From a very early period in the history of the common law the two most important methods of beginning a criminal prosecution have been the procedure by way of Presentment and Indictment, and the procedure by way of Criminal Information. The criminal information is almost as old as the indictment, and, like it, it has been affected by the course of the political and constitutional history of the English State. Nor is the antiquity of these criminal informations surprising; for the idea underlying the procedure by information, criminal or civil, came very naturally to the centralized royal justice of the thirteenth century. It was a very natural mode of putting the law in motion that the King by his counsel should inform his courts of some fact which had legal consequences. Thus, if some one had got possession of property to which the King was entitled, or had committed some offence, the King could inform his courts, and ask them to act. Moreover such a procedure was in accord with the ideas of an age which considered that all men, including the King, were subject to law. The mediæval King was no Austinian sovereign who could motu mero assert his rights or punish those who had broken his laws. He must take the proper steps to see that the law which had been broken was enforced; and the natural way to do that was to inform his courts.

But naturally this vague general notion of an information developed as time went on. It is, so to speak, caught up into the technical procedure of the common law, the different cases in which the King may

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proceed by information are classified, and thus we get many different kinds of information each governed by its own technical rules. Further complications arose from the fact that this procedure by information was taken up and developed on somewhat different lines by the Common Law Courts, by the Council and Star Chamber, and by the Court of Chancery. The Council allowed other persons besides the King by his counsel to give information to the Court, on which it could be asked to take action; and this idea was taken up and largely developed by the legislature. Many penal statutes were enforceable by qui tam informations as well as by qui tam actions; and the abuses arising from these invitations to informers to take these proceedings had given rise to legislation in Elizabeth and James I.'s reigns. In one case this procedure by information was extended in a manner analogous to some of the extensions of the action of trespass. On account of the greater convenience of this procedure the old writ of quo warranto was in the sixteenth century superseded by an information in the nature of a quo warranto.

It is not therefore surprising to find that in the developed common law there are many kinds of informations. Firstly, there are the informations by which the Crown asserts its right to money or chattels, or to damages for an intrusion on lands belonging to the Crown, and the information in rem by which property seized as having no owner was adjudged to belong to the Crown. To these informations at common law by Latin bill were added later informations in equity by English bill. All of these informations were essentially civil proceedings. Secondly, there is the information in the nature of a writ of quo warranto which superseded the old writ. It was originally a criminal proceeding designed to punish the usurper of a franchise as well as to seize the franchise for the Crown. But, in the course of the sixteenth and seventeenth cent-

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uries, it developed into a purely civil proceeding, and it is now enacted that it shall be so exclusively regarded. Thirdly, there is the criminal information. These fall under two heads—those brought by a subject on a penal statute on behalf of himself and the Crown, which "are a sort of qui tam actions, only carried on by a criminal instead of a civil process"; and those brought solely at the suit of the King. The latter variety again fall under two heads: "first, those which are truly and properly his own suits, and filed _ex officio_ by his own immediate officer, the Attorney-General: secondly, those in which, though the King is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the King's coroner and attorney in the Court of King's Bench, usually called the Master of the Crown Office, who is for this purpose the standing officer of the public."

It is with the informations falling under this third head that I am dealing here. But since this classification of informations is the result of a long historical development, it will be necessary, in tracing the history of these criminal informations, to say something of the other informations which have become distinct varieties. As I said at the outset, their history has been coloured by political and constitutional influences coming from different periods in the history of the law; and, as has happened with other institutions of English law, the legality of _ex officio_ informations was made a matter of constitutional and legal controversy at the end of the seventeenth and in the eighteenth centuries. It will be necessary therefore in tracing their history to follow a chronological arrangement. I shall deal firstly with the mediæval and early Tudor period; secondly with the seventeenth century; and

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4 Bl. Comm. iii 262, IV 307-8; Holdsworth. Hist. of Eng. Law. (3rd ed.) i. 230; the proceedings on this information were regulated by 9 Anne, c. 20.

5 47, 48 Victoria, c. 61. s. 15.

6 Bl. Comm. IV 303.

7 Ibid. 304.
thirdly with the settlement of the modern law in the seventeenth and eighteenth centuries.

(i) The Mediæval and Early Tudor Period.

It seems to be quite clear that in Edward I.'s reign the King could, by information to his Court, put a man on his trial for treason or felony. But, probably before the close of the mediæval period, this right to put a man on his trial by information, without the process of presentment and indictment, had been restricted to offences under the degree of felony, that is, to misdemeanours. It is, I think, probable that we must look for the cause of this restriction to the extensive use made by the Council of the process of information, and to the mediæval statutes passed to restrict the jurisdiction of the Council in Criminal cases. There seems to be no doubt that the Council habitually proceeded criminally against persons on the information, not only of the King and his counsel, but also of any private person. The decay of the criminal appeal had created the want for a criminal proceeding begun at the suit of the injured person; and though the action of trespass helped to fill this gap, there was room for this other expedient of an information to the Council. But, considering the way in which all the forms of law were abused by the litigious and unscrupulous in the latter part of the mediæval period, it was inevitable that this procedure should be turned to evil uses. And "as the proceedings were secret, the way was opened for all kinds of false and malicious accusations." But it was this abuse of the Council's procedure, coupled with the professional jealousy of the common lawyers, which led Parliament to pass that ser-

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8 P. and M. ii. 658-9, and the references cited 659 n. 1 (1st ed.).
9 For these statutes and their effect see Holdsworth, Hist. Eng. Law (3rd ed.) i. 487-488.
10 Baldwin, the King's Council, 286; Select Cases before the King's Council (S.S.) XXXVI-VIII.
12 Select Cases before the Council (S.S.) XXXVII.
14 Baldwin, the King's Council, 286.
ies of statutes which effectually debarred the Council from hearing capital cases. It is reasonable therefore to conjecture that this restriction of the sphere of the information to offences under the degree of felony in cases coming before the Council reacted on the proceedings at the suit of the Crown by way of information in the common law courts. There can be little doubt that the sphere of informations was thus restricted in the mediæval period, and later; but it would be as difficult to find an express authority for it as to find an authority for the equally obvious proposition that the Council, certainly in the Tudor period and probably from the latter part of the fourteenth century, had no jurisdiction to try a case of treason or felony. Perhaps this lack of express authority lends further probability to the view that the restriction on the competence of the information at the King's suit in the common law courts, is connected with this legislation which insisted, as against the Council, that accusations for capital offences must be begun by presentment and indictment.

There is however no reason to think that the King was unable to proceed by information for offences under the degree of felony. It is clear that in civil cases he could proceed by information to recover property to which he was entitled. It is clear, too, that he could proceed in this way in the Exchequer for customs duties which had not been paid; and it would seem that there are a series of precedents, which Hale recognized to be authorities, showing that an information also lay for such offences as nuisance, contempt, resews, and the like. There are also cases of infor-

15 Thus Hawkins, P.C. ii 260 can only say, "I do not find it anywhere held that such an information will lie for any capital crime or for misprison or treason"; and he only cites so recent an authority as Shower's argument in R. v. Berchet (1690), 1 Shower at pp. 109-10.
16 Above.
17 See e.g. Reniger v. Fogossa (1549), Plowden, 1.
18 See the cases cited from the Hale MSS. in Lincoln's Inn. 1 Shower at pp. 118-9; cp. Y. B. 39 Hy. VI Hil. pl. 4 (p. 41) = Brook Ab. Surmise, pl. 3.
mations for trespass, maintenance, champerty, and forestalling. It is true that there are certain cases in the fourteenth century in which, because the King had sued by ordinary writ, it was argued that he need not be answered, because he should have proceeded by indictment. But the cases are conflicting; and if they mean anything it would seem they intend only to assert the proposition that, though the King can sue for a wrong done to himself by ordinary writ, he cannot, merely because A. has sued B. for a wrong, himself take proceedings by writ for that wrong. He must prove by presentment and indictment or in some other way that the wrong has been done; and in the last sentence of the Y.B. of 7 Edward III. it seems to be admitted that he can take proceedings for a trespass without indictment. It is true also that there are other cases in which it was decided that certain commissions issued from the Chancery to take a man and his goods, without indictment or suit of the party or other due process, were void. We shall see that both

19 Shower, 117, 118.
21 See Y.B. 5 Ed. III. Trin. pl. 19.
22 In Y.B. 7 Ed. III Trin. pl. 12, the king sued a sheriff on a statute of Edward II's reign: "Hill. Sir nous entendons que le Roy ne voet estre respondu a cesty bref, sans cee qu'il fuist aprise de cee per enditement ou en auter maner. Parning. Le Roy est aprise per le suggestion de Thomas, et tout fuist le bref Thomas abatu, le Roy voet estre response. Herle. En Eire le Roy ne mettra nul home a responde a chose fait encontre les articles, s'il ne soit aprise per enditement, ou per process, etc., mez en cas ou le Roy pretz son accion de tort fait a luy meme, de que auter n'ad accion forisque le Roy, en tiel cas le Roy serra rescu tout sans estre aprise; mes la ou le Roy pretz suite per reason de tort fait principalment a auter le Roy ne serra my respondu sans estre aprise, etc. Gayn. En un attachementsur la prohibition leRoy voet estre respondu soit le party nonsuy a son bref. Herle. La le Roy pretz action de Trespass fait encontre luy meme Contra Coronam et dignitatem suam, de que il voet estre response sans estre aprise, etc"; it would seem that the case in Y.B. 26 Ed. III Mich. pl. 20, turned on an application of the same principle; cp. Theloall. Digest Bk. I c. 3, ss. 9-11.
23 42 Ass. pl. 5—"Les justices disoient que cest commission fut contre le Roy de prendre un home et ses biens sans enditement ou suit de party, ou auter due process"; see also 41 Ass. pl. 13; these would seem to be the cases referred to in Winnington's argument in Prynn's Case (1691), 5 Mod. 459—but the references are wrongly given.
these lines of cases were appealed to at the end of the seventeenth century to prove that criminal informations were illegal at common law. They were cited in conjunction with the statutes passed to restrict the criminal jurisdiction of the Council to prove that the common law recognized no criminal procedure except that of indictment or appeal. It may well be, as we have seen, that the effect of these statutes has been to limit the scope of the criminal informations to misdemeanours. But there is nothing in them, or in the cases cited, which justifies us in saying that the due process of law contemplated by the statutes and the cases does not include informations, which, as we have seen, were well enough known. Moreover, as we shall now see, so far was the legislature from wishing to condemn informations root and branch that it made use of them for the enforcement of statutes.

Several mediæval statutes provide that the penalty for the breach of the statute shall be recovered by action or information at the suit either of the King or any other person who chooses to sue. Thus, for instance, a statute of 1424 imposes a penalty of three times the value of the merchandise on custom house officers who embezzle the duties paid by a merchant, and gives a third of the penalty to an informer who sues on behalf of himself and the King. Similarly Edward IV.'s statutes against the giving of liveries were to be enforced by an information at the suit of any person who would take proceedings; and in the famous Act of 1487 Pro Camera Stellata, it was provided that the statutory committee of the Council thereby constituted should have power to proceed ‘up-

24 Below.
26 Above.
27 See 1 Shower, 120, 122, 123-4.
29 3 Henry VI c. 3.
30 8 Edward IV c. 2.
31 3 Henry VII c. 1; in the Act of 32 Henry VIII c. 9, against maintenance there was a permission to common informers to proceed for penalties by information, as Holt, C.J. pointed out in Prynn's Case (1691), 5 Mod. at p. 464; below
HISTORY OF THE CRIMINAL INFORMATION.

On bill or information put to the said Chancellor for the King or any other.” In fact Henry VII. considered, and perhaps rightly, that in the existing state of the country more speedy justice was likely to be done by the use of the machinery of an information, than by the use of the machinery of presentment and indictment. It was therefore enacted in 1495\(^2\) that the judges of assize and justices of the peace should have power, upon information given for the King to try any offence (not being a capital offence) against any statute, and punish the offender as provided by that statute. This Act was supposed to have facilitated the extortions of Empson and Dudley,\(^3\) and it was repealed in 1509.\(^4\) Clearly neither its passage nor its repeal affected the right of the King to sue by information in the King’s Bench. The repeal of the Act simply left the law as it was before it was passed.\(^5\)

(ii) The Seventeenth Century.

The law as it stood at the beginning of Henry VIII.’s reign gave the King a somewhat indefinite power of proceeding by way of information for offences under the degree of felony, either in the Court of King’s Bench, or before the Council and Star Chamber. Further, a growing number of statutes gave to any one who liked to sue the power to inform on behalf of himself and the King for the breach of those statutes. As I have already pointed out, the proceedings of informers gave rise to such abuses that informations of this nature were regulated by statutes of Elizabeth and James I.’s reigns. But of these informations I need say no more. The main interest lies with the informations initiated either *ex officio* by the Attorney-General, or by the master of the Crown office on behalf of some member of the public.

There seems to have been a large number of both:

\(^2\) 11 Henry VII c. 3.
\(^3\) See Coke, Fourth Instil. 198-9; Bl. Comm. IV 306.
\(^4\) 1 Henry VIII c. 6.
\(^5\) 1 Shower, 123; 5 Mod. at p. 464.
varieties of information in the King's Bench in Henry VIII.'s reign. There are also instances in Edward VI.'s, Mary's, Elizabeth's, and James I.'s reigns; but they were not so numerous in those reigns, as the Star Chamber was then taking cognizance of many offences which would formerly have been brought before the King's Bench. In 1630 occurred the famous information against Eliot, Holles, and Valentine; and in Calthorp's argument for Valentine we get the first hint of the theory that an information is not a legitimate mode of proceeding in a criminal case. The argument was based partly on the theory that 'informations ought not to be grounded on surmises, but upon matter of record.' But this theory was partly founded upon dicta in cases connected with informations in civil cases to assert the King's proprietary rights, which had no application to criminal informations. Partly also it was founded upon the mistaken theory that the mediæval statutes, passed primarily to restrict the jurisdiction of the Council, prevented any criminal procedure but that of presentment and indictment. The argument is historically important from the point of view of the later controversy on this subject; but it rests upon mistaken analogies and a false interpretation of mediæval statutes. The Court paid no attention to it; and the fact that it was disregarded was not assigned as an error when this decision was questioned in 1641, and finally overruled in 1667. In fact, throughout the reign of Charles I. there are very many precedents of these criminal informations; and as Blackstone points out, 'in the same Act of Parliament which abolished the Court of Star Chamber, a convic-

35 See cases cited in 1 Shower at pp. 114-116.
36 3 S. T. 294.
37 3 S. T. at p. 302.
38 See 1 Shower at pp. 112-3.
39 Ibid. at p. 112, citing the case of Hobert and Stroud (1632). Cro. Car. 209; R. v. Wingfield (1633), ibid. 251; R. v. Mayor of London (1633), ibid. 252; R. v. Warde and Lyne (1633), ibid. 266; Stevens Case (1640), ibid. at p. 567; Freeman's Case (1641), ibid. at p. 579.
40 16 Charles I c. 10, s. 6 (3).
tion by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute."

Their legality was asserted under the Commonwealth. In Style's Practical Register some rules relating to them are collected; and these rules are said to have emanated from Rolle, who was Chief Justice of the Upper Bench when this book was composed. In fact the abolition of the Star Chamber had made it necessary for the Upper Bench (which had taken the place of the King's Bench) to exercise alone a jurisdiction which the King's Bench had formerly shared with the Star Chamber. That the Upper Bench regarded itself as exercising a similar jurisdiction to safeguard the state can be seen from the following entry based on a case heard in 1649: "An information may be preferred in this Court against the inhabitants of any town or village in England for the not repairing the Highways which by law they are bound to repair. For this Court may punish offences done against the weal publick all England over." The same reason made for the continuance of these informations in Charles II.'s reign. "They were so common in Charles II.'s time, that they are got into our precedent books of pleading. In Vidian's Entries is one exhibited by Sir Thomas Fanshaw v. Justinian Paggit Senior for neglects and abuses in his office of custos brevium, as for an offence at common law; and fol. 215 are two more of a like nature; one of which is against Wilkinson the Six Clerk for cheating Sir John Marsh, Longvil, and Bluck of a deed of articles and cancelling it; all of which shows the opinion of the lawyers on this point; for the last was at the instance of lawyers; and

42 Bl. Comm. IV 306.
43 Regestum Practicale or the Practical Register, consisting of Rules, Orders, and Observations concerning the common laws, and the Practice thereof. But more particularly applicable to the proceedings of the Upper Bench, as well in matters criminal as civil. Taken for the most part during the time that Lord Chief Justice Rolle did sit and give the rule there. Ed. 1657.
44 Style, op. cit. at p. 187.
Vidian was well known to be a good clerk, and a curious observer of what past here. 345

But at the latter part of Charles II.'s reign and in James II.'s reign the procedure by ex officio information was used for purely political objects. There were the cases of Barnardiston, 46 of Pilkington, Shute and others, 47 and other similar cases; 48 and it was upon an information that the Seven Bishops were tried. 49 Naturally the nature of the cases in which these ex officio informations had been used called attention to the question of their legality; and it was pointed out that, besides the political objection based upon the use of them by Charles II. and James II., the procedure upon them inflicted many hardships on accused persons. Thus, the accused person, even if he were acquitted, could get no costs against the King, "but after an expensive troublesome suit must sit down contented with his own loss, and be glad he escape so." 50 He must plead instantly, "though he cannot possibly be prepared for it, having never before heard the information" 51—a hardship which was also experienced in the case of the procedure by indictment. The Master of the Crown Office did not follow the advice given by Style, 52 and take care to see that the plaintiffs had a probable cause of complaint before he allowed them to exhibit an information. 53 This want of care in effect enabled "all private persons to prosecute criminally any person who had offended them by any act which could be treated as a misdemeanour without the sanc-

46 (1684) 9 S. T. 1334.
47 (1683) 9 S. T. 187.
48 See Winnington's argument in 5 Mod. at p. 461; 1 Shower at p. 110.
49 (1688) 12 S. T. 183.
50 5 Mod. at p. 461.
51 Ibid.
52 The Clerk of the Crown ought not to set his hand to an information without examining the cause for which it is preferred. For if there be not (at least in probabilities) good matter in law to ground an information upon, the party that doth prefer it is not to be so assisted and encouraged in it; for the law doth abhor vexatious and causeless suits. Practical Register (Ed. 1657). 187.
53 4, 5 William and Mary, c. 18, Preamble.
tion of a grand jury.\textsuperscript{54} And, as might be expected, litigants abused this power to prosecute. An information was exhibited; the defendant pleaded to issue; and then the prosecution was abandoned.

It is not surprising, therefore, that a party in the House of Commons should wish to end this procedure.\textsuperscript{55} In several cases an attempt was made to prove all criminal informations were illegal.\textsuperscript{56} The arguments used were in effect an expansion of the argument used in Eliot's Case.\textsuperscript{57} Like that argument it rested partly on the same erroneous construction of Edward III.'s legislation, partly on a misreading of inconclusive dicta in the Year Books, partly on a wholly erroneous assertion of the absence of precedents, and partly on quite baseless gossip that Hale considered informations to be illegal. The fallacies of these contentions were exposed in Sir Bartholomew Shower's very able argument which he had intended to deliver in Berchet's Case.\textsuperscript{58} But, even without the help of that argument, Holt, C.J., found no difficulty in exposing them. "The matter," he said,\textsuperscript{59} "truly seems not of any great difficulty, for we shall hardly now impeach the judgment of all our predecessors; it would be a reflection on the whole bar. In Lamb and Wingfield's information there were learned counsel who would certainly have taken exceptions to the information had they thought it did not lie. My Lord Chief Justice Hale complained of the abuse of informations, but not that they were unlawful." He pointed out that the repeal of the Act of 1495 did not affect the question. "Notwithstanding the repeal of 11 Hen. VII., c. 3 by the 1 Hen. VIII., c. 6, yet afterwards the statute 32 Hen. VIII., c. 9 of Maintenance, supposes that informations still lay; and if it had been a new thing, that statute would have said, that there

\textsuperscript{54} Stephen. Hist. Crim. Law, i 296.
\textsuperscript{55} See the King v. Abraham (1690), 1 Shower 49
\textsuperscript{56} Ibid.; Prynn's Case (1691), 5 Mod. 459; the King v. Berchet (1691) 1 Shower 106.
\textsuperscript{57} Above.
\textsuperscript{59} 1 Shower 106.
\textsuperscript{60} 5 Mod. 463-4.
shall be an information for that crime, and not that it shall be punished by information, which supposes informations to lie. A man may make a better argument against writs of enquiry and new trials than against informations." This was really decisive. It is true that a Mr. Earbery wished in 1737 to contend that informations were illegal. His undelivered argument is published in the State Trials; but it is little more than a reproduction of the arguments which had been rightly rejected in 1691.

But, though the legality of criminal informations was established, the legislature did something to mitigate the hardships which resulted from those exhibited by the Master of the Crown Office at the suit of private persons. For the future no such informations were to be exhibited without an express order of the Court, and without taking a recognizance for effectual prosecution. If the information was not effectually prosecuted within a year, or a nolle prosequi was entered, or the defendant got a verdict, the Court could award the defendant costs. A check was thereby imposed upon the exhibition of baseless or frivolous informations; for, as Stephen has pointed out, a motion for an information made to the Court in substance operates, like a preliminary proceeding before the magistrates, to stop at the outset merely frivolous prosecutions. But, of course, much depends upon the manner in which the Court exercises its discretion; and on this matter its practice has fluctuated. At the end of the eighteenth and the beginning of the nineteenth centuries its practice had come to be somewhat lax. But in the latter part of the nineteenth century there was a return to the stricter practice followed at the beginning of the eighteenth century. That practice was in substance described by Blackstone, when he said that the objects

51 20 S. T. 856.
52 4, 5 William and Mary c. 18.
53 Hist. Crim. Law. i. 296.
54 See the Queen v. Labouchere (1884), 12 Q. B. D. at p. 324.
55 Ibid. at pp. 325-6.
56 Ibid. at pp. 326-7.
of this species of information were the suppression of "gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government (for those are left to the care of the Attorney-General), but which on account of their magnitude or pernicious example, deserve the most public animadversion." This sentence was quoted with approval in 1884, and represents the modern law.

It is perhaps hardly necessary to add that, throughout its history, the difference between the procedure by way of presentment and indictment and by way of criminal information in the King's Bench was only a difference as to the method by which the proceedings were initiated. "The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same Judges, as if the prosecution had originally been by indictment."  

65 Comm. IV 304-5.
67 Bl. Comm. IV. 305.