applied as not to injure life or limb. If so applied the judge was *infamis.* The examination was not to begin by torture; other proofs must be exhausted first\* The evidence@@1 must have advanced so far that nothing but the confession of the slave was wanting to complete it. Those of weakest frame and tenderest age. were to be tortured first. Except in treason, the unsupported testimony of a single witness was not a sufficient ground for torture. The voice ana manner of the accused were to be carefully observed. A spon­taneous confession, or the evidence of a personal enemy, was to be received with caution. Repetition of the torture could only be ordered in case of inconsistent depositions or denial in the face of strong evidence. There was no rule limiting the number of repetitions. Leading questions were not to be asked. A judge was not liable to an action for anything done during the course of the eχamina- tion. An appeal from an order to torture was competent to the accused, except in the case of slaves, when an appeal could be made only by the master.@@2 The appellant was not to be tortured pending the appeal, but was to remain in prison.@@'1 The *quaesitor* asked the questions, the *tortores* applied the instruments. The principal forms of torture in use were the *equuleus,* or rack (mentioned as far back as Cicero),@@4 the *plumbatae,* or leaden balls, the *ungulae* or barbed hooks, the *lamina,* or hot plate, the *mala mansio*,@@5 and thé *fidiculae,* or cord compressing the arm. Other allusions in the *Digest* and *Code,* in addition to those already cited, may be shortly noticed. The testimony of a gladiator or infamous person (such as an accomplice) was not valid without torture.@@6 This was no doubt the origin of the medieval maxims (which were, however, by no means universally recognized)—*Vilitas personae est justa causa torquendi festem,* and *Tortura purgatur infamia.* Torture could not be inflicted during the forty days of Lent.@@7\* Robbers and pirates might be tortured even on Easter day, the divine pardon being hoped for where the safety of society was thus assured.@@8 Capital punish­ment was not to be suffered until after conviction or confession under torture.@@® Withdrawal from prosecution *(abolitio)* was not to be allowed as a rule after the accused had undergone the torture.@@10 In charges of treason the accuser was liable to torture if he did not prove his case.@@11 The infliction of torture, not judicial, but at the same time countenanced by law, was at one time allowed to creditors. They were allowed to keep their debtors in private prisons, and most cruelly ill-use them, in order to extort payment.@@12 Under the empire private prisons were forbidden.@@1\* In the time of Juvenal the Roman ladies actually hired the public torturers to torture their domestic slaves.@@14 As a part of the punishment torture was in frequent use. Crucifixion, mutilation, exposure to wild beasts in the arena and other cruel modes of destroying life were common, especially in the time of the persecution of the Christians under Nero.@@14\* Crucifixion as a punishment was abolished by Constantine in 315, in veneration of the memory of Him who was crucified for mankind. On the other hand, where the interests of the Church were concerned the tendency was in favour of greater severity. Thus, by the Theodosian Code, a heretic was to be flogged with lead *(contusus plumbo)* before banishment,@@κ and Justinian made liable to torture and exile any one insulting a bishop or priest in a church, or saying litany, if a layman.@@17

The *Leges barbarorum* are interesting as forming the link of connexion between the Roman and the medieval systems. Through them the Roman doctrines were transmitted into the Roman law countries. The barbarian codes were based chiefly on the Theodosian Code. As compared with Roman law there seems to be a leaning towards humanity, *e.g.* the provision for redemption of a slave after confession by s. 40 of the *Lex salica.* After the edict of Gundobald in 501 the combat rather than the torture became the expression of the *judicium Dei.*

*The Church.—*As far as it could the Church adopted the Roman law. The Church generally secured the almost entire immunity of its clergy, at any rate of the higher ranks, from torture by civil tribunals;@@t8 but in general, where laymen were concerned all persons were equal. In many instances councils of the Church pronounced against torture, *e.g.* in a synod at Rome in 384.@@19 Torture even of heretics seems to have been originally left to the ordinary tribunals. Thus a bull of Innocent IV., in 1282, directed the torture of heretics by the civil power, as being robbers and murderers of souls, and thieves of the sacraments of God.@@2υ The Church also enjoined torture for usury.@@1 A characteristic division of torture, accepted by the Church, but not generally acknowledged by lay authorities, was into spiritual and corporal, the latter being simply the imposition of the oath of purgation, the only form originally in use in the ecclesiastical courts. The canon law contains little on the subject of torture, and that little of a comparatively humane nature. It laid down that it was no sin in the faithful to inflict torture,@@22 but a priest might not do so with his own hands,@@23 and charity was to be used in all punishments.@@24 No confession was to be extracted by torture@@26 and it was not to be ordered *indiciis non praeeedentibus@@\*j* The principal ecclesiastical tribunal by which torture was inflicted in more recent times was the Inquisition. The code of instructions issued by Torquemada in Spain in 1484 provided that an accused person might be put to the torture if *semiplena probatio* existed against the accused—that is, so much evidence as to raise a grave and not merely a light presump­tion of guilt, often used for the evidence of one eye or ear witness of a fact. If the accused confessed during torture, and afterwards confirmed the confession, he was punched as convicted; if he retracted, he was tortured again, or subjected to extraordinary punishment. One or two inquisitors, or a commissioner of the Holy Office, were bound to be present at every examination. Owing to the occurrence of certain cases of abuse of torture, a decree of Philip II. was issued, in 1558, forbidding the administration of torture without an order from the council. But this decree does not appear to have been fully observed. By the edict of the inquisitor-general Valdés, in 1561, torture was to be left to the prudence and equity of the judges. They must consider motives and circumstances before decreeing torture, and must declare whether it is to be employed *in caput proprium, i.e.* to extort a confession, or *in caput alienum, i.e.* to incriminate an accomplice. Torture was not to be decreed until the termination of the process and after defence heard, and the decree was subject to appeal, but only in doubtful cases, to the Council of the Supreme. It was also only in doubtful cases that the inquisitors were bound to consult the council; where the law was clear (and of this they were the judges) there need be no consultation, and no appeal was allowed. On ratification twenty-four hours afterwards of a confession made under torture, the accused might be reconciled, if the inquisitors believed him to be sincerely repentant. If convicted of bad faith he might be relaxed, *i.e.* delivered to the secular power to be burned. The inquisitors had a discretion to allow the accused to make the canonical purgation by oath instead of undergoing corporal torture, but the rule which allows this to be done at the same time discountenances it as fallacious. It is remarkable that the rules do not allow much greater efficacy to torture. They speak of it almost in the terms of Roman law as dangerous and uncertain, and depending for its effects on physical strength.@@27 Torture had ceased to be inflicted before the suppression of the Inquisition, and in 1816 a papal bull decreed that torture should cease, that proceedings should be public, and that the accuser should be confronted with the accused. The rules in themselves were not so cruel as the construction put upon them by the inquisitors. For instance, by Torquemada’s instruc­tions torture could not be repeated unless in case of retractation. This led to the subtlety of calling a renewed torture a continuation,

*@@@*1 The evidence on which the accused might be tortured was expressed in Roman law by the terms *argumentum* and *indicium* (used technically as early as Cicero, *Verres,* i. 10 and 17). The latter term, as will be seen, afterwards became one of the most important in the law of torture, but the analysis of *indicium* is later than Roman law. *Indicium* was not quite the same thing as *semi­plena probatio,* though the terms appear to be occasionally used as synonyms. *Indicium* was rather the foundation or cause of *probatio,* whether *plena* or *semiplena.* An *indicium* or a concurrence of *indicia* might, according to circumstances, constitute a *plena* or *semiplena probatio.* The phrase *legitima indicia* was sometimes used, ln Sir T. Smith’s work, c. 24 (see below), *index* means a prisoner acting as an approver under torture. *Tormentum, tortura* and *quaestio* appear to be equivalent terms. The medieval jurists derived the first of these from *torquere mentem,* an etymology as false as *testamentum* from *testatio mentis (Inst.* ii. 10 pr.).

*@@@1 Dig.* xlix. i. 15.

*@@@, Cod.* vii. 62, 12.

*@@@4 Milo,* lvii.

*@@@*s Of doubtful meaning, but perhaps like the “ Little Ease ” of the Tower of London.

*@@@β Dig.* xxii. 5, 21, 2.

*@@@7 Cod.* iii. 12, 6.

*@@@*8 Ibid, iii. 12, 10.

*@@@*9 Ibid. ix. 47, 16.

*@@@*ιc Ibid. ix. 42, 3.

*@@@*11 Ibid. ix. 8, 3.

*@@@*12 See, for instance, Livy vi. 36.

*@@@1, Cod.* i. 4, 23; ix. 5.

*@@@*14 Ibid. vi. 480.

*@@@*15 As an example of such punishments, cf. the well-known lines of Juvenal *(Sat.* 1. 155):—

“ Taeda lucebis in illa,

Qua stantes ardent qui fixo gutture fumant.”

For other poetical allusions, see vi. 480, xiv. 21; Lucr. iii. 1030; Propert. iv. 7, 35.

*@@@*16 xvi. 53.

*@@@π Nov.* cxxiii. 31. On the subject of torture in Roman law reference may be made to Wasserscheben, *Historia quaestionum per tormenta apud Romanos* (Berlin, 1836); H. Wallon. *Histoire de Γesclaυage dans l'antiquité* (Paris, 1879); Mommsen, *Komisches*

*Strafrecht,* iii*.* 5 (Leipzig, 1899); Greenidge, *Legal Procedure of Cicero's Time,* p. 479 (Oxford, 1901).

*@@@*18 See Escobar, *Theol. Mor.* tract, vi. c. 2. They were to be tortured only by the clergy, where possible, and only on *indicia* of special gravity.

*@@@*19 Lea, *Superstition and Force,* p. 419 (3rd ed., Philadelphia, 1878).

*@@@20 Leges et constitutiones contra haereticos,* § 26.

*@@@*21 Lecky, *Rationalism in Europe,* ii. 34.

*@@@22 Decretum,* pt. ii. 23, 4, 45.

*@@@*2a Ibid. pt. i. 86, 25.

*@@@*24 Ibid. pt. ii. 12, 2, 11.

*@@@*26 Ibid. pt. ii. 15, 6, 1.

*@@@2β Decretals,* v. 41, 6.

*@@@*27 the rules will be found in H. C. Lea, *Hist. of the Inquisition of Spain* (1906). See also *Hist. of the lnquisition of the Middle Ages* (New York, 1888) by the same writer; R. Schmidt, *Die Herkunft des Inquisitionsprocesses* (Berlin, 1902).