrès des droits des Belges." (Gand. 1824, 1826), 3 vols. For a description of the criminal procedure under the French kings, see "Théorie des loix politiques de la monarchie françoise" (Paris 1792, 8 vols.), in vol. VII, pp. 1–186, or in the new edition (Paris, 1844, by *M. de Lazardière*), vol. II, p. 97, vol. III, p. 1, and vol. IV, pp. 29, 200. There is also much in certain passages of *Bodman*, "Rheingauische Alterthümer"; *Feuerbach*, "Betrachtungen über Oeffentlichkeit und Mundlichkeit," (Giessen 1824); *Eichhorn*, "Rechtsgeschichte"; *v. Savigny*, "Geschichte des römischen Rechts."

The following are also important. *Maurer*, "Geschichte des altgermanischen und namentlich altbaier., öffentlichen, mundlichen Gerichtsverfahrens" (Heidelberg 1824); *Frieberg*, "Das altdeutsche Gerichtsverfahren" (Landshut 1824); *Buchner*, "Das öffentl. Gerichtsverf. in bürgerl. und peinl. Saachen" (Erlangen 1825); *Steiner*, "Über das altdeutsches imbes. altbaier. Gerichtswesen" (Aschassenburg 1824); *J. Burchardt*, "Diss. hist. de judiciorum criminal. formis olim hodieque" (Basil. 1823); *Vos*, "De judiciis Drenthinorum antiq." (Groning 1525). In regard to the Middle Ages, see *Cannert*, "Bydragen tot de kennis van het oude Strafrecht in Vlaenderen" (Ghent 1835); *Rosshirt*, "Geschichte und System des deutschen Strafrechts" (Stuttgart 1838); *Wilda*, "Das Strafrecht der Germanen" (Halle 1842); *Unger*, "Die altdeutsche Gerichtsverfassung" (Gött. 1842); *Pardessus*, "Loi salique" (Paris 1843), p. 567 *et seq*; *Hélie*, "Traité de l'instruction criminelle" (Paris 1836), I, p. 179.

to that of to-day.[1] The civic community, in the case of crimes committed against individuals, so long as the vengeance of the family prevailed, took cognizance of a crime only so far as those limits to the exercise of vengeance which custom had established were transgressed,[2] and in case of crimes which were deemed breaches of the peace, enforced the collection of the fines, or made effective the punishments incurred.

A fundamental principle of the old order was the separation of the judicial power from the executive and ministerial power. The ministerial power, resting in the hands of the princes, laid the foundation for the "comes." [3] This latter was the officer appointed by the king, who presided over the popular courts,[4] in which crimes of a graver nature were tried. He guided the trial, and saw to the execution of the formal sentence.[5] Along with the "comes," the "missi dominici" [6] were also important because of their supervision of officials and of the administration of justice, and of their duty of searching out secret crimes, and also because of the authority granted to them to organize a court themselves [7] and preside over the same.[8] The organization of society, under which every free man, whenever he heard of a crime, was bound at once to take steps for the keeping of the peace, shows that crime was universally regarded as a breach of the peace and likewise shows how the attempt was made to suppress vengeance. It explains also how, little by little, this peace preserved by the people became a peace preserved by officers.[9]

[1] As to its development, see *Wilda*, p. 169.

[2] *Wilda*, p. 160; *Waitz*, "Deutsche Verfassungsgeschichte," p. 193.

[3] *Marculf*, "Form." I, 8; "Capit." 779, Art. 21; "Théorie des lois politiques," tom. VII, p. 35; *Savigny*, "Geschichte des röm. Rechts," I. Thl., p. 222; *Meinders*, "De judic. centen." cap. III, No. 18; *Grimm*; "Rechtsalterthümer," p. 752; *Pardessus*, "Loi salique," p. 571; *Unger*, p. 152.

[4] "Capitul." III, a. 812, c. 4.; "Cap." 815. c. 3. Only in the great "placitis," where the "comites" presided, was there a criminal court dealing with the gravor class of crimes; this was not the case in the court of the "centurius," where only minor crimes were tried. However, if the "comes" himself sat in the "judicium centenarium" graver crimes would be taken up. See *Rosshirt*, "Geschichte," p. 11; *Montesquieu*, "Esprit des loix," XXX, 18. But on the contrary, see *Le Grand de Laleu*, "Recherches hist. sur l'administration de la justice crim. chez les Français" (Paris 1822), p. 53.

[5] *Meyer*, "esprit." vol. I, p. 355.

[6] *Gregor*. Turon. V, 29; *Marculf*, I, 11. See the two treatises by *de Roy* and *Muratori*, printed in Baluz. Capitular. regum Francorum; *de Kock*, "Diss. de potestat. civil. episcop." p. 29; *Bluntschli*, "Rechtsgeschichte von Zürich," I, p. 38.

[7] "Capit." IV, 55.

[8] "Capit." III, 812, No. 8. *Muratori*, "Diss. de missis dom." p. II, cap. III, and V. See also *Wigand*, "Das Vehmgericht," p. 36.

[9] The old Swiss statutes and actions are interesting. See *Schauberg*, "Zeitschrift für ungedrückte Schweizerrechtsquellen," I, pp. 20–35.

§ 2. **The Judicial Power.** — The judicial power was exercised by the people. They met in the great popular courts, which were regularly held, and rendered judgment; in the beginning in full assembly,[1] although at an early date[2] the custom arose of choosing a certain number from the most experienced and oldest men of the community. These were the so-called "Schöffen."[3] Charles the Great found this system of "Schöffen" already established. He confirmed and improved it in this respect,[4] namely: That for the great popular courts, which were regularly held, the presence of all the free men of the Gau was required, while the presence of these "Schöffen" was required for both the ordinary and extraordinary courts. Only in the last named, would the "Schöffen" in a certain number[5] suffice for a valid judgment. Other free men, however, were not excluded from the court. In criminal cases, especially, the judgment seems to have been passed in the general popular courts.[6] Charles the Great extended this system of "Schöffen" over his newly conquered territories.[7] So far as criminal procedure, at least, is concerned there is no indication that judgment was passed only as to the facts. On the contrary, there seems to have been passed a final judgment either of conviction or acquittal.[8]

[1] *Pardessus*, p. 565; *Unger*, p. 143.
[2] VII "Scabini" are mentioned in "leg. Sal." tit. 60. Ripuar. 32.
[3] Passages in "Théorie des loix polit." tom. VII, p. 203.
[4] *v. Savigny*, "Geschichte des röm. Rechts." I, p. 195. However, see *Meyer*, "Esprit." vol. I, p. 396; *Maurer*, "Geschichte," p. 66; *Le Grand de Laleu*, p. 63; *Wigand*, p. 280; *Rogge*, "Gerichtswesen," p. 66; *Grimm*, "Rechtsalterthümer," p. 774; *Unger*, p. 169; *Pardessus*, p. 576; *Lehuerou*, "Hist. des institut. caroling." p. 382. Also in regard to the "Scabini Rachinburgi," see *Thomas*, "dor Oberhof zu Frankfurt," p. 9; *Sachse*, "Histor. Grundlagen des deutschen Staatslebens," p. 295.
[5] As to the number of "Schöffen," see *Unger*, p. 281; *Hélie*, I, p. 195.
[6] This appears from "Capit." 801. Art. 27. cap. III. of 812, cap. 4. Cap. I, 810. See also "Théorie des loix," VII, p. 50; p. 204; *Bouquet*, "Rer. Gall. Script." III, p. 533. Also "Capit." 813, cap. 13; *Bluntschli* "Rechtsgeschichte," I, p. 37; *Falk*, "Gerichtsverfassung von Schleswig," pp. 83–86; *Hélie*, I, p. 254.
[7] In regard to the Italian States, *Troya*, "Della condizione dei romani vinti dai Longobardi," p. eccli; *Gregori*, Introduction, "degli statuti di Corsica," p. lxxxix. A document dealing with the Lombard "Schöffen," in *Troya*, l.c. p. clxx.
[8] *Eichhorn*, "Rechtsgeschichte," No. 75. But *cf. Rogge*, p. 68; *Maurer* p. 106; *Biener*, "Beiträge," p. 120. In regard to the separation of questions of fact and law, see *Birnbaum*, in the "Zeitschrift für ausl. Rechtswissenschaft," I. Thl. p. 160; II. Thl. p. 436. There is considerable uncertainty in regard to the "sagibarones," especially as to whether they expressed an opinion on points of law. *Birnbaum*, in "Zeitschrift etc." I, p. 151; and in "Archiv etc." XIV, p. 203. *Pardessus*, p. 274, regards them as representatives of the "comes." See also *Unger*, p. 197; *Maurer*, p. 19; *Beuker Andræ*, "De orig. juris. fris." p. 417; *Lehuerou*, p. 380. *Hélie*, I, p. 197; *Thomas*, p. 11; *Sachse*, pp. 287–293.

In the Frankish period,[1] it is impossible to say definitely to what extent a duty was incumbent upon the court, or particular officers,[2] especially the "Schöffen," to inform upon the crimes known to them personally, when no accuser appeared.[3] It does appear, however, that in the assemblies convened by the "missi"[4] there was a duty of censure incumbent upon certain "Schöffen" as in the "Sendgerichte."

In many places the great criminal folk-courts disappeared. They persisted longest, however, in the so-called "ungebotenen Dingen"[5] or in the inferior courts of justice,[6] in which each free man had to appear, and where, after a questioning of all present in regard to the crimes which had been committed in the course of the year, certain ones were censured. Later this duty of censure, in most places, ceased to have reference to the graver class of crimes.

The trial and decision of capital offenses still always took place before the land courts,[7] or in the grain exchange,[8] or else before the courts of the Gau,[9] or the parish.[10] In all these courts, "Schöffen"[11] (as lay assessors) or judges[12] had already come to pass judgment instead of the whole people; although frequently this was not the case,[13] and then a so-called "collaudatio sententiae"[14] would take place. In the place of the old "comes" there

[1] "Capit. Carol. Calv." tit. XIV, cap. 4. "Capit." 828. No. 3. *Beiner*, p. 132.
[2] "Cap." I, 802. c. 25, because of the expression "juniores." There is some controversy as to their construction; *Wigand*, p. 284. *Beiner*, p. 130. But see *Unger*, p. 402.
[3] *Unger*, pp. 403–406.
[4] "Capit." 828. in Pertz III, p. 328.
[5] They were so called in the "nassauische Landesordnung" of 1498. Art. 76, 80.
[6] See also the Würtemburg "rüggerichtordnung" of 1495; *Eberhard*, in *Pitts*, "Repertorium für peinl. Recht," I, p. 45. It is certain that in many countries the customs referring to the "Rügen," passed from the "Sendgerichte" to the courts of the Sovereign. *Unger*, p. 408.
[7] *Buchner*, p. 137; *Grupen*, "Diss. prælim. observat. jur. crim. applicat. torment." (Han. 1754), p. 445; *Grupen*, "Discept." p. 576; *Kopp*, "Hessische Gerichtsverordnung," I, p. 270.
[8] *Maurer*, p. 168.
[9] References in *Grupen*, "Discept." p. 667.
[10] Important passage in *Verhanderlingen der Genoothschap*, "Pro excolendâ jur. patrio," I, p. 369.
[11] "Sachsenspiegel," I, 62; "Schwabenspiegel," I, 75; "Kaiserrecht," I, 7; *Maurer*, p. 106. There is a collection of references dealing with the institution of the "Schöffen," in *Dreyer*, "Nebenstunden," p. 157; *Raepsael*, "Supplement à l'analyse de l'origine des Belges," p. 134.
[12] References to the effect that there were seven "Schöffen," in *Dreyer*, p. 142.
[13] *Maurer*, p. 180; *Bluntschli*, "Rechtsgeschichte," I, p. 37.
[14] "Sachsenspiegel," II, 12; *Falk*, "Gerichtsverfassung von Schleswig," p. 84.

came into existence, with similar prerogatives, certain judges and other officials, such as the public administrators ("Pfleger") and bailiffs ("Drosten"). That the presiding judge could not himself pass judgment remained a general rule everywhere, even in the 1400s.[1]

§ 3. **Trial by Battle, Ordeal, Compurgators.**—The more society rested upon the foundation of the old family and community relation, the more easily in an age of simple and primitive ideas could the conception prevail[2] that the mere accusation made by a free man created a definite and established suspicion against the accused.[3] This accusation of its own weight was equivalent to a challenge to the accused and his family. Thus every criminal action between the accuser and the accused was, as it were, a "casus belli" between both families or bands to which the two men belonged.[4] Consequently every free man against whom an accusation was brought either availed himself of this right of feud and a battle took place,[5] or else, in an imitation of this right of feud, summoned his relatives as security, who in a body[6] as vouchers,[7]

[1] *Warnkönig*, "Flandrische Rechtsgesch." III, p. 265. As to the changed position of the judges, *Unger*, p. 326.

[2] As to the use of the rack in the Frankish period (applied only to slaves), *Hélie*, I, p. 225.

[3] *Rogge*, p. 212; *Wigand*, "Vehmgericht," pp. 373, 386; *Evers*, "Ältestes Recht der Russen," p. 136.

[4] This explains the circumstance that both the accuser and the accused and their families appeared before the court. *Dreyer*, "Nebenstunden," p. 49.

[5] As to trial by battle, see "Leg. Saxon." XVI, No. 1; "Baiuv." XI, 4; XVI, 1; "Aleman." tit. 84; "Théorie des loix politiques," vol. VII, p. 17; *Rogge*, p. 206; *Hélie*, I, pp. 240–280.

As to the Middle Ages, see "Sachsenspiegel," I, 48 and 63; "Schwabenspiegel," I, 228; *Hauschild*, pp. 52, 106; *Kopp*, I, p. 479; *Meyer*, "Esprit." vol. I, p. 323. Likewise family feuds to-day persist among people who have few legal institutions, as among the Montenegrins, of which, see an example in "Le Droit" of Feb. 1839, No. 32.

[6] *Grimm*, p. 860; *Schildener*, "Beiträge zur Kenntniss des germanischen Rechts," pp. 34–73; *Luden*, "Deutsche Geschichte," III, p. 397. The "Théorie des loix politiques," vol. VII, p. 13 (on p. 45 is a collection of references to "preuves") calls them "preuves negatives." See also *Rogge*, p. 136. There were two kinds of "compurgatores." This appears very clearly from the "Leg. Walliæ" (*e.g.*, lib. 1. cap. 10. No. 47), "sacramentum minus et majus." In the first they stated on oath, "se credere, juramentum esse verum." Here they must all be unanimous. In the case of "majus," it depended on the majority. See *Wotton*, in "Præf. ad leg. Walliæ"; but also see *Hickes*, "Diss. epist. zum thesaur. linguar." p. 35.

In regard to compurgators, see *Abegg*, "Histor. pract. Erört." pp. 47–65; *Gaupp*, "Das alte Gesetz der Thuringer," p. 299; *Pardessus*, "Loi salique," p. 624; *Hildenbrand*, "Die purgatio canonica," p. 10; *Waitz*, "Deutsche Verfassungsgeschichte," p. 210; *Sachse*, p. 312; *Hélie*, I, p. 229. As to the different numbers of those who took oath, *Gaupp*, p. 305.

[7] *Schildener*, "Uber die religiöse Gemeinschaft der alten Mittschwornen" (Greifswalde 1833 and supplement 1835).

stood beside him with their testimony and furnished evidence that an accused at whose side there stood so many feud companions did not wantonly refuse a settlement, and then the community prohibited the plaintiff from raising a feud.

Many passages seem to sustain the assumption[1] that the privilege of securing an acquittal by means of this oath did not belong to the accused absolutely, but was dependent upon judicial permission.[2] The arrangements were various in kind.[3] It was an important difference whether those who supported the accused with their oath were not necessarily chosen only from among the relatives of the accused,[4] or whether the accuser chose from among the relatives of the accused those who should give oath together with the accused.[5] A restriction, which must be regarded as developed under the influence of Christianity, was that only those could support the accused with their oath who had a conviction of his innocence.[6]

The "Hardes" or "Stocknasn"[7] and the "Neffninger"[8] existing in Norse law, and employed for the settlement of disputes through their oaths, were fundamentally developed from the "Kionsnafn" (compurgators). Later they were definite men chosen by the people for the entire year; while the "sandmanner"[9] already were regularly appointed and permanent judges. Under the conditions at that time existing there could be no production of evidence[10] in the modern sense. Everywhere there can be

[1] *Pardessus*, p. 625.

[2] Especially, if the accuser could plead a "probatio certa."

[3] *Wigand*, "Vehmgericht," pp. 387–391; *Schildener*, "Guta-Lag," p. 170. As to the meaning of the word "electi," *Pardessus*, p. 627.

[4] *Stirnhoek*, "De jure Sueonum vet." p. 105; *Rosenvinge*, "De usu juram." II, p. 50.

[5] *Rosenvinge*, l.c. II, p. 158. Here belong the "Kionsneffninge" of the "jutischen Lovbuch." *Rosenvinge*, "Grundriss der dänischen Rechtg." p. 244. As to "Folgeeid," "Deedeid," see *Verhanderlingen der Genootschap*, "pro excolend. jure patrio," vol. V, p. 64.

[6] *Phillips*, "Englische Reichs- und Rechtsgeschichte," II, p. 259. In regard to restrictions in the statutes, *Pardessus*, p. 629.

[7] They were twelve assessors appointed by the chief bailiff, for the decision of single cases, having to do with the graver kind of crimes, and they rendered their verdict by majority vote. *Falk*, "Gerichtsverfahren." p. 94.

[8] Also called "nominati." They passed judgment as to the lesser offenses, but were appointed for the entire year. *Rosenvinge*, "De usu juram," l.c. II, p. 7; *Rosenvinge*," Grundriss," pp. 146–232. See also *Rogge*, p. 242; *Paulsen* in the "Zeitschrift für ausländ. Rechtswissenschaft," I, p. 484; *Falk*, p. 95. See also the article by *Repp*," Historical treatise on trial by jury" (London, 1832). See also "Deutsche Vierteljahrschrift," 1844, I. Hft. p. 216.

[9] "Jutisch Lowbuch," II, c. 1; *Rosenvinge*, p. 231.

[10] *Rogge*, p. 93; *Weigand*, "Vehmgericht," pp. 371, 385; *Cropp*, "Heidelberger Jahrbücher," 1825, No. 41, p. 669.

noticed the influence of the idea that the revelation of secret crimes may be left to the direct intervention of the Deity,[1] who would surely bring the truth to light and would not suffer the innocent to perish.

In close relation with this idea there stood the conception of the ordeal,[2] in so far as those who by good fortune had endured an ordeal could appeal to the protection of the gods, and to their certain manifestation that they regarded him as innocent, and stand acquitted of the accusation.[3]

There is no uniformity in the various folk laws in regard to the relation of the compurgators to the ordeal and the judicial trial by battle.[4] The earlier the ideas of the production of proof by witnesses came to prevail and the conception was gained that the testimony of two witnesses was required for a judgment,[5] the more would the old institutions be done away with.

The theory of proof, in so far as one can thus designate the means of conviction based on rules consisting in custom, was determined[6] by: (*a*) the kinds of crime which were under consideration, — since in the case of certain crimes,[7] on the existence of certain conditions, and certain testimony, there would be an immediate judgment; (*b*) by the circumstance whether or not the act was premeditated;[8] (*c*) by the trial by battle, — since, according to many statutes, the proposal of battle by the accuser precluded the accused from his defense by oath; (*d*) by the reputation of the accused, — since he who was of bad reputation had no claim to the right to stand acquitted upon his oath.[9]

[1] References in "Théorie des loix politiques," vol. VII, p. 16; *Meyer*, "Esprit," vol. I, p. 311.

[2] *Dreyer*, "Abhandl." III, p. 1269; *Maier*, "Geschichte der Ordalien," (Jena 1795); *Hof*, "Von den Ordalien" (Mainz 1784); *Grupen*, "Observat." IV; *Hauschild*, p. 187; *Schildener*, "Guta-Lag," p. 160; *Rogge*, p. 195; *Rosenvinge*, "Grundriss," p. 143; *Wilda*, in the "Hallische Encyclopadie," under the word "Ordalien."; *Pardessus*, p. 632; *Sachse*, p. 455.

[3] *Hildenbrand*, "Purgatorio," p. 16.

[4] In some countries, it appears that the accuser could defeat the use of compurgators, if he immediately proposed that both he and his opponent submit their cause to the doubtful outcome of trial battle, and only under exceptional circumstances could he require that the accused undergo an ordeal, *e.g.*, by fire. *Gaupp*, "Recht der Thuringer," p. 316. *Pardessus*, p. 632, that the method depended upon the proof which the accuser could produce.

[5] "Théorie des loix politiques," vol. IV, p. 200.

[6] *Albrecht*, "doctrina de probat. secund. jus. germ. med. ævi." (Regiom. 1825).

[7] *E.g.*, in case of rape.

[8] If the wrongdoer was not caught in the act, he had an advantage in the matter of acquittal through the intervention of compurgators.

[9] As to the procedure against the individual who contumaciously refused to appear, see *Bluntschli*, I, p. 205; *Cropp*, "Beiträge," II, p. 388.

PART I

HISTORY OF CRIMINAL PROCEDURE IN FRANCE FROM THE 1200s TO THE 1600s

INTRODUCTORY;[1] GENERAL FEATURES OF THE EVOLUTION

§ 1. The Three Sources of French Criminal Procedure and its Evolution. — French criminal procedure, the broad features of which we now propose to sketch, sends its roots deep through the three successive strata, Roman, Germanic, and Canon law, upon which all our juridical institutions are planted.

The first element in its history is the Germanic element. Down to the 1200s the procedure is very much more uniform than the law. It is public, oral, severely formal, and rarely makes use of the proof by oath-helpers or by battle. The ancient ordeals, by boiling water, branding, cold water, in favor under the Merovingians, soon fell into disuse. Such is the first phase. Under the pressure, however, of various causes, the accusatory procedure of the nations of the Germanic race becomes inquisitorial, written, and secret, taking its inspiration from the two learned legislations of Europe, the Roman law and the Canon law. An ordinance of St. Louis (which is usually attributed to 1260, but which is probably of earlier date) helps this movement by substituting, in the domains of the crown, the *procedure by inquest* or jury (" enquête ") for the proof by *wager of battle*. The king could not put " coustumes ou ban " in the territory of his barons without their consent. The seignorial jurisdictions also show themselves averse to this substitution, and the nobles persist in demanding to be tried according to the ancient rules. But the citizens (" bourgeois ") and the peasants (" vilains ") readily enough accept

[1] [This introductory Chapter and Title I = §§ IV, III, and VI of Professor GARRAUD'S "French Criminal Procedure." For this author and work, see the Editorial Preface. — ED.]

these innovations, which proscribe the duel and replace the wager of battle ("en champ clos") by oral or written pleadings. The municipal jurisdictions of the rural communes and the towns, and all the jurisdictions of the south, eagerly adopt this procedure, which revives very ancient traditions, going back probably to the Gallo-Roman epoch.

The two procedures, accusatory and inquisitorial, so different in origin and character, also remain in opposition during the latter half of the 1200s and the first part of the 1300s. This is the transitional period, during which the plastic force of custom is acting. The evolution, begun in the 1200s, is accomplished in the 1500s. The Ordinance of 1539, proclaimed by Francis I at Villers-Cotterets, upon justice and the shortening of actions, definitely fixes the rules of the inquisitorial procedure in France. The Ordinance of 1670, which was the Code of Criminal Examination of the "Old Régime," merely systematized the method already sanctioned, making it precise in its details and even aggravating its severities.

From this time on, criminal procedure becomes crystallized for nearly a century. But the new and critical spirit preceding the Revolution has theoretically condemned this system as offering no safeguard to the accused. The philosophers look to England; they admire her judicial as well as her political institutions. It is the English criminal procedure, especially the jury, which the Constituent Assembly will endeavor to acclimatize in France; and it is that procedure which the Law of 16–29 September, 1791, and the Code of Offenses and Punishments of the 3d Brumaire, year IV, will successively organize.

But the same causes which, in the 1200s and 1300s, had brought about the substitution of one system of procedure for the other, operate anew; the need of reorganizing State authority is felt, of strengthening the system of repression, weakened amidst the troubles of the period, caused by civil and foreign wars. The Ordinance of 1670 again becomes the ideal of many minds; there is a desire to put it once more in force. Then a compromise is effected, and although the ancient procedure is not entirely revived in the Laws of the Consulate and of the Empire, the best part of the provisions of the Ordinance, and even some of its severities, pass into the first part of the Code of Criminal Examination, the second part retaining the accusatory procedure and the institution of the jury. This Code of 1808 has become, for the whole of Europe, a type on which many legislations are modeled. It there-

fore typifies an essential phase, and is a landmark in the historical evolution of the laws of procedure.

§ 2. **Double Tendency; Safeguards of the Accused; Social Protection; Classic and Modern Schools.** — From that time a double movement is apparent. There is a tendency to eliminate, by means of revision, the excessive severities which French procedure has inherited from the Ordinance of 1670, and to introduce into the preliminary examination the safeguards which it lacked. There is a desire to open the chambers of the examining judge, if not to the public, at least to certain authorized persons; to allow the presence of counsel during the examination; to recognize in the prisoner and his counsel, from this initial phase of the prosecution, the right to challenge and criticise the measures taken to arrive at the discovery of the truth. Protests against the secrecy of the examination seem general, and rebellion sets in against this practice of our old procedure, as dangerous for the judge as for the accused, which, as the English jurist Stephen expresses it, "poisons justice at its source."

But, on the other hand, the part played in the trial by the intervention of the jury, though in other times considered too restricted, seems nowadays to be almost excessive. There is a sincere demand for a justice less impressionistic; more scientific. To this ideal, it is thought, we might sacrifice that inveterate respect which has everywhere existed until recent times for the institution of the jury.[1]

There is, in this double movement, the expression of a ceaseless strife between the two tendencies which in these days divide the domain of the criminal sciences. The *Classical School* is above all individualistic, demanding new safeguards in favor of the accused, a continual control over the criminal authorities, the diminution of arbitrariness, and the increase of liberty. The *Modern School*, which is above all collectivist, desires to strengthen the "social defense," to deprive the prisoner of those safeguards which are summed up in the "presumption of innocence," to substitute for a humanitarian procedure a scientific procedure, to transform the penal action into a clinical examination and the judges into expert specialists, who must have a very special education in matters of psychology, anthropology, and criminal sociology.[2]

[1] See *Jean Cruppi*, "La Cour d'assises de la Seine" (Revue des Deux-Mondes, 1895, vol. IV, p. 39).

[2] *Ferri*, "Sociologia criminale" (4th ed.) 79–84, pp. 777–826; *Garofalo*, "Criminologie," pp. 387–397. See, but in a somewhat different direction, *Cruppi*, "La Cour d'assises," p. 130 *et seq.* and p. 281 *et seq.*

At the time when we write, and notwithstanding the evident progress of socialism and collectivism, it seems likely that the tendency, in matters of criminal procedure, is no longer to arm the social power in the strife against criminality, but much more probably to protect the prisoner against the abuses of social power. It is in this direction that the reforms, so numerous and so characteristic, of which criminal procedure in France and abroad has been the object, have been pointed within the past fifty years.

§ 3. **Features of Contemporary Procedure; Unity of Civil and Criminal Justice.** — The French system belongs to the mixed type. The present judicial organization and procedure are governed by four fundamental ideas.

The *unity of civil and criminal justice* in France means that the same tribunals take cognizance of both civil and criminal matters. This unity has its expression, 1st, in the person of the keeper of the seals, supreme head of both jurisdictions; 2d, in the justice of the peace ("juge de paix"), who has various civil functions, and who, in criminal matters, is at once officer of judicial police and police judge; 3d, in the attorney-general ("procureur général") and the "procureur de la République," who occupy the position of public prosecutors in both jurisdictions. This unity is made effective, 4th, in the Tribunal of First Instance, which furnishes the examining magistrate ("juge d'instruction"), and forms the correctional tribunal of the first stage; 5th, in the Court of Appeal, whose two branches, the correctional branch and the arraignment branch, act in criminal matters, and whose members take part in the trial of crimes, by presiding and by directing the jury.

This unity of civil and criminal justice imports merely an *organic unity*, and not a *unity of procedure*. The separation of civil and criminal procedure is an essential principle of the French legislation. Each of these procedures has its special code. This work being devoted to the criminal procedure, we shall study the details of the judicial organization only as they relate to that procedure. We shall take for granted a knowledge of the French judicial organization.[1]

The unity of civil and criminal justice is broken by the institution of the jury, which calls upon private citizens to take part in

[1] Reference may be made, on this point, to *M. Garsonnet's* "Traité théorique et pratique de procédure" (2d ed., 1898–1904, 8 vols. 8°, revised and corrected by *Charles Céygar-Bru;* 3d ed., 1912). Vol. I, down to page 473, is devoted to judicial organization.

the trial of crimes. In civil trials there is no jury,[1] except in matters concerning expropriations for public purposes, where citizens are summoned, in case of disagreement, to fix the indemnity due to the person deprived of his property.

§ 4. **Division of Official Functions.** — This organization is governed by the *principle of the division of labor*. The operations of criminal justice necessitate the organization of separate authorities to exercise the functions of *arrest, examination, trial,* and *execution*. And the law ordains that, by reason of incompatibility, the agents who exercise one of these functions cannot, unless in exceptional cases, encroach upon other functions. The authorities who unite in administering the criminal law are practically four, 1st, the *officers of judicial police,* charged with investigation, and examination preliminary to the charge; 2d, *courts of examination,* who, upon complaint made, decide on the arraignment or indictment of the accused and on the propriety of arrest and trial; 3d, the *trial court,* who decide on the issue, that is, on the guilt of prisoners and those accused, and pronounce the punishments; 4th, the *officers of the public prosecution,* whose duty is to invoke, by filing a charge or requisition, the action of these different authorities and also to see to the execution of their decisions.

The functions of the *judicial police* and of the *public prosecutor,* which consist chiefly in taking active measures, are performed by *individuals,* placed under the orders and supervision of a hierarchy of superiors. The functions of *judging,* which consist in deliberating and trying, are usually confided to *collective bodies,* whose decisions may be modified or quashed, but who do not have to take instructions from any one as to their manner of carrying out their duty. The officers of judicial police and of public prosecution are dependent on the executive, which can remove or dismiss them "ad nutum." The judges, on the contrary, are, in general, irremovable.

The official criminal procedure has three successive stages: it is begun by the *filing of a charge;* it is continued by an *examination;* and it is ended by a *judgment.*

(1) Before the criminal law can be applied, the perpetration of the wrong must be discovered. The authorities must therefore

[1] In the sitting of 30th April, 1790, after long debates and at the instance of Thouret and Tronchet, the Constituent Assembly decided against the establishment of the civil jury desired by Duport. Since then, the question has been taken up from a scientific point of view; but from a practical point of view it may be regarded as abandoned. See *Garsonnet, op. cit.* vol. I, § 3, pp. 83–88.

investigate into the commission of crimes and misdemeanors, secure, if necessary, the accused persons, and hand them over to the courts. The officers having this duty are the *judicial police*. This body is distinct from the *administrative police*, which has for its object the maintenance of order and especially the prevention of crime. The judicial police forms part of the judicial system. It investigates the offenses which the administrative police has not been able to prevent. It paves the way for and facilitates the action of the tribunals of repression. Its intervention precedes the first stage of the public prosecution. The law has organized the judicial police, but it has abstained from placing upon its action formalities of procedure which might cramp it. In this respect the preliminary and official inquiry, conducted by the police, must be distinguished from the magisterial examination ("instruction") properly so called, belonging to the judicial function. But as the purpose of the two institutions and the working of the two mechanisms are identical, we find, in fact, the police doing the work of examination and the examining judge doing police work.

(2) The public prosecution is intrusted, in its entirety, to officers who fulfil, along with various duties, the functions of the public prosecutor. They are charged with doing all the acts necessary to secure the infliction of a punishment upon the perpetrator of an offense. The victim of the offense, in whom is recognized the exclusive right to demand civil reparation for the injury suffered, has access, to obtain damages, to criminal tribunals either by way of intervention or of suit. But the civil action can only be tried, by these courts, accessorily to the criminal charge. This is the fundamental rule which limits the right of the injured party.

(3) The case, however, is not always brought before the criminal courts without other preliminary examination than that made officially by the agents of the judicial police. On a charge of crime invariably, and of misdemeanors optionally, a *magisterial examination preliminary to the formal charge* is always had. This duty is performed by certain special judicial officers called magistrates of examination ("instruction") who either authorize the charge or quash it. This examination is in the hands of the State's attorney and the examining magistrate. The former has the right to investigate and prosecute crimes and misdemeanors committed in his district; but he has no power, in ordinary cases, to do anything towards collecting the evidence, or ordering the arrest and detention of accused persons. These powers belong to the examining magistrate. The latter, however, has not the

right to initiate the charge of his own accord, that is to say, to begin the examination without being requested by the State's attorney. Still, this rule of the separation between the functions of examination and the functions of prosecution has a notable exception in cases of flagrant crimes or misdemeanors, or other cases of that nature. In these the State's attorney may himself begin the examination without waiting for the judge, and the latter may open it without being first requested by the State's attorney.

The preliminary examination had, until recently, three features derived from the inquisitorial procedure; it was *secret*, and *written*, and *not confrontative*. One of these characteristics, and the most open to criticism, the last-mentioned, has been very much modified by the Law of 8th December, 1897, especially in the stage of the preliminary examination which takes place before the examining judge in *ordinary cases*. Two important reforms have been brought about which have entirely changed the aspect of the procedure of examination. The first is the duty of the judge, at his first interview with the accused, to warn him of his right to make no statement except in presence of his counsel. The second is the presence and aid of counsel in the interrogatories and confrontations, to whom must be communicated the chief documents of the charge and who may have access to the evidence in the case.

The preliminary examination is not meant to serve as a foundation for the verdict of the judge who will decide as to the guilt of the accused. It merely allows the examining judge to determine whether there is ground for a formal charge, and, in that case, to decide upon the jurisdiction. The accused is not, in fact, immediately brought before the court which is to acquit if he is innocent and to condemn if he is guilty. The welfare of society and the interest of the accused demand that the appearance of the latter in court shall not take place until the accusation rests upon sufficient grounds. The law confers on certain authorities, intermediate between the officers charged with the examination and those charged with the trial, the investigation of the charges and the determination of the jurisdiction. These authorities, performing the functions of *magistrates of examination*, are the examining judge (above-mentioned) as a first step, and the court of arraignments as the second. This procedure of arraignments, which is obligatory in felonies, involves a measure of delay, which is probably not compensated for by the safeguards which it gives the ac-

cused. Nevertheless, it has passed into a great number of codes; and it is only in the last third of the 1800s that the obligatory and absolute principle of the control of the accusation by the judicial power has been breached and abandoned by the Austrian code of procedure in 1873 and the legislations which are inspired by it.

(4) When the prosecution has arrived in the trial court proper, the procedure changes character and borrows its essential features from the accusatory system. The three principles of *confrontation*, *orality*, and *publicity* govern the proceedings. The memoranda of the police and the record ("dossier") of the preliminary examination cannot be used as evidence (*i.e.*, can be used only in a subsidiary way), for it is upon the oral, confrontative, and public testimony that the judge forms his "sheer belief" ("conviction intime"), the only proper basis of his verdict.

§ 5. **Division of Criminal Jurisdictions.** — The division of the criminal jurisdictions and authorities corresponds to the division of offenses into three groups, "crimes," "delicts," and "contraventions" (C. p. Art. 1). There are three categories of courts for the trial of criminal prosecutions: the assize courts, which try crimes; the correctional tribunals, for delicts; the police tribunals, contraventions. Each of these tribunals is invested with full judicial power for the repression of the offenses which are allotted to it; each exercises, with reference to these offenses, a complete ordinary jurisdiction. The other three classes of officers of repression perform their duties before these three classes of tribunals — the officers of charge, of examination, and of execution.

§ 6. **Jurisdiction over all Kinds of Persons and Offenses.** — These officers act *in regard to all kinds of persons and all kinds of offenses*. There are not two systems of justice: one, the common law; the other, privileged exceptions. One of the most odious institutions of the Old Régime, the special tribunals, for a short time resuscitated by the law of 16 Pluviôse, year IX, by the Code of Criminal Examination of 1808, and by the institution of the provosts' courts ("cours prévôtal") of 1815, exist only as a historic memory: article 54 of the Charter of 1830 made their return impossible. No doubt soldiers and navy-seamen, so long as they are subject to the duties of their station, hold an exceptional position, and their offenses belong to the jurisdiction of the military tribunals; but this is, in a way, the common law of the army, through which every citizen passes nowadays. There is even a question of the abolition of these exceptional jurisdictions in time of peace.

TITLE I

THE CRIMINAL JURISDICTIONS IN ANCIENT FRANCE

§ 1. **Phases of Judicial Organization of Ancient France. Union of Civil and Penal Justice.** — In ancient France, the organization of penal jurisdictions has passed through three successive stages; but, in every epoch, one feature in common is notable, namely, the union of civil and criminal justice, both administered by the same tribunals. This unity corresponds at first with the unity of the civil and criminal procedures; then, when the jurisdictions become differentiated, this results from the substitution of professional judges for popular judges, and from the conception of a single justice, emanating from the same source and administered in the name of the king.

In the barbarian era, the nations of Germanic race preserve their popular organization. Justice is administered by the chief ("rex, princeps, dux, comes, grafio," etc.) with the coöperation of the free men of the tribe ("boni homines, rachimburgi, pagenses," etc.) in temporary and periodical assemblies ("mallum" or "placitum"). The chief summons the assizes, presides over the assembly of the men who judge, receives the verdict without taking part in rendering it, and causes it to be executed. Thus, according to a rule which appears to have its foundation in customs prior to the invasion of Roman Gaul, it is the *men* who pronounce the judgment, and not the *chief*. A few "rachimbourgs" may compose the tribunal. Nevertheless, plenary assemblies are not uncommon.[1]

[1] I need not go into the sources. They will be found analyzed, with ability and minute care, in "l'Histoire des institutions politiques et administratives de la France," by *Paul Viollet* (1890, 8°, Larosse and Forcel) vol. I, pp. 307–312.

In the feudal period and during the Middle Ages, justice is, in a measure, diluted; it is everywhere, — in the family, the school, the king's palace, the municipalities, and around the feudal chieftain. From this results a two-sided fact, which sums up, at this epoch, the history of the judicial organization. This is the incessant conflicts of jurisdiction, "the daily bread of business," [1] which arise between all these kinds of justice. This struggle between the tribunals for the extension of their jurisdiction is a struggle in which the royal justices will end by absorbing all the others, in the same way as royalty will end by absorbing the feudal system. The chief justices are four,— the royal, seigniorial, municipal, and ecclesiastical justices. The great division which governs this organization is that of the *secular jurisdictions* and the *ecclesiastical jurisdictions*.

§ 2. **Division of Courts of Justice. Secular and Ecclesiastical Jurisdictions.** — 1. Among the secular jurisdictions there are chiefly three kinds, the *seigniorial*, the *royal*, and the *municipal* courts.

(1) The right to administer justice was looked upon, at a certain period of history, as a patrimonial right. That is one of the characteristic features of the feudal system. The lord had thus jurisdiction over the fiefs and manors of his domain, in virtue of his supreme ownership of the land. The numerous seigniorial justices were originally divided into high and low justices ("alta, magna, major justitia"; then called "justitia sanguinis, sanguis"; in Normandy, "justitia ensis, placitum spatæ; minor, bassa justitia"); later will appear an intermediate grade, the middle justice ("media justitia"). This classification, which appears in the second part of the Middle Ages, had especial importance from the repressive point of view. The high justice in reality took cognizance of the more serious crimes, — murder, rape or violation, "avortes" or "encis" (that is, blows, etc., upon a pregnant woman causing abortion), and arson.[2] Unpremeditated homicide ("occisio") and the mutilation of a limb were ranked by the Parlement among the cases of high justice. In those provinces which did not recognize the middle justice, the low justice had, among its attributes, all that was not within the jurisdiction of the high justice. It has always been rather difficult to state precisely the cases of middle justice, when that is distinct from the high and low justices.

[1] *Viollet, op. cit.* t. 2, p. 453.

[2] See the enumeration of these cases of high justice in *J. Desmares*, "Decisions," 295. Compare *Becquet*, "Traité des droits de justice," chap. 2, in "Œuvres," Geneva 1625, vol. III, pp. 3-7.

Originally exercised by the lord himself, assisted, when a vassal was concerned, by the peers of the latter, the right to administer justice was delegated to officers, who took, according to locality, the names of "*baillis*" or of "*prévôts*." [1] This evolution answered a double purpose; it diminished the number of judges, and it made them a select body, giving them the character of officers.

(2) At the beginning of the feudal system, the king only exercised his jurisdiction over the fiefs and manors of his own domain: and there, he administered justice by the same authority and under the same conditions as a lord justiciar. Like the feudal chieftain, he put in his place, to fill this office, officers whom he invested with an authority at first temporary, afterwards permanent. Originally these were the *provosts* ("prévôts"); later, perhaps because of a need for concentration and surveillance, superior officers were created; they took the name of *bailiffs* ("baillis") in the north and the centre, and of *seneschals* ("sénéchaux") in the south of France.[2] The duty of these functionaries was to hold solemn assizes in the towns of their jurisdiction. They received all complaints against the royal officers and reversed their judgments; later still, the more serious offenses, those which were called *royal causes*, were reserved for them.

Finally, in the last phase of the royal jurisdictions, was the "Parlement," the outcome of two institutions, distinct in law, but blended in fact: the *King's Court* and the *Court of Peers*. The "Parlement," held at first at fixed periods and by sessions, became gradually a sedentary body. For a long time, royalty had only one "Parlement," that of Paris; the provincial "Parlements," all of later creation, appeared successively from the 1300s to the 1700s.

(3) The citizens of the communal and aldermanic towns, when prosecuted in criminal matters, could only be tried by their municipal courts, that is to say, by their peers. We know little of these courts.[3] On the one hand, the customs and books of customs furnished only meagre information as to these jurisdictions, which were little in sympathy with the royal and manorial officers or the jurisconsults. On the other hand, although the organization of these courts was apparently drawn from a uniform type, their

[1] The composition of courts of justice, however, varied according to the provinces and the times. See *Viollet, op. cit.* vol. II, pp. 461–465.

[2] See on royal bailiffs *Beugnot's* Preface in vol. I, to the edition of "Les Coutumes de Beauvoisis" by *Phillippe de Beaumanoir* (Paris 1842).

[3] See *George Testand*, "Des juridictions municipales en France, des origines jusqu'à l'ordonnance de Moulins" 1566 (8°, 1904, Paris).

jurisdiction varied from one commune to another. The radical fault of these jurisdictions, in the majority of the towns where they acted, was the union in the same hands of the administrative and judicial power. At Toulouse, for example, — and the organization of that town was by far the most usual, — the consuls or "capitouls," who had, in great measure, the government of the town, formed, after 1283, a civil and criminal court. This court was presided over by the "viguier," representing the count; but this presidency, purely honorary, did not give even a deliberative voice to those who filled the office.

§ 2. The *ecclesiastical* jurisdictions, the *courts Christian*, as they were then called, had a double source of jurisdiction, *personal* and *real*. The privilege of clergy, which comprehended all grades of the regular clergy and all those of the secular clergy down to the lay clerks, gave to those whose right it was to invoke it the privilege to be tried by these tribunals. To this jurisdiction belonged also the cognizance of certain crimes, committed by any person; for example, those of heresy, sorcery, adultery, and usury. If, however, these jurisdictions tried all these cases, they did not always pronounce the sentence. It was a principle of the Canon law that the Church could not shed blood, and consequently could not inflict capital punishment. In cases where the crime of which they claimed the cognizance entailed the last expiation, the Church delivered over the culprit to the secular arm, which passed the sentence and caused it to be executed.

The judge was usually the bishop. Like the lords, and probably before them, he delegated his right, first to the archdeacon, then, from the 1200s, to a special dignitary called the "*official*." The ecclesiastical jurisdictions consequently took the name of "officialités."[1] The learned hierarchy of the Church permitted the organization of a series of appeals, from the official to the archbishop, from the latter to the primate, then, finally, to the Pope, as head and supreme judge of Christendom.

§ 3. **Development of the Royal Jurisdictions.** — These jurisdictions were all in existence down to the end of the 1700s. But, while the ecclesiastical, seignorial, and municipal jurisdictions gradually lose their importance, the royal jurisdictions flourish, develop, and end by almost absorbing the others. How is this transformation accomplished? What is the position of the several jurisdictions in the 1600s and 1700s?

[1] See the masterly work of *Fournier*, "Les officialités au moyen âge," 1880, now unfortunately out of print.

1. The royal jurisdictions developed, like royalty itself, because of usurpations of which the legists[1] made themselves the active and persevering instruments. Setting out from the idea that the king represents the public welfare, as he is the "keeper of the kingdom," [2] the officers and jurisconsults of the crown argue from this that the king has a prëeminent right of justice throughout the whole kingdom. They were thus led to contrive various means gradually to lessen the jurisdiction of the secular and ecclesiastical courts for the benefit of the royal courts.

The first of these means was the institution of so-called *royal causes*. In the 1200s the causes of which the king claimed cognizance in his barons' territories because they "concerned" him are already very numerous. A jurisconsult of the end of the 1300s devoted twelve large pages to their enumeration.[3] The list of royal causes is always being augmented and will never close. The Roman law furnished to the legists their best weapons in this strife; for this right, which they construed for the benefit of royalty, is typical of the imperial Roman law. Very soon they began to lay down, as a principle of public law, that all justice emanates from the king. From the end of the 1200s they affirmed that all the secular jurisdictions are held from the king in fee or secondary fee.[4] His barons received from him the seisin of the rights of justice, but the king held them of no one.

The practical consequence of this theory was the introduction of the *appeal*. The feudal system had never entertained the idea of submitting anew, to a superior judge, the litigation already decided by the first judge. It did not recognize inferior and superior judges. All the feudal courts, within the limits of their cognizance, were superior courts (of last resort). There were, in the feudal procedure, but two ways of recourse: the *appeal for error in law*, in which the litigant complained of a denial of justice; and the *appeal from false sentence*, a kind of barbarian appeal, consisting in wager of battle by the litigant against the peers

[1] Or lawyers trained in the Roman law, then at the height of its influence under the Renascence.

[2] *Beaumanoir*, XXXIV, 41. See, however, the formula in the 1300s in the "Grand Coutumier," Book IV, ch. V, edited by *Charondas le Caron*, 1598, p. 323. "Generally speaking, there is but one justice which emanates from God, of which the king has the control in this kingdom."

[3] *Bouteiller*, II, 1. Compare Ord. 8th October, 1371 (ord. V, 428) reproduced in the "Grand Coutumier de France," Book I, ch. III, p. 90 *et seq.*

[4] See *supra*, note, and *Beaumanoir*, XI, 12, Book 1, p. 163 of the *Beugnot* edition, "For every secular jurisdiction in the kingdom is held of the king in fee or secondary fee."

who sentenced him. The appeal, in our sense of the word, is in time admitted from the seigniorial to the royal courts, when judgment had been rendered against the common custom, or when the vassals or undervassals did not do as they should.[1]

Finally, a right of prosecution was recognized in the king which his officers made use of to a great extent: that is to say, the king could summon before his courts all persons in regard to any matters, except those claiming the court or jurisdiction of their lord. But if the party summoned has tacitly accepted the royal justice either by acknowledging the rightfulness of the demand or by denying it, he can no longer apply to another court. The litigation must be finished where it is begun.

The jurisconsults of the crown in another way employed various means to restrict the jurisdiction of the ecclesiastical tribunals. Under the vague and elastic idea of the crime of treason or sedition ("lèse-majesté") they caused to be included among the "royal causes" various offenses formerly brought before the courts Christian; but, especially, they weakened, by the creation of causes called "privileged," the import of the privilege of clergy. In very serious cases which deserved a punishment less severe than the canonical punishments, the clerks were tried by the royal judges, unless the latter were forced to give them up to the Church. The list of these privileged causes, like that of the royal causes, always continued to grow.[2]

The municipal jurisdictions, the criminal at least, usually survived the supremacy of the communal towns. They offered few dangers, since the royal power had indirectly laid hands upon the nomination of the municipal officers.

2. In thus extending the sphere of their action, the royal jurisdictions completed their organization: on one side, the old tribunals are seen to become modified and developed; on the other, tribunals of exception to appear.

(*a*) Down to the last days of the old monarchy, the provosts constituted the usual judges of the first stage; the bailiffs and seneschals, originally itinerant, subsequently become sedentary, always constituted the second stage of the royal jurisdictions. The bailiffs, high officers of the crown, delegated their powers to inferior officers who were called lieutenants of bailiwick. To the *criminal lieutenant* fell the trial of criminal causes; he became the judge in criminal matters for all the cases transferred because of

[1] *Beaumanoir*, XI, 2, 3.
[2] See *Muyart de Vouglans*, "Inst. crim." 3d part, p. 34 *et seq.*

their gravity from the provosts' jurisdiction. At first he tried alone; later, he was assisted by assessors, who took the title of counsellors. But it was always he who made the criminal examination, and from this point of view he was, under the old system, an essential part of the machinery of repression.

In the reign of Henry II there were created seats of a special importance called *presidials* ("présidiaux"). By an edict of November, 1551, that prince ordained that, in the chief bailiwicks and seneschals' jurisdictions there should be a presidial, composed of at least nine magistrates, including the civil and criminal lieutenants, general and particular. These tribunals, so far as criminal, were not distinguished from other bailiwicks except that they could take cognizance of "prévôtal" cases.

In the Parlement of Paris, the personnel of which was always growing, a special branch called the Tournelle was established to try criminal cases. The ordinance of 28th October, 1446 (Arts. 10 and 11), is the first which mentions it as distinct from the other branches.[1] It is composed of secular counsellors, chosen from the Grand Chambre and sitting in the little tower of St. Louis, la Tournelle, from which it takes its name. The Grand Chambre itself pronounces the judgments prepared by these counsellors. In 1515, Francis I constituted this group of judges a special branch. But its composition never was autonomous, — in this sense, at least, that, by a rule of rotation, the counsellors passed from a civil to a criminal branch, so that even with this organization, the unity of civil and penal justice was always the dominating principle.

The provincial Parlements came into existence one after the other with the development of the political power of royalty and the territorial extensions caused thereby. Several of these Parlements did in fact no more than continue the old supreme courts of the large fiefs united to the crown.[2]

The Parlement of Paris, throughout its successive transformations, remained, up till recent times, the Court of Peers. All the peers of France had the right to sit there, and they could only be tried by the Parlement.

Besides their ordinary functions, the Parlement of Paris and certain other provincial parliaments, those of Toulouse, Rouen,

[1] *Pardessus*, "Essai sur l'organisation judiciaire," p. 163.
[2] The Exchequer of Normandy, become "Parlement," had, in 1519, a criminal Chamber, Tournelle, in imitation of Paris. In 1491 a criminal Chamber or Tournelle was installed at Toulouse, "so that criminal justice may be administered as at Paris."

and Bordeaux, took part in the administration of justice by Great Days, a kind of solemn and temporary assizes, held, in a province, by commissaries chosen by the king. The Great Days always had as their object the repression of serious and persistent general disorders, and of exactions made by the local authorities.

(*b*) Besides ordinary jurisdictions, tribunals of exception were created. They were of two kinds: 1st, some had jurisdiction of criminal causes only incidentally to the matters which constituted the chief object of their establishment; such were the provost of the Mint ("Hôtel des Monnaies"), the "Cour des Monnaies," and the Admiralty judges; 2d, others had a chief criminal jurisdiction; such were the provost marshals and the military judges.

TITLE II

THE PROCEDURE

CHAPTER I[1]

THE ACCUSATORY PROCEDURE OF THE FEUDAL COURTS

§ 1. **Introductory.**—The forms of civil and of criminal procedure in the feudal courts were identical. This is a feature generally characteristic of primitive systems of law; and the feudal customary law had borrowed it from the law of the Frankish epoch. The criminal law itself had doubtless undergone many changes since the Frankish epoch. The system of pecuniary compositions, for example, had for the most part disappeared; offenses were punished, according to their gravity, either with very severe corporal punishment or with fines by which the baronial courts profited. But the criminal procedure had remained accusatory in the strictest sense of the word.

§ 2. **The Accusation.** — The action belonged to the injured party alone, or if he was dead, to his kindred. This is a principle as to which the contemporary sources are in unanimous agreement: "It is not lawful for any one to bring an accusation except for himself, or for his kindred, or for his liege lord."[2] "No one is heard if he be not connected with the deceased by blood relationship, or if she be not his wedded wife."[3] "The next of kin may prosecute for murder or homicide, and if the next of kin be a minor or aged, the nearest of kin after him, or other relative on

[1] [This Chapter I and the entire remainder of the book (except Part IV and the Appendix) = Part I, Title II, and Parts II and III of Professor ESMEIN'S "History of Criminal Procedure." For this author and work, see the Editorial Preface. — ED.]

[2] *Beaumanoir*, LXIII, I, "Très-ancienne coutume de Bretagne," ch. 96 (Bourdot de Richebourg).

[3] "Livre de Jostice et de Plet," XIX, 3, § 1, 2.

whom the kindred shall agree, may do so. And if peace be made, a minor may recommence the suit on coming of age. But if the proceedings have been brought and completed, no other proceedings can be brought or commenced." [1] Jean d'Ibelin takes great pains to enumerate, by way of limitation, those who may bring an accusation on account of murder.[2] And there can be no criminal action in the absence of an accuser. The criminal action being, therefore, merely a contest between two private parties, and only distinguished from the civil action by certain differences in detail due to the different nature of the circumstances involved, it is evident that it was unnecessary to create for it a special procedure.

The procedure was public, oral, and formal. The hearing was usually held in the open air, at the gate of the castle or at the public meeting-place of the town. The parties had to appear on the day fixed in the summons ("semonce"), unless they could invoke some one of the numerous excuses recognized by the feudal procedure. They could not be represented; the impossibility of representation in a court of justice was, according to ancient principles, more rigorously maintained in criminal than in civil affairs.

The accuser made his complaint orally without omitting any necessary words or making any mistake ("faute"), which would have permitted his adversary to have the complaint declared null.[3] The accused was obliged to answer on the spot; silence on

[1] "Grand coutumier de Normandie," ch. LXX; the following extract from the text permits the *man* to pursue for his master: "If any stranger (*i.e.*, in blood) make an accusation of homicide in this form: 'I complain of R. who has feloniously assaulted and killed Q. my lord in my presence: and while I was defending him he shed this blood and caused this wound.' Then he should show the blood and the wound to the judge in presence of knights who can bear witness to it. Should the other offer to defend himself, battle should be wagod, as aforesaid. In this way murder and homicide can be sued by a stranger (in blood)." — "Summa de Legibus" (Tardif edition), c. LXIX. The idea of *private vengeance* is apparently always uppermost.

[2] Chap. LXXX *et seq.* Although *Jean d'Ibelin* admits spiritual as well as carnal relatives and even other persons (on foreign soil the bonds thus somewhat relaxed tighten again) he none the less upholds the principle according to which the pursuit belongs to interested parties alone.

[3] See fully on this formal aspect of the old procedure *M. Brunner's* noteworthy study, cited above: "Wort und Form in altfranzösischen Process." Modern writers, moreover, are not alone in noticing and commenting upon the matter: "Fabrefort . . . pleading a cause concerning a duel, and having proposed for Armand de Montaign against Emery de Durefort that he should prove his fact by his body on the battlefield, without expressly saying that the proof should be made by the combat of his party, was in danger of being drawn into the combat himself, and was ridiculed by the assembled company, so *formal* was then the procedure in such causes." *Loysel*, "Pasquier, ou dialogue des avocats," edit. Dupin, Paris 1844, p. 40.

his part would have been equivalent to a confession, and in primitive systems of law a confession is the best proof.[1] The defense could only consist of a denial exactly meeting the complaint in each particular, refuting it word for word, "de verbo ad verbum"; and this requirement was preserved for a long time, except in civil matters, where at an early date a general answer "en gros" was permitted.[2]

§ 3. **The Theory of Proof.** — The proofs were the same as in civil matters, and were derived from the usages of the Frankish epoch, feudalism merely giving the preference to those which best suited its own circumstances and allowing the others gradually to fall into desuetude.

But although the exculpation by the *oath-helpers* became rare, the exculpation by the oath of the defendant alone continued to find numerous applications, both in civil cases and in those for minor offenses. The latter mode of exculpation is the "deraisne" ("disraisina") of the old Norman customary law.[3] Beaumanoir calls it "Le passer par loi," [4] and the "Très-ancienne coutume de Bretagne" contains a very curious application of it criminally.[5]

In the 1200 s the ordeals (the "purgatio vulgaris" of the Canon law) are rarely any longer in practice; they were condemned by

[1] *Beaumanoir*, speaking of the confession, says, "This proof is certainly the best and clearest, and the least expensive of all," XXXIX, 2 (Salmon, No. 1146). As to the necessity for an immediate answer, see *Beaumanoir*, VII, 10; XXX, 94 (Salmon, Nos. 246, 915); "Livre de J. et de P." II, 14, § 6; *Jean d'Ibelin*, ch. LXI.

[2] "Livre de Jostice et de Plet," XIX, 2, § 1; *L. Delisle*, "Échiquier de Normandie," No. 113; "Grand coutumier de Normandie," ch. LVIII *et seq.*; *Jean d'Ibelin*, chs. XCI, XCVII, C, CIV; *Brunner*, *op. cit.* p. 706 *et seq.* *Cf. Britton*, Book 1, ch. XXII, "concerning Appeals," No. 7: "And as to the defense, the appellee may defend himself in this manner. 'Peter who is here defendeth all the felonies, and all the treasons and contrivances, and compassings of mischief against the person' of such an one, or such an one, according as he is charged, word by word. And we will that in these appeals, it shall be more necessary for the appellor to set forth the words orderly without any omission, that his appeal may stand, than for the defendant in his defense; and in every felony we allow the defendant to defend the words of the felony generally, without treating him as undefended." *Britton* (F. M. Nichols' edition, 1865), vol. I, pp. 101, 102.

[3] "Summa" (Tardif edition), c. CXXIII.

[4] Ch. XXX, 86 (Salmon, No. 912).

[5] (*Planiol* edition), c. 102, p. 145: "If he is not taken in the act or in pursuit, or if the fact is not notorious, as said, and for the reason that he has lived in the country a year and is of good repute as one who goes to monastery and market and he is not seized or arrested because of crime, he can say in case the judge wishes to proceed against him that he is not bound to wait for testimony by the custom in a case in which he could be put to death and that he prove himself to be of good repute. In the event that it cannot be judicially proved against him to a certainty, he shall take his vassal's oath that he did not do the deed [and this done] the custom decrees that he go freed and acquitted."

the Lateran Council of 1215. But before that time they played an important part in Normandy, as is proved by the fact that they were widely practised in England,[1] into which country they had been carried from Normandy. According to the "Summa de legibus"[2] they were there resorted to when a woman was accused, and also when a man was accused by a woman or incriminated by "the law." These last words doubtless point to the practice which we shall later on note in our own common law as that according to which the person on whom the "infamia" was laid because of an offense committed, had the burden of exculpating himself, "sese purgare." We find a passage in the "Assises de Jérusalem," however, which sanctions the ordeal only when it is accepted voluntarily and without restraint by the party under suspicion.

In the "Cour des Bourgeois," chapter CCLXI treats "dou juice portare":[3] "Be it known that neither the bailiffs nor the sworn men shall cause any man or any woman either to bear law forcibly. But if the man or the woman be accused of any crime imputed to him or her, and he or she voluntarily offer to bear law, reason commands and judges that he or she cannot retract the offer, but is held to bear (law) in spite of himself if he who

[1] *Thayer*, "A Preliminary Treatise on Evidence at Common Law," pp. 7–16; *Holdsworth*, "A History of English Law," I, p. 142; *Pollock and Maitland*, "History of English Law," II, pp. 596, 597.

[2] C. CXXVI, No. 2: "Olim mulieres causis criminalibus insecuto, cum non haberent qui eas defenderit jussio (judicio) se purgabat et homines per aquem vel jussium cum justicia vel muliores in criminalibus eos impetrabant; et quoniam hujusmodi ab ecclesia catolica sunt abscissa inquisitione frequentor utimur."

See *Brunner*, *op. cit.* p. 719 *et seq.* The most remarkable use of the exculpatory oath is the "deresne" of the old Norman custom; "Summa," II, c. XVIII, § 2. "Est enim disresina super injuria a querulo exposita coram justiciario purgatio per sacramentum querelati et coadjutorum suorum in curia facienda." It was only admitted in trivial causes, the "simplices querelæ." *Cf.* "Assises de Jérusalem": Inferior court, ch. CCXXII: "In the case of a man who is mortally wounded, if any one appear in court and complain of any one who he says has done this wrong, and he who is accused of it appears and says 'that (he did it) not as God wills' and he demands an assize and is granted an assize in the presence of the sheriff and sworn men, he swears upon the holy scriptures that he did not do it himself, or cause it to be done, or consent to the act, or know any one who did it, he is thereupon acquitted, since his judicial oath is received, as was demanded." *Kausler's* edition, p. 330.

[3] "Juice," equivalent to judicium, the branding which does duty as the judgment of God. "Summa de legibus Normanie," Tardif edition, c. CXXII, No. 2: "Sirendum est ergo quod hac probabilia quandoque per juramentum solius, quandoque per sacramenta duorum, quandoque quinque, quandoque sex, quandoque septem, in curia recipitur paicali." c. CXXXIV, No. 2: "Est autem disraisina purgatio super injuria coram justiciario a querulo exposita per sacramentum querelati et coadjutorum facienda."

charges the person with the crime wishes. . . . And if he will not bear law as the court tells him, reason judges that (the complainant be heard) as, since (the person accused) will not bear law, it is very clear that he had done that which is imputed to him; for if he had not done it he would not have distrusted the law, which is a just thing to all people who seek justice.[1]" We also find a curious application of it in the "Très-ancienne coutume de Bretagne;" but there the ordeal appears, by a singular reversion, as a "succedanæum" of torture.[2]

The judicial duel, the appeal to the divine judgment, aided by the oaths of both adversaries and decided by *battle*, has, on the other hand, a longer lease of life. It is the customary mode of proof, at least in cases of crime. In all serious crimes, for which the punishment was loss of life or mutilation, the accuser could proceed by "appeal"; that is, he could spontaneously and immediately challenge the accused to the judicial duel;[3] but in minor cases this direct challenge probably could not be given, and proof by witnesses would be necessary.[4] The appeal was, moreover, a very risky procedure, not only on account of its purpose, but also because the challenge had to be couched in certain terms (the words by which battle took place), and an error in the expressions used might specially aggravate the conditions of the combat.[5] It is, therefore, probable that the accuser, instead of pro-

[1] *Kausler* edition, p. 307.

[2] C. 101, *Planiol* edition, p. 144: "And if complete proof cannot be found and common repute or strong presumption is adduced against him [he ought to] undergo the ordeal 'jous' ('juice, judicium') or torture ('gehine') three times. And if he is able to endure the torture without confession, or the ordeal ('jous') should save him, it would certainly appear that God has worked miracles for him and he ought to be safe. Therefore the man [or woman] shall not be put to the ordeal 'joux' or the torture until proceedings have been taken against them in such way." It is surprising to find the "judicium ferri" in Brittany a century after the fourth Lateran Council, for the "Très-ancienne coutume" belongs to the first third of the 1300s; but I suspect that, particularly in the chapters treating of the criminal procedure, the author must have studied an earlier text, the data of which he applied, without regard to their appropriateness, to the law of his own time.

[3] *Beaumanoir*, LXI, 2 (Salmon, No. 1710).

[4] It is only "in regard to all crimes involving risk of loss of life or limb" that the ordinance of 1260 declares that henceforward proof by witnesses shall replace the proof by battle. *Cf. Beaumanoir*, XXXIX, 4 (Salmon, No. 1148); "Livre de J. et P." II, 18, § 1.

[5] *Jean d'Ibelin*, ch. CXX; *Beaumanoir*, LXI, 41; LXX, 5 (Salmon, Nos. 1264, 1972); "Abregé des assises de la cour des Bourgeois," part II, ch. XXXVI; "Grand coutumier de Normandie," ch. LXVIII; "Livre de J. et P." XIX, 33; "Etablissements de S. Louis," II, 118; *Britton*, I, I, ch. 22: "An appeal is a plaint brought by one person against another in a set form of words with intent to convict him of felony." (*Nichols'* edition, t. I, p. 95); "Stylus Curiæ Parliamenti," CXVI, § 8.

ceeding by way of the "appeal," although that was available to him, could offer to prove the fact by witnesses, subject to the accused's right subsequently to falsify ("fausser") these witnesses.

This testimonial proof was quite different from that known in the later systems of law; it was entirely formal. The witnesses proceeded to pronounce a formula which they sometimes merely repeated after the "avant-parlier" or advocate; this formula must state that they were eye-witnesses, and they confirmed it by swearing on relics.[1] Two witnesses, fulfilling these conditions, were sufficient to entail condemnation, and their oaths necessarily led to that result;[2] in such a system the witnesses could not be enumerated or their evidence weighed. These witnesses, produced on the day fixed by the decree which ordered the proof, from which no adjournment could be granted, testified at the hearing in open court and in confrontation with the parties.[3] This publicity was necessary, for one reason, to allow the accused to make use of a valuable right, that of *falsifying* or challenging the witnesses. He could, in effect, accuse them of perjury, and on that ground challenge them to the judicial duel. The action would then depend upon the outcome of that battle. This challenge had to be made, according to some authorities, before the taking of the oath; according to others, immediately thereafter; but it was certainly essential that all the actors in the drama should be present when it was made.[4] Seeing that the "garants," as the witnesses were called, risked their lives, they could not be compelled to testify. For other reasons a large number of persons were incompetent to testify; in this category were included all who were unable to fight, women, minors, and the clergy, for example, and all those social reprobates who were considered infamous.

The foregoing is a sketch of the leading features of the ancient accusatory procedure. It was entirely oral; writing played no part in it. Whether the proceeding chosen was by appeal or by

[1] "Grand coutumier de Normandie": "Witnesses in the secular court are those who testify to what the complainant has alleged in these words: 'I saw and heard it and I am ready to do what the court may decree.' . . ." *Cf. Jean d'Ibelin*, chs. 70, 77; *Beaumanoir*, XXXIX 57 (Salmon, No. 1200).

[2] *Beaumanoir*, XXXIX, 5; LXI, 54 (Salmon, Nos. 1149, 1762); *Jean d'Ibelin*, ch. 68.

[3] *Beaumanoir*, XXXIX, 78 (Salmon, No. 1222): "In such a case the proper course is for the witness to appear in open court for the purpose of testifying publicly, and there he may be challenged."

[4] *Jean d'Ibelin*, ch. 74; "Clef des assises de la Haute-Cour," 101; *Phillippe de Navarre*, ch. 10; *Geoffrey le Tort*, ch. 23; *Beaumanoir*, LXI, 55 (Salmon, No. 1762).

testimonial proof, it was an equal and public contest between two private persons.

But this system was notably barbarous and inadequate; and it was bound to leave many crimes unpunished. Very soon it came to be seen that the community and the State were sufferers from the offense as well as the private individual; and even before the advent of a new system this idea had stamped its influence on certain points of the procedure.[1]

§ 4. **Capture in the Act.** — Capture in the act ("taking with the mainour," etc.) was originally subject to special rules; we usually find it occupying a place of its own in primitive systems of law. Although the prosecution of crimes is not readily admitted in primitive times, that is because it was considered almost impossible to clearly convict an accused who denied his guilt. When he is taken in the act, however, the proof becomes clear and all hesitation vanishes. During the Middle Ages, when a person was taken in the act, an accuser is unnecessary and the wager of battle is not available. The justiciar, surrounded by his men, before whom his servants ("sergents") bring an individual taken in the act, judges him at once in the public presence, according to the testimony of those who have seized him.[2] We also know that, following the traditions of the Frankish epoch, the feudal procedure had originated a formal and ingenious way of preserving to the affair the character of a capture in the act for a certain time after its accomplishment. This was the arrest "by hue and cry" — the pursuit by "haro," "harou," or "hareu."[3]

[1] *Beaumanoir*, LIX, 7 (Salmon, No. 1673): "Malefactors not only transgress against the adverse parties and their kindred but also against the lords who are their protectors and justiciars."

[2] "It is not proper for any one to proceed against him . . . for such a deed which is so clear should be avenged by the judge officially, as long as no one proceeds against him directly." *Beaum.* VI, 12; LXI, 2 (Salmon, Nos. 208, 1710); "Livre de J. et P." XIX, 44, § 14. The "Assises de la cour des Bourgeois" has a curious chapter in connection with this point, ch. CCLIX: "If peradventure it happen that one man assault another and kill him, or a woman, and two vassals pass the spot and see him commit the offonse and arrest him, as all vassals should hold and arrest (for) all the rights of their lord and all the wrongs done to him, and if they deliver him over to the court and they say faithfully in the court, before the sheriff and the échevins on the faith and homage which they owe to the king that they saw him commit this murder, reason judges and commands that it be adjudged that such person is attainted without battle and that it avail him not to say 'no, as God wills, he did not do it,' but he should be immediately hanged. For to this extent should the testimony of two vassals be equal to two sworn men or 'échevins' in such a matter." Edit. *Kausler*, p. 314.

[3] "Grand coutumier de Normandie," ch. 54; *Beaumanoir*, LII, 16; XXXIX, 43 (Salmon, Nos. 1571, 1187). The present-day text-books on English law still describe this procedure as the "arrest by hue and cry."

All this, however, gave but a limited scope to the public prosecution; an endeavor was made to go further. What was to be done in the case of the murder of a man who left no relatives? In such a case it was unreasonable to confine the accusation to the person injured or his relatives; and, according to certain writers on the customary law, it became the duty of the public authorities to intervene. "If it peradventure happen that a man or woman be slain and if this murder be imputed to any man and he who is dead have no relatives or friends (in blood) male or female who demand his death from him who killed him, reason judges that the king or the lord of the soil, or the lady of the town if it belong to her, is bound to demand his death by law and by assize, and the method is to assign a champion, if he (the person accused) deny this misdeed; for our Lord says in the Scriptures that the blood of the poor cried out to him for justice saying 'Lord God, avenge the blood of the poor.' And since this is said by our Father in Heaven, so should it be understood on earth by law that to the baron's court should be given earthly vengeance as is laid down by all commandments. And for this purpose his right is established to undertake these matters and to avenge the death." [1] "If the king impute to a man that he has killed another, he ordains that he be punished. To this the man may reply, 'I will not answer, as it is not law, since one should not answer for such a deed when no one complains except you.' It is asked, What says the law? And the answer is: If such man as the deceased had children or descendants or near relatives who were able to avenge their relative, the suit is theirs, not his lord's. But if the man or woman who is killed have no relative who can avenge him or her the king can pursue and administer punishment; the corporal punishment of such person belongs to him who *seized* him." [2]

§ 5. **Arrest on Suspicion.** — There was still another situation. If the victim or any of his relatives were still living and made no complaint, the barons' court had no cognizance of it. But in course of time a right was ascribed to it. Although the public authority could not, in its own name, press for the application of the punishment, it was at least granted power to seize the male-

See *Stephen's* "Commentaries on the laws of England," Book IV, p. 351 (edit. 1873).

[1] "Assises de la Baisse Cour," ch. CCLXVII, p. 324 (edit. *Kausler*).

[2] "Livre de J. et P." XIX, 45, § 1; *cf. ibid.* § 2: "It is asked if an answer shall be made to him when he (the injured party) makes no complaint. The reply is in the negative, since he is alive against whom the offense is said to have been committed."

factor and invoke the necessary proceedings by the interested parties. Numerous texts lay down this principle.[1] But this did not furnish a final solution of the difficulty; and from this provisional state there were two ways out.

According to the logic of these old institutions, the action of the public authority in seizing the person on suspicion was but a means preliminary to accusations. So we find in texts of the most diverse origin a procedure of the following nature. It is the duty of the lord to announce by sound of trumpet that he holds such and such a person on suspicion of such and such a crime, and to call upon the victim or his relatives to constitute themselves accusers. If after a certain period and several publications, usually made at three assizes, no one appears, the prisoner is liberated on bail, or, according to other writers, he is imprisoned for a year and a day. If no accusation shall have been brought within that period, he is finally set free and acquitted. "The lord should allow him to go, and he is acquitted of this murder, so that he is no longer bound to answer any one who accuses him thereof." [2] The following is a very clear summary of this procedure. "No one shall be arrested on suspicion for such deeds involving corporal punishment if the grounds of the suspicion are not clear or reasonable. And if any one be arrested on suspicion he can be held forty days. And if within the forty days no one appear to accuse him he shall be liberated on bail, body for body. And this bail shall last for three periods of forty days each. If no one appear to accuse him his surety will be freed; it may be that if any appear to accuse him within a year and a day, such person will be heard, but not afterwards." [3] This was merely a stimulant to

[1] *Jean d'Ibelin*, ch. 85: "The lord shall cause search to be made for him who is charged with the murder, if he is his subject, and apprehend him, and put him in his prison." "Compilatio de Usibus Andegaviæ," § 7: "Custom and law is that no man be arrested without 'plaintif' (accuser) if he be not arrested on the spot or apprehended by judges on suspicion. A murderer can properly be arrested without accuser when he has slain the man, for the blood cries out. This was shown us in the killing of Abel by his brother Cain, to whom God said: 'Cain, the voice of Abel thy brother's blood, whom thou hast killed crieth unto me from the ground.'" "Livre des Droiz," § 334: "A judge should not apprehend anybody without accuser or without present misdeed, or on suspicion. But he may properly apprehend the murderer when he has slain a man, for the *blood* complains." "Livre de J. et P." XIX, 26, §§ 5, 12; "Etab. de S. Louis," II, 16; *Beaumanoir*, XL, 14; XXX, 90 (Salmon, Nos. 1236, 917).

[2] *Beaumanoir*, XXX, 90 (Salmon, No. 917); *Jean d'Ibelin*, chs. 35, 85; "Livre de J. et P." XIX, 26; "Compilatio de usibus Andegaviæ," § 24; "Livre des Droiz," §§ 252, 387.

[3] "Livre de J. et P." XIX, 26, § 12. According to some writers, final release took place on the expiry of the time for publication. *Beaumanoir*, XXX, 91 (Salmon, No. 918).

private accusation; it was not prosecution in the name of the State.[1] This practice was even employed to give immunity to whomsoever had committed an act which might give rise to a criminal prosecution on the part of the victim, or, if he was dead, on the part of his relatives, and it was doubtless for this reason that it survived as long as it did. He delivered himself up to the lord, who, by means of a procedure regulated by custom, made public the facts and gave an opportunity to possible accusers to come forward. If the prescribed period expired without any accusation being brought, the perpetrator of the deed had nothing further to fear, as prosecution was no longer possible. The "Très-ancienne coutume de Bretagne," which calls this procedure "finporter," doubtless because it "put an end" to the whole matter, gives full details of it.[2] We also find the same practice in the "Livre des usages et anciennes coutumes de la comté de Guynes" in 1344.[3] In the latter instance the procedure is blended with that of the inquest by the country, "enquête du pays," (of which we shall treat in the next section),[4] probably in order to make it more decisive and efficacious. This is called "putting oneself to law" ("se mettre à loi"), a term which is often used in certain Flanders' texts to denote the action of a man who by this means exposes himself to accusations with the real object of securing himself against any possible accusation. It is only to be supposed that the person who thus spontaneously exposed himself to prosecution did not do so unadvisedly or without first taking due precautions. This procedure was most frequent in the case of homicide by misadventure. The "Livre des usages de Guynes" gives as an example the killing of a man in an archery contest; and one text recommends the perpetrator to compromise at once with the interested parties.

§ 6. **The Inquest by the Country.** — There was another alternative. The prisoner might agree to be judged without any

[1] In certain provinces, this procedure could be invoked by the person under suspicion; it was then said that he put himself "to his law" ("à loi"). See "Ancien coutumier de Picardie" (*Marnier's* edition), LV (p. 47). "In law, Andrieu the knight, Jehan and Henri brothers, who put themselves to law in the court of Poitieu at Abbeville and were allowed to do so on suspicion of the killing of Colart Hurtant, and summoned several times by wager of battle any who wished to charge them on account of the said suspicion, to appear and do right and law upon them; and no one appeared against them or offered . . . released and absolved of the said suspicion."

[2] (*Planiol's* edition), c. CI, CII, p. 142–145.

[3] (*Taillar and Courtois's* edition, Saint Auer. 1856), p. 144 *et seq.*

[4] *Esmein*, "L'acceptation de l'enquête dans la procédure criminelle au Moyen Age" in "Revue générale du droit, de la législation et de la jurisprudence," 1888, p. 14 *et seq.*

accuser, under a certain procedure called by the texts the "inquest by the country" ("l'enquête du païs") — "When any one is arrested on suspicion of a serious offense . . . he may be asked if he will submit to the inquest into the matter."[1] The assent of the prisoner was absolutely necessary. "Be it known that no one is condemned by inquest unless he submits thereto."[2] It is true that very strenuous means of persuasion were used to obtain this assent: "He ought to be arrested by the judge and imprisoned for a year and a day with very little to eat and drink, if within that time he does not submit to the inquest by the country."[3] The old "Coutume de Bourgoyne" (1279–1360) also says (Art. 13, "Enqueste"): "Inquest made against any one for crime is null unless he puts himself on inquest."[4] The "Livre des coutumes notoires demenées au Chastelet de Paris" warns against inadvisedly putting oneself on inquest: "No one should put himself on inquest if he can help it, for he may put himself in very great danger, since everybody cannot be friendly to him; but he can properly authorize the judge that he, under God and on his soul, inquire and cause inquiry to be made by his liege vassals, and this can be done where there is no complainant."[5] The effect of acceptance of the inquest by the accused was decisive; it was conducted both for and against him, and, as Beaumanoir says, it "ended the quarrel." According to its result the man was acquitted or condemned.

What was this inquest? It was a kind of proof by witnesses, but very different from the common law testimonial proof before described. It was, moreover, no new thing. It had existed in the Carlovingian period under the name of "Inquisitio."[6] The fact that, in France, it was very soon merged with the testimonial proof introduced by the Ordinance of 1260 makes it rather difficult definitely to ascertain its features from the texts of the 1200s. The "Grand Coutumier de Normandie," however, gives a detailed description of it.[7] "Those people who are likely to know about

[1] *Beaumanoir*, XI, 14 (Salmon, Nos. 1236–1238).

[2] "Livre de J. et P." XIX, 45, § 1; "Ancien coutumier de Picardie," p. 52.

[3] *Cf. Beaumanoir*, XXXIV, 21 (Salmon, No. 1042).

[4] *Charles Giraud*, "Essai sur l'histoire du droit français au Moyen Age," vol. II, p. 291.

[5] *Mortet's* edition, § 61, p. 71.

[6] See *M. Brunner*, "Die Enstehung der Schwurgerichte," particularly chapter VI.

[7] Ch. LXVIII. The Latin text according to the "Somma" is as follows (II, ch. II, § 13): "Si autem de multro facto nullus sit qui sequelam faciat aut clamorem, si publica infamia aliquem super hoc fecerit criminosum, per justiciarium debet arrestari et firmo carcere obersvari

the offense shall be summoned without delay, to the number of twenty-four at least, such as are not suspected (of bias) from like or dislike . . . the most capable and the most honorable in the place where the offense was committed." The bailiff is to bring them singly before four knights and commit their statements to writing; then "the accused shall be brought forward and he shall be asked if he wishes to object to ('saonner') any of the swearers, who shall be pointed out to him."[1] Finally, the swearers are called up together and what they have said is read over to the accused by the judge. "And they shall acknowledge that they have so sworn; and upon that judgment shall then be pronounced with the advice and on the opinion of the assistants of the court."

In England this institution played a leading part, as we shall later see; it gave birth to the jury in criminal matters. Although it proved barren in France, owing to its somewhat unfavorable environment, it is none the less the same institution as that which attained such a splendid development on the other side of the Channel.

A few of our old texts, however, show the "jurée du pays" in what seems to me to be a different application, and call to mind the "jury de dénonciation;" this operated in the 800s, as the Capitularies show, and survived, without any real interruption, in the ecclesiastical procedure, where, as we shall presently see, it culminated in the "inquisitio generalis." It was also the anti-

usque ad diem et annum cum penuria victus et potus; nisi interim super hoc inquisitionem patrie se offerat sustinere. Quam si sustinere voluerit sollicitudo justiciarii debet procurare quod omnes illi, quos de multro aliquid scire præsumpserit vel ipsius aliquam noticiam habere, de quocumque loco fuerint, coram se certo die et loco faciat convenire et hoc subito et inopinate, et causa propter quam eos faciat submoneri celetur, ne parentes criminosi eorum prece vel precio corrumpant sacramenta; et ab eis unoquoque per se vocato, coram IIII^or militibus non suspectis, utrum criminosus illud multrum fecerit inquiratur diligenter. Et auditis dictis eorum et inscriptis, et si sufficiens *seonium* super aliquem miserit dictum ejus pro nullo debet reputari et a *jurea* debet removeri. Et si sufficiens non fuerit seonium nihilominus ulterius procedatur. § 14. Hujusmodi jurea fieri debet per XXIIII^or homines ad minus legales quos nec favor nec odium a jurea debeat amovere. . . . § 18. Post hoc autem coram ipsis juratoribus et aliis in publico convocatis dictum eorum coram reo debet per justiciarum recitari et per juratores confiteri quod ità juraverunt. Et super hoc debet fieri judicium in continente et judicium factum sine dilatione adimpleri, et quod XX^ti eorum juraverint observetur. Et si aliqui eorum se nescientes dixerint tot debent juratores apponi, si possunt inveniri, quod per sacramentum XX^ti eorum veritas rei eluceat inquisite." (*Tardif* edition, c. LXVII, No. 11.)

[1] According to Beaumanoir, the time for requiring the person put to the inquest to offer his objections was at the very beginning, before any of the "men" had been heard. (XL, 14, Salmon, 1236.)

type of the "inquisitio," from which sprang the English "grand jury." The "Très-ancienne coutume de Bretagne" places the matter in this light: "When a serious offense is committed in a district . . . it is the judge's duty to cause to *be sworn certain people of the district* — men, women, and children, who are competent to take oath — and to ask them [where they were][1] the day and night the offense was committed. And if the judge find the people of a house constantly changing, he can arrest them, and also if he can find through third parties that suspicion points to any one, in order to enable him to find the cause for the suspicion, he shall proceed against him according to the custom in such cases. And then the judge shall cause him to be interrogated and asked who he was and where he dwelt, and with whom he ate, and what food (such people) ate, and who they were, and other words and like matters, without question or notice of the deed, but only so that the discrepancy be discovered."[2]

To return to the inquest "accepted" by the accused. In 1887 M. Zucker, professor in the Prague University, in a very interesting monograph full of ingenious criticisms, put quite another interpretation on it.[3] He does not think that the inquest by the country, accepted by the accused, antedated the "aprise," of which we shall speak presently, and which is the official prosecution, the "processus per inquisitionem" of the Canon law. According to him, the only object of the accepted inquest was to make an action without an accuser possible; it was merely a detail of the "aprise," a plea in defense put into the hands of the person against whom the "aprise" was directed, and who could use it to avoid a prolonged detention or take advantage of a justificative fact.[4] But this opinion is too inconsistent with the data furnished by a comparison of all the texts. Beaumanoir in particular shows conclusively that the "aprise" and the inquest are two different procedures; that the judge only resorted to the "aprise" when the accused did not accept the inquest and that

[1] It seems to me that the bracketed words added by the editor should be omitted.

[2] *Planiol's* edition, ch. CXIV, p. 154. The question of the "jurée du païs" is also discussed in chapter CXVI, p. 155: "and if it is so that any person complain that he has been robbed of anything, whereby either man or woman ought to suffer death if the fact were proved against them, should he who complains swear by the saints that he does not know whom to accuse, the judge shall *make the 'jurée' and the inquest*, as he is called upon to do for serious offenses."

[3] *Dr. Alois Zucker*, "Aprise und loial enquête, ein Beitrag zur Feststelling des historischen Basis der modern Voruntersuchung" (Vienna, 1887).

[4] *Op. cit.* pp. 85, 86, 88, 89, 97 *et seq.*, 100, 101, 110, 111.

his powers were not the same in both cases.[1] It was undoubtedly possible, with the consent of the accused, to shift from the opened "aprise" to the inquest, and it might be very much to the advantage of the accused to give such consent after having at first refused it, since the accepted inquest might effectively secure him against a serious peril. For a long time during the 1200 s and 1300 s it shielded him from the "question," — the torture — introduced into the "aprise," and that would make it a likely course for him to take. In effect, the only reason for the introduction of torture into the "aprise" was that it was often essential to have the confession of the accused in addition to the other proofs obtained before capital punishment could be inflicted; on the other hand, whatever testimony might have been obtained, the accepted inquest permitted the judge, if he was convinced, to pronounce the full sentence. The judge, on his side, seeing his powers increased by this acceptance, naturally tried to obtain it even while the action was in progress. I have tried to make all this clear, with the aid of numerous texts, in my study upon "L'acceptation de l'enquête dans la procédure criminelle au Moyen Age."[2]

§ 7. **Detention pending Trial and Bail.** — In this old procedure, which, though restricted in scope, was logical, detention pending trial played an important part. The arrest was styled the "prise,"[3] but it was attended by the liberation on bail or "récréance,"[4] and from this point of view the old customary law was liberal enough. The "Livre de Jostice et de Plet," treating of bail, commences as follows: "When a man is imprisoned or any chattel is held, the method of giving back or liberating on bail. — This proclamation is made for the purpose of preventing oppression by the lords and felonies by those who seize the goods of others."[5]

The maxim that liberation on bail is not granted when a crime for which the penalty is the loss of life or limb is concerned is, however, found in books on customary law of diverse origin.[6]

[1] "Coutumes de Beauvoisis," *Salmon's* edition, Nos. 1186, 1235–1238, 1244.

[2] "Revue générale du droit, de la législation et de la jurisprudence" (1888).

[3] *Beaumanoir*, ch. LII, "des Prises."

[4] "Récréance" means causing the person arrested to give security to again put himself at the disposal of his captor on a specified day, or at any time on the summons of the "Seigneur" who caused his arrest. *Beaumanoir*, LIII, 2 (Salmon No. 1583): "If any one desire to have bail ('récréance') in any matter, he should give sureties for the bail. For according to the custom of the secular court, there is (can be) no bail without sureties."

[5] XIX, 26, § 1.

[6] "Etablissements de St. Louis," II, 5: "Bail should not be allowed in matters involving risk of loss of life or limb or where blood has been shed.

In such cases the security given by a surety or bail ("plege") was not considered to offer a sufficient safeguard. The personal sureties certainly bound themselves most rigorously "body for body, property for property," according to the old formula which was long kept up. But this was not pushed to its logical end. The punishment which the defaulting criminal had incurred was not inflicted on his bail. The latter was merely mulcted in pecuniary damages, which were, however, sometimes very heavy.[1]

It would nevertheless appear, from a mere consideration of the sources, that an evolution took place in this respect. Here is a noteworthy passage from the "Etablissements de St. Louis." "If it should happen that the person liberated on bail should flee, and should not appear at the term fixed for his appearance, the judge should then say to the sureties: You have bound yourselves that such and such a man shall appear before us on such and such a day (specifying these) and he was accused of such and such a great offense and he has fled. For this reason I will that you be proved and sentenced to suffer whatever punishment the fugitive would have suffered. Sire, they say, do not do this, because in becoming bail for our friend, we but did our duty. And therefore the sureties may be fined a hundred sous and a 'denier' and released. And this fine is called 'Relief d'home,' and the judge should therefore take great care not to take bail for any who are accused of such grave offenses as murder or treason, because such sureties could not suffer any other fine than that we have mentioned."[2]

Ibid. II, 7. "In the secular court bail has no place in adjudicated matters, nor in cases of murder, treason, rape, blows delivered on a pregnant woman to cause abortion, ambush on roads, robbery, larceny, fire-raising." *Cf. ibid.* I, 104. *Beaumanoir*, LIII, 2 (Salmon, No. 1583): "Release on bail should be allowed in all cases of arrest except those for crime or where there is suspicion of crime involving possible loss of life or limb, unless the fact is known or proved." "Livre de J. et P." XIX, 26, § 6: "But if I am arrested for a matter involving corporal punishment is bail or restoration of goods proper should any one complain against me? Neither bail nor restitution is proper." *Cf.* "Compilatio de Usibus Andegaviæ," § 47. "Très-ancienne coutume de Bretagne," ch. XCVII, *Bourdot de Richebourg*.

[1] *Beaumanoir*, XLIII, 24 (Salmon, No. 1332): "A surety cannot lose his life for becoming bail, although he may have pledged himself body for body for any one held for serious case of crime to return and stand trial on a certain day and if he who is bailed should flee; in such a case the surety is at the mercy of the 'Seigneur' when he has lost all his property." The surety is usually sentenced to a fine of a hundred sous.

[2] "Etablissements de St. Louis," I, 104. The "Livre de Droiz," § 763, is to the same effect: "It is commonly held that if any one become bail to the court for a man who is held for a crime in general terms and without declaring or specifying that he undertakes that the man shall submit to a specified punishment, the court cannot, under the customary law, impose a penalty of more than a hundred sous. If any one become bail

From another point of view there were good reasons why a lord should not readily liberate on bail a person accused of a crime; in doing so he ran a great personal risk. "If the man allow bail in the case of a crime where he is not entitled to do so he puts himself in two dangers, and the first is a greater peril than the other; for if he who was bailed departs without returning on the day when he ought to stand law, he who allowed the bail loses his justice, it being no excuse that he took suretics. For the sureties cannot be sentenced to death on account of their becoming bail: but the malefactor could have been if he had not been allowed bail. The second peril to the man when he allows bail in a case where he should not do so is that if the count knows that he has unduly allowed bail or he should find the accused when he wishes him he can arrest him without giving court or jurisdiction to him who allowed the bail. In this case, however, the latter does not lose his justice, but he loses the jurisdiction of and the vengeance for the offense. And he can allow the bail in such a way as to lose his justice although it is customary to allow such bail where he makes the bail against the prohibition of the lord, for his disobedience in allowing injudicious bail ("fole récréance") is interpreted as an injury to his justice."[1]

But the rule under which liberation on bail was not allowed in cases of crime involving "loss of life or limb" has its exceptions. First of all, on the occurrence of a crime, an accusation might be brought by the party interested, when, as we know, the procedure most frequently began directly by an *appeal*, or challenge to the judicial duel.[2] In such a case, detention pending trial was the rule; but, strange as it may appear, this was applied to the accuser as well as to the accused.[3] This is explained, first, by the general character of the accusatory procedure, the object of

for a man held on a criminal charge 'body for body, and property for property,' as it is expressed, it is to be understood that as to his body he shall suffer the same punishment as he (the person bailed) would and as to property the same civil punishment. And many are able to discover in this reasonings to the contrary." *Cf. Beaumanoir*, LVIII, 18 (Salmon, No. 1658). See *M. Tanon*, "Registre criminel, de la justice de Saint Martin des Champs au XIV^e^ siècle," preface, pp. lxxx, lxxxi.

[1] *Beaumanoir*, LVIII, 18 (Salmon, No. 1658).

[2] *Beaumanoir*, LXI, 2 (Salmon, No. 1710).

[3] *Beaumanoir*, LIII, 4 (Salmon, No. 1585); "Etablissements de St. Louis," I, 104; "Somma de Legibus Normaniæ," II, 2, § 2: "Primo autem capiendum est vuadium defensoris, et post ea vuadium appellatoris, et de lege deducenda plegios debent tradere, *uterque tamen in prisonid ducis mancipandus est.*" "Très-ancienne coutume de Bretagne," ch. 104: "And if there be an accuser, he should be imprisoned as well as the other, for both parties should be punished alike."

which is to maintain an absolute equality between both parties.[1] Another explanation is, that the accuser, should he get the worst of the combat, forfeited his life and his property.[2] The duel was like a two-edged sword, which was bound to strike one or other of the combatants. This rule of mutual imprisonment lasted, in France, as late as the accusation by formal party.[3] It was not confined to the cases where the duel was the method of proof chosen or enjoined by the customary law. But that particular case had one distinctive feature. If wager of battle had been given, even where the most serious crimes were in issue, both parties might be set at liberty on sufficient bail, for it was very essential that the adversaries should prepare themselves for the combat. "In case of crime this liberation on bail shall be made but in one case,—when wager of battle is given in serious cases by one party against the other; in such a case, if the parties bind themselves by sufficient sureties ('pleges') that they will return on the day fixed, liberty on bail shall be accorded to them, so that they may be able to prepare themselves for proceeding as the case requires."[4] The "Grand Coutumier de Normandie" gives the same solution in a somewhat different form. After saying that both accuser and accused must be imprisoned, it adds that they may be confided to the care of trustworthy persons, whom it calls the living prison ("vifve prison").[5] But here again the treatment of both adversaries must be equal. Liberty on bail cannot be granted to one party without at the same time granting it to the other. The "Etablissements de St. Louis," after saying that "the judge shall hold the persons of both in equal imprisonment, if one is not

[1] This sense of equality caused the imprisonment of both parties in the feudal appeal. Under the Roman system of "judicia publica" it had led to the abolition of detention pending trial. See *Geib*, "Die Römische Criminalprozess bis auf Justinian," part 2.

[2] *Beaumanoir*, LXI, 11 (Salmon, No. 1718): "He who is defeated loses his life and whatever he possesses of whatever lord he hold it." See "Très-ancienne coutume de Bretagne," ch. 104, quoted above, and ch. 96. "For if it is decided that the accuser has not made out his case he shall be convicted of his accusation, and shall be punished in the same measure as the other would have been if he had been found guilty."

[3] As regards Germany compare the "Carolina," Art. 12 *et seq.*

[4] *Beaumanoir*, LIII, 4 (Salmon, No. 1585), *cf.* LVIII, 18; (Salmon, No. 1658).

[5] "Somma," II, 2, § 2: "Per justiciarium tamen his quod necesse fuerit ad duellum debet inveniri, et utrumque, si voluerit *vive prisonie* poterit committere dum tamen bonos de ipsis habuerit, qui eos ita fideliter cutodiant, quod vivos vel mortuos ad diem duelli terminatam reddant, et ad duelli deductionem habeant preparatos." And both may be bailed "en vifve prison" if they so wish, provided they are faithfully delivered to good guardians who will give them up dead or alive on the day appointed for the battle, armed for the fight if they are alive."

more troublesome than the other," calls him a "fole justice" who shall allow one of them to be set free on bail, while the other is held.[1]

In this respect the powers of the judges were at first very restricted; but they continued to expand. The "Livre de Jostice et de Plet" allows the judge a wide latitude: "If it is asked whether restoration (of goods) or liberation on bail is proper where two are arrested on account of an offense of which one of them accuses the other, the answer is that the matter is in the judge's discretion. And if it is asked whether one of them may be liberated on bail and the other held, the answer is, no; no advantages can be given to one more than to the other, nor can one be relieved more than the other."[2] This discretionary power was bound to have a greater development in the royal jurisdictions than elsewhere in the absence of the feudal responsibilities.

Another situation might present itself besides that of an accusation by formal party. The lord could, as we have said, *apprehend* ("prendre") and imprison the person suspected of crime, and, in order to give rise to accusations, make his arrest public at three assizes, or after such other delay as the customary law provided. This imprisonment was limited to a year and a day, for, after the lapse of that time, no accusation was any longer possible. But could the imprisonment be terminated sooner? The writers on customary law generally admit that at the expiration of the periods for publication, the accused had the right to demand to be set at liberty on furnishing bail.[3] Some, it is true, maintain that the detention should continue.[4] Still others hold that the final *release* ("delivrance") should take place immediately after the expiration of the delays.[5]

A last hypothesis presents itself. The person *arrested* ("pris") by the lord may consent to submit to the inquest by the country. Ought he then to be liberated on bail? That is probable; certain texts seem to hold the opinion that liberty is a matter of right when there is no formal party: "If the judge imputes to me that I have been concerned in the deed done, for which death is the penalty, and no one claim aught of me save himself, by right he shall not seize my property, but my body; but in justice he shall liberate it on bail, body for body."[1]

[1] I, 104; *cf. Beaumanoir*, LIII, 4 (Salmon, No. 1585).
[2] XIX, 26, § 9.
[3] "Compilatio de Usibus Andegaviæ," § 24; "Livre de J. et P." XIX, 26, § 12. Ordinance of 1315: "The suspicion may be so great and notorious that the suspected person, against whom the denunciation shall be framed, ought to be detained in the abode of his seigneur and there remain a space of forty (days) or two or three at the most, and if that terminate without any one accusing him of the deed, he shall be bailed ('ostagez')." (Ord. I, p. 358.)
[4] *Jean d'Ibelin*, ch. LXXXV.
[5] See *Beaumanoir*, LVIII, 20 (Salmon, No. 1660); XXX, 90 (Salmon, No. 917).

The net result of what we have stated is that liberty on bail was a matter of right except where an offense had been committed which might entail the loss of life or limb. Of all this old theory, although it is mainly allied with the feudal system and the judicial duel, two ideas continued to prevail in the following period. These are, first, that bail ought to be allowed in the case of minor offenses, and, second, that it ought to be refused in the case of serious crimes.

§ 8. **Procedure by Contumacy.** — The old law came to recognize a procedure of contumacy, which constitutes a point of departure for our legal system so far as that relates to the doctrine of default, although the procedure has completely changed its aspect in the course of its successive transformations. The old criminal procedure, in common with all formal procedures, admitted of no judgment by default. An accuser and an accused must be present from the beginning to the end of the action. A means was found, however, of insuring that justice should take its course despite all resistance on the part of the recalcitrant. As in the Germanic practice, the procedure by contumacy resulted, not in a condemnation for the act struck at by the prosecution, but in the outlawry of the person guilty of contumacy. Every safeguard given by the law was withdrawn from the person who refused to submit to the law. That was only logical. The veritable flood of summonses and delays connected with the procedure vary somewhat according to the different customs, but this variation does not prevent the ascertainment of its main features.

The procedure of contumacy was called "*forbannissement*" — banishment, or outlawry. The sentence of "forbannissement" could only be pronounced at the assizes, and the procedure could only be followed for serious offenses, which we shall find called later on "le grand criminel."[2] The ancient "Coutume de Nor-

[1] "Livre de J. et P." XIX, 26, § 5.
[2] "Livre de J. et P." XIX, 37, § 4: "It is asked for striking a man, or for insult or drawing blood or causing bloodless wounds, causing contusions without death or mutilation and he flee, if he ought to be banished? And the answer is, No. — § 5. Then it is asked if he be charged with murder, or theft, or rape, or homicide, or dismemberment, or if he have taken from the other by force, or if he do not appear to make his peace and if he

mandie" probably exhibits its purest type. Three summonses to three successive assizes are necessary: "*Criminalem autem dicimus actionem de qua convictus aliquis membris vel corpore condemnatur. Si quis autem crimen, quo secutus est, confessus fuerit in publico, sui judicium protulit damnamenti. Diffugiens autem hujusmodi criminosus ad tres primas assisias contumax debet vocari. Est autem assisia militum et virorum certo loco et certo termino XL dierum spacium continente, per quos de auditu in curia judicium et justitia debet exhiberi. Ad quartam autem recitatis ejus criminibus et subterfugus facto ab his judicio debet forbanizari publicè sub hac forma: Nos forbanizamus Petrum propter mortem Luce, quem occidit, ex potestate ducis; ità quod si quis eum post elapsum hujus assisiæ invenerit ipsum vivum vel mortuum reddat justiciario, vel si non poterit clamorem patriæ qui dicitur harou clamosis vocibus debet excitare.*"[1] This is all quite clear;—the outlawry and the delays, consisting of four periods each of an assize. These four periods will always be found, and the last term will always be of an assize or forty-day duration ("quarantaine"). "Be it known that before a man shall be outlawed, he shall be caused to be summoned for three specified days, eight days apart, and if he do not appear within (that time) his nearest relatives shall be sent for and told to have him on a day fixed. And if he clear himself by proper excuses he shall be heard; if not, the space of forty days shall be allowed to elapse from that time, and if within that time he do not appear he shall be banished."[2]

According to the "Etablissements de St. Louis" the fugitive is summoned "that he appear within seven days and seven nights to acknowledge or defend, and he shall be caused to be summoned in open market-place . . . shall be caused to be summoned anew for judgment that he appear within fifteen days and fifteen nights . . . then within forty days and forty nights, and if he do not appear then he shall be caused to be banished in open market-place."[3] According to Beaumanoir there were different periods of delay according to whether a peasant or a gentleman was concerned: "If he is a vassal he shall be summoned by three fortnights, at the third fortnight to the provostship. And if he do not appear within the three fortnights, at the third fortnight it shall be proclaimed that he appear at the first assize thereafter . . . and if he do not appear at that assize he shall be banished."[4]

flee, should he then be banished? And the answer is, Yes; for such things involve corporal punishment and peril of his eternal salvation."

[1] "Somma," I, 23, §§ 5, 6.
[2] I, 26.
[3] XIX, 37, § 9.
[4] LX, 5 (Salmon, No. 1695).

For the gentleman there were three provostship summonses and then three assize summonses; it seems as though there were here two systems superposed: "If he be a gentleman he shall be summoned to appear in law of the sovereign by three fortnights to the provostship; and if he do not appear he shall be summoned for three consecutive assizes thereafter, between which assizes shall elapse the space of at least forty days, and if he do not appear within the last assize, he shall be banished."[1]

This procedure of contumacy could be followed whether there was a party plaintiff, or merely *suspicion* and action by the lord justiciar. In either case there was disobedience of the seigniorial summons.

The person banished was really without the law; his murder went unpunished, and all were forbidden to shelter him: "When a man is banished from the court by any of the count's men no other man may or shall shelter him, but shall seize him if he find him upon his land, and shall acquaint the count that he holds such outlaw . . . whoever shelters him knowing of the banishment, his house shall be torn down and the penalty is in the discretion of the court according to what he is worth, and also punishment of imprisonment."[2] Moreover, these terrible threats were not the only means of constraint employed to bring about the appearance of the person accused of contumacy. His property was confiscated by virtue of his outlawry,[3] and that was sequestrated by the lord from the beginning of the procedure, namely, from the first default.[4]

The most distinctive feature of this form of process was that it resulted in making, not a condemned person, but an "outlaw." It soon lost this characteristic. Resistance to the law was construed as a kind of confession; hence the outlaw was looked upon as "attainted and convicted" of the crime, for which he ought to

[1] *Beaumanoir*, LX, 6 (Salmon, No. 1695); XXX, 99 (Salmon, No. 930).
[2] *Beaumanoir*, LXI, 21, 23 (Salmon, Nos. 1728, 1730). Banishment, however, was not and could not be decreed except from the territory subject to the jurisdiction of the lord justiciar (*Beaumanoir*, LXI, 22, Salmon, No. 1728); but Beaumanoir points out a curious procedure (LXI, 21, Salmon, No. 1728), the object of which was to extend its effect to the whole jurisdiction of the lord paramount.
[3] *Beaumanoir*, LX, 9 (Salmon, No. 1698).
[4] *Beaumanoir*, LXI, 10 (Salmon, No. 1717): "For fear of the risk consequent on delay the count shall set guards upon him whom he has summoned . . . and double daily until he appear to prevent his loss." "Livre de J. et P." XIX, 37, § 8: "In the first place he shall cause him to be summoned at his dwelling where he is expected to return . . . and if he do not appear his goods shall be seized and shall remain in the judge's possession." *Cf.* "Ancien coutumier de Picardie," LIV (p. 46).

suffer the usual punishment if he should be captured and given up to the lord. Beaumanoir and the "Livre de Jostice et de Plet" are the first to formulate this new idea.[1] From their time onwards the procedure by contumacy will always contain a combination of these two ideas of outlawry and condemnation for the deed under prosecution.

Was the outlawry, with its terrible consequences, final and irrevocable? When the outlaw was seized, or when he presented himself willing to purge his contumacy, as it was later phrased, could he demand to be tried confrontatively? The logical answer was, No. Originally, outlawry, being the punishment of the disobedience and not of the crime, was final, or at least could not be recalled except by him who had decreed it. The recall was a discretionary decision, not the result of any method of recourse.[2] This recall involved the exercise of a kind of right of the crown, as in the enfranchisement of a serf, and to grant it the baron required the assent of the superior suzerain.[3] Moreover, the *letters of recall* might nullify all the consequences of the outlawry and contain a complete pardon, or they might merely open up the possibility of a new judgment. This is very clearly illustrated by Beaumanoir: "If the outlaw be recalled by the sovereign for any cause of pity, as I have said above, he shall have everything belonging to him which was held on account of the suspicion of the offense, whether in the hands of the court or of others, for he who is acquitted in the court of the sovereign cannot be condemned in the court of the subject. But it is otherwise if the count recall his outlawry on petition or on entreaty or in his discretion for cause of pity, for in such recalls the subject shall not give up what he holds of the out-

[1] *Beaumanoir*, LX, 9 (Salmon, No. 1675): "Whoever is accused of any of the aforesaid matters and it happen that by the custom of the county he is outlawed, and he is rearrested after the outlawry, he has forfeited his life and effects and is judged as if he had notoriously done the deed of which he was accused." *Ibid.*, XXX, 12 (Salmon, Nos. 834, 835): "He should be judged according to the misdeed for which he is outlawed." "Livre de J. . P." XIX, 37, § 7: "And if he is arrested soon after the outlawry he . condemned for the deed." "Ancien coutumier de Picardie (Anc. cout de . thieu et Vimeu, XIV)," p. 131: "If he defaults he ought to be convicted of the crime of which he is accused."

[2] *Beaumanoir*, LXI, 24 (Salmon, No. 1731): "If the count withdraw his outlawry from any reason of mercy; if, for instance, he has heard that he who was outlawed, was, at the time when he was accused and outlawed, in foreign lands or on a pilgrimage, and it is evident that he was ignorant of the accusation and of the outlawry . . . or if the count has since felt certain that he did not do the deed for which he was outlawed, it were a work of mercy to withdraw such manner of outlawry."

[3] *Beaumanoir*, LXI, 26 (Salmon, No. 1733): "The man who has caused any outlawry in his court on account of crime cannot for any reason withdraw it without the consent of the count."

law's on account of the offense if he does not purge himself of the offense by judgment, in the same way as if he was accused and freed himself from the accusation or submitted to inquest and was freed by the inquest; then, indeed, it would be proper that he should have his own in whosever hands it was."[1]

But akin to these principles another idea grew up. There was a tendency to allow the "outlaw-condemned" ("banni-condamné") to prove his good faith, and to attack judicially the sentence of outlawry. The "Livre de Jostice et de Plet" for this purpose provides a last delay of pardon: "Be it known that if any one remain in a state of outlawry for forty days he is outlawed merely; and if he appear within the next three assizes and make his excuses that he shall and will suffer law, he shall be allowed to do so. And if he do not appear within the three assizes he shall be condemned for the deed of which he is accused."[2] The "Etablissements de St. Louis," without fixing any period of delay, declares that if the outlaw appears and pleads his good faith "then the judge shall receive his oath on what he wishes to declare and he who desires to accuse him shall have his defense."[3] There are here the elements of a future development; but the primary idea is not destined to disappear for some time; and in the procedure for default which the Ordinance of 1670 will organize, we shall see pardoning decisions and methods of recourse concurrently in operation.

Such was our very old criminal procedure. In so far as it was logical in its imperfection, it embraced in reality two distinct elements. One of these belonged to the past and was very soon to disappear without leaving any traces; the other, on the contrary, contained the germs of new institutions, and we shall show how it changed its aspect to conform to the changing conditions.

[1] *Beaumanoir*, LXI, 25 (Salmon, No. 1732).

[2] XIX, 37, § 10; *cf.* "Ancien. cout. de Picardie," XCVIII (p. 88).

[3] "Etab." I, 26. Judging from a passage in the "Livre de Jostice et de Plet" it would appear that the effects of the outlawry could not be wiped out by lapse of time, XIX, 37, § 12; "Cefroi de la Chapele (says) that the bailiffs of Orléans caused a man to be outlawed on proclamation and report that he declared that he had killed a man. And he was summoned at his domicile by command of the king for the space of forty days, and neither appeared nor sent nor lodged a defense and for this he was outlawed and suffered the outlawry without appearing for fifty years, during which time the court did not summon him. At the end of that time he came to the bishop of Orléans and declared that he belonged to his jurisdiction, lying down and rising on his land, which was the case. The bishop had the power to withdraw this outlawry. And it was decided that he would not withdraw (it) because he had not come sooner to allege his privilege nor had the law required him, and he was given up to the bishop to whose jurisdiction he belonged. The bishop caused him to be tried and decided that he should be hanged."

CHAPTER II

THE ORIGIN OF THE INQUISITORIAL PROCEDURE AND ITS GROWTH DURING THE 1200 s AND 1300 s

§ 1. **Introductory.** — In the harsh and inadequate procedure which we have described, the pursuit of offenses was the affair of private individuals. It was only in rare instances that public authority could intervene in an efficacious manner; except in the case of capture in the act, all it could do was to seize the culprit and await the pleasure of the injured parties in bringing the accusation, or the culprit's consent to the inquest.

It was impossible for such a state of matters to last. We shall therefore see a regular official prosecution make its appearance in the 1200 s and rapidly develop, simultaneously with the substitution of inquests for the old methods of proof. But before studying this movement in the works of our old writers, it is necessary to explain briefly what was the criminal procedure of the ecclesiastical courts. Its influence upon the transformations which we purpose to describe is undeniable. This is not due to the fact that the Church had created its own system of procedure in every detail. On the contrary, most of the different elements of which it made use it borrowed from secular institutions. It imbued these, however, with a new spirit and lost no time in substantially altering them. It is sometimes said that the inquisitorial procedure of ancient France is merely the result of a borrowing from the Church. That, as we shall make clear, is not precisely correct; but it is none the less true that the Church was the first authority which changed from the accusatory to the inquisitorial procedure. And having been the first to effect this evolution, it very naturally furnished a model to France and the neighboring

nations which inspired a similar movement under the impulse of similar requirements.

§ 2. **The Ecclesiastical Criminal Procedure.** — The system of repression in force was manifestly inadequate. It was essential that an unfettered and effective official prosecution should be created, and the Canon law laid the foundation for this by instituting, at the end of the 1100 s, the inquisitorial procedure, the "processus per inquisitionem."

The Canon law had originally recognized only the accusatory system in criminal matters, influenced in this respect both by the Roman law and by Germanic custom. In the 800 s, however, it made a step forward. When, by reason of a crime committed, any one had been pointed out as suspected by public opinion, and this "mala fama" or "infamia" was established by the judge, the Canon law had admitted that this gave a certain right of action against the "infamatus." This did not allow the judge to bring witnesses against him and condemn him if he should be convicted, but the accused was obliged to exculpate himself from the crime imputed to him. This exculpation was effected, according to the circumstances of the case, by the oath of the "infamatus" supported by compurgators, "co-swearers" ("purgatio canonica"), or by ordeals ("purgatio vulgaris"). If he refused, or failed, he could be condemned as convicted of the offense charged against him.[1] These methods of proof the Canon law had borrowed from the Germanic customs, although it may at first have spontaneously adopted a similar method, allowing, in certain cases, a suspected person to exculpate himself by his own oath, but without "co-swearers."[2] In the procedure introduced in the 800 s, if the "infamatus" refused to exculpate himself, or failed in the "purgatio," he was considered convicted of the crime and could be condemned accordingly. Out of this procedure grew, by evolution, the inquisitorial procedure.[3]

At least as early as the 800 s the Canon law had also opened another way. It had permitted notorious ("notoria") crimes to be prosecuted and condemnation pronounced by the judge without the necessity of an accuser; whence the maxim "notoria

[1] C. II, qu. 5; X, "de purgatione canonica," V, 34; X, "De purgatione vulgari," v. 35.

[2] Chaps. V, VI, VIII, IX, C. III, qu. 5. *Hildebrand*, "Die purgatio canonica et vulgaris," 1841; *Richter-Dove*, "Lehrbuch des deutschen Kirchenrechts," § 226; *Löning*, "Geschichte des deutschen Kirchenrechts," II, pp. 496, 503.

[3] *Hincmar de Reims*, "De presbyteris criminosis," c. XVI.

accusatore non indigent." But this rule was not of very much practical use on account of the difficulty which existed in determining what constituted "notorium." [1]

The Canon law did not yet admit of an official prosecution properly so called; and it gave as the chief reason for this that the judge (a different person as prosecutor was not thought of) would be at once judge and accuser.[2] This was the doctrine of Yves de Chartres (end of the 1000s and beginning of the 1100s);[3] and it was also that of Gratian (first half of the 1100s).[4] It is that taught by Rolandus, the future pope Alexander III, about 1150,[5] and Bernard of Pavia in his "Summa decretalium," written between 1191 and 1198.[6] But in the final years of the 1300s a new form of criminal action made its appearance, the "processus per inquisitionem," which is really an official prosecution by the judge.

This procedure is distinguished from the earlier form of which I have spoken and in which the "infamatus" was compelled to exculpate himself. The difference is clearly shown by the fact that the judge cannot proceed except upon the "infamia precedens"; but, on that being established, he can summon or arrest the accused, bring witnesses against him, and condemn him if proof of his guilt is furnished by this means. Other striking features corroborate this view.

But it is apparent that this change was not brought about by custom, but by legislation. It was introduced by the decretals of Pope Innocent III. The first to come under notice is of date 1198.[7] Then a series is found in rapid succession, in 1199,[8] 1206,[9] 1212.[10] At last, in 1215, the fourth Lateran council solemnly confirms the principle.[11]

[1] Cc. 15–17, C II, qu. 1.

[2] *Panormitanus* upon c. 7 X, "de accusat." V. 1, No. 7: "Judex non est loco partis . . . non fungitur duplici officio, quia aliquis debet esse accusator, alius judex."

[3] *Yves de Chartres*, Ep. CXIX, CVIII, CCVI.

[4] Dictum upon c. r. C. IV, qu. 4.

[5] "Summa magistri Rolandi," *Thaner* edition.

[6] In the "Compilatio prima decretalium" of *Bernard of Pavia* the title devoted to criminal prosecutions bears only the heading "De accusationibus," while the corresponding title in the Decretals of Gregory IX (V. 1) is entitled "De accusationibus, inquisitionibus et denunciationibus." The doctrine contained in the "Summa decretalium" corresponds to that of the cited title of the "Compilatio prima."

[7] c. un. X. "Ut ecclesiæ vel beneficia sine diminutione conferantur," III, 12.

[8] c. 10 X, "de purg. can.," V, 34; cc. 31, 32 X, "de simonia," V. 3.

[9] c. 17 X, "de accus.," V, I. [10] c. 21 X, "de accus." V, 1.

[11] c. 24 X, "de accus." V, 1.

[For the text of these decretals, and their bearing on the same movement as later influencing English law, see *Wigmore*, "Treatise on the System of Evidence," § 2250 ("History of the Privilege against Self-crimination"). — TRANS.]

At the same time, and even in the same texts, the theory was put forward that it was essential to discard the standard objection that the judge would become judge and party too. It was got rid of in two ways. In the first place, texts of Holy Scripture were invoked, which had nothing to do with the question except as showing that God or His prophet spontaneously intervened to inquire into human excesses.[1] Symbolical interpretation applied this power to the ecclesiastical judge. On the other hand, we have seen that the "inquisitio" could not proceed unless the "infamia" had in the first place been established against the "inquisitus;" it was said that as this was equivalent to an accusation brought from without, and in a manner personifying this establishment, it took the place of an accuser. This theory was destined to become classic.[2]

It was not, as has often been said, the struggle against the heretics which led to the introduction of this official prosecution. A special application of it was undoubtedly made to heresy in the "inquisitio hæretica pravitatis" (as to which I shall have something to say later), that is, the right to proceed "per inquisitionem" against heretics, delegated to certain special commissioners, usually selected from among the Dominicans or the Franciscans. The earliest case of inquisition thus delegated (of which we know) took place in 1227. The decretals which were the basis of the procedure "per inquisitionem" are sometimes directed against heresy among the clerks, but most frequently merely against clerical abuses. It was for the repression of these abuses generally that the papacy felt the need of a more strenuous mode of prosecution.

The evolution of the "inquisitio" from the "infamia," leading to the obligatory "purgatio," is attested by other characteristics than the persistence of this essential condition, the preliminary establishment of this "infamia." In the first place, if the "inquisitio" did not lead to a conclusive result, if it did not furnish sufficient evidence against the accused, he could be compelled to exculpate himself by the "purgatio canonica"; this was a late return to the old system.[3]

[1] cc. 30 X, "de simonia," V, 3; 17, 24 X, "de accus." V. 1.

[2] *Panormitanus* upon C. 2. X, "de accus." No. 7: "Nota quod in inquisitione judex non tenet hanc partis, sed infamia est loco accusatoris seu denunciatoris"; and upon C. 17 X, "deacons," No. 6: "De occultis non fit inquisitio ubi non processit infamia quia defuit veras et fictas accusator."

[3] *Hostiensis*, "Summa," Lyons edition, 1517, p. 409: "Si omnes testes dicunt cum (inquisitum) innocentum non suspenditur non purgatione oneratur infamia nisi ad tollendam facti." But see, as to the "accusatio," C. 6 X, of "purg. can." V. 34.

On the other hand, one of the most formal and, at the same time, most odious features of the procedure "per inquisitionem" is that the "inquisitus" was not only compelled to reply to the interrogatories of the judge, but he must also reply on the faith of his oath, after having taken oath to tell the whole truth.[1] This rule goes back to the earliest days of the procedure "per inquisitionem." It appears to be quite contrary to the original principles of the Canon law, holding that nobody in "forum externum" should be compelled to incriminate himself. But a reply to this objection was looked for in the earlier system upon which the "inquisitio" was grafted. According to that system the "infamatus" was obliged not only to exculpate himself by his oath, but also to furnish "co-swearers"; in the "inquisitio" only his own oath was required, and this was a lesser requirement. This justification was put forward by the future Innocent IV in very precise terms, and it became classic.[2] It was, however, merely a sophism. The formal method of the "purgatio canonica" and the replies to dexterous and imperative interrogatories were very different things.

The Canon law, however, ameliorated one characteristic of the procedure "per inquisitionem" which had operated unfavorably to the accused. Its construction of it was that, even if a conviction were obtained, the heavier punishments which a successful "accusatio" would have involved could not be inflicted in an "inquisitio," but only the lesser punishments. Thus, when the prosecution was against a clerk — as at first was always the case — and he had been found guilty and incapable of continuing in his ministry, he might be deposed, deprived of office ("ab officio"), but not degraded.[3] It must, however, be added that if the confession of

[1] *Esmein*, "Le serment des accusés dans le droit canonique," in the Bibliothèque de l'Ecole des Hautes Etudes (Mélanges), Vol. VII, 1896, p. 257 *et seq.*

[For the bearing of this on English legal history, see *Wigmore*, "Treatise on the System of Evidence," § 1815 *et seq.* — TRANS.]

[2] "Commentaria Innocentii quarti pontificis maximi super libros decretalium," Frankfort edition, 1570, p. 246, upon c. 2 X, "de confessis," II, 18: "Quod probo sic. Potest ei indici purgatio ubi per sacramentum suum ot purgatorium potest negare se crimen commisisse. Multo fortius antequam indicatur purgatio, potest ab eo quærere an crimen commiserit. Sed tamen non præcisa cogam eum respondere, sicut nec præcisa cogitur se purgare; sed, si non responderit sicut si se non purgaverit suspendetur, vel alias procedetur contra eum: quia videtur vanum purgare de simplia verbo qui se purgare debet multorum juramento." *Cf. Panormitanus*, upon c. 2 X, "de confessis," Nos. 16, 19.

[3] c. 24 X, "de accus.": "Criminalis accusatio sed capitis deminutionem, id est, degradationem intenditur. Sed cum super excessibus suis quidam fuerit infamatus, ita ut clamor ascendat qui diutius sine scandalo tolerari non potest, absque dubitationis scrupulo ad inquirendum et puriendum ejus excessus procedatur, si fuerit gravis excessus, etsi non

the accused was supported by the testimony furnished in the "inquisitio," the doctors admitted, as in the case of "notorium," that the condemnation to the full punishment could be pronounced.

The procedure "per inquisitionem," as it came to be described, met with very natural resistance in other directions. Texts there are which show us the "infamati" whom the judge wished to prosecute according to this method, invoking the earlier law and essaying to exculpate themselves by the "purgatio canonica." Others show them invoking the custom followed under the secular law and demanding that the judge should continue to hold them prisoners and fix a term within which accusers, if any, should be invited to present themselves, liberation or the "purgatio" to follow in the event of no such appearance.[1] None of these objections was allowed to prevail.

The procedure "per inquisitionem" had a special form and a somewhat different application. This was the "inquisitio generalis," otherwise called "preparatoria" or "ordinaria." Its purpose was, not to establish the "infamia" of a single specified person, but it was applied to a society or community of people which it compelled to disclose whether it had in its midst any individuals defamed by reason of offenses or misdemeanors; it called for informations and revelations. It was especially serviceable in the work of inspection and reformation of monasteries. It had a peculiar and very ancient origin.

Under the Carlovingian monarchy an actual jury of denunciation, "jury de dénonciation," is seen to be in operation. It appears both in the secular courts, where the texts show it first from the beginning of the 800s, and in the ecclesiastical courts. There it is grafted upon older institutions (which probably served the party to attain the same end), namely, the diocesan synod and the bishop's "visitatio." Considering only the ecclesiastical aspect, we have precise information on the subject from Reginon, who

degradetur ab ordine ab administratione tamen amoveatur omnino." As to the effect of the supplementary confession, see the Decretalists upon the above-cited chapter 24.

[1] *Gofodus*, "Summa decretalium de accus." Lyons edition, 1519, p. 199: "Quid si superior velit inquirere, reum autem dicat! Nolo ut inquiras sed profigas terminum accusare volentibus et, accusatore deficiente paratus sum me purgare. Nunquid audietur reus an judex? Videtur quod reus quia quod reus petit ordinarium est, quod diut judex extraordinarium et judex potius ordinario quam extraordinario jure procedere debet. Puto potius inquirendum quia purgatio sequitur inquisitionem." *Cf. Hostentius*, "Summa, de inquis." Lyons edition, 1517, p. 408; *Durantis*, "Speculum," p. 33.

wrote in the first third of the 900s,[1] and Burchard de Worms, who wrote in the first third of the 1000s.[2] The ecclesiastical judge, the bishop, in his visits to the places where his jurisdiction lay, convoked all the members of the clergy and also the faithful. From among the latter he chose a certain number of men and made them swear to denounce those whom they knew to be guilty of offenses or certain named public trespasses; these were the "juratores synodi." Those whom they denounced were under the necessity of exculpating themselves, according to the nature of the case, by the "purgatio canonica" or by the "purgatio vulgaris" on pain of being convicted.

This institution never disappeared from the ecclesiastical organization, although the performance of its duties was often suspended in the midst of feudal disorder. The fourth Lateran council plainly had it in view for the denunciation of heretics.[3] Other texts show the old procedure discharging its duties anew in the "visitationes" of the bishop or the archbishop.[4]

The effect of these obligatory denunciations in the olden days had been to force the denounced parties to the "purgatio canonica" or "vulgaris," but when the procedure "per inquisitionem" was once established these naturally gave place to it. The judge who had made the "visitatio," in a parish or in a monastery, and had admitted testimony for the persecution, could proceed against the accused by hearing witnesses against him, who might be either those who had testified in the "inquisitio generalis," or new witnesses. The change is well shown by the description given by Durantis of the "inquisitio generalis." He puts it forward as the natural instrument for the use of the bishop in his "visitatio," when he "inquires of the clerks as to the laymen, and of the laymen as to the clerks and laymen"; much the same thing is seen in Regino's book as regards the 900s. Without speaking of "juratores synodi," Durantis also says that the bishop would do well "secrete cum aliquibus de parochia fide dignis inquirere."[5] We have, besides this, direct proof of the evolution in the "Registre de

[1] "Libri duo de synodalibus causis," *Wasserschlaben* edition.
[2] "Burchardi Wortmatencis ecclesiæ episcopi decretorum libri vigorati," Migna Patrol. lat. t. CXL, p. 536 *et seq.* The interrogatories, eighty-eight in number, will be found in Book I, c. 90–95.
[3] C. 9 X, "de hæret." V. 7; c. 29 X, "de accus." V. 1.
[4] A very close application, which will hereinafter be made use of, is furnished by the "Registre de l'officialité de Cerisy" (1314–1457), published by *M. G. Dupont.*
[5] *Durantis*, "Speculum," Book III, part 1, "de inquisitionibus," § 3, Frankfort edition, 1592, p. 30: c. 1, § 4, VI, "de cons." III, 20; *Panormitanus* upon c. 7 X, "de test. cogend," II, 21, No. 5.

l'officialité de Cerisy."[1] In the 1300s the official of the abbey, who had succeeded to the jurisdiction of the bishop within a certain radius, still made his "visitationes" in the old way, with the convocation of the faithful and the procedure of denunciation by the "testes synodales"; this was called "Inquisitio," "Inquisitio generalis," "Inquester," "Informatio."[2] According to the earliest accounts the effect of the synodic denunciations was merely to submit the denounced persons to the "purgatio canonica."[3] But, starting from the year 1320, examples of the "purgatio" are no longer to be found. The "inquisitio generalis," as a consequence of numerous decisions, then always gives place to the "inquisitio specialis" against the denounced person, the synodic denunciation being equivalent to an "informatio." But these applications, showing the affiliation, are, generally speaking, rare and exceptional after the 1200s. The "inquisitio generalis," which is very frequently used and practised, and which has its roots in the domiciliary visits to the monasteries, is directed against regular and secular societies; it consists in "inquirere de capite et de membris."[4]

The "inquisitio" led to the "denunciatio," the charge by the judge upon the denunciation of a private individual. The "denunciatio" had no doubt been mentioned at an earlier date; even Gratian alludes to it in his exposition of criminal procedure;[5] but he appears to have used the term as synonymous with "accusatio." Even at a very early date a procedure was known in the Canon law which survived and was expounded by the Decretalists according to the traditionary law upon C. 13 X, "de judiciis." This was called "denunciatio evangelica" or "caritativa," because it was based upon certain passages of scripture (Math. xviii, 15–17). It was, to all intents and purposes, a procedure of repression, originating in the denunciation of one Christian against another. This might have resulted in a real mode of criminal procedure and it looks as if the old-time doctors had made attempts in that direction; but their efforts were fruitless, and the "denunciatio evangelica" was ultimately considered as of no further

[1] "Le registre de l'officialité de Cerisy" (1314–1457), published by *M. Gustave Dupont* (extracted from the "Mémoires de la Société des Antiquaires de Normandie").
[2] "Registre de Cerisy," Nos. 25, 26, 73, 96, 138; "inquisita," 110, 121; "Inquisitio loco visitationis," 43; "Informare," 215.
[3] "Registre de Cerisy," Nos. 5 b, 20 a, 25 e, f, 84 d.
[4] *Durantis*, "Speculum, de inquis." §§ 2, 3, p. 30.
[5] c. 47, C. II, qu. 7, and Dictum upon c. 20 C. II. qu. 1; *Hostiensis*, "Summa," p. 406; *Panormitanus* upon c. 13 X, "de jud." II, 1, No. 45.

efficacy than to allow of the application of the "censuræ" or "pœnæ medicinales" and not of that of real and personal punishments, "pœnæ vindicativæ." It was a means of discipline, not of criminal repression.

Once the "inquisitio" was established, however, the judge, instead of proceeding of his own accord, "ex mero officio," could proceed with the inquest, "inquirere," upon the denunciation of a private individual. This was at first done as a matter of fact, but by and by it came to be done as a matter of law. The person who formally made the denunciation was naturally one who was interested in the prosecution; he was even one who could have brought an "accusatio." This he did not do, preferring to set in motion the "inquisitio" of the judge by means of a denunciation; but the fact remained that it was in his interest that the action was brought. Doctrinally he was called the "promovens inquisitionem," and this "inquisitio cum promovente" was governed by special rules which ascribed to the denunciator an active part; so much so as at first to tend to assimilate this particular application of the inquisition to the "accusatio." Chief among these rules are the following.

We have said above that the "inquisitus" was obliged to take the oath "de veritate dicenda"; but this was originally imposed upon him only when the judge pursued "ex mero officio," not when there was a "promovens," "sed ibi adversarius habet probare ea qua denunciavit." But this distinction was subsequently done away with, and the taking of the oath was enjoined in both cases. This was only logical, seeing that in the procedure of "accusatio" it was imposed even upon the accused.[1] In the second place, when there was a "promovens," the rule was that the "informatio" must first of all be established by formal proofs, which it was for the "promovens" to furnish. It will be seen later on that when the judge prosecuted "ex mero officio" the same necessity did not arise. But in the former case it resulted in the accused being allowed not only to dispute these proofs, but also to meet them with contrary proofs, in establishing his "bona fama" by witnesses.[2]

But doubts were raised as to the application of the rules of the "accusatio" in regard to one main point. The unsuccessful accuser could be condemned, as calumnious, to the punishment of retaliation, that is, to the punishment which he had claimed for

[1] c. 18 X, "de accus." V. 1. *Panormitanus* upon c. 16, *ibid.* No. 2.
[2] *Panormitanus* upon c. 19 X, "de accus." V. 1.

the accused, and for this purpose he had first of all to submit to the "inscriptio in crimen"; should the "promovens" be treated in the same way in this respect? One thing was undeniable, namely, that if he had made the denunciation in bad faith and calumniously, he ought to be punished "extraordinem," with a "pœna extraordinaria." But should the "inscriptio in talionem" be imposed upon him? It seemed that it should not, because in the "inquisitio" the judge was, in law, the sole prosecutor.[1] This idea, however, was far from becoming the fixed general opinion, which was, rather, that when punishment was possible, the "inscriptio in crimen" was necessary. It was argued that the "promovens" was, as a matter of fact, the equivalent of the accuser.

The denunciation took very simple forms; it could be made orally and by the voice of a third person, a "procurator." There were those, even among the academical Canonists, who likened it to the "denunciatio evangelica," declaring that it equally entailed, in effect merely, the "correctio" of the culprit, and that although it often resulted in the infliction of a "pœna vindicativa," that was when the disorder was such that order could not be otherwise restored.[2] This would explain the characteristic noticed above that the "inquisitio" did not authorize the same severe punishments: "nutius punitur per inquisitionem."

But the essential difference between the two kinds of "denunciationes" is that any one, without distinction, could make the one ("evangelica"), while only those entitled to bring the "accusatio" could make the other ("judicialis").[3]

The net result of what we have said, however, is that the "denunciatio judicialis," as understood, had become a particular form of criminal action, and the "inquisitio," properly so called, only existed when the judge proceeded in the matter "ex mero officio."[4]

A new organ of the machinery of the ecclesiastical judicature, the "promotor," was the inevitable outcome of the theory of the "promovens inquisitionem." This titular officer of the officialities was nothing other than a functionary charged with the duty of denouncing offenses to the judge and "promovere inquisitionem,"

[1] c. 16 X, "de accus." V. 1.
[2] c. 16 X, "de accus." and *Panormitanus* upon this chapter, No. 2.
[3] *Durantis*, "Speculum, de accusat." p. 24.
[4] *Panormitanus* upon c. 24 X, "de accus." No. 21: "Proprie processus inquisitionis est quando judex facit ex officio suo puro et mero nemine deferente et impetrante inquisitionem: sed quando fit ad denonciationes alicujus tunc est proprie processus per viam denunciationis. Propter hoc facit quia, ex quo denuntiat et eligit viam quasi extraordinariam, debent præmonnisse quia forte inquisitus se conescisset."

against the culprits. His function, moreover, was one of progressive growth. Its origin is found in the commissions and temporary and extraordinary delegations made by the judge in the course of the procedure of "inquisitio." When he proceeded "ex mero officio" he was bound frequently to appreciate the arduousness and difficulty of his task, and he then appointed a capable person to play the part of promotor or "promoveur" in a specified case. This was a material and moral assistance to him, and appears to have furnished an answer to the objection which regarded the judge as being at the same time judge and party.

It is upon chapter 53, X, "de testibus" II, 20, that the old-time doctors base this practice. Innocent IV had already shown it to be prevalent and attempted to deduce therefrom doctrinal consequences. In his time the character of such a "promotor specialiter a judice deputatus" had not yet been altogether determined. In particular, it was asked if, once he had been brought into a particular "inquisitio," he could not be recalled or a substitute appointed, and whether he could lodge an appeal from the judgment. He was, at all events, already styled "Minister inquisitionis"; but Hostiensis states that he was not in reality a party to the action and that the litigation should not be conducted with him.[1] The function was nevertheless destined to become consolidated and grow into that of a titular office. But no mention is yet found of a titular "promotor" in the "Liber practicus de consuetudine Remensi," which belongs to the end of the 1200s or the beginning of the 1300s, although elsewhere unmistakable and interesting traces are found of the usage of "promotor specialiter delegatus a judice."[2] An influence was bound to be exercised in the development of the office by the king's "procuratores," or lords justiciar, who make their appearance about the end of the 1200s. From 1274 we find a "procurator episcopi Parisiensis,"[3] as to whom we shall have something to say elsewhere. In the "Registre de l'officialité de Cerisy" the promotor appears from the year 1338.[4]

The details of the "processus per inquisitionem" were settled

[1] "Vox loquando iste non est vera pars, sed quasi pars similitudine quia talis nullum libellum offert nec litem contestatur."

[2] "Liber practicus de consuetudine Remensi" (in the "Archives législatives de la ville de Reims" published by *M. Varin*), Nos. VIII, p. 43. Cc. LXXX, c. 269, p. 210.

[3] *Tanon*, "Histoire des justices des Eglises et communautés ecclésiastiques de Paris," p. 341.

[4] "Registre de l'officialité de Cerisy," Nos. 204 b, 334, 338 c, 269, 288 c, 386, 414 b.

at an early date, and afterwards remained almost unaltered. They were, in fact, succinctly laid down by the fourth Lateran council.[1] In the canonical common law they even allowed a sufficiently extensive liberty of defense to the accused. The "inquisitio" naturally began with the establishment of the "infamia." But when the "inquisitio" was made "ex mero officio" no particular form was prescribed for this institution. The judge assured himself concerning it and informed himself in this respect ("sese informabat") as far as his pleasure and ability went; in case of appeal, however, it became necessary to justify in regard to it before the superior judge.[2] But it was otherwise when there was a "promovens." In order to prove the "infamia" he had, first of all, to produce witnesses, who were heard by the judge, or more frequently by a deputy of the judge or merely by a notary, in the absence of the accused, who, moreover, had not yet appeared. This gave rise to the first opportunity of defense offered to the accused. When he was summoned he was entitled to require that he be made acquainted with the testimony by which he was "infamatus," and he could then dispute it.[3] It was asked if the "inquisitus" could not himself bring witnesses to prove his "bona fama." It was a natural thing to allow this, but it was also a delicate matter, to prevent the testimony of one set of witnesses contradicting that of the other. The judge was generally allowed to choose between the different affirmations "propriis auribus se informans."[4] Unless there had been an "inquisitio præcedens de infamia," it was necessary in all cases for the "inquisitus" to claim, otherwise the irregularity was waived.[5]

The accused was then summoned, unless he had been "captus" at the outset. He appeared before the judge and was made acquainted with the offenses imputed to him. This was done in either of two ways. If the "inquisitio" was brought "ex mero officio," the judge drew up "articuli," comprising the different charges upon which the "inquisitio" was to rest, and these he was required to communicate to the accused, giving him a copy of them and granting a delay sufficient to allow him to examine them.[6] If there was a "promovens," he was obliged, in the same way as a plaintiff in a civil action, to draw up a "libellus"

[1] c. 24 X, "de accus." V. 1.

[2] c. 19 X, "de accus." V. 1, and *Panormitanus* upon this chapter.

[3] *Panormitanus*, "Practica," c. 150.

[4] *Panormitanus*, upon c. 19 X, "de accus." No. 10.

[5] c. 2 VI°, "de accus." V. 1.

[6] *Durantis*, "Speculum, de inquis." p. 36.

and the "litiscontestation" intervened, the accused taking part.[1]

The examination began with the interrogation of the accused by the judge, who could repeat it as often as he pleased. The accused was compelled to reply, and we know that he was bound to reply under oath. The difference at first recognized in this respect between the "inquisitio ex mero officio" and the "inquisitio cum promovente," disappeared at an early date.[1] If he pleaded guilty, that was, in effect, sufficient to authorize his condemnation,[2] and if he pleaded not guilty, the judge or the "promovens" produced evidence, mainly testimonial, against him.

In the "inquisitio" in its first form, two distinct sets of witnesses were, by law, heard, one to the "infamia" and one to the guilt. When the "inquisitio" was made "ex mero officio," the testimony establishing the "infamia" was not, for the most part, formal testimony. In all cases the testimony received in the preliminary inquiry (or examination), "super infamia," was inadmissible against the "inquisitus" for the purpose of proving his guilt, and there were necessarily two successive and separate inquiries, even when the same persons testified in each.[3] But this rule was not absolute; it was subject to exception in the case of proof of the "corpus delicti" in notorious offenses unless the culprits were known,[4] and in the "inquisitio generalis," directed against a society or a community,[5] where the "inquisiti" could be condemned upon the testimony of the witnesses originally heard and without new inquiry.

The witnesses whose allegations could entail condemnation were heard in secret and out of the presence of the "inquisitus." This, however, was not a characteristic peculiar to the "inquisitio"; it also existed in the action "per accusationem" and in civil causes. Liberty of defense, as it was then understood, was in force. In the first place, on the termination of the inquest, the "inquisitus" received the depositions of the witnesses. He

[1] *Durantis*, *ibid.*, p. 34; *Panormitanus*, "Practica," c. 150.

[2] *Durantis*, "Speculum, de inquis." p. 34: "Post hoc interrogabitur; quod si confessus, bene, procedat ad pœnam. Si vero negaverit, tunc inquisitur inducat testes."

[3] *Durantis*, "Speculum, de inquis." p. 32: "Si enim reciperentur testes simul super crimine et super infamia, sæpe is qui inquisitionem prosequitur, ut sic ad probationem criminis admitteritur de quo quis infamatius non est, quod esse non debet;" — p. 33: "quid si inquisitor potuisset inquirere de infamia et de criminibus? Responde: Non servaretur ordo juris, Nam infama inquisitio præcedere debet veritatis cognitionem nec debet processus tali permixtione confundi."

[4] *Innocent IV*, upon c. 23 X, "de elect." I, 6.

[5] *Panormitanus*, upon c. 22 X, "de accus." No. 2.

not only got the witnesses' names but also a copy of the depositions themselves.[1] He had the right to have such witnesses interrogated anew and to produce against them his objections to their admissibility and his replies to their testimony.[2] He could even freely plead excuses and justifications and bring witnesses in support of these allegations.[3] Finally, the old texts contain no restrictions as to the assistance of a counsel.[4]

It is true that the procedure of the "inquisitio" allowed torture, but it was the torture of the "accusatio" and practised under the same conditions. The Canon law had permitted it by virtue of the predominating influence of the Roman law. No trace of it is to be found, to be sure, in the procedure of the ecclesiastical courts of the Frankish monarchy,[5] and the "Decretum" of Gratian contains the opposite theory, which bars and repudiates torture.[6] That is also the doctrine reproduced in the "Summa" of Paucapalea, while that of Etienne de Tournay (between 1165 and 1177) only recognizes the application of the torture to slaves and false witnesses (p. 221). The instrumentality by which the influence of the Roman law in this direction was augmented and sanctioned is to be found in certain passages borrowed from the ancient ecclesiastical Fathers who lived in the days of the Roman Empire, and who spoke of the torture which they saw in practice every day in a civilized country as if it were a natural and normal thing.[7] Johannes Teutonicus, who compiled the glossary to Gratian's "Decretum," also approves, in his teaching, of torture, and he adopts all the applications made of it by the Roman laws.[8] The great doctors of the 1200s, including Innocent IV and Durantis, entertained no doubts as to the legality of this method of examina-

[1] c. 26 X, "de accus." V. 1. *Durantis*, "Speculum, de inquis." p. 32: "Et dabitur ei facultas defendendi se et dabuntur ei nomina testium et dicta eorum sunt ei publicanda et de iis copia facienda, ut se defendere possit et proponet exceptiones et replicationes tam in principali quam contra testes."

[2] *Durantis*, "Speculum, de inquis." p. 33: "Item potest opponi contra testes inductos et replicari et contra dicta eorum. Unde cum testes contra cum producentur, protestetur quod possit opponere in personas eorum et dicta; et formet interrogationem et judici porrigat ut secundum Uno, testes interroget, secundum Rolandum."

[3] cc. 18, 19 X, "de accus." V. 1. *Durantis*, "Speculum, de inquis." pp. 28, 34, 35.

[4] *Panormitanus*, "Practica," c. 150, p. 30: "Advocatus inquisiti quibus modis prospicere possit suo clientulo."

[5] It is hinted at only in one pseudo-Isidorian passage (c. 4, C. V. qu. 5), which speaks of the torture administered to accusers and witnesses, and which aims at the protection of the bishops against accusations.

[6] C. XVI, qu. 6, under the headings of "Cause" and "Torture."

[7] c. 1 C. XV, qu. 6; c. 1 C. XII, qu. 5.

[8] Gloss upon C. XV, qu. 6, *q.v.*

tion. Certain formal texts, having the force of laws, also admitted it.[1] In the "inquisitio hæreticæ pravitatis" the legislation was particularly precise.[2]

We have said that the canonical procedure "per inquisitionem" in its broad features remained throughout much as it had been at its beginning. It underwent sundry important modifications, however, the consequences of which were more severely felt in the secular than in the ecclesiastical courts. One of these was the abolition of the distinction, formerly so well defined, between the "inquisitio super forma" and the "inquisitio super veritate." The first "informatio" had a double purpose; but a practice was introduced by which, at least whenever the "inquisitus" demanded it, the witnesses heard in the information must be examined anew.[3] This was the "repetitio tertium," equivalent to our re-examination of the witnesses.

Another was the limitation placed upon and the final abolition of the right of the "inquisitus" to have full knowledge of the depositions produced against him and to learn the names of those who had made them. Already the doctors of the 1200s asked whether it was invariably necessary to acquaint the "inquisitus" with the names of the witnesses. Some of them would not permit it when it might be attended with danger. Innocent IV left it to the judge's discretion.[4] The fact was noted that c. 26 X, "de accus." expressly mentioned the "dicta testium" only and did not speak of the "nomina." One of Boniface VIII's decretals unreservedly suppressed the names in the "inquisitio hæretica pravitatis."[5] A further step had to be taken. Letters of the popes Pius IV and Paul III generalized the principle.[6] We shall find that with us the practice ceased in the secular courts in the course of the 1300s. It was maintained that this safeguard was replaced by another, the *confrontation*, that is, the bringing

[1] C. 1. (Alex. III) X, *de deposito*, III, 16; "Nam judicibus dedimus in mandatis ut idum iniquum *sub questionibus* ad rationem ponant." Flagellation in particular appears to have been employed as a means of torture, c. 4, X, *de raptor*: "Poteris . . . etiam flagellis adficere ea tamen moderatione adhibita quod flagella in vindictam sanguinis transire minime videantur." One passage would seem to have a general application, c. 6, X, *de reg. juris*, V. 41: "In ipso causa initio non est a quæstionibus inchoandum." It is true that some read "questibus" instead of "quæstionibus." But that text is taken from a letter of Gregory I, and merely reproduces a Roman rule in regard to torture, Book 1, par. D. XLVIII, 18; L. 8, § 1, C. IX, 41.

[2] *Clement*, 1, "de hæret," V. 3.

[3] *Guazzini*, "Tractatus ad defensionem inquisitorum," Venice, 1649, "defensio," 25 V, pp. 15, 19.

[4] *Panormitanus*, upon c. 26, "de accus." V. 1.

[5] c. 20 VI°, "de hæret." V. 2.

[6] *Guazzini, op. cit.* "defensio," 24, II, p. 3 *et seq.*

face to face of the accused and the witness, when the deposition of the latter was read over to the former. The confrontation was not unknown in the canonical procedure, but it was not required as a matter of right and the proceeding was quite valid without it. It was, however, very frequently employed, as it was, as a matter of fact, an excellent method of examination. It was, moreover, held in law that it cured all defects of the summons, — even the lack of summons,[1] — and that it was equivalent to the "publicatio processus."[2]

Such is the inquisitorial procedure of the common law. But, for the general mass of humanity, who had little knowledge of the history of the law, it received a special and world-famous application in the *Holy Inquisition* itself. Created in the 1200s to quell the great heresies of the Waldensians and the Albigenses, this was in very active operation in the south of France for about a century. It had two especially distinctive and peculiar features. In the first place, its judges were not the ordinary ecclesiastical judges, but special delegates of the Pope, usually drawn from among the Dominican and Franciscan friars, who constituted special tribunals of Inquisition. In the second place, though its procedure followed, in effect, the "processus per inquisitionem," or Canon common law, as we have described it; yet the Holy Inquisition employed the most drastic rules of the Canon common law. We have already referred to the text which sanctioned the withholding of the names of the witnesses from the "inquisitus"; the aid of counsel, if not wholly prohibited, was at all events rendered more difficult and its allowance surrounded with precautions; and, above all, witnesses considered incompetent on principle were held to be admissible and were heard. The first of these characteristics lost much of its importance through the decrees passed by the Council General of Vienna in 1312, but it never altogether disappeared. Associated in the pursuit and the judgment of heretics were the Inquisitor and the bishop, the "judex ordinarius." Each of these functionaries maintained an independent initiative in the pursuit and the summons; but all the important steps of the procedure had to be taken in unison.[3]

Elsewhere, from the 1300s onward, the Holy Inquisition has a local history of its own with each of the important European nations. In France it soon lost its importance; at the end of the 1500s it is in rapid decline and on the way to ultimate total

[1] *Guazzini, op. cit.* "defensio," 20, c. 19, II, p. 315, 317.

[2] *Guazzini, op. cit.* p. 318, No. 7.

[3] *Clement*, 2 "de hæret." V. 3.

desuetude. The pursuit of heresy became a *royal and privileged cause*, the cognizance of which belonged to the royal jurisdictions, except when the king pleased to confer it upon the ecclesiastical authority, which sometimes happened in the course of the complex and changing legislation of the 1500s against the Protestants.

But we may leave at this stage the "Inquisitio heretica pravitatis," for the great influence exercised upon the development of French law cannot be attributed to that institution, but to the "inquisitio" of the Canon common law.

§ 3. **The "Aprise" or Official Inquest. Its Appearance in the 1200s.**—We have pointed out above that in the 1200s the official prosecution made its appearance in the secular jurisdictions under the name of "aprise."

How did this come about? Down to that time the inquest ("enquête") was only possible if the man arrested *on suspicion* submitted to it of his own free will; though an indirect and very strenuous means of constraint was often employed, "the close ('dure') prison with little to eat and drink." Was it not simpler, more in accordance with the dignity of the law, to decide that all consent should be dispensed with, that the judge should have the power to open the inquest in all cases, and if it should be conclusive, apply the punishment? Such a development was the logical outcome, and the old jurists found in the theory a judicial basis.

In case of a capture in the act, it was always admitted that the malefactor could be punished without a formal accusation, solely on the testimony of those who had seen him commit the misdeed.[1] It was thought that a fact which would be sworn to by many witnesses and which would, therefore, be a matter of public notoriety could be held to be a capture in the act; and that the judge could then of his own accord hear the witnesses and pronounce the punishment.[2] This was called "l'aprise," in low Latin,

[1] "Livre de Jostice et de Plet," XIX, 44, § 14: "Those who are arrested for present misdeed and immediately brought into court go by inquest . . . in case of denial: because it is recognized that misdeeds known to have been done ought to be punished."

[2] "If he who is arrested on suspicion of an offense will not stand the inquest into the fact, the 'aprise' is the appropriate procedure; that is to say, the judge should of his own accord make an 'aprise' and inquire whatever he can ascertain concerning the deed, and if by the 'aprise' he find the *fact notorious among a large number of people*, he can properly pass judgment upon the 'aprise.' And he should be able to ascertain the fact so clearly by the 'aprise' that the prisoner can be judged. But before he can be sentenced to death by the 'aprise,' it is proper that the fact should be clearly ascertained by at least three or four witnesses, so that the sentence shall not be based *solely upon the 'aprise' but also upon notorious fact.*" *Beaumanoir*, XL, 15 (Salmon, No. 1232).

"aprisio." Beaumanoir explains the word in this sense that "the judge is the wisest as to the necessity (of the case) that he has opened up."

According to him, this would be merely a kind of police inquiry which could only entail a condemnation if it approached the semblance of an establishment of a capture in the act.[1] But this theory was too subtle and too inadequate to last long. The "aprise" ought to be, as far as its effects were concerned, exactly similar to the inquest: but the similarity was not very striking. For a fairly long time the sufficiency of the "aprise" to sustain the ordinary and normal punishment of the offense was denied.[2] Several texts only allowed of the outlawry of the guilty person in such a case. "Les Etablissements de St. Louis" expressly says so: "If any be of evil report by proclamation or by public rumor, the law should seize him and inquire ('enquerre') into his acts and his mode of life at the place of his abode, and should he be found on inquiry guilty of any act involving capital punishment, he should not be condemned to death if no one accuse him, or when he is not taken in the act and there is no avowal. But if he will not submit to inquest, then the judge should make it and banish him, should he appear guilty on the facts and as he shall find by the inquest which he shall have made of his own accord."[3] "Le Livre des Droiz et Commandements de Justice" is no less

[1] He contrasts the "aprise" with the inquest "which brings the quarrel to an end." XL, 16 (Salmon, No. 1233).—See as to the "aprise" the "Registre des Grands-Jours de Troyes," quoted by *Brussel*, "Usage des fiefs": "Cum non appareret sufficiens, accusator . . . inquesta seu aprisio facta est," vol. I, p. 227.—"On the advice of knights, esquires, and certain other gentlemen . . . caused him to be arrested and imprisoned . . . and on the aforseaid information and advice caused an 'aprise' to be held upon the fact and suspicion of the said murder." In Beaumanoir's eyes the word "aprise" is really the translation of the term "informatio" and "aprandre" is the equivalent of "se informare." Fundamentally, therefore, he copies the Canon law as far as he can. *M. Zucker*, "Aprise und loial Enquête," pp. 93, 96, holds, on the contrary, that the term "aprise" comes from "prisio," "prise," the fact of the seizure and imprisonment of a person. But that is not reconcilable with the passage quoted from Beaumanoir. "Prise par suspicion" is doubtless frequently mentioned, but that is because the capture and the imprisonment almost always accompany the "enquête" or the "aprise."

[2] This is a feature which we have noticed in connection with the "inquisitio" of the ecclesiastical courts.

[3] *Ib.* 16; *cf. Beaumanoir*, LXI, 20 (Salmon, No. 1727). The text of the "Etablissements," in order to permit of this official prosecution, expressly refers to the Roman law: "For it is one of the duties of the provost and every loyal judge to cleanse his province and his jurisdiction of all wicked men and women according to the law written in the Digest "de receptatoribus" . . . and in the law "Congruit" in the Digest "de officio Præsidis" . . . and so he may put him to the inquest and if the inquest should prove him guilty, the judge should condemn him to death, if it be one of the cases above mentioned."

clear, although it belongs to a later epoch. "Of bad report and official action of the court; how malefactors may be punished, on proclamation, or on public report and bad repute: — To wit, he may apprehend him and inquire into his actions, at the place of his abode; and if he finds him guilty he should not therefore condemn him to death when he is not taken in the act or on avowal or when he has refused the inquiry; but he can clearly banish him according as he shall be found guilty. But several well advised deny this so far as regards the banishment." [1] — "Also, another proof which the old law calls 'inquisitive,' that is to say, when an information is laid or any official inquest ('enqueste') in any matter or offense, and witnesses are brought, but he who is under suspicion is not tried of his own free will, or taken in the act, or submits to the inquest by the country ('du païs') of his free will, such inquest shall not be the basis of his apprehension and detention for the purpose of making him stand trial." [2]

The "aprise" was undoubtedly introduced into the secular jurisdictions principally in imitation of the procedure of the ecclesiastical courts; that will be clearly apparent in the ordinances of the 1300 s which regulate the new inquest in a very clear fashion, though in few words, and which reiterate the principles and the terminology of the Canon law.[3] The first ordinance which mentions it in any precise way calls it an institution of the countries of written law. This Ordinance of 1254 is designed "for the reform of the customs in Languedoc and Languedoïl."

It contains a double text in Latin and in French. The Latin text, designed for the provinces of the South, contains an article, 21, couched in these words: "Et quia in dictis seneschaliis secundum jura et terræ consuetudinem fit inquisitio in criminibus volumus et mandamus quod reo petenti acta inquisitionis tradantur

[1] § 328.

[2] § 476, *cf. Boutaric*, "Actes du Parlement de Paris," decree of 1259 (No. 345); it concerned a real royal violation of the law; the culprit is to be kept in prison until he has paid the penalty of his crime against the king. "Salva tamen eidem vitâ suâ, membris suis et hereditate sua, quia non supposuit se isti inqueste." No. 4372; Decree of 1315; the guilty person is condemned to death: "it was proved against him that he had accepted the 'enquête' presented to the bailiff."

[3] On the influence of the Church in the domain of the procedure see *M. Glasson*, "Les sources de la procédure civile française" (Nouvelle Revue historique du droit français et étranger," 1881, p. 413 *et seq.*). *M. Stintzing* ("Geschichte der deutschen Rechtswissenschaft," 1880, p. 27) points out that by reason of the exegetic plan exclusively followed in the Universities, "the criminal procedure in so far as it was connected with the civil procedure was, especially for the canonists, a subject which they had to expound from the second book of the 'Decretals.'"

ex integro." [1] Is not the conclusion possible that the criminal inquiry before reaching the North would have taken root as a normal institution in the South, where the inquisition against the heretics had first made its appearance?

But the "aprise" found a basis of support elsewhere than in the Canon law. It is nowadays accepted that in the time of the Frankish monarchy, under the Carlovingians, another procedure held its place side by side with the strict and formal common law. In this procedure, which was styled "per inquisitionem," the judicial duel, the exculpatory oath, and the formal testimony had no place. In principle, the king alone, by virtue of his sovereign authority, had the right to proceed by inquisitions personally or by delegates. The person commissioned to inquire ("inquirere") assembled together a certain number of men belonging to the district, and, on the faith of their oaths, took their declarations upon the point in litigation; he then pronounced the sentence in accordance with their allegations. This description of regalian right did not belong to the judges except by virtue of a commission from the sovereign; but when fiscal rights were concerned the procedure was always "per inquisitionem," and the churches and monasteries obtained by privilege the employment of this procedure in the actions in which they were interested. It was also employed in actions in which widows, orphans, and the indigent, "homines minus potentes," figured. But in the Frankish period the inquisition was rarely employed except in civil matters.[2] This right of causing inquest to be made ("en-

[1] Ord. 1, p. 72. The editor points out that, in the French text, Articles 20, 21, and 22 are wanting.

[2] See upon all these points the noteworthy works of *M. Brunner*, "Die Entstehung der Schwurgerichte," ch. VI, pp. 84–126 (1871). — "Zeugen- und-Inquisitions-Beweis des Karolingischen Zeit" (1866). In the capitularies instructions addressed to the "missi" are sometimes found, which charge them to inquire ("inquirere") when a crime has been committed. But it appears that once the "inquisitio" was made, the action could proceed to its termination only in one of two ways; either an accuser presented himself, or the accused purged himself by his oath or by the ordeals. See especially "Capitulaire de latronibus," Ann. 804 (Pertz I, 129); chapter I is in very general terms: "Ut ubicumque eos repererint diligenter inquirant et cum discreptione examinant, ut nec hic superfluum faciant, ubi ita non oportet, nec prætermittant quod facere debent;" but chapter 2 provides for the presence of an accuser and the judicial duel; chapter 3 speaks of ordeals. See also examples of official prosecution in the laws of the barbarians. Lex Burg., LXXXIX (*Walter*): "*De reis corripiendis.* Gundebaldus rex Burgundionum omnibus comitibus . . . præceptionem ad eos dedimus ut si quos caballorum fures, aut effractores domuum, tam criminosos quam suspectos invenire potueritis, statim capere et ad nos adducere non moretur. Futurum ut is qui capitur, et ante nos adductus fuerit, si se innocentem potuerit adprobare, cum omnibus rebus suis liber abscedat, neque calumniam pro eo quod ligatus aut captus est movere præ-

querir ") was retained by royalty in the Middle Ages. It exercised it when its civil or feudal interests were at stake. The " Livre de Jostice et de Plet " contains an important chapter which in this respect reproduces the principles of the Frankish period.[1] Book XIX, Tit. 44: " § 1. If the king claims from any one heritable or movcable property, taken from him or due to him, he wins or loses by inquest. . . . § 3. If any one beats or maltreats one of the king's officers of the law while in the performance of his duty, that is a matter for inquest. . . . § 7. If any stranger take a prisoner of the king's, together with other things belonging to the king, by main force, that is a matter for inquest. . . . § 11. Whoever makes raids by force of arms and carries away and destroys, that is a matter for inquest. . . . § 13. He ought to make inquest who knows to do it; and should make inquiry as to all the particulars of the dispute, and the witnesses cannot be falsified." [2] But that did not apply to criminal matters; the consent of the accused was at that time necessary, as we have seen, before the inquest (" enquête ") could proceed. This reasoning, then, must be adopted; since the king is directly interested in the repression of crime, why not employ the inquest in this case as in all cases where the king's interests are concerned? This is a strong argument; and it happens that in the same chapter of the " Livre de Jostice et de Plet " in which we read that old maxim " none shall be put to the inquest to lose life or limb " [3] we see the inquest admitted in criminal matters:

" If injury is caused to a poor person who cannot prosecute his rights, either by himself, his goods, or his friends, such matter should proceed by inquest; for such matters are not allowed to come to naught because of such poverty. And if he claim for an

sumat. Si vero criminosus inventus fuerit, pœnam vel tormenta suscipiat, quæ meretur . . . et non solum in eum tantum pagum, ubi consistit, liceat persequi criminosum; sed sicut utilitas aut fides uniuscujusque habuerit, etiam per alia loca ad nos pertinentia non dubitent hujusmodi personas capere, et judicibus præsentare, ut præfata scelera non liceat esse diutius impunita." — *Lex Wisigoth*, Lib. VI, tit. 5, l. 14: "Si homicidam nullus accuset, judex mox ut facti crimen agnoverit, licentiam habeat corripere criminosum, ut pœnam reus excipiat, quam meretur."

[1] The title is: "What matters should be dealt with by inquest."

[2] In civil matters, the inquiry was introduced on a great many points into the ordinary procedure, in order to dispense with the "battle." This was done, for example, in matters of sasine ("Livre de J. et P." XIX, 44, § 6), of partition (*ibid.*, § 10), and wills (*ibid.*, IV, 4, § 1). Chapter 44 of book XIX sets out with a maxim very propitious to the extension of the inquiry. *Johanz de Beaumont* says: " Chamberlains of France should see to it that battles should be avoided as far as possible and that lawsuits should be brought to an end; this concerns a right common to all.' "

[3] XIX, 44, § 4.

offense involving capital punishment it is not a matter for inquest, except it happen that the king should grant conditional absolution." [1] And a little further on: " If the man or the woman who is killed shall have no relative or friend who can avenge him or her, the king can prosecute and punish according to what is ascertained in the 'aprise,' without capital condemnation." [2] — " The king can make an inquisition by reason of evil notoriety on keepers of brothels, thieves, doers of malicious mischief, rioters, and those who are accustomed to commit other mischief, and punish at his pleasure, without capital punishment, so that honesty do not suffer; if any one is feared on account of his cruelty or excesses, punishment ought to be administered without delay." [3]

In this way the inquest by the country (" enquête du pays ") was bound to become merged in the " aprise." But the probability is that the right of causing an inquest to be made (" faire enquérir ") was at first exercised by the king alone as a kind of right of the crown. The " Olim " books, which offer numerous examples of criminal inquests, do not fail to note that they were held " de mandato domini regis." [4] Even at a fairly late date the right of inquest was still refused to the inferior courts of justice: " No mesne lord can release a felon without the assent of the baron, but the cognizance belongs to the baron; nor can he cause inquest to be made ('fere enqueste '), which appertains to high justice." [5]

§ 3 *a*. **Same: The Denunciation.** — The " aprise " led to the *denunciation*. Many people were bound to shirk an " accusation." Its danger was apparent as long as the judicial duel remained in existence, and later, the courts, following the

[1] XIX, 44, § 8.

[2] XIX, 45, § 1.

[3] XIX, 44, § 12. The "Livre de Jostice" also takes notice of the ecclesiastical inquisition, I, 3, § 7: " The king by advice of his barons makes the following 'établissement' or law; when a man shall be suspected of heresy, the ordinary judges should request the king or his court to make the 'aprise' in regard to the case. He should be apprehended and imprisoned. Afterwards the bishop and the prelates of the place, that is, the Church officials, should hold an inquisition upon his case and inquire of him concerning his faith. And if he is condemned by their judgment and holy Church takes what belongs to it, the king afterwards takes possession of the prisoner and causes his execution, and all his goods belong to the king, except his wife's dowery and his heritage."

[4] See for example vol. I, pp. 213, 394, 482, 544, 619, 768. See *Pardesssus*, "Organisation judiciaire," p. 107: "The court (of the king) appears in very early times to have given to the proof by witnesses or by written documents the preference over the judicial combat, and I firmly believe that, when Saint Louis, by the ordinance of 1260, prohibited this combat within his domains, he but generalized a custom which his court had for a long time practised."

[5] "Etablissements de St. Louis," II, 35. Probably the only object of this text, even in its concluding words, was to limit the right of low justice.

principles of the Roman law, still declared that the defaulting accuser could be condemned to the punishment of the talon. It is important to remember that before the ecclesiastical courts the injured party could rest satisfied with denouncing the misdeed to the judge, who then prosecuted officially; and this convenient procedure now came to be employed before the secular jurisdictions. But at the outset, as in the case of the "aprise," before the denunciation could be effectually made, the fact must be sworn to by numerous witnesses, — it must be tantamount to a taking in the act.[1] This restriction was bound very soon to disappear and the denunciation to be always admitted. The complainant, however, did not necessarily lose all his interest in the action: he often remained a party to it, — as in the case of the "promovens inquisitionem" of the Canon law, — with the object of obtaining a pecuniary reparation for the damage which he had suffered; this gave rise to the appointment of the civil party. The following passage of the "Livre des Droiz" contains a very accurate description of the new forms of the criminal procedure: "The law declares that there is a difference between accusation, inquisition, and denunciation. '*Accusation*' is when any one accuses another of crime and constitutes himself a party; it is proper in such case that he give security and submit to the punishment known to the law as 'ad pœnas talionis.' '*Inquisicion*' is when the judge makes inquiry of his own accord and brings suit 'quod fama præcedat,' according to law. '*Denonciation*' is when any one informs against another in any matter, for the purpose of having restoration of his chattel, in which case he should aver that he does not seek criminal recourse against the party, but merely restoration of his chattel." [2]

The "aprise" and the denunciation were not introduced without meeting with strong opposition. When the person prosecuted was a serf ("homme de poeste") there was little trouble; but when the matter concerned a gentleman having the right

[1] *Beaumanoir*, LXI, 2 (Salmon, No. 1710): "But there is indeed another way besides the accusation; for before the accusations are made, if he who desires to accuse wishes, he may denounce to the judge that this misdeed has been done in the sight and to the knowledge of so many reputable men that it cannot be hidden; and upon this he ought to act as a good judge would, and inquire into the matter although the party does not wish to submit to inquiry. And if he find the misdeed open and notorious, he may sentence him according to the misdeed. For it would be an unjust thing if any one had killed my near relative openly or before a large number of people, if it behooved me to fight in order to obtain vengeance. And so in those cases which are mentioned one may proceed by way of denunciation."

[2] § 942.

to trial by his peers according to the old forms, with accusation and battle, the "aprise" constituted an attack upon the privileges of the feudal subject. The aristocracy resisted, and numerous traces of this strife remain. The most curious document reflecting this is the account of an action brought against one of Saint Louis' "men" ("hommes"). This narrative, reduced to writing by the Confessor who wrote a life of the king, presents a vivid picture of this old quarrel, and we may be pardoned if we quote it almost in its entirety. "As my lord Enjorranz, lord of Couci had caused three young gentlemen to be hanged . . . because they were found in his forest with bows and arrows [1] . . . the said abbot [2] and certain female relatives of the said persons who had been hanged carried complaint of their killing before our gracious king; who caused the said Enjorranz, lord of Couci to be summoned before him, since it was his duty to make adequate inquest ('enqueste suffisant') as should be done in such a case; and he then caused him to be arrested by his knights and officers and brought to the Louvre, and put in prison and there held in a room, unfettered. And one day while the said Enjorranz, lord of Couci was thus held, our said gracious king caused the said lord of Couci to be brought before him, with whom came the king of Navarre, the duke of Burgundy, the count of Bar, the count of Soissons, the count of Brittany, the count of Champagne, my lord Thomas, then archbishop of Rheims, and my lord Jehan de Thorote, and also all the barons of the kingdom.[3] Finally it was proposed on behalf of the said my lord of Couci before our gracious king that he desired to take advice, and then he went apart with all the beforesaid noblemen . . . and when they had consulted a long time they returned before his gracious majesty and the said my lord Jehan de Thorote [4] in behalf of the said Enjorranz, lord of Couci urged that he ought not to and would not submit himself to inquest in such case, such inquest touching his person, his honor, and his property, and that he was ready to defend himself by battle, and denied absolutely that he had hanged the aforesaid youths or caused them to be hanged. And when our gracious king had patiently heard the determination of the said my lord Enjorranz, lord of Couci, he replied that in the affairs of the poor, the churches, and of those deserving of commisera-

[1] They had committed a hunting offense.
[2] The three youths belonged to the retinue of an abbot.
[3] This is an assembly of peers called together to judge one of their number.
[4] He plays the part of "avant parlier."

tion it was not proper thus to proceed by law of battle; for it was difficult to find any who would combat for such manner of people against the barons of the realm, and he said that a new procedure could not be adopted different from that followed in former times by our ancestors in similar cases. And then his gracious majesty related how his uncle, king Philip, because my lord Jehan, then lord of Soilli, was said to have committed a homicide, caused an inquest to be made against him and held the castle of Soilli for twelve years, although the said castle was held of the king by immediate homage. Then his gracious majesty refused the said request and straightway caused the said lord of Couci to be arrested by his officers and brought to the Louvre and there held under arrest . . . and then his gracious majesty adjourned his court and the aforesaid barons departed thence amazed and abashed. And that same day, after the said reply of his gracious majesty, the count of Brittany said to him that he ought not to maintain that inquests should be made against the barons of the realm in regard to matters which concerned their persons, their property, and their honor. And his gracious majesty replied to the count: 'You did not speak thus in former times when the barons who held of you by immediate homage brought before us their complaints against yourselves and offered to prove their cause of action in a specified case by battle against you. You then answered before us that you should not proceed by battle but by inquests in such cases, and that battle is not the lawful way.' — He added that, since the said lord of Couci had not submitted to the said inquest he could not, according to the customs of the kingdom, judge by inquest made against him by which he could punish him personally. But as he knew well God's will in this case, he would not allow his noble birth or the power of any of his friends to prevent him from administering full justice upon him. And finally his gracious majesty, by the advice of his counsellors, sentenced my lord of Couci (to a fine) of twelve thousand livres of Paris." [1]

[1] "La vie de St. Louis" by Queen Marguerite's confessor. "Recueil des Historiens des Gaules et de la France," Vol. XX, pp. 113, 114. The demands of the barons are renewed with added vigor on the death of St. Louis. When Queen Blanche convoked them for the coronation of her son, they laid down their conditions: "Maxima pars optimatum ante diem præfixam petierunt de consuetudine Gallicana omnes incarceratos et præcipue comites Flandrensem Ferrandum et Bononiensem Reginaldum a carceribus liberari, qui in subversionem libertatum regni jam per annos XII aretiori custodia in vinculis tenebantur. Petierunt insuper quidam eorum terras suas sibi restitui quas pater ejus Ludovicus et avus illius Philippus multo jam tempore injuste detinuerant occupatas. Adjiciunt

Here the protests of the barons and the manner in which St. Louis laid down the new doctrine are portrayed with a lifelike touch. But royalty could not overcome everywhere and at once this obstinate resistance of the old system of law. In the 1300s we find, on the contrary, a number of documents which half yield to it. Two ordinances of 1315 (Louis X) recognized the privileges of the aristocracy of Burgundy and Champagne in this respect. The king decides upon the protest which has been made to him: "The first matter submitted to us is as follows. First, that in case of crime it shall not be lawful to proceed against the said nobles by denunciation or upon suspicion, nor judge or condemn them by inquests, unless they submitted thereto; although the suspicion might be so great and so notorious that the suspected parties against whom the denunciation should be made ought to remain in the custody ('en l'hostel') of his lord for a period of forty days, or two or three such periods at the most, and if within that time no one should accuse him ('l'approchoit') of the deed, he should be liberated on bail ('ostagez'); and if an accuser present himself ('en faisant partie') he should be entitled to have their defense by wager of battle. We allow them, if the person be not so infamous or the deed so notorious that the lords should have recourse to some other remedy. And as to the wager of battle, it is our will that it be made use of as has been formerly done." [1] And the following provision is made in regard to the nobility of Champagne: "Art. 13. Also, when any gentleman of Champagne was arrested on suspicion in case of crime he should be heard as to his sufficient reasons and defenses and held prisoner for a certain time, and if any one should appear who accused him ('feist partie contre li') he was entitled to defend himself by wager of battle if he did not desire to submit to inquest. And to this end he should be released from prison, if he had not been arrested in present misdeed ('en présent meffet'). It is our will and purpose that every one arrested for a criminal matter be heard as to his sufficient reasons and that justice be done him in the matter, and if any 'aprise' be made against him, that he be not condemned or judged by that 'aprise' alone." [2] Finally, Bouteiller also shows that the nobility of Artois enjoyed the same privileges:

etiam quod nullus de regno Francorum debuit ab aliquo jure suo spoliari nisi per judicium XII. parium." Math. Paris, "Historia Major Anglorum" (ann. 1226), *Wats.* edition Paris, 1644, p. 231.

[1] "Ordonnance rendue sur les remontrances des nobles de Bourgogne, des Evêchez de Langres, d'Autun et du Comté de Forès" (Ord. I, p. 558).

[2] Ord. I, p. 575.

"Be it known that according to the customs of Artois and several places, a gentleman who does not submit to inquest should not be put nor be compelled to put himself (to inquest) if he does not request it. And if that should be done without his knowledge and consent, he should not be prejudiced thereby if he does not voluntarily ratify it." [1]

§ 3 *b*. **Same: The Secular Inquisition in the 1300 s.** — The inquisitorial procedure, however, constantly gained ground. It made especial progress in the energetic hands of the royal officers. Some traces of this progress are still discernible. In 1347 King Philip of Valois decides upon the demand of the inhabitants of Lyons against the king's counsel. The former complained: "quod passim et indifferenter judex ordinarius inquirit de omnibus criminibus sine accusatore vel denunciatore, qui persequitur legitime, cum tamen consuetudo dictorum civium sit, sicut asserunt, quod solum in criminibus furti, incendii et proditionis inquisitio fieri debeat, et non aliter nisi post denunciationem et accusationem ut suprà." The king merely ordains that this custom be proved by witnesses.[2] In 1363 King John confirms the privileges granted to the inhabitants of Langres by their bishops, by which the official prosecution is limited only in a certain degree:[3] "We declare and ordain that neither we nor any of our said officers shall be entitled to proceed against the said inhabitants nor arrest any of them officially, except in criminal cases where person and property are at our disposal, and the certain committing of the deed be notorious and against a person of bad fame and repute or strongly suspected of the said deed. . . . But our spiritual officers shall be entitled to proceed officially against those inhabitants, according as the law allows them." The "Très-ancienne Coutume de Bretagne" retains distinct traces of this development: ch. 113. "Whoever commits an offense against minors or those under the protection of justice or the Holy Church, women or men of feeble condition, as to property or person, or

[1] "Somme rurale," I, Tit. 34, p. 224.

[2] Ord. II, p. 258. In a certain number of town charters lists are found limiting the crimes for which proceedings "per inquisitionem" could be taken. See "Consuetudines Tolosæ" rubric "de inquisitionibus" *Bourdot du Richebourg* (IV, 2, p. 1044). "Cout. de Limoges" (in Latin), *ibid.*, p. 1149.

[3] The inhabitants made the following complaint: "It is deplored by us and our said officers that it is declared that no matter what be done, neither we nor our said officer can proceed officially against them in a criminal case, nor arrest for such an offense, if the said resident male or female be not taken in present misdeed or be not prosecuted by party, or the fact be not *notorious*, both by their privileges and customs above mentioned and by certain decision already made on the subject by our bailiff."

against those who come or go to church or market, or on pilgrimage or (to attend) their lord's term days or for fire or water at home or abroad, on the sea or the highway, who are on their way from house or from market or to market town or whatever the offense may be the law can proceed against such offenders on denunciation of party." [1] — ch. 114. "When a serious offense is committed in a district, such as murder or burning of houses or property or highway robbery or despoiling of churches, or of ships, or other serious offenses, it is the duty of the judge to cause the people of the district to be put on oath in regard to the matter, men, women, children, and servants, who are capable of taking the oath, and to demand of them where they were on the night or the day that the offense was committed, and if the judge find that the people of a house are changeable, he can arrest them: and if he can find from others that any one is suspected, he shall proceed against them as should be done according to custom." — ch. 115. "And also justice may and shall proceed with all action where the blood of man or woman has been shed by violence." [2]

Although the accusation, as we have already pointed out, by no means disappeared,[3] the accusatory procedure, as we have described it, underwent important modifications. The wagers of battle began to disappear. The ordinance issued by St. Louis in 1260, at the Parlement of the Octaves of Candlemas, was the point of departure of this transformation.[4] This is the celebrated "Etablissements le roy" of which Beaumanoir speaks so often in his chapters on *proofs*, *inquests*, and *wagers of battle*. "We prohibit all battles within our domain . . . and for battles we substitute proof by witnesses," said the king. This resulted

[1] *Bourdot de Richebourg*, IV, 1, p. 227. It will be noticed that the majority of the matters struck at call to mind those in which, at the Frankish period, the procedure was "per inquisitionem" in civil matters.

[2] *Cf.* ch. 102, p. 225: "And if he is not captured in the act or on pursuit, or if the fact is not notorious, as the saying is, — for the reason that he has been dwelling in the district for five years, and is of good repute, as one who goes to church and market, and has not been arrested for crime, he may say, in case the courts wish to proceed against him, that under the customary law he cannot be compelled to submit to proof by witnesses against him."

[3] According to certain texts, this was even the only way open to certain parties, since everybody was not allowed to denounce: "Coutume de Bragerac," Art. XXII: "Item si quis vilis conditionis et parvi status voluerit denunciare contra hominem bonæ famæ et boni status, non suspectum de contentis in denunciacione predicta, talis denunciatio minime recipitur. Si vero eum accusare velit directe, ad hoc erit admittendus, dum tamen criminosus et captus accusans non existat." *Bourdot de Richebourg*, IV, 2, p. 1016.

[4] Ord. I, 86; *Isambert*, I, 283.

in the suppression of the *appeal* or direct challenge to the judicial duel and the challenging ("faussement") of witnesses for perjury. The consequence was that a goodly number of persons hitherto incapable of testifying became competent witnesses.[1] But that was not all. The king also changed the method of taking the testimony. The new method was very much more intricate and required much more learning than the old, and writing played a great part in it. It was copied from the practice of the ecclesiastical courts, and it also borrowed some of the features of that inquest of which we have formerly spoken. The witnesses, summoned by order of court,[2] no longer appeared in open court, but before certain delegates of the judge, who were called inquirers ("enquesteurs") or auditors.[3] They questioned the witnesses separately and "artfully" ("subtilement"). This, it will be seen, is far removed from the old formal testimony. The parties were not present at this examination. They were present only at the taking of the oath by the witnesses; at which time they were obliged to state their grounds of objection to the competency of the witnesses if they had any to urge, or at least reserve them.[4] The examiners reduced the depositions to writing, and these writings became the principal document in the action; moreover, both parties, accused as well as accuser, had access to it; "the auditor should hear them (the witnesses) separately and anon make public;"[5] — "then he shall judge of the matter according to the testimony of the witnesses published to the parties."[6]

The accused could produce witnesses on his side. The sentence was pronounced in open court, after a debate in which both parties or their counsel addressed the court.

It will be seen that the forms of the accusatory procedure and those of the official prosecution or the prosecution on denunciation tended to borrow from each other and even to become merged.

[1] *Beaumanoir*, XL, 37 (Salmon, No. 1259).

[2] As they no longer ran any risk, they could not thereafter refuse to testify.

[3] *Beaumanoir*, XL, 12 (Salmon, No. 1234). These were practitioners or experts, "prud' hommes" and occasionally the judge's assistants, officers of the court, and others.

[4] *Beaumanoir*, XL, 18, 28; XXXIX, 27, 28 (Salmon, Nos. 1240, 1251, 1170, 1171).

[5] "Etablissements de St. Louis," I, 1.

[6] Ord. of 1260, Art. 4. The most elaborate precautions were taken to have this important document accurately worded and preserved. The inquirers must be "at least two lawful and capable persons" and each time the inquest was closed, the document must be closed and sealed. *Beaumanoir*, XL, 2, 27 (Salmon, Nos. 1225, 1250). Here we find already the "sacs" of later days.

But this was still merely a tendency. The king had not been able to force upon the lords justiciar the procedure which he introduced within his own domains. It took time for the inquest to gain ground and supersede the battle; it forced its way on its own merits alone.[1] The judicial duel did not disappear all at once and forever, even within the royal domains. In 1306 Philip the Good readmitted it into all accusations involving capital punishment except theft, where the crime had been committed "so secretly and quietly ('en repos') that it would have been impossible to convict the perpetrator by witnesses."[2] But it was an institution doomed to extinction. In Bouteiller, the wagers of battle appear as something unusual and adventitious; and Loysel says later, "All battles and combats are now probibited, and the king alone has the power to decree them."[3]

§ 4. **Torture.** — Although the judicial duel was kept up for a rather long time, and although Philip the Fair temporarily reestablished it within the crown domains, this was, according to the Ordinance of 1306, because of the great difficulty in producing the two eye-witnesses required by the old customary law to sustain condemnation. But practice ere long introduced a new method of inquiry, as powerful as it was odious, namely, torture.

Torture is out of place in a purely accusatory procedure and in a free country; the accuser and the accused are two combatants who fight in broad daylight and with equal weapons. So at Rome, as long as the procedure remained strictly accusatory, torture was never made use of against a freeman. Although it did play a great part in criminal actions, that was when it was necessary to make a slave speak, either as an accused or as a witness; in the olden days the idea was universal that the slave only told the truth when under the influence of pain.[4] An exception to this rule was made by the law "Julia Majestates," which decreed that when the crime of high treason was concerned all accused persons without distinction might be put to the torture. As the criminal procedure underwent modification and the accusatory principle lost ground, the employment of torture was, ere long, admitted as

[1] "Établissements de St. Louis," I, 24; *Beaumanoir*, XXXIX, 21; LXI, 15, 16 (Salmon, Nos. 1165, 1722, 1723): "When king Louis abolished them (the wagers) in his court, he did not abolish them in the barons' courts."

[2] Ord. I, p. 435; *Isambert*, I, p. 831. See "Stylus Curiæ parlamenti," ch. XVI.

[3] "Inst. Cout.," VI, 1, max. 30.

[4] See *Geib*, "Geschichte des römischen Criminal prozesses bis auf Justinian," p. 348 *et seq.*; and our study on the "Délit d'adultère à Rome" (Nouvelle Revue historique, 1878, p. 416 *et seq.*).

a normal mode of proof in accusations or suits relating to serious matters, when strong presumptions already existed against the accused. But, except in actions for high treason, the "honestiores," that is, all those belonging to the upper classes of society above the rank of decurions, were by law exempt from torture.[1]

The system of private accusation which the barbarians brought with them did not recognize the employment of torture any more than did the old Roman procedure. When the "Leges" were drawn up, however, a place was found in a certain number of them for this cruel method of examination; these were the law of the Bavarians,[2] that of the Burgundians,[3] the law of the Vizigoths,[4] and even the Salic Law.[5] This was, of course, a borrowing from the Roman institutions;[6] but few of these laws sanctioned torture except in the case of an offense ascribed to a slave, and to that extent the borrowing is comprehensible. The Germanic law gave to the aggrieved party a right of action against the master of the delinquent slave,[7] with this proviso, that the owner could not undertake the defense of the "servus."[8] The latter was at that time obliged to defend himself; but he was not acknowledged to have the same rights as a freeman; he could not purge his fault by oath supported by co-swearers; he had to undergo the ordeal of fire or boiling water.[9] Was it not surer and simpler, without being more cruel, to subject the slave to torture, then, as did the Romans? So it was decided by the "Leges" cited above, precautions being taken, at the same time, for the indemnification of the master should the slave tortured prove to be innocent.[10] The law of the Burgundians subjected, not only

[1] *Geib, op. cit.* p. 615 *et seq.*

[2] *Merkel*, "Text. primus," Tit. IX, § 19. *Pertz*, "Leges," II, p. 306 (*Walter*, VIII, 18).

[3] Tit. VII, XXXIX, LXXVII (*Bluhme* edition). *Cf.* CVII, 3.

[4] L. VI, Tit. I, ll. 1–3. [5] Tit. XL (*Merkel*).

[6] No manuscript version of chapter XL of the Salic Law contains any "Malberg glosses."

[7] *Cf. Wilda*: "Strafrecht der Germanen," p. 650 *et seq.*

[8] *Ripuar.*, Tit. XXX: "Si servus talis non fuerit, unde dominus ejus de fiducia securus esse possit, dominus . . . sine tangano loquatur et dicat: ego ignoro utrum servus meus culpabilis an innocens de hoc extilerit." *Walter*, I, p. 171.

[9] *Ripuar.*, XXX, § 1 (al. 31): "Quod si servus in ignem manum miserit et læsam tulerit, dominus ejus . . . de furto servi culpabilis judicetur." Lex Frision, III, 6: "Servus autem ad judicium Dei in aqua ferventi examinet." *Walter*, I, 356.

[10] The Salic Law permitted the slave to be subjected to torture a second time, XL, 2: "Si confessus non fuerit, ille qui eum torquet, si adhuc voluerit ipsum servum torquere etiam nolente domino, pignus domino servi dare debet sic servus postea ad suppliciis majoribus subditur." *Bajuv.*, VIII, c. 23, § 1: "Si quis servum alienum injuste accusaverit, et innocens tormenta pertulerit . . . domino simile mancipium reddere non

the slave, but also the husbandman ("originarius, colonus"), to torture,[1] and in a peculiar provision, it even condemned to it the stranger ("advena") who came to seek refuge with a Burgundian. It is true, as the text shows, that such "advena" was strongly suspected of being a fugitive slave.[2]

The law of the Visigoths goes farther. More thoroughly impregnated than any other with Roman law, it allows torture even when the accused is a freeman, in default of other proof. Its system is most peculiar in other respects. It conforms the method to the accusatory principle. If the accuser cannot otherwise prove his accusation, he must claim the application of torture by an "inscriptio trium testium subscriptione roborata;[3] he must besides lay his complaint before the judge secretly and in writing, the confession made under torture being of no avail when the accused knew of what he was accused.[4] The accused is safeguarded in other respects. If he comes out of the ordeal victorious, his accuser is put at his discretion.[5] Moreover, a gentleman could not be tortured except for the most serious crimes "in caussis regiæ potestatis, vel gentis, aut patriæ, seu homicidii vel adulterii," and upon the accusation of a person of his own rank. The freeman of inferior station could also be put to torture for a theft or other offense, provided the value involved exceeded the sum of five hundred solidi.[6] Should a less sum be involved, the judge must subject the accused to the ordeal by boiling water, and if that did not show his innocence, he could then torture

moretur." *Cf. ibid.*, §§ 2, 3. Burg., VII, LXXVII. Lex Wisigoth, Book VI, Tit. I, l. 5.

[1] Burg., Tit. VII.

[2] Burg., XXXIX, § 1: "Quicumque hominem extraneum cujuslibet nationis ad se venientem susceperit, discutiendum judici presentet, ut cujus sit, tormentis adhibitis fateatur."

[3] Lex Wisigoth, Book VI, Tit. I, l. 2: "Quod si probare non potuerit . . . trium testium inscriptio fiat, et sic quæstionis examen incipiat." (*Walter*, I, 537.)

[4] *Ibid.*: "Accusator omnem rei ordinem scriptis exponat, et judici occulte præsentata sic quæstionis examinatio fiat . . . quod si accusator, priusquam occulte judici notitiam tradat, aut per se aut per quemlibet de re quam accusat per ordinem instruxerit quem accusat, non liceat judici accusatum subdere quæstioni, cum jam per accusatoris indicium detectum constet ac publicatum esse negotium."

[5] *Ibid.*: "Qui subditur quæstioni, si innoxius tormenta pertulerit, accusator ei confestim serviturus tradatur; ut salva tantum anima, quod in eo exercere voluerit, vel de statu judicare in arbitrio suo consistat." The remainder of the text also delivers up to the relatives of the accused the accuser who (he being the director of the torture) shall have caused the death of his victim in the torments.

[6] *Ibid.*: "Inferiores vero humilioresque ingenuæ tamen personæ, si pro furto, homicidio, vel quibuslibet aliis criminibus fuerint accusatæ, nec ipsi inscriptione præmissa subdendi sunt quæstioni, nisi major fuerit caussa quam quod quingentorum solidorum summam valere constiterit."

him.[1] It might also be possible to find in the law of the Burgundians a provision subjecting freemen to torture; but the text dealing with this is rather obscure.[2]

When the feudal system was evolved, torture, the use of which, as we shall show, had by no means wholly disappeared along with the judicial organization of the Roman empire, had no place in the accusatory and public procedure which brought the fief owner ("homme du fief" or "miles") before his peers. But is it quite certain that it was never employed when the justiciar or his provost arraigned before them those bondsmen and peasants who could not appeal from their sentence except to God?[3] Beaumanoir speaks of it in one passage rather in an appreciative way; but there is no mention of torture in Pierre de Fontaines. The "Livre de Jostice et de Plet," which, as we know, follows the order of the Digest, reproduces no provision under the title "de Quæstionibus," and its Book XX, which corresponds with Book XLVIII of the Digest, is one of those in which its unknown author lays completely aside the Roman law, to the influence of which he so often bows, to follow the purest and most archaic customary law. On the other hand, the "Assizes of the Court of Bourgeois of Jerusalem" contains two passages in which torture figures, and where it is mentioned as a well-known institution. One of these deals with the case of a dead man whom a person has buried at the home of the latter; public rumor reveals a crime: "And if it be known by public rumor that he had been killed, justice demands that the body shall be disinterred to ascertain how he met

[1] Lex Wisigoth, Book VI, Tit. I, l. 3: "Quamvis parva sit actio rei facta ab aliquo criminis, eum per examinationem aquæ ferventis a judice distringendum ordinamus, et dum facti temeritas patuerit, judex eum quæstioni subdere non dubitet."

[2] Tit. LXXXIX (*Walter*): "Gundebaldus rex Burgundionum omnibus comitibus . . . præceptionem ad vos dedimus ut si quos caballorum fures, aut effractores domuum, tam criminosos quam suspectos invenire potueritis statim capere et ad nos adducere non morentur. . . . Si vero criminosus inventus fuerit pœnam vel *tormenta* suscipiat quæ meretur." *Cf.* Bluhme edition, Tit. CVIII, and the note. (*Pertz*, "Leges III," 577.)

[3] In the first edition of this work I said: "*M. Beugnot* in the 'Glossaire' accompanying his edition of *Beaumanoir* gives the word 'gehine' (torture) without referring to any passage in the book and we have not been able to find any place where it is mentioned." But M. Salmon in his "glossaire" refers, at the word "gehine," to No. 1996 of his edition (CLXIX). *Beaumanoir* relates the strange and interesting story of a woman who caused her husband to be beaten to death by two ribalds and impudently tried to charge them with it before the judge; but the latter discovered the fraud; "then accused her of two lies which she had told and imputed the deed to her, and as soon as he determined to put her to the torture ('engehine') she confessed the whole truth and was burned." It is true that in this case there was only the threat of or presentment to the torture.

his death. And if it is seen or ascertained that the deceased had been strangled or killed by violence, the court is then bound to try these people by the drinking ordeal or torture so that it may ascertain the truth of this misdeed. And if he has killed him by violence,[1] it is right that all who were concerned in the misdeed should be buried head downwards without other injury."[2]

The other text deals with the case of a man whom two knights swear they surprised in the act of committing murder. Both men being relatives of the victim, their testimony is not sufficient to entail condemnation, in the absence of a confession, but it is sufficient to cause the accused to be put to the torture "*by water*" without having recourse to the accusatory procedure. "The evidence of two liege men should be equivalent to that of two sworn men ('jurés') and it is a matter for trial by the assize because the deceased is not related to the liege men. For if he were related reason judges that the prisoner should not be hanged if he did not acknowledge it. But it is quite reasonable that he should be put to the torture by water until he acknowledge the truth and as soon as he shall have acknowledged it, he should then be hanged. But if he acknowledge nothing under the anguish that he has suffered for three days,[3] he should then be imprisoned a year and a day, to see if within that period he will submit to the ordeal, or if any one will appear who will prove him guilty of this murder. And if no one appears within the year and the day and he will not submit to the ordeal he should be released from prison and therewith acquitted of the murder without being required to answer any one who should desire to accuse him, because he has done all that was required of him."[4]

The Ordinances lay down and regulate the employment of torture from the 1200s. The Ordinance of 1254, Art. 21, ordains that torture shall never be administered upon the testimony of a

[1] There is either an error or a hiatus in the text at this point: the *Kausler* edition has the note, "Locus lacuna laborat."

[2] Ch. 285 (*Beugnot* edition, II, p. 216). *Cf. Kausler* edition, CCLVIII (pp. 338, 339). The text, after explaining that it concerns a person who has buried a man in his house, proceeds: "If it happen that a man or a woman inter in the town, a dead man or woman in his or her house," then after declaring that the place is confiscated to the good of the Church, he adds: "And the body be given up to the mercy of God and the proprietor of the land, since he who has done such misdeed cannot very well be heard to say whether he killed him whom he buried or whether the latter died a natural death."

[3] It should be noted that according to the law of the Visigoths, torture could also last for three days. Book VI, Tit. I, l. 2: "Per triduum quæstio agitari debet."

[4] *Kausler* edition, ch. CCLIX, pp. 314, 315.

single witness when the accused is a man of good fame. "Personas autem honestas et bonæ famæ, etiam si sint pauperes, ad dictum testis unici, subdi tormentis seu quæstionibus inhibemus, ne hoc metu vel confiteri factum vel suam vexationem redimere compellantur."[1] In 1315, the nobility of Champagne protest against the use of torture, and the king decides upon their grievances: "Art. 51. Also, Concerning the complaint that our officers and provosts go upon their property to summon private persons and their men before them, and that they put them to the torture contrary to their customs and rights. We will and ordain that our said provosts and officers cease from all the aforesaid things, in accordance with the strictest commands of the old ordinances on the subject."[2] But here again all protests were doomed to futility; in the 1300s torture was already in general use.[3]

What were the causes which permitted the establishment of this odious procedure?

In the first place, the energetic repression of crime was necessary. Royalty strove to satisfy this necessity, so at first torture appears most frequently before its jurisdictions.[4] The influence of the Roman law was predominant. Our jurists found, in the pages of the Digest and the Code, the custom of torture expounded by the great jurisconsults and regulated by the constitutions of the emperors. Such weighty authority was without doubt bound to cause partial forgetfulness of the odious nature of this mode of examination, of its cruel character; moreover, the people of these rude times were not likely to be too sensitive.[5]

[1] Ord. I, p. 72. This article is one of those found in the Latin text only and wanting in the French text.

[2] Ord. I, p. 575.

[3] [For another account of the history of torture, see Professor *A. L. Lowell*'s article on "The Judicial Use of Torture," Harvard Law Review, XI, 293. Further citations on its history in England are given in *Wigmore*, "Treatise on Evidence," 1905, I, § 818, n. 7. — TRANS.]

[4] A passage in *Bouteiller* ("Somme rurale," I, 34, p. 229) shows that not all of the jurisdictions had the right to put to the torture: "Be it known that in the case of a court where the men judge according to their custom and law, they should not judge by confession by torture, for such judges have no authority to put or cause any one to be put to torture, and cannot judge if it is not confessed before them without any recourse to torture, or if it is not duly proved by witnesses. And so the usage of inferior courts ordains."

[5] Other authorities did not blink the terrible nature of torture. See in this respect a curious passage in the "Très-ancienne Coutume de Bretagne," ch. XCVII: "If he deny the deed, and be taken either red-handed or in pursuit or the deed be notorious among the people of the parish, it is proper that he submit to the inquiry and the "garentie" (proof by witnesses) . . . and if it cannot be completely proved and common report or strong presumptions are found to be against him, he should have ordeal or torture three times. And if he can endure the torture or the ordeal without confessing he shall have saved himself (*and it will be evident that God performed miracles for him*), and he should go unscathed concerning the deed and it should be adjudged that he be acquitted and released." (*Bourdot de Richebourg*, IV, 1, p. 214.) — As in the passage in the "Assises" and that in the law of the Vizigoths quoted above the text speaks here of torture *on three occasions*.

A last cause was that torture filled a blank in the official prosecution, the "aprise," as we have described it. The "aprise," as we have said, could not form the basis of a capital sentence unless it contained testimonies so numerous and so conclusive that the fact could be regarded as notorious. Failing that, the confession of the prisoner was indispensable. That confession the judge must strive to obtain by every means, and to obtain it, seize whatever method, effective albeit cruel, was open to him. That consideration was decisive of the question; this is shown by the fact that when the prisoner accepted the inquest he could not be put to the torture; the practical effect of such acceptance was that a condemnation could be reached without recourse to torture. "Be it also known," says Bouteiller, "that when the prisoner submits to inquest he should never be put to the torture; for that would be to do him wrong and injustice. For torture should not take place except when the offense is such that proof cannot be brought or found and the offense is always presumed when information makes it clear."[1] This similarity between the rigorousness of the proofs and the use of torture is destined to form a vicious circle within which our old criminal procedure will revolve throughout its whole future existence.

Torture was introduced along with a rule which had the appearance of palliating its atrocity and which appears to have been recognized from the very beginning; the confession obtained was not held to be legally valid unless it was ratified after the pains inflicted had ceased. An Ordinance of the month of April, 1215, enacted in response to the complaints of the nobles of Champagne, reads as follows: "As it appears that our officers, against the ancient usages and customs of Champagne, endeavor to put to the torture the nobles of Champagne taken on suspicion of crime although they are not taken in the act nor in thorough knowledge of the fact. . . . We grant and ordain and forbid any nobles to be put to the torture, if the presumptions of the misdeed be not so

[1] "Somme rurale," I, 34, p. 224. The same rule is found in the "Coutume de Bragerac," Art. 17 (*Bourdot de Richebourg*, IV, 2, p. 1015): "Item si burgensis sit accusatus de capitali crimine non manifesto, esto quod informatio adprehendat illum aut vehemens suspicio, dum tamen dictum crimen non sit notorium vel manifestum, *et velit se supponere inquestæ de dicto crimine, in isto casu non erit quæstionandus.*"

great that it is proper to do so by right and reason or the misdeed would remain unpunished, in which case it shall be henceforth forbidden and we hereby forbid that any one be condemned or judged on account of the said torture, *if he does not persist in his confession for a sufficient time after the torture.*" [1] This rule was maintained. "We have spoken of the voluntary confession, which is the third kind of proof held to be essential; for as to the involuntary confession made while under torture, that may very well constitute proof if the accused persists in it after the torture; otherwise, should he not persist, it forms rather a presumption than an essential proof." [2] But the palliation was more apparent than real. The judge, according to the "Très-ancienne Coutume de Bretagne," could repeat the torture three times. The accused who retracted after the torture naturally exposed himself to a fresh administration of it.

§ 5. **The Public Prosecutor.** — In the 1300 s the official prosecution was already armed almost cap-à-pie; then appeared its principal medium, the *public prosecutor*.

The king's procurators and the procurators fiscal of the lords were originally merely men of business. The feudal procedure was, as we know, oral and formal, and like another formal procedure, that of the "Legis Actiones," it did not acknowledge the principle of representation in courts of law.[3] So far down as the 1200 s even, no one could be represented in suing ("demandant") [4] civilly any more than criminally. The king and the sovereign lords were exceptions to this rule; they could sue by procurator ("demander par procureur"). This is the origin and primary meaning of the maxim "In France no one pleads by procurator save the king." The king and the nobility had, therefore, procurators entitled to prosecute their rights either before foreign jurisdictions or their own courts. These were advocates, practitioners in whom they placed their trust, and who were originally distinguished from their fellows only by having more illustrious clients. But it was predestined that these procurators of the king and the nobility should become real functionaries, and that was what practically did happen.

[1] *Isambert*, "Anciennes lois françaises," III, p. 90. *Esmein*, "L'acceptation de l'enquête dans la procédure criminelle au Moyen Âge," p. 9 *et seq.*

[2] *Bodin*, "De la démonialité des sorciers" (Antwerp edition, 1593), Book II, ch. III, p. 349; *cf. ibid.*, pp. 357, 358.

[3] [For the full history of this principle, as seen in Norman, French, English law, see the translation of Professor *Brunner's* essay, "The Early History of the Attorney," in the Illinois Law Review, II, 257. — TRANS.]

[4] *Beaumanoir*, IV, 2 (Salmon, Nos. 137, 138).

Besides their procurators, the king and the nobles had also certain advocates, who remained for a long time mere advocates, before being provided with a real office: "Be it known that the official advocate shall rank highest in the court of the lord he represents, as does the king's advocate in the royal courts. And be it known that where there is an official advocate for any lord he never can act as an advocate against that lord, even although he should receive no compensation or payment from the said lord. Law wills, however, that the official advocate may, at the will and with the permission of his own lord, act as counsel for any other lord, provided that it be not against his lord or against the cause which had been formerly pleaded on behalf of his lord." [1]

One of the most important duties of the king's procurator or fiscal was the superintendence of the prosecution of certain offenses: fines and forfeitures, the fruit of penal sentences, were one of the chief sources of revenue of the king and the nobles. The appellation of procurators fiscal, which was applied to the procurators of the seigniorial courts of law, still exists as a souvenir of this conception. Ere long another interest of a higher order was added to this original duty. Justice to all is the duty of the justiciar, and he is directly interested in the prosecution of crime; it is therefore his procurator's duty to secure its repression as far as possible. The procurator certainly could not constitute himself accuser as could an injured party, but it was in his power to instigate the judge to take cognizance. The above is a general view of the origin and original functions of the king's procurators; it is essential, however, to go more into detail, and in this respect the Ordinances are our best sources of information.

The king's procurators do not appear in any of the customary lawbooks of the 1200 s; but, after 1302, Philip the Fair regulates their duties in terms which carry the conviction that the institu-

[1] "Somme rurale," II, 2, p. 671. *Loysel;* "Pasquier." "There was at that time (1380) no official king's advocate, but one of the attorneys general of the Court was chosen for the defense and protest of the rights and causes of the king, as occasion arose. This is shown by the Registers of Parlement of 18th February, 1411, where mention is made of one M. Jean Perier, canon of Chartres, who spoke as king's advocate, and also by the decrees and proceedings of M. Jean le Coq called Gally, who lived much later, namely, in the time of Charles VI, when he and several other advocates were employed to plead for the procurator-general, which prevented their pleading for the parties. . . . From which we gather two facts, one being that the titular office of king's advocate is modern inasmuch as the ordinary attorneys pleaded for the procurator-general, and the other that the king's advocates also pleaded for and advised the parties, when the king had no interest in the matter; and this is corroborated down to the time of Louis XII in regard to the pleading, and down to that of Francis I in regard to the consultations." (*Dupin* edition, pp. 23, 24.)

tion had already existed for quite a long time. That king wills particularly that they take a general oath, as in the case of royal functionaries, and that when they act in his name, they take the oath of calumny ("de calumnia") like other parties.[1] He also forbids them to take up the causes of others, except in certain cases. We recognize here the king's counsel themselves. A reaction sets in, however. In 1318 the king's procurators are for a time suppressed in the districts following the customary law, and the duties they performed return to the bailiffs.[2] The cause of this suppression was probably the opposition of these districts to the new criminal procedure in which the procurators already played an important part. So we find the town of Lyons in 1347 demanding to be relieved of the king's procurator for a like reason.[3]

But such resistance was fruitless. In all the courts of the 1300s we shall see the king's procurators acting as an acknowledged power. The "Registre criminel de la justice de Saint-Martin des Champs," published by M. Tanon, which covers the period from 1332 to 1357, several times mentions the "procurator of our lord the King";[4] and Jean Desmares ascribes to him a very clearly defined rôle.[5] As for the procurators of the nobles, their existence could not cause any trouble. That of Saint-Martin appears frequently enough in the "Registre criminel."

How do the procurators gain entrance into the criminal procedure? Not by appearing as direct accusers, — by constituting themselves parties; although we find some traces of such a conception,[1] that would appear too contrary to the old principles, which required that one must have a direct interest before he could accuse. It is into the official inquest that they insinuate themselves, slipping in through an opening provided for them by the procedure "per inquisitionem" of the Canon law. We have seen that, according to the Canon law, the judge could be instigated to use his power by a denunciator, who could remain party to the action, producing his witnesses and furnishing his evidence; that is called "promovere" or "prosequi inquisitionem." This is the part which the procurator will play; he is the denunciator of all crimes, and intervenes in all prosecutions, whether he appears alone or in conjunction with a private individual.[2] His function, according to the Ordinance of 1347, cited above, is "promovere inquestas fieri." From the contemporary viewpoint, it is the judge who authorizes the king's procurator to act, not the latter who prompts action by the judge:[3] "Ordinance of 1350, Art. 15. Also, let no one be accused officially without sufficient information made under order of court by a party not suspected. And before the procurator begins his action or joins with the party, let the said information be seen and advised upon by the bailiff or other sufficient person acting on his order."[4] In the "Registre criminel de Saint-Martin" the official procurator appears several times, playing a part similar to that described.[5]

[1] Ord. I, p. 368: "Art. 15. Volumus insuper quod ipsi procuratores nostri jurent secundum formam infra scriptam.— Art. 20. Cæterum volumus quod procuratores nostri, in causis quas nostro nomine ducent, contrà quascumque personas jurent de calumnia sicut predicte persone. Et si contingat ipsos facere (substitos) substitutis satisfaciant et non partes adversæ, immo procuratores nostri de causis alienis se intromittere aut litteras impetrare non præsumant, nisi pro personis conjunctis ipsos contingeret facere prædicta." It is apparent that from this time the procurators are exclusively the king's agents. *Cf.* Ord. 1303, Art. 18 (Ord. I, p. 399).

[2] Ord. of 1310, Art. 29: "All procurators shall be withdrawn except those in places where the written law is followed." (Ord. I, p. 657.)

[3] Ord. of 1347, Art. 2: "Item super procuratore regio quem petunt removeri a civitate Lugdunensi cives prædicti, ordinamus seu providemus quod dispositio istius remotionis promittitur ad regem. Interim tamen in civitate Lugdunensi dictus procurator nullas inquestas promovebit, nisi illas quæ sibi mandatæ fuerint a seneschallo promoveri extrà civitatem Lugdunensem nec aliquas causas in dicta civitate nomine regis agitabit nisi primorum hereditates regis contingant." (Ord. II, p. 258.)

[4] 9th December, 1337 (p. 107); 1st July, 1339 (p. 153); 7th December, 1340 (p. 153); 4th September, 1343 (p. 198). All these cases dealt with difficulties as to jurisdiction arising between the royal judge and the judge of Saint-Martin.

[5] Decisions 89 and 150.

[1] *Jean Desmares*, 89: "The king's procurator in a criminal accusation in the bailliage of which he is procurator is not obliged to subscribe himself on pain of retaliation, 'secus de alus.'"

[2] *Biener*, "Beiträge," pp. 200, 201. The Church had also its official "promoters"; but they were of later creation and were copied from the "procurators" of the secular jurisdictions. See *M. Fournier*, "Les officialités au Moyen-Âge."

[3] Ord. of 1338, Art. 7: "Statuimus etiam prohibentes ne quis procurator regius partialiter se admergatur in causa quacumque nisi prius a judice, coram quo lis pendebit, in judicio, partibus præsentibus et auditis, mandatum expressum." (Ord. II, p. 124.)

[4] Ordonnance contenant plusieurs règlements en faveur des seigneurs et habitants de Normandie, à cause d'une imposition accordée au roi. (Ord. II, p. 407.)

[5] p. 74 (18 October, 1336): "The said defaults with the prosecution of the said misdeed have been prosecuted so far by our promoter and procurator, as to the denunciation and claim made to our mayor of Saint-Martin by the said August." — p. 69: "Jehannette the haberdasher surrendered by the lieutenant of the provost and the king's procurator who held her prisoner." — pp. 187, 188 (30 September, 1842), an accused is acquitted "by action tried between the procurator of the Church and the said Jehan." — *Cf.* 223, 224. An agreement takes place upon a question of jurisdiction "between Master Pierre Martin, clerk and procurator of the Church of Saint-Martin des Champs of Paris of the one part and Jehan de la Bretesche, bailiff of Saint-Denis of the other part." M. Tanon very judiciously observes that at the period covered by our register the king's procurator did not appear to fill "the part in the prosecution of all crim-

But the farther we advance, the more important the action of the king's procurator becomes. We have already quoted a curious passage from Jean Desmares in this respect. Here is another of his decisions: "Also, when any high justiciar has had the prosecution and the first cognizance in his court, the pleading is bound by litiscontestation against any one amenable to his jurisdiction in regard to offenses . . . if there have been no privilege or defenses violated or other thing which could give the cognizance of the cause to another judge: in that case it is proper for the plaintiff to prosecute his action and his claim before that judge in the court in which it was commenced, notwithstanding that the plaintiff, *with the concurrence of the king's procurator*, demand that the cause be remitted to the court of the sovereign." — "When it happens," says Boutciller, "that any one commits an offense in regard to which no one constitutes himself a party except the king's procurator by prior information, — for no one is brought into court except by summons on the request of the king's procurator, — if the person summoned should object, saying that he desires to be treated and judged by men ('hommes') or by complaint or prior commission . . . the king's procurator shall dispute this and say that the bailiff should judge him and take jurisdiction of the case, because *the king is the only party plaintiff* and it is on prior information. It was, however, declared by decree of Parlement in the year 1377 that the bailiff either alone or with such counsel as seemed good to him could and should take jurisdiction, since the king alone was interested and there had been prior information."[1]

We shall see the maxim that the king's procurator is a real accuser established later on, and that this title belongs to him alone; but some vestige of the original idea always remains; to the very last the judge has the power to take cognizance of the offense himself.

In the "Registre criminel du Châtelet de Paris," which runs from 6th September, 1389, to 18th May, 1392,[2] king's procurator Andrieu or Andry le Preux constantly figures; mention is also made of the king's attorney-general in the Parlement,[3] and the king's

inal matters which necessarily belonged to him later or in common with all the procurators fiscal." (Pref., p. lvii.)

[1] "Somme rurale," II, 1 (p. 653); *cf. ibid.*, I, 34 (p. 221). "Who may constitute himself formal party in denouncing, either by formal action, or officially at the request of the procurator or by the judge's official right."

[2] "Registre criminel du Châtelet de Paris" . . . published for the first time by the Society of French bibliophiles. 2 vols. Paris 1861.

[3] I, 301.

advocate.[1] For the most part, Andry le Preux is merely mentioned as figuring among the "preudhommes," who composed the council of the provost or his lieutenant, but a phrase appears from time to time indicating the rôle of public prosecutor. A judgment of 6th November, 1391, shows information made "by command of the honorable and learned master Jehan Truquan, lieutenant of Mons. the provost of Paris, at the request of the procurator of our lord the king at the said Châtelet against Jehannin Pelart . . . (of) which information the said prisoner desired to prosecute inquest."[2] The determinations of the accused and those of the king's procurator are reported several times: "The above named prisoner, Jehan Pelart, and also the said king's procurator, desire to prosecute their rights by the inquest hereinbefore made and written."[3] — "The inquest and process herein above written, by which the said king's procurator and prisoner have both desired to prosecute their rights, were seen, examined, and read word for word."[4] Finally, we find several oral requisitions by the king's procurator or fiscal reported;[5] one passage containing an abbreviated formula would seem, if it were set out at length, to recognize in the public prosecution the right which he will undeniably have later on, thanks to the rule of "further inquiry" (*post* p. 238).[6]

Simultaneously with the determining of the public prosecutor's rôle, rules for the official prosecution are laid down and embodied in the royal Ordinances. Like the "inquisitio" of the Canon law, this procedure necessarily embraces two parts, the information and the inquest. First of all the information must be made to the judge or his delegate,[7] since no one could be prosecuted

[1] I, 36, 74, 268, 373; II, p. 6: "The procurator at Chartres of our lord the king." The promoters or official promoters of the official are also mentioned several times. I, 84, 246, 255.

[2] II, p. 352, 4. [3] II, 356. [4] 16th January, 1390–1391, II, p. 26.

[5] 24th March, 1391–1392, "Gerart de Sanseurre was taken from the prison of the said Châtelet and brought before the aforesaid . . . who it was said and maintained by such procurator was an idler and a vagabond, without means or employment, etc." (II, 456). — 2d September, 1390 (II, p. 2): "Jehannin le Fournier . . . was taken from the prisons of my lord the duke at Tours . . . and was brought to trial in open hearing . . . and was there, by the procurator of said my lord the duke . . . accused of being of the condition and a confederate of certain prisoners who went up and down the land."

[6] 25th August, 1390 (I, 443): "Exculpated brother Pierre le Brun and the prior of the Jacobins, who were prisoners, because they had been accused at Chasteaudun, etc. And on account of this, done upon this advice of the aforesaid and others, the said prior and brother Pierre have been released from the said prisons, etc. Regarding the present, etc. Reserved for the king's procurator, etc."

[7] Sometimes the king's procurator proceeded with the information himself, not by order of the judge, but by virtue of a commission contained in royal letters. See Ord. of 1344, Art. 7 (Ord. II, p. 215).

officially "unless prior secret information against the said person be first made and advised upon." [1] The judge must deliberate upon this information with his counsel, and should he find that it contains sufficient charges, the real confrontative action then begins. In determining their essential features these two divisions of the action have not been invariably clearly separated.[2] Certain texts, however, leave nothing to be desired in the way of precision. We shall content ourselves with citing two chapters of the "Coutume de la Ville et Septène de Bourges": "Ch. XXXIX. *The mode of procedure against any accused of a criminal offense.* Proceedings must be taken against any one who is accused either by accusation or by denunciation in criminal cases, or in any important civil case in which the king may be greatly interested, as offenses done and attempted, villainies and wrongs on privileged persons, and on the king's burgesses within his domain, villainies done to officers of court or other important cases which demand immediate punishment. After secret information made by trustworthy people, above suspicion, if it be sufficient to show the guilt of the accused, his person and goods may be seized, and an inquest proceeded with, he being summoned, and by the inquest justice shall be done, and the arrest is always understood should the case require it. . . . Ch. XLI. *The difference between information and inquest.* There is a difference between information and inquest. The information does not carry condemnation. The inquest justly made, the party, being summoned to the hearing of the testimony and to see it judged and published, is thereby acquitted or condemned; and it is quite reasonable that the defendant should have first answered the 'articles' on his oath." Plainer language is impossible. It is evident that the "inquest" required the reappearance of the witnesses heard in the information, if not for the reiteration of their depositions before the accused, at least for the purpose of taking the oath in his presence. This reappearance could, however, be dispensed with if the accused waived it. It was then said that he consented that "the information be equivalent to inquest." This is a

[1] Ord. of 1363 (Ord. II, pp. 664–665); Ord. of 1350 (Ord. II, p. 400).

[2] See a note of *De Laurière* (Ord. III, p. 159): "The distinction which should here be drawn between the information and the inquest is that the former should be made by the judge officially, before any proceedings are taken against the person who is impeached in court as a criminal; the judge should determine after consideration of this information whether there is cause shown for an action against him or not. If such action be brought the judge then directs an inquest to be made."

formula found more than once in our "Registres criminels" of the 1300 s.[1]

At this stage all the important features of the inquisitorial procedure have been already settled. Before going further it may be well to give a general sketch of the criminal procedure as it was known and practised in the 1300 s and 1400 s. Here we have sure guides. On one hand, Bouteiller's work, which, as we know, had a great success; on the other, the "Registre criminel de Saint-Martin des Champs," which shows us a criminal tribunal in action during the first half of the 1300 s, and the "Registre criminel du Châtelet de Paris," extending from 6th September, 1388, to 18th May, 1392.

§ 6. **Final Changes. The "Ordinary" and "Extraordinary Procedures."**—According to Bouteiller, who aims at a systematic exposition, the criminal judge could take cognizance in four ways: "by denunciation, by present misdeed, by accusation of formal party ('partie formée') and by public report, of which inquest and prior information is made." [2] We shall go over these four methods with him, altering somewhat the order he has selected.

1. The *accusation of formal party* is the ancient accusatory procedure. "By formal party every judge who may and shall take cognizance of criminal cases, may and shall allow any man, lawfully competent, to become party against the accused and undertake and carry on the cause by close prison." [3] The principle of equal combat between the two adversaries always requires the imprisonment of the accuser as well as the accused. According to a rule borrowed from the Roman law, the accuser who was worsted was obliged to suffer the punishment which he had demanded. "In several places and according to the written law it is a dangerous matter to form party criminally against any one. For according to the written law he who fails therein incurs the same punishment that he would have been satisfied to have the prosecuted party sustain. This is called by the learned the punishment of retaliation." [4] This very harsh rule was, however, more honored in the breach than in the observance. A remission of the punishment was granted to the unsuccessful accuser on a petition directed by him to the court. This was called "praying for total pardon and remission." A severe punishment was inflicted in the case of calumnious accusation alone.

[1] "Registre criminel du Châtelet," II, 354. "Registre criminel de Saint-Martin des Champs," pp. 57, 83.

[2] "Somme rurale," I, 34 (p. 221).

[3] p. 222.

[4] *Bouteiller*, "Somme rurale," p. 222.

officially "unless prior secret information against the said person be first made and advised upon." [1] The judge must deliberate upon this information with his counsel, and should he find that it contains sufficient charges, the real confrontative action then begins. In determining their essential features these two divisions of the action have not been invariably clearly separated.[2] Certain texts, however, leave nothing to be desired in the way of precision. We shall content ourselves with citing two chapters of the "Coutume de la Ville et Septène de Bourges": "Ch. XXXIX. *The mode of procedure against any accused of a criminal offense.* Proceedings must be taken against any one who is accused either by accusation or by denunciation in criminal cases, or in any important civil case in which the king may be greatly interested, as offenses done and attempted, villainies and wrongs on privileged persons, and on the king's burgesses within his domain, villainies done to officers of court or other important cases which demand immediate punishment. After secret information made by trustworthy people, above suspicion, if it be sufficient to show the guilt of the accused, his person and goods may be seized, and an inquest proceeded with, he being summoned, and by the inquest justice shall be done, and the arrest is always understood should the case require it. . . . Ch. XLI. *The difference between information and inquest.* There is a difference between information and inquest. The information does not carry condemnation. The inquest justly made, the party, being summoned to the hearing of the testimony and to see it judged and published, is thereby acquitted or condemned; and it is quite reasonable that the defendant should have first answered the 'articles' on his oath." Plainer language is impossible. It is evident that the "inquest" required the reappearance of the witnesses heard in the information, if not for the reiteration of their depositions before the accused, at least for the purpose of taking the oath in his presence. This reappearance could, however, be dispensed with if the accused waived it. It was then said that he consented that "the information be equivalent to inquest." This is a

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[2] See a note of *De Laurière* (Ord. III, p. 159): "The distinction which should here be drawn between the information and the inquest is that the former should be made by the judge officially, before any proceedings are taken against the person who is impeached in court as a criminal; the judge should determine after consideration of this information whether there is cause shown for an action against him or not. If such action be brought the judge then directs an inquest to be made."

formula found more than once in our "Registres criminels" of the 1300 s.[1]

At this stage all the important features of the inquisitorial procedure have been already settled. Before going further it may be well to give a general sketch of the criminal procedure as it was known and practised in the 1300 s and 1400 s. Here we have sure guides. On one hand, Bouteiller's work, which, as we know, had a great success; on the other, the "Registre criminel de Saint-Martin des Champs," which shows us a criminal tribunal in action during the first half of the 1300 s, and the "Registre criminel du Châtelet de Paris," extending from 6th September, 1388, to 18th May, 1392.

§ 6. **Final Changes. The "Ordinary" and "Extraordinary Procedures."**—According to Bouteiller, who aims at a systematic exposition, the criminal judge could take cognizance in four ways: "by denunciation, by present misdeed, by accusation of formal party ('partie formée') and by public report, of which inquest and prior information is made." [2] We shall go over these four methods with him, altering somewhat the order he has selected.

1. The *accusation of formal party* is the ancient accusatory procedure. "By formal party every judge who may and shall take cognizance of criminal cases, may and shall allow any man, lawfully competent, to become party against the accused and undertake and carry on the cause by close prison." [3] The principle of equal combat between the two adversaries always requires the imprisonment of the accuser as well as the accused. According to a rule borrowed from the Roman law, the accuser who was worsted was obliged to suffer the punishment which he had demanded. "In several places and according to the written law it is a dangerous matter to form party criminally against any one. For according to the written law he who fails therein incurs the same punishment that he would have been satisfied to have the prosecuted party sustain. This is called by the learned the punishment of retaliation." [4] This very harsh rule was, however, more honored in the breach than in the observance. A remission of the punishment was granted to the unsuccessful accuser on a petition directed by him to the court. This was called "praying for total pardon and remission." A severe punishment was inflicted in the case of calumnious accusation alone.

[1] "Registre criminel du Châtelet," II, 354. "Registre criminel de Saint-Martin des Champs," pp. 57, 83.

[2] "Somme rurale," I, 34 (p. 221).

[3] p. 222.

[4] *Bouteiller*, "Somme rurale," p. 222.

The accusation, burdensome and harsh, was a relic of the past. From the 1300s its use was infrequent. In the "Registre de Saint-Martin des Champs" we find but two certain examples of formal party, one on 7th October, 1332,[1] and the other on 14th January, 1338.[2]

2. On the disappearance of the accusation, the *denunciation* came more and more into use. It took place "when any one did not wish to make or form party against any one for a crime; he can always denounce him to the court and *offer to produce or name witnesses*."[3] The judge was by no means bound to prosecute. He first of all considered whether he ought to place confidence in the denunciation. If he decided to act, he proceeded with the information in the first place, then summoned or caused the arrest of the accused, and the action took its course. As Bouteiller clearly indicates, the denunciator was usually party to the action; he pointed out the witnesses and attended the inquest. He was in reality an accuser who kept in the background and from motives of personal interest left the chief part to the judge acting in his official capacity. By a natural enough phenomenon a part of the rules of the accusation were applied to the denunciation. The punishment of retaliation and the obligation to remain in prison were alone spared to the denunciator. All this is shown by the "Registre criminel de Saint-Martin." In that the denunciations are so frequent that it is useless to count them; it is by their means that the action usually begins.[4] The forms of denunciation differ in some degree. Sometimes it is said that the procedure is "on the request and denunciation" of such and such a person.[5] Sometimes the denunciation "denounces to us the deed as a matter for the court and prays us to do what is right

[1] "Brought into our prison by the men of the provost of Bondis, Jehannin de Saint-Soupplet, butcher, on the accusation made by Jehannin le Bouchier . . . because he accused the said Saint-Soupplet in judgment, declaring that he had stolen his wood . . . and that, besides, he was a murderer, and that so he would prove . . . and that on the aforesaid accusation the said provost had put and held him in prison. — Also, this day brought by the said provost's men the said Jehannin . . . accusing the prisoner" (pp. 25, 26).

[2] "Jehanne de Montargis, wife of Thomas Lenglais, and Colin Piquart held in our prison by the mayor for the reason that on trial before the mayor the said Jehanne said, maintained and affirmed on oath against the said Colin . . . and the said Jehanne offered to prove what is said" (p. 117).

[3] *Bouteiller*, p. 221.

[4] See pp. 10, 16, 19, 27, 31, 32, 34, 41, 48, 57, 63, 67, 68, 81, 82, 84, 89, 93, 94, 98, 102, 114, 116, 124, 132, 139, 143, 145, 166, 167, 173, 174, 178, 203, 207, 209.

[5] pp. 167, 173, 174, 185, 186.

and just therein."[1] Or again, "He requests that we will administer the law and do justice for him in the matter."[2] The denunciation is made to the judge, but it is usually repeated in public court in presence of the accused.[3] The denunciator is called upon to furnish witnesses, and he must prove his cause of action;[4] should he subsequently declare that he demands nothing from the accused, or if he fail to furnish witnesses, or abandon, the consequence would appear to be the acquittal of the person prosecuted.[5]

One judgment seems even to import into the procedure of denunciation the release or "deliverance," which was formerly pronounced when, an accused being held prisoner, no accuser appeared within a certain time: "3d May, 1332. Released Godefroy Lalement after VIII days imprisonment. . . . Acquitted in regard to the contumacies which he impetrated against the denunciation by the council of the assizes the Sunday after Saint-Nicholas of May."[6] It might appear from the following that calumnious denunciation was punished: "He says in judgment and on oath that he had caused their imprisonment without cause, and that he repented of it and compensated them" (p. 102).

The blending of the accusation and the denunciation which takes

[1] p. 114.

[2] p. 188.

[3] pp. 32, 34: "And it is denounced to us by our said mayor of St. Martin, in the manner aforesaid, in the presence of the said Jehan (the accused)" (p. 188). — In one case, the denunciator is wounded and cannot be brought to the place where the court is held; the judge in such a case goes to him and receives his denunciation before witnesses.

[4] p. 105: "It was sufficiently proved by Marie, wife of Jehannin de Trambley," the denunciatrix; — action of Sedille Lenglaiche "for the reason that Estienne the painter had denounced against her . . . acquitted by action tried between her and the said Estienne (4 May, 1345)."

[5] On 23d February, 1338, Endelot de Picardie denounces against Guillaume Damours, mason, that he had ravished her: "The said Endelot denounced the aforesaid crime, and asserted on oath the said denunciation to be true, and which the said Guillaume denied completely. — And this done, he immediately required and summoned the said Endelot, if she had any witnesses by whom she could inform us of the truth of the said fact, that she should name and produce them, which she swore and affirmed on her oath that she had not. . . . And to fully inform ourselves of the said case we grant day to the said Endelot on Thursday next. — Acquitted because she never prosecuted her denunciation." 22d December, 1332: "Guillot le Pelletier was put and held in our prison on the denunciation of Richart . . . who has been acquitted by party and therefore delivered from prison and set at liberty by the court" (p. 31). — 26th November, 1336: "Sedilon la Franquette . . . held in our prison on the denunciation of Guillot . . . delivered because he withdrew and claimed nothing of him" (p. 81). — 13th October, 1338: "Michelet le Lièvre and Catherine his wife denounced to Autel Labbé mayor of Saint-Martin against Guillot de Soissons . . . delivered from prison because party did not wish to claim anything of him" (p. 145); *cf.* pp. 200, 203; *cf.* "Registre criminel du Châtelet de Paris," I, 309.

[6] pp. 10, 11; *cf. M. Tanon*, *ibid.*, note 1.

place here is by no means a casual commingling; from this is destined to spring a very original institution, — that of the civil party. From this time, it must be noted, the injured party is allowed to act in a civil suit, for the purpose of obtaining reparation, without bringing the criminal action: "In a criminal case," says Jean Desmares in his decision 58, "which seeks for a civil reparation, only two defaults are sufficient, but the facts must be proved; and in that seeking a criminal reparation, four are essential, and the applicant need not prove his facts." We also read in the "Registre de Saint-Martin": "3d May, 1332. This day Thomasette de Piront made civil demand against Marote de la Marc, wife of Richard Lenglais, and Huete de la Mare, her sister, saying that in the stews of the said Marote she had delivered her purse into the care of the said Huete, and lost, from its contents, the half of XXIII pieces of white 'maille,' and seeking solely for the restoration of her lost chattel. Imprisoned. The said sisters released after VIII days imprisonment to this date." [1] These prosecutions for civil purposes are often found in the "Registre du Châtelet." The parties then took great care to limit their demand "protesting and declaring only civil reparation is sought." [2] — "Pierre des Moulin, master of arts . . . makes express protest and calls the aforesaid parties present in witness that he intended to say, he did it not for any injury, but to tell the truth, and also that he only looked for civil reparation." [3] — "These scholars protesting that they sought for civil reparation." [4] — "Guillaume Certain . . . by manner of denunciation and for civil issue says and reports to the said Mons the provost." [5] The object of these reservations and protests is to make it plain that, although parties to the action, the denunciators do not formulate a real accusation, from the consequences of which they recoil; they also show that this distinction is still a novelty and that mistakes might be made.

3. The case of "*present misdeed*" ("présent meffait") is the ancient procedure of capture in the act; "by present misdeed may and shall be understood that the judge may and shall officially take action against the delinquent and convict him of the deed and sentence him to capital punishment solely of his own accord, without other denunciation or prior information; if he deny and the case be easy of proof, the judge or official procurator shall offer to prove it, and, this proved, punishment

[1] p. 11. [2] I, 213. [3] I, 310. [4] I, 138.
[5] II, 275. See II, 89, a sentence which awards to the civil party his conclusions.

shall follow, and if proof of it be not quite clear, since the case is of present misdeed, the judge may and shall put him to the torture to ascertain the truth." [1] The "taking in present misdeed" occurs very often in the "Registre de Saint-Martin." [2] Even the old customs are found to be faithfully preserved. The clamor of "harou" is mentioned several times, and it is often said that the criminal has been "taken on chase and proclamation." [3]

4. Finally, the proceeding by "*common report*" is the ancient "aprise": "by common report may be summoned into a secular court by prior information, or otherwise by bruit and notorious report, as where any one may be so noted in the district as a murderer or highway robber, that it is clear and known to all that he is so: in such case prosecution of the crime may be made by the judge officially without other party, or by office, or by the procurator officially, and the judge may do it officially at his request." [4] The action must always begin by information, except in the accusation by formal party, and in the case of capture in the act, where the matter is urgent. This is an important point, and it is a characteristic feature which the later law will enforce with still greater strictness. In the "Registre de Saint-Martin" the official charge is very frequent. It goes under its ancient name of "arrest on suspicion." The two parts of which it is composed, the information and the inquest, are clearly indicated in several passages; [5] in several others care is taken to state that the capture of the prisoner has not taken place until after prior information. [6] Sometimes, however, only the inquest is mentioned, without any

[1] *Bouteiller*, p. 222.
[2] pp. 38, 58, 63, 64, 73, 77, 92, 93, 99, 104, 124, 130, 134, 136, 138, 142, 151, 156.
[3] "Brought them into prison, and also because their neighbors in the street raised the hue and cry upon them, they having fled" p. 115. — "Captured them in hot pursuit and on the hue and cry of neighbors," p. 141. — "That when she cried *harou* he had put her hood over her mouth, in order that her cries should not be heard" (p. 47). — "Our officers arrested him at night with candles burning in pursuit and on hue and cry" (p. 71). *Cf.* "Registre du Châtelet," I, 410. "*Harou* the murder," II. 63; "*Harou* the fire."
[4] *Bouteiller*, p. 223.
[5] "6th November, 1341. Acquitted by the council by the *inquest, information* and report of the sworn men made upon the aforesaid case, by the mayor" (p. 184). — "Delivered from prison by the *inquest* and *information* which has been made by the mayor of the said town of Bouffemont and elsewhere" (p. 185). — "Acquitted of the fact and of his murder by our council by virtue of the *information* and *inquest* made by the mayor upon it" (p. 189). — In many cases, it is true, one of the two only is indicated.
[6] "6th April, 1337: Jehannin Leuffaut of Paris brought by Robin the jailer and Croz who arrested him . . . for the reason that we were sufficiently informed that he had beaten Jacquemin de Soissons to the effusion of blood" (p. 93). — "On 18th January, 1338, Jehan de Florence Lom-

question of information;[1] under either hypothesis we may say that the information alone exists, replacing the inquest and so performing a double function: it is true that in the one case it takes place with the consent of the accused himself, and that in the other the result is favorable to him.[2]

When the judge takes cognizance, two ways present themselves to him, and we find two forms of procedure, the "*ordinary*" and the "*extraordinary.*" This is a leading distinction, the importance of which will constantly continue to increase: "Also, Be it known that there are actions ordinary and extraordinary."[3] The "ordinary" procedure took its course in public; it knew nothing of the employment of torture, and it allowed the accused an unfettered defense. In the "extraordinary" procedure, on the other hand, torture was allowed; secrecy very soon began to find its way into it, and the defense was bound to be thereby more and more trammelled. This was, unfortunately, the procedure of the future. And this duality is found almost everywhere else in Europe at this period.

When must one or other of these ways be taken? The "ordinary" procedure was always followed when there was accusation by formal party: "And it should be known that, according to some, if the prisoner is arrested on accusation by formal party and put to his law he should not afterwards be put to the torture, but should be tried by ordinary action."[4] The parties respectively brought their witnesses, who were heard by the examiners ("enquesteurs"); the inquest was immediately communicated to the accused; the advocates or defendants argued on both sides in open court, and on this the sentence was based. Pierre Ayrault will be found as late as the 1500 s describing this form of procedure, then extinct, but whose disappearance was regretted by his strong intellect and great heart: "I have read," he says, "among the criminal actions brought more than six score[5] years ago by master Jean Belin, lord of Doinart and Foudon, my grand

bart, brought by command of the mayor and by information made by P. de Chivry our tabellion, for the reason that it was proved and found by the said information that he had beaten and struck basely blows causing contusions" (p. 115).

[1] p. 24; 200.

[2] "14th June, 1336. Ydre de Laon . . . delivered by imprisonment and by information that she agreed to inquest" (p. 57). — "12th November, 1336; Pierre Terlait, resident of Saint-Martin is given up to the court of the monastery by the provost of Paris who had arrested him on suspicion; delivered by information made by R. Pié de Fer examiner of the Châtelet de Paris" (p. 83). See above.

[3] *Bouteiller*, "Somme rurale," I, 34 (p. 223).

[4] *Ibid.*

[5] This takes us back to the middle of the 1400 s.

uncle, that by ordinance a time was granted to the party to bring witnesses for the prosecution and to the accused to do the same in his defense, provided in the latter case he had by his answers brought forward some fact in justification or extenuation. It seems to me (or I am deceived with antiquity) that nothing could be more equitable or just . . . The whole action took place at one time, and as in a single picture, the truth for both parties was presented before the judges."[1] In a system in which the denunciator and the accuser were so nearly assimilated, such as that which we have noted in the "Registre de Saint-Martin," this rule was bound to be followed even in case of denunciation.

The "ordinary" procedure had to be adopted even in the official prosecution when the individual prosecuted accepted the inquest: "If the doer be then arrested and desire to submit to all inquests, in all such cases he shall be admitted to ordinary action and shall only be treated on accusation of party or officially, and by proofs, without any torment of 'question' whatsoever, and without threats made, and shall always have reasonable imprisonment and facility for the conduct of his whole cause."[2] This is confirmed by a passage from the "Livre des Droiz et Commandemens de Justice": "If any be suspected of any criminal matter and the law pursue him as guilty, he shall be apprehended and punished according to the degree of the misdeed, and if he who is accused knows nothing of (the matter) he shall request the court to proceed against him in regard to the said offense, for the purpose of being acquitted of the deed. And the mode of action should be such that the judge may declare the fact in judgment by way of demand against him and lead finally to punishment should he confess; and if he denies (it) he should offer to make such proof of it as shall be reasonable. And he who is accused should allege his reasons and justifications and undertake proof thereof as is meet. And on this follows the allegation of the facts and the granting of authority to either side to bring his witnesses and make his inquiries, and then other lawful procedure. And the proceedings shall be conducted with greater deliberation and more leisurely in such cases, than in others."[3] In the "Registre de Saint-Martin" we find a certain number of cases where the criminal expressly submits himself to inquest.[4]

[1] "L'ordre et formalité et instruction judiciaire," Book III, Art. 2, No. 50.

[2] *Bouteiller*, "Somme rurale," II, 3 (p. 765).

[3] § 943.

[4] "23d August, 1332; Robin Fleurian . . . has submitted in our information to inquire into the request above mentioned" (p. 23). — "The

In contrast with the "ordinary" procedure is the "extraordinary" procedure. Its very name is awe-inspiring; and it will be said of it that it owes the name to the fact that the normal rules of law are no longer observed.[1] Bouteiller already gives a sufficient idea of the powers which it allows to the judge: "Also, the extraordinary action shall be used and brought in all other cases, especially in great and heinous crimes which are denied, and which have been committed secretly. And the judge shall not hesitate to bring the extraordinary action and to learn the truth daily, without any intermission, by information or otherwise."[2] The "extraordinary" action allowed torture. "If the person in question be found anyway suspected by strong presumption, he (the judge) may and shall put him to torture according to his physique, for one person can stand more severe torture than another, and the judge should by all means take care that he does not torture the man so that he thereby loses life or limb, for that is at the peril of the judge and his agents, also that he refrain from torture by fire, which is forbidden by the king; and if by dint of torture he will say nothing nor confess the first time, the judge can repeat it the second day, and even the third and fourth if he sees that the case requires it, and if there be such great presumption and the prisoner be a man of high courage."[3]

Another feature erelong distinguished the "extraordinary" procedure. The depositions of the witnesses were not produced to the accused. Everything was hidden from him for the purpose of removing from him the means of evading the prosecution. Originally, conformably to the principles of the Canon law, the "acta inquisitiones" were produced to the accused, both in the official inquiry and in that which took place upon the accusation of a party. This communication was ordered by the Ordinance of 1254, Article 21: "Et quia in dictis seneschaliis secundum jura et terræ consuetudinem fit inquisitio in criminibus, volumus et mandamus

men of Saint-Martin arrested him at Noysi and consigned him to close prison. He submitted to inquest concerning this matter, and the inquest was made by the men of Saint-Martin concerning this misdeed; it could not be proved against the man" (p. 225). — "The barber of Anet and his son arrested on suspicion of murder . . . were brought to Paris and personally to Saint-Martin for this matter; they submitted to inquiry and the inquest was made against them upon this matter by the men of Saint-Martin" (pp. 228, 229).

[1] *Damhouder*, "Practica criminalis," Pars. III, quæstio 103, No. 21: "Nonnunquam proceditur ordinarie et secundum juris ordinem et aliquando extraordinariè, id est, juris ordine non servato." It is true that the law mentioned here is the Roman law.

[2] *Bouteiller*, "Somme rurale," I, 13 (p. 765).

[3] *Ibid.*, I, 34 (pp. 228, 229).

quod reo petenti acta inquisitiones tradantur ex integro."[1] An Ordinance of 1338 grants to the parties in a general way the right to attend at the hearing of the action which took place before the assembled bench.[2] But gradually the tendency grew to refuse production of the documents to the accused: "Certe jure canonico et civili judex ex officio potest procedere infamia præcedente . . . de hac facienda est inquisitio, quam judex non tenetur parti ostendere nisi velet."[3] — "Although in the Parlement no publication of witnesses is made either in civil or criminal causes, yet publication of the names and testimony of the witness is made in the Châtelet, and in criminal causes as to the names only and not of the testimony, and for this reason; if publication were made of the testimony in criminal causes, when the guilty defendant knew that the crime was proved against him, he could flee, and thus offenses would remain unpunished and he could encompass the death, annoyance, and obloquy of those who had testified against him."[4] This secrecy, which recalls the proceedings of the "inquisitio hæreticæ pravitatis," became one of the distinguishing features of the "extraordinary" procedure: "Be it known that where one is to be put to the torture on prior information which shows genuine and strong suspicion of the crime for which he is imprisoned, which crime he does not deny, the said information and crime shall be shown to the counsellor of the Court before the prisoner is put to the torture and the prisoner shall be heard as to why he denies the crime contrary to the information laid against him, *without the information being shown to him*, it shall, on the advice and order of the counsellors of the Court, be declared that the prisoner be put to the torture."[5]

It is to be noted that, even though it should have proved impossible to obtain the confession of the accused by torture, he could not on that account be fully acquitted: "If by torture he will say nothing, nor confess, and is not convicted by witnesses, if it should happen that, on suspicion, he be imprisoned for a long time and by 'exclamasse,'[6] to ascertain if any will appear against him, and if for a long time none appear, the punishment of imprisonment which he shall have undergone and suffered shall be the penalty

[1] Ord. I, p. 72.

[2] "Statuimus et mandamus relationes processum tam civilium quam criminalium amodo fieri coram seneschallis et judicibus aliis . . . in præsentia partium litigantium si ad id voluerint interesse." (Ord. II, p. 125.)

[3] *Joannes Faber*, "ad Instituta, tit. De publicis judiciis."

[4] *Jean Desmares*, 262. [5] *Bouteiller*, "Somme rurale" I, 34 (p. 229).

[6] Proclamation by public hue and cry.

for the bad presumption, and then he should be released at the discretion of the judge on pain of being attainted and convicted of the matters with which he is charged and of which he is presumed guilty, and no other release ('delevrance') shall be made by the judge, for if he be freed absolutely, it would seem that he had been held prisoner without cause."[1]

In this "extraordinary" procedure we already find the prototype of the 1500s and 1600s; the information as a starting point; then the order "à l'extraordinaire" decreed by a judgment; the application of torture, also decided by judgment; and, lastly, something resembling the "further inquiry" ("plus amplement informé"). It still, however, offered the accused a certain number of safeguards which were subsequently to disappear. The publicity of the hearing still remained. Originally, as we have said, the pleadings were made in the open air, but that state of matters necessarily disappeared along with the old feudal customs. "The vestiges of it," says Ayrault, "are still at the doors of churches, castles, markets, and public places where the benches of the judges still remain. They have begun to deride the open air judges, now that they have erected courts of justice and court-rooms to judge in. But that shows that formerly the greatest judged there very well."[2] Publicity, however, still existed within the court-rooms, somewhat restricted, it is true. To quote Ayrault once more: "The actions of the late master Jean Belin, lieutenant-general of this jurisdiction, which we have mentioned, usually note that seven or eight named by him, besides himself and his clerk of court, were present at the examination, and he adds, 'and several others,' to show that admittance was open to all who desired it."[3]

This publicity is likewise shown in the "Registre criminel de Saint-Martin des Champs"; it extended to everything which took place at the trial, that is, except the information or the inquest made before the commissioners or examiners ("enquêteurs") and the torture administered in secret. The clerk of court of Saint-Martin is careful to specify the principal persons present,

[1] *Bouteiller*, "Somme rurale," II, 13 (p. 765); *cf.* I, 34 (p. 229). — This principle is often applied in the "Registre de Saint-Martin"; it speaks of a man "delivered by imprisonment" (pp. 57, 64). — "Delivered by long imprisonment and by being beaten with rods" (p. 67). — Sometimes only a penalty was inflicted on the unconvicted accused; it was then said that he was delivered by penalty; when he could not pay, however, the matter was ended by his being set at liberty under the formula "Delivered by poverty" (pp. 77, 95, 99, 100, 101, 102).

[2] "L'ordre, formalité," etc., Book III, Art. 3, No. 56.

[3] *Ayrault*, *op.* and *loc. cit.*, No. 71.

always adding at the end of the list "and several others." That it was indeed a veritable public and not merely chosen assistants is shown by the fact that the names of artisans abound and that women are often designated.[1] Publicity is particularly proved for the following documents: first, the denunciation, which must be repeated at the trial,[2] then the reports of physicians or midwives, which play an important part,[3] the release of prisoners on bail,[4] the confessions made at the trial and the sentences which follow thereon.[5] Publicity is also the rule for the judgment on declinatory pleas and confessions from foreign jurisdictions,[6] for the reading of royal letters,[7] and the exhumation and examination of bodies.[8]

Liberation on bail is still practised very extensively, according to the "Registre criminel de Saint-Martin." It does not appear to have ever been a matter of right, but it seems that the judge could always grant it; in fact, we find it granted in very serious cases, such as theft, where capital punishment was involved.[9] The sureties pledged themselves, according to the old formula, "body for body, property for property"; they were as a rule only answerable for the appearance of the accused;[10] they sometimes also undertook to pay the amount decerned for.[11] In one case the prisoner, instead of furnishing sureties, gave in pledge "two anvils of the value of LX sols of Paris";[12] latterly, they were sometimes liberated without bail.[13] The pecuniary sufficiency of the sureties was, besides, not the only security had against the accused who was set at liberty; failing his appearance he was as a matter of course declared attainted and convicted.[14] This presumption of guilt arising from flight is one which was to remain a long time in our law.

Rigorous as the "extraordinary" procedure was, it for a long time allowed the accused to defend himself. Before sentence he could plead his cause or have it pleaded for him; and he could also allege facts in justification and prove them by witnesses. In this respect there must originally have been a considerable laxity, for

[1] See, in particular, pp. 20 and 28.

[2] pp. 35, 41, 42, 114, 124, 167.

[3] pp. 13, 19, 20, 22, 29, 35, 36, 45, 46, 48, 64, 106, 109, 112, 117, 127, 133, 139, 170, 171, 173, 181, 188, 189.

[4] pp. 30, 31, 33, 34.

[5] pp. 26, 51, 174.

[6] pp. 39, 40, 47, 50, 52.

[7] p. 62.

[8] pp. 148, 197.

[9] See 29th March, 1332, p. 4; 12th April, 1332, p. 6; *cf.* pp. 3, 4, 5, 6, 14, 15, 22, 28, 32, 33, 34, 37, 40, 127, etc.

[10] The formula is then: "Sureties for his appearance before us each day for which we shall summon him."

[11] p. 127.

[12] p. 34.

[13] "27th January, 1328: Released Jehanne de Montargis, on himself." It is true that Jehanne was an accuser in formal action.

[14] See pp. 4, 6.

we even find the following in the "Pratique" of Masuer: "If the accused, being imprisoned, offer to prove his defenses, he should be allowed to do so before proceeding further, provided he can do it easily; and this is reasonable, especially as irreparable injury and damage is involved." [1]

In Bouteiller's time the "extraordinary" procedure appeared only as a last resource; it gave place to the "ordinary" procedure when there was a formal party, and even when the accused, prosecuted officially, submitted to the inquest. To this extent, though it was not lawful, it was almost tolerable. This state of matters could not last, and the exception was found to become the rule. The prisoners could refuse to accept the inquest; it might be to their advantage to do so, for it is quite possible that, in conformity with the early spirit of the institution, eye-witnesses were not at that time essential. That would give an opportunity for the "extraordinary" procedure. But it must frequently happen that the testimonial proof did not furnish sufficient evidence of guilt, either in the accusation by formal party or in the accepted inquest. Would not the judge feel an almost irresistible temptation to employ even torture to extract the confessions which he believed to be necessary? That is exactly what happened, as Bouteiller himself acknowledged by reversing all the rules and distinctions which he had laid down. After saying that torture is not allowed when there is a formal party, he adds: "Should the judge consider the case as one of murder and the prisoner be so cunning that nothing can be learned by the testimony and the case is 'prima facie' made out, then the judge shall have power to put to torture if that be possible without doing harm." [2] To the same purpose he specifies a number of serious cases where the person under suspicion is not permitted to exculpate himself ("se mettre à purge"),[3] and where the "extraordinary procedure" should be compulsory: "Several cases do not allow of purgation, such as murder, arson (of houses), violation of women, highway robbery, . . . treason, heresy, unnatural offenses . . . by purgation all

[1] "La Pratique de Masuer," done into French by *Antoine Fontanon*, new edition by *Pierre Guénois*, Paris 1606 (Book XXXII, No. 14, p. 589). The translator, *Fontanon*, carefully points out in a note that this is the old law. "In regard to what is said in two different articles as to the accused being allowed to prove and verify his justifications and defenses, and that restoration should be made of his goods seized on his giving bail, that has since then been somewhat changed."

[2] "Somme rurale," I, 34 (p. 223).

[3] This is doubtless the same procedure as that indicated in the "Ancien coutumier de Picardie" by the expression "se mettre à loy." See above, p. 64.

would escape, because when a man is 'put to purgation' he cannot be tried by any but an 'ordinary action,' and *the above-mentioned cases should be tried by 'extraordinary' actions.*" [1] This movement was undoubtedly brought about in great measure by the learned system of "legal proofs" [2] which found its way into jurisprudence. This system had been borrowed from the law-doctors, especially those of Italy, who, in turn, had found its first germs in the Roman law, and had developed them to a great extent. Very clear or "open" ("bien apertes") proofs were necessary; "according to the law, proofs in criminal matters should be as clear as the sun at noonday to show cause." In default of the accused's confession, certain proofs, the nature of which was determined beforehand, were essential to base a condemnation; and a desire to obtain the confession at all hazards was the inevitable consequence. Very soon it made no difference whether the accused accepted the inquest or not; the "ordinary" or the "extraordinary" procedure was followed according to the greater or less gravity of the crime. So strong is the influence of an old usage, however, that to the last the custom was kept up of asking the accused if he wished to put himself upon the witnesses.[3]

At first sight it would appear as if the "Registre criminel de Saint-Martin" made no distinction between the two forms of procedure. Nowhere does it specifically mention the "extraordinary" or "ordinary" actions; but it substantially shows that there is a difference between the cases. Whenever a matter so serious as to warrant the infliction of capital punishment is in question, we find one or other of the following formulas: — "Action tried — crime: action tried — criminal action." [4] When, on the other hand, the data of the information do not reveal a serious crime, or when the report of the physician ("mire juré")

[1] "Somme rurale," I, 34 (p. 223).

[2] [See *post*, Part II, chap. III on the system of "legal proofs." TRANS.]

[3] See *Dupaty*, "Mémoire pour trois hommes condamné à la roue," Paris 1786, p. 20. — "Réquisitoire" of Louis Séguier, to demand the suppression of Dupaty's "Mémoire," pp. 30, 31: "It is true that the final question put to these prisoners substantially demands *whether they wish to trust to (the evidence of) these witnesses*, and that they replied, 'Yes, if they tell the truth.' *This question is a formal one in all our first interrogatories;* from none is it omitted. It does not assume either complaint made, information ordered, or witnesses heard. It can neither mislead, deceive nor surprise the prisoners."

[4] pp. 43, 66. Note by *M. Tanon:* "A similar statement is met with in the majority of capital cases. Its principal object is to indicate the inquisitorial procedure adopted by the judge in serious criminal cases. Bouteiller calls 'extraordinary' action that which is adopted in *serious and heinous crimes.*" See pp. 78, 81, 121, 169, 177, 180, 186, 187, 188, 219–221.

states that the victim is "not in danger of death or loss of limb" it is observable that the parties plead civilly.[1] This does not mean that the case is a purely civil one, as we would express it nowadays, for a penalty is often inflicted,[2] but merely that there is no occasion for a criminal punishment, and that the proceedings will be by "ordinary" action ("procès à l'ordinaire") and will follow the rules of civil procedure, which were originally also those of criminal procedure. The "Registre" contains a passage which expresses this very clearly: "Information is made of it and converted into civil and has expiated the offense against our safety."[3] The Ordinance of 1670 will contain the same phraseology.[4]

The "Registre de Saint-Martin" does not specify the employment of torture in so many words; but it must be noted that the details of the proceeding are not stated, and that nearly all those who undergo capital punishment after action brought, are declared "to have confessed." In one particular case, moreover, the clerk of court expressly states that the confession has been obtained without torture: "Jaquet, son of Jehan Duderot, aged nine years or thereabouts, detained in our prison, for the reason that he confessed, without constraint or terror of *torture* (*'gehine'*)." [5] Sometimes proceedings are employed to obtain a confession which call to mind the threat of torture, — the mere presentment, "présentation," — practised in later times.[6]

[1] p. 35: "Sent out of crime — acquitted civilly." — p. 76: "And pleaded civilly, are released next day." — p. 127: "They proceed." — p. 94: "Reported the peril suffered by duchess Emmeline; criminal denunciation; — civil, they proceed." — p. 116: "Crime reported, civil."

[2] p. 82: "Civil — by penalty." — p. 83: "Crime — reported — civil and penalty." — p. 93: "Civil — penalty."

[3] p. 97.

[4] Ord. Tit. XX, Art. 3: "If it should appear before the confrontation of witnesses that the matter should not be prosecuted criminally, the judges shall receive the parties in ordinary action. And for this purpose they shall decree that the informations be converted into inquests." See *Jousse* upon this article: "This is called civilizing a (criminal) process or remitting the parties to civil remedies. It may, however, be said, all things being considered, that this procedure does not put an end to the criminal action; but that from that time that action merely ceases to be prosecuted by the extraordinary method, and commences to be prosecuted by the ordinary method."

[5] p. 51. See Introduction, pp. lxxxviii to xci.

[6] "And subsequently the Saint-Martin people brought them back to Noisi, and brought them by force and made believe that they would hang them. And they would nowise confess the said murder, and because it was not quite clearly proved against them, the Saint-Martin men banished them at Noisi in the court of Saint-Martin perpetually and on pain of the gallows, from all the Saint-Martin land" (p. 229). The men concerned had submitted themselves to inquest, and probably this stratagem was employed against them because they could not be tortured according to the rules laid down. See *M. Tanon*, p. xcix: "They were allowed to submit to inquest. If they did the effect of the inquest was

Finally, an examination of the state of the decisions of the earliest provostship of France as it existed at the end of the 1300s is a matter of interest to us, as those decisions would inevitably serve as an example to other provostships.

There is not, in the "Registre criminel de Châtelet de Paris," which, as we know, covers the period between 1389 and 1392, a solitary case of real accusation, that is to say, by formal party. The term accusation [1] appears often enough, but it is quite apparent that these are in reality nothing other than denunciations. It is always the court which prosecutes officially; most frequently, it is true, it acts on the request of those interested; in such cases their complaint goes under different names, "denunciation, request, pursuit, clamor" ("dénonciation, requeste, pourchaz, clameur"); fundamentally there are always denunciators. It is noteworthy that, judged by the rules laid down above, the action does not always originate in a perfectly regular manner. According to these principles every official prosecution, save in the case of capture in the act, should, in practice, begin by an information. In the "Registre" the action sometimes opens by an information, which the clerk of court has transcribed; [2] in other cases, an information is indicated but not produced; [3] usually, it is upon a mere denunciation of party that the judge proceeds and has the accused arrested; [4] sometimes the party himself directly causes his arrest by an officer of the court.[5] From this point of view the denunciation retains all the efficacy of the ancient accusation; we may add that, when this proceeding is followed, the rule is that the denunciator shall affirm his complaint on oath, in open court, in confrontation with the accused, thus allowing the prisoner a first opportunity to defend himself.[6] Detention pending trial

to determine their acquittal or condemnation, and recourse to torture was not allowed."

[1] Certain passages seem even to faithfully reproduce the old-time distinctions; II, 279.

[2] See, for example, II, pp. 20, 441, 352; *cf.* I, 523.

[3] I, pp. 330, 382, 406; II, 239, 525.

[4] See, for example, I, 376. One might be tempted to believe that in these numerous cases a preliminary information has always existed, without any mention being made of it, but for the fact that sometimes order to inform is given after the arrest and the first interrogation. See I, p. 256; II. p. 77.

[5] I, p. 14; *cf.* I, 212, 365.

[6] I, 158, 173. 175, 344, 365, 393; II, 6, 7, etc. This is a feature which we have already remarked in the "Registre de Saint-Martin des-Champs." *Cf.* "Coutume de Bragerac," Art. XII (*B. de Richebourg*, IV, 2, p. 1014): "*Item* aliquis Burgensis non debet capi nec arrestari pro aliquo crimine, nisi in flagranti seu recenti crimine, aut de dicto crimine fuerit publice diffamatus, aut denunciatio fiat contra eum de dicto crimine; qui quidem

exists in all cases without exception;[1] and not a single example of release on bail is to be found here.

A minute inspection of the action, however, reveals the constant employment of the two most odious methods of examination known to the "extraordinary procedure," namely, the oath of the accused and torture. The accused is invariably made to swear that he will tell the whole truth; he swears "upon the holy Gospels, upon the salvation of his soul and the share which he hopes to have in heaven that he will speak the truth concerning that which is asked of him."[2] As for torture, the instances in which it is not inflicted upon the accused are extremely rare. It matters little that he has declared his acceptance of the inquest in the clearest fashion,[3] and that there are eye-witnesses;[4] and even when he has confessed, the judge is authorized to employ torture if he suspects that the accused has committed other misdeeds besides those he has confessed. The following passage well illustrates the spirit which animates this system of jurisprudence: "The said provost asked of the said councillors present what was proper to be done with the said prisoner and if his confession was sufficient to warrant the punishment of death. All of them were of opinion that, as to the present (misdeed), it was not advisable that the

denuncians debet jurare ante captionem dicto bajulo . . . dictam denunciationem se scire vel credere fore veram, et hoc etiam tenetur facere coram parte denunciata antequam dictus denunciatus respondeat dictis propositis contra ipsum."

[1] There is a regular entry of prisoners in the jail book, I, 202; however, all are not treated alike; some receive solitary confinement; others are imprisoned together; II, 285. Sometimes they may communicate freely with the outside, I, 245: "Was confined in the prison called 'la Fousse' so that any one might talk with him"; sometimes, on the contrary, such communication was forbidden; II, 83: "The wife of the said Hays had gone to the said Chastellet to confer with her husband, and she had a great quantity of florins in a purse which she carried, of which she had offered the jailor two florins, if she could speak to her said husband; with which the jailor would have nothing to do."

[2] Where Jews were concerned the Jewish custom was followed in administering the oath, II, 44: "Joesne d'Espaigne and Salmon de Barselonne Jews . . . after they had been made to swear according to their law, by putting the hand upon the head, that they would tell the truth . . . acknowledged and confessed." *Cf.* II, 132. The oath of the accused is also required by Chapter XLII of the "Coutume de la Ville et Septène de Bourges," above cited.

[3] I, 285: "Says that concerning the aforesaid matters he relies upon the opinion and common report of the said country . . . asked whether concerning the common report of his condition and actions and also of the said accusation he will trust and believe in the testimony and depositions of Adenat le Brebiat, Jehan Beautas and Perrinet Beautas, who were present for this purpose in judgment before the said prisoner, said on his oath, yes, be the result death or life, and that he knows and acknowledges these to be men of good life, report and credit;" he is tortured, p. 287. — *Cf.* II, 361, 381, 407, 448.

[4] II, 81, 85.

condemnation of the said prisoner should be proceeded with, the pilfering which he was known to have done being so small, but they decided that the prisoner should again be put to the torture several times, in order to ascertain more plainly the other crimes and offenses by him done, committed, and perpetrated."[1] It appears that up to a certain point two institutions, subsequently distinguished, the preparatory torture and the preliminary torture, were then blended. The judgments decreeing torture are usually based upon the discrepancies in the accused's statements and upon the inferior character and suspicious nature of his station and condition.[2]

The judge of the Châtelet knew, moreover, how to vary and grade the torture according to the constitution of the accused persons and the necessities of the cause. It was usually the torture of water which was employed, and it seems that sometimes the accused was forced to drink, and sometimes water was thrown upon him;[3] for this purpose he was stretched naked upon a wooden horse, to which he was bound.[4] A gradation was imported into the tortures by having two patterns of wooden horse, "the little and the big horse."[5] There were other kinds of torture of a more formidable description, — that of the "pelote,"[6] and probably that of the "courtepointe."[7] Some-

[1] I, 207. *Cf.* I, 463: "Notwithstanding the said confession he was caused to be put to the torture twice on the succeeding day, to ascertain and inquire if he knew anything more of the said poisonings than he had confessed, or if he knew any others who were accessories ('consentans') or guilty."

[2] See I, 196: "Considering her condition of life, which is that of a sinful woman and of little reputation." In one case where torture is not administered it is declared that the accused is "a respectable man, not suffering or in want of money, because he is well and decently clothed" (II, 28). *Cf.* "Coutume de Bragerac," *Bourdot de Richebourg*, IV, 2, p. 1015, Art. XVI. "Si captus fuerit dictus Burgensis pro crimine capitali publico vel manifesto et sit talis conditionis quod ipsum oporteat qustionare."

[3] I, p. 145: "And before water shall be given him to drink or any be thrown upon him." — I, 179: "When he has been given a little to drink." On nearly every page expressions like these appear: "Then water will be given him to drink." — "Then a little water should be thrown upon her."

[4] "Was stripped naked, put and bound to the rack." Such expressions are of constant occurrence. See, for example, I, 264: "The said Marguerite was stripped, bound to the rack by the hands and feet."

[5] See, for example, I, 207: "This prisoner was put to torture upon the little and big wooden horse." — 248: "Was tortured upon the little horse and when it was desired to put him on the big horse he earnestly implored that he be set free."

[6] I, 212: "Was brought back again and put to the torture of the 'pelote.'" — II, 54: "Because he would confess nothing he was put to the torture of the 'pelote.'"

[7] II, 203: "Was stripped quite naked, put, bound, and stretched out to the torture of the 'courtepointe' upon the little horse."

times the severities were moderated, and they tortured "mildly" ("doulcement").[1]

It is apparent that the torture could be repeated indefinitely; its repetition had no other limits than the judge's pertinacity or the accused's strength of resistance.[2] It was a terrible method of examination; but it must be acknowledged that it usually succeeded in extorting the truth from very questionable characters amenable to the tribunal of the provost of Paris. As a general rule, from the moment they are put to the torture they commence a general confession of the most unedifying description; the list of thefts and murders lengthens indefinitely under the pen of the clerk of court. If we remember the state of insecurity and the depredations revealed by the "Registre criminel," we can understand the stern and harsh attitude of the men of that time towards accused persons. But, on the other hand, torture sometimes lends its formidable aid to the prejudices of the period and stamps with its approval the most regrettable errors. In an action for sorcery, when under torture for the fourth time, a woman finally confessed that she had seen the devil and had heard him speak. "And then . . . appeared before her an enemy in guise and condition of the enemies acted in the Passion plays, except that he had no horns. He spoke these words; 'What wantest thou?' . . . And she who speaks said to him . . . and she who speaks saw the said enemy depart through an open window of her room; and on leaving the said house, this enemy made a great noise, as of a whirlwind, of which she who speaks was in very great fear and trembling." [3]

Constitutions there are, however, robust enough to endure these sufferings, and their owners escape with their lives whatever the judge may do. Thevenin de Braine was put to the torture four times without confessing anything; so then "taking into account the nature of his constitution which is that of a perverse man of obdurate and wicked disposition, whose offenses, by him

[1] I, 241: "Were of opinion that . . . this prisoner should be mildly put to the torture." — II, 523: "Except that, in consideration of his age, he was only once treated and tortured and that mildly."

[2] Margot de La Barre is tortured four times (I, 330, 333, 335, 353). Regnault de Poilly "in order further to learn the truth from his lips was tortured five times on so many different days" (I, 432).

[3] This proceeding deals with witchcrafts vaguely reminiscent of the second idyll of Theocritus. A courtesan, Marion l'Estatée, is really smitten with her lover who is about to get married. Through the instrumentality of an older friend, Margot de La Barre, she causes artless harmless spells to be cast upon him. Marion was tortured three times and Margot four; both were burned alive.

done and committed, could not be ascertained by his confession, though when any one commits crime, and does not call witnesses he should do so (confess); and considering that he has been formerly banished for offenses done and committed by him and acquiesced in the said banishment . . . and that he is an incorrigible man . . . deliberated and were of opinion that the said Thevenin de Brayne should be forever banished from the kingdom of France on pain of the gallows." [1]

Before the confession obtained by torture could serve as a foundation for a condemnation it must besides be adhered to without torture. So the "Registre" states that each time the sufferer, benumbed with cold, worn out, and bruised, is led to the kitchen of the Châtelet, he is there warmed and strengthened; [2] he is then interrogated anew on trial without other constraint than the faith of his oath. If he retract, the confession obtained by torture goes for nothing. It is true that the prisoner naturally reckons on being put to torture again; there are, however, those who withdraw their confession each time and thus escape death.[3]

The above are the sad features which mark the procedure of the Châtelet de Paris, but it must be said that there are less sombre sides to the picture. The "Registre criminel" shows that the accused could introduce his defense freely enough. We certainly never see it conducted by an advocate; but the prisoner could scrutinize the testimony produced against him and offer his justification. As we have said, the action often did not commence by an information, as the rule required. In such case, if witnesses are to be heard, they are frequently brought into court and testify in presence of the accused, who has every facility for contradicting

[1] II, 147; *cf.* I, 163: "Considering . . . that the said prisoners have acknowledged and confessed as little as possible, (also) their condition and the punishment of imprisonment suffered by them, deliberated and were of opinion that these prisoners should be revolved in the pillory in the market place, the cause of their judgment being there proclaimed, and after that banished from the town, sheriffdom, and provostship of Paris forever." — I, 506: "Considering that this Berthand is a wandering man, and his condition, that it were well he should be tortured once more, and if he confessed nothing further than is stated above, that he should be drawn in the cart to the court of Paris, where his left ear should be lopped off, and he should (then) be banished forever from the said town of Paris and a radius of ten leagues around."

[2] The usual formula is: "So was put out of this (torture) and brought to be warmed in the kitchen in the customary manner"; occasionally something more is said, I, 167: "After he had been very thoroughly warmed, clothed, and refreshed." — II, 373: "After he had been well and leisurely warmed." — I, 324: "After he had been fed, warmed, and refreshed, was again brought back into judgment."

[3] Process of Joesne d'Espaigne, II, 33-36; he is merely "banished from the kingdom." *Cf.* I, 438 *et seq.*

them.[1] When there is an information, several passages show that the accused is conversant with it.[2] If the second part of the action, the *inquest*, is entered upon, we find in several places that the mode of proceeding already outlined by Beaumanoir is followed; the witnesses are brought face to face with the accused and take oath before him, so that he may present his grounds of objection, but they testify out of his presence, before the examiner ("enquesteur") alone.[3] But according to the traditionary principle, the prisoner is made acquainted with the depositions, which are read to him: "He demanded and requested that upon the deposition of said Marion, which was read to him, she should tell the truth."[4] — "After the deposition (of) Gieffroy Olivier, read to him verbatim, agreed with and relied on everything for or against him or said of him."[5] Sometimes a request of the accused that the witness testify anew in his presence is granted. "Macete, wife of Hennequin de Reuilly . . . requested if she wished to rely upon what the said witch would say and testify for or against her, says on her oath No, and that she would willingly hear her speak, and for this (reason) . . . the said mons. the provost causes to come and attend in judgment the said Jehanne de Brigue, who is said to be a witch . . . in the presence of the said Macete."[6] Moreover, for the purpose of avoiding any difficulty, it also happens that after the information, instead of proceeding with the inquest in the form above described, the witnesses may be made to testify in open court in presence of the accused: "By the opinion of the said councillors it was said . . . that Margot . . . and

[1] I, 134: "Which prisoner, having heard the depositions hereinbefore written, made in his presence by the said Gilet and David, was asked," etc. — I, 303: "Before further proceedings shall be taken against the said prisoners, the said knight shall be despatched . . . on a day fixed, to be examined upon the said matter, in the presence of the said prisoners." — I, 313 (the following relates to certain herbs found in the possession of the accused, and which are supposed to be poisonous): "For this purpose, Richart de Bules, herbalist, was summoned into his presence . . . to whom were shown the herbs above mentioned."

[2] I, 407: "Denied having even . . . spoken the words mentioned in the information." — I, 260: "As to the words contained in the said information declared to have been spoken by her, she knew nothing of them."

[3] See, especially, II, p. 20 *et seq.*; four depositions are quoted; in the case of each witness it is said that he has been sworn in the presence of Charlot de Couvers (the accused) . . . heard and examined in the absence of the said Charlot: "they are interrogated, as in Beaumanoir, concerning the facts of the rescript hereinbefore written."

[4] I, 264. [5] I, 415; *cf.* II, 290, 347.

[6] II, 320; I, 350: "Asked if . . . she would rely upon and believe in what the said Ancel should say and depone. The said Margot said, Yes, provided that she heard him speak and that he took the oath in her presence. And for this purpose the aforesaid Ancel was summoned, who . . . said and testified in presence of the said Margot."

Jehennette of Blé, examined in the said information, should be anew made to swear, and be heard and examined in presence of the said prisoner. And, this done, and immediately the said women were summoned into court, the depositions of whom the said prisoner . . . referred to; (and) who were examined and testified in presence of the said prisoner."[1]

If the law is severe it still endeavors to administer even-handed justice. The accused has the opportunity to prove his innocence;[2] from the moment when he invokes some justificative fact, such as alibi, every effort is made to facilitate his proof of it. If uncomplicated facts only have to be verified and the witnesses to be heard are at hand, the judge has them immediately examined into;[3] or an examiner is sent from the Châtelet to secure the testimony.[4] "On hearing the confession of which prisoner, the said master Nicolas Bertin was ordered to repair to this lady of Fymes and ascertain from her whether or not the said prisoner had told the truth."[5] Or a regular information might even be opened; "Ordered the said master Jehan Soudan that he should commune with and examine the said Ancel Gohier and such others as he might see as should seem proper, to ascertain if the alibi offered by the said Margot was true or not, and that he should report what might have been done in this matter next day or as soon as might conveniently be done."[6] The accused had only one recourse against sentences to torture — the appeal to the Parlement. The appeal, composed of one word, stayed the execution of the interlocutory decree. It is brought several times in the "Registre criminel," but at the same time it is noticeable that the Parlement always affirms the decision of the Châtelet.[7]

Although the main features of the criminal procedure, as we have just sketched it, were already settled, it was still, on certain points, changeable and uncertain. Greater precision was essential.

[1] II, 81.

[2] Let us say, in passing, that in one instance the question of challenge to the judicial duel arises in the "Registre"; that was the case of a poor girl, of whom we have spoken before, and who no doubt had heard gentlemen talk (of it) I, 344.

[3] II, 345: "Jehan Vilete, door-keeper, was ordered by the said lieutenant to go speedily to the said rue de la Vennerie and cause to come all the women living there engaged in the business of binding hemp, to be examined by the said lieutenant in respect of what is said." — I, 411: "It is ordered that the said Gieffroy Olivier shall be sent for and made to come into the presence of the said prisoner."

[4] II, 232; I, 404; II, 361: "The said Master Dreue d'Ars is commanded to journey to this lady and examine her . . . as well and assiduously as possible."

[5] II, 411. [6] I, 346. [7] I, 334; II, 143, 144, 299, 415, 428.

To accomplish this, we find the "récolement," or re-examination of witnesses introduced. According to an old custom it was not the judge himself, but a special delegate, who heard the witnesses in the information and reduced their depositions to writing. It was usually an officer of the court and sometimes a practitioner who laid the information, with the assistance of a notary; sometimes the courts kept special functionaries charged with this duty, who bore the old name of "*enquesteurs*." "The king's procurator and the civil party cause information to be made of the crime committed by a sergeant royal or of the lord high justiciar, (to act) with whom is summoned a notary royal or of the secular court; and in some places the order of the judge is taken to do this; in others that of the 'enquesteur' of the jurisdiction to which the report is to be made; in others the 'enquesteur' only is empowered to conduct the information, which is unreasonable and leads to a multiplicity of parties; in other places the order of the judge is not taken."[1] These customs were very inconvenient, as they placed the most important interests in the hands of an inferior officer. In order to rectify these inconveniences it was provided that the judge ought himself to hear the witness anew. This was the "re-examination to confirm": "The witnesses examined by the judge," says Ayrault, "are not subject to confirmation unless the cause be removed from him, as from a judge suspected."[2] This, moreover, assumes that the aforetime division of the action into *information* and *inquest* had become a dead letter, and that the inquest, as we have described it, had fallen into desuetude; it had undoubtedly always been admitted that, whether the accused assented to it or not, "information should be tantamount to inquest." The information will ultimately tend to absorb the rest of the action. Simultaneously with the introduction of the confirmation, as the accused, in the "extraordinary" procedure, received neither copy nor knowledge of the information, the custom was begun of confronting him with each witness separately. This was the least that could be done, and it was at this moment that the accused must prefer his objections (to the witnesses) if he had any to offer. As to producing witnesses on his side, this was probably forbidden soon after this period, at least unless by authority of the judge after the witnesses for the accusation had been heard, re-examined, and confronted.

[1] *Imbert*, "Pratique," I, III, ch. 2, No. 2 (edition of 1604); *cf. Ayrault, op. cit.*, 1, III, Art. 1, No. 40. Although the authors cited belong to the 1500s, the customs they describe go back to earlier times.
[2] *Op. cit.*, Book III, Art. 2, No. 38.

Under such a system, all that remained of the ancient accusatory procedure must necessarily vanish. The accusation by formal party died out in the 1500s, without being suppressed by law: "It is to be noted that formal parties are not allowed in France to-day, Be it known that any one may be arrested and imprisoned for an offense, without prior information, provided he who constitutes himself formal party will submit to imprisonment like the other."[1] — "This was undoubtedly done until not long ago, and such accuser was called formal party, but this is no longer the practice. And I certainly have never seen it happen but once: this was a case of two unknown foreigners who had no sureties. . . . I allowed it in their case because they were unknown and proposed it themselves."[2] Henceforward we shall find but one real accuser, the king's procurator or those of the lords; the punishment is inflicted in the public interest, and no longer to satisfy a private thirst for vengeance. "We have two kinds of accusers," says Imbert, "those who prosecute the interest of the king and the common good, who are called king's counsellors, that is, the advocate and procurator of the king or of the lords, possessing high justice; they seek for corporal punishment and suitable and pecuniary penalty against the delinquent; the others demand reparation of their civil interest, which they have suffered because of the offense committed upon their persons and to their property and do not seek for corporal punishment by our practice, although they might, according to common law, be able to seek for corporal punishment and reparation of their interest."[3] The injured individuals did not quit the action altogether; they remained in it, as we said when speaking of the denunciation, for the purpose of claiming damages. From the above comes the constitution of the civil party, one of the most original features of our criminal procedure. The injured person is to all intents and purposes a party to the criminal action; he brings witnesses; it is really he who originates the cause by requesting from the judge permission to inform, "faire informer," as the phrase will run as long as the ancient law exists. The steps in the procedure are taken in his name and at his expense.[4] Besides, the public prosecutor is not, as a matter of fact, the prin-

[1] *Imbert*, "Pratique," III, ch. 1, Nos. 11, 14.
[2] *Ayrault, op. cit.*, Book III, Art. 1, No. 15.
[3] *Imbert*, "Pratique," II, ch. 1, No. 3.
[4] "Most frequently the king's procurator and the civil party are claimants together, and then the civil party bears the whole expense of the criminal process." *Imbert.*

cipal party, but a *joint party*.[1] The constitution of civil party ("partie civile") is in reality a combination of formal party ("partie formée") and of the ancient *denunciation* by the injured party; henceforward it will be totally distinct from the denunciation, where the private individual is merely the instigator of an action in which the official prosecutor figures alone.

[1] "The king's procurator is forbidden by the Ordinances to *join* with any civil party, without prior information." *Imbert*, "Pratique," III, ch. 1, No. 3.

CHAPTER III

FRENCH CRIMINAL PROCEDURE UNDER THE ORDINANCES OF THE 1400s AND 1500s

§ 1. **Introductory.** — We now enter upon a period of change and formation. In this development, which so materially changed the criminal procedure, the judicial practice of the royal courts was the agency whose influence was especially felt. It was, indeed, practically the only factor; the legislative power, that is, the royal power, had only intervened to affirm, in some short provisions of the Ordinances, rules already recognized and admitted. That duality of forms which divides the criminal procedure into "ordinary" and "extraordinary" process, the keystone of the whole edifice, was established by the jurists and by actual practice. But when the evolution had been completed and the system had attained its full development, royalty stepped in to embody it in statute law. Several famous Ordinances at the end of the 1400s, and during the first half of the 1500s, are declaratory of already settled rules of the customal law. They particularize various points on which the practice was wanting in exactness, or erroneous. If they introduced some new severities, it may be said that, even in that respect, they but hastened what practice would have ultimately effected, and probably generalized what it had introduced in some particular place. Of these Ordinances, by far the most important are those of 1498 and 1539.[1]

§ 2. **The Ordinances of 1498 and 1539. The Criminal Action in the 1500s.** — The principal purpose of the Ordinance of 1498,

[1] The lengthy Ordinance of 1507 (*Isambert*, XI, p. 464 *et seq.*) is merely an adaptation of earlier ordinances, to suit Normandy; in regard to criminal matters in particular, Article 184 *et seq.* are merely repetitions of Article 106 *et seq.* of the Ordinance of 1498.

so far as it concerns our subject, was to distinguish clearly the "ordinary" from the "extraordinary" procedure, and to point out how one or other of these might be chosen, and what forms were to be followed in either case. First of all an information must be laid, a document which was kept secret from every one except the king's procurators.[1] "After deliberation on the said informations, a 'dictum' shall be made in writing, signed by him who shall have seen and reported them, which shall contain the provisions as to personal citation, arrest, etc."[2] If occasion required, citation or capture was the next step; then came the interrogations,[3] which, along with the informations, were at once communicated to the king's procurators,[4] so that they might file their charges. From this point the procedure became bifurcated: "Article 108: And it shall be decided whether the procedure shall be extraordinary, or if the parties shall be heard." If the latter method was decided upon, the parties "shall be heard in trial in open court before an order for further hearing shall be made, and that done the said parties shall be heard by our said bailiffs, seneschals, and judges, or their lieutenants, as shall appear proper;"[5] that is to say, the procedure was to be by inquests ("enquêtes") and pleadings according to the old forms.[6] A quicker procedure could, however, be followed. The king's procurator or the party might declare that they would take law by the confession of the accused: "they shall lodge their motions in writing only, to which the accused who pleads guilty can reply in extenuation only, and that being done, justice shall be administered as is proper."[7]

If, on the contrary, the "extraordinary" procedure was decided upon, the ordinance goes on to specify its two distinctive features,

[1] Art. 120 (*Isambert*, XI, p. 367); Art. 96 *et seq.* (p. 362).
[2] Art. 98 (p. 362).
[3] Art. 106: "Let all those imprisoned, arrested, or summoned to appear personally, be examined with all speed by our said bailiffs, seneschals, and judges, or their lieutenants, and let the matters be despatched summarily and conclusively, our advocate and procurator and the parties (civil parties) being heard."
[4] Art. 107: "Nothing being shown or communicated to the parties."
[5] Art. 107.
[6] Art. 119: "The parties are summoned confrontatively and by inquests." — Art. 118: "The cause shall be tried publicly." *Cf.* Ordinance of 1493 (*Isambert*, XI, p. 241), Art. 84: "And in regard to the cases of prisoners and those summoned to appear personally, or others who desire to come into court, we will and ordain that our said advocate, who shall plead our cause, shall read over at length the charges, informations, and confessions, and adopt the appropriate conclusions, so that the delinquents may acknowledge their offenses, and that it may serve as public example."
[7] Art. 109; *cf.* Art. 108.

secrecy and the employment of torture. "Article 110. In regard to prisoners and others accused of crime, where it is necessary to institute criminal action, the said action shall be conducted as diligently and secretly as possible, so that none shall be apprised, in order to avoid the subornations and forgeries which might be made in such matters, in the presence of the clerk of court ('greffier') or of his assistant, without summoning the jailor, officers, clerks, or attendants, or any others who have not taken the oath to us and to justice."[1] As to torture, the Ordinance of 1498 contains certain provisions which are in reality an amelioration of the earlier practice. It first of all provides that the judgment which decrees the torture shall be rendered after a serious deliberation;[2] and it expressly forbids a repetition of the torture in the absence of fresh evidence.[3] Bearing in mind the practice vouched for by Bouteiller and the "Registre du Châtelet," this may be considered a substantial improvement. The official report had also to be drawn up, containing "the form and manner of the said torture, and the quantity of water administered to the said prisoner, and how often, if at all, the torture has been repeated,[4] the interrogations and the replies, with the persistence of the prisoner, his constancy or variation, and on the day after the said torture the said prisoner shall be interrogated anew away from the place of the said torture to test his persistence, and everything shall be written down by the said clerk of court."[5] There is no doubt that the accused's only knowledge of the charges was

[1] Art. 110. It follows from the text and also from Article 108 that the decree which sent the action to the extraordinary procedure was not given in court and the parties heard.
[2] Art. 112. "And the said proceedings (having been) taken with all diligence as aforesaid, down to the 'question' or torture, our said bailiffs, seneschals, and judges, or their lieutenants, shall cause the said torture to be deliberated upon in the council chamber or other private place by notable and literate men, not suspect nor favorable, and who have not been of counsel to the parties, our advocate and procurator being present or summoned." This is the very same Council which we have seen in the "Registre du Châtelet." The Ordinance of 1498, speaking in another article of torturing "ear-cropped men, outlaws, and vagabonds," still mentions the *judgers*: "Art. 94. . . . Without in any way departing from the customs, usages, and laws observed in certain places of our kingdom, where the custom has been to judge the said criminals with the aid of *judging men*."
[3] Art. 114. "We forbid our bailiffs, seneschals, and judges to repeat the said 'question' or torture on the said prisoner without new facts supporting presumptions."
[4] Consequently, it was possible to put the accused to the torture several times in the course of the same sitting. What was forbidden was to recommence it after that sitting had ended.
[5] Art. 113. The accused was thus given twenty-four hours for meditation after the torture.

through the confrontations spoken of in Article 111;[1] but, on the other hand, it would appear that he was allowed to plead his defenses from the outset, and such proof of these as was conformable to the practice at that date was immediately taken: "Article 111. Then shall be made all necessary progress with fullest informations, confirmations, or confrontations of witnesses, or with the proof of alibi, or any other fact that there may be, if admissible, for or against the prisoner, as diligently and secretly as possible, in such a way that none may be apprised." Finally, the sentence of condemnation was pronounced in presence of the accused.[2] If "by the extraordinary action, duly carried out, nothing shall have been learned, and it shall be necessary to hear the parties and admit them to ordinary action, our said bailiffs . . . shall order the parties to be heard by the council on a certain day, on which the prisoner shall be brought into court and the matter tried publicly."[3] As to liberation on bail, it seems that that was only allowed when the "ordinary procedure" was followed.[4] It will be seen that the Ordinance of 1498 is notable inasmuch as it contains a description of the entire procedure. It is important particularly in respect of its provision for absolute secrecy in the "extraordinary" action. Henceforward there is an express law, repudiating publicity, traces of which we have found in the practice of the 1300's and the 1400s. The public is barred from the court-room of the criminal tribunals, to which they will not regain entrance for a long time.

But the most important Ordinance in regard to criminal matters was that promulgated by Francis I at Villers-Cotterets in April, 1539, on justice and the shortening of trials. Modeled upon

[1] But see the Ordinance of April, 1510, relating to the amendment of the laws, etc., promulgated as a result of the assembly of the Nobles held at Lyons (*Isambert*, XI, 575 *et seq.*), Art. 47: "In order to obviate the abuses and inconveniences which have heretofore resulted from the judges of the said districts of written law having conducted the criminal actions of the said districts, as well as the inquests, in Latin, we have ordained and hereby ordain that henceforth all criminal actions and the said inquests . . . shall be done in the vernacular and the language of the district, so that the witnesses may hear their depositions and the criminals the proceedings had against them."

[2] Art. 116: "Our said bailiffs, seneschals, and judges, or their deputies, shall pronounce sentence in open court or in the council chamber, that being within the prison house, according to the lawful customs of the district, to which place of court-room or council chamber the said prisoner shall be brought and the said sentence pronounced upon him in the presence of the clerk of court, who shall record it in the book of sentences."

[3] Art. 119.

[4] Art. 119. An Ordinance of the month of October, 1485, relating to the provostship of Paris (*Isambert*, XI, p. 147 *et seq.*), contains interesting information about the prisons.

another Ordinance previously promulgated for the reform of the style of Brittany, this work of Chancellor Poyet, who afterwards suffered under the stern law which he himself had brought into existence, definitely settled the rules of criminal procedure in France. Very soon people even came to believe that it had originated all that it dealt with. On the other hand, the Ordinance of 1670 will do nothing more than take the system which that of 1539 had organized and particularize it in its details, at the same time often increasing its severities. It is therefore useful to pause here long enough to explain this system, elucidating the text of the Ordinance by the comments of the authors who commented on it.

This criminal procedure is, in the first place, distinguished by a certain number of salient and characteristic features. In every prosecution, the king's procurator or that of the lord is, in future, a party. He is doubtless only a joint party, but from this time onwards the principle exists that the criminal examination requires the united action of two magistrates, the procurator who claims or petitions and the judge who conducts the examination. The action is divided into two parts of very unequal duration, the examination and the judgment. The first, of inordinate duration, comprises all the search for evidence which will make up the record, and this is the province of a single judge. He is "the criminal judge" according to the law books, which always speak of him in the singular number, that is, the criminal lieutenant or the seigniorial judge. It is not until everything is in readiness that the accused appears before the entire bench, if there is one, and that tribunal has for its enlightenment only the written proceedings and the last interrogation of the accused. Everything is in writing; and everything is secret, both examination and judgment; and in the majority of cases the latter is not evidentially grounded.

The following is the whole course of a prosecution. Formerly, except in the case of capture in the act, where the culprit is seized and interrogated immediately, the information was the first step in all criminal procedure.[1] This is undertaken either upon the complaint of the civil party, who obtains permission to lodge information,[2] or of the lord, who, advised by a

[1] Unless the offenses in question were so trivial that the injured party could at once proceed with the ordinary action.

[2] Every complaint on the part of the injured party is necessarily a constitution of civil party (or private prosecutor); no distinction is made between the two.

denunciation or otherwise, petitions the judge; or by the spontaneous act of the judge, who can always take action ex officio. That is a right kept up by the Ordinance of 1539 (Art. 145). The witnesses cited by the civil party, or by the public prosecutor, are heard separately and privately, either by the judge or by special officers called examiners ("enquêteurs"), or more frequently by a mere officer of the court assisted by a royal notary.[1] The deposition of each witness had to be transcribed "ad longum," but it seems that it was necessary to read it over to the witness and require him to sign it.[2] The employment of these inferior officers in such an important act was a great evil; "there is no man in such good standing as to escape at the hands of these officers and notaries . . . and they make the information serious or trivial according to the party's wish, not according to what the witnesses really say."[3] The Ordinance of 1539 tolerates this practice. "The judges," says Article 145, "*shall inform or cause information to be made.*"[4]

The information or inquiry made and submitted to the criminal judge, it devolved upon him to communicate it to the king's procurator, to require his conclusions, which were given in writing (Art. 145): "the information having been made and communicated to our said procurator, and his conclusions considered, it shall be his duty without delay to return the said information, without taking any fee therefor." It does not appear that there was any communication to the civil party. According to the conclusions, the judge allowed the matter to drop or issued the decree, that is, the order which required the appearance of the accused. The Ordinance of 1539 was vague in this respect. "Such lawful provision," it said, "shall be decreed as shall meet the necessity of the case." (Art. 145.) But judicial practice had

[1] *Imbert*, "Pratique," III, ch. II, Nos. 2 and 3. *Cf.* "Le style de la cour de Parlement," by *Philbert Boyer*, latest edition, revised after the author's death in 1610: "It shall be necessary to deliver the said request (to have a commission to cause information to be made) to a clerk of the criminal court, who shall thereupon draw up the commission, addressing it to the judge or examiners of the districts or to the head officer of court upon this request. Which information shall be made in the presence of a respectable deputy, who has taken the judicial oath."

[2] *Imbert*, III, ch. XIII, Nos. 13, 14.

[3] *Ibid.*

[4] Sometimes "monitories" were decreed. These were orders by the temporal judge, affixed to the church doors and read after mass, enjoining all the faithful to tell the curé what they know about the crime; the curé took the depositions and sent them under seal to the criminal judge. This practice recalls those denunciations which the faithful already made on oath in the "judicia synodalia"; it was probably in these that the monitories originated.

introduced two kinds of decrees, that of personal summons and that of bodily arrest, "prise de corps."[1] The "personal summonses should be executed like the ordinary summonses in civil matters, except when the accused is a man who is feared and accustomed to resist arrest, and if it be dangerous to summon him personally or at his domicile, the judge orders and permits him to be summoned by public proclamation by sound of trumpet at the market place or elsewhere, wherever there is a concourse of people nearest to his residence."[2] The effect of the decree of personal arrest was to put the accused in a state of detention pending trial: "according to the common law the apprehension of a person in his residence was not allowed, but nowadays one may apprehend him in his residence provided it be in the day time and not the night time, and with 'records' (special kinds of witnesses), and not with a great assemblage of people and by main force; and provided nothing in the house be destroyed or carried away; but if the doors are closed they may always be broken open."[3] The decree of bodily arrest could only occur in serious offenses; "great prudence in this respect is required on the part of a judge," says Imbert, "to avoid issuing a warrant of bodily arrest unless in case of public crime and even then only in serious matters." The judge, however, was not bound by what the commentators wrote; the exceptions to this rule were numerous,[4] and individual liberty found in these rules but a slender safeguard.

The accused, whether he appeared or was arrested, must be interrogated by the judge "immediately, carefully, and assiduously."[5] The interrogation took place "in the house of the said judge or in the criminal court-room set apart for the purpose," and this art of interrogating was a great one, too often cruel and treacherous. It put the accused at the mercy of the judge. He was compelled to reply without having the aid of a counsel and without having had any knowledge of the information.[6] He also swore that he would tell the truth. This odious formality was, however, not imposed by any law, but was the result of a custom

[1] *Imbert*, III, ch. II, No. 3. [2] *Ibid.*, III, No. 1. [3] *Ibid.*, V, No. 2.

[4] It was possible to commence with the decree not only in the case of taking in the act, but also in the case "of a non-resident poor person who had no personal effects, or where the offense was such that it was probable that he would conceal whatever chattels he possessed . . . then it was lawful to arrest without information and to make it afterwards" (*Imbert*). This is the same practice which we have seen in the "Registre criminel du Châtelet"; see *supra*, p. 135.

[5] Ordinance of 1539, Art. 146. [6] *Ibid.*, Arts. 146 and 162.

already very old, as we have said. Imbert is explicit on this point: "The judge," he says, "must first make him swear to tell the truth and then interrogate him."[1] All the replies were reduced to writing: "It is essential that the clerk of the court transcribe, under the judge's direction, everything that the judge shall say and state to him." If the accused had confessed in his interrogation, this document was communicated to the king's procurator, who considered whether he wished to take law upon it, that is, to demand judgment, without more formality. If he was of that opinion, which, according to the theory of evidence then in force, did not happen in serious cases, the interrogation was communicated also to the civil party. Both these parties then gave their conclusions in writing and these were communicated to the accused "that he might reply to them by way of extenuation only."[2] From this point, nothing more remained to be done than to appear in order to receive sentence. If, on the contrary, the parties did not wish to take law on the interrogation, which always occurred when the accused pleaded not guilty and sometimes when he confessed, there was a ruling to the extraordinary action, or to the ordinary action. For this purpose the judge, always acting alone, rendered an interlocutory decree. Prior to the Ordinance of 1539, the three parties to the cause, including the accused, stated their demands at the hearing, either orally or in writing.[3] "The joinder of issues," says Imbert, "takes place when, after the hearing of the prisoner, the parties appear before the judge, and the prisoner pleads, by coming personally to be heard and his statement communicated to the king's advocate and procurator and demands to be acquitted or at least to be granted ordinary action and released on bail . . . and the complainant civil party objects and demands that the accused be proceeded against extraordinarily by confirmation and confrontation of witnesses and to receive during the action provision of sustenance and medicaments. And in such places as the court of Parlement, the king's advocate pleads the fact of the accusation contained in the information and moves that it be tried extraordinarily as is said; and in other places they submit their motions at the termination of the hearing."[1] This was the time for the accused to present his defense with some advantage, especially if he had the aid of a counsel, although the information had not been communicated to him.[2] But the Ordinance of 1539 (Art. 162) "abolished all the forms, usages, and customs by which accused persons had been accustomed to be heard in judgment for the purpose of ascertaining if they should be accused and for that purpose to have communication of the facts and circumstances covering the crimes and offenses of which they were accused, and all other things contrary to what is hereinbefore expressed." Henceforth, therefore, only the motions of the public and private prosecutors were submitted to the judge in writing; the accused was no longer allowed to speak. Conformably to the Ordinance of 1498, however, when the judge decided upon the 'ordinary' procedure, he must first hear all the parties in judgment; Article 150 adds in effect, "unless the matter was of so little importance that *after the parties were heard in judgment* it was proper to order that they should be received in ordinary action." Save in this very rare case, the judge ruled that the action would be "extraordinary," and he fixed a day to proceed with the confirmations and confrontations of witnesses.[3]

The witnesses were subpœnaed afresh for the confirmation; "the judge first causes the witness whom he is about to examine to swear to tell the truth, and if he is in doubt whether or not the testimony is false he will require him to state what he knows of the subject of the accusation, which he will briefly summarize to him, without informing him of the contents of his deposition con-

[1] L. III, ch. X, No. 2. The Latin text prior to the ordinance is no less clear: "Judex ergo primum ad nudandam veritatem reum jurejurando adigit." Boyer's "Stile" reads: "Then the commissary has the accused brought before him and makes him swear to tell the truth" (p. 238 recto).

[2] Ordinance of 1539, Art. 148; *cf.* Ordinance of 1498, Art. 109.

[3] See, however, what is shown in the Ordinance of 1498, *supra*, page 137, note. *Imbert's* text, quoted above, appears to show that on this point the law was not rigidly followed in actual practice.

[1] *Imbert* "Pratique," III, ch. X, No. 6.

[2] See "Notice sur les archives du Parlement de Paris" in *Boutaric's* "Actes du Parlement." "The existing registers of the end of the 1400s and those of the 1500s down to the year 1529 belong to the category of pleadings. After a lapse of several years, the first register which appears in the ordinary series is one of those of the council of November, 1535, to November, 1536. Registers of pleadings are no longer found after that period and all are of the council down to the end of that century. It is not correct to say, as Chancellor *Séguier* does in his 'Mémoires sur le Parlement de Paris,' that the Tournelle did not hold hearings at the time of its establishment. The contrary is shown by the very terms of the edict of April, 1515, making it permanent. It was no longer so under the Villers-Cotterets Ordinance of August, 1539, which forbade advocates to act in criminal matters (Vol. I, p. 227)."

[3] Ordinance of 1539, Art. 151; *Imbert*, III, ch. XII, No. 1. The ordinance itself provides that, on the expiry of this delay, the action will be tried on the documents extant, except for the granting of a second delay, for good cause shown; but Imbert informs us that "the said ordinance is not followed, as the royal and other judges still grant three or four delays as before, which is a cause of much vexation to the unfortunate prisoners."

tained in the information, and if he sees that he states substantially what is contained in that deposition, he will cause it to be read to him by the clerk of court, and after that he will demand of him on the oath which he has taken if it contains the truth, and will write down in what respect he confirms and in what he corrects his first deposition." [1] Immediately after that came the confrontation of the witnesses with the accused: "And if he persists and charges the defendant, the said witness shall be immediately confronted with him, that is to say, the judge shall have the defendant brought before him in presence of the witness, and they will both be made to swear to tell the truth, and afterwards interrogated whether they know each other well, and if the defendant is he of whom the witness speaks in his deposition and confirmation." [2] The confrontation had a double purpose, first, to allow the accused to state the objections which he might be able to urge against the witness, and in the second place, to enable him to directly contest the charges brought against him. This is the first and only time the opportunity to do this is offered to him. The Ordinance of 1539, going farther than the former practice, decided that at that moment, before the reading of the deposition to him, the accused must offer all his objections. "Art. 154. Before the reading of the deposition of the witness in the presence of the accused, the latter shall be asked if he has any objections against the witness there present, and enjoined to state them promptly, which it is our will that he be bound to do, otherwise they shall not be afterwards received, and of this he shall be expressly warned by the judge. . . ."—"Art. 155. The accused shall no longer (after the reading) be allowed to state or urge any objections against the said witness." That was putting the knife to his throat. The actual practice, however, was rather less severe; it allowed the accused to demand time to lodge his objections.

The reading of the deposition was then proceeded with: "Should he urge no objections (to the witness) and declare that he does not wish to urge any, or demand time to state them or submit them in writing, the judge shall read the deposition of the witness in the presence of the defendant and the witness; and he shall demand of the witness, and afterwards of the defendant, if it contains the truth, and shall cause their answers to be written down." [3] The confrontation, very inadequate as it was as a means of defense, since it took place in secret and without the aid of a counsel, yet offered some help to a capable and intelligent accused. He

[1] *Imbert*, III, ch. XIII, No. 9. [2] *Ibid.* [3] *Ibid.*, No. 10.

might by his remarks induce the witness to retract or contradict himself. The witness ran no risk in retracting; "The witness is not bound by his confirmation and confrontation to stand to his deposition as reduced to writing in the information, and may with impunity vary and change his deposition." [1] Were all the witnesses confronted? It would appear that the Ordinance only required confrontation in the case of the witnesses for the prosecution who stood to their testimony at the confirmation; "however," says Imbert, "some judges of wide experience confront all the witnesses, both those of the prosecution and those who are not."

Up to this point the accused had taken only a passive part in the action. He had, in short, had the privilege of examining, at the time of the confrontation, the witnesses brought by the public and private prosecutors; but he had not had the opportunity to summon any witnesses on his own behalf; he had not been able to prove his innocence directly. Was he ever to have the opportunity to do that? On this point a most astounding and sadly ingenious theory was put forward. It was not admitted, in a general way, that the accused could bring any witnesses to prove that he was not guilty. In effect, from a purely logical point of view, there was no need to prove a negative fact such as non-culpability; and according to the theory of legal proofs the thing was, not to convince the judge, but to produce specific evidence. If the fact was not "legally" proved by the witnesses brought by the prosecution, any proof on the part of the accused was said to be useless. If, on the contrary, the action should establish, by the requisite proofs, that the crime had actually been committed and that the accused was the perpetrator of it, he could only rebut the testimony by means of the objections which he had urged, or prove that these witnesses were suborned, or, finally, offer certain positive facts, which formed his justification. These facts — called "justificatifs" — were of two kinds; some proved the innocence of the accused indirectly, but beyond dispute. Such were, the "alibi," or the production of the person who was believed to be dead, or the production of a prior sentence pronounced against the real perpetrator of the crime.[2] Others, without rebutting the facts established in the action, deprived the act of all criminality; for example, legitimate self-defense, or insanity of the doer of the act at the time of its occurrence. Objections to the wit-

[1] *Imbert*, III, ch. XIII, No. 12; but he asks (No. 14) if the witness who has signed his deposition can still change with impunity.

[2] Several of these facts were, subsequently, sometimes offered as *peremptory exceptions to the accusation.*

nesses and justificative facts, therefore, were the only defenses left to the accused. It is evident that his proof must always be in support of some fact distinct from that proved by the prosecution. But that was not all. He could not produce this proof until all the proof of the prosecution had been produced; and even then he encountered obstacles. We have seen that he was obliged to state his objections to the witnesses at the time of the confrontation; as for his justificative facts, he was bound in practice to urge them from his first interrogation; "if he has any justificative facts he must state them in the said confession;" [1] he could then produce them in the course of the examination ("instruction") each time he was brought before the judge, or even without that, by a request addressed to the latter. But to produce them was not all-sufficient; it was still necessary, in the case of the justificative facts, as well as in the case of the objections, that the judge should allow him to prove them.

The whole process, information, interrogation, confirmations, and confrontations,—all the documents, in short,—were communicated to the king's procurator: "If he find that the accused has pleaded any peremptory facts conducing to his acquittal or innocence, such as "alibi," or any lawful and admissible facts concerning objections, he shall require the accused promptly to name the witnesses by whom he intends to prove the said facts . . . failing which he shall move for torture or final sentence." [2] On that motion the judge decided. He could always disallow proof of the justificative facts by ruling them to be inadmissible. Assuming, on the contrary, that he had admitted proof of the objections and justificative facts, a final obstacle still presented itself. "Then shall be drawn up," said the Ordinance, "admissible facts, if any there be, for the defense of the accused either by way of justifications or objections, which he (the judge) shall show to the said accused and shall order him to name promptly the witnesses by whom he intends to sustain the said facts, which he shall be bound to do, otherwise they shall not afterwards be received." [2] If the

[1] *Imbert*, III, ch. X, No. 4.
[2] *Imbert*, III, ch. XIII, No. 15; Ordinance of 1539, Art. 157. "If the accused were permitted to present their justificative facts from the start, the decree granting this permission, fatal to the public welfare, would constitute a title and an assurance of immunity for them; they would, on the pretext of bringing their proofs, indirectly evade those which might convict them; and by weakening the strength, authority, and weight of the evidence, they might often render the court powerless to prove either the crime or the innocence, without having even proved their justificative facts." *Séguier*, "Réquisitoire de 1786."
[3] Art. 158.

accused shall have been able summarily to indicate all his witnesses, how were they brought before the judge or the examiner? They were "heard and examined 'ex officio' by the judges or their clerks and deputies," [1] in the absence of the accused. It was the prosecutor who directed the inquest for the defense; the witnesses, however, not being subject to objection. The official report of this information was added to the record of the action.

Whatever the result of the examination might be, the next step was to call for the motions of the public and private prosecutors, and to bring the matter before the assembled bench; "when the process is complete, the judge orders that it be communicated to the king's counsel so that they may lodge their motions thereon within three days." [2] But this mass of waste paper relating to proceedings at which no one except the examining magistrate had been present, was not to be submitted to the court without anything to facilitate their comprehension of it, and therefore a report was made upon the process by a judge. This institution of "reporter" is an essential part of the written procedure. It is always found in its wake.

The conclusions or motion of the public prosecutor, instead of being final, that is, leading to the infliction of a punishment, could only lead to the application of the preparatory torture. "The judge places the whole matter before the council, and if the offense in question is so nearly verified and proved that only the confession of the defendant is lacking, and the crime is heinous and such that, if proved, it would warrant a severe corporal punishment, the judge shall cause the matter to be deliberated in some private place by influential and literate men, not suspect or favorable, who shall not have been of counsel to the parties, the king's advocate being present or summoned." [3] In this case the Ordinance of 1539 provided that the torture be administered immediately, except in the event of appeal (Art. 164). Nothing, however, was prescribed as to the manner of its administration, and the methods thereof were as varied as they were odious. Hippolytus of Marseilles took the pains to enumerate forty methods of torture in Italy, and they were apparently no less numerous in France. "According to the provisions of the law, the judges should not use for the

[1] Ordinance of 1539, Article 139. [2] *Imbert*, III, ch. XX, No. 1.
[3] *Imbert*, III, ch. XIV, No. 1. These "expert and learned" men, styled in Latin "causidici," are the practitioners with whom the judges of that period still surrounded themselves, and who were the successors of the judges of the feudal period. *Cf.* Ordinance of 1498, *supra*, page 147, note 2.

torture anything but cords. Nevertheless, in various provinces, the judges and provost-marshals use other instruments, such as fagots, water for ' l'avallement de la serviette,' vinegar, oil poured down the throat drop by drop, eggs cooked in the embers and applied under the armpits, sometimes intolerable cold, hunger, or thirst induced by the manducation of excessively salt food given to the accused without anything to drink; others by tightly compressing the fingers either in the end, or in the cock of an arquebus or pistol, or binding them with little strings or packthreads between various little sticks called ' gressilons ' ; others by the bundle of cord, others by the pump, and others in different ways. See ' Hippolytus of Marseilles in commen. super tit. de quaestion. in l. I, ubi ponit quatuordecim species tormentorum diversas.' — But everything depends upon the decree of the judge." [1] Nevertheless, the practitioners seem to have placed great faith in witchcraft and drugs, by means of which accused persons endeavored to make themselves insensible to torture. Damhouder's narrative, as an ocular witness of and actor in one of these dramas, must be read to give some idea of what aberration the human intellect can be capable of.[2] The official report of the torture was drawn up; but next day the accused was interrogated anew, to see if he adhered to his confessions. This was in conformity with the earlier law, but it had become a mere formality: " Inasmuch as there be many so cunning and wily that they will totally deny whatever they have confessed under torture when they are interrogated the next day, the custom has been to stop with the confession made under torture, if it be probable, and conform to or approach the contents of the informations." [3]

When the torture had been administered, or if at the outset the conclusions of the public prosecutor had been final, " the entire criminal process so made shall be submitted by the judge for deliberation by the council of his court, as before said, in presence of the advocates and king's procurator, to take counsel as to what is to be done, and the clerk of court shall transcribe the opinions and deliberations." Then an interrogation of the accused usually took place before the whole court which was to judge him.[4] But

[1] "Le procès civil et criminel," by *Charles Lebrun de la Rochette* (Rouen 1616), Part 2, p. 140.

[2] *Damhouder*, "Praxis," ch. XXXVI, No. 21 *et seq.* *Lebrun de la Rochette*, "Le procès civil et criminel," Part 2, p. 144 *et seq.*

[3] *Imbert*, III, ch. XIV, No. 6.

[4] *Imbert* says nothing about the accused being interrogated before the entire assembled bench. This final interrogation, although very important, was altogether discretionary.

at no time had the accused the help of a counsel; the Ordinance expressly declares, Art. 162, " in criminal matters the parties shall in no wise be heard by counsel or agency of any third person; but they shall answer by their own word of mouth for the crimes of which they are accused."

The deliberation upon the judgment might occur in various ways. When there was only a council (" conseil ") of practitioners assisting the judge, he merely took their opinions, which were not binding upon him; but when there were counsellors or assessors, it seems that the question was decided by the mere majority opinion alone.[1] In this case, the judges, according to Ayrault, gave their opinion orally or by ballot. " These are formalities which depend on ordinances or the practice of the companies. Different courts use different methods. Provided that everything in the process is seen, no error is made in pursuing either course." [2] Already the custom was introduced into the higher jurisdictions of not assigning a reason for the judgments. " It should be understood that in a criminal judgment it is necessary particularly to declare for what crime the accused is condemned, and that the Court of the Parlement of Paris does so, at least usually; the royal judges do not, however, regard this rule; thus they put in their judgments the clause, — for the punishment and reparation of the crimes of which he is found guilty in the action." [3]

Even when the procedure had become secret, the judgments had for some time been pronounced publicly, or at least in presence of the accused; but this last trace of publicity also disappeared: " The said Ordinance (of 1498), Art. 116, states that if the prisoner is condemned to death, or other corporal punishment, the judge shall pronounce sentence in open court, or in the council chamber where the prisoner shall be brought, and the sentence shall be read to him in presence of the clerk of court, who shall record it in the books of sentences . . . but this formality is not adhered to nowadays, as the judge sends his decision to the clerk

[1] " The judge puts the criminal process with the said motions to the vote of eminent advocates of his jurisdiction not suspected or favorable. And although by the Ordinance of King Louis XII, Art. 115 . . it is said that the clerk of court should write down the opinions of those taking part in the deliberation, this was not invariably done; for the clerk is not present at the said deliberation unless when there are counsellors whom the judge is compelled to summon to the judgments of the actions, and to decide according to the majority opinion of the said counsellors." *Imbert*, III, ch. xx, No. 4.

[2] " L'ordre et formalité," etc., III, Art. 4.

[3] *Imbert*, III, ch. xx, No. 6.

of court, who communicates it to the prisoner in the doorkeeper's room, where he has the prisoner brought." [1]

The accused had been kept in jail throughout the whole of these proceedings. In the 1300s we have said that liberation on bail was granted freely enough, but it was necessarily excluded by the general character of the new procedure. In this respect again the Ordinance of 1539 sanctions a severity formerly unknown: "Art. 152. In matters subject to confrontation accused persons shall not be released during the delays which are given for the purpose of making the said confrontation." It was, therefore, only when the action was put on the ordinary rôle that liberty on bail was allowed (Art. 150). Very soon we shall find Ayrault protesting against the maxim which made detention pending trial a rule without exception. Certain indications, however, show that the provisions of the Ordinance on this point were not always respected; "in trivial matters involving no corporal or criminal punishment," says one who lived at the end of the 1500s, "the judges are accustomed to release accused persons on bail or on their juratory bail, or even in the custody of a sheriff's officer or officer of court. It might be said against this that the Ordinance forbids it and that criminals should not be released until the confirmations and confrontations have taken place, and that this would be an obstacle in the way of prosecution, and that it would be impossible to obtain proof of a crime, which would consequently go unpunished; but the obvious answer, based on common sense, necessary and peremptory, is that when the Ordinance was drawn up, false witnesses were not so abundant as at present. This is in common and daily evidence, to such an extent that there are as many and more sentences carried out on false witnesses than for all other crimes. I say this not only from the horror and detestation of this abominable crime of perjury, or because I desire the introduction of a new (system of) practice; but because it is necessary to use new remedies to cope with the increasing maliciousness of the evil-doers." [2]

Thus, little by little, the safeguards of the defense disappeared. The procedure had become absolutely secret, not only in the sense that everything took place beyond the range of the public eye, but in the sense that no production of documents was made to the accused. The aid of counsel and the freedom to summon witnesses for the defense had been taken away from him one after

[1] *Imbert*, III, ch. xx, No. 3.
[2] *Boyer's* "Stile," 1610 edition, Part IV, Title 12, p. 239.

the other. Submitted to skilful, and often treacherous, interrogations, he was in a terrible plight; it might even be said that after the Ordinance of 1498 his position became more desperate; and the Ordinance of 1539 sanctioned new severities.

The appeal was, however, always open in criminal prosecutions; and for a long time it was always taken before the royal judges. Imbert, who still recognized a certain recourse, "ressort," from the seigniorial judges in civil matters, recognizes none in criminal matters.[1] The Ordinance of Crémieu of 1536, confirming a usage already established, gave to "appellants from corporal punishment" the right to pass over the middle judge, and go directly from the lower judge to the supreme court, provided they formally expressed their desire to do so (Art. 22). The Ordinance of 1539 went farther. In Article 163 it provided that in future all appeals, in criminal causes, should "be taken immediately and without intermediary step to the supreme court, for whatever cause it may be appealed." This perhaps went beyond the equitable limit; therefore a "Declaration" of 21st November, 1541, determined that the foregoing provisions should apply only "to appeals from sentences and judgments of torture and other corporal punishments, such as civil or natural death, scourging ("fustigation"), mutilation of members, perpetual or temporary outlawry, condemnation to public works or services." In criminal as in civil matters, the appeal had, in general, to be made immediately the sentence was pronounced; but even in civil cases this was only nominal, for letters "of relief" were easily obtained, which permitted subsequent appeal; in criminal matters it was a matter of right; "when the accused is a prisoner, he always appeals as of course." [2] It even appears that the person condemned to a corporal punishment was not under the necessity of raising ("relever") his appeal; "when the accused is condemned to corporal punishment, he is brought with his process before the court or before the middle superior judge." Appeal could be lodged, not only from final sentences, but also from all the decisions of the judge, decrees, rulings to the "extraordinary" action, sentence of torture, etc. The appeal had, usually, a suspensive effect.

We have not spoken of the procedure by contumacy since we described its earliest forms. It had been very greatly modified.

[1] The order was, 1st, the seigniorial judge or the royal provost; 2d, the bailiff or the seneschal of the province; 3d, the Parlement (*Imbert*, III, ch. xx, Nos. 1–7).
[2] *Imbert*, IV, ch. I, No. 1.

In particular the periods of delay had been changed; in this respect no difference between the gentleman and the humble plebeian was now recognized. The "Registre criminel de Saint-Martin des Champs" contains several cases of procedure by contumacy, all of them of the same nature. There was a first summons given on three consecutive days, the accused being summoned by oral proclamation by one or more officers of court.[1] Then came four more fortnightly summonses, only the first three of which appear to have been strictly required;[2] on the last default came outlawry. The following are two cases in which this procedure was followed, complete and in detail: "In the year LII (1352) Girart de Neelle . . . was duly summoned by Philipot de la Villette and Jehan Lefournier, our officers, at his residence, and on the people of his house and his neighbors, the said summons being served for suspicion of the murder of lord Guillaume des Essars . . . on three days to personally appear, to wit, on the Sunday following Saint Denis, and on the succeeding Monday and Tuesday (14, 15, 16 October), on which days he was held in default, and on each of these summonses he was summoned for each of the said days in judgment by Girart la Souris, our officer, and because he was summoned to appear for our rights and those of the mayor and the court, once, twice, thrice, and the fourth in full, to wit, for the first forty days, on Wednesday before Saint Luke the Evangelist (17 October) in the year 1352, on Wednesday before All Saints (31 October), for the second, on Wednesday following Saint Martin in winter (14 November), and on Wednesday before St. Nicholas (5 December), on which days he was held in default and did not come or appear to take law for the said crime: he was outlawed forever on pain of the gallows as use is."[3] — "10–12 January, 1352. . . . Jehan Millon was put in default on suspicion of the murder of the deceased Symon de Cappeval . . . and since he, Jehan Millon, was summoned to the rights of the court and mayor of the said place, to wit, three times on pain of outlawry: and at the place and in the accustomed manner, to wit, for the first forty days the Sunday after Epiphany (13 January) for the first; on the Sunday after the Conversion of Saint Paul (27 January) for the second; on the Sunday when 'Reminiscere' is sung (17 February) for the third, and on the

[1] pp. 32–74: "Perrin-Duport on three day oral summons by Phelipot Malgars and Colin de Montmartre," *cf.* p. 85.
[2] "Was summoned to appear for our rights and those of the mayor and the court, once, twice and thrice and the fourth and last" (pp. 211, 212).
[3] pp. 311, 312.

Sunday when 'Lætare Jerusalem' is sung (3 March) for the fourth, on which days he was held as in default, the said Jean Millon was banished from all the lands of my lord of Saint-Martin on pain of the gallows."[1]

From that time there are two phases in the procedure by contumacy: first, a summons on three days in close succession, then three or four summonses at intervals of a fortnight. But the proceedings were too long, and the Ordinance of 1539 shortened them. It contains two articles on the subject. "Art. 24. In all civil or criminal matters where four defaults have been usual, two, well and duly obtained by summons served personally or at the domicile, shall be sufficient, except that the judges may 'ex officio' add a third if the said summonses have not been served personally and they see that the matter can be so arranged."[2] — "Art. 25. In criminal matters on the first default made upon personal citation let arrest be made, and if there be two defaults it shall be ordered that, failing apprehension of the defaulter, he shall be summoned on three short periods with attachment and seizure of his property, until he has obeyed." These texts were not very clear, but the practice was plain enough. First, a single default or two defaults were declared, then the decree issued against the accused. This either ordered his arrest, or took the form of a merely personal citation: "Where there has been only personal summons the proper course is to wait for two defaults before proceeding by summons on 'three short periods' and by attachment; but if there be arrest, the clause of 'three short periods' and attachment may be included in the same decree."[3] There was not entire harmony as to what was the delay indicated by these "three short periods." According to Imbert it was essential "that there should be an interval of three full and complete days, as to the first two . . . and the last and third period must consist of a week or other sufficient period of time according to the distance between the places." But, according to Boyer, "the said summonses at three short intervals should be distinct and separated

[1] pp. 213, 214. Sometimes the "Registre" does not give the whole of the procedure. Thus in the case of one called Guillon, the defaults for the three consecutive days of the first summons only are mentioned, viz. the 30th and 31st December and 1st January (pp. 32, 33). The same thing occurs in the case of one named Perrin Dupont (pp. 74, 75); on 20th January, 1337, the default of Jehannin de Senlis on three days is noted (p. 85); then on 21st January, 1337, is added, "By Pons the Mayor, Jehannin de Senlis, default for the first day for the specified offense on the preceding Sunday," and that is all; *cf.* p. 133. Evidently there are omissions here.
[2] *Cf. Jean des Mares*, 58.
[3] *Imbert*, II, ch. III, No. 5.

by the same writ with such a sufficient interval between them as ten or eight days at least; some maintain that the procedure requires only three days, although by the law 'ad peremptorum ff. de judiciis' it is essential that ten days intervene." [1]

Contumacy resulted in a real and final condemnation; henceforth, moreover, the charges were proved before it was pronounced. This idea, although contrary to the Roman laws, is thoroughly admitted: "Although, according to the civil law, final judgment cannot be pronounced against one guilty of contumacy in criminal matters, in this kingdom we adopt a contrary custom, which is in accordance with several Italian statutes, by which the person guilty of contumacy is regarded as if he had confessed the offense of which he is accused." [2] In theory, to entail this condemnation letters from the sovereign were necessary; but the idea of regarding the judgment as capable of being purged and annulled by the appearance of the condemned person grows and will soon triumph. Imbert points out that the judgment can be attacked by way of appeal, and, although he observes that "letters" are then necessary, it is evident that these are mere matters of form: "If, therefore, the accused do not personally appear, judgment of contumacy is pronounced against him, but he can always appeal from the judgments of contumacy, and in that case shall have royal letters, directed to the first royal judge who has given the judgment, by which he shall be commanded to allow him (the accused) to be within the law, notwithstanding the judgment of contumacy, which shall be annulled by the said letters on reimbursing the expense thereof." [3] Boyer goes farther; he supposes that by the accused's appearance the judgment *ipso facto* falls.[4] Traces of the

[1] *Boyer's* "Stile," p. 234.

[2] *Imbert, loc. cit.; cf. Constantin,* "Commentaire sur l'ordonnance de 1539," p. 56: "Bartolus . . . dicit valere statutum vel consuetudinem, quod judex condemnet et procedat contra contumacem, quæ consuetudo viget in toto regno Franciæ." — The clause of execution was incorporated into the decree: "Si pris et appréhendé peut être." (If taken and arrested may be.) See *Bornier,* Ordinance of 1670, Title 17, Art. 15: "This clause . . . was probably a matter of the old style, for in former times the sentences rendered for contumacy were executed personally on those sentenced if they were found . . . as it was only inserted 'ad terrorem' and was not practised in France it was very properly repealed by the Ordinance."

[3] Ch. IV, p. 663.

[4] "The person in default can always purge himself of the accusation, although the said decree has been issued and executed, and to do this he is obliged to give himself up as a prisoner in the prison of the Court of Justice, and on that being done the record of the registers of the imprisonment for the pursuit of the accusation upon the examination of the action must be produced, otherwise he shall be released as hereinafter mentioned." "Stile," p. 236.

original idea will, however, subsist for a long time; Serpillon points out that the question was still in dispute and was determined by a decree in 1635.[1]

In this procedure, the seizure of the effects of the rebel, the origin of which we have traced to the feudal period, was carefully regulated; this was the *attachment* ("annotation"). It took place after the summons at three short intervals had been served.[2] The Ordinance of Roussillon (Art. 80) declares that if accused persons do not appear within a year after the seizure, "their property attached and seized shall belong absolutely to whomsoever has right to it." This feature was borrowed from the Roman law, and added to the old procedure of contumacy, which up to that time had been wholly common law. The Ordinance of Moulins (Art. 28) went further; it ordains that if the judgment carries confiscation or fine, persons guilty of contumacy "shall forfeit not only the income of their property, but also the ownership of all their effects awarded by the law. And the civil parties shall retain their adjudications without power of redemption, and we and our seigniorial justices what shall have been awarded to us and them by fine and confiscation." The text added that the king could grant letters to "allow the condemned persons to come into court and to exculpate themselves after the said period and to remit the severity of this our Ordinance." Letters of pardon again appear in the procedure of contumacy. It was generally considered that this law had repealed the provisions of the Ordinance of Roussillon. The Ordinance of 1670 will do no more than bring together these principles, and develop and in some respects perfect them.

§ 3. **Protests against the Ordinance of 1539. Constantin, Du Moulin, and Pierre Ayrault.** — We have seen how and by what disintegration of the old forms the system sanctioned by the Ordinance of 1539 was slowly built up. It is not so easy to understand the unopposed acceptance of this procedure by the nation; still, it is an undeniable fact that the Ordinances which are the subject of our study coincide in point of time with the meetings of representatives of the country who could make the voice of the people heard. This, however, is capable of explanation. This procedure, due in great measure to the practice of the royal judges,

[1] "It was formerly a matter of doubt as to whether the appearance of one condemned to death annulled the contumacy. This was the subject of a conflict of opinion which was decided by a decision of the Court of Assize of the month of June, 1633." "Code criminel," p. 851.

[2] Ordinance of 1539, Art. 25.

had grown with the growth of royalty; it rested upon a sentiment of inherent infallibility and stern protection, which royalty had borrowed from the Church, and which constituted its principal strength. The people, emerging from the anarchy of the Middle Ages and from the great wars against the English, torn ere long by the devastating religious wars, felt above all else the need of security and peace.[1] The new Ordinances furnished a better assurance than any other law for the repression of crime. For this reason, they were willingly accepted and almost popular. The Ordinance of 1539 was not, however, passed without protest on the part of the jurists; both feeble and eloquent voices were raised against the severities which it introduced.

The first undoubtedly to criticise it was a Bordeaux lawyer, called Jean Constantin, who wrote in the year 1543.[2] His commentary is in Latin. His was not a great intellect, and Néron gives him small praise in the preface to his collection.[3] He was, in truth, an honest man, who had no love for provost-marshals, a thing often observable in those days.[4] He displays an undigested erudition, stuffed with texts from the "Corpus juris" and the works of Italian doctors, whom he quotes at every turn, piling citation upon citation between the different parts of a single phrase. But that was the fashion of the time, and Constantin deserves our passing consideration. He represents the unadulterated doctrine of the Italian doctors, and he certainly shows that, if France had borrowed literally certain points of its criminal doctrine from these doctors, — the theory of proofs, for example, — it had given to the inquisitorial procedure a shape and direction of its own and a severity unknown to the Ultramontanes. The expressions themselves

[1] Leaving judicial documents out of the question, every page of the "Registre criminel du Châtelet" shows the brigandage and the state of insecurity under which France suffered at the end of the 1300 s.

[2] "Commentarii Johannis Constantini, in jure licentiati curiæ que Parlamenti Burdigalensis advocati, in leges regias seu ordinationes de litibus brevi decidendis recenter editas," P. 248: "Hoc anno millesimo quadragesimo tertio."

[3] "A commentary on this ordinance appeared ten years after its publication written in Latin by *Jean Constantin*, advocate to the Parlement of Bordeaux. The great copiousness of this work cannot be denied, but if the useless matters are eliminated and the large number of quotations with which it is swelled are cut down, substantially little is left." "Recueil de Néron," preface, Paris 1720.

[4] "Isti intrunculatores et judices maleficiorum quos præpositos marescallorum nominamus, et qui eis tallia officia committant, qui cum deberent esse literati viri, sunt ignari, et omnium honorum litterarum expertes, tiranni vindicatores sibi et suis complacentes, pereant a cæterorum commercio et exterminentur tales tyranni et homicidæ et eorum officia bonis viris et litteratis committant" (p. 237).

had sometimes changed their meaning in passing into France, and Constantin gives a curious example.[1] In the name of the law-doctors he protests against the severities of the Ordinance.

Commenting upon Article 162, he inveighs against the exclusion of advocates: "Practicam antiquam quæ hic tollitur et aboletur meminit Angelus in suo tractatu maleficiorum . . . ubi dicit quod ipse reus vel ejus advocatus potest interrogatoria facere."[2] Commenting on Articles 157 and 158 he shows what slender resources the law leaves to the accused for his defense: "Quomodo potest allegare reus aliquid ad suam defensionem si sibi non detur copia testium et totius processus? Ideo quæro, numquit facta et completa inquisitione, testes et totus processus debeant publicari et de his fieri copia ipsi reo."[3] Farther on he launches into a long dissertation, citing all his authorities, and coming to the conclusion that the law-doctors admit, in general, the production of documents, that it was even a matter of right whenever there was a party "promovens inquisitionem." As to the provision which bars the proof offered by the accused at any time during the action, and allows only that of justificative facts, Constantin not only declares it odious, but absolutely refuses to allow it. As to article 158 he says: "De severitate hujus articuli satis patet ex suprà dictis, maxime in articulo CXLVI ubi habes quod istæ ordinationes, quæ excludunt reum a defensione ante sententiam, sunt omnino contrà jus commune . . . licet Angelus dicat talia statuta excludentia reum a defensione valere, ego limito hoc esse verum si reus petat calumniose se admitti ad defensionem, alias secus, . . . quia confesso et condemnato datur defensio; ergo multa magis non confessus nec condemnatus, volens de innocentia sua probare, admittitur quandoque ante sententiam, si videas eum hoc calumniose non petere, ut puta quia hoc tempore, de quo loquitur ordinatio nostra, non habebat probationes et postea reperit vel alia modo constat de sua innocentia."[4] As to article 162, rejecting the confrontative judgments

[1] "Judices maleficiorum in senatu Burdigalensi hoc anno millesimo quin gentesimo quadragesimo tertio consedentes, qui, cum me ad se accessissent quod quemdam furem sententia torquendum dixissem, et ipsi suo arresto cum suis furtis absolvendum, quæsiverunt inter alia quid erat ordinariè procedere; qui, quum dixissem quod secundum formam et ordinem juris, subridebant dicentes, quod imo procedere ordinarie erat sine confrontationibus et extraordinarie per confrontationes, et quia usus non eram confrontationibus in processu illius furis dicebant me errasse in facto et in jure, et allegabant advocatus et procurator regius l. *Ordo, ff. De publiciis judiciis;* quod plusquam asininum est et tantis viris indignum; sed quia coram ipsis non audebam aperte loqui, ideo tacui: nam aliam esse formam et ordinem juris in criminibus et aliam horum statutorum nemo est qui nesciat" (p. 248).

[2] p. 288. [3] pp. 281, 282. [4] p. 284.

formerly allowed, he is still more forcible. "Nota quod dixi articulo CXLIX quod debet assignari terminus reo ad suam defensionem faciendam; alias non debet damnari. . . . Ita dicit Bartolus, et Imola . . . quod hanc practicam servat totus mundus, qui quidem terminus tollitur his ordinationibus ut dicto articulo constat. Ergo non servamus illam practicam quam servat totus mundus, juris et justitiæ ignari; quare dico quod non valet tale statutum per quod tollitur defensio quæ est de jure naturali . . . cum jus naturale jure civili tolli non possit, et quod judex, ipso non obstante, potest præfigere terminum ipsi reo ad suam defensionem faciendam . . . alias poterit lædi innocens, quod non esse debet."[1] All this, even when disencumbered of the citations with which it is burdened, certainly offers few fine phrases. But although the style is poor enough, the ideas are none the less noble on that account.

Constantin was not the only practitioner to find fault with the pitiless severities of the Ordinance: here and there in Imbert are to be found short remarks in the same spirit. But louder voices were raised. First there was that of Du Moulin, who commented on the Ordinance of 1539 in a grotesque style, in a clumsy Latin mixed with French. Several of his indignant and curt remarks have survived the ages as lasting protests. He tried first to put as favorable an interpretation upon the text as possible. As to Article 155, which does not give the accused any delay to allege his objections, he says: "Si hoc verbum (delay) referatur ad singula et sic ea excludendo, esset barbarica iniquitas; ideo debet intelligi quod implicet non distributive sed collective. Ita quod judex possit dare dilationem modicum arbitrio suo, et sensus est quod verba non excludent aperte dilationem dari, quod est favorabile."[2] In the same fashion he repudiates the literal interpretation of Article 157, ordering the accused immediately to name his witnesses for the proof of the justificative facts.[3] Two of his outbursts in particular have remained famous, that upon article 158, where he brands the name of Poyet with that epithet of infamy which never left it: "Vide tyrannicum opinionem illius impii Poyeti";[4] the other, on article 154, which does not require

[1] pp. 291, 292.
[2] "Recueil de Néron," vol. I, p. 250.
[3] *Ibid.*, p. 251: "*Nommer* intellige quâcumque demonstratione, quia non semper innocens scit nomina eorum per quos probabitur absentia allegata; *faits justificatifs:* etiam de facto vidi *à Mascon* 1550 *reçu* post 21 menses et dicere etiam variando quæ nova facta *estoient venus à sa mémoire et nommer tesmoins pour ce prouver* et ad requestam *du procureur du Roy* et tantum non vocato accusatore."
[4] "Recueil de Néron," vol. I, p. 251.

the judge to verify the witnesses for the defense: "Vide duritiem iniquissimam per quam etiam defensio aufertur, sed nunc judicio Dei justo redundat in authorem, quia major pars judicum voluit hanc servare constitutionem hoc mense octobris 1544. Sed est perniciosissima consequentia."[1]

But louder still than Du Moulin speaks another, who cannot be too highly eulogized, Pierre Ayrault. He had a great intellect and a large heart. In his chief work, "l'Ordre, formalité et instruction judiciaire," we still obtain valuable information on Roman criminal law; and this learned work is written in an admirable, fervid, and glowing style. Rising high above his contemporaries, he showed to a nicety the dangers of the criminal procedure to which France was given over. We may be permitted to quote the chief passages in which he fights for a cause, which, though for a long time lost, could never perish, and demands orality in the trials and publicity and liberty in the pleadings.

His first concern is to point out the fundamental defects of the system which he attacks, namely, its secrecy, the undue importance attached to written documents, and the immense power left in the judge's hands. "Justice," he says, "is treated like sacred mysteries, which are imparted only to the priest.[2] . . . In olden days at Rome and in Greece all this examination ('instruction'), confirmation, confrontation, and judgment took place with open doors and publicly, in presence of the people and of all the judges and parties concerned. In no other respect is our practice more contrary than in this, for so rigorous is our requirement that criminal actions be examined apart and in secret that we will not judge them if any other than the judge and his clerk of court should have been present. Whence this difference? Are right and reason different factors in republics where the people take part in the administration from those existing in States dependent on one single person? We in France have certainly not thought so for a long time. . . . It is not, therefore, political difference which causes this variance between secret and open examination. . . . In private it is easy to twist the evidence, to intrigue or browbeat. The court-room, on the contrary, is the bridle of the passions, the scourge of bad judges. But, while this public examination serves as a curb for bad judges, it gives good judges an inconceivable sense of security and freedom. The innocent will never be clearly acquitted or the guilty justly punished, and there will always be some cause for com-

[1] "Molinæi opera," vol. II, p. 792.
[2] "L'ordre et formalité," etc., Book III, Article 3, No. 21.

plaint, if their trial has not been conducted and considered publicly. That head with more eyes, more ears, more brains than those of all the monsters and giants of the poets, has more strength, more energy to penetrate straight to the conscience, and lay bare on what side the right lies than our secret examination." [1] "Is it reasonable to credit what one judge and a hired clerk report as to the testimony of ten or twenty witnesses? . . . Such depositions do not show either what is said by the deponent or how he says it. It is the concoction of an officer, a searcher, or an examiner, even, forsooth, of a judge, if it has been taken by one, who all make the witness say what seems good to them. Nothing can be said in reply, though there may be ever so great a contradiction in the terms, and the very first assertion which the witness has made use of in deponing exists no longer when we come to our confirmations and ordinary confrontations. I have oftentimes heard the late lord lieutenant-general of this jurisdiction, a very well-informed man, say that the witnesses might be likened to clocks. Just as we can make the latter strike any hour we want, so the witness, according to the way he is examined, and the terms used to embellish and clothe his narrative, testifies for the prosecution or the defense; . . . for this reason he declared that nothing was so harmful in the trial to which we are accustomed as the introduction into it of the methods and functions of the hearing of witnesses. On the report of an examiner and inquisitor the judge gives credence to men whom he has never seen, and if perchance he causes their re-examination, they usually tell another tale, or else say, 'Let them read me my deposition; I stand to what is written therein.'" [2]—"The mouth lies most when it is closed tight from fear of falling into a trap, but our gestures and outward expressions, whether we wish it or not, speak, and speak the truth, in one way or another." [3]

The oral and public procedure has never been better defended, or in better language. Ayrault paints with no less vigorous a brush the terrible power of the examining magistrate and the helplessness of the defense. "I insist that the best feature which the criminal examination of the ancients possessed was that this act of interrogating the parties depended upon themselves or their advocates and not upon the judges. . . . The method has been so thoroughly changed, and ours is so radically different, that if any other

[1] "L'ordre et formalité," etc., Book III, Article 3, Nos. 58, 59, 60, 63, 64.

[2] *Ibid.*, Book III, Article 3, No. 38.

[3] *Ibid.*, Book III, Article 3, No. 64.

than the judge should now interrogate the accused, or if he should do it in the presence of the party, the whole proceeding would be null. . . . Depriving the parties of that option of interrogating, hearing, and examining their witnesses, we have put the matter in the judge's hands to such an extent that the unfortunate parties appear to-day with their hands tied, and blinder than those who write in midnight darkness. . . . Nowadays, when all the functions which rested with the parties and their lawyers center in him (the judge), he must proceed with so much guile and finesse, if he would drag the truth from the lips of a criminal, that it is very hard to say whether these artifices should be dubbed justice or chicanery." [1]

The system of objections and justificative facts appears particularly intolerable to Ayrault's honesty. "The testimony would be much better rebutted by timely debate, argument, and refutation than by blame and reprehension of the person giving it. But since we are on the subject of objections, let us see, for the sake of argument, if the ordinance introduced by Chancellor Poyet, providing that the accused must plead them before having heard the testimony of the witness, and that after the reading they should no longer be admissible, is just and equitable. . . . The same officer even ordered that no witnesses should ever be brought by the accused except his relatives, neighbors, and fellow-citizens. . . . How can the accused know at the very moment whether or not the witness is bribed or has been incited against him; his relatives, his friends, his solicitors and attorneys themselves cannot find that out so soon; how can he do it from his prison? The device of alleging objections before the reading has resulted in the accused persons being constrained to object at all hazards, and in the majority of their objections being matters of course . . . the ignorant especially need protection . . . everybody does not understand the ordinance, no matter what notification has been given of it. Does this not look like the establishment of such a formality that not to object before or after will deprive one of life or honor? . . . Many unfortunate accused persons, who do not know A or B do not know either to object or challenge.[2] All the foregoing emboldens me to say that

[1] Book III, Article 3, Nos. 21 and 22. These inconveniences are noticed by *Imbert* (III, ch. X, Nos. 2 and 3), who gives wise advice to the interrogating judge and censures the practices of crafty magistrates.

[2] *Imbert* likewise makes a protest in this respect: "Which ordinances," he says, "are extraordinarily severe (and their author has met the fate of Perillus); for it is very harsh and severe to make an unfortunate prisoner languishing under an imprisonment of a year or six months instantly

I do not clearly understand what induced the said Chancellor Poyet to abandon that excellent and straightforward mode of proceeding, where both parties bring their evidence at the same time, for that which he has introduced of granting an interlocutory judgment to inquire as to justificative facts and objections, the former method having been an invariable rule hitherto. Whence comes this contrivance of not allowing the accused to bring his evidence until that of the prosecutor is brought and settled? . . . Is there justice in the fact that one party labors and strives to bring his evidence after the other is all ready? . . . A duel fought on the understanding that one should fire all his shots first and the other afterwards would be neither just nor seemly. In the trials now in vogue the judgments are arbitrary and the assessors are prone to accept what they are primed with rather than what is proved, the accused are in danger of seeing themselves condemned in spite of and without regard to their justificative facts and objections. In short, is it proper to judge an action after looking at but one side? . . . There remain in this ordinance two matters, which we ascribe to the said lord chancellor Poyet, so far removed from the old time forms as to throw doubt upon his equity; it is declared that the accused shall name his witnesses immediately and that not he but the king's procurator shall cause their appearance. What does this signify? The prosecutor is to have ample time to make his investigation, but the accused is to divine at once what witnesses can vindicate him! And a third party, and not he, is to bring those whom he names for his defense; his innocence will thus depend upon the fidelity or faithlessness, the diligence or indifference of another. Is there any king's procurator as concerned about the vindication of the accused as the accused himself?" [1]

Ayrault also inveighs against the abuse of detention pending trial and of the monitories ("monitoires"). After having praised the practice of release on bail in a magnificent passage, and lauded the ancients for having permitted it, this is what he says

cite his said witnesses, and not to allow the prisoner nor another for him to speak to the witnesses who may come to testify on his behalf, and that the king's procurator, who is an adverse party, should cause their appearance, not to mention the fact that they will probably be delivered into the charge of an officer of the court who is practically for the party adverse to the prisoner. And on this account it would be well to somewhat ameliorate the said ordinances" (III, ch. xiii, No. 16). The proof of the justificative facts and the objections to the admissibility of the witnesses is here the matter in question.

[1] *Ayrault*, Book III, Article 3, Nos. 50–52.

of sudden arrest: "It may nowadays be almost ranked as the regular procedure. It oftentimes happens, I know not how, that what is the finest and most reasonable thing in theory is very unprofitable in practice. It has been necessary, in order to safeguard the public, to discard the traditions of freemen and treat all as sworn enemies, rogues, and slaves, for whom prisons, tortures, and gibbets have been invented. All our other reasons may be as plausible as you like; yet so harsh is our practice, that experience shows us that if the accused are not kept in prison, it is impossible to convict a single one; there is no witness who dares testify, no judgment which can be executed." [1] — "Nothing is so common nowadays as to resort to the monitories and ecclesiastical censures to obtain proof and revelation of crime prosecuted or to be prosecuted before us. Have we any criticism to make upon the ancients because, to gain these same ends, they implored from their pontiffs such imprecations and maledictions? . . . I think not . . . To entice the witnesses by bribery or by fear of being punished by God or man was a thing they never did. As it is a crime for the accused to bribe the witnesses on his behalf, so should it be for the prosecution to coerce them, or bribe them. The ancients, after all, were more careful about their religion than we are. The public is not so deeply interested in the charging and proof of a crime as to injure itself by the profanation and pollution of holy things." [2]

We may be pardoned for having multiplied these quotations; it was useful to show that in our country the sentiment of true freedom remained in some exalted hearts, at a time when it was most lacking in our institutions. It is not quite correct to say that "when the royal Ordinances altered the form of criminal actions, to substitute the written examination for the traditions of the old oral procedure, no voice was raised to recall the individual safeguards." [3] The fact is, however, that the protests which were made found public opinion indifferent. The bitter plaint of Pierre Ayrault, which to-day commands our admiration, then fell on empty ears: "Vox clamantis in deserto." The country

[1] *Ayrault*, Book III, Article 2, No. 30. It is strange that this is the only word of blame to be found in Ayrault for this horrible institution of torture. Compare *Imbert* on detention pending trial: "Although it may be somewhat arbitrary, it would nevertheless be well to designate expressly by Ordinance the offenses for which an order for arrest could be granted, so as to restrain the license which many judges usurp on this point." Book III, ch. II, No. 4.

[2] *Ibid.*, Book III, Article 2, No. 31.

[3] *M. G. Picot*, "Histoire des États-Généraux, vol. IV, p. 254.

thankfully accepted everything that helped to check the disorders from which it had suffered so long. "Towards the end of the Middle Ages," says M. Picot, "after the terrible Hundred Years' War, which had shaken France to its very core, royalty realized that the nation's greatest need was internal order. The whole country was then obviously enamoured passionately of safeguards which bade fair to shield it from the violence of the strong hand." And the movement which had transformed the criminal procedure in France was at the same time making headway among the neighboring continental nations; there its force was irresistible.

§ 4. **The Criminal Procedure and the States-General of the 1500s.** — Whenever the nation chose to speak by the mouths of its representatives, either in the States-General or in the convocations of Notables, it approved of the revolution effected in its criminal procedure. On rare occasions, the Third Estate, actuated by the vague instinct of freedom which never left it, and the Nobility by a sentiment of jealous independence, raised objections on certain matters of detail. As time went on, satisfaction with the new procedure became more marked and it struck its roots more vigorously and tenaciously. This approval of the secret and inquisitorial procedure by the States-General has been demonstrated at different periods. Attorney-General Séguier recalled it in 1786, in a celebrated speech before the Parlement of Paris, in which he discountenanced the desires for reform. "One remarkable thing," he said, "which we should not forget, the great Ordinances of the kingdom have in common. The Ordinance of Villers-Cotterets is dated 1539, that of Orléans 1560, that of Moulins 1566, and that of Blois 1579. They all belong to the same century; the aim of all is the reformation of the law. The three last mentioned were issued in answer to the complaints, laments, and protests of the three estates of the kingdom . . . and in all these solemn laws, in which, if I may be permitted to say so, the nation demanded justice from its sovereign, there is no complaint against the form of procedure, nor against the barbarity of the Ordinance of Francis I. Can it be pretended that the whole nation assembled in deliberation upon its affairs has been blind enough not to demand, in this respect, the reform of a fantastical system of law which is also contrary to natural law?" [1] Later, at the time of the drawing up of the Code of Criminal Examination, when the "prévôtal" jurisdictions were introduced into our judicial system, under the name of "Special Tribunals," those who drew up the Code re-

[1] pp. 240, 241.

called that the States-General of the 1500s had approved of this institution. "It will be sufficient for the purpose of the debate to observe that a special institution, analogous to that which we now propose to you, reëstablished in every part of France by Francis I at the beginning of the 16th century, was recognized, demanded by the States-General held at Orléans, Moulins, and Blois, and sanctioned and reconstituted in the celebrated Ordinances issued in answer to the protests of these States." [1] The only mistake made by Séquier and M. Réal was in deeming the attitude of the States-General to be a vindication of the procedure of the Ordinance of 1539.

It is of interest to examine more minutely the exact language of the Estates; which M. Picot's excellent "Histoire des États-Généraux" has made an easy task.

In the Estates of 1560, the Nobility merely insisted that the king's procurator should be "bound to disclose the informer on pain of being liable in his own individual name." The Third Estate and the Clergy demanded an increased activity in the use of public prosecution, and the Ordinance of Orléans (Art. 63), embodied this desire in the law.[2] The Third, however, protested against the provision which "compels accused persons immediately to allege their objections to the witness, which is a great hardship, and often results in the innocence of many being imperilled." It urged that the judge should be empowered to grant a delay. The king's Council replied that "the Ordinance shall be observed." [3] The greatest concern of the Estates centred upon the provost-marshals; while the Third demanded and obtained for certain royal courts concurrent jurisdiction with the provost,[4] all three orders were unanimous in their demand for speedier and more effective action by the marshalcy.

In 1576, at Blois, the Third Estate desired that the accused should be "regularly informed of the name of the informer against him before any confrontation." [5] This desire was destined to be ignored; but not so another, likewise preferred by the Third, to the effect that "all those who shall investigate crimes by information shall be bound to examine the witnesses as to the full truth of the fact, as much for the defense as for the prosecution of the accused." It was considered that enough had been done for the defense by thus handing over its care to the conscience of the

[1] "Exposé des motifs du titre VI, livre II, du Code d'Instruction Criminelle," by *M. Réal*.(Leiré, vol. XXVIII, p. 47).
[2] *M. Picot, op. cit.*, vol. II, pp. 169, 170. [3] *Ibid.*, vol. II, p. 171.
[4] Ordinance d'Orléans, Article 72. [5] *Picot, op. cit.*, vol. II, p. 528.

judge. It was at bottom a purely formal satisfaction, and the provision was inserted in the Ordinance of Blois (Art. 203), and was subsequently incorporated in the Ordinance of 1670 (Title V, Art. 10). A more important matter, also prescribed by the Ordinance of Blois, was that the judges were obliged to ask the witnesses if they were "relatives, kinsmen, domestics, or servants of the parties, and to mention the fact at the commencement of their depositions, on pain of nullity and damages to the parties." [1] But what was wanted more than anything else was an acceleration of the public prosecution and in the service of the marshalcy: "A perusal of the 'Cahiers,'" says M. Picot, "clearly shows that the deputies were charmed with the Ordinance of 1539. . . . The information by itself seemed to them fitted only to terrify evildoers and consequently to reassure peaceable people. So they refrained from criticising the secret examination." [2]

At the new Estates of Blois, in 1588, the foregoing questions still less troubled the minds of the deputies; "neither the Clergy nor the Third concerned themselves with the criminal examination." [3] The Nobility demanded the accceleration of the proceedings; they manifested a desire to revive accusation by individuals, as opposed to the action of the public prosecutor, proposing a provision, which, moreover, has passed into our laws, providing for the forfeiture of all right "against the widows, heirs, or assignees of the victims of homicide who did not prosecute the murder or manslaughter in the person of their husbands or relatives." [4]

The mission of the Estates of the Ligue of 1593 was exclusively political, and criminal legislation was not the concern of that assemblage, the immortal satire on which is contained in the "Ménippée." The Assembly of Notables, held at Rouen in 1596, was likewise without influence in this matter.[5]

It was at the Estates of Paris of 1614, and at the Assemblies of Notables of Rouen (1617) and of Paris (1626, 1627), that the representatives of the country were able to give expression to their opinions for the last time before the drawing up of the Ordinance of 1670. Public opinion showed itself still more favorable to the secret and inquisitorial procedure: "a whole generation of the legal profession were trained under the mysterious customs

[1] *Picot, op. cit.*, vol. II, p. 528. The Nobility had desired "that prisoners released for want of evidence should not be liable to arrest after the expiration of one year from the date of the decree ordering the further inquiry."
[2] *Ibid.*, vol. II, p. 530.
[3] *Ibid.*, vol. III, p. 184.
[4] *Ibid.*, vol. III, p. 184.
[5] *Ibid.*, vol. III, pp. 257, 323.

of the written examination, and the indolence of injured parties had gradually accepted the initiative on the part of the magistrate, which spared the citizen the care of defending himself, and substituted the protection of the State for individual action." [1] Even in the "Cahiers" we find the expression of views tending to aggravate still more the hardships of the procedure. It is at the request of the Third Estate that the Ordinance of 1629 will be found expressly to forbid entering pleas at the outset of the criminal proceedings (Art. 112), lest the lawyers and the procurator-general should perchance by mere hint designate the witness clearly enough "to give the accused the opportunity to prepare themselves and bring forward objections and have recourse to stratagems against the witnesses for the prosecution." [2] All three orders insisted upon a single judge conducting the information with the assistance of his clerk or "greffier." [3] This, it is true, was chiefly from motives of economy; the same impulse moved the compilers of the Ordinance of Moulins to provide (Art. 37) "that henceforward a single commissary and not two shall be appointed to attend to the examination of actions; always in the presence of his clerk of court or assistant, the whole on quadruple penalty." The Third Estate also concerned itself with "dilatory 'incidents'[4] and evocations,[5] commonly used for the purpose of evading the punishment of crimes; it demanded that it should not be possible to suspend the examination under diverse pretexts, and that the judge should not stop until the moment when he pronounced the final sentence." [6] Some alleviations were, however, demanded. The Nobility "persisted in demanding that the attorneys-general, being parties, should be compelled to name the informers at the beginning of the action." [7] The Third Estate wished that "the interrogation of the accused should take place within twenty-four hours after his arrest." [8] The jurisdiction of the provost-marshals received the attention of the deputies; they proposed that their "jurisdiction, which is a pure abuse, be restricted to disorders committed by the military." [9]

The complaints of the Estates of 1614 and of the Assemblies of Notables which followed resulted in the publication of an Ordinance. In 1627 Michel de Marillac gathered around him a certain

[1] *Picot*, vol. IV, p. 61.
[2] *Ibid.*, vol. IV, pp. 61 and 187.
[3] *Ibid.*, vol. IV, p. 64.
[4] Facts emerging in the course of a case constituting a claim depending upon the principal claim.
[5] "Evocation" is the calling of a case from one court to another.
[6] *Picot*, vol. IV, p. 64.
[7] *Ibid.*, vol. IV, p. 60.
[8] *Ibid.*, vol. IV, p. 61.
[9] *Ibid.*, vol. IV, p. 65.

number of State's Councillors, and the complaints of the deputies were considered. An Ordinance was made, comprising a large number of articles, many of which were devoted to the administration of the law and to the procedure; but it was by no means a detailed and systematic codification. It was registered by the Parlement of 15th January, 1629. But this "Code Michaud," as it was called, was rarely observed in practice.

In the 1600s, as we shall see, public opinion demanded no reforms in criminal law; it was not even hinted that the procedure which was followed could possibly be bad. But the need was ere long felt of a Criminal Code, precise and detailed, which should settle all the details and do away with the irregularities and divergencies in the administration of justice. The time of the Fronde had been one of severe distress. Crime, the inevitable offspring of evil days, had increased; and at the same time, by a phenomenon invariably observable in the midst of political troubles, the administration of justice had become less exact and less energetic. Five years after the death of Mazarin, Denis Talon was able to say "that the number of evil doers had grown to such an excess on account of the impunity with which crime was committed, that soon all security of public liberty will have ceased to exist." [1] In 1665, the "Great Days" of Auvergne, of which Fléchier has left us a very interesting account,[2] showed in a startling fashion the disorders and scandals which tarnished the administration of justice. It was also the case that, although for a long time the broad features of the procedure had been settled, no general law had regulated its details. The inexactitude and diversity of the systems of judicial practice were also an evil which continued to be more and more keenly felt: "The evil," according to one of the compilers of the Ordinance of 1670, "has come to such a pass that in the same Parlement several maxims have changed two or three times within thirty years, and even at the present day they are construed differently in the different chambers of the same Parlement." [3] Nothing but a general law could provide a remedy. Such a law was also called for to correct another abuse. The criminal proceedings being entirely written, a multitude of formalities and useless productions were introduced into it, which had the effect of retarding the progress of actions, and

[1] Quoted by *M. Pierre Clément*, "Lettres, papiers et documents de Colbert," vol. VI, Introduction, p. xxxix.
[2] "Grands-jours d'Auvergne," *Chéruel*.
[3] "Lettre d'Auzanet à un de ses amis." See *Pierre Clément*, "Lettres et documents de Colbert," vol. VI, App. p. 397.

inevitably ended in the excessive increase of the expense of the proceedings.

The Monarchy had emerged triumphant from the recently ended strife, which it had waged for centuries, first against feudalism and then against the nobility; the Fronde had been the final convulsion of the opposed forces. Henceforward unopposed, royalty strove to establish that absolute and centralized government which left such a marked imprint upon France. The time was favorable for a reform of the laws. Whenever, after secular struggles between rival forces, a nation arrives at a stage which seems to it final, and which in reality should assure it of a long period of stability, it feels the need of recasting and unifying its laws. A desire is felt to unite into one harmonious whole the rules of law which have been in slow process of formation and to disencumber them of their heterogeneous elements. That was the kind of work imposed upon the government of Louis XIV. A fact which clearly shows that there was a real need for such an undertaking, one of those ideas which "are in the air," as we say to-day, is that two eminent men, Lamoignon and Colbert, simultaneously formed the conception of a codification of the laws, and separately commenced the first labors to attain that end.

PART II

HISTORY OF CRIMINAL PROCEDURE IN THE LATE 1600s AND THE 1700s

TITLE I[1]

THE FRENCH ORDINANCE OF 1670

CHAPTER I

THE DRAFTING OF THE ORDINANCE OF 1670

§ 1. **The Project of a Codification; Colbert, Pussort, and Louis XIV.** — Louis XIV, in several passages in his Journal and his Memoirs, speaking of the Ordinances dealing with the laws promulgated during his reign, claims as his own, not only the glory of the execution, but also the original conception.[2] Those around him strove, indeed, to persuade him that he was the real achiever of the enterprise, and posterity seems to have been of that opinion, since it has given the name of "Code Louis" to the collection of these Ordinances. It is, to-day, thanks to modern research, possible to assign to each his share in the work. In the account which we shall now give, the Ordinance of 1667 and that of 1670 must be considered together; both are parts of the same work, executed by the same hands.

The credit of the undertaking belongs to Colbert and his uncle, Pussort. Even in the 1700s legal scholars had come to believe this, although all they had to go upon were the minutes of the meetings between the members of the Parlement and the State councillors. Speaking of the criminal Ordinance, they called Pussort "the chief compiler of that law." Colbert and Pussort were both men capable of carrying out such a work successfully. Colbert's strength of will is well known, and Pussort was as energetic and able

[1] [The order of the author's chapters in this Part has been slightly changed, to make the development clearer for the purposes of this volume. — ED.]

[2] "Mémoires de Louis XIV" (*Dreyss* edition), vol. II, pp. 156, 224, 368.

as he. Saint-Simon, who had no love for him, yet speaks of him in these terms; "M. Colbert was a self-made man; his ability had stood him in good stead . . . he was very wealthy and very avaricious, morose, exacting, and bore a fierce and discontented expression which reflected his disposition, and the sternness of which aroused fear . . . withal a man of great integrity, a vast ability, keen insight and very hard-working, invariably taking the lead in all the important commissions of the Council and in all important internal affairs of the kingdom." [1]

Colbert's plan is shown by a document in his own handwriting, found among his papers.[2] It is a "list of the royal ordinances promulgated by our kings for the regulation of law, police, finances, and military affairs of the kingdom." This list, intended for the king, runs from the reign of Saint Louis to the year 1626; it concludes with this résumé: "It clearly appears from all these lists that, since the time of Charlemagne, who drew up the Capitularies which comprise the regulation of all ranks of his kingdom, and those of his son Louis le Débonnaire, no king has labored of his own accord to put into a single code all the Ordinances of the kingdom; that all our great kings, Charles V, Charles VII, Louis XII, Francis I, and Henry IV, immediately they were at peace, and even often during war, have made Ordinances concerning justice and other matters; that Henry III alone had the conception of reducing the whole into a single Code, which work he intrusted to president Brisson, who compiled the Code Henry, never put in force; keeper of the seals Marillac had the same fate, with the result that this great work has been reserved in its entirety for Louis XIV." The date of this memorandum is unknown, but it can be asserted that as early as 1661 the industrious Pussort was already at work on the realization of Colbert's project: "I have scratched the surface of the work which I suggested to you on the matter of the ordinances;" he wrote to Colbert on 6th September, 1661, "but I recognize that it is a work of enormous extent and entailing delicate handling. I shall continue to work upon it when I have nothing more pressing on hand. If you have need of me and my work, both are at your disposal." [3] The codification of the ordinances was in itself an immense work, even without comprising in it the unification of the civil law; so, down to 1665, Colbert's plan appears to have slumbered.

[1] "Mémoires," *Chéruel* edition, vol. I, p. 325.
[2] "Lettres, papiers, et documents de Colbert," edited by *M. Pierre Clément*, vol. VI, App. p. 362.
[3] "Lettres, etc., de Colbert," vol. IV, App. p. 368.

The prime minister wished the new work to be a direct work of royalty. It was a maxim of ancient law that the legislative power resides in the king and in him alone.[1] The great Ordinances of the 1400s and the 1500s had doubtless often been issued after convocations of the States-General and after Reports from the deputies; but in a legislative sense they none the less emanated from the king alone. The "Coutumes" had been drawn up by delegates and representatives of the three orders, but they had only become written laws by royal promulgation. This point was indubitable. But in order to accomplish his legislative task the king must surround himself with counsellors and compilers; for the Ordinances concerning justice it seemed natural to consult the Parlements; and Colbert did not want to do this. We find among his papers an autograph draft "upon a way to put the Parlement in its proper sphere and to strip it for ever of the powers by which that body has attempted to hamper the State, by wishing to take part in its administration." [2] The minister, like his royal master, did not wish to associate the Parlement officers with the glorious enterprise which he meditated; he wished to ask assistance only from State councillors and eminent lawyers, famous members of the bar. "None of these great works," he said later, "can very well be accomplished except by means of the State councillors, and of the Masters of Requests." [3]

Colbert probably communicated his project to the king in the year 1664 or 1665, easily finding a way to make the communication as if the conception had spontaneously occurred to His Royal Highness. He says as much in an important memorandum of 15th May, 1665: "The plan which the king signifies that it is his intention to carry out for the judicature of his kingdom is the greatest and most glorious which a king could conceive. . . . His Majesty, recognizing perfectly the two duties of kings, the first, the duty of protection, and the second, the duty of administering justice to his subjects, and having already so completely accomplished the former . . . he at the same time recognizes his desire to perform the latter with the same success. . . . He has not left it to us to say by what means that is to be accomplished, having said in a few words all that the deepest meditation of the

[1] Even as late as the 1700s the lawyer Barbier reëchoes the tradition upon this point: "Every king," he says, "since he possesses full power, may change and repeal the laws of his predecessors, as the latter have done with the laws and customs made before their time" ("Journal," vol. VII, p. 281).
[2] "Lettres, etc., de Colbert," vol. II, VI, p. 15. [3] *Ibid.*, vol VI, p. 8.

ablest men living could contrive upon the subject in several years." [1]

§ 2. **Memorials of Members of the State Council.** — Colbert first of all advised the king to have the leading members of the State Council submit Memorials upon existing abuses and the remedies to be applied to them. This was one way of acquiring useful information and at the same time finding out the most capable of the councillors.[2] These Memorials were furnished and they are still in existence in the "Bibliothèque Nationale." [3] Colbert does not seem to have had a very high opinion of the work; in fact, he has left an "epitomized abstract" of these Memorials, in which these words often recur — "nothing in general, either in proportion to the plan or the king's greatness." Pussort's Memorial alone is carefully analyzed.[4] But we need not allow Colbert's valuation of these curious and unpublished documents to prevent our cursorily dwelling upon them. Pussort's work is undoubtedly far superior to the others; it is notable not only for the consistency of the ideas, but also for the excellent style in which it is written, and the dignity of the sentiments which he expresses. But the other Memorials can show us what projected reforms were striven after; in particular, we shall see what the councillors thought of the criminal law, and what abuses they had in view to correct.

The Memorials, taken in the aggregate, show that the councillors understood by the reform of justice rather the reform of the magistracy than that of the law. The diversity of the "Coutumes" was no doubt complained of, and a codification of the provisions scattered through the Ordinances was considered a useful work; but the most essential matter was to insure the exact observance of the laws. In this respect Pussort well expresses the general opinion: "France is credited with the best and wisest Ordinances in Europe, but it probably has the reputation of a worse administration of them than in any other country; the forethought displayed has been so accurate in every particular that Your Majesty will find little to add to that. But it is in regard to the methods of administration of these provisions that we require the whole weight of your

[1] "Lettres, etc., de Colbert," vol. VI, pp. 5, 6.

[2] "It seems that the first thing that His Majesty should do is to choose such persons as are capable of undertaking such a great work; and that is apparently what he has prudently resolved upon in ordering all those of his council to give him their opinions, so as to be able to choose, with a knowledge of the case, the number of persons whom he would select to serve him on such a great plan" ("Lettres, etc., de Colbert," vol. VI, p. 6).

[3] "Bibliothèque Nationale Manuscrits: Mélanges Clérambault," No. 613.

[4] "Lettres, etc., de Colbert," vol. VI, p. 21.

authority, as we have to struggle against either the nature of the climate, or habit so old and firmly intrenched that it has almost become a second nature." [1] The Code Michaud in particular receives his approval as being worthy of being adopted. "I am of opinion that we should especially adhere to the later Ordinances, among which is that of keeper of the seals Marillac, which, it must be acknowledged, has been drawn up with great care and in a spirit of zeal and justice." [2] — "which, although very excellent and judicious, has not been received with the approval due to it, and has not been practised nearly enough in the Parlements, although they would find it hard to state their reasons for this." [3]

The councillors exhibit a genuine ardor for the reform of the magistracy; they, above all, reproach it with ignorance and venality, the inevitable results of the sale of offices and the system of *judges' fees*. "All kinds of persons are appointed indiscriminately," says Pussort, "minors just out of college whom the law has not considered capable of defending themselves in the least important matters touching their interests without the intervention of a guardian, to be the judges where the lives and property of your subjects are at stake, and to give their opinions upon the most important matters of the State, ignoramuses who but for the help of their wealth would have remained among the rank and file of the people, to decide, without any attention, questions which have perplexed the most enlightened doctors, and to see through what human malice and guile have most artfully disguised; corrupt men and those bred in the midst of the debauchery and the prostitution of justice brought about by their ancestors or by themselves, to discharge for your majesty the greatest and most sacred of all the duties of his crown." [4] — "The greatest evil which the age has introduced into courts of justice and which breeds and perpetuates chicanery and litigation is that petty and sordid sale of offices which is ever on the increase; it is a poison which insidiously spreads among the most elevated parties and threatens the ultimate destruction of the spirit of justice." [5]

[1] "Mélanges Clérambault," No. 613, p. 443. *Pussort* explains the causes of this disorder: "The cause of this bad administration is primarily the characteristic bent of the nation. It has a love for novelty, provided it finds there honor and virtue as well, but it has not enough phlegm in its constitution to enable it to stick to its choice, being instantly carried away by the appearance of something else more specious" (p. 411). We shall often find these ideas subsequently repeated in less happy terms.

[2] "Mémoire de d'Aligre," p. 5.

[3] "Mémoire de la Maugrie," p. 277. [4] p. 406.

[5] "Mémoire de Barillon de Morangis," p. 33; *cf.* "Mémoire de Boucherat," p. 84.

The councillors advocate measures which are at first sight astounding in their temerity. They demand safeguards in the shape of assurances of the learning and character of the magistrates; some of them, at least, demand the suppression of the sale of offices and of judges' fees,[1] and even of the irremovability of magistrates. In this respect, it is true, it is public sentiment which speaks; we are reminded of the Fronde. "It will be necessary to modify the Ordinance of Louis XII, confirmed in the late evil days of his reigning majesty, providing that appointments to judicial offices shall only take place on death, resignation, or forfeiture. . . . But as the offices are in the gift of the king and as he is free from venality, it is right that they should be revocable at his pleasure."[2] Pussort, who, for the time being, only asks for the reduction of the number of judicial officers by one fourth or one fifth, is, on the whole, of the same opinion. "It is the judicial offices alone, the disposal of which the kings, having deprived themselves, first by the venality which they have introduced, and latterly by the establishment of the Paulette, have freed from their particular dependence, and have deprived themselves of the only means which they possessed of being able to reward the meritorious. . . . If this means had been in use we would not have seen the sovereign companies of judges indiscreetly engaging in the cabals and strifes which have disquieted this kingdom, and the leaders would not have failed to make the counsellors remember their duty; and if the presidents had been blind enough to disregard their duty to their king, their honor, and the offices they filled, they would have found all the chief officers of their courts in action. These, possessing virtue, courage, and ambition, would have been glad to take advantage of such a favorable opportunity to mount by their services into the positions for which their chiefs had proved themselves unworthy."[3]

Another very bold proposal, which will come up again in the debate upon the Ordinance of 1670, and is found in several Memorials, aims at the suppression of the seigniorial and ecclesiastical courts. Pussort refers to "the great number of jurisdictions existing in the kingdom, which breeds four kinds of evils, — the multiplication of jurisdictions, conflict between them, increase of litigation and annoyance to his majesty's subjects. The true remedy for this disorder would be to unite all the seigniorial courts, secular as well as ecclesiastical, with the royal courts, of which they are the offspring."[1] — "The suppression of all the seigniorial courts of the kingdom is due to the dignity of the king, and the establishment of royal courts in those places where they may be deemed necessary, for it is indecorous to royalty that the judges appointed by individual lords, and who are in most cases peasants, incapable of performing any duties, who dishonor the name of judge and bring justice into contempt, should be set up as judges of the property, the honor and the lives of the king's subjects. The right of taking life, that is to say, high justice, the distinguishing mark of sovereignty, belongs to the King. . . . In ancient times private individuals were never found in the enjoyment of this right . . . and even to-day in all the European states it is unheard of that this right of appointment of judges should be in any other hands than those of the sovereign power. That is the invariable rule in Italy, Spain, England, Venice, and elsewhere except in Germany."[2] Councillor Lemaistre de Bellejame merely proposes to keep criminal justice in the hands of the royal judges.[3] De Sève asks that, if within three days after the crime, the seigniorial judges have not informed, the royal judge should have the precedence.[4] Deshameaux desires that "the officers of the middle and low courts of justice should not be entitled to any other jurisdiction than that of tenures, quit-rents, and other seigniorial rights."

While, however, they always have in view the reform of the magistracy, the authors of the Memorials are of opinion that it is also necessary to remodel and recast the Ordinances. It is desired "to establish a fixed and uniform procedure throughout the kingdom,"[5] "to lay down general maxims as to the courts,"[6] "to codify all the Ordinances which his majesty desires to be kept

[1] "The best expedient would be completely to do away with the sale of offices and let the king have the absolute disposal of them, filling and vacating them in favor of those possessing the requisite qualifications" ("Mél. Clér." No. 613, p. 625). In regard to judges' fees, see the following pages. The foregoing is taken from a Memorial which begins at folio 609 of the volume, and whose author's name we have not discovered. Following the title there is only the statement, "This Memorial was brought before Monseigneur at Saint-Germain on 19th June, 1665." D'Estampes also proposes in very positive terms the abolition of the sale of offices and judges' fees, p. 191; *cf.* *Pussort*, p. 418. *Boucherat*, p. 62.

[2] "Mémoire de d'Estampes," p. 107. [3] *Pussort*, pp. 428–431.

[1] p. 445. [2] "Mémoire sans nom d'auteur," pp. 615, 616.

[3] This is what he says of the ecclesiastical jurisdictions: "The jurisdiction of the Church is not in the best condition. The action is examined mechanically, judges' fees and commissions are taken, no criminal actions are brought unless there is a party who advances the cost, impunity reigns in it, and all this is due to the sale of the offices of official, promoter and clerk of court II" (p. 49).

[4] "Mémoire de Sève," p. 485. [5] "Mémoire de Boucherat," p. 75.

[6] "Mémoire de d'Estampes," p. 117.

and observed within the kingdom," [1] " to prescribe a uniform procedure and practice." [2] But a question which necessarily presented itself was, how to proceed with this codification?

It is remarkable that the States-General naturally occur to the councillors. They do not accept the idea of a convocation of the States, but they for the most part think it their duty to raise the point, if only to reject it. "An assembly of the States-General of your kingdom might be suggested to your majesty, but they contain such a large number of deputies that the diversity of opinions would destroy their good intentions. The late king of glorious memory called to his assistance private assemblies of leading men in 1617 at Rouen, and in 1626 at Paris, composed of prelates, the chief members of your nobility, and officers of your sovereign courts whom he selected along with those of his council, by whose advice a new Ordinance for the reform of justice was drawn up . . . and the Ordinance of 1629 was issued after the assembly of leading men of 1629. . . . Your majesty could, if he wished, form his Ordinance upon the Memorials and opinions which your majesty has ordered us to prepare without the great hindrance of either assemblies of States or of leading men." [3] Mesgrigny also refers to the States-General. [4] Pussort himself mentions them, but only to treat them haughtily: "It must be agreed that the reformations of the States-General, which are the highest and noblest aims of royal foresight, are incompatible with the turmoil of civil war and variances between sovereign and subjects: at such times the rebels never fail to demand reforms which will give color to their revolt and to take advantage of opportunities to weaken the royal power, and kings never fail to grant them so as to show their regard for the public welfare as well as to disperse the clouds. But such reforms are never enforced; that is neither the purpose of those who asked for them nor of the grantors, and probably one of the reasons (besides those which I have mentioned before) why there are no regula-

[1] *Pussort*, p. 117.
[2] "Mémoire sans nom d'auteur," p. 494. One of the Memorials (p. 646) proposes even to establish a uniform civil law, one general and sole coutume; but other councillors think that the "Coutumes" cannot be changed (*D'Estampes*, p. 117); and *De Sève* designates them as "laws established by the general consent of the people under the authority of the kings, which are for the most part as old as the monarchy, and are called 'Coutumes,' among which I would rank what is in some provinces of France called written law, seeing that the authority of its decisions is not derived from the Emperors, but from the people who have voluntarily embraced them, as Procopius has written" (p. 465).
[3] "Mémoire de la Maugrie," p. 227. [4] p. 376.

tions in France which have been fully put into operation is that a careful examination shows that they have originated in the midst of the turbulence of civil war, and it may be said that the sound of the cannons has drowned the protest of the laws." [1] In the debate in the State Council, the word States-General will also be heard, — with what effect we shall see.

The majority of the Memorials agree in giving the judicial officers a share in the reform. "This matter is most proper for discussion by officers of the courts of justice, daily engaged in the examination and report of actions, who, better than any others, know the abuses and stratagems of the litigants and those who conduct them." [2] "It is essential to have the advice of the chief officers of the Parlements." [3] It was desirable "that the first presidents and attorneys-general should be caused to convoke the Parlements in a body or by deputies to consider general maxims and that Memorials be sent to his majesty within six months at latest." [4] "His majesty should have a preliminary conference with the principal officers of his sovereign courts of Paris, who are aware of the particular abuses which are committed there and in the bailiwicks and inferior courts, upon which it is said they are even now at work." [5] "It seems proper . . . to advise the Parlements and other sovereign companies of judges to choose from among these bodies or their deputies not more than four or six of their leading men (a greater number would cause confusion) to revise the Ordinances and make a compilation of those which are not observed." [6] Pussort alone, in pursuance of his fixed ideas, draws up a very precise plan in which the magistracy plays no part. "This work," he says, "which is of great extent, can and should be the business of several individuals, among whom the matters can be distributed according to their abilities and the particular knowledge which the duties they have performed have enabled them to acquire. I am satisfied that six men would be sufficient for the success of this work, and that a less number would cause delay, and a greater number lead to confusion. I think that it would be advisable that they should give up all other occupations and even retire to some country retreat, out of the reach of everything that could distract their attention, so that, by applying themselves entirely to the work, they could accomplish it with the greatest despatch and accuracy. These six individuals should work quite separately,

[1] p. 422. [2] *D'Aligre*, p. 4. [3] *Barillon Morangis*, p. 31.
[4] *D'Estampes*, p. 117. [5] *La Maugrie*, p. 277.
[6] p. 493; *cf.* "Mémoire de Mauroy," p. 355.

and report to each other once a week on what they had done. I would have this assembly headed by a man of merit, ability, and eminence, who would supervise the work, distribute the subjects, preside at the meetings, and report to your majesty on the more important matters on which it would be necessary to take your majesty's orders." [1] We shall see by and by what success Pussort's plan had.

What do these Memorials show us upon criminal procedure, the subject of our special interest? They assert in this respect that the Ordinance of 1539 is a perfect model, and its development is all that is required. "This Ordinance has disentangled all the confusion which existed in the examination of criminal proceedings, arising from the fact that formerly there was no precise rule for the examination of such actions, so that it often happened that, for want of a valid examination, crimes remained unpunished, or were sometimes too severely punished, or the fact was not sufficiently proved, or the proofs were lost owing to the length of the procedure." [2] — "Criminal justice, the usual subject of their (the judges') neglect, must not be omitted, and for this I see but little help, since *it rests with their conscience alone*. As to the forms, there is nothing to add to the articles of the Ordinance of 1539 dealing with criminal proceedings, except to insist that they be given effect." [3] This procedure is by no means considered too severe; on the contrary, if there is any cause of complaint, it is rather on account of its exceeding mildness, and some of the harsher rules which the Ordinance of 1670 will contain, are indicated in these Memorials. "Impunity for crime is the greatest of all disorders met with in the administration of justice, and it springs from the favorable and lax interpretation put by the judges, from time to time, upon the Ordinances which have been issued on this matter." [4] — "The accused should not be allowed to communicate with any one before their interrogations, nor should they be allowed any counsel before the confrontation of the witnesses, provided that take place within a month or two at the latest, according as the judges may order after the imprisonment. After that time the accused should have counsel, without prejudice, however, to the safety and custody of prisoners as that has always been seen to; unless a crime against the State is concerned, where secrecy is important, in which case they should neither have communication nor counsel without the order and permission of

[1] *Pussort*, p. 447. [2] *Boucherat*, p. 62; see also *D'Estampes*, p. 118.
[3] *De Sève*, p. 485. [4] *Pussort*, p. 400.

the judges." [1] "The criminal matters which have been handled for some years past have shown that the Ordinances have not, in all respects, provided the necessary forms for the examination of criminal actions, such as in the matter of decrees to hear right, advice to give to the accused free or face to face, the making of permissible distinctions. . . . It appears that the persons condemned by contumacy are treated too favorably by the Ordinance, which grants them five years within which to have themselves rehabilitated." [2]

These documents above all reveal betrayals of trust and abuses, such as appear at the Great Days of Clermont. Pussort speaks "of the assistance which influential persons who have been accused have received from officers of the long robe by the intrigues which they have practised with them, so that it is rare to see the punishment of a crime of any description, but a very common occurrence to see those who have brought the actions ruined and annoyed by the excessive expenses of the proceedings." He mentions "those criminal societies aided by the authority of the magistrates and put, to some extent, under the protection of the laws." [3] — "Nothing is so dangerous as to countenance rebellions against justice, the sheltering of criminals in the houses of the great, to deprive the officers of the law of the liberty of making their seizures and executions, so that justice remains unobeyed. An usher with his rod carries the authority of the prince." [4] The abuse of costs and the rapacity of the judges are denounced.[5] At Rouen the proceedings are communicated to the king's counsel only for the purpose of giving their final conclusions; [6] at Toulouse judges' fees are exacted for decrees rendered for contumacy "which prevents alike the acquittal of the innocent and the punishment of the guilty, against the spirit of the Ordinance, which, in order to facilitate both, has taken especial care to burden criminal proceedings with few judges' fees." [7] In particular that serious abuse of inquiries made by the incompetent or people of bad character is mentioned. "I am forced to tell your majesty of a mischievous custom which is practised in some présidials. . . . In order to increase practice and chicanery, they establish clerks in the cities and market-towns of their jurisdiction, who, at a price, distribute commissions to make inquiry into crimes and offenses, addressed to the chief royal officer of court, which are entitled of the Prési-

[1] p. 525. "Mémoire sans nom d'auteur." [2] p. 646.
[3] p. 400. [4] *Barillon Morangis*, p. 30.
[5] *Boucherat*, p. 73. [6] *Ibid.*, p. 83.
[7] *Ibid.*, p. 84; *cf. Barillon*, p. 75.

dial, of the lieutenant-general or of the criminal lieutenant, and as these commissions are delivered to all and sundry without cognizance of the cause, it very often happens that the guilty informs against an innocent party, and carries the information to decree; the innocent party is arrested, which occasions many wrongs." [1] The Councillor of Sève points out a double defect in the procedure: on the one hand, there was a tendency to follow the "extraordinary" procedure, even for very trivial offenses; on the other hand, even in case of serious crimes, if no civil party appeared, the prosecution was very often neglected.[2]

But by far the most defective institution was that terrible "prévôtal" jurisdiction, the name of which remains with sad significance. Some of the Memorials treat this subject with remarkable spirit. "It would be expedient for the well-being of justice to abolish the small marshalcies, or unite them with the large ones existing in the cities where there are présidials. For the small marshalcies work incredible ruin among a poor populace; the provost lives in one locality, the lieutenant in a market-town, and the assessor in still another place. As they have no archers they commission jailbirds, and arrest poor peasants, whom they think may have some property, under the pretence that they have stolen or have carried firearms, and imprison them in private jails until they have extorted money from them. I omitted to mention that if your majesty does not abolish the petty marshalcies, he should at least abolish the assessors, who cause more mischief than the rest, because, being graduates, they are better acquainted with the tricks of chicanery." [3] D'Estampes also declares that the provosts do not do their duty, because the archers are not paid, and he would have the acceptance of money from the parties expressly prohibited.[4] Mesgrigny and D'Estampes both demand that the provosts should bring the proceedings "immediately and without delay," and that they should be obliged to announce to the accused whether they are going to try them "prévôtally" or in the last resort, "at the first interrogation, so that the accused may not be surprised and may be able to plead his declinatory pleas and objections to the jurisdiction, which should be decided in the accustomed manner according to the Ordinances . . . the defenses being different when he is to be

[1] *D'Estampes*, p. 382. [2] p. 485.
[3] *Mesgrigny*, p. 283; *cf.* a letter from the bishop of Tarbes to Colbert, of 21st May, 1664. ("Correspondance administrative sous Louis XIV," vol. II, p. 133.)
[4] p. 132.

tried in the last resort from what it is when there is an appeal." [1] Both agree in desiring to prohibit the superior judges from taking jurisdiction of appeals from provosts, vice-bailiffs, and vice-seneschals; [2] which is at first sight astonishing on the part of men who did not approve of this jurisdiction; but Mesgrigny states the reason for this view. "Since the Ordinance of 1629, there has been a Declaration which ascribes to provost-marshals the power to try subject to appeal, which is a very bad institution, for the provosts abuse it, and when an enemy desires to injure a domiciled citizen, and even a titled gentleman, it is to the provosts that he applies." [3] One thing appeared to be absolutely necessary, to fix strictly the still vague jurisdiction of the provosts.[4] This the Ordinance did; but it was necessary to return to the matter again in the following century.

We have lingered a long time over these Memorials; but these unpublished documents appeared to us to possess some interest. They contain a greater freedom of speech than will often be found in the debate in the State Council or in the Conferences.

§ 3. **Colbert's Plan; the Council of Justice; its Preliminary Labors.** — Colbert adopted in its entirety the plan proposed by Pussort. In the memorandum which he prepared upon the Memorials he makes this statement: "Concerning the codification of all the Ordinances, — to appoint six capable persons with a president, who shall retire into the country to compile the Code of all the Ordinances to be observed and put into effect throughout the whole kingdom." [5] He then addresses to the king that Memorial of 15th May, 1665, of which we have spoken above. In that he shows clearly from the outset that an extensive codification is proposed. "As all His Majesty's thoughts and actions are in proportion to the magnitude of his intellect, we have been sufficiently impressed by the fact that in undertaking this enterprise he does not wish to follow the example of his predecessor sovereigns who have been contented with making some collections of Ordinances, the enforcement of which they did not greatly exert themselves to insure. His Majesty having informed us that he wished to bring together into a single body of Ordinances everything necessary to establish the judicial practice in a fixed and certain way and to reduce the number of judges . . . it only remains for us to explain our views according to the command which His Majesty

[1] *D'Estampes*, p. 133. [2] *Ibid.*, p. 132; *Mesgrigny*, p. 382.
[3] p. 383. [4] *Barillon Morangis*, p. 76.
[5] "Lettres, etc., de Colbert," vol. VI, p. 21.

has been pleased to give us, on the methods that may be practicable to accomplish these great aims."

The plan which Colbert now proposes is, as has been said, that which was followed later for the drawing up of the Codes which govern us to-day. It is in two parts: a discussion in the State Council of the plans prepared by the committees or sub-committees; and, at the same time, to facilitate the labor, an extensive inquiry opened throughout the whole country among the appropriate bodies.

First of all, "a Council of Justice" is constituted, composed of the ablest members of the State Council. "Its sitting must be appointed to take place on a day fixed, once a week or every three days, and at the same time the division of the subjects must be made, namely, the examination of the whole collection of the Ordinances to find out all the changes which will have to be made. For this matter, which is the greatest and the most extensive of all the work, it will be necessary to appoint four or six of the ablest State Councillors, who will take with them the four or six ablest advocates of the Parlement, who will together compose a separate committee, under the leadership of the dean of the State Councillors. — It will also be necessary to keep this matter separate from that of the distributive civil justice. — In each of these matters two State Councillors and two advocates will work; to examine, in the assembly of the whole twelve, what shall have been decided by the four, and immediately to submit the whole, well digested, to the King's Council." Colbert is not contented with sketching this wise division of labor and assigning to each his share; he goes on to point out the spirit in which the work should be done. This is what he says of the criminal procedure: "To examine everything which concerns the system of criminal justice of the kingdom, as being the most important, *to cleanse it from all chicanery*, and to take care to establish sure methods, while protecting and safeguarding the innocent, for promptly arriving at the punishment of criminals." We shall see how Colbert was understood.

For the *inquest*, of which we have spoken, it was necessary, "at the first sitting, to choose eight masters of requests of as high a degree of ability and probity as may be, to go to assist in all the Parlements of the kingdom": they were to receive "an ample instruction"; and in the stated meetings they were to collect the complaints and observations which they would report to the Council of Justice. For the purpose of

facilitating the reports, certain members of the Council must be designated to receive the communications of such and such of the masters of requests on their mission, "to correspond with all the masters of requests making their circuits in the provinces; to report to the council on all the disorders which they should find in the matter of justice, to allow of the immediate application of the remedies which should be found appropriate, and to submit immediately to the special meeting of the six whatever should concern the drawing up of the Ordinance." This was done, at least partly;[1] but we do not have the results of this vast inquiry. Louis XIV no doubt refers to it when, in "his 'feuillets' for 1667," he mentions, while speaking of the drawing up of the Ordinances, the "Memorials sent from other Parlements."[2]

The Council of Justice, proposed by Colbert, met for the first time in the Louvre, on 25th September, 1665. The great work then began, and was to be continued without interruption until its complete achievement. The entire history of these discussions is not known. Although the official minutes of the Conferences held later between the members of the Council and the delegates from Parlement were published in good season and served as a basis for the interpretation of the Ordinances, for a long time nothing transpired as to the sittings of the State Council. An official report of these sittings was, however, drawn up, and a manuscript of the "Bibliothèque Sainte-Geneviève" contains a portion of it, entitled, "Délibération du conseil de la réformation de la justice." This document, which was brought to light and used for the first time by M. Francis Monnier,[3] has been published in its entirety by M. Pierre Clément in his "Lettres, mémoires, et instructions de Colbert."[4] It is, however, unfortunately only a fragment; it contains the official reports of only three sittings. On the other hand, we possess a very interesting letter from the advocate Auzanet to one of his friends upon the reform of justice. This is the

[1] On the last folio of No. 613 of the "Mélanges Clérambault" we find a note dated 2d October, 1665, containing the names of "masters of requests chosen to serve in the departments," with remarks upon each of them.

[2] "Mémoires" (*Dreyss* edition), vol. II, p. 252. Colbert, moreover, collected the documents. We find in the month of September, 1665 (the day of the month not appearing), a note in which he requests M. de Gomont, an eminent lawyer, "to make a draft or plan of the course the king may and ought to take for the reform of the justice of his kingdom." "Lettres, etc., de Colbert," vol. VI, p. 12.

[3] "Guillaume de Lamoignon et Colbert, Essai sur la législation française au XVII[e] siècle," 1862. (Extracted from the report of the Academy of Philosophical and Political Sciences.)

[4] Vol. VI, App. p. 369 *et seq.*

testimony of one of the chief actors, but its extreme brevity shows that the author did not wish altogether to tear the veil from these mysteries.[1] Both these documents relate chiefly to the drawing up of the Ordinance of 1667; nevertheless, as the plan adopted at the beginning was followed to the conclusion, it is not entirely useless to examine them briefly.

The first sitting of the Council of Justice was held, as we have said, on 25th September, 1665, "in His Majesty's cabinet after mass."

Those chosen to compose the council were MM. Voisin, de Villeroy, Colbert, Hotman, Chancellor Séguier, de Machault, de Verthamon, Poncet, Boucherat, and Pussort. Chancellor Séguier appeared in the great enterprise for the first time; till then Colbert had conducted everything, and the Chancellor was so little acquainted with what was proposed to be done that he made a number of mistakes during this first sitting.[2]

The sitting opened with a speech by the king. He announced that he desired the reform of justice, "which he was resolved to prosecute assiduously, and that the Council which he had that day assembled was not for one year or for several, but that he intended to employ it and summon it around him as long as he lived." The Chancellor, after having lauded the king's resolution, said that it would be proper to begin with matters concerning the ecclesiastical state; "he assigned these matters to the members of the Council who sat on his left." The king appeared to be displeased; "although matters did not turn out either according to the plan, or to the liking of the king, His Majesty, with extraordinary moderation, allowed the Chancellor to make this assignment;" then, searching in the pockets of his close-coat, "he drew from among several Memorials and papers one written by himself, which he said he had composed while at Villers-Cotterets to explain his intentions upon the principal points of the object of the meeting."

[1] "You have frequently requested me to acquaint you with the details of everything that took place in all the meetings which have been held for the reform of justice, but I have neither been able nor permitted to gratify your wish, because of the secrecy which has been imposed; but since time reveals the most private occurrences, and this matter has now been made public, I am at liberty to gratify your curiosity and will explain the causes of this assembly and the orders which have been given and followed on this subject." "Lettres, etc., de Colbert," vol. VI, App. p. 396 *et seq.*

[2] "Colbert has the king's ear, and he has become the real chancellor, reforming, at the same time, every department of the administration. . . . Séguier presides over all the reform committees, but it is Colbert's inspiration which governs these boards." "Le chancelier Séguier," by *M. René de Kerviler*, p. 379.

What Memorial was this? Had the recollection of the Ordinance of 1539 inspired the king at Villers-Cotterets, or was this merely the report drawn up by Colbert? This much is certain, that Louis XIV first of all proposed two of the measures pointed out by his minister; reforms in the State Council, and the sending of masters of requests through the provinces. Thereupon the meeting terminated.

The second sitting was held on 11th October, 1663, again at the Louvre. MM. d'Estampes, de Morangis, and de Sève figured in the Council for the first time; M. Poncet had dropped out. This time they proceeded to determine on the course to be followed. Colbert had also prepared a speech, the original of which we have among his papers, but which, it seems, was never delivered; in it he insists upon the idea that it is nothing short of a codification that the king desires.[1]

Hotman, being the youngest, spoke first; he appeared to be thoroughly conversant with Colbert's plans; he pointed out that it was not a matter of making really new laws, but of reforming the old laws, emphasizing the fact that "the criminal jurisdiction has not enough laws and regulations . . . and that is why such a lengthy and divergent style of procedure is observable in criminal matters, where the toleration of recent times has introduced so much laxity that it seems absolutely necessary to provide against this by definite regulations which shall confirm and fix firmly all the forms." He proposes to his majesty "to divide the duties among the individuals whom he has assembled"; he also demands a wide inquiry. "The commissioners will look for the means of accomplishing their task in the opinions which they will bring back from the provinces, namely, in criminal matters, in the opinions of the criminal lieutenants and former king's attorneys, judges, and assessors in the marshalcies."

M. Voisin, who was the next speaker, proposed to follow the Code Henry and employ commissioners. M. Pussort stated that Justinian had "in a similar project, utilized ten years' assiduous application of twelve of the ablest and most experienced jurisconsults," and that consequently "he could not give a reasoned opinion offhand." M. Boucherat said that "as the reform of the Ordinances was of unlimited extent and deserving of the forethought and application of a great king, it could not be resolved upon or undertaken without long and arduous study; that the kings who preceded His Majesty had sometimes convoked the Estates,

[1] "Lettres, etc., de Colbert," vol. VI, p. 14.

and sometimes eminent individuals who had been met by the leading officers of the Council and of the courts of the kingdom; and that, while he thought that His Majesty's project deserved much consideration, it could not be resolved upon on the spot."[1] It is strange to hear the word States-General, which we have already found in the Memorials. Boucherat apparently wished that body, which more or less directly represented the country, to have a share in the work; this man, whom Saint-Simon treats very cavalierly,[2] here gives utterance to the most enlightened thought. MM. de Morangis, de Sève, and Le Tellier are also seen to share his opinion. This was bound to displease Colbert very much, but M. de Verthamont returned to the plan of working simply by commissioners; then the report would be made in presence of the king so that "the decision should be resolved and established by the great intellect with which God had endowed His Majesty. This he did not say from a spirit of flattery, but from the public knowledge of all His Majesty's subjects as well as foreigners, who were obliged to acknowledge that God had endowed him with an extraordinary intellect and a genius which raised him above other men." He did not stop there, but went on to make comparisons, which he apparently thought very ingenious, between Justinian and Louis XIV. This had the effect of restoring the king to good humor. M. de Machault was of opinion "that it would be sufficient to take the lectures on the Ordinances, and the Code Henry, or the Ordinance of M. de Marillac, add omitted matters, strike out superfluous matter, and in a short time put things in a state of perfect law."

Then came Colbert's turn to speak. He began by extolling the king; then he proceeded clearly and briefly to explain the plan which ought to be followed, which we already know. Then everybody rallied. The king asked the Chancellor for his opinion, and he spoke next. "The task of the reform of the laws was a sovereign prerogative; all the opinions and even the regulations of the courts could have no force of law, the form of which must be stamped with the character of the prince." He approved the assignment of the matters to councillors assisted by advocates, and suggested that the conferences to prepare what should be submitted to the king's council should be held at his home. The king stated that this was what he had resolved upon; but he set

[1] "Lettres, etc., de Colbert," vol. VI, p. 374.
[2] "It is difficult to understand how M. de Turenne manages to execute the duties of his office, simple as they are." "Mémoires," vol. II, p. 217.

aside the idea of conferences at the Chancellor's: "in all matters of business he had invariably wished that the matters should be brought before him without intermediary, so that he might learn freely and more naturally the sentiments of all who transacted his affairs. This he could not do if, before speaking in his presence, they should be in agreement and with uniform ideas." Such sentiments from Louis XIV are not surprising. The Chancellor then made to the king proposals for the assignment of matters; but "the king, rising, said that he would confer with him in private, and that the matter deserved some discussion."

On Monday, 13th October, Colbert, by the king's command, sent to the Chancellor the list of commissioners chosen. It was drawn up beforehand, for it is found attached to the Memorial of the month of May, which we have mentioned before; and it had undergone hardly any change. We find: "for justice (to be subdivided into civil, criminal, and police), MM. de Verthamont, Colbert, Pussort, Voisin, Caumartin, Le Pelletier de La Reynie; M. Hotman to act as secretary. — Advocates who should act on the said reform: MM. Auzanet, l'Hoste, Senior, de Gomont, Raguenau, Bellain, and a sixth to be afterwards appointed."[1] The useful work was about to commence; but here we find a considerable hiatus in our documents. We have only the official report of a single sitting of the Council of Justice, that of Sunday, 25th October, 1665. The discussion related to the Articles which subsequently composed Title I of the Ordinance of 1667, upon the observance of the Ordinances. On this point the king and Colbert were insistent. It was necessary to check the power of the Parlements and render of no avail the right of enrolment. Lamoignon said of the Ordinance of 1667, "that it commences by threats against the Parlements and all the sovereign companies of judges." An interesting debate took place in the Council of Justice; it was declared that the ecclesiastical courts should, on the same principle as the others, be subject to the laws of the State, and that the title of "Sovereign courts" as applied to the Parlements must be abolished. Louis XIV intervened in his usual high-handed way. "The king has said that during his life protests may be made without fear, because he knows well how to reject the useless and disorderly and give consideration to those which are respectful and reasonable." But all this takes us far from our subject.

[1] "On the 16th of the same month of October, the king appointed M. Foucault, 'greffier' of the Chamber of Justice, to work in the capacity of lawyer." "Lettres, etc., de Colbert," vol. VI, p. 377.

The conferences of the commissioners and advocates, however, had begun; Auzanet's letter, above quoted, shows us their nature. In October, 1665, probably soon after the 13th, M. de Verthamont, who was to be president of the committee, "sent letters to the advocates requesting them to meet at the Chancellor's." They attended, gowned, and were received by Séguier, who apprised them of what was wanted of them. "A few days after, the commissioners having met at M. de Verthamont's, the latter took his seat at the upper end of the board or table, in the president's chair: on his right were M. Pussort, State Councillor, also in a speaker's chair, then MM. de Caumartin, and Le Pelletier de La Reynie, masters of requests, and MM. l'Hoste, de Gomont, and Foucault, advocates; and on his left were MM. Voisin and Hotman, masters of requests, MM. Auzanet, Ragueneau, and Bellain, advocates." This is a verbal photograph of the meeting. This stickling on questions of etiquette, which is shown by several passages in Auzanet's letter, is destined later on to cause a little ill feeling in the first conferences with the parlement officers.

At first there were two sittings every week; then, as the king was at Fontainebleau, only one day was fixed; and they met at Essonne, ".so that the State Councillors and the masters of requests, on one hand, and the advocates on the other, could each come halfway." In the course of the work, M. de Verthamont died, and the meeting place was changed to Pussort's. "M. l'Hoste having been appointed director of hospitals, his place was left unfilled, and the number of commissioners was thus reduced to nine." Subsequently, Colbert came to this Council, "the secretary of state," says Auzanet, "to whose care the king intrusted the order, administration, and the most important functions of the State;" he did not wish to preside and "in spite of all entreaties he was contented to take a second place."

The observance of the Ordinances was the first thing to occupy the Council's attention, and the articles which were discussed at the Council of Justice on 25th October were presented as having been elaborated by the commissioners. As a matter of fact, they had never touched them. "This matter did not remain long in doubt," says Auzanet, "for at the following meeting, the king acquainted us with his wishes on the matter and sent the eight articles which constitute the first title of the Ordinance of 1667." As to the remainder, they proceeded in the following manner. It would appear from a passage in the official report of subsequent conferences published by Foucault in 1709, that Pussort first of

all did one preliminary piece of work. "From among the commissioners of the Council, M. Pussort was selected to draft the articles upon reform. That great man worked on this with much care and exactness; his work was inspired by that quick perception and that inviolable attachment to justice which were universally acknowledged to be the most admirable of his sublime qualifications." Then the subjects were assigned "to each of the lawyers to work upon by himself, for the purpose of dividing the subjects into articles and putting the articles in order. And after the reading of the whole title to the meeting, each article was considered separately, lodged, and agreed upon by a majority vote, and although very often the opinions had been diverse, nobody exhibited the slightest jealousy or eagerness to impose his opinion, but everything passed with the most laudable good feeling and good nature."[1] This settled, the articles were submitted to the Council of Justice. "After we had settled the articles among ourselves, they were submitted to the king's Council, where, in His Majesty's presence, those which were considered just were authorized and the others amended or rejected." The lawyers did not attend these discussions, for, Auzanet adds: "at several junctures the king did our company the honor of adopting its opinion upon matters proposed, which were dealt with directly and had to be settled in the Council, in his majesty's presence."

§ 4. **The Parlement's Share.** — The Ordinance upon the civil procedure was, however, completely elaborated. "After our meetings had continued for fifteen months," says Auzanet, "it was found that there was sufficient matter for an initial volume, and to warrant its execution." Nothing more appeared to be necessary than to publish this work, when the Parlement all at once reappears upon the scene. New conferences are about to take place, but this time delegates from the Parlement of Paris figure alongside of the State Councillors and the masters of requests. What is the meaning of this unforeseen occurrence? Auzanet, in reporting the fact, merely says that the king "thought fit" to have it so. Louis XIV himself explained his position upon this point. "In regard to the general regulation of justice, of which I have already spoken, a considerable number of articles having been drawn up in the form which I desired, I did not wish longer to deprive the public of the benefit which it awaited from them; but I did not consider it fitting either to send them to the Parlement as they were, at the risk of some chicanery happening

[1] *Auzanet*, "Lettres, etc., de Colbert," vol. VI, p. 399.

to them there, which would have vexed me, or to carry them out at once myself, in case it might some day be alleged that they had been passed upon without thorough investigation; that is why, taking a middle course, which would obviate both objections, I caused all the articles to be read over at my Chancellor's, in the presence of deputies from all the Chambers and commissioners of the Council; and, when some reasonable objection was raised in the conference, it was immediately brought before me, to be dealt with as I should see fit. After such discussion I finally proceeded personally to cause the Edict to be published."[1] These scruples and fears are very unlike the monarch who so recently treated the Parlement's right of protest in such a high-handed manner. The cause of the fact has, moreover, been sought for elsewhere, and this is what was found.

First president Lamoignon, almost at the same time as Colbert, had been impressed with the necessity of codifying the laws. Not being able to handle such an enterprise, his sole aim was to settle the controverted points in the jurisdiction of the Parlement of Paris. He purposed to employ on this work magistrates and also lawyers, and among the latter the very Auzanet whom we have seen not long ago also chosen by Colbert. Such a mark of esteem coming from opposite quarters was the highest encomium on this man; and it is through him that we learn what happened. "M. de Lamoignon, First president of the Parlement of Paris, impatient of the conflict of opinion in his company of judges, and aware that I had previously begun some memoranda upon a part of these doubtful questions in order to apply the necessary remedy, ordered me to recover these memoranda and add to them whatever I should deem proper, which was done; after which M. the First president, having obtained the consent of the king to his purpose, held three or four meetings of some twelve lawyers in his house and took their views upon the first articles. Two deputies from the Grand Chambre and a like number from each of the Chambers of Inquests also met in his house on other occasions, in whose presence, the said articles and the opinions of the lawyers having been read, several articles were resolved upon and the remainder left in abeyance. But the progress made was so unsatisfactory that M. the First president came to the conclusion that he would never achieve his purpose by this means, and discontinued the meetings."[2] Lamoignon did not, however, entirely abandon his

[1] "Mémoires pour 1667" (*Dreyss* edition), vol. II, p. 224.
[2] *Auzanet*, "Lettres, etc., de Colbert," vol. VI, pp. 397, 398.

plan; he insisted on Auzanet continuing his work, and also employed another lawyer in the Parlement, Bonaventure Fourcroi. "This task lasted over two years, during which time two meetings were held every week, one of these privately, attended by the two lawyers and M. de Brillac, councillor in the Grand Chambre, and M. Le Pelletier, president of the Inquests, to arrange the subjects and formulate the articles, and the other in presence of M. the President, to judge of and resolve upon the articles according to his opinion. . . . Here the initial work ended, awaiting its publication under public authority."[1] As we know, it never saw the light of day; all that survived of it were the "resolutions of president Lamoignon."

Lamoignon's enterprise, which, it must be said, had been directed upon the most difficult part of the legislative system, the civil law, came to nothing. The President must, however, have felt very keenly being excluded from the great official work after having been authorized by Louis XIV, according to Auzanet, to attempt something similar. His great wisdom and loyal character led him straight to the king; but, with great acumen, he had the appearance of not knowing what had taken place without his co-operation. He proceeded to make to Louis XIV a proposal similar to that which Colbert had made and succeeded in getting adopted; at least that is what we gather from his biographer, Gaillard. "Colbert had commissioned Pussort with a task for the reform of justice. His design was not to acquaint any one with the Ordinance, and to publish it by the sovereign authority alone, enacting it in a 'bed of justice.' M. de Lamoignon, apprized of this design, approached Louis XIV, and proposed to him, as a way of making his reign illustrious, this idea of reforming justice, after the finances. The king said to him, 'M. Colbert is even now employing M. Pussort on this task; see M. Colbert on the subject and act in concert with him.'"[2] Astonished at the confidence which the king had placed in the First president, Colbert saw his plans go awry. "Then began conferences, of which the official report has been published, the modification of a number of articles showing how necessary these conferences were."[3] Is this strange statement quite in accordance with the truth? Lamoignon's stratagem and Louis XIV's reply may be doubted, but one thing appears to be certain, that the First president did go to see the king, and the

[1] This took place before 1665.
[2] "Vie du président de Lamoignon," quoted by *M. Pierre Clément*. "Lettres, etc., de Colbert," vol. VI, p. 14.
[3] *Ibid.*

latter, probably remembering the encouragement which he had previously given to the head of the Parlement of Paris, ordered the new conferences; it is highly probable that Louis XIV was, at the same time, very glad in this way to avoid any obstacle to the enactment.

However that may be, "on 24th January, 1667, the king sent a message on the subject to the Parlement, and especially to the First president and the attorney-general, commanding the First president and the other presidents of the Parlement, four councillors of the Grand Chambre, and five former presidents of the Chambers of Inquests with the oldest members of these chambers, the former president of Requests of the court of justice and the oldest member of the first chamber and the lawyers and attorneys-general to meet continuously at the Chancellor's to confer with him and the commissioners of the Council by whose advice the articles had been drawn up." This much is shown by the official report of the conferences, but it was not the Chancellor who had been the means of bringing about this decision; it is even almost certain that he was not informed of it until everything was in readiness. The letter sent to him by Secretary of State Guénégaud is in the following terms: "My lord, I have, by order of the king, written to the Parlement of Paris, informing it that His Majesty, considering it inexpedient to publish the articles of the Ordinances which he has caused to be codified for the reform of justice until they have first of all been seen and considered by you and any members of the Council and by several of the chief officers of the Parlement appointed by His Majesty, the First president should hold meetings at your house immediately and as often as possible, so that they may give His Majesty their opinion upon the whole, of which I think your lordship should be notified, so that you may know what is being done in this matter." [1] The conferences began on Tuesday, the 26th January, at the Séguier mansion. Fifteen sitttings were held to begin with, the last of which took place on 17th March, 1667. There were nine commissioners of the Council, including the Chancellor, twenty-nine deputies of the Parlement, including the First president, the attorney-general and two solicitors-general.[2] M. Joseph Foucault was the clerk of the assembly. A weighty and dignified discussion ensued in which especially shone Pussort in the defense of the articles as his own work, and the First president. After the termination of the discussion, the various articles, the

[1] Letter quoted by *M. de Kerviler*, "Le président Séguier," pp. 385–386.
[2] "Procès-verbal de l'Ordonnance de 1667," p. 4.

modification of which had been demanded, were submitted anew to the King's Council, which made its final decision. We learn from Auzanet how the finishing touches were ultimately given to the civil Ordinance. "Seeing that the articles which had been compiled by different persons were found to be couched in different styles, the king appointed MM. Morangis, Pussort, and Boucherat, State councillors, and M. Hotman, master of requests, and myself, the only practitioner, to put the Ordinance in shape, by reducing it to a uniform style and arranging the titles in their proper order. This occupied seven whole weeks, five and sometimes six sittings being held each week; and finally, in April, 1667, the first Ordinance was drawn up in the form in which it appears to-day, brought before the Parlement of Paris and published in the presence of the king sitting in his Parlement on the 20th of the same month." [1]

§ 5. **Discussion of the Ordinance; Lamoignon and Pussort.** — Although our narrative is the story of the drafting of the civil Ordinance, it is also that of the drafting of the criminal Ordinance. Both were parts of the same task. The organism which produced the former produced the latter and by the same work. Here the details of the preparation of the articles by the commissioners and of the debates in the Council of Justice are much less numerous. Auzanet, at the end of that letter of December 1st, 1669, the whole of which we shall very soon have quoted piece by piece, states that the elaboration of the criminal Ordinance began in May, 1667, and had not ended at the time when he wrote. "In the month of May, 1667, the same commissioners, reduced in number to nine, have continued, as they still continue daily, to labor on the said matters in the manner aforesaid, to make and compile other Ordinances when his majesty shall deem fitting." This preliminary work was not completed until the middle of the year 1670. New conferences with the deputies of the Parlement then began. The official report shows that they were really a continuation of the conferences of 1667: "On 6th June, 1670, the king's commissioners and the deputies of the Parlement met at the Chancellor's house, at 3 P.M. and held their sitting in the lower gallery in the same order and arrangement they had followed since the conference of the year 1667." The composition of the assembly differed somewhat from that of 1667; it was as follows: I. Commissioners of the council: Chancellor Séguier, MM. d'Aligre, de Morangis, d'Estampes, de Sève, Poncet, Boucherat, Pussort, Voisin, Hotman. II. Deputies of the Parlement: the First president, presidents

[1] "Lettres, etc., de Colbert," vol. VI, p. 400.

Maisons, Novion, Mesmes, Le Coigneux, de Bailleul, Molé de Champlastreux, de Nesmond. III. Councillors of the Grand Chambre: MM. de Catinat, du Brillat, Fayet, de Refuges, Paris, Royault. IV. Deputies of Inquests: MM. Potier de Blanc-Mesnil, de Bermond, de Bragelone, Maudet, de Fourcy, Faure, Le Pelletier, Le Vasseur, Maupeou, Malo. V. Deputies of Requests of the Court of Justice: MM. Chatron and Leboult. VI. MM. de Harlay, procurator-general; Talon and Bignon, first and second attorneys-general.

There were only seven conferences, the last of which was held on Monday, July 8th, 1670. After a revision in the Council of Justice, the Criminal Ordinance was "issued at Saint-Germain-en-Laye in the month of August, 1670, then registered at Paris in Parlement, 26th August, 1670." The official report of these conferences, like that of the conferences of 1667, was published soon after. At first a number of manuscript copies were put in circulation, and two printed editions of it appeared during the 1600s. But in 1709 a new quasi-official edition of it was published "by the associates chosen by His Majesty for the printing of his new Ordinances." The heading "by authority of the king" shows that this publication was made by Foucault, State councillor, and of the Privy Council, and that he reproduced a manuscript which had been delivered to him by "his father, Foucault, Secretary of State and Director of the Finances." The latter was the secretary of the conferences of 1667 and probably also of those of 1670.[1]

We possess sufficient information to enable us without difficulty to summarize the discussion. Three men, two in particular, take part in the first draft; these are Pussort, president Lamoignon, and attorney-general Talon. Pussort and Lamoignon, who have already fallen foul of each other in 1667, are this time true adversaries, maintaining at the same time the most unassailable dignity: there is no article on which they do not speak. Pussort represented the spirit in which the new law had been drawn up, according to Colbert's views. Their chief desire had been to disencumber the procedure of the complexities and quibbling which clogged it, to strip it of all parasitical growths, to lessen its length and its cost. It was also desired to have a strong and certain instrument of repression, without interfering too much with the rights of the defense.

Lamoignon showed himself in a double aspect. High-spirited and noble-hearted, he protested against the severities of this terrible

[1] This is the edition which we invariably cite.

procedure; he alone in this assemblage spoke in the name of humanity, as the following age accepted it; and in this respect he far outdistanced his contemporaries. He protested against the compulsory oath of accused persons, against the provision refusing them the assistance of counsel, and against the article punishing as for perjury the witness who contradicts himself at the confrontation. Finally, although he inveighed less vigorously against torture, it is none the less a great distinction for a magistrate of the 1600s to have said "that he saw strong reasons for its abolition, but that was only his own private opinion." [1]

Lamoignon had, on the other hand, professional loyalty and respect for tradition in the highest degree; and this conservative leaning led him to oppose a certain number of articles which nevertheless realized an advance. This caused him to defend the seigniorial jurisdictions, the suppression of which was threatened by one provision. These were, however, most frequently particular courts; but to abolish them would have meant "despoiling the lords of the principal part of their property, without which their lands would have lost all their value, it being certain that the nobility had nothing but the preservation of their jurisdictions at heart, since there is nothing which distinguishes them in a greater degree from the rest of the king's subjects." [2] He protested against the necessity imposed of interrogating the accused within twenty-four hours of his arrest,[3] and against the admirable provision that the judgments in the first instance shall be rendered by three judges at least and those of the last resort by at least seven.[4] Here is apparent the magistrate whose chief anxiety is promptness of service. The articles reducing the rights and emoluments of the judicial officers above all aroused protests from the First president; he spoke in favor of the clerks of court,[5] the king's procurators,[6] even of the jailers.[7] Here, as in the case of the seigniorial judges, he defended the rights of property. "These are offices which they have dearly bought, and which comprise the greatest part of their property."

Talon spoke often and very authoritatively; but his remarks were much less trenchant. Sometimes he supported Pussort and sometimes the First president; he showed all the characteristics appropriate to magistrates of the public ministry. Although he was a magistrate, he was at the same time "the king's man." The other magistrates and councillors, including even the Chan-

[1] "Procès-verbal," p. 222. [2] *Ibid.*, p. 15. [3] *Ibid.*, p. 151.
[4] *Ibid.*, p. 246. [5] *Ibid.*, p. 82. [6] *Ibid.*, p. 108. [7] *Ibid.*, p. 135.

cellor, played an unimportant part. Of these, MM. Boucherat and de Novion spoke most frequently, usually on matters of detail. If we are to believe Saint-Simon, de Novion was certainly a man capable of grasping details: "He was neither unjust nor dishonest like his grandfather the other First president de Novion; but he knew nothing of his profession except the petty technicalities, in which he was as proficient as the ablest attorney; outside of that obscure science he could not be depended upon." [1] The neutral rôle of MM. de Harlay and Bignon is matter for surprise. They were really men of great merit. Saint-Simon also speaks of them. "Descendant of these great magistrates, Harlay had all their weight, which he exaggerated to the point of cynicism, affecting indifference and modesty. . . . He was learned in public law, and well grounded in the various systems of jurisprudence; he ranked with the most conversant in Belles-Lettres, and was well read in history." [2] — "Bignon was a magistrate of the old school in respect of knowledge, integrity, and modesty; worthy of the name he bore, so well known in the legal profession and in the republic of letters, and he had, like his father, enjoyed a wide reputation as attorney-general." [3]

After having been discussed in these conferences, the articles, as we know, again passed through the hands of the Council of Justice. Sometimes the comments which had been made in the name of the Parlement were taken into consideration, but more frequently they were ignored. It is to prove a matter of subsequent regret that President Lamoignon's advice was not listened to with more respect.

[1] "Mémoires," vol. XIV, p. 216.
[2] *Ibid.*, vol. I, p. 136.
[3] *Ibid.*, vol. I, p. 392.

CHAPTER II

THE PROCEDURE UNDER THE ORDINANCE OF 1670

§ 1. **Introductory.** — We have no intention of making a commentary on the Ordinance of 1670; but it is essential briefly to indicate the novel features which it introduced and for that purpose to take a bird's-eye view, as it were, of its chief provisions. As it contains both jurisdictional rules and rules of criminal procedure properly so called, we must adopt that division of the subject.[1]

§ 2. **Jurisdictional Rules.** — From the 1200s a continuous movement took place, as we have seen, impoverishing and despoiling the seigniorial and ecclesiastical jurisdictions for the benefit of the royal jurisdictions. In order to arrive at this result the jurists had gradually changed the old rules of jurisdiction; apart from the appeal, their principal inventions had been the jurisdiction of the court of the place of the offense, the theory of precedence, and the theory of royal causes. Let us see what form these had taken in the new law, now that royalty was irrevocably victorious.

I. The jurisdiction of the court of the place of the offense was finally triumphant. It was even the only competent court (Tit. I, Art. 1); the court of the accused's domicile and that of the place of capture were discarded. President Lamoignon, in the debate, protested against this provision, showing the difficulties which would result from it in practice, but the article was retained. Pussort said, "It was of importance that the court should be ascertainable with certainty." [2] This jurisdiction was not, however, exclusive of all others. If the complainant had brought the

[1] We shall cite the principal Commentators of the Ordinance according to the following editions: *Bornier*, "Conférence des nouvelles Ordonnances de Louis XIV," 1703 edition. — *Jousse*, "Commentaire sur l'Ordonnance criminelle," 1766. — *Muyart de Vouglans*, "Institutes du droit criminel," 1757 edition; "Instruction criminelle," 1762. — *Rousseau de La Combe*, "Traité des matières criminelles," 1769 edition. — *Serpillon*, "Code criminel," 1767 edition. — *Pothier*, "Procédure criminelle," *Bugnet* edition.
[2] "Procès-verbal," pp. 4–6.

matter before another judge, and the accused did not demand its transference before the reading of the first deposition, at the time of the confrontation, the action went on.

II. Article 11 of Title I enumerated the royal causes assigned to the bailiffs, seneschals, and presidial judges, "exclusively to our other judges and those of the lords." We know that all the Ordinances up to that time had made a similar enumeration, having invariably finished it with the words "and all others appertaining to the royal right." This clause was omitted for the first time. It was no doubt considered useless to retain this weapon, now that the strife was at an end. Lamoignon urged the replacement of these words in a long speech; this is a proof of that conservative spirit which we have remarked in the First president. Pussort replied that the king's intention had not been to extend his power, he being sole master, but to decide all disputes; "The edict of Crémieu specified five or six royal causes and added 'and others,' but that is a matter of form." Lamoignon, here more royalist than the king's men, returned to the charge and won his case; the list ended with the words: "and other causes explained by our Ordinances and regulations."

III. As to the precedence of the royal judges over those of the seigniors in the matter of jurisdiction, the plan contained an Article which completely ruined the seigniorial courts. "Our judges," it said, "shall take precedence of the inferior and non-royal judges in their jurisdiction if they have made inquiry and 'decreed' the same day;" the seigniorial courts have in future only those causes which have escaped the vigilance of the royal officers, or which the latter disdained. The First president here still constituted himself the energetic defender of the past; it was, according to him, a question of absolute justice and propriety. Pussort supported the plan; he pointed out that the greater part of the seigniorial judges were "incapable," that the administration of justice was burdensome on the seigniors themselves; he finally vehemently claims the rights of royalty. "The real property of (criminal) justice, which is called 'jus gladii,' is a right of taking life over the king's subjects, lying, properly speaking, in the hands of His Majesty, who communicates it to his officers." [1] But royalty had not the temerity to abolish the seigniorial judges completely. Two modifications were introduced into the Article: precedence was given only to the bailiffs and seneschals, and not to all the royal judges; a term was fixed for the lord's judges, before the arrival of which precedence

[1] "Procès-verbal," pp. 15–17.

could not intervene.[1] Pussort had admitted the first compromise and rejected the second; both figure in the final working of the article.

As between the royal judges themselves, the provosts might have precedence taken of them by the bailiffs "three days after the crime was committed"; [2] the traditionary provision was also adopted according to which the provosts took no jurisdiction of the crimes of the nobility.[3]

IV. The Ordinance dealt with the appeal at length in Title XXVI; but upon this point Royalty had won such a decisive victory over the seigniors that it did not deem it necessary to register it formally. The appellate judges were always royal judges; in the second instance the courts of the seigniors never intervened. "It is only the criminal lieutenants of the bailiwicks and royal seneschals who have the right of criminal jurisdiction. This is decided by Article 22 of the edict of Crémieu, and still more clearly by the Article of the Ordinance which speaks only of bailiffs and royal seneschals; with the result that the judges of the lords who have appellate jurisdiction in civil cases of some other judges, have not the same right in criminal proceedings." [4]

V. The ecclesiastical jurisdiction had gradually lost ground, thanks to the theory of the *ordinary misdemeanor* and of the *privileged case*. The ordinary misdemeanor could be retained by the secular judge, as long as it was not required to be transferred; and in that case only the bailiffs and royal seneschals had jurisdiction, to the exclusion of the seigniorial judges.[5] The secular judge was not divested of the privileged cause. It was settled by the Ordinance of Moulins that the secular judge should hold the ecclesiastical accused until the action had been brought against him and concluded; only, he must thereafter hand him over to the ecclesiastical judge so that the latter might try the common misdemeanor covered by the privileged cause.[6] This successive intervention gave rise to much trouble. An endeavor was made to unite both actions in one; this was settled by the edict of Melun of 1580 in Article 22. "The examination of actions against ecclesiastical per-

[1] This is a delay of 24 hours, Tit. I, Art. 9. [2] Tit. I, Art. 7.
[3] Tit. I, Art. 10. [4] *Serpillon*, "Code criminelle," p. 1139.
[5] *Muyart de Vouglans*, "Inst. crim." Part III, pp. 50, 51.
[6] "We ordain that our officers shall examine and judge in all cases the privileged offenses among ecclesiastical persons, before relinquishing them to the ecclesiastical judge, which relinquishment shall be made on condition of their being imprisoned for the punishment of the privileged offense, where it shall not have been satisfied, for which the Bishop's officers shall answer in case of release."

sons in privileged causes shall be made conjointly by ecclesiastical and royal judges; and in that case the said royal judges shall go to the bench of the ecclesiastical jurisdiction." But the only result of this joint examination, prolific of jarring and conflicts, was to effect a compromise between the rights of royalty and the old immunities of the Church. Now that royalty was passing a new law, would it remove this difficulty? This it tried to do, and the first draft contained two articles which retained the ecclesiastical judges' jurisdiction only for purely ecclesiastical offenses. This was very reasonable and was what the States-General had asked several times; but it was not allowed to pass, royalty yielding to the Church as it had yielded to the seigniors. In this case also it is Lamoignon who appears in defense of the past. "He was obliged to represent to the king that both articles intrenched on clerical privilege to a great extent and seemed almost to destroy it. . . . This clerical privilege, however, is universally recognized wherever there are catholics, and it might be said that this general custom is an adjunct of the altar." [1] And he reviewed the history of the Church's immunities, calling to mind that this privilege "had the sanction of possession during fourteen hundred years"; he begged "His Majesty to make the reflections he might find necessary." Pussort then rose in favor of the reëstablishment of the rights of the civil authority. "The king's intention is not to restrict the ecclesiastical jurisdiction, but to regulate it. . . . The discipline of the spirituality is left absolutely to the ecclesiastical judges. . . . The article, it is true, is contrary to the practice, but it is in conformity with reason; . . . it is not decent that a royal magistrate should act as the assessor of another judge . . . therefore the article is just." [2] It could not have been better put, but Pussort invoked reason, an authority whose reign would not arrive till a century later, and he had the opposition of all-powerful tradition. Talon came to the rescue of the First president. Being a "king's man," he began by doing homage to royalty. "It is true," he said, "that this privilege is a favor which monarchs have granted to the clergy, actuated by pious motives and by the respect which they have for the sacredness of their ministry . . . so it is indubitable that it is in the prince's power to revoke or restrict a privilege granted by his predecessors;" but he moved for the maintenance of the immunity; "it is sufficient if this privilege is placed within limits; in this way the bad effect which it had at some junctures would be rectified, and the complaints which the

[1] "Procès-verbal," pp. 44, 45.

[4] *Ibid.*, pp. 46, 47.

bishops and all the clergy in the kingdom and even the Pope himself would not fail to make if a single feature of a privilege based upon the constitutions of the Roman emperors, renewed by Charlemagne and affirmed by fourteen hundred years' possession were withdrawn, would be avoided.[1]" This formidable opposition, as Talon points out, gave the king, who, in the Council of Justice, had seemed to rely very much on these articles, matter for reflection. They were suppressed and replaced by a text which maintained the *status quo*: "Art. 13. Nothing in the preceding article shall derogate from the privileges which the clergy have been accustomed to enjoy." As, however, the Ordinance did not regulate the joint procedure, it was necessary to make a kind of separate Code for this purpose. This was the object of several Laws; first of all the Edict of February, 1678, expanded the principles contained in the Edict of Melun, incorporating in it but one restriction by way of sparing the feelings of the Parlements; then came a Declaration in July, 1684, the general Edict of 1695 upon the ecclesiastical jurisdiction, and finally a Declaration of February 4, 1711.[2]

VI. The Ordinance did not deal with the jurisdictions of the cities, mayors, échevins, consuls, etc., and did not modify their rights in any respect. Everywhere they had mere police matters; that was what the States-General had asked for them at Orléans,[3] and it was granted to them by the Ordinance of Moulins, Arts. 71 and 72. Those authorities, however, which took the cognizance of civil actions from the municipal jurisdictions, left to them that of criminal actions, with which they were already invested. But the majority of the cities, taking them individually, lost the high justice. Royalty, however, did not invariably succeed in these usurpations, and we possess a curious document of the very time of Louis XIV, which gives us a view of one of these little dramas. This is a letter from Colbert to Talon, dealing with a question of the suppression of the aldermanic courts in operation in Hainault. "It appears from what we hear from these frontier districts that nothing makes a worse impression upon the minds than the suppression of their aldermanic courts and the establishment which has been made of benches in the method in vogue throughout the kingdom, because they are informed that the majority of the officers only buy their offices to more easily make exactions from them." [4]

[1] "Procès-verbal," pp. 47, 48.
[2] *Muyart de Vouglans*, "Instr. crim." Part III, p. 70 *et seq.*
[3] *Picot*, "Histoire des États-Généraux," vol. II, p. 216 *et seq.*
[4] "Lettres, etc., de Colbert," vol. VI, p. 2.

Colbert, therefore, comes to the conclusion that the offices must be redeemed and the old order of things reëstablished. Here the old communal spirit of the people of Flanders was encountered; and in a certain number of cities of the south the same opposition was met. The result was that in a great number of cases, if not as a general rule, "the cities have retained a right of trial in criminal matters down to the time of the Revolution. Strange to say, royalty had taken from them the civil jurisdiction and left them the criminal jurisdiction." [1]

The jurisdiction of the royal judges was thus settled in opposition to the other jurisdictions. But we have seen that a certain number of courts of exception figure among the royal courts. The Ordinance merely left the majority of these to the existing laws, but it selected for special treatment the most important of these jurisdictions, that of the provost marshals.

We know how the "prévôtal" jurisdiction, originally purely military, had gradually extended its sway; it was a formidable weapon in the hands of royalty, with which to put down the disorders which disturbed the public safety, but it was a terrible tribunal. These "men of arms" tried summarily, harshly, and there was no appeal. It was considered good enough for those amenable to their jurisdiction, whom Imbert calls "the provost marshal's jail-birds; these were in former times the vagabonds and especially 'the armed men roaming over the country and eating honest men's poultry.'" [2] The States-General, however, had often complained of the disorders which this jurisdiction brought in its train.[3] The new Ordinance ought at least to regulate it in a precise way; this was the object of a part of Title I and of the whole of Title II. Article 13 of Title I really extended the jurisdiction of the provosts, and it did not pass without opposition.[4] President Lamoignon declared "that it might be affirmed that the greatest abuses met with in criminal justice have originated with these officers . . . who oppress the innocent and discharge the guilty. The majority of them are more to be feared than the thieves themselves." This constituted such a great evil that the defenders of the institution

[1] *Laboulaye*, Revue des cours littéraires, year 1865, p. 723.
[2] *Imbert*, Book II, ch. V, No. 4.
[3] *Picot., op. cit.*, I, 447; II, 135, 172–175, 529, 530; IV, 63–65.
[4] Besides the offenses committed by vagrants and excesses by the soldiery, it was the duty of the provosts to try "unlawful assemblies and thefts upon the highways, nocturnal thefts in the towns, sacrileges accompanied by breaking in, premeditated murder, sedition, popular tumults, and coinage of false money, whatever the station of the perpetrators might be."

themselves are compelled to acknowledge it. "The provost marshals," says Pussort, "being men of no uprightness of life, their bad conduct has brought them into very great disrepute." Talon for his part says that "as neither the officers nor their archers have any fees to live on, there are no malversations to which they have not given themselves up; they perform no duty unless they hope to get some emolument from it." Finally, president de Novion adds "that this was not for the purpose of establishing the public safety but of extending the power of the provost marshals." [1] Royalty, however, desired the preservation of this jurisdiction, and the discussion was restricted to matters of detail; the list of "prévôtal" cases which the draft contained was passed with very few exceptions.

While maintaining the "prévôtal" jurisdiction, the safeguards which had been contrived by judicial decisions to regulate and curb it were also retained and increased. First, The provosts must necessarily have their jurisdiction passed upon by the presidial in the jurisdiction in which the capture took place "within three days at latest, although the accused has put in no declinatory plea." [2] Second, Within twenty-four hours of the capture, the accused must be interrogated by the provost in the presence of the provost's assessor, who was a graduate in law; and it was necessary to declare to the accused at this first interrogatory that it was intended to try him "prévôtally." Third, The jurisdictional judgments could not be rendered by less than seven judges, like all the other "prévôtal" decrees, whether preliminary, interlocutory, or final.[3] Fourth, When crimes, "prévôtal" by their nature and not by the character of the person, were concerned, the provosts had no cognizance of them if they had been committed in the cities where the provosts resided. This provision was an indication of the true character of the institution. The provosts, "road watchmen," had been created to beat the country in increasing circuits; the old Ordinances were very strict in that respect. "Going up and down the country, they will not stop in one place more than a day, unless for necessary cause (Orléans, 68; Moulins, Art. 43)." To call upon the provosts to try the crimes committed within the towns of their residence would have been to invite them to reside there continuously. Fifth, Minute precautions were taken to avoid disorders and malversations; [4] in particular an inventory must be made of everything found upon the captive, and that had

[1] "Procès-verbal," p. 28 *et seq.*
[2] Tit. II, Art. 13; see also Arts. 19, 20.
[3] Tit. II, Arts. 18, 24.
[4] See Tit. II, Arts. 10, 14.

to be done " in the presence of the two inhabitants nearest to the place of capture, who shall sign the inventory." [1] Sixth, The right of precedence over the marshals was given, or rather confirmed, to the presidials. In " prévôtal " cases the latter had jurisdiction " preferably to the provost marshals, criminal lieutenants of the short robe, vice-bailiffs, and vice-seneschals, if they had issued decree either before the latter or the same day ; " in order to give final judgment they had to observe all the rules we have just laid down. The ordinary judges, in a " prévôtal " case, could only inquire and decree in case of capture in the act, and were obliged to refer the case to whom it might concern.

The Ordinance of 1670 was not destined to be the last word of the old law upon this matter : in 1731 (5th February), a royal Declaration was issued upon " prévôtal " and presidial cases. It contained thirty articles and was much better drawn up than the corresponding titles of the Ordinance. It for the first time clearly distinguished the cases which were " prévôtal " by the character of the persons from those " prévôtal " by the nature of the crimes. It was also more lenient than the old law on several points.[2] Gentlemen not previously condemned were excepted from the " prévôtal " or presidial jurisdiction in the last resort. If we have dwelt at some length upon the " prévôtal " jurisdiction, it is not merely because of the important place which it occupies in the Ordinance and in the ancient French social life ; but also because we shall see it reappear at the commencement of the 1800 s, soon after to disappear for ever.

We may note, in concluding this explanation of the principles of jurisdiction, that the clergy, gentlemen, king's secretaries, and officers of judicature had the right to be tried in the " Great Chamber of the Parlement and not in the criminal Tournelle . . . on appeal only, and provided they petitioned for a reference (to the Great Chamber) before the voting began in the Tournelle." [3]

§ 3. **The Procedure.** — The Ordinance left the procedure to rest upon the rules established by the prior judicial practice. In future, and more than ever, it can be truly said that there is but one true accuser, the king's procurator or that of the seignior : the private prosecutor could only ask for damages. The last traces of the old accusatory system had not, however, yet disappeared. For offenses which did not merit corporal punishment, the intervention of a settlement between the injured and the guilty parties suspended and even put an end to the public action

[1] Tit. II, Arts. 9, 11. [2] See Arts. 17 and 20. [3] Tit. I, Arts. 21, 22.

also.[1] Title III speaks of *accusers* at the same time as it speaks of *denouncers ;* [2] and the law always places private individuals in the first rank in the prosecution of crimes ; " If there is no civil party, the actions shall be prosecuted at the instance and in the name of our attorneys or of the attorneys of the seigniorial courts." [3] The public prosecutor would seem not to make his appearance except following and in the absence of complainants ; but this is only an empty appearance ; or rather whatever reality there is in this presentation of the matter is from a fiscal point of view ; if there is a civil party, it is he who bears the cost of the action ; if not, it is the king or the seigniorial judge.[4] In other respects the theory of the civil action in the shape in which it has come down to us was finally settled in its broad details ; it is in annotating the title on *Complaints* that our old authors have made that subtle and deep study which may still serve as a model for us to-day.

I. The Ordinance clearly distinguishes denunciations from complaints. The denouncers address themselves to the king's procurator ; they write and sign their denunciation, or the clerk of court writes it out in their presence ; subsequently, if the accused is acquitted, they can be sentenced as calumnious or imprudent ; but they do not figure in the action. The act makes an innovation in regard to complaints. They can be made by request addressed to the judge, who shall answer them (Art. 1). This is the old request for permission to inform. Or again, they may be written by the clerk of court in the judge's presence ; but they must always be addressed to the judge. Faithful to the spirit of reform in which it was conceived, the Ordinance rejects in this matter sheriffs, officers of the court, archers, and notaries. But here is something which possesses novelty and importance. Down to that time every complaint, being the request for a permission to inform, by the very fact of its being made, constituted the complainant a civil party, imposing on him the heavy burden of costs. Private individuals were, therefore, naturally reluctant to ask the judge to take cognizance ; they remained inactive or constituted themselves denouncers to the king's procurator, who did not always act. The Ordinance declares that " the complainants shall not be deemed civil parties unless they so declare formally by the complaint." [5] It does more ; formerly

[1] Tit. XXV, Art. 19.
[2] Tit. III. " Des plaintes, dénonciations, et accusations."
[3] Tit. III, Art. 8. [4] Tit. XXV, Arts. 16, 17. [5] Tit. III, Art. 5.

one did not become a civil party except by a complaint; his intervention in the course of the action was not thought of. Henceforth it could be accomplished in a "subsequent document which could be drawn up at any stage of the action." Finally, as a last favor, the civil party was allowed to abandon "within twenty-four hours and not afterwards"; and in case of abandonment he was not held liable for costs subsequently accruing. These were innovations enough for one single article. They were excellent, and so president Lamoignon said. "The article," he said, "is new, but it appears to be excellent." [1] The judge having taken cognizance, he proceeded first of all to establish the "corpus delicti," and the Ordinance contains very judicious provisions as to the official reports of the judges and the reports of physicians and surgeons.[2]

II. Title VI of this act, which had so far adhered to the chronological order of events, was devoted to inquiries, the chief part of the action. The principle of the *secrecy* of the procedure was rigorously followed: "The witnesses shall be heard secretly and separately." [3] — "The clerks of court are hereby forbidden to communicate the inquiries and other secret documents of the action." [4] These provisions seemed so natural that they did not give rise to any criticism. But alongside of this traditional severity the Ordinance contained admirable reforms in matters of detail. The custom of causing "an officer of court and a notary" to make the inquiry was entirely abolished. Henceforth the deposition is to be written "by a clerk of court in the presence of the judge." [5] — The witnesses must, before testifying, "produce the writ which has been served upon them to testify, of which mention shall be made in their depositions." This was a way of insuring obedience to the rule that the witnesses should only be brought by the public prosecutor or by the civil party; [6] to prevent witnesses for the accused being insinuated into their number, production of the citation must be made necessary. [7] — Everything was devised so that the information, so important a document, should be true and unaltered; the oath to be administered to the witnesses, the questions to be put to them, the reading of the depositions, the prohibition of interlineations, the necessity for the ratification of

[1] "Procès-verbal," p. 66.
[2] Tits. IV and V.
[3] Tit. VI, Art. 11.
[4] Tit. VI, Art. 15.
[5] Tit. VI, Art. 9; *cf.* Art. 6.
[6] Tit. VI, Art. 1.
[7] This provision has been incorporated in the Code of Criminal Examination (Art. 74), but it has not the same value, the accused being always able to summon to the hearing the witnesses for the defense.

erasures, the material effect of the register (Articles 5, 9, 11, 12), — all these provisions were prescribed on pain of nullity.

The witness fee was fixed by the judge (Art. 13). The commissioners' draft added that payment of it should be made by the hands of the clerk of court, forbidding the parties to give anything in addition; but the First president observed "that the witnesses were sometimes at a distance; and if the parties were not careful to see that they came, and to pay their travelling expenses, they would neglect to appear." The words "by the hands of the clerk of court" were struck out, and the parties were merely forbidden to give anything in addition to the fee taxed. Lamoignon had helped to retain an abuse.

The monitories followed the informations (Title VII). The judges decreed permission to obtain them, and the official was obliged to obey. This was also possible "even though no proof had been begun, or on refusal of the witnesses to testify;" this was excessive, especially as it was said that the judgment which would intervene on attachment, if there should be any, would be executed notwithstanding "appeal even as from abuse." Lamoignon observed "that the examination of an action is not begun by a 'monitory';" [1] but everything was passed.

III. If the information contained charges, it resulted in an order which had always to be given upon the motion of the king's procurator. [2] The draft of the act provided that "neither judges' fees nor commissions" could be claimed for these motions. Lamoignon protested, Pussort vainly argued, "that the king's purpose was not to diminish the emoluments of his officers, but rather to curtail the actions, by depriving them of the opportunity of claiming decrees too readily and too causelessly." [3] The provision was suppressed.

The Ordinance allowed three kinds of writs, that of summons to be heard, that of personal citation, and that of arrest. The first, which we have not found in Imbert, had been introduced by judicial decision. It was milder than the personal citation, inasmuch as it did not entail, as the latter did, the prohibition of exercising all functions. [4] In order to choose between these different writs, it was necessary to take into account the nature of the crimes, the proofs, and also the persons. A warrant of arrest could not be granted against a resident "except for corporal or ignominious punishment." The writ of summons for hearing was,

[1] "Procès-verbal," p. 74.
[2] Tit. X, Art. 1.
[3] "Procès-verbal," p. 108.
[4] Tit. X, Arts. 10 and 12.

on default of appearance, converted into a writ of personal citation, and that, in the same circumstances, into a warrant of arrest,[1] at least if the accused did not plead a hindrance or excuse in the forms prescribed by Title XI. These were the "essoins of accused persons," and this is the last time that this description of dilatory exception, formerly so important in the feudal procedure, will appear in our laws in the proper sense of the term.[2]

Writs could not be granted without a prior information. That was the general rule, but it was subject to many exceptions, not only in the case of capture in the act, but also on other less favorable hypotheses. "Arrest may be decreed on notoriety alone for duelling; on the complaint of our procurators against vagabonds, and on that of the lawyers for crimes and domestic offenses." [3]

The warrant of arrest placed the accused in a state of detention pending trial; and an order of the judge was always necessary for release (Art. 23). But release on bail was not always possible in the "extraordinary" action.[4] After the interrogation, however, if there had originally been only a personal citation, and the warrant of arrest had only been issued in default of appearance, the accused could be released (Art. 21). This provision was very severe, and paid little regard to individual liberty. At the same time, it was more precise than any of the earlier Ordinances, and contained several safeguards. The king's procurators were obliged to send twice a year to the attorneys-general a "statement signed by them and the criminal lieutenants of the entries in the jail-book and detainers made during the preceding six months in the prisons of their jurisdiction, which had not been followed by a final judgment, with the dates of the warrants, jail-book entries and detainers, the name, surname, designation, and residence of the accused, and the title of the accusation in brief and the stage of the procedure." [5] This was an admirable provision,

[1] Tit. X, Arts. 3 and 4.

[2] If he who was personally cited should appear, he could not be imprisoned unless new charges were brought up (Art. 7); or "by secret deliberation of our courts, it has been resolved that he shall be arrested on his appearance, which cannot be ordered by any other of our judges." — This "retentum" well illustrates the spirit of this procedure, which often plays with the accused to the very end.

[3] Tit. X, Art. 8; *cf.* Arts. 5 and 6. — The decrees could be issued by the examining judge alone. Bornier, it is true, considered them as null "when they were rendered by a single judge without the opinions of any others" (p. 348); but the prevailing opinion was to the contrary. "The decrees are usually rendered by the examining judge." *Jousse*, "Comment," p. 187. — "The contrary usage sufficiently proves that Bornier's idea does not conform to the rules." *Serpillon*, "Code crim." p. 532.

[4] Tit. XV, Art. 12.

[5] Tit. X, Art. 20.

and it undoubtedly inspired articles 249 and 250 of the Code of Criminal Examination.

After dealing with the warrants the compilers of the Ordinance naturally turned their attention to the policing of the prisons. This they did in Title XIII. The prisons of the 1600s and the 1700s were atrocious places: "Dare to descend for an instant into these gloomy dungeons, into which the light of day never penetrates, and gaze on the disfigured features of your fellow-creatures, bruised by their chains, half-covered with some rags, poisoned by an air never renewed, and apparently impregnated with the poison of crime, eaten alive by the same vermin which devour the corpses in their graves, hardly kept alive with some coarse food sparingly distributed, kept in a constant state of terror by the groans of their unfortunate comrades and the threats of their keepers." [1] These are the words of a magistrate in an opening address and the poignant truth is apparent under the rhetorical amplification. Voltaire said later: "A prison need not resemble a palace, but no more is it necessary that it should resemble a charnel-house. It is a common complaint that the majority of the jails of Europe are cloacæ of infection, which spread disease and death, not merely within their precincts, but throughout their neighborhood. Daylight there is none, and the air is stagnant. The prisoners communicate to each other only their tainted exhalations. They suffer a cruel punishment before they are tried. Charity and good policy ought to suggest a remedy for such inhuman and dangerous negligence." [2]

The Reports of 1789 furnish irrefutable testimony to the same effect. The Third Estate unanimously demands that "the prisons be made safe and healthy, that they do not impair the health of the prisoners, and that hospitals be instituted." [3] — The same protests appear in the Reports of the Nobility: "the prisons," says one of them, "are in an inhuman and indecent state." [4] The Clergy are equally vehement: "let the prisons, where too often the innocent suffer side by side with the guilty, cease to be, against the spirit of the law, a *seat of horror and infection;* let the poor wretches at least have fresh air, and wholesome and sufficient sustenance; let the prison hospitals be aired and so equipped that they may be of service to the sick." [5] These are incontrovertible facts.

It must not, however, be thought that the legislatures and the

[1] *Servan*, "Discours," etc., p. 14.

[2] "Idée de la justice et de l'humanité," Art. xxv.

[3] *Prudhomme*, "Résumé des cahiers," III, pp. 588, 173, 174.

[4] *Ibid., op. cit.*, II, pp. 152 and 411.

[5] *Ibid., op. cit.*, I, pp. 163 and 357.

magistrates of ancient France showed themselves indifferent to the fate of the prisoners. This harsh discipline and these sufferings appeared to them natural and necessary. But, on the other hand, numerous precautions were taken to prevent peculation and vexations on the part of the jailers. Certain court practices touched upon the matter. Thus the Tournelle of the Parlement of Paris held a sitting annually on the day before Ascension to listen to the grievances and inquire into the lot of the prisoners.[1] The Parlements frequently made regulations for the police of the prisons of their jurisdiction. That of the Parlement of Paris of 1st September, 1717, is celebrated and very extensive. The compilers of the Ordinance were inspired by the same sentiment. In Title XIII we find few provisions concerning the penitentiary question, as we would call it nowadays. The sexes must be separated (Art. 20); the turnkeys shall visit the prisoners every day in their dungeons, and must report those who are sick, so that they may be visited by physicians and if need be transferred to rooms (Art. 21); the prisoners must be given "bread, water, and straw in good condition, according to the regulations" (Art. 25). That is all. Nearly all the other Articles are directed towards the repression of the peculations of the keepers. They disclose serious disorders and above all a shameful venality (Arts. 2, 6, 7, 9, 15, 19, 10, 11, 14, 18, 22, 28, 30, 33). The jailers are constantly forbidden to take money for the performance of their prescribed duties. The king's procurators or those of the lords are commanded "to visit the prisons once a week to receive the complaints of the prisoners" (Art. 25).[2]

IV. The accused, whether summoned or arrested, must be interrogated by the judge. This was an act of the greatest importance. We shall see that in the majority of cases, in the absence of the accused's confession, the heavier sentences could not be pronounced. The art of interrogating was therefore a very valuable qualification of the examining magistrate, in this secret procedure. The authors of treatises on criminal law laid down a series of rules on this subject which have become standard, the

[1] "On Ascension Thursday the Parlement holds its sitting at the Châtelet for the prisoners. The last appointed president, at half past ten o'clock, goes to Châtelet with the councillors of the Tournelle. The hearing ceases on their arrival, the civil lieutenant leaves his place, and while the Parlement holds the hearing, the criminal lieutenant, the king's procurator, and the criminal lieutenant of the short robe are on the bench of the king's people, so that they may be able to answer should there be any complaint against them." *Barbier*, "Journal," II, p. 328.

[2] Compare Article 610 *et seq.* of the Code of Criminal Examination.

fruit of experience and study. The remarks with which Jousse prefaced Title XIV of the Ordinance remain the most judicious of these short treatises, which are somewhat reminiscent of the manuals of the confessional.

A slight amelioration was introduced into the practice of the interrogatories, which had to be begun within twenty-four hours from the imprisonment at the latest; but the severe rules introduced by judicial practice and the Ordinances were retained and even aggravated. The interrogation must take place secretly, before the judge and his clerk. The oath introduced by custom was expressly imposed upon the accused (Art. 7).

A memorable discussion is known to have occurred on this point during the preliminary conferences. President Lamoignon showed all the nobility of his great heart, and gave voice to the opinions of the old magistrates whom he cited as precedents. He strove with all his power to have the necessity for the oath done away with. He pointed out that it was only a mere custom, which was introduced, "like those things neither the origin of nor the reason for which were well known." He recalled the sanctity of the oath. "If it is obligatory, it will infallibly invite the accused to commit an additional crime, and to add to the untruth which is inevitable at such junctures a perjury which could be avoided. If it is not obligatory, it is taking the name of God in vain." — "In France it is universally said that it must be done in this way without inquiring into the reason for its being done; for none of the nations from whom we have taken all our good maxims has so practised it." He pointed out "that the civil law, far from sanctioning it, was undoubtedly opposed to it, and that there is not the slightest trace of it even in the Canon law before that was confounded with the formalities of the Inquisition." He observes that the "Carolina" (of Charles V of Germany) does not speak of it, nor had it made its way into the Netherlands at least. He finally invoked the tradition of the old French magistracy. "No one is bound to condemn himself out of his own mouth," President Lemaître had said; and De Thou, "whose memory is held in such high esteem in the courts of justice and elsewhere . . . in interrogating a person accused of a named crime would never make him take the oath, because there was no Ordinance compelling the judges to exact it from the accused, and he would not invite him to a manifest perjury."[1]

Pussort attempted a refutation of this vigorous reasoning;

[1] "Procès-verbal," pp. 153, 159.

but his efforts were feeble. "The arguments which have been advanced cannot be admitted, as it is in no case permissible to do evil to attain the greatest good; natural law when opposed to that of Christianity must naturally give way to it, nobody doubting that death is preferable to a mortal sin . . . the use of the oath is very old, and was observed before the Ordinance of 1539 . . . and the use of it is much more solemn, inasmuch as it has been established without law; . . . it is not entirely useless; . . . timid consciences are to be found which the fear of perjury might force to acknowledge the truth." M. Talon supported Pussort. He maintained "that in Spain, Italy, and, it might be said, among all the nations of Europe, the oath was administered to the accused before they were interrogated. . . . This obstacle," he said, "having been raised, it was absolutely necessary to make it the subject of an article in the Ordinance." Lamoignon, who really remained unanswered, asked that the king be consulted. The king retained the article.

But to command a thing to be done is not the same thing as having it done. What was to be done if the accused refused to take the oath? The Ordinance had foreseen the probability of an absolute refusal by the accused to answer.[1] It provided that action should then be brought against him as a voluntary mute.[2] After being called on three times to reply, and after three warnings of the consequences of his silence, the judge proceeded, recording, whenever there was occasion for the appearance of the accused, that he refused to speak. All the proceedings were, however, valid, and even if the accused should subsequently wish to reply, nothing was reopened, not even the confrontation. This very rigorous procedure, more severe than that followed in the case of contumacy, furnished a means of indirectly forcing the accused to the oath. He who was willing to answer, but without taking

[1] Title XVIII, concerning the deaf and dumb and those who refuse to answer.

[2] A person present was not allowed to figure as a contumax. "There was formerly a contumacy, the party being present, when the examination was against voluntary mutes, but that form of procedure was disapproved by resolution of the Parlement of Paris of 1st December, 1663." *Serpillon*, "Code crim." p. 900. — "Formerly a curator was appointed for voluntary mutes, but the Ordinance has thought fit to abrogate this usage, and to deprive them of an aid of which they showed themselves unworthy." *Muyart*, "Inst. crim." 1st part, p. 684. — "The practice of the Châtelet has changed at different times as to the form of bringing an action against voluntary mutes; formerly a curator was assigned to them, but the inconvenience of this, due to the necessity of recommencing the procedure when the accused offered to reply orally, was recognized." *M. Talon*, "Procès-verbal," p. 217.

the oath, was put in the same position as a voluntary mute. So Jousse decided. After speaking of the voluntary mute he adds, "it is the same if the accused refuses to take the oath, as sometimes happens."[1] And Serpillon, while protesting against this practice, appears to declare it. "He who answers, saying that he does not wish to take the oath, cannot be considered as such (a voluntary mute). He does not refuse to answer, he does not remain silent, and no punishment is pronounced against him who refuses to take the oath. It is, however, true that MM. the commissioners of the Parlement of Paris, in the proceedings against the infamous Damiens, on 8th February, called upon that accused three times to take the oath, which he refused to do; which proves their custom in that respect."[2]

The aid of counsel was once more prohibited by the Ordinance. The accused must always answer personally. This applied not only to the first interrogation, in which case it could be easily understood, but throughout the whole course of the examinations, whether before the criminal lieutenant, or before the assembled bench. If, however, a crime not capital was concerned, "the judges might, after the interrogatories, permit consultation with whomsoever they pleased," without there being any question of a defense being turned into a speech at the bar. If, on the contrary, a capital crime was concerned, all consultation was forbidden, "notwithstanding all customs to the contrary, which we repeal, except for the crimes of peculation, extortion, fraudulent bankruptcy, theft by clerks or partners in financial or banking affairs, in regard to which crimes the judges may order, if the matter requires it, that the accused may communicate with their clerks after the interrogation." Such was the plan proposed. Although it had all the appearance of imposing a less absolute prohibition than that of the Ordinance of 1539, it really went beyond the latter, the somewhat vague language of which left a certain power to the judges. Lamoignon here again raised his voice in favor of the accused. "This Article forbids the judges to assign counsel to the accused, even after the confrontation. This is new and very hard on the accused." Taking up the cause of free defense, his language seems antedated by a century. "If counsel has saved some guilty persons, it might also happen that innocent persons might perish for lack of counsel. — No evil which could happen in the administration of justice is comparable to that of causing the death of an innocent person, and it would be

[1] "Comment," p. 384.

[2] "Code crim." p. 902.

better to acquit a thousand guilty. — This counsel which has been granted to the accused is not a privilege accorded either by the Ordinances or by the laws. It is a liberty obtained from natural law, which is older than all human laws. — Our Ordinances have deprived accused persons of so many advantages that it is highly just to preserve to them what they have remaining. — If our procedure is compared with those of the Romans and other nations, it will be found that the latter are not so rigorous in this respect as in France, especially since the Ordinance of 1539. — It might be ordered generally that the judges should not grant counsel to accused persons except for crimes of a complex nature, but it would appear to be exceedingly dangerous to specify particularly what these crimes were, and by so doing exclude all others." [1]

In opposition to Lamoignon, Pussort anew constituted himself the advocate of inflexible repression. "Experience taught that the counsel which was granted deemed it an honor, and thought themselves at liberty with a clear conscience, to secure the impunity of the accused by any method." He was bold enough to recall the action of Chancellor Poyet to mark the import of the Ordinance of 1539. "It is true," he said, "that the silence of the Ordinance has been variously interpreted. . . . It has given the judges the opportunity to use it in various ways, some refusing (counsel) entirely, others granting it in all kinds of accusations, and still others only in certain cases. . . . We know how fertile these kinds of counsel are in finding openings to frame conflicts of jurisdiction, how they often scheme to discover nullities in the proceedings and to give birth to an infinitude of side issues. An accused is refused nothing, and it is necessary to read all the documents of the action, as well those which lead to his acquittal as those for his conviction. Provided, therefore, he has the means of employing enough advocates and furnishing the costs, expedients are not wanting to make the action go on forever. It is therefore peculiarly in the interests of the wealthy and of impunity that counsel is granted." [2] Here, as an eminent criminal law-writer has remarked, Pussort found himself in opposition to a truth taught by experience. By a logical necessity, it must be that the written and secret procedure, overburdened by formalities before it can deserve the name of procedure, offers to chicanery an admirably tilled soil.

M. Talon proposed a compromise. He wished that counsel should be excluded in a general way "in causes which depend

[1] "Procès-verbal," pp. 162–164. [2] *Ibid.*, pp. 164, 165.

solely on witnesses," but that they should be granted, also generally, and without proceeding to a dangerous enumeration "in accusations in which documents are produced for the conviction of the accused and where he is able to produce them in his defense." He cited as examples the trust-entails of children and wished the addition of the clause: "and others of the same nature." The article passed, after being modified by the addition to the cases in which counsel for the defense would be permitted "the trust-entails of children and other crimes where personal status is involved." [1] It was considered that enough was done to safeguard the rights of the defense by inserting in the text this reservation: "It is left to the sense of duty and the good faith of the judges to investigate before giving judgment whether there is any error in the proceedings." This was the same idea which prompted the declaration that the testimony in the inquiry should be taken "for the prosecution and for the defense." Under this system the judge in a manner played the part of Providence. He is infallible, and defends the accused at the same time that he prosecutes him.

All the formalities of the interrogation were, however, minutely and carefully regulated.[2] The interrogation was at once communicated to the public prosecutor and the civil party (Arts. 17, 18), who, if there was a confession, could take law immediately, that is to say, ask for judgment, but only, as we shall explain later, if the crime did not merit corporal punishment. The accused in the same circumstances could ask to take law on the charges, which were then communicated to him. On either hypothesis there were requests addressed to the judge by the prosecutors and answers on the part of the accused (Art. 20). If it was not appropriate to take law in this way, the civil party and the public prosecutor presented their motions in law asking for a ruling to the "extraordinary" action. The accused could also present a request to be received in "ordinary" action; but this "civilizing" of the action was only allowed when the offense entailed merely a pecuniary punishment.[3]

V. The ruling to the "extraordinary" action resulted in an order stating that the witnesses heard in the inquiry were "heard anew, confirmed in their depositions, and, if necessary, confronted with the accused." [4] By whom was this important judgment to

[1] Tit. XIV, Art. 8. [2] See Arts. 9, 11, 13, 16.
[3] The effect of Tit. XX, Art. 3, of the Ordinance was that the conversion to the "ordinary" action could take place even after the ruling to the "extraordinary" action, provided it was done before the confrontation.
[4] Tit. XV, Art. 1.

be rendered? "By the judge," said the Ordinance. It seemed logical to conclude from this that the judge of examination alone was meant. Besides, he alone had so far appeared upon the scene. Jousse, however, no doubt taking into consideration the immense power which would thus be put into the hands of one man, was of the contrary opinion "that this order should be rendered in the Chamber, as a judgment on the merits, by three judges if the judgment is subject to appeal, and by seven when it is final."[1] But he was alone in this opinion. "In the bailiwicks and other jurisdictions subject to appeal, the examining judge may alone render a judgment of confirmation and confrontation.—It is matter for surprise that M. Jousse, so conversant with this fact, should have observed upon this article that the ruling to the 'extraordinary' procedure should be rendered by three judges if it is subject to appeal. That is contrary to the authorities which he cites, since they only speak of the last resort, which implies that the criminal lieutenants can, alone, render them to the 'ordinary' procedure, as a multitude of rulings have decided. Besides, it is the custom of all the courts of the kingdom that the examining judge by himself renders the judgments to the 'ordinary' procedure. It would be tedious to cite the regulations in refutation of this error."[2]

The confirmation was necessary in order that the deposition should constitute a charge against the accused; but in the inspection ("visite") of the proceedings, on the contrary, the depositions of the witnesses for the defense were read although they had been neither confirmed nor confronted, in order to be noticed by the judges.[3] Consequently, it was asked if there was any necessity for confronting all the witnesses; that appeared to be more just; however, it was usually decided that only those for the prosecution ought to be confronted.

The confrontation was the first opportunity that this merciless procedure gave to the accused to acquaint himself regarding the charge, until this time kept a secret from him. But the Ordinance rendered this resource almost entirely illusory. Originally, the object of the confirmation had been to allow the judge to check the inquiry which had been made by a mere officer of the court, assisted by a notary. Now it was of no more use for this purpose, the judge always making the inquiry himself. The confirmation was made a means of clinching the testimony so as to render all argument at the confrontation useless. "The witnesses," said Article

[1] "Comment. sur l'ord. de 1670," p. 296.
[2] *Serpillon*, "Code crim." p. 690.
[3] Tit. XV, Art. 10.

11, "who, from the time of the confirmation, retracted their depositions, or changed them in essential particulars, shall be prosecuted and punished as false witnesses." Lamoignon, for the third time, protested on behalf of the defense. "It may be dangerous to enact so strict a law, because sometimes an accused could put a witness right on important points and bring to his recollection the truth of a fact which had escaped him. That could sometimes be done in good faith, both on the part of the accused and of the witnesses, and the accused's situation would be rendered much worse if the witness were not allowed to retract at the confrontation without being treated as a criminal. . . . Everything is against the accused down to the confrontation; for it is then that he commences to realize his position and to become acquainted with the nature of the crime and of the proof. That is why it is more fitting to leave the matter in the judge's discretion; he is able to perceive whether the contradiction which occurs between the deposition, the confirmation, and the confrontation of the witness savors of bad faith or is clearly the result of want of knowledge."[1] Better sense could not be uttered; but Pussort said "that so far it has been considered an invariable rule, established by the authors and sanctioned by usage, that no man who has taken two oaths in the presence of the court can change with impunity; . . . that the article had been considered necessary for the public safety, and, far from being productive of perjuries, it would, on the contrary, from the necessity which it would entail upon them of confirming their testimony at the confrontation whether it were true or false, compel the witnesses to be circumspect and not to give their depositions without reflection . . . and that, besides, the essential circumstantial clauses of the article cover everything." The power of certain preconceived ideas is truly astonishing. After having resolved upon the article as Pussort wished, this provision was inserted: "If the accused discovers in the witness's deposition some contradiction or circumstance which could clear up the fact or prove his innocence, he can require the judge to call upon the witness to acknowledge it." This has to-day almost the appearance of a jest.

Although the confrontation could hardly any longer be of use to the accused in contesting the depositions, it was still useful for the pleading of his objections to the witnesses; but the rule introduced in 1539, according to which he was bound to plead his

[1] "Procès-verbal," p. 178.

objections immediately and prior to the reading of the deposition, was retained;[1] he was not allowed to plead them afterwards. That passed without remark. It was a point which had been admitted for a long time. Care was merely taken to declare expressly that the accused could "at any stage of the action plead his objections to the witnesses, provided they were proved by writing" (Arts. 20).

VI. When the informations, interrogations, confirmations, and confrontations were finished, the action was said to be examined ("instruit") and passed from the hands of the examining judge into those of the reporting judge, whose duty it was to analyze the proceedings and to exhibit the results to the whole assembled bench. But first of all the record was intrusted to the king's procurator, so that he might make his final motions.[2] This he was bound "to do immediately." These motions might claim the pronouncement of the penalty, but they might also claim the application of torture or the proof of justificative facts. They were "lodged in writing and sealed," and were not to be opened until later, after the report. They must not "contain the reasons upon which they were based."[3] At this point the report intervened, "When the action has been completely examined, and the king's procurator or fiscal, after having taken communication of it, has sent it back to the clerk of court's office with his motions, sealed, the process shall be remitted to one of the judges, who makes the report of it to the assembled bench."[4] This was extremely important. No doubt the documents of the proceedings were read before the councillors; but how were these magistrates, coming into the matter for the first time, to obtain a thorough knowledge of it? They judged by the report. The reporting judge must therefore "give his opinion first. This is the invariable custom in all the courts, and the reason for it is that the reporting judge is presumed to be better acquainted with the facts of the action than the other officers."[5] The fact that the reporting judge had such great authority made the choice of this magistrate a matter of importance; but it was not a point determined by the Ordinance. In the bailiwicks the criminal lieutenants reported the actions. "They have the right," says Serpillon, "founded on the Edict of May, 1553, to report all the actions in their jurisdiction." He also cites an Edict of 1537 and a multitude of decrees and regulations, which

[1] Tit. XV, Arts. 15 and 16.
[2] Tit. XXIV, Art. 1.
[3] Tit. XXIV, Art. 3.
[4] *Pothier*, "Instr. crim." p. 466.
[5] *Serpillon*, "Code crim." p. 1052.

show that the question of judges' fees was always involved.[1] But, on the other hand, the criminal lieutenant was the examining judge; and the action was thus almost entirely confided to his discretion. This was an abuse which the Ordinance of Blois had aimed at suppressing;[2] but as it only spoke of the Parlements, its provision was not applied to the jurisdictions trying cases in the first instance. It is surprising that those who drew up the Ordinance, usually so solicitous in settling the details of the administration of justice, passed over this point in silence.

No one except the judges was present at the inspection ("visite") of the process, or at the report. Even the "king's people" were expressly excluded.[3] Before proceeding to the judgment, however, the accused was made to appear for the purpose of undergoing another interrogation. This was the first time that the magistrates, with the exception of the examining judge, saw him or heard him speak. When the motion of the public prosecutor demanded corporal punishment, the final interrogation had to take place upon the "sellette" or prisoner's seat.[4] In other cases, it took place "behind the bar of the court-room . . . the accused then stand publicly behind the railing forming the bar."[5] The Ordinance does not mention any necessary formalities other than interrogations upon the prisoner's seat. The abuse had also insinuated itself into several jurisdictions not to hear the accused when there were no motions for corporal punishments. A royal Declaration of the 13th April, 1703, suppressed this abuse. "It never was the spirit of our Ordinance of 1676," it was said, "to deprive accused persons in any case of their natural right to plead orally, nor to take from the judges the means they possess of enlightening themselves regarding the circumstances of actions prosecuted 'extraordinarily.'" The accused must always he heard either upon the prisoner's seat or behind the bar.

It might happen, however, that the examination of the action was not finished. "When, after the inspection of the process and the final interrogation of the accused, the judge comes to the conclusion that the proof is not sufficiently full, and that he is still in doubt as to the judgment which it should entail, then it may happen that these doubts are met by strong presumptions, which

[1] *Op. cit.*, p. 1230 *et seq.*
[2] Art. 130: "The criminal actions brought or examined before the Parlements in the first instance, cannot be reported by him who shall have made the confirmations and the confrontations, and examined the said actions."
[3] Tit. XXIV, Art. 2.
[4] Tit. XIV, Art. 21.
[5] *Serpillon*, "Code crim." p. 682.

arise against the accused in such a way as to make him appear rather more guilty than innocent, and that nothing is wanting for his conviction but his own confession. In this case torture can be ordered. . . . Or, again, it may happen that these doubts make the balance swing in the prisoner's favor, as when he has, in his final interrogation and his confrontation set forth certain facts or furnished certain objections to the witnesses, the proof of which would completely show his innocence. In this case the judge shall, at the request of the accused, or even of his own accord, choose from among these facts or objections those which appear to him to be the most relevant, in order to make them the subject of an inquiry which he shall order by a special judgment, and which is called admitting the accused to his justificative facts." [1] Let us examine both sides of this alternative.

VII. There were more than one variety of this torture, the lamentable progress of which we have related. Looked at from the point of view of intensity of the pain, it is divided into *ordinary torture*, and *extraordinary torture*. The judge always had full power to stop with the first, or to go on to the latter.[2] Looked at from the point of view of the function which it fulfilled, there was the *preparatory torture*, which was used to extort from the accused the confession of his crime, and the *preliminary torture*, which was administered to *condemned persons* to compel them to disclose their accomplices. It is of the preparatory torture that we now speak.

The Ordinance regulated the circumstances under which recourse could be had to torture. It required that the "corpus delicti" be established; and that there should have already been "considerable proof." [3] The decrees sentencing to torture were appealable as a matter of right.[4] The accused, interrogated before being tortured, must be interrogated immediately after, so that it could be seen if he stuck to his confessions. An important point was that "whatever new proof appeared, the accused could not be put twice to the torture for the same fact;" [5] and, if he had been released and entirely withdrawn from the torture, he could not again be put to it." [6] These provisions somewhat alleviated this horrible proceeding; but as a counterbalance the Ordinance sanctioned the torture under reservation of proofs, which had been introduced by judicial decisions, and of which we shall speak later. All this

[1] *Muyart de Vouglans*, "Inst. crim." p. 390.
[2] This calls to mind "the little and the great horse" in the "Registre criminel du Châtelet."
[3] Tit. XIX, Art. 1.
[4] Tit. XIX, Art. 7.
[5] Tit. XIX, Art. 12.
[6] Tit. XIX, Art. 10.

passed without encountering any opposition. It was a natural thing at that period. Lamoignon and Pussort, surprised, no doubt, to find themselves in agreement, both spoke against the preparatory torture, but without pressing the matter, and as if merely to salve their consciences. Pussort declares "that the preparatory torture had, in his opinion, always seemed useless, and that if it was desired to do away with the practice of an ancient custom, it would be found that it is rare that it has drawn the truth from the mouth of a condemned man."

The president "said that he saw great reasons for doing away with it, but that was only his individual opinion." [1] Lamoignon, however, had something more practical to propose. No fixed rule existed as to the mode of administering the torture; the usages of the companies of judges were the only law. Was it not urgent to put an end to all arbitrary action in this respect? "It is to be wished that the method of administering the torture be uniform throughout the whole kingdom, because in certain places it is administered so harshly that he who suffers it is unfitted for work and often remains a cripple for the rest of his life." To that Pussort made this astounding reply: "It was difficult to make torture uniform; . . . the description which it would be necessary to make of it *would be indecent* in an Ordinance; . . . but it is implied in the article that the judges shall take care, when they cause it to be administered, that the persons condemned to it are not made cripples." [2]

Nothing was therefore settled in this respect, and the practices differed as in the past. We find in Muyart de Vouglans the following concise description of the most frequently used methods: "In the Parlement de Paris, the torture is administered in two ways, by water and by the boot." The Parlement, by decree of 18th July, 1707, gave a detailed memorandum in regard to torture, which comprises twenty-three articles. This is a very curious document, wherein everything is provided for.[3] This regulation was adopted in many jurisdictions, but in certain others the old methods were adhered to, "In the Parlement of Brittany it (torture) is administered by squeezing the thumb or the fingers or a leg of the patient with iron machines called 'valets.' . . . In the Parlement of Brittany the naked feet of the sufferer are placed together (he being seated), and attached to a chair in front of a fire. . . . In the Parlement of Besançon, torture

[1] "Procès-verbal," p. 225.
[2] "Procès-verbal," p. 224.
[3] See in *Serpillon*, "Code crim." p. 930 *et seq.*

is administered in two ways. The sufferer, whose arms are tied behind his back, is raised into the air by a pulley attached to his bound arms; . . . for the extraordinary torture, a large iron or stone weight is attached to the large toe of each foot, which, when he is raised, remain suspended from his feet." [1] Serpillon, on his side, describing the torture by boiling oil, as it is administered in the Autun presidial, adds, "I do not know of any other court in the province which practises this cruel torture, which is said to have been in vogue of old throughout all France." [2]

As to the preliminary torture, the Ordinance merely declared that "it could be decreed by the judgment."

The old rules as to justificative facts were retained and more explicitly laid down than they had ever been before. "Judges" were "forbidden, even in the courts, to order the proof of any justificative facts, or to hear the witnesses to arrive at such proof, until after the inspection of the process." [3] Nothing could be admitted to proof except "the facts chosen by the judge from among those which the accused shall have set forth in the interrogations and confrontations," and the latter must immediately name the witnesses, who were subpœnaed at the request of the public prosecutor and heard without being seen by the accused. The helplessness of the defense is apparent; it was, however, necessary that the claims which the civil party presented to the judges and the documents relating thereto be communicated to the accused. "A copy of them shall be delivered to the accused, otherwise the claims and documents shall be rejected." [4]

VIII. The next thing was the pronouncement of the judgment. The Ordinance repeats the traditional provisions commanding the judges to give criminal matters the preference over civil causes and forbidding them to try important cases "of an afternoon." [5] But they also contained new and important provisions. In all the jurisdictions where sentence was passed subject to appeal, the sentence must be pronounced by three judges at least "if there are so

[1] *Muyart*, "Inst. crim." p. 403. [2] "Code crim." p. 967.

[3] Tit. XXVIII, Art. 1.

[4] Tit. XXIII, Art. 3. It was asked whether communication of the depositions of the witnesses upon the justificative facts ought to be made to the accused. See *Poullain du Parc*, "Principes du droit français," vol. XI, p. 374. "Article 8 only orders the communication of the inquest to the public prosecutor and the civil party, which leaves room for the belief that the accused cannot demand its communication. This, however, is not an information, but an inquest; and since the civil party ought to have communication of it, it appears unjust to refuse it to the accused. The silence of the Ordinance is not negative of this communication, although it gives rise to a considerable difficulty on the point."

[5] Tit. XXV, Arts. 1 and 9.

many on the bench, or graduates in law, who shall go to the place where the court sits, and where the accused is imprisoned, and who shall be present at the final interrogation." [1] This was an admirable reform, especially considering what manner of judges those of the seigniors were. Lamoignon, however, made some opposition. He still defended the interests of the seigniorial courts. He even wished that it should not be required that the assessors always be graduates in law; "in the minor jurisdictions there might be counsel of good sense and fit to be officers who are nevertheless not graduate." But Pussort successfully replied: "Too great precautions cannot be taken when the lives and honor of the king's subjects are concerned, especially if it is considered that gentlemen might be amenable to the judges of the seigniors, who are all inexperienced and who might easily be bribed." [2]

As to judgments in the last resort, they must always be rendered by seven judges, whether in the case of judgments of examination or judgments on the merits. In default of judges, resort was had to graduates.[3] The accused always had the benefit in the event of a divided court, and the most severe judgment could not be passed in the case of a sentence in the last resort except by a majority of two votes (Art. 12). Montesquieu called the last-mentioned provision a divine law.

The Ordinance fixed a scale of punishments, so as to make it clear what the most severe sentence was.[4] This was very important, in view of the system of arbitrary punishments which governed the ancient law. It is to be noted that torture figured as a punishment in this enumeration, whereas elsewhere it was settled that it was only a method of examination. The real truth of the matter had to be acknowledged. The benefit which this article appeared to insure was not, as a matter of fact, very great. This list of punishments was not complete. Many others were recognized by judicial practice. A perusal of the old authors makes this readily apparent.[5] They were divided into corporal and afflictive punishments, punishments merely afflictive, degrading punishments, and slight punishments which were not degrading.

The Ordinance did not require that the judgment recite the facts found as its basis. The inferior judges, however, "must

[1] Tit. XXV, Art. 10. [2] "Procès-verbal," p. 246. [3] Tit. XXV, Art. 11.

[4] Art. 13: "Next below the punishment of natural death the most severe are those of torture with reservation of proofs in their entirety, the galleys for life, perpetual outlawry, torture without reservation of proofs, the galleys for a term, the lash, the 'amende honorable' and temporary outlawry."

[5] See especially the enumeration given by *Jousse*, "Comment." pp. 208-211.

state the basis of the condemnation or that of the acquittal. Thus, whenever that is lacking (*i.e.* that they do not state the basis) the Parlement or other court annuls the sentence or the judgment; nevertheless it pronounces what is the same thing as the sentence. But the Parlements and courts are not bound by this formality. The decree merely rehearses that the accused is condemned for the crimes are named in the charge." [1]

The old provisions as to the payment of costs were retained. If there was a civil party to the action, they were borne by him; if there was not, by the king or by the seigniors. The accused was never directly condemned in the costs, although the civil party had recourse against him; and when the king paid the costs of the action, a penalty was pronounced against the accused, which constituted a kind of set-off.

The decrees of condemnation had to be executed on the same day they were pronounced. Only in the case of women big with child was the execution delayed until their delivery. The sacrament must be offered to those sentenced to death.[2]

If the accusation was found to be baseless, it would seem that judgment of acquittal should always be pronounced; but that was not the case. When condemnation did not take place, three solutions were possible: *acquittal, putting out of court,* and "further inquiry." Acquittal was the pure and simple rejection of the accusation, and gave the accused the right to proceed for damages against the civil party. The "out of court" was a less complete acquittal: "when the accused is not discharged acquitted, but merely sent out of court, he cannot claim damages, not, being completely absolved. This kind of judgment leaves the accused under suspicion; he escapes through lack of proof." [3] This kind of judgment was, however, allowed only in the supreme courts.[4] Lastly, the "further inquiry" was merely a provisional acquittal; "this last appears to be the safest and most regular of all, as being the most conformable to the spirit of the Ordinance, and it should take place when there are not enough proofs to condemn, and still enough to prevent acquittal." [5] It was either for a time or indefinite: "the 'further inquiry' for a time is given for crimes which are not absolutely atrocious or the presumptions of which are slight; it also takes place in all cases where there is no other party than the king's procurator or that

[1] *Rousseau de Lacombe*, "Mat. crim." p. 437.
[2] Tit. XXV, Arts. 23 and 24.
[3] *Serpillon*, "Code crim." p. 409.
[4] *Ibid.*, "Code crim." p. 1069.
[5] *Muyart*, "Inst. crim." p. 362.

of the seigniors, and where it would have been proper to put out of court, if there has been a civil party . . . the indefinite 'further inquiry,' on the contrary, is only pronounced in serious cases and where the presumptions are strong. The effect of this is to cause the accused always to remain 'incerti et dubii status,' and the public prosecutor can, if new proofs are discovered, again take up the prosecution against him . . . it is the punishment, not of the crime, but of the presumptions and of the strong indications, not purged." [1] It seems that any one once taken in the coils of this procedure must of necessity leave behind him something of his honor and his liberty.

IX. The Ordinance devoted an entire title (Title XXVI) to *appeals* ("appellations"), and here it was apparently generous. The accused could appeal from all the judge's decisions, not merely from the judgments on the merits, but also from the preliminary and interlocutory judgments of examination.[2] In the case of a condemnation to an afflictive punishment, the appeal was taken directly before the courts; in other cases it was taken to the bailiwicks or to the courts "at the choice and option of the accused." For certain very serious condemnations to corporal punishments, the galleys, perpetual outlawry, the "amende honorable," the appeal was *a matter of right* and the cause was necessarily brought before the courts.[3]

The appeal might offer some resource to the accused. The procedure was not necessarily secret nor the aid of counsel absolutely forbidden. It appears, at least before the Ordinance of 1670, that one distinction must be made. If a sentence entailing afflictive punishment or torture was involved, the action on appeal was continued in the same forms as in the first instance and without counsels' speeches. The other appeals, on the contrary, and especially those from the decisions of examination, were judged in the same form as the civil appeals; [4] if the appellant chose the oral procedure, the "oral appeal," [5] instead of the written procedure, as he was entitled to do, they were judged in court and upon counsels' speeches. The Ordinance of 1670 ratified this practice. Article 2 of Title XXVI declares, in effect, "that appeals from permission to inform, decrees, and all other examinations shall be brought in the hearing of our courts and judges." But it was sought to restrict this provision, which had only been pre-

[1] *Muyart*, "Inst. crim." p. 363.
[2] Tit. XXVI, Art. 1.
[3] Tit. XXVI, Art. 6.
[4] "Pratique de Boyer," pp. 117, 119.
[5] *Ibid.*, pp 220, 221.

scribed to accelerate the judgment of appeals upon the measures of examination. "The appeals from judgments of examination, or preliminary judgments," says Muyart de Vouglans, "should be brought before the courts and judges at public hearing. Consequently, the appeal from *interlocutory judgments*, which are not mentioned in this article, should, like that from final judgments, be judged in the chamber with closed doors and be subject to judges' fees, in the same way as those in written actions."[1] This power was, moreover, rendered almost illusory by the article of the Ordinance which provided that "no appeal can prevent or retard the execution of the decrees, the examination, and the judgment."[2] If the action was judged with sufficient celerity on the merits, the incidental appeal was judged at the same time and in the same form as the appeal upon the merits.[3] Here, however, one door was open to the defense. It was possible to plead his cause, not upon the merits, but upon an incident; only, he must not delay, and credit and money were necessary for this. "In the lower criminal courts, and in the debates created by various incidents relative to appeals and certain acts of examination, the counsel's speech will, erelong, be admitted. President Séguier also remarked that the Tournelle has granted hearing 'subsequently and for a very long time.' The 'feuilles d'audience' prove this custom."[4]

The only safeguard which the accused found in the procedure of appeal from final judgments in the actions sent to the criminal side was the higher standing of the magistrates. There was no real argument. Attorney-General Séguier is compelled to acknowledge "that the Ordinance limits almost all the appeal procedure to interrogating the accused upon the prisoner's seat or behind the bar."[5] — "This interrogation in the court is the time

[1] "Inst. crim." p. 832. [2] Tit. XXVI, Art. 3.

[3] *Serpillon*, "Code crim." p. 1141: "This article does not indicate that the appeals which it mentions shall be adjudged at the hearing; it only provides that they may be brought there; this leaves the judge at liberty, when a final judgment has intervened in the court of first instance after the appeal, to judge by writing in case of appeal. It is proper then to decide not only upon the examination, but also upon the appeal from the final judgment rendered, on a consideration of the documents. Although that rule is not observed in the jurisdiction of the Parlement of Paris, we in Burgundy are accustomed to follow it."

[4] "Notice sur les archives du Parlement de Paris," by *A. Grün*, in *Boutaric*, "Actes du Parlement," vol. I, p. 227. — There was, however, a tendency to restore the inferior criminal courts to the purely written procedure: "In Burgundy, minor crimes are often tried by written proceedings" (*Serpillon*, p. 977). We note, conversely, that there was still trial in court and pleadings when a monitory was issued and an objection was lodged to its publication.

[5] "Réquisitoire de 1786," p. 157.

for the accused to allege his complaints against the sentence, and consequently his justification. This is the reason that the clause, 'Heard the accused as to his reasons for appeal and crime imputed to him' is always put into the decrees."[1] In this respect, most of all, the reporting judge was all-powerful. It must not be forgotten, besides, that those accused of "prévôtal" and presidial crimes were tried in the last resort by the provost marshals or the presidials.

The prosecution, on its side, could appeal. "The king's procurators or procurators-fiscal may appeal 'a minima' from sentences which they do not consider to be in proportion to the kind and seriousness of the crimes, and in that respect do not conform to their motions."[2] The civil party could also appeal "on account of an inadequate award of civil reparation, civil interests, or damages." In those cases where the appeal was not a matter of right the different parties could make it, so long as the action had not undergone limitation, but waiver of this right and acquiescence in the judgment was allowed.

The appeal was, in general, suspensive (we refer to the appeal lodged, not to the period granted to make it). If a sentence of condemnation was involved, the execution of the punishments was suspended; but pecuniary punishments were executed provisionally, provided they did not exceed a certain amount.[3] Where decisions of examination were involved, on the other hand, the appeal was not suspensive; the only exception was when the execution of the decree would have caused irreparable damage, as in the case of sentences to torture. The custom of "decrees forbidding the continuation of the examination" was not totally abrogated; but it was restricted.[4] As to judgments of acquittal, in the case of appeal by the public prosecutor, the accused must remain in prison, and if "the appeal 'a minima' has not been lodged until after the prisoner shall have been released and freed from imprisonment at the time of the pronouncing of the judgment, the prisoner shall be bound to be in readiness at the time of the judgment of the action."[5] If the civil party alone had appealed, the appeal proceeded as in a civil action. In regard to details, the Ordinance minutely regulated the procedure as to the appeal; it also restricted the right of evocation of the courts.[6]

[1] "Réquisitoire de 1786," p. 159.

[2] *Rousseau de Lacombe*, "Matières crim." p. 481.

[3] Tit. XXV, Art. 6. [4] Tit. XXVI, Art. 4.

[5] *Rousseau de Lacombe*, "Mat. crim." p. 480. [6] Tit. XXVI, Art. 5.

X. A final recourse might be available to the condemned person, but it was not mentioned in the Ordinance, for the reason which we shall state. This was the recourse to the king's council, the application for a writ of error. The judgments of the supreme courts were final and, on principle, could not be attacked. They might, however, be annulled, thanks to a theory which plays a great part in ancient law, and of which we shall have to speak very soon, that of *justice reserved*. All justice resided in the king and emanated from him. In delegating its exercise to his officers, he none the less retained the plenitude of it within himself, and could quash decisions, including those of the supreme courts.[1] But the appeal could only be based on a violation of the law. "It is equally permissible to claim the quashing of a judgment when it has been rendered contrary to the provisions of the Ordinances and the customary law. The reason of this is that the supreme courts are no less under the obligation to observe the laws than the inferior judges."[2] Attorney-General Séguier, in one of his addresses to the court, which we have quoted several times, explains the doctrine at length. "The legislature has not forgotten that the dignity of the magistracy does not shield it from the deceptions and weaknesses common to human nature. It has recognized, probably by personal experience, that to err is human, and that even the most careful of men may make mistakes, without being subject to the accusation of bias or betrayal of his trust. The law, the guaranty of the rules made by itself, jealous, at the same time, of the forms which it has sanctioned, and in which alone it recognizes its work, has, from an excess of precaution, thought fit to allow, after all the stages of jurisdiction have been exhausted, recourse still to the Sovereign himself, in cases where judgment has been rendered contrary to the provision of the Ordinances, and in all those where the prescribed forms have not been exactly observed. Every condemned man has thus a way of escape from the condemnation."[3] The application was brought before the privy council "consisting of the Chancellor, four secretaries of State, State councillors, and masters of requests, who serve in it by rotation . . . the masters of requests report the matters to the privy

[1] Before the theory of appeal to the court of cassation took shape, there existed another method of attacking the decrees of the supreme courts, namely, the *assignments of error*, which, moreover, lasted for a long time concurrently with the recourse to the court of cassation, and which the Ordinance of 1667 abrogated. See *Guyot*, "Répertoire," under "Cassation."

[2] *Guyot*, "Répertoire," see "Cassation."

[3] "Réquisitoire de 1786," p. 9.

council."[1] Refusal of the application followed, or quashing and remand to a new jurisdiction, according to the particular case. The procedure was settled in a definite fashion by the regulation of the Council of 28th June, 1738, the provisions of which, as we know, have partly passed into our modern legislation. In criminal matters, this regulation required the deposit of a penalty and the "mise en état," provisions which were adopted by our Code of Criminal Examination.

This was, to all appearance, a powerful weapon to place in the hands of the accused. These proceedings, written and bristling with formalities, were bound to be very often riddled with errors rendering them null, and memorials could be presented to the king's council, which were unfailingly published.[2] Yet, it amounted to nothing. The possibility of bringing this recourse was often the result only of royal favor. In effect, the appeal to quash, when brought, did not stay the execution of the judgment. In civil actions, it did not prevent the claim from producing its result, execution having no irreparable consequences. In criminal proceedings, the hand of the executioner had often intervened before it had been possible to reach the king's council. An additional favor of His Majesty was necessary before a quashing was possible, in the shape of an order from the sovereign staying the execution. "In civil actions, the judgment which is attacked is executed all the same; but in criminal matters, the extraordinary remedy of appeal to the sovereign should be preceded by a suspension of execution of the judgment, because it is not in the power of the magistrates to suspend the condemnation which they have pronounced."[3] This saving order intervened frequently. The last years of the absolute monarchy are not alone in offering frequent examples of it.[4] In order to obtain it, influential entreaties were necessary, or some happy chance, such as the passage of some

[1] *Guyot*, "Répert.," see "Conseil." He remarks that "no petition to quash can be brought before the council until it has been first communicated to the commissioners generally appointed for the investigation of claims in cassation."

[2] *Guyot*, "Répert.," under "Cassation." "No request may be distributed, nor consultation nor memorial printed relative to claims in cassation, before these claims have been ordered to be communicated. This is why advocates in the Council are forbidden to sign writings of this kind. The parties or their counsel can only distribute among commissioners or other judges their pleadings in manuscript."

[3] *Séguier*, "Réquisitoire," cited pp. 9, 10.

[4] See, for instance, "Correspondance administrative sous Louis XIV," vol. II, p. 184, dealing with sorcerers condemned to be burned alive; the courier arrives on the very day appointed for the execution; p. 190 deals with the case of a woman who was hanged and survived; *cf.* p. 206.

great personage through the province. Frequently, the messenger who bore the order did not, as in the old tales, arrive until the scaffold was already prepared.[1] The application for a writ of error was the only method of extraordinary recourse available against criminal judgments in the last resort. They could not, in effect, be attacked by the bill of review.[2]

XI. The procedure by contumacy which the Ordinance contains is that of the prior law, simplified and stated precisely. If it was found impossible to execute the warrant for the arrest of the accused, search for his person and an inventory of his property might be made. Then came a subpœna at a fortnight's notice, and a summons at a week's, by a single public proclamation; any other delay was forbidden.[3] Next, a judgment intervened upon the motions of the public prosecutor, ordering the confirmation of the witnesses, which was equivalent to confrontation. Finally, "the same judgment shall declare the contumax properly examined, make the award, and contain the condemnation of the accused."

The essentially revocable nature of the judgment of contumacy was clearly shown by the prohibition to insert the clause "If taken and apprehended can be." Instead of real execution, that being impossible, an execution in effigy was organized for capital punishment, for some other punishments posting up upon a list in a public place, or still others the service of the judgment at the accused's residence. This was a matter of great importance; it made the periods begin to run, at the expiration of which serious forfeitures were incurred.

At whatever period the condemned person might present himself,

[1] This is what we read in a Memorial which we shall examine later; "Come to your senses," the abbé said to him, "all is not lost; try to tell your story; the keeper of the seals is here;" [which was the case], "I shall have him present a request by a person having due credit at the French court. . . . The wisdom of the legislature, and the vigilance of the worthy chief justice sent to M. the Marquis of Belbœuf, procurator general to the Parlement of Rouen, the order to stay the execution. . . . It was time, for the orders were given and the execution fixed for the next day" (Mémoire de Lecauchois, pp. 7, 8, 11).

[2] The contrary would seem to result from certain testimonies of our old jurisconsults; see *Muyart de Vouglans*, "Institutes," p. 368. But that should be understood only in the case where the action follows the "ordinary" form, that of civil actions. *Jousse* explains it very well: "One can also appeal by bill of review against the decrees and judgments in the last resort rendered in criminal matters, although final, *when they have been rendered in public hearing*, and generally against all those of examination" ("Commentaire sur l'Ordonnance," p. 329). — *Guyot*, "Répert." Voce "Revision": "Letters of revision are in criminal matters very nearly what bills of review are in civil matters." *Cf. Dupaty*, "Moyens de droit," p. 67.

[3] Tit. XVII, Arts. 7–10.

as long as the action was not prescribed, the judgment by contumacy dropped as a matter of law;[1] but at the end of a year or of five years certain effects remained. At the end of a year, the accrued profits on the personal property of the contumax and the purchase price arising from the sale of his movables were finally lost to him; at the end of five years, "the pecuniary condemnations, penalties, and confiscations, were regarded as awarded after hearing, and ranked as if ordered by judgment."[2] Civil death was then incurred in a definite fashion if the punishment carried by the judgment was of a character to warrant it.

When the contumacy was purged, the confrontation of the witnesses with the accused was proceeded with, notwithstanding that it had already been declared in a judgment that the confirmation was equivalent to confrontation.[3] If, however, the witnesses had died, or if it was impossible to confront them, their depositions remained admissible; only a confrontation on paper was made, and the only possible objections to witnesses were those supported by documentary evidence. If the accused had been captured at the outset, and had escaped, but only since his interrogation, the action continued confrontatively, notwithstanding his absence.[4]

Besides the procedures which we have sketched, which were the normal ones, the Ordinance described several followed in exceptional cases. These were the actions brought against deaf and dumb persons,[5] those brought against communities, — cities, towns, villages, corporations, and societies; and, finally, the odious prosecutions which the ancient law sometimes directed against the corpse or the memory of a deceased person.[6]

§ 4. **Reserved Justice, and Letters from the King.** — Such were the rules of criminal procedure according to the Ordinance of 1670; but certain circumstances might interfere with it or stop its course.

In ancient France it was quite true to say that all justice emanated from the king. Although he had undoubtedly delegated its exercise to the judicial officers, he could intervene whenever he chose. This was the theory of *reserved justice;* and it gave rise to *letters of mercy* ("lettres de grâce") emanating from the king, a generic term embracing numerous varieties. "Nothing was more worthy of the good-will of our kings than the reservation they made

[1] Tit. XVII, Art. 28.

[2] Down to that time the parties had been entitled to sue for payment of their damages, but on giving security (*Serpillon*, p. 870). This system was very simple and it obviated many difficulties which present themselves under the existing law.

[3] Tit. XVII, Art. 10.

[4] Tit. XVIII, Art. 24.

[5] Tit. XVIII.

[6] Tit. XXII.

of this power, at the same time that they intrusted to the magistrates the care of rendering justice to their subjects; it is equivalent to saying that the power of the latter is, above all, limited to pursue the crime, to pronounce the punishments and see that they are executed; but that the prosecutions, the condemnations, and the execution cease immediately it pleases the monarch to interpose his authority and to declare the crime and the accusation to be extinct." [1] That was not all. The king, as the depository of omnipotence, could not only stay the course of justice, but could also supplement his action in a mysterious way by means of "lettres de cachet." Let us examine these two kinds of letters a little more minutely.

The term "grâce," mercy, or king's pardon, according to Jousse, is a generic term embracing all the letters emanating directly from the sovereign power.[2] There were numerous kinds of them, and the Ordinance carefully specified them all, but they all belonged to two types. The first of these appeared after a sentence pronounced, for the purpose of staying its execution. The others, more forcible, stopped all procedure and even obliterated the crime. The latter corresponded to what we call to-day an act of amnesty, with this difference, that they were granted in the interest of a mere private individual.

The most important of the letters of mercy were those of *royal pardon* ("abolition"). "These are they which His Majesty grants for private individuals, accused of crimes which, according to the provision of the laws and ordinances of the kingdom, deserve capital punishment. They are only granted in rare cases and for weighty reasons, and are only given out in the office of the great seal." They usually intervened before the sentence; however, "as the king declares that he pardons the crime, no matter how it happened . . . they could be obtained even before the judgment of condemnation." [3] The *letters of remission* ("lettres de rémission") were of rather a curious character; they were granted for "involuntary homicides only, or those which had been committed under the necessity of a lawful defense of one's life." What was the necessity for these letters of remission when lawful self-defense excluded all culpability? The reason was that in France, at that period, "although the crime had been committed for reasonable

[1] *Muyart*, "Inst." p. 103.
[2] "Comment." p. 322. They were distinguished from *letters of justice* properly so called, like those of appeal, or of bills of review, which were, so to speak, mere formalities of procedure.
[3] *Muyart*, "Inst." p. 110.

cause and under the necessity of lawful self-defense, one could be punished for homicide in the absence of letters of remission." [1] For involuntary or accidental homicide, the same thing was allowed. At bottom this was nothing but a fiscal proceeding. There was also another kind of letters of remission. This was a reproduction of letters of royal pardon ("lettres d'abolition") couched in different terms. The *letters of pardon* ("lettres de pardon") were granted for those crimes "which do not involve the punishment of death, but which, nevertheless, cannot be excused." All these letters, which arrested the course of justice, constituted one of the plagues of the Old Régime, and the States-General had often protested against this abuse; [2] but it had not been able to obtain anything but the declarations contained in the Ordinances, by which the king renounced his right of pardon in the more serious cases. The Ordinance of 1670 contained an enumeration of this class of crimes.[3]

The other letters which remain to be mentioned did not intervene until after the condemnation. These were, first of all, the letters *to be at law*, "pour ester à droit," which were necessary to the contumax five years after the execution by effigy, in order to prevent the confiscation of his property; then the letters of *recall from banishment of the galleys*, "ban de galères," and the letters of *commutation of punishment*, "commutation de peine," similar to the letters of pardon in force to-day; the letters of *rehabilitation*, "réhabilitation," granted for the purpose of reinstating the condemned in his honor and his property; in them it is always presumed that he had satisfied the punishment, and paid the civil damages; they are obtained for those who have died as well as for living persons. "Finally came the *letters of rehearing* 'lettres de révision,' granted by the king for the reëxamination and new trial of a criminal action, either on account of defects of nullity in regard to form, with which it may be tainted, or because of the apparent injustice in substance which it contains. These perform the same duty in criminal actions as the letters in the form of a bill of review do in civil actions." [4]

Although all these letters constituted the exercise of *reserved justice*, they were, however, connected with the delegated jurisdiction in so far that they had to be enrolled and ratified, "entéri-

[1] *Rousseau de Lacombe*, p. 83; *cf. Muyart*, "Inst." p. 542. This was not quite in accordance with the theory which proposed to class lawful self-defense among the justificative facts. See *Jousse*, p. 495.
[2] See *Picot*, I, p. 121; II, 191, 555, 556; III, 186; IV, 84.
[3] Tit. XVI, Art. 4.
[4] *Muyart*, "Inst." p. 114.

nées," by the tribunals; to wit, by the courts, if gentlemen were concerned, and by the presidials and bailiwicks, if plebeians were concerned (Arts. 12 and 13). This ratification was not always a mere formality. In certain cases, the judges were required to make certain whether the letters "conform to the charges and informations," and if there was not agreement between them in this respect they proceeded with the judgments; "His Royal Majesty having been deceived, the crime which is then prosecuted is not the one which His Majesty has pardoned." It was the same in the case of the letters of royal pardon, remission, and pardon. If, on the other hand, the crime was heinous, or especially if it was one of those in regard to which the king had renounced his right of pardon, the tribunals could present protests, the courts to the king directly, and the other jurisdictions to the Chancellor. In the cases of letters of recall from condemnation to the galleys, commutation of punishment, and rehabilitation, they must be ratified "without inquiring as to whether they conformed to the charges and informations, except as regards the right of representation"; but as a guaranty of good faith, the decree or judgment of condemnation had to be attached "under the counter-seal of these letters." The Ordinance originated a kind of litigious procedure for the ratification of the letters, in which the private prosecutor and the public prosecutor took part. The letters of rehearing gave rise to a regular action. It was necessary, in order to obtain them, to bring an action before the king's council (Arts. 8–10).

The "*lettres de cachet*" constituted a very much more strenuous act of the royal power. They derived their name from their form. "This is a letter written by order of the king, countersigned by a secretary of State, and sealed with the king's seal." [1] They might contain all sorts of commands, and especially an order of exile or of imprisonment. "The king being looked upon as the fountain head of all justice, has the peculiar privilege of being able to dispose of the liberty and property of citizens without trial, at his own free will." [2] And it must be understood that it was not a matter of addressing these letters to courts of justice; we are here in the domain of the king's good pleasure. "This description of letter is carried to its destination by some police officer; . . . the person who is commissioned to deliver the letter makes a kind

[1] *Guyot*, "Répert." voce "Lettre de cachet." See *Mirabeau*, "Des lettres de cachet et des prisons d'État." A work composed in 1778, Hamburg 1782 (all the first part).
[2] *Laboulaye*, "Revue des Cours littéraires," year 1868, p. 9.

of official report as to the execution of his trust." [1] We are aware of the use to which royalty put this lamentable expedient. The criminal laws were silent on the point. A thing which is essentially arbitrary is not a subject for regulation. Protests were, however, often raised, and sometimes from high places. Malesherbes, especially, speaking for the Court of Accounts, once presented to Louis XV a protest of great force; [2] and the Parlement, in the strifes which disquieted the reign of that king and which recent researches have laid bare, come to the point of disputing the "lettres de cachet." In 1753 (April), while speaking of certain protests, the lawyer Barbier thus expresses himself: "Particular mention is made of the article regarding 'lettres de cachet.' This article goes the length of impugning the authority of all the ministers, and, besides, also attacks the king personally, as if it presumed that he would sign 'lettres de cachet' without knowing what he was doing, or that the ministers would have it in their power to issue them without consulting the king." [3] He says again, the same year: "The protest of the Parlement of Rouen has not yet been printed, but the Jansenists have spread the reasons for this protest through Paris. The reasons given cannot be the true ones, seeing that it openly attacks the sovereign authority. It is expressly said that the king is not entitled to make use of 'lettres de cachet' except in regard to his ministers and household officers, but not against any private subject; that if such an one is guilty or suspected of being guilty in any matter, the king should leave him to justice to be tried by the courts and according to law." [4]

Another manifestation of the sovereign power was the appointment by the king of commissaries charged with the trial of criminal actions, or the *evocations* which he made of them to his council. "In France a distinction is made between commissaries appointed by the king and those appointed by the courts and other judges. . . . The general commission is granted by letters from the chancellor's office and only the king can grant it. The king alone can grant extraordinary commissions, and these commissions must contain the extent and limits of the authority granted to the commissaries. Any description of private individual can be selected by the sovereign either to judge or to reverse. . . . The commissaries so appointed should publish their letters of com-

[1] *Guyot, loc. cit.*
[2] See *Laboulaye*, "Revue des Cours littéraires," 1864, p. 643.
[3] "Journal," VI, p. 368.
[4] "Journal," V, p. 415.

mission at the place where they intend to use them, especially when it is a question of doing some act of justice or of severity. If they do not do so, one may refuse to obey them. In the examination and judgment of the matters in regard to which they have been appointed, they are bound to act in conformity with the laws and Ordinances of the kingdom in the same manner as other judges. No appeal is allowed from a judgment of commissaries appointed by the king unless they have exceeded the limits of their commission. . . . When they are appointed for the trial of any criminal matter they may set aside their procedure if it is defective and order its recommencement. Extraordinary commissions, moreover, are considered a dangerous expedient. For that reason they are not readily permitted by the Parlements."[1] We know of what abuses royalty sometimes made this institution the medium, and the States-General frequently protested against it.

[1] *Guyot*, "Répert." voce "Commissaires."

CHAPTER III

THEORY OF PROOF

§ 1. **Proofs under the Customary Law.** — The criminal procedure which has been the subject of our study, that terrible mechanism which was gradually organized until it reached its utmost tension in the Ordinance of 1670, must, in order to be properly understood, be correlated with the theory of proof which was formulated during the same period. This theory is the system known in the history of law as that of *legal proofs*. Its chief essential is that, before the judge can condemn, he must bring together certain predetermined proofs; but, on the other hand, confronted with these proofs, he must, of necessity, condemn; in either case, his personal opinion goes for nothing. The leading maxim of the ancient law in this respect is that judgment must be rendered "secundum allegata et probata."[1] The judge may be likened to a harpsichord, responsive according to the particular keys which are struck. This tyranny of proof was invoked as a necessary counterbalance to the inquisitorial and secret character of the procedure, and it would appear as though such proof, "clearer than the sun at noonday," was required in the interests of the defense. But, on the other hand, the theory of legal proofs bound still more firmly the fetters of the criminal procedure by rendering the conviction of the guilty person more difficult to obtain; the double movement led inevitably in the same direction.

The system was of gradual growth. Its primitive elements were found by the bailiffs and provosts in the texts of the Roman law; but it was in existence in all its power at the time when the

[1] *Loysel*, "Inst. cout." Title on Judgments, rule 11. — "Nec præsumant judices judicare secundum eorum conscientias, ut faciunt Veneti juris et justitiæ ignari, sed solum secundum leges et jura et probationes sibi factas, licet aliud viderunt oculata fide, vel habeant in conscientia sua quantum sit probatum, nisi eis esset notum et judici." *Constantin*, "Comment. de l'Ord. de 1539," p. 238. — "It is not enough that the judge is as thoroughly convinced as any reasonable man could be by a collection of presumptions and facts leading to presumptions. This is a most erroneous way of judging, and is really nothing but the expression of a more or less *based* opinion." *Poullain du Parc*, "Principes du droit français," vol. XI, p. 112.

jurists took the place of the "men judgers," in the feudal courts. When a body of permanent magistrates has for a long period had the sole administration of the criminal law, the slow formation of a system of legal proof is inevitable; and on the improbable assumption of the disappearance of the jury from our system of laws, we might expect to witness the revival of this subtilty and casuistry, at present so remote.

The Ordinance of 1670 did not expressly state these minute and complex rules; but it took them for granted. Such a statement would have been inappropriate in a legislative statute; but notwithstanding the fact that they are only to be found in the books on doctrine and judicial practice, these rules had none the less the authority of regular laws. We shall briefly inquire into the introduction of these principles into our law, explain the theory as it developed in the 1600s and the 1700s, and show how it harmonized with the forms of the procedure.

(1) Although, in the feudal procedure, the proofs were of a rude nature — often rather irrational — their appreciation was easy; the judge, a mere spectator, had, as a general rule, only to establish one material fact. The confession was the most complete proof, even obviating the necessity for any further procedure; but neither force nor subterfuge was employed to obtain it. This feature the English procedure still retains. If the accused pleaded not guilty, recourse was had either to the judicial duel or to witnesses. In the former case, victory or defeat in the combat dispelled all doubt. In the latter, the testimony originally consisted of a set formula; there was no weighing of the evidence by the judge. Nothing could be simpler than such methods of proof, and their very simplicity made them acceptable to the uncultured intellects of the time, puzzled by the problem of proving and placing beyond all doubt a thing denied. The list of proofs did not, however, end with these. Presumptions were also recognized. These were, however, equally simple, rude, and, so to speak, formal. Thus, it was held that an accused prisoner who made his escape thereby acknowledged his guilt. "When any one imprisoned on suspicion of a crime makes his escape a presumption is raised so clear as to be equivalent to proof of the fact; for his flight raises such a strong presumption that he did not dare to stand law that he is punished for the crime if he is recaptured." [1] — "Those arrested, charged with or suspected of any offense, who make their escape or break bounds, and are seized

[1] *Beaumanoir*, XXXIX, 15 (Salmon, 1160); XXX, 13 (Salmon, 836).

beyond their bounds, are convicted of the offense for which they were arrested and punished according to the offense." [1] In the same way, repeated defaults, leading to outlawry, in the procedure for contumacy, are considered by the custumal law-writers as equivalent to an irrebuttable presumption of guilt.[2]

In the special proceedings which took place when the person under suspicion accepted the inquest by the country, the judge doubtless had a freer appreciation and a more delicate task; but we have hardly any information about this form of judgment, which was destined to disappear from our law at an early date.

When the Ordinance of 1260 suppressed the formal testimony produced in open court, the theory of proof was thereby altered. The judge had to weigh the deposition; but the old principle was retained, whereby two eye-witnesses agreeing upon the facts were required for a condemnation. The "aprise" in particular, augmenting, as it did, the powers of the judge, exercised a great influence upon the development of the theory of proof.[3] From the very outset there was an evident disposition to be very exacting as to the proof, but at the same time judicial practice strove to devise means of finding combinations of presumptive evidence which had been thus far overlooked. Presumptions were made the chief study.

Some of the ancient presumptions and the ancient proofs lost their force. This happened very soon in regard to the confession; alone and unsupported, it no longer constituted a complete proof. This was because it was not free and spontaneous, but extorted by skilful questionings, and it is a rule which allows of hardly any exceptions in the history of law that the confession does not constitute a complete proof against the guilty party except where it is absolutely voluntary. It would even seem, according to one authority, that at a certain period both confession and testimony were required jointly for a condemnation, but the passage in the "Livre des Droiz," making this assertion, should not be considered as going farther than to demonstrate the decreasing force of the confession among the methods of proof.[4] The pre-

[1] "Livre des Droiz," § 333.

[2] *Beaumanoir*, XXXIX, 16 (Salmon, 1161); XXX, 13 (Salmon, 836). "Livre des Droiz," § 331. This is the period when contumacy resulted in a condemnation for the offense and no longer in mere outlawry.

[3] See *Beaumanoir*, XXXIX, 12, 13, 14 (Salmon, 1157, 1158, 1159).

[4] § 644: "The law is that if a man is condemned to death by any court of law, he, or some of his lineage on his behalf, can appeal to the supreme judge. . . . And the law provides that if he who is condemned is not convicted *by confession and witnesses* his sentence is null and void; *and if there should have been confession without witnesses or witnesses without con-*

sumption of guilt flowing from contumacy also diminished, and it was in course of time held that the judge should not, in that case, necessarily pass sentence. The flight of the prisoner became no longer an insuperable imputation against him.

On the other hand, however, new presumptions, firmer and more subtle than the old, were introduced. Very few of these, it is true, were of such a nature as to ground a condemnation upon. Beaumanoir divides them into two classes, as follows: "Some can make the fact so clear that it is proven by the presumptions, and the others are so doubtful that they do not of themselves prove the offense." [1] Among the first he specifies several the force of which never diminished, — that, for instance, which consists, in the case of manslaughter, in the fact that two witnesses have seen the accused in flight holding in his hand a naked and bloody sword.[2] But others grew weaker, such as that which consists in the fact that threats were uttered before the crime. The utterer of the threats, when he denied them, was regarded as the perpetrator of the crime, "when a threat is made and, after the threat, the thing is done of which the threat gave promise." [3] Very soon this was nothing more than a "proximate presumption." But the number of presumptions strong enough to cause the condemnation of a man was exceeding limited, and whatever the number of other presumptions might be, they could not effect a condemnation. "No one should be punished on account of presumption alone, unless the presumption is very plain, as we have said before, although there may be many probable presumptions against the prisoner." [4]

fession, and *both of these should not have concurred*, the sentence shall be unlawful."

[1] *Beaumanoir*, XXXIX, 11 (Salmon, 1156).

[2] "They saw Jehan leave the throng carrying a naked and bloody knife, and heard the man who was slain say: 'He has killed me.' And in this 'aprisé' it was impossible to prove this notorious crime except by presumption, for no one saw the blow dealt; nevertheless the said Jehan was sentenced and executed on that presumption." XXXIX, 12 (Salmon, 1157).

[3] *Beaumanoir*, XXXIX, 13, 14 (Salmon, 1158, 1159). — "Ancienne coutume de Bourgogne," Art. 53: "Also, if I threaten any one personally or as to his property and subsequently injury and damage happen to him, and I deny threatening him and he proves it, the judge shall have and hold as proven what has been done to the threatened person; and if I confess to having threatened him, and swear that no injury or damage has happened to him by me or mine, although I have threatened him, such threats will not avail him; and if after I have so sworn he offers to prove that injury and damage has happened to him through the said threats, he shall not prove it by witnesses nor by inquest but by wager of battle." *Ch. Giraud*, "Essai sur l'histoire du droit français," II, p. 278.

[4] *Ibid.*, XXXIX, 18 (Salmon, 1162).

Such a theory, marked probably by exaggerated scruples, could not have been other than worthy of approbation had it not been that the judge, finding his way barred by these accumulated obstacles, hit upon a means of surmounting them. This means, as we have already said, was torture. When there was but a single eye-witness testifying against the accused, or when a very strong, but not, according to the law, irrebuttable presumption existed, the court, placed as it was between the two alternatives, either to allow a man whom it thought guilty to escape, or to complete its proof at all hazards, did not hesitate to have recourse to torture.

The jurists thought to find, and, indeed, did, to a considerable extent find, these new principles in the texts of the Digest and the Code. At Rome, as long as the jurors of the "quæstiones perpetuæ" continued to be the judges, no very precise theory of proof was developed. The rhetoricians had merely distinguished a certain number of rules for the facilitation of the drawing up of pleadings and the greater assurance of oratorical success. But when the power of judging passed into the hands of permanent magistrates, a theory of legal proofs began to see the light of day, along with the principle of arbitrary punishments and the resource of appeal. This result was due to judicial practice, and the jurisconsults of the period contributed exclusively to the formation of the theory although it never attained perfect development.[1] It was very soon agreed that the confession should not constitute a complete proof unless it was supported by corroborative evidence.[2] The causes which could result in the rejection of evidence were determined, thus limiting the judge's unrestricted rating of the evidence; we even find traces of a classification of presumptions and the rudiments of a doctrine of written proof. The use of torture is also governed by settled rules, showing, on the one hand, that it is a resource which should only be employed on the failure of all others, and on the other hand, that forcible presumptions must be found before it is allowed.[3]

These are the principles which the authors of the 1400s and the 1500s set out in detail and in so doing developed and expanded; they constructed from them a theory which was certainly no more than "in gremio" in the Roman laws. This theory, for which

[1] *Geib*, "Geschichte der Röm. Criminalprozess bis auf Justinian," p. 611 *et seq.*

[2] Book 1, §§ 17, 27, D. 48, 18.

[3] Book 8, pr. Book 1, § 1. Book 18, § 2. Book 20, D. 48, 18.

thanks are due chiefly to the Italian criminal law-writers, imposed itself wherever the inquisitorial procedure was introduced. We find certain traces of it in Bouteiller, and the Ordinance of 1498 owes to it, among other provisions, one which is very remarkable. It declares, as we have seen, that if no result has been attainable by the "extraordinary," or criminal proceedings, the parties must be sent to the "ordinary" action, that is, to civil forms of action;[1] this is explicable if we consider that quite special proofs were necessary before pronouncing capital punishment, the normal aim and end of criminal proceedings.

(2) The system of legal proofs was thoroughly settled in the 1500s and the 1600s. It continued in vogue as long as the criminal procedure of the Ordinance lasted; that is to say, down to 1789. We shall attempt to describe it briefly, taking our information principally from Muyart de Vouglans, who has devoted Part VI of his "Institutes du droit criminel" to this subject, summing up and coördinating the theories of the law-doctors, or at least of those who had accepted French judicial practice.

Four methods of proof were recognized: witnesses, the confession, or vocal proof, written documents, or instrumental proof, and presumptions, or conjectural proof.[2] These are, to be sure, found in all systems of law; but these various modes might afford many combinations peculiar to the present system. What was wanted was a complete proof, sufficient to warrant a capital sentence. That was the hypothesis the criminal law-writers always put to themselves, capital crimes constituting, in their opinion, the very foundation of criminal law.[3] The rigor of the rules as to proof was not retained in regard to less grave accusations.[4]

[1] See above, p. 146 *et seq.*

[2] This is impliedly recognized in the Ordinance, Title XXV, Art. 5: "Actions can go to examination and judgment although there is no information, if there is otherwise sufficient proof by the interrogations of the accused or by authenticated documents or documents acknowledged by the accused, or other presumptions and circumstances of the action."

[3] "There being no law authorizing the punishment of innocent persons, a complete proof is essential before capital punishment can be pronounced, no matter what the crime may be, and such proof can be produced only according to the forms prescribed by the law. . . . Failing that, any judgment of condemnation is at least rash; and it may, in a sense, be said that such a judgment is unjust, even when the accused is really guilty." *Poullain du Parc*, vol. XI, pp. 112, 113.

[4] *Poullain du Parc*, vol. XI, p. 116: "In non-capital accusations, it is evident that such strong proofs are not required. . . . But when there are only strong presumptive facts, their force can only ground pecuniary punishments, unless the judge adopts the alternative of sending the case 'quousque,' that is to say, for 'further inquiry.'"

Our ancient authors proceeded, in the most logical way, to teach that two things must be proved to warrant the conviction of the accused person: 1st, that a crime had been committed; 2d, that the accused was the perpetrator of it.

Proof of the first point meant the establishment of the "corpus delicti": "De re priusquam de reo inquirendum."[1] This preliminary proof was already required by the old "coutumal" laws; but it was then of a rude and formal character; it was necessary to exhibit to the judge the wound or the corpse itself. "Be it known that in such proceedings, if the blood and the misdeed are not exhibited to the court and sufficiently ascertained, battle ought not to be waged in cases entailing death or mutilation."[2] In case of necessity, the judges visited the scene of the crime, in order to proceed "à la vue," — by what they saw, — which they immediately put on record. "In Saint Louis's time, assault could only be proved by the judges' inspection of the blood or the wound, judicially seen."[3] But at an early date this rude method gave place to inspection by professional people. In the "Registre de Saint-Martin," the "mire juré" (sworn doctor) and the "matrone jurée" (sworn matron) play an important part and make numerous reports.

Two kinds of offenses were distinguished in regard to the establishment of the "corpus delicti." The first were those which leave physical traces, "delicta facti permanentis"; homicide, arson, and robbery, for instance. In such cases the physical fact of the doing of the deed could be ascertained and the establishment of the traces that it had left became the judge's first duty. This was accomplished by means of the minutes of the magistrate, who proceeded to the spot; or, if the facts in question required technical knowledge, by means of reports by physicians, surgeons, and experts. No other proof was, as a rule, allowed,[4]

[1] *Muyart de Vouglans*, "Inst." p. 308.

[2] "Grand Coutumier de Normandie," ch. LXXV. Compare the language of the complaint in the "Livre de Jostice et de Plet," XIX, 9, § 1: "And saw the wrong openly." — *Ibid.*, XIX, 2, § 2: "And if any one accuse another of the murder of a man who is not found, it is asked what the law says of that? The reply is that there is no cause of action, nobody having been seen murdered, unless the murder has been actually witnessed, or the body of the slain man has been actually seen. It may be properly said that the murder of a man who has been thrown into the Loire and is not found has been witnessed.

[3] *Dupaty*, "Moyens de droit pour trois hommes condamnés à la roue," 1786, p. 117 *et seq.*

[4] *Muyart de Vouglans*, "Instit." pp. 308, 309: "This proof is so essential, that its place cannot be supplied either by the testimony of witnesses, or by mere presumptions and conjectures, whatever value these may otherwise have, not even by the accused's confession."

save in exceptional cases where such action was impossible.[1] This matter of minutes and experts' reports had been carefully regulated by the Ordinance (Tits. IV and V), and, strange to say, early judicial practice recognized the accused's right to demand a second inspection and report. "He is entitled to ask permission to have a second inspection made by other surgeons at his expense, which he easily obtains on his petition, provided he presents it within a few days after the first inspection."[2] In regard to those offenses which leave no lasting traces, "delicta facti transeuntes," slander, for instance, it was impossible to separate the establishment of the "corpus delicti" from the proof of guilt. In this case, certain authors, such as Jousse, declared that "the corpus delicti could not be proved at all"; others, including Muyart de Vouglans, stated that in such a case "proof of the 'corpus delicti' cannot be obtained otherwise than by the accused's confession added to presumptions and conjectures." But, fundamentally, these were merely different ways of expressing one and the same thing.

To establish the second point we have mentioned, namely, the guilt of the accused, the theory of proofs appeared to its fullest extent. The whole of the methods of proof, considered in regard to their value, were divided into three classes, *complete proofs*, *proximate presumptions*, and *remote presumptions*. Each of these classes comprised totally different methods. Only the complete proof was sufficient, unsupported, to ground a capital sentence. "When all the conditions laid down by the law are fulfilled, the proof is then deemed legal and complete, which is absolutely necessary to effect condemnation to capital punishment."[3] It could, however, be obtained, first, by testimony, second, by the production of documents, or third, by presumptions. Did the confession constitute a complete proof? That was not generally conceded.

[1] *Poullain du Parc*, vol. XI, p. 81: "It does not follow that the crime ought to go unpunished in every case where it is impossible to establish the 'corpus delicti.' But the judges should then proceed and judge with greater circumspection, because it may be that the crime is imaginary, as turned out in the case of Pivardière and in several others." p. 109: "When the 'corpus delicti' is not found, clear proofs are necessary of sufficient force as to make it possible, in a way, to say that the crime must have been committed."

[2] *Muyart de Vouglans*, "Inst." p. 226. It is true that the first inspection was often made at the request of the party prosecuting for civil amends before the judge took cognizance. The accused did not get production of the judge's minutes. *Poullain du Parc*, vol. XI, p. 90: "It is the invariable rule in Brittany that the accused shall not be summoned to the judge's minutes nor to the reports of the experts."

[3] *Ibid.*, "Inst. crim." p. 307.

First. Testimonial proof was naturally considered the proof "par excellence" in criminal cases, "it being impossible to prove the majority of crimes in any other way;" but numerous conditions had to be realized before this proof became complete. It was absolutely necessary that there should be *two witnesses* testifying to the same fact; that was the unquestioned tradition. "Testis unus, testis nullus," or as Loysel said, "Voice of one, voice of none." The testimony of a single witness was not regarded as being absolutely valueless, but it could not alone be the basis of a capital sentence;[1] "it is, generally speaking, certain that depositions of witnesses turning upon isolated and different facts can constitute no proof."[2] It was, besides, necessary that both witnesses should have been eye-witnesses, — "that they should have seen the accused committing the crime." *Hearsay* witnesses could never furnish a complete proof, whatever might be their number; nor those called "testes ex auditu proprio," who testified to "having heard the accused's threats and the cries of a person dying"; nor those styled "testes ex parte accusati," who claimed to have received from the accused the confession of his crime; nor "a fortiori" the mere hearsay witnesses, "testes ex auditu alieno."

That is not all. The witnesses had to make a decided deposition and give a reason for it. If they expressed themselves in qualified terms, as "I believe . . . if I am not mistaken . . . it might have been . . . if I remember rightly," they were called "vacillants" and "could not be used in criminal cases, such evidence not constituting even a presumption." The deposition must always have remained identical in every particular throughout the three examinations undergone by the witness, in the information, or preliminary inquiry, the confirmation, and the confrontation. We know, moreover, that the Ordinance had taken precautions to insure that at the confrontation at least no variation should be possible. Lastly, it was essential that the witnesses should be neither *incompetent* nor *objected to*. Although the use of the right of objection had been notably hampered in the procedure, judicial practice had, by way of counterbalance, multiplied the causes of objection: affection, fear, mortal enmity,

[1] A complete proof could not be drawn from the testimony of two isolated witnesses, that is, testifying to different facts, unless in the case of crimes "which are committed by repeated acts, such as incest, adultery, blasphemy, sodomy, peculation, concussion, usury, and theft." *Muyart de Vouglans.*

[2] *Muyart de Vouglans*, "Inst. crim." pp. 322, 323.

weakness from age and weakness of intellect, infamy, personal interest, relationship, and many other causes still, were all admitted. The list of persons subject to objection given by Muyart de Vouglans begins with relatives and ends with "paupers and beggars," whose testimony could be excluded in certain circumstances. When these two "raræ aves," the perfect witnesses, were met with, they inevitably entailed condemnation; the judge was bound thereby.

Second. Next to the testimonial proof came the written proof, much rarer in criminal cases — so rare, even, that certain law-writers maintained that it was an impossibility. Erroneous as this opinion is, it is comprehensible when we bear in mind that, in this system, there had to be direct evidence of the perpetration of the crime.[1] On a closer examination it was seen that there were certain crimes which could hardly be proved except by writing, "because they consist chiefly in the thought or the intent, such as heresy, confidence, plotting against the prince, usury, subornation of witnesses;" and others "where the testimonial and instrumental proof concur," such as forgery. In order that the writing, where it was thus admitted, should constitute a *complete proof*, it was first of all necessary "that it should be precise as to the fact of the crime; that is, in questions of insult, lewdness, subornation, or conspiracy, it was necessary that the facts should be expressly mentioned in the very document which it was proposed to produce against the accused. Consequently, if it was used only to draw inferences against the accused, it ceased from that time to be regarded as complete proof, and entered into the class of conjectural proofs."[2] In the second place, it was essential that the writing should be authenticated, or, if it was signed by the accused, that he should acknowledge it. This was implied by Article 5, Tit. XXIV, of the Ordinance of 1670. A verification of handwriting could never furnish a complete proof. "In effect," says Muyart de Vouglans, "in addition to the fact that the experts always explain themselves in a vague and uncer-

[1] *Muyart* recognized that there are numerous cases where testimonial evidence entirely excludes instrumental evidence, "as in the case of such crimes as slander, blasphemy, adultery, rape, or the coinage of false money." "Inst. crim." p. 327.

[2] *Muyart de Vouglans*, "Inst. crim." p. 330. — "It is essential that the document should *contain* and prove in a precise manner the fact in question, for if the passage does not expressly contain the crime or misdemeanor in question, and it is only used to draw inferences and deductions from, such proof can no longer be called complete documentary proof; it is merely a conjectural and imperfect proof." *Rousseau de Lacombe*, "Matières criminelles," p. 371.

tain manner in such phrases as, 'We believe, we consider,' everybody knows that their art is, of itself, subject to a multitude of errors."[1] — "If it is a private writing and requires to be judicially authenticated to be available against the accused, it is no longer properly a complete proof, since it is no longer the document which, by itself, proves the fact . . . so that it is nothing but a mere conjecture and a testimonial proof."[2] These qualifications were exceedingly reasonable; the art of the handwriting experts was uncertain, as it may be said to be still. In the draft discussed among the parlement officers and the commissioners in 1670, there was even an article in the following terms: "No sentence of afflictive or degrading punishment can be based on the deposition of experts alone, unsupported by other proofs, adminicles, or presumptions."[3] It was suppressed, upon the observation of M. Talon, that the judges "were only too circumspect in such matters, without there being any need to tie their hands."[4] But the theory remained, all the same, as it had been. In this system, the personal writings of the accused, even when he had acknowledged them, could never constitute full proof against him, for they could contain nothing more than an extra-judicial confession, and, as we shall see by and by, the judicial confession itself did not have that effect.[5]

Third. Complete proof could also result from *presumptions*, on condition, it must be understood, that the fact from which the inferences were to be drawn had itself to be sufficiently established, *i.e.*, by two eye-witnesses or by writing. Judicial practice had in fact kept some of these presumptions incontrovertible, as we have found them in the very ancient law; they were called *manifest and necessary* presumptions and they were often compared with the presumptions, "juris et de jure" of the civil law. The following is an example: "When in a case of manslaughter two witnesses not subject to objection testify to having seen the accused, with a naked and bloody sword in his hand, leaving the place where soon afterwards the body of the deceased has been found wounded by a sword blow."[6]

[1] *Muyart de Vouglans*, "Inst. crim." p. 330.

[2] *Rousseau de Lacombe*, "Matières criminelles," pp. 371, 372. *Cf. Poullain du Parc*, vol. XI, p. 191 *et seq.*

[3] This was Art. 15 of Title VIII.

[4] "Procès-verbal," p. 99.

[5] *Muyart de Vouglans*, "Inst. crim." p. 336. The Ordinance (Tit. IV, Art. 2; Tit. XIV, Art. 10; Tit. II, Art. 9) nevertheless provided that an inventory of the accused's papers should be made.

[6] *Ibid.*, "Inst. crim." p. 346. *Cf. Poullain du Parc*, vol. XI, p. 118: "The comparison of manifest presumptions with the presumption 'juris et de jure' does not appear to me to be warranted . . . evidence is very

The authorities were not in agreement as to the value as proof of the accused's confession made in court. Some of the most celebrated, Jousse, for instance, held to the ancient opinion according to which it was the proof "par excellence" and the most complete; "of all the proofs which can be had in criminal cases, the accused's confession is the strongest and most certain; consequently that proof is sufficient. . . . Such a confession is the most complete proof that could be wished for."[1] Jousse relied upon the authority of Bartolus, Paul de Castro, and Julius Clarus. He declared "that it could never be presumed, without subverting all the laws of nature, that a man would in cold blood accuse himself of a crime which he had not committed." He also cited in support of his opinion the formalities of the interrogations, so thoroughly regulated by the Ordinance, and asked if so much care would have been taken to obtain a confession, if it had not had a decisive value?[2] It was in reality these very formalities which prevented the ascription to the confession of its natural force. Jousse's opinion therefore remained a solitary one, and this was what was in general decided. In the case of a crime grave enough to entail capital or even merely afflictive punishment, the confession was not sufficient to ground such a sentence: "Nemo auditur perire volens;" it was essential that the confession should be corroborated by urgent presumptions or the deposition of a competent witness. That was Louet's[3] opinion, and, later, that of Domat[4] and of Duplessis.[5] The authors of the 1700s are no less

rarely admitted in rebuttal of the presumption 'juris et de jure,' while in criminal cases evidence is admitted in rebuttal of manifest presumptions." This evidence in rebuttal of which Poullain du Parc speaks consists, as he explains, of the justificative facts, lawful self-defense, for instance.

[1] *Jousse*, "Comm. sur l'Ordonn. de 1670," on Art. 5, Tit. XXV, Nos. 1 and 2.

[2] Jousse, however, only recognized the confession as a complete proof when the "'corpus delicti' is indubitable and properly verified by means of an inspection or an official report of the judge or by the deposition of witnesses." If, however, the crime was one of those "which could only be committed in the intention, such as heresy, in feelings not outwardly manifested . . . it being impossible to prove the 'corpus delicti,' the confession of the accused could not be sufficient to cause his condemnation." *Jousse*, p. 434.

[3] Letter C, No. 34.

[4] "Le droit public," Book III, Title I, "Concerning crimes and misdemeanors": "Although the accused acknowledges the crime (if it is a capital offense) the production of the evidence is not abandoned; for it would be unjust to condemn an innocent person on a false confession."

[5] "Réponse de Duplessis à Colbert sur le procès de la Voisin": "The bare confession by a criminal of his crime cannot effect his condemnation; but if, besides his confession, there is a single witness, that is sufficient. In the same way, if in addition to his confession there is some presumption, either real or arising from the deposition of even a single witness, that is sufficient for his condemnation." "Lettres, etc., de Colbert," vol. VI, App. p. 429.

explicit. "The confession from its nature cannot effect the condemnation to capital punishment; for that the concurrence of several other circumstances are necessary; . . . it must be accompanied by several weighty presumptions or the deposition of a competent witness."[1] — "The free and voluntary confession of the accused does not constitute a complete proof against him: 'Nemo non auditur perire volens.'"[2] Lastly, Serpillon disputes Jousse's opinion most respectfully, but at the same time most energetically.[3] If, on the contrary, a slight punishment was in question, it was admitted that the sentence could be grounded on the confession made in court, provided that the "corpus delicti" was conclusively established: "It is true that there are judgments which have sentenced the accused upon their confession alone, but to lighter punishments than the crimes deserved."[4]

The provisions of the Ordinance of 1670 were, however, perfectly in harmony with this theory. Article 5 of Title XXV provides "that criminal actions can be examined and judged although there are no informations, and if there is otherwise sufficient proof by the interrogations and by documents, either authenticated or acknowledged by the accused, and by the other presumptions and circumstances of the action." From this it is evident that to obviate recourse to testimonial evidence the culprit's confession was not, of itself, sufficient; it was still necessary to add to that the written proof or presumptions.[5] Article 17 of Title XIV provides that immediately after the appearance of the accused, and before proceeding further, "the interrogations shall be at once produced to our procurators or to those of the seigniors, to take law upon them or to make such motions as to them appear advisable;" and the authorities have always understood this provision to mean that if a crime meriting a severe punishment was in question, the motion, notwithstanding the confession, should not be for an immediate sentence. "If the crime should appear to him (the public prosecutor) to be a serious one, he moves for the criminal ruling of confirmation and confrontation; for in this case, even when the accused should have confessed to all the counts of the accusation on which he is charged, a full examination under the criminal forms is none the less necessary."[6] Finally, Article 19 of the same

[1] *Muyart de Vouglans*, "Inst. crim." p. 339.

[2] *Rousseau de Lacombe*, "Matières criminelles," p. 372.

[3] "Code criminel," p. 1012.

[4] *Serpillon, loc. cit.*

[5] "Real presumptions which naturally appear from the thing itself and do not arise from the testimonial evidence are here spoken of." *Duplessis* ("Lettre à Colbert," above cited).

[6] *Serpillon*, upon this article.

Title XIV is also in perfect harmony with the whole of this theory: it permits the accused of crime "for which he will not be liable to afflictive punishment" to "take law" on the charges after the interrogation. This power remotely recalls the plea of "guilty" of the English procedure; it was serviceable to the accused, by permitting him to avoid the delays of a criminal trial. It is conceivable that it did not exist unless there was a confession, but the confession was not enough; it was still necessary that the crime should be one not punishable by afflictive punishment; otherwise the procedure had to be followed through to the end. Although the ancient authorities have sometimes attempted to explain this rule in other ways, it is quite conceivable that although admitted in serious crimes the confession did not by any means constitute a complete proof. The importance of the confession was, nevertheless, considerable; added to what was called a proximate presumption, it constituted a real and sufficient proof; and these proximate presumptions were of much more frequent occurrence than complete proof.

The *proximate presumptions* were also called *half-proofs*. This term, against which Voltaire's common sense afterwards protested, was not adopted by all the jurists;[1] but it was, nevertheless, in use, and not without reason, considering the system of which it formed a part. The proximate presumptions could not, by themselves, justify a capital sentence of the accused. Some of them were strong enough, however, to make it seem very difficult to forbear from inflicting upon the guilty person the chastisement he deserved. If the voluntary confession had been obtained, that would have been possible; in default of a voluntary confession, a *forced* confession had to be obtained, and this was done by means of torture. The principal effect of proximate presumptions in grave accusations was, therefore, to permit of the administration of torture. This is declared in the clearest manner in the 1500s, the 1600s, and the 1700s. "Where there shall have been neither full nor entire proof against the accused, but there shall have been half-proof of the crime by a witness of notable standing and not of mean station, testifying to the principal fact, which witness shall be free from any objection or suspicion what-

[1] "Several authors have defined the half-proof as a means of taking the false for the true." *Denisart*, "Half-proof." — "There is no such thing as half-proofs; several of the authorities deprecate this expression. It is a barbarous and fictitious term; this is proved by the fact that not a single text on law mentions it. Half of the truth cannot be discovered; there is no such thing as a half-truth . . . half-proofs are as impossible as half-men." *Serpillon*, "Code criminel," p. 1074.

ever, or where there shall be strong conjectures and presumptions at least equivalent to the said half-full proof, not avoided or diminished by the proof which shall have been produced 'ex officio' for the justification of the accused, sufficient for the administration of torture, (the judge) shall proceed to the judgment of torture."[1] — "It is clear that every presumption constitutes a half-proof which may be sufficient to warrant the administration of torture."[2] — "There are some crimes of a nature deserving of capital punishment, and it is in regard to these in particular that the presumptions may give cause for torture."[3] So that this theory, apparently so favorable to the accused, resulted in rendering torture almost inevitable; it became the indispensable corollary of this system of proof.

Another means of arriving at a capital sentence had been to *add the presumptions together*, and this was admitted by certain jurisconsults: "If there were two weighty presumptions, each proved by two witnesses, they could unquestionably constitute complete proof, according to their quality . . . if these presumptions were of such a quality that a natural connection existed between them, uncontradicted, and they all belonged to the class of proximate and weighty presumptions, it might be said that they proved each other, and that the incomplete proofs in regard to each fact should be cumulated so as to constitute a perfect proof, which should be sufficient for a condemnation."[4] But the sufficiency of these combinations was, in general, denied. "The half-proof is no more conclusive than a half-truth; and, for the same reason that two uncertainties cannot make a certainty, two half-proofs cannot constitute a complete proof."[5]

Although the proximate presumptions were not sufficient to base a capital sentence, they permitted the judge to inflict "certain afflictive, degrading, or pecuniary punishments,"[6] if he deemed them strong enough for that purpose. But care was taken to add that "before imposing a punishment not commensurate with the

[1] "Pratique de Lizet," 1577, p. 28.
[2] *Duplessis*, "Lettre à Colbert," cited above.
[3] *Muyart de Vouglans*, "Inst. crim." p. 351.
[4] *Duplessis, loc. cit.*
[5] *Denisart*, "Half-proof."
[6] *Muyart de Vouglans*, "Inst. crim." pp. 346, 351. *Poullain du Parc* (vol. XI, p. 115) even shows that the judge can in such case sentence to the galleys for life: "The preparatory torture under reservation of proofs is more severe than the galleys for life; and since it can be decreed upon considerable evidence (although insufficient to base a capital sentence), it must necessarily follow that the judge can sentence to the galleys, however atrocious the crime may be, upon considerable evidence, when there is not enough to warrant a capital sentence. For the same reason, if the evidence is less considerable, the judge can modify the punishment."

character of the crime, for the reason that the evidence, although considerable, was not sufficient to sustain a capital sentence, it was necessary that the judges should have exhausted all the means indicated by the Ordinances for the proof and the investigation of the crime." [1]

Attempts were occasionally made to maintain that complete proof of atrocious crimes was not necessary for the capital sentence: "In atrocissimis leviores conjecturæ sufficiunt et licet judici jura transgredi." "Such a barbarous and absurd idea," says Poullain du Parc, "has never been entertained in France. It is the badge of tyranny and cruel despotism. The more atrocious the crime, the more terrible should be the punishment; consequently, the evidence against the accused should be so much the clearer in proportion to the atrocity of the crime with which he is charged." [2] What facts constituted proximate presumptions? Here again the Ordinance furnished no details. It merely declared that torture could only be administered where the crime was one deserving of capital punishment, and where there was a considerable amount of evidence, which, however, "was not sufficient." [3] This necessarily left a wide discretion to the judges. "The Ordinance not having determined in the article . . . the nature of the presumptions and circumstances which it proposes should constitute proof in criminal actions appears to have left the matter in the discretion of the judges." [4] — "When the witnesses do not testify to having seen the blow struck, and they furnish nothing but presumptive facts, it being possible that some of the presumptions may be more weighty and conclusive than others, and that the judges may be more impressed by some facts than by others . . . the matter usually lies in the judges' discretion." [5] Certain rules were, however, laid down by precedent.

Among the half-proofs we find, first of all, the testimonial proof, or *imperfect* writing, the deposition of a single eye witness, or personal writing verified by experts, and also the *extra-judicial* confession of the accused, when it was denied by him, but proved "by two competent witnesses," or by his "diaries and household papers." [6] Then in this category of proximate presumptive facts a crowd of presumptions began to be marshalled. Muyart

[1] *Poullain du Parc*, XI, p. 116.
[2] *Ibid.*, XI, p. 110. *Cf. Dupaty*, "Mémoire" and "Moyens de droit pour trois hommes condamnés à la roue," *passim.*
[3] Ordinance of 1670, Tit. XIX, art. 1.
[4] *Muyart de Vouglans*, "Inst. crim." p. 347.
[5] *Duplessis*, "Lettre à Colbert," cited above.
[6] *Muyart de Vouglans*, "Instit. crim." pp. 336, 350.

de Vouglans divides them into general presumptions and presumptions peculiar to certain crimes. He enumerates sixteen belonging to the former class, some of which are very curious; we find among them, "the status of the accuser, whether or not he is a person of standing, or the head of a house, in regard to offenses committed by his domestic servants;" the "status of the accused, whether or not he is a vagrant or a non-resident." The presumptions peculiar to certain crimes are specified with great care; the nomenclature of some of them would be laughable, if we did not catch a glimpse of the torture lurking behind them. Thus we find ranked among the proximate presumptions of the crimes of *magic* and of *sorcery* the following things: "If there have been found in the accused's house books or instruments relating to magic, such as sacrifices, human limbs, waxen images transfixed by needles, the bark of trees, bones, nails, locks of human hair, feathers intertwined in the form of a circle or nearly so, pins, embers, parcel of embers found at the head of children's beds . . ., 2d, If he has been seen placing anything in a stable, and the cattle therein have soon afterwards died, 3d, If a document has been found upon him containing a compact with the devil . . ., 7th, If those living in intimacy with the accused have been seen to change their abode immediately after his arrest . . ., 8th, If he has the name of the devil constantly upon his lips, and if he is in the habit of calling his own children or those of other people by that name." [1] This was written in the 1700s! Muyart de Vouglans adds, it is true: "All these presumptive facts might, according to the authorities, be a reason for torture, but we shall see, in treating of this crime (sorcery), with what circumspection the judge ought to behave in such a delicate matter and one which the inordinate credulity of the common people might cause to degenerate into dangerous superstition."

All the proximate presumptions could, as a rule, be the occasion for the administration of torture, provided they were themselves proved, and for that a single witness was sufficient. For a large number of half-proofs, however, it was necessary to add *a remote presumption* at least, in order to justify torture. At this point a third class of presumptions made their appearance, under the name of *adminicles;* these had only a corroborative value.[2] This was a very slender safeguard, for very little was required to give rise to remote presumptions. Muyart de Vouglans gives

[1] *Muyart de Vouglans*, "Instit. crim." p. 353.
[2] See *Muyart de Vouglans*, "Inst. crim." pp. 346, 350, 351.

the following examples of them: "The changeableness of the accused's discourse, the tremor of his voice, his uneasiness of mind, his taciturnity, . . . the proximity of the accused's house to the place where the crime was committed, . . . the accused's feigning deafness, or to have lost his mind or his memory when he is questioned, . . . the accused's bad expression, or the ill name he bears."[1] The remote presumptions had to be proved by two witnesses, or by the judge's minutes.

Certain authorities, however, showed themselves to be more exacting. "It cannot be too often repeated, that several presumptions in combination are necessary to furnish a considerable proof, such as is required by this article of the Ordinance.[2] The majority of the authorities require three presumptions; but manifest presumptions must be distinguished from remote presumptions; the former furnish necessary inferences from a certain fact, . . . an example of a manifest presumption is the case of two competent witnesses who testify to having seen the accused leave a place where a murder has just been committed carrying a naked and bloody sword; this presumption would appear to be 'luce clarior.'[3] For a sentence to torture, however, other presumptions called remote are also required, such as prior threats, proven enmity and such like 'adminicles,' unless, at all events, the accused was a vagrant or a person of bad reputation."[4] Duplessis holds a similar opinion. "Three kinds of presumptions are usually distinguished, namely: 1st, General and remote presumptions, as from the general bad conduct of the accused, if he has been already arrested for similar crimes; these can have little more effect than to put the judges on inquiry and merely arouse their suspicion; 2d, Nearer presumptions, which, however, are not immediately connected with the act, as, in homicide, where the accused was the mortal enemy of the person slain, or where he threatened him or boasted that he would kill him, etc.; these are somewhat stronger, but they are in no ways conclusive, and do not constitute even a half-proof; 3d, Proximate presumptions, immediately connected with the act, as, where a man has been slain in a house or in a wood, and at the same time the accused has been seen to leave the house or the wood in flight, with naked

[1] *Muyart de Vouglans*, "Instit. crim." p. 350.
[2] Art. 1, Tit. XIV, specifying the circumstances under which the sentence to torture can be passed.
[3] The classification here, compared with that of Muyart de Vouglans, would seem to carry the various presumptions down a step lower in the scale. *Cf. Poullain du Parc*, XI, p. 119.
[4] *Serpillon*, "Code criminel," p. 912.

and bloody sword. . . . These facts raise thoroughly conclusive presumptions that the accused has committed the crime, but still they are not absolutely irrebuttable; presumptions of this description go under the name of 'full presumptions,' and they usually constitute half-proof."[1] When all is said, it must be acknowledged that it was difficult to indicate with sufficient certainty the evidence upon which torture would be administered. "The difficulty is to ascertain what evidence should be regarded as considerable. What might come under that description when applied to a vagrant or other bad character ought not to be so considered when the accused is domiciled and of good character; consequently nothing is so arbitrary or difficult to settle. It depends upon the place, the time, the status of the persons concerned, and a multitude of other circumstances."[2]

Remote presumptions, unsupported, permitted the judge to pronounce pecuniary punishments, or a "further inquiry"; he could also, if there was a party prosecutor for civil reparation, send the action to the civil side. "And where by the proceedings there has been neither full nor half-full proof, but merely some presumptions or conjectures less than the said half-full proof and not sufficient for the administration of torture, and a likelihood resulting from the proceedings that the complainant in a criminal case could more fully prove and verify the crimes charged by him against the accused in a civil action, in such a case, if the judge has done all that could and should be done to end the criminal action, he should refer the parties to a civil action."[3] — "When there are only strong presumptions, their force can determine nothing but pecuniary punishments, if the judge does not enter an adjournment 'quosque,' that is to say, for 'further inquiry.'"[4]

In the midst of these waverings and hesitations, one point remained certain and acknowledged on all hands, namely, that a sentence of capital punishment was impossible in the absence of a complete proof; and it was exceedingly difficult to procure one. Except where that had been obtained, it was essential to add to weighty presumptions the confession of the accused. To this end two powerful mechanisms were organized; one was the interrogation — subtle and secret — where the accused, without the opportunity of pleading any defense, was obliged to swear to reveal the truth, and by which the so-called voluntary confession was obtained; the other was torture, by which the *forced confes-*

[1] *Duplessis, loc. cit.*
[2] *Serpillon*, "Code crim." p. 911.
[3] "Pratique de Lizet," p. 28.
[4] *Poullain du Parc*, vol. XI, p. 116.

sion was extorted. That was the end and aim of the system of legal proofs; and in the supposed necessity for a confession must be found the real reason for the maintenance and continuance of torture. This is most explicitly stated by Muyart de Vouglans. "The reasons which appear to necessitate its authorization are based upon the fact that it being often impossible to obtain a full conviction of the crime, either by the depositions of witnesses or by documents, or by presumptions, which rarely concur in such a way as to constitute that proof, clearer than day, which is essential for a condemnation, there would be no less injustice in sending away absolved the person who is otherwise suspected of crime, than there would be in condemning him who is not completely proven guilty; not to mention the fact that the welfare of humanity demands that crime should not remain unpunished. It is for that reason that, in the absence of other means of arriving at this complete proof, we are obliged to torture the body of the accused." [1] Unsympathetic remarks such as these are not surprising, coming from Muyart de Vouglans, who invariably constituted himself the advocate of this odious procedure; but they expressed a logical necessity which imposed itself without discrimination on all. "In the perplexity in which the judges find themselves," says Poullain du Parc, "when they see very strong presumptions against an accused, and when all the means of proof are exhausted, they are driven to the resource of the preparatory torture." [2] And this is what Serpillon, who himself had begun to protest against torture, has to say: "About twenty-five years ago we were still *compelled* to sentence to the preparatory torture the notorious Auribaut, of the parish of Planché-en-Nivernois, accused of about a dozen crimes, the majority of which were murders on the highways. Without this not a single one of them would have been fully proved." [3] By what was Serpillon "compelled"? By the theory of legal proofs.

There might, however, remain to the accused one last resource. If he resisted the torments of the torture without confessing, the accusation was doubtless completely purged, and the strong presumptions which had made the administration of the torture possible were totally obliterated. But this last hope might prove to be a vain one; there was such a thing as *torture under reservation of proofs*. Then, although the accused, by dint of constancy, refused any confession, it was possible, nevertheless, by virtue of

[1] "Inst. crim." p. 341.
[2] Volume XI, p. 114.
[3] "Code criminel," p. 909.

the presumptions, to sentence him to some punishment other than death. The use of torture under reservation of proofs is of very ancient date. Imbert describes it in the following extraordinary language. After saying that there are criminals "so wily and malicious that whatever they have confessed under torture, they altogether deny when they are questioned next day," he adds: "For which reason, when the judge sees that there is not sufficient proof to justify corporal punishment, but merely pecuniary punishment, in order that he may not, by denying everything obtained by torture, elude the pecuniary punishment which he ought to suffer, he orders that the delinquent be put to the torture, without the presumptions resulting from the prior proceedings being purged on that account. For although capital punishment or other serious corporal punishment ought not to be based upon presumptions, even though unquestionable, pecuniary punishment and some slight corporal punishment can always be adjudged." [1] Would not the appropriate inscription above the doors of the criminal courts have been: "Abandon hope, all ye who enter here"?

[1] "Pratique," Book III, ch. XIV (p. 739).