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## The Power of Pardon Possessed by the 'Princeps.'

A. H. J. Greenidge

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# The Classical Review

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## THE POWER OF PARDON POSSESSED BY THE 'PRINCEPS.'

THE question as to the exercise of the power of pardon in the Roman Principate cannot be said to be one which has suffered from over-treatment. Mommsen in his first edition of the *Staatsrecht* (ii. p. 848, note 2) lamented that 'the whole subject of the rescission of sentences and of the power of pardon earnestly demanded a comprehensive revision.' The complaint was listened to by Johannes Merkel, who in 1881 produced his treatise *Über die Begnadigungscompetenz im Römischen Strafprocesse*, a marvel of learning and clearness, and so complete that any attempt to revive the question must be largely a criticism of his work. Still the question deserves to be revived, for on at least one all-important point, the power of pardon possessed by the Senate, Mommsen and Merkel differ fundamentally from one another. Hence any attempt to weigh again the delicate balance of probabilities, which is the result not only of discrepant statements of historians but of conflicting utterances of jurists, is justifiable, in spite of the fact that little or no evidence can be added to the material already collected. The solution of questions such as this may be assisted by analogies gathered from other fields of inquiry as well as by the addition of positive evidence, however poor a substitute the former may be for the latter.

Pardon may be treated under two aspects, as a question of judicial administration and as a question of constitutional law. From both points of view its historical development is important, although from the latter it is more obviously so. But, from one point of

view at least, its importance as an element in constitutional law has been perhaps exaggerated. We often find a tendency to treat the growth of a power of pardon as though it were equivalent to the growth of a theory of sovereignty. This is not necessarily the case. Pardon may be an administrative or it may be a purely judicial act. It may be the right of an extra-judicial branch of the executive, such as the President of a Republic, or it may be the right of a High Court to rescind sentences; but this executive authority or this court may have none of the other attributes of sovereignty. It can be shown that at Rome the Emperor's power of pardon grew with his control of legislation; but, had the latter power not accompanied the former, few would have dreamed of seeing in the mere executive exercise of pardon a sign of sovereign authority.

This brings us to another—a narrower but still more instructive point of view—from which the power of pardon may be treated either as mainly a constitutional or as mainly a judicial question. Pardon may be exercised by a central controlling authority set above all courts of law, or it may be exercised by a supreme court over its own jurisdiction and over that of lesser courts. In neither case is it essentially a sovereign prerogative, but in the first it must have an extra-judicial basis: in the second it depends simply on the scheme of subordination of courts recognized by the state. But a third and more complicated alternative is possible, one also more closely connected with the

judicial than with the administrative functions of government. The power of annulling its sentences may be possessed by each separate court in its own right. Here there is a general power of pardon but no general pardoning power. We shall have to inquire whether this system, familiar to the Republic, and which maintained itself in the form of the modified *in integrum restitutio* of each separate court, still survived in its perfect form in the Principate, or whether the striving after unity of administration was powerful enough to suppress the autonomy of the courts.

Another important distinction between the different aspects of this power is suggested by the possibility of limitations being set on the power of pardon—limitations not, like those just discussed, connected with its sphere of operation, but with its actual exercise. Pardon, in short, may be conditional or unconditional. It may be limited to certain contingencies by law or by custom, which is as strong as law, or it may be wholly unfettered. It is in the latter case only that it is a true sovereign right, although the exercise even of this power would not make the holder of it a sovereign. The question of main interest from the point of view of constitutional law, and the one which chiefly demands an answer, is the question whether this unconditioned power of pardon, however it may be viewed, was possessed by the princeps. If it was, we must ask further how it was gained and whether it had a legal basis.

The power of pardon, as generally understood, implies the previous existence of a sentence to be rescinded, and all who have treated this question have been careful to distinguish it from such powers as that of amnesty, which precedes trial, or of *abolitio*, which precedes a sentence, or even from the power of completing the function of a lower court by ratifying a sentence which it is incompetent to pronounce on its own authority. The distinction is a just one, yet even juristically the latter are analogous powers, and historically they tend usually to accompany the exercise of the true power of pardon. They, therefore, demand a place in this discussion.

The judicial influence of the princeps was of such a many-sided character that it is necessary to begin by distinguishing his power of pardon from the many indirect modes by which he could control the jurisdiction of other courts. The least formal of these was guaranteed by his presence at the senate when sitting as a court of justice :

and in whatever character he attended the 'consilium' of the consul's court, whether as magistrate or as senator, his control of its decisions was none the less effectual because it was indirect. A less anomalous, but still indirect interference with the jurisdiction of lower courts arises from the emperor's position as a Court of First Instance. This authority of the emperor as a high court of voluntary jurisdiction, granted apparently to Augustus by a plebiscitum of 30 B.C. (*Classical Review*, 1894, p. 144), did enable him to usurp the jurisdiction of the lower courts; but it is going too far even to describe it as a 'right of summons' possessed by the emperor (Merkel, *op. cit.* p. 58); it is really rather a right of the parties than a power of the magistrate, since the summons could proceed only on a request for cognizance. Its effectiveness as a mode of control rested on the facts that the request could proceed from prosecutor or accused in a criminal case, as it might from either of the parties in a civil suit, and that the merits of the case would have to be considered before the emperor decided whether he should exercise his own jurisdiction. It is obvious that this procedure might be employed as an indirect mode in which the accused might secure the grace of the emperor, although there appears to be no case known in which the power was used, or rather abused, for this purpose. We come next to a procedure which approximates much more closely to a power of pardon, and in its final stages does not fall far short of it. It is the emperor's control of provincial jurisdiction, not in the way of appeal, but in the form of supplementing the competence of provincial governors by confirming penalties which required ratification. The capital punishment of decurions was prohibited by Hadrian (*Dig.* 48, 19, 15), and the earliest *mandata* directing the procedure of governors in such cases are those of the 'divi fratres' (*Dig.* 48, 19, 27, 1 and 2). The punishment of deportation had also been confined to the princeps and to the two great prefects by the time of Septimius Severus (*Dig.* 48, 19, 2, 1 and 21, 2, 1),<sup>1</sup> and any provincial governor could only inflict the penalty subject to the emperor's ratification (*Dig.* 48, 22, 6, 'missa plena opinione ut

<sup>1</sup> The earliest notice of the restriction appears to be found in the edict-commentary of Ulpian, written probably under Septimius Severus. It was Severus who created, or confirmed, the power of the 'praefectus urbi' to 'deport' (*Dig.* 48, 22, 6). This does not touch the question of the emperor's control over the ordinary criminal courts of Rome even for the time of Severus, since the 'praefectus urbi' was a delegate of the emperor.

*principes aestimet, an sequenda sit ejus sententia*'). It was inevitable that this power, gradually usurped by the emperor, should be followed by another—by the power, that is, of reforming illegal sentences, where a mistake had been made by the governor and where a change in the sentence required ratification; in this case both amendment and restitution were forbidden to the judge, and the question was referred to the emperor (*Dig.* 48, 19, 9, 11, '*referre ad principem debet, ut ex auctoritate ejus poena aut permutetur aut liberaretur*'). In both these cases the confirmation, the change, or (what must have been very much rarer) the rescission of the penalty was made by imperial rescript following on the '*relatio*' of the governor. The emperor acts in this case as an interpreting authority, and it is evident that we have here no theory of a power of pardon. The procedure is simply the result of the limitation of the competence of certain judges. If limitations of this kind, based on nature of punishment or on rank, exist, there must be some court to fill up the lack of competence: and, as in the history of the appeal, the highest court in the Roman world, that of the '*principes*,' was ultimately chosen for this purpose. Its basis is to be sought not so much in any general prerogative, such as the '*proconsulare imperium*,' as in the fact that the '*principes*' and the consistory formed the highest interpreting authority in the empire. Nor could the procedure usually have led to the exercise of pardon; the punishment, where found improper, was changed by the emperor. Yet full restitution was contemplated as a possibility, and this power of ratification might be so used as to become an act of grace. A passage in the *Code* (9, 51, 1) shows us Antoninus (Caracalla) in the consistory saying to a man who had been deported to an island, '*Restituo te in integrum provinciae tuae*.'<sup>1</sup> This necessity for consulting the *principes* by '*relatio*' in certain cases must have done a great deal to strengthen a power which we shall soon have to examine—that of the superior *restitutio* possessed by the emperor over all criminal jurisdiction in the provinces, although the latter had an independent origin and is found as early as Trajan, probably before the fixed rules which we have just discussed had been finally framed.

<sup>1</sup> In this case the delinquent had appeared in person, and the result was practically a trial in the '*auditorium*' of the emperor. But this must have been very unusual. As a rule the procedure was by rescript, which did not demand the presence of the accused.

For the present we must turn from the provinces and glance again at the courts of the central state to find a true, though very limited, power of pardon resting on a legal basis. This is the '*intercessio*' in virtue of the '*tribunicia potestas*' which gives the emperor the power of vetoing the decrees of the Senate when constituted as a criminal court. Here the emperor extends the functions of the tribune of the Republic as a court of cassation; the procedure becomes formal, for rules are framed for its exercise<sup>2</sup> and the language of the appeal is used. But it is an accidental power in so far as it arises merely from the fact that this class of sentences assumed a form which was subject to the tribunician veto, and it was consequently confined to one sphere of jurisdiction only. The tribunician power furnished no basis for the exercise of a general power of pardon.

Its complement, the '*proconsulare imperium*,' with its direct supremacy over the imperial provinces, and its vaguer but still very real control over the senatorial, would seem at first sight sufficient for establishing a basis for this power in the world outside Italy. But, except in the case of military jurisdiction, which was, as a matter of course, completely under the control of the '*imperator*,' the power of '*restitutio*' over provincial jurisdiction seems to have been of too gradual a growth for it to have been felt as a necessary and immediate outcome even of this '*imperium*.'

The unlimited power of '*in integrum restitutio*' over criminal jurisdiction is a true power of pardon: and that this prerogative was possessed by the emperor in all the provinces is proved by many statements of the classical jurists. But there are also evidences which prove that it had a gradual growth—a growth perhaps as gradual as that which led to the recognition of the universal appeal to Caesar. The passages in the correspondence of Pliny and Trajan (31, 5; 56, 3; 57, 1), which have been sometimes taken to show that this power then existed, sometimes that it did not exist in its perfect form, really prove two points: firstly, that there was at the time no fixed rule limiting the '*restitutio*' of governors, at least in senatorial provinces; and, secondly, that

<sup>2</sup> Tac. *Ann.* 3, 51, 3, '*factum senatus consultum, ne decreta patrum ante diem decimum ad aerarium deferrentur idque vitae spatium damnatis prorogaretur*'; cf. Dio lvi. 20, 4; Suet. *Tib.* 75. Merkel (*op. cit.* p. 54) notices a striking peculiarity of this rule from the point of view of constitutional law. The regulation that increases the power of the superior court is obtained by a concession of the lower.

'restitutio' by a governor was felt to be permissible in certain cases. A fixed rule was created by a series of 'mandata,' of which this of Trajan may have been amongst the first, laying down the general principle that 'praesides' should not rescind their sentences without consulting the emperor, and specifying the cases in which they might use their own discretion.<sup>1</sup> This prerogative of the 'princeps' is necessarily associated with the 'proconsulare imperium,' since it is this alone that brings the emperor into contact with the provinces; but it is not an outcome of it. The courts even of the provincial world are not the emperor's courts in the early principate. It grew with the greater centralization of government and the increasing limitation of the powers of governors—a limitation created by the ever growing practice of making 'relationes' in cases of difficulty. The reference is made to the emperor as the highest court, as an interpreting authority. The history of the usurpation of the 'restitutio' by Caesar is a part of the history of procedure by rescript: and the imperial rescript is rather a vehicle of advice than of command. But a general 'mandatum' was the inevitable consequence of successive rescripts; it saved time and informed provincial governors of limitations on their powers which had been largely created by their predecessors. It was thus that the creation of customary law became fixed in the imperial ordinances before it was finally stereotyped in the writings of the jurists. If we ask whether this power even as finally developed rests on any general theory of pardon, the answer is 'probably not.' It is simply restitution on equitable grounds, but on wider grounds than those possessed by the ordinary provincial governor.

It is when we turn to the courts of the central state that the question where pardon resides becomes, as we should expect, more complicated. For, if pardon is a function of the judicial power, the imperial jurisdiction has two rivals, the senate and the *quaestiones perpetuae*, theoretically exempt from its control; and if it is a part of the executive functions of government, then there is the senate, whose administrative control over Rome and Italy is far more real than that nominally assigned it over certain of the provinces. Here we are in the midst of controversy; for while Momms-

sen assigns pardon to the senate, Merkel, with less confidence but with more certainty, finds it vested in the 'princeps.' We shall attempt to show that neither of these two views is tenable in its extreme form; but that the power of pardon, like most administrative, judicial and even legislative functions in the Principate, is divided.

The senate continues to grant public amnesties (*abolitiones publicae*) on the occasions of festivals or public rejoicings ('ob laetitiam aliquam vel honorem domus divinae vel ex aliqua causa, ex qua senatus censuit abolitionem reorum fieri,' Ulpian in *Dig.* 48, 16, 2; cf. 48, 3, 2, 1). This has little or nothing to do with any general theory of pardon; it is primarily an administrative act; the power of ordaining such 'feriae' was naturally accompanied by what, according to Roman religious notions, was an inevitable consequence of such ordinances. This power is not shared by the emperor, but, as an interpreting authority, he may step in to show the proper limits of such decrees. Domitian by an edict declared that such 'abolitiones' did not extend to slaves who were in custody awaiting trial (*Dig.* 48, 16, 16; cf. 48, 3, 2, 1).

We now turn to two cases, which have been preserved, where the senate seems to exercise the power of actually rescinding criminal sentences, i.e. of 'restitutio' in its pure form. It is said of Claudius (Suet. *Claud.* 12) 'neminem exulum nisi ex senatus auctoritate restituit': and of Antoninus Pius (*vit.* 6) 'his quos Hadrianus damnaverat in senatu indulgentias petiit, dicens etiam ipsum Hadrianum hoc fuisse facturum.'<sup>2</sup> Standing by themselves these passages might appear to exhibit a general power of 'restitutio' possessed by the senate, although they are far outweighed in number by passages which assign such a function to the 'princeps' alone. But the context in both of these cases shows that Merkel is undoubtedly right in holding that we have here to deal with an unwonted concession made by the 'princeps.'<sup>3</sup> They are cases of certain 'principes' exercising, with the senate's

<sup>2</sup> The words 'quos Hadrianus damnaverat' must probably be taken, with Merkel, to signify persons condemned in the emperor's courts. If they mean persons condemned by the senate (through the indirect influence of the emperor), the case is simple enough; since, as we shall see, the senate undoubtedly possessed the power of 'restitutio' within the sphere of its own jurisdiction.

<sup>3</sup> This procedure of Claudius is cited by Suetonius amongst instances of his being 'parcus atque civilis.' The sentence immediately following the words cited from the life of Antoninus Pius begins 'imperatorium fastigium ad summam civilitatem deduxit.'

<sup>1</sup> Such specified cases are found in Trajan *ad Plin.* xxii. and in a rescript of divus Pius (*Dig.* 48, 19, 22).

authority, a power which the average ruler would have exercised in his own right, and it is doubtful whether they rest on the faintest idea of the senate's being a body properly qualified to pardon. They are, in fact, not exactly parallel to the imperial delegations of appeal, to which they have been compared. In the delegation of appeal we have the recognition that there is another side to the dyarchy; the appeal is made primarily to the consuls. Here we have simply an instance of the emperor consulting an ever-present 'consilium'; cases that would naturally have come before the smaller council (the later consistory) are referred to a wider body. The procedure resembles the delegation of appeals only in so far as it springs from the same 'civile ingenium' of the 'princeps.'

A third instance of the exercise by the senate of a power which at least approximates to pardon dates from the reign of Pertinax. In an inscription (Wilmanns i. n. 1198) we find the record of a M. Antonius Antius Lupus 'cujus memoria per vim oppressi in integrum secundum amplissimi ordinis consultum restituta est.' He had been put to death by Commodus (*vit. Commod. 7*) and was amongst those whose memories were restored in the reign of Pertinax (*vit. Pertin. 7*, 'revocavit etiam eos qui deportati fuerant crimine majestatis, eorum memoria restituta qui occisi fuerant'). Here we have apparently an instance of 'restitutio memoriae' by the senate. Merkel (p. 44) in his efforts to disallow any power of pardon to the senate understands the 'senatus consultum' here as that which rescinded the 'acta' of Commodus. It is a possible, but it is not the most obvious, interpretation. The difficulty arises here from the fact that the whole question of 'damnatio memoriae' is shrouded in great obscurity. It must be treated both as a general power of the senate and as an appendix to its criminal jurisdiction (Mommson, *Staatsrecht* iii. p. 1190). It was a consequence of 'perduellio' (Rein, *Criminalrecht* p. 501) but a special appendix to each separate condemnation (*ib.* p. 537). No instance appears to be known of condemnation of memory being pronounced by any other authority than the senate, during the Principate. If in this way it supplemented the jurisdiction of other courts, then we need not inquire by whom Antius Lupus had been condemned. 'Restitutio memoriae' would be a prerogative of the senate<sup>1</sup> and if we choose to regard it as

a power of pardon, the senate does to that extent possess this power.

Has the senate, then, no power of 'restitutio' other than this occasional restoration of the memory of the condemned? For an answer to this question we have the best material conceivable, the definite statements of jurists. The praetor in his edict dealing with the 'infames' exempted those who were 'restituti' from the praetorian infamia. Ulpian in his commentary to the Edict remarks (*Dig. 3, 1, 1, 10*) 'De qua autem restitutione praetor loquitur? utrum de ea quae a principe vel a senatu Pomponius quaerit: et putat de ea restitutione sensum, quam princeps vel senatus indulxit.' This statement is certainly no justification for Mommsen's theory of a general power of pardon possessed by the senate; but it is equally illegitimate to extend it with Merkel (p. 49) to a general *abolitio infamiae*. No abolition of immediate infamia appears to be known until the period after Constantine, and there is no evidence for an 'abolitio' of mediate infamia without a quashing of the sentence which created it. Nor could the senate have had power to cancel the immediate infamia even of its own members. It could expel its members—and even this procedure is quasi-judicial—but there is nothing to show that it could restore them. The passage in the praetor's edict on which Ulpian commented clearly refers only to judicial *restitutio*, which, according to the commentators, might be granted by three courts, the emperor, the senate and the praetor, and the important point to notice is that the 'restitutio' of the senate is *unconditioned* like that of the princeps, not conditioned like that of the praetor. Here at least the dyarchy of emperor and senate is complete. But for this very reason the passage furnishes no evidence for a general power of pardon being possessed by the senate. It possesses 'restitutio' only over its own sentences and only in its capacity as a criminal court. This 'restitutio' doubtless continued in force as long as the senate continued to be actively employed as a criminal court. In legal theory this power was never lost to the senate; for, however seldom its jurisdiction was employed in the later empire, it never ceased to be a court of criminal jurisdiction. Hence the appearance of the principle, however casually stated, in the *Digest*. Its preservation is due to a motive similar to that which led Justinian's

<sup>1</sup> When Nero 'Lolliae Paulinae cineres reportari sepulchrumque exstrui permisit' (Tac. *Ann.* 14,

12, 6), this 'restitutio memoriae' was no doubt effected by a 'senatus consultum.' Lollia Paulina had been condemned by the senate.

compilers to preserve the theory that the senate was an inappellable court.

It is true that a great number of passages may be cited from the writings of the classical jurists which appear to conflict with this conclusion and implicitly to deny this power to the senate. All these passages state that pardon is confined to the emperor. A closer examination shows, however, that they are by no means conclusive against our theory. First we may take a series of passages from Ulpian (*Dig.* 28, 3, 6, 2; 32, 1, 5; 48, 23, 2) and from Paulus (*Dig.* 34, 1, 11; 48, 23, 4), chiefly referring to the validity of wills and codicils, all of which speak of restitution 'a principe' or 'indulgentia principis,' and have no word to say of restitution by any other power. The reason for this silence is no doubt to be sought, as we shall soon see, in the place occupied by these passages in the *Digest*. The next important point to notice here is that the passages are perfectly general and do not raise the question of the court which had condemned the persons so restored. More important is the series of passages from the jurists which deal directly with criminal law and which state that 'restitutio,' as well as any change or commutation of sentence, can be effected by the 'principes' alone. Of these six passages no less than four refer directly to the provinces (*Dig.* 48, 18, 1, 27; 19, 9, 11; 19, 31; 19, 27); a fifth from Marcian (*Dig.* 48, 19, 4), although it appears in a general form, seems as though it may have been originally directed to provincial administration. The sixth and most important is a statement by Paulus (*Dig.* 42, 1, 45, 1 = lib. i. *sent.*) and seems the only one that means to lay down quite a general principle. It runs 'de amplianda vel minuenda poena damnatorum post sententiam dictam sine principali auctoritate nihil est statuendum.' It refers, therefore, to revision of sentences rather than to 'restitutio,' but, judicially considered, the principle of both these powers is the same.

The uniformity of statement in these passages, which seems to conflict with the theory that the senate possessed a power of 'restitutio,' may be accounted for on three grounds; (1) many refer to the provinces, and the emperor's superior power of 'restitutio,' the growth of which has been traced above, is here admitted; (2) even the most general statements, such as that of Paulus, are sufficiently true approximately not to surprise us by their occurrence. They are true of nearly the whole Roman world.

The early exceptions had been the senate and the 'quaestiones,' but the senate with its limited Italian jurisdiction was not an important exception, and the 'quaestiones' had disappeared by Paulus' time (*Dig.* 48, 1, 8); and (3) we must always remember the place of these passages in the *Digest*. They were excerpted by the compilers as a statement of a principle which was literally true after the abolition of the procedure of the 'judicia publica' and after the senate had practically ceased to act as a court of justice.

We may now turn finally to the only form of pardon which yet remains to be discussed: that of the emperor for Rome and Italy. That the emperor possesses the power of judicial 'restitutio' over his own sentences can hardly be doubted. In some of the passages which treat of recall from exile and the like a personal act of the emperor seems clearly implied (e.g. Tac. *Ann.* 14, 12 and 12, 8); others (e.g. Tac. *Ann.* 4, 31) are rendered doubtful, because they may imply previous condemnation by the senate, and consequently a restitution through the employment of the tribunician veto. But, apart from these isolated cases of 'restitutio,' we have frequent evidences of a wholesale pardon being extended by emperors to the victims of past reigns. Such acts are mentioned under Claudius (Dio 60, 4), Otho (Tac. *Hist.* 1, 90; Plut. *Otho* 1), Vitellius (Tac. *Hist.* 2, 92),<sup>1</sup> Vespasian (Dio 66, 9), Antoninus Caracalla (*vit.* 3) and Gordian (Herodian 7, 6, 4).<sup>2</sup> In none of these passages is there any suggestion of the cooperation of the senate.

If we compare these instances with the few examined above, where the senate is mentioned as being consulted by the emperor on questions of 'restitutio,' we have to choose between the probabilities of all mention of the senate being omitted in these numerous cases, the actual controlling power of the emperor being so great, and of the activity of the senate, where it occurs, being abnormal. In questions of historical probability, where we are dealing with legal institutions described by non-juristic writers, the number of instances on either side counts for little. It is the context of the instances that is all-important, and from this point of view, as we have already seen,

<sup>1</sup> In the passages referring to the reigns of Otho and Vitellius the language is indeterminate; the mention is simply of 'reversi' or 'revocati ab exilio.'

<sup>2</sup> A similar isolated case of 'restitutio' is mentioned by Pliny (*Ep.* 4, 9, 2), '(Julius Bassus) a Domitiano relegatus est: revocatus a Nerva.'

there is everything to be said for Merkel's view that 'restitutio' was made by the emperor, and that, where we find a mention of the senate, its concurrence was only an imperial concession.

If we ask what sentences were thus rescinded, the most obvious answer is 'the judgments of the emperor's own courts.' The holder of office may change, but the 'princeps' as a court never dies. It is purely judicial restitution, which is as valid over the acts of the emperor's predecessors as over his own. The exemption of the senate's jurisdiction from this power is almost certain. Besides the evidence for senatorial restitution noticed above, the fact that cross appeals were not allowed<sup>1</sup> makes it extremely unlikely that the emperor gained<sup>2</sup> any power of rescinding its sentences. For 'restitutio' on the whole follows throughout the analogy of the appeal. The 'quaestiones perpetuae' are not necessarily implied in any of these instances, for these courts were not usually employed in the trial of political offences. The question whether the emperor had any power of 'restitutio' over the 'quaestiones' is by no means easy to answer. There is no evidence for such a power, but perhaps it is not quite so impossible that it existed as has usually been thought. If we admit that the emperor has no control over the 'quaestiones' in the way of appeal, does this exclude a 'restitutio' of their sentences based on certain valid grounds? Possibly not. In civil cases the analogy of the appeal is not followed here. We have the instances of Claudius' 'restitutio in integrum' of cases in the 'judicia ordinaria' (Suet. *Claud.* 14), and of Domitian's restitution of judgments of the centumviral court (Suet. *Dom.* 8). The passages cited by Merkel (p. 64) to illustrate the unchangeableness of judgments in the early Principate—

Quinctil. *Declam.* 372: 'judicia judiciis rescindi non possunt. sera post damnationem innocentiae defensio est.'

Seneca, *Controv.* iii. 23: *judex quam tulit de reo tabellam revocare non potest. quaesitor non mutabit sententiam suam.*—are perhaps too general to be argued from.

<sup>1</sup> Ulpian in *Dig.* 49, 2, 1, 2, 'sciendum est appellari a senatu non posse principem, idque oratione divi Hadriani effectum.' It becomes a stronger proof if we believe it to be an old principle confirmed (and not created) by Hadrian.

<sup>2</sup> That he could not have possessed it from the first is proved by the necessity of employing the tribunician 'intercessio' as an indirect means of pardon.

They only show the general inviolability of a 'res judicata'; this did not, however, in general exclude either the appeal or the 'restitutio.' But, if they be taken to prove the complete unchangeableness of a sentence by the ordinary criminal court at Rome which had pronounced it, this will be an argument for some power of 'restitutio' having been vested in the 'princeps.' For it is hardly conceivable that, at a time when the whole Roman procedure was being co-ordinated and reformed by statute law as well as by imperial edicts,<sup>3</sup> no provision whatever should have been made for an equitable readjustment of unjust sentences. If such a power was exercised by the 'princeps,' it would probably not have assumed the form of a cancelling or an amendment of the sentence, but of permission for 'retractatio judicii' or renewal of the trial. The control, in any case, would not have been so arbitrary as that in the emperor's own courts. The grounds for 'retractatio' may have been fixed, but the question whether it should be resorted to in any particular case may well have been referred to the highest court and the highest interpreting authority, the emperor. This may be pronounced conjecture; but we have more right to speculate about the 'quaestiones' than about any other court in the Principate, since their complete disappearance has caused no trace of their relations to the emperor to be preserved in the *Digest*.

On the whole there is no evidence that this 'restitutio' was exercised over any criminal courts at Rome but those of the 'princeps' himself. Had it been, it could not be explained, as the control over provincial courts has been explained, as the gradual growth of customary law—the instances are too early for the growth of customary law on such a point. This 'restitutio' must have been based on a principle fairly obvious from the first: and this could have been none other than rescission by the emperor's court of its own sentences.

But, even in the procedure as thus limited, have we any theory of pardon? Probably none of free pardon such as that granted by a sovereign—the epoch of 'general indulgences' is not reached until much later. In all these cases there was probably at least the fiction of improper—i.e. of irregular—condemnation. This appears very clearly

<sup>3</sup> Of the first kind were the *leges Juliae de judicis ordinandis* and *judiciorum publicorum*; of the latter such imperial regulations as that by which Titus put an end to an anomaly of the criminal courts by forbidding 'de eadem re plurimis legibus agi' (Suet. *Tit.* 8).



in the procedure adopted by Gordian (Herodian 7, 6, 4), where he is spoken of as *παλινδικίαν διδοὺς τοῖς ἀδίκως κατακριθεῖσι*; that is, his 'restitutio' did not lead to an acquittal but to a renewal of the trial (*retractatio iudicii*). It is a power which does not differ essentially in theory from the praetorian restitution, which is certainly not a power of pardon.

But, besides the restitution proper, we have evidences of a power possessed by the emperor from the very dawn of the Principate. This is the 'abolitio,' or power of quashing indictments, which approximates to pardon and may clearly be used for this purpose. Instances of its employment are found under Augustus (Suet. *Oct.* 32), Gaius (id. *Calig.* 15; cf. Dio 59, 6), Domitian (Suet. *Dom.* 9), and Vespasian (Dio 56, 9). So far as we conceive this procedure to have been adopted within the sphere of the emperor's jurisdiction, the possession of the right of 'abolitio' creates no difficulty, although we may not be able to fathom the principles on which its exercise was based. If we are forced to adopt a legal theory for what seems to have been a somewhat irregular procedure, it seems simply to have been the right of a court, less hampered by legal formalities than any other, to refuse indictments brought before it. But the instances given by our authorities seem to show a wider power than this. The procedure of Augustus, who 'diuturnorum reorum — nomina abolevit,' we may perhaps account for with Mommsen (*Staatsrecht* ii. p. 885, note 1) by saying that it was an outcome of the extraordinary 'potestas' which he possessed before the final constitution of the Principate. Gaius 'criminum — omnium gratiam fecit,' but the context shows that political charges, which had survived his predecessor's rule, are meant, and these might have been before the emperor's court. The same is true of Vespasian's use of the 'abolitio'; but Domitian 'reos—univeros discrimine liberavit,' and fixed certain conditions under which alone these charges could be renewed. There is nothing in the context here to fix the limits within which he exercised his authority; it is quite possible, however, that political prosecutions before the emperor's court alone are meant.

But, if we hold that these instances force us to admit a wider power of 'abolitio' than this, it is not altogether impossible to supply, from the known prerogatives of the 'princeps,' a basis for this power. A very wide power of quashing indictments might have been exercised by the emperor in two ways.

The one is an indirect mode of control based on his personal jurisdiction, the other a direct power springing from his 'tribunicia potestas.' As regards the first, we must remember that it was possible to get any case brought to the emperor's court. It might be presented to that court in the first instance by the prosecutor, or the request for cognizance might come from the accused. The emperor might, therefore, listen to the preliminaries of any case and then refuse to take it, without 'remitting' it to another court.<sup>1</sup> It is extremely unlikely that any other criminal court at Rome would have listened to even the preliminaries of a prosecution which had been rejected by the emperor, and in this way what was practically a general power of 'abolitio' might have grown up.

But the power might also have been exercised more directly. It has been stated above that the 'tribunicia potestas' furnishes no basis for a general power of pardon; but it does not seem hitherto to have been noticed that it might have furnished a basis for something approaching to a general power of 'abolitio' in criminal jurisdiction. The veto of the tribunes was in the Republic sometimes exercised against the preliminaries of a prosecution in a 'judicium publicum,' and might be directed against the reception of the charge itself. Vatinius appealed successfully to a tribune 'ne causam diceret' (Cic. *in Vat.* 14, 33), and the college interfered to protect C. Antonius against condemnation for 'repetundae' (Ascon. *in orat. in tog. cand.* p. 111). The exercise of this power, although unusual, was admittedly legal, and it must undoubtedly have descended to the emperors with the other attributes of the 'tribunicia potestas.' It might be directed against the senate as well as against the 'quaestiones,' and perhaps the indirect influence of the emperor on senatorial jurisdiction may be accounted for largely on this hypothesis. The numerous instances in which the senate refuses to entertain a charge until the will of the emperor is consulted may have arisen, at least partly, from a sense that the tribunician veto was possible at any stage of the proceedings.

Here we may conclude our sketch of the

<sup>1</sup> In the case of Piso Tiberius 'minas accusantium et hinc preces audit integramque causam ad senatum remittit' (Tac. *Ann.* 3, 10, 6). The word 'remit' is unfortunate, as it might seem to imply that the court to which the remit was made was bound to accept the case. This was not true either of the senate or of the 'quaestiones,' which were theoretically independent of any anterior decisions of the 'princeps.'

'princeps' as the head of criminal jurisdiction in the Roman world. He does become very nearly the head, but he is not a supreme authority, still less a sovereign. His exact position will be best exhibited by a brief summary of the conclusions tentatively arrived at.

The senate possesses no general power of pardon beyond its inheritance from the Republic of declaring 'abolitiones' on certain public occasions; but it has, as a high court, the 'restitutio' of its own sentences. Further than this, it is occasionally consulted by the 'princeps' on the advisability of his rescinding the sentences of the imperial courts, but in this procedure there seems to reside no recognition of a power of pardon.

The emperor, as regards Roman courts, possessed the right of 'restitutio' only over his own sentences. It is merely a judicial power, and there is no interference, in the way of 'restitutio' proper, with the sentences of the senate, and perhaps none with the sentences of the 'quaestiones.' If any interference was possible with the latter, it probably merely assumed the form of a permission for 'retractatio.' The emperor probably possessed some power of 'abolitio' in all criminal jurisdiction. As regards criminal jurisdiction in the provinces, the revision of the sentences of the courts, where revision is suggested by the judge, like the infliction of punishments denied to the judge, centres finally in the hands of the emperor. It appears to have been based on no special prerogative, but to have been a gradual development of customary law—a reference to the highest authority in the Roman world, the emperor and the imperial consistory. This custom became fixed by the writings of the jurists, and appears as an undisputed prerogative of the emperor in the form in which they have been preserved for us by Justinian's compilers. The difference between the imperial 'restitutio' and that of the provincial governor, when it was permitted, is that the former, although supposed to be based on equitable grounds, was unlimited, the latter was limited by certain well-defined rules. This power might be so employed by the emperor as to take the form of a free pardon, but theoretically it was merely an equitable assistance. As a legally unlimited power of rescinding sentences, it approaches very nearly to a power of pardon;

but it is an executive duty rather than a sovereign right, and we search in vain in the Principate for a power of pardon regarded as an admitted constitutional right of a sovereign.

In the later empire, if there is no difference in theory, there is yet a difference in practice. The issue of 'indulgences' and 'abolitiones,' some occasional, like those granted by Constantine to the Christians, some, like the Easter pardons, regularly recurring, proceeds from the emperor as the head of the administration. They are the work of the imperial consistory rather than the function of a supreme judge. Meanwhile the wholesale pardons, retrospectively extended to the victims of past reigns, have disappeared. For it is one of the brightest features of the later empire that, as the emperor's prerogative became more undisputed, the actual administration of justice became more independent of the imperial personality. There were greater stretches of administrative law, but there was less judicial tyranny.

From a practical point of view, throughout the history of this power the imperial consistory must be kept in mind. It is significant that the consistory first becomes prominent under Hadrian (*vit. Hadr.* 18 and 22, Haubold *de consistorio*, p. 30) at the very time when the control of provincial jurisdiction was beginning to centre in the hands of the emperor. The references (*relationes*) were felt to be no longer made to the emperor alone but to the emperor's privy council, or, if we regard the 'auditorium' as distinct from the consistory, and employ what is not quite a perfect analogy, to the judicial committee of the privy council,<sup>1</sup> composed of the greatest jurisconsults in the Roman world. This was the standing defence of the emperor's control of jurisdiction; it was through this that he came to be replaced by his prefects, no doubt in pardon as well as in appeal, and that his personality came in time to be lost in a great impersonal system of central administration.

A. H. J. GREENIDGE.

<sup>1</sup> The analogy is rendered imperfect by the probability that some of the members of the auditorium (e.g. great lawyers who were not distinguished for statesmanship) were not members of the consistory (Haubold *de consistorio*, p. 42).