*Territory of New Mexico* v. *Ketchum,* 65 Pacific Rep. 169 (death penalty for train robbery held not unconstitutional).

*Continental European States.*—These fall into four main groups, the Latin, Teutonic, Scandinavian and Slav states respectively. The principles of Roman law were generally adopted in the first and second groups.

*Latin States*.—In France torture docs not seem to have existed as a recognized practice before the 13th century. From that period until the 1 7th century it was regulated by a series of royal *ordonnances* at first of local obligation, afterwards applying to the whole kingdom. Torture was used only by the royal courts, its place in the seigneurial courts being supplied by the judicial combat. The earliest *ordonnance* on the subject was that of Louis IX. in 1254 for the reformation of the law in Languedoc. It enacted that persons of good fame, though poor, were not to be put to the question on the evidence of one witness.@@1 Numerous other provisions were made between 1254 and 1670, when an *ordonnance* was passed under Louis XIV., which regulated the infliction of torture for more than a century. Two kinds were recognized, the *question préparatoire* and the *question préalable.* The first was used where strong evidence of a capital crime—strong, but of itself insufficient for conviction—was produced against the accused. The second was used to obtain, a confession of accomplices after conviction. There was also a mitigated torn called the presentment, in which the accused was simply bound upon the rack *in terrorem* and there interrogated. No person was exempt on the ground of dignity, but exemption was allowed to youths, old men, sick persons and others. Counsel for the accused were usually not allowed. The *question préparatoire* was abolished by royal decree in 1780, but in 1788 the parliaments refused to register a decree abolishing the *préalable.* But torture of all kinds was abolished by an *ordonnance* in 1789. The Declaration of Right in 1791 (art. viii.) affirmed that the law ought not to establish any punishments other than such as are strictly and evidently necessary. In modern law the *code pénal* enacts that all criminals shall be punished as guilty of assassination who for the execution of their crimes employ torture.@@2 The code also makes it punishable to subject a person under arrest to torture.@@8 The theory of *semiplena probatio* was worked out with more refinement than in other systems. In some parts of France not only were half-proofs admitted, but quarters and eighths of proofs.@@4 Among the numerous cases of historical interest were those of the Templars in 1307, Villon about 1457, Dolet in 1546, the marquise de Brinvilliers in 1676 and Jean Calas in 1762.@@6

The law as it existed in Italy is contained in a long line of authorities chiefly supplied by the school of Bologna, beginning with the *glossatores* and coming down through the *post-glossatores,* until the system attained its perfection in the vast work of Farinaccius, written early in the 17th century, where every possible question that could arise is treated with a revolting completeness. One of the earliest jurists to treat it was Cino da Pistoia, the friend of Dante.@@β He treats it at no great length. With him the theory of *indicia* exists only in embryo, as they cannot be determined by law but must be at the discretion of the judge. Differing from Bartolus, he affirms that torture cannot be repeated without fresh *indicia.* The writings of jurists were supplemented by a large body of legis­lative enactments in most of the Italian states, extending from the constitutions of the emperor Frederick II. down to the 18th century. It is not until Bartolus (1314-1357) that the law begins to assume a definite and complete form. In his commentary on book xlviii. of the *Digest* he follows Roman law closely, but introduces some further refinements: *e.g.* though leading questions may not be asked in the main inquiry they are admissible as subsidiary. There is a beginning of classification of *indicia.* A very full discussion of the law is contained in the work on practice of Hippolytus de Marsiliis,@@7 a jurist of Bologna, notorious, on his own admission, as the inventor of the torture of keeping without sleep. He defines the question as *inquisitio veritatis per tormenta et cordis dolorem,* thus recognizing the mental as well as the physical elements in torture. It was to be used only in capital cases and atrocious crimes. The works of Farinaccius and of Julius Clarus nearly a century later were of great authority from the high official positions filled by the writers. Farinaccius was procurator-general to Pope Paul V., and his discussion of torture is one of the most complete of any.@@® It occupies 251 closely printed folio pages with double columns. The length at which the subject is treated is one of the best proofs

of the science to which it had been reduced. The chief feature of the work is the minute and skilful analysis of *indicia, fama, prae- sumptio,* and other technical terms. Many definitions of *indicium* arc suggested, the best perhaps being *conjectura ex probabilibus et non necessariis orta, a quibus potest abesse veritas sed non υerisimilitudo.* For every infliction of torture a distinct *indicium* is required, A single witness or an accomplice constitutes an *indicium.* But this rule does not apply where it is inflicted for discovering accomplices or for discovering a crime other than that for which it was originally inflicted. Torture may be ordered in all criminal cases, except small offences, and in certain civil cases, such as denial of a *depositum,* bankruptcy, usury, treasure trove, and fiscal cases. It may be inflicted on all persons,' unless specially exempted (clergy, minors, &c.), and even those exempted may be tortured by command of the sovereign. There are three kinds of torture, *levis, gravis* and *gravissima,* the first and second corresponding to the ordinary torture of French writers, the last to the extraordinary. The extraordinary or *gravissima* was as much as could possibly be borne without destroying life. The judge could not begin with torture; it was only a *subsidium.* If inflicted without due course of law, it was void as a proof. the judge was liable to penalties if he tortured without proper *indicia,* if a privileged person, or if to the extent that death or permanent illness was the result. An immense variety of tortures is mentioned, and the list tended to grow, for, as Farinaccius says, judges continually invented new modes of torture to please themselves. Numerous casuistical questions are treated at length, such as, what kinds of reports or how much hearsay evidence constituted fame? Were there three or five grades in torture? Julius Clarus of Alessandria was a member of the council of Philip II. To a great extent he follows Farinaccius. He puts the questions for the consideration of the judge with great clearness. They are—whether (1) a crime has been committed, (2) the charge is one in which torture is admissible, (3) the fact can be proved other­wise, (4) the crime was secret or open, (5) the object of the torture is to elicit confession of crime or discovery of accomplices. The clergy can be tortured only in charges of treason, poisoning and violation of tombs. On the great question whether there are three or five grades, he decides in favour of five, viz. threats, taking to the glace of torment, stripping and binding, lifting on the rack, racking.@@9 Other Italian writers of less eminence have been referred to for the purposes of this article. The burden of their writings is practically the same, but they have not attained the systematic perfection of Farinaccius. Citations from many of them are made by Manzoni (see below). Among others are Guido de Suzara, Paris de Puteo, Aegidius Bossius of Milan, Casonus of Venice, Decianus, Follerius and Tranquillus Ambrosianus, whose works cover the period from the 13th to the end of the 17th century. The law depended mainly on the writings of the jurists as interpreters of custom. At the same time in all or nearly all the Italian states and colonies@@10 the customary law was limited, supplemented, or amended by legislation. That a check by legislative authority was necessary appears from the glimpses afforded by the writings of the jurists that the letter of the Taw was by no means always followed. The earliest legislation after the Roman law seems to be the constitutions of the emperor Frederick II. for Sicily promulgated in 1231. Torture was abolished in Tuscany in 1786, largely owing to the influence of Beccaria, whose work first appeared in 1764, and other states followed, but the *puntale* or piquet seems to have existed in practice at Naples up to 1859.

Several instances of the torture of eminent persons occur in Italian history, such as Savonarola, Machiavelli, Giordano Bruno, Campanella. Galileo appears to have only been threatened with the *esame rigoroso.* The historical case of the greatest literary interest is that of the persons accused of bringing the plague into Milan in 1630 by smearing the walls of houses with poison. An analysis of the case was undertaken by Verri@@11 and Manzoni,@@12 and puts in a clear light some of the abuses to which the system led in times of popular panic. Convincing arguments are urged by Manzoni, after an exhaustive review of the authorities, to prove the groundlessness of the charge on which two innocent persons underwent the torture of the *canape,* or hempen cord (the effect of which was partial or complete dislocation of the wrist), and afterwards suffered death by breaking on the wheel. The main arguments, shortly stated, are these, all based upon the evidence as recorded, and the law as laid down by jurists. (1) The unsupported evidence of an accomplice was treated as an *indicium* in a case not one of those exceptional ones in which such an *indicium* was sufficient. The evidence of two witnesses or a confession by the accused was neces­sary to establish a remote *indicium,* such as lying. (2) Hearsay evidence was received when primary evidence was obtainable. (3) The confession made under torture was not ratified afterwards. (4) It was made in consequence of a promise of impunity. (5) It was of an impossible crime.

*@@@1 Ordonnances des rois,* i. 72.

*@@@*2 s. 303.

*@@@*, s. 344.

*@@@*4 See Pollock and Maitland, ii. 658, note.

*@@@*8 On the French system generally see Imbertus, *Institutiones forenses gallicae* (Utrecht, 1649); N. Weiss, *La Chambre ardente, 1540-1550* (Paris, 1889). A large number of authorities deal mainly with the *ordonnance* of 1670; Muyart de Vouglans, *Inst. crim.* (Paris, 1767), and Jousse, *Traité de la justice crim.* (Paris, 1771), are examples. F. Siegneux de Correvon, *Essai sur l'usage, l'abus, et les inconvéniens de la torture* (Geneva, 1768), is one of the opponents of the system.

*@@@*β Cinus Pistorensis, *Super codice, de tormentis* (Venice, 1493).

*@@@7 Practica criminális quae Averolda nuncupatur* (Venice, 1532).

*@@@8 Praxis et theorica criminalis,* bk. ii. tit. v. quaest. 36-51 (Frankfort, 1622).

*@@@9 Practica criminalis finalis* (Lyons, 1637).

*@@@*10 It is obvious from the allusion at the end of *Othello* that Shake- speare regarded torture as possible in Cyprus when it was a Venetian colony.

*@@@11 Osservazioni sulla tortura.*

*@@@12 Storia della Colonna infame.* Neither writer alludes to Beccaria.