LAW JOURNAL

VOL. I. NO.5

EDITORIAL

In the Editorial of the April 1946 Number of this Journal, we, had thought it fit to bid farewell to the Alma Mater "while handing the flame over to our successors in the management of this periodical." But, as circumstances have turned out, our farewell was premature and it has been our privilege to edit also the present Number. Since then the conferment of degrees has taken place in the University Church and the new doctors are busy carrying on the work rendered sacred by the memory of the glorious names of many a son of the Athaeneum in the different fields of intellectual activity.

While humbly praying that we may not be unworthy of walking on the path of our forbears, we propose to keep constantly in touch with those we leave behind and with the future members of the Law Society.

AN UNPLEASANT SITUATION

It is common knowledge that confessions in criminal matters must be made deliberately ; otherwise, a reason for inadmissibility arises. This rule is not only explicitly declared in the law but it has received much attention in jurisprudence. However, in spite of such a thorough exploitation of its inroads, this principle has lately been shown to be virtually stultified by a serious obstacle militating against its effective actuation. It is with no spirit of generosity or mercy which admittedly would be misapplied virtue, that we are manifesting a doubt as to whether the law, as it stands, really leads to the goal it aims at.

The main point is this : if the law insists upon disregarding any confession provoked by means of promises, threats or violence, it should not fail to grant a remedy that would effectually bring to light the flaw of such confession without at the same time conducing the unsuspicious to a weird strait.

Very often the only means of proving a flaw in the confession is the deposition of the accused himself during the trial. According to the law the accused may offer his evidence, saving exceptional circumstances, only before the start of the defending counsel's address and when he chooses to testify he may be questioned on any point relative to the case, not excluding the most natural query as to the veracity of the confession, independently of the threats or promises.

Even a superficial study of human psychology will reveal that a man will not take upon himself the commission of a crime with which he had no connexion, unless he is suffering extreme torture or labouring under some psychological condition. One will have to admit that these two contingencies are by no means the normal feature. The unlucky barrister would

consequently be brought to a strange nonplus : either instruct the client to deny having said the truth—an attitude which is a first-rate incitement to perjury—or tell his client to abandon his allegation of violence, thus rendering his case well-nigh hopeless : and the will of the law will be frustrated on account of a flaw immanent in the law itself.

One may perhaps observe that it is only those who are really guilty that are puzzled and, maybe, ultimately adversely affected by this state of things. Those who are innocent will find no hesitation in asserting that what they declared was untrue nor will they require any prompting. This is perfectly correct; but, is it in accordance with the dictates of Reason to give a man a "privilege" that one knows, will most surely lead him to the gallows or to imprisonment, as the case may be, unless he finds shelter behind the desecration of all that is most holy? Indeed, it is a queer sort of liberality. And if his barrister makes him realise what his position really is, would that not be tantamount to being privy to a perjured criminal?

Any barrister determined to do his duty in accordance with the voice of his conscience and in the way which is demanded by the nobility of his profession will undoubtedly revolt against his being put into such a hopeless quandary whose key lies in sheer dishonesty. One of the leaders of our Bar lately suggested that a preliminary enquiry be held anent the validity of the confession. The accused would in that case be able to give his evidence only on the circumstances attending the confession and *not* on its merits. Later on he may or may not take, advantage of the option which the law gives him; but, whatever course he chooses, he would be acting freely and not under the necessity of destroying the *regina probationum* that the Prosecution brings forward. Naturally, our Courts of Law have not allowed such a procedure, for the very simple reason that the Judge is not the legislator. One can expect a remedy only from the Law Officers of the Crown or from the Criminal Code Commission. We feel that the urge is sufficiently powerful and convincing. It is not generosity that we insist upon : truly, it must have its place in life but in matters criminal normally the harm outweighs the benefit; it is only the spirit of fair dealing that lies at the root of this suggestion .

PERSONAL NOTE TO OUR GOVERNOR

On the appointment of H.E. Mr. Douglas, Malta has not only the second Civilian Governor in her history, but also the first Governor who is a member of the legal profession; with great confidence therefore, we do hope that he will devote particular attention to the legal activities in the Island. Substantially, the wisdom and juridical exactitude of Maltese law do not admit of doubt ; one thinks with gratification that a Commercial Code is being drafted and one may be inclined to entreat the Commission entrusted with the task to do its utmost with the view to expediting its work, *if* that can be done without prejudice to view to value of the Code. We have hitherto insisted that uniformity in the law, both in regard to form and content, should be retained with extreme solicitude. We are no supporters of blind conservatism but we cannot withhold our regret in seeing the conciseness and limpidity of our laws being superseded by the comparative complication of contemporary legislation. If life has become more complex, we should at least refrain from intensifying the chaos. Undoubtedly, laws cannot be rendered *too* simple ; it was Napoleon's desire to have a Code couched in terms intelligible to all, but he had

only attempted the simplification of several provisions of law when he perceived that "over-simplicity in legislation was the enemy of precision": He willingly gave up what he himself called "over-simplicity", but we daresay, he (or his advisers) never indulged in sheer verbosity or in endless sentences. We have followed the remarkable model produced by French legal talent and thus Maltese legal tradition has remained unruptured ; in fact Roman law had been in force for centuries and the Code Napoleon was mainly a well-balanced condensation of Roman legal thought mixed, though at times imperfectly, with the more liberal sentiments that had rooted themselves in French Customary Law.

Several other matters, we humbly submit, deserve serious investigation. It is not too pleasant for us to go on harping on topics which have already received their share of attention from us but our deep conviction in the necessity of certain reforms being effected prevents us from standing demurely apart satisfied with having completely performed our role.

Our readers may perhaps have noted that a particular suggestion has been brought to the ore in our editorials more than once (1), and this third reference to it, we hope, will not lessen its chance of being accepted. Let us try to imagine (if our imagination can go so far) a barrister who is quite incapable of understanding the language of all the judgements delivered by our Courts of Justice before 1935; unable to make out what the wills and contracts in our Archives say; unable to consult 90 or 95 per cent of the Law books to be found in the Island to which constant reference has been made in Maltese jurisprudence up to the present day; unable, indeed, to understand the original text of our laws. A much longer enumeration could easily be made out but, for brevity's sake, we may say that such a barrister would be *unable* to practise his profession in a proper manner.

This, we hope, lays out the unshakeable foundation of the proposition favouring "the re-introduction of Italian as a compulsory subject in the Preparatory Course of Laws and in the Matriculation Examination for candidates intending to join such a Course." The present University Statute virtually *prohibits* a barrister "in potential" from choosing Italian in his Matriculation (2) ; it does not give him an opportunity to study it in his Preparatory Course and actually *penalizes* him if he chooses it in the first year of the Academical Course of Literature, in the sense that he will have to study it over and above all his other subjects. His Excellency the Governor, as a man of law, will most surely realize that the disadvantages mentioned above in hibit anyone from practising in a serious manner; he may not appreciate the full extent of the disability but, if the opinion of *anyone* in touch with matters legal is asked for, we can entertain no doubt of the result.

At a plenary meeting of the Law Society held on the 29th November, 1945, a suggestion recommending to the General Council of our University "that students intending to join the Preparatory Course of Laws should be given the option to take Italian in their Matriculation," passed onwards unopposed. Had it been a meeting of all the members of the legal profession starting from the Chief Justice to the youngest lawyer it might perhaps not have had a different result. The recommendation in itself is only a half measure and we have given support to the more definite view because we think it to be a more logical consequence of the common premise. However, in any case, this second proposition is likewise acceptable because, at least, it gives a chance to the students themselves to redress the evil in some manner.

(1) Vide *Law Journal,* Vol. I, No. 2, pages 6-7 and Vol. I No. 3, pages 6-7.
(2) Vide Vol. I, No. 3, page 7).

We doubt not that deep interest will be taken by His Excellency personally who will be able to evaluate for himself the support which our suggestions deserve and we know we can depend upon him. With this belief we can at present gratify our desire.

We have already directed the attention of the public towards certain anomalies existing with regard attention Maltese citizens domiciled abroad or contracting marriages with foreigners. No improvement has been bruited; we believe the Government has already given these matters its consideration, although it may perhaps be incited to augment its efforts with the object of having a solution arrived at expeditiously. We do not wish to make the British Government follow an unprecedented course, but there can be no question as to the deserving character of the instances we mentioned in our last number. (Vide *Law Journal*—Vol. I, No. 4, pages 9-14).

No Maltese jurist has as yet been appointed to sit on the Judicial Committee of the Privy Council, in spite of the many grave arguments tending to the elimination of the inequality of treatment by reason of which we do feel uncomfortable. We fail to grasp the reason for which nothing has been done. (Vide Vol. I, No. 3 pages 8—10) . There are, it appears, only tender hopes of having the Royal University declared autonomous, at least, in the near future. Autonomy means the unshackling of the University from State control; it spells freedom of thought and research—a pre-requisite to the natural, progressive evolution of intellectual values (Vide Vol. I, No. 4, pages 5-6). Barristers are still being required to undergo their one year's practice *after* they finish their seven years' University Course. All attempts to arrive at a moderate solution have failed. These are some of the points mentioned in past Editorials still deserving attention and in order to avoid useless repetition, we make reference to our back numbers.

From the birth of the *Law Journal* we have tried to follow the tradition of barristers, who are reputed to possess sufficient power to express their views in a resolute and categorical manner. We appreciate the possibility of objection being raised against the adoption of some, if not all, of our suggestions : we cannot regret that, because it is in the nature of free men to discuss freely, but what one and all desire is an impartial and enlightened investigation. Nor do we entertain a blind conviction regarding the existence of obstacles in the way of the implementation of our suggestions, but these obstacles will not be prevailed upon only if one's attempts are unattended with serious effort. One may think of the existence of difficulties with real satisfaction, if one is sure of the dynamism of the Governing Body.

GOVERNMENTAL RESPONSIBILITY

The notion of Government, in its evolution, acquires a wider comprehension resulting in major complexity of administrative machinery and in the further whittling of individual initiative, whether directly or indirectly. The causes of this aggrandizement are mostly of a political and economic nature and therefore very sensitive to any variation in the posture of the national and the international. Thus, it cannot allow itself to be crippled by "a priori" rules but it must none the less be dependent on tenets of a higher order. Its aim is the nation's welfare : there can be no justification for the senseless decrying of governmental activity or "interference", as same choose to call it, far its own sake, because in general it is a potent agent

of social reform; but it is indeed to be strongly censured by all freedom-loving people, if it leaves in some phase of its operation a *state of injustice* unattended. In a few words, governmental activity partakes of the nature of all human "means" : it can be good or bad, in accordance with the use which is made of it.

Too much thought can never be employed in such matters of profound importance : one at the end of one's mental peregrinations may never say that the final solution has been achieved for it must be tested by an ever-changing criterion. That, fortunately, is the statesman's mental racking-problem — not the lawyer's. The latter's views are bound to be more sedate, because they are based on foundations bearing the sinews of solidity that stands him in goad stead especially when he is obliged to work in unison with those who fatigue themselves fumbling with the insidious task of Administration. Government, he is taught from his early days, is not the art of devising "short cuts" and common remedies : that was indeed the task of feudal potentates who could choose to be diabolical or angelical according to their whims. An age of constitution-making did not suffice to ostracize arbitrariness and modern times are affording constant proof. Ethically, the Government is bound to preserve untramelled certain forms of individual "wealth" ; it may only affect others to a limited extent and it must faithfully perform all the obligations it incurs in the course of its activity. These are mere commonplaces, once we are adamant in our belief that the State is not the Deity and that, contrariwise, it must be subservient to the realization of man's essential Good. In view of this, Ethics prescribes severe, restrictions on the operation of the governmental structure and, since Law properly can never discard Ethics, it must needs repeat that, although the State may impose duties on its subjects in relation to the circumstances prevailing, it should never infringe on those inalienable qualities which are immanent in man's nature that far all its humanity transcends the human.

In all other matters the State has no more than a faculty of "substitution" and therefore the duty to give compensation in every case in which damage is caused automatically arises. Naturally, this duty exists only in the cases to which the faculty of "substitution" is applicable, and not in matters in which the State may not interfere without abuse : in such instances only the prophylactic virtues of a good contribution can be of assistance. "Naeminem leadere" is a prescription binding the State as much as any individual and the immunization of the State is nothing less than an advanced Pantheistic outgrowth, more dangerous than hitherto in view of the centralization of powers that characterize the modern State.

In Malta there is no *general* law regulating governmental liability. Apart from sporadic provisions jurisprudence has been the only source of rules. It has been established that the Crown is not responsible for a delict or quasi delict committed by one of its servants, unless *culpa in eligendo* be proved; that the Crown is fully liable for breach of contract; that the Courts are incompetent in respect of acts performed "iure imperii", even if they amount to a violation of some contractual tie. These rules are progressive enough but they are open to serious criticism—the natural consequence of vagueness in law.

We hope, in the future, to examine in detail the principles which we think have a claim to the express sanction of the law. At present we only desire to point out the need of enacting laws envisaging the several hypotheses which normally arise, providing new rules and clarifying the old ones. For instance, it must be made clear that the State cannot oppose the negligence of an employee in all those cases in which the law expressly enjoins *the State* to

render some "praestatio" ; besides, contractual liability requires exact delineation, because it is evidently of moment to know what is contractual and what is not.

It is indeed gratifying to think that the Courts have invariably declared the amenability of the Crown to being sued before them, but they have been likewise firm in their decision that the Courts may not adjudicate on acts, pertaining to the State qua State, except on questions of validity. The theory founded on the distinction between acts *jure imperii* and acts *jure gestionis* has been in the main accepted but not more than one judgment (1) dwells on direct responsibility accruing to the Government's detriment in consequence of a breach of a non-contractual character. This judgment stresses the point that one should not lightly "rassegnarsi ad una insuperabile difficolta di conciliare il diritto positivo con la giustizia senza riconoscere e deplorare nel positivo diritto un'imperfezione... Non e' questo interpretare il diritto ma calunniarlo." These indeed are words deserving ponderation. This judgment reduces the Crown's responsibility in the particular case to a quasi-contractual one and it therefore forfeits much of its value; but the positive fact remains that the Crown was held responsible for an act performed *jure imperii.*

We feel that one may look at the distinction between acts *jure imperii* and acts *jure gestionis* not as referring to the jurisdiction of the Courts, *not* as the basis of the right to claim damages but as purely referable to execution. The flaw in the distinction, as hitherto interpreted, consists in the fact that there are certain acts *jure imperii* which imply only the faculty on the part of Government to *change* the lawful state of things i.e. to *substitute* one thing for another, but they cannot dispel the Government's liability or the jurisdiction of the Courts. In such cases therefore the Courts should have the right to order the payment of damages without their being able to demand positive reinstatement. In short this would involve the existence of *three* classes of acts :

1. acts *jure imperii* necessitated by public policy and affecting the very essence of social co-existence, e.g. public morals, national defence, etc., in regard to which the Government is not liable in any way.

2. acts *jure imperii* in relation to which the Government is responsible for damages but not for specific performance.

3. acts *jure gestionis.*

This three-fold distinction does extend the Crown's liability but it does not extend it more than that of several less liberal Continental States : in fact the position here and, still more, in England, is paradoxical. We feel that if due weight is given to such a distinction the door will be open to just legislation, incorporating the law of governmental responsibility; and, in the interim, extreme care should be employed in the drafting of legislation in order to be on guard against the so-called "practical" measures which constitute a novel form of tyranny.

REPORT ON EXAMINATIONS

In several Government Examinations the Examiners are asked to draw up a Report detailing the merits and demerits in general of the papers so that the candidates will know against which

(1) Camilleri vs. Gatt (1902) Ist. Hall, Civil Court.

errors they must be more on their guard. Of course the comments and recommendations which the Examiners make are bound to refer to the generality of the papers and may or may not be applicable to individual cases but, in the long run, they will be helpful to all and can in no way work to the detriment of anyone.

In the University this system has never gained favour. We can hardly explain why, allowing for the tendency in all forms of human activity to repose trust in "what was done in the Past". We admit it may prove of some inconvenience to the Examiners to have to draw up a Report after that their sufficiently irksome duties are performed, but one may note that the Examiners are furnished with all the material, they require unconsciously while examining the papers and the Students, arid, therefore, the drawing up of the Report does not entail any substantial stress.

They may think in one examination that the students were apprehensive in expressing their personal views; in another they may feel that the papers lack conciseness and precision in treatment; in another they may be inclined to advise the students, or the lecturers, as the case may be, to take a more doctrinal outlook and so forth. As matters stand, the Students have no means, officially recognised, to become aware of their shortcomings. It would be advisable, we feel, to amend the University Statute in the sense that Examiners will in future be required to present a written report dealing with the Examination in general with special reference to the way in which the Students tackled or ought to have tackled the "pericula" set to them.

PUBLICATION OF LAW REPORTS

During the past decade life has had abrupt changes : and the legislator under effect of shock may have at times acted under this anaemic sort of condition : the tragic, the dismal and the normal have had their share in the grand orchestration. With life, law has been subject to change : justly or unjustly, severe restrictions have been laid an all sides and the Courts in their role of protectors of civic liberty have constantly attempted to rationalize the burthens which certain laws imposed, albeit not always effectively. In this manner the pronouncements of the Courts often do not find a counterpart in past judgments and they therefore are of the greatest importance to law practitioners. This notwithstanding not one judgment delivered from 1935 to the present day has received detailed publication.

It is indeed surprising how barristers can manage to keep abreast with jurisprudence; only a boundless spirit of fraternity between barristers can make it possible. But even if barristers pool their knowledge of recent case-law, it is abundantly clear that the publication of Law Reports is to be taken in hand without delay.

With regard to judgments prior to 1935 we feel that it is disgraceful that complete sets of Law Reports are nowhere to be found. If one happens not to have had one's father a barrister, one is barred from having a complete set of Law Reports. The Government should try to re-print all the extant judgments which have so far been delivered by our Courts; say, a volume every year would enliven the hope of many lawyers to have their own set of judgments. We know that all this spells hundreds and hundreds of pounds but everyone will agree that the pre-

sent position is as unfair as it is ludicrous.We also suggest that the judgments of the Judicial Committee of the Privy Council should be included in the Law Reports. The Judicial Committee in hearing appeals from the Courts of Malta and Gozo is in reality acting as a Maltese Tribunal advising His Majesty on Maltese affairs and its judgments reasonably fall within the general category of "Decisions of the Maltese Courts". Likewise to be included we deem the judgments of the Courts of Gozo in their superior jurisdiction and also the decisions of the Courts of Judicial Police as Courts of Civil and Commercial competence. We see no reason for which these judgments are to be excluded.

It has been hitherto the practice to publish *only* the judgments delivered by the appellate Court in all those cases in which an appeal is filed. We find a few judgments of the Courts of first instance which were published but these instances are meaningless when compared with the thousands of judgments delivered by the Courts of first instance, which are left to be a prey to the worms that mark the lapse of time. No words will adequately convey the reprobation which one feels for this senseless jettisoning. It is true that technically once an appeal is carried on to a close, the judgment of first instance loses its binding force but its intrinsic merits and its erudition cannot be lost, and they entitle it to be reproduced in some part of the Law Reports, maybe in some special appendix.

JUDGE A. PANNIS O.B.E., LL.D.

The death of Judge Parnis has deprived Malta of one of its most prominent citizens—one who was a very brilliant member of the legal profession. At the time of his death Judge Parnis had long retired into private life but his dynamic personality was still very strongly felt by all who came in contact with him.

Judge Parnis who was born in 1860, was called to the Bar in 1879. He showed great promise at the very outset of his career, and soon acquired a very extensive practice, specializing in Commercial matters in which he was looked upon as the leading lawyer. He was appointed Professor of Commercial Law in the Royal University, in 1905, but soon relinquished this professorship on his elevation to the Bench. As Judge he presided for many years over His Majesty's Commercial Court. In 1919 he was created an Officer of the Most Excellent Order of the British Empire and retired from the Bench in 1925.

The General Elections of 1927 saw Judge Parnis contesting a seat in Parliament as a Constitutional Candidate for the Fifth Electoral Division. He was returned and was appointed Minister for Justice. He believed in reciprocal toleration and his kindly manners endeared him to a host of friends in the political and social spheres.

The spirit of service to the country and to society at large which Judge Parnis and other members bf the legal profession have shown in the past, cannot but stimulate our ambition and clench our resolves to take a manly and noble part in the task of upholding the tradition which those that came before us have set up.

EDITORIAL

Law is not an exact science. Despite the majesty and gravity with which its administration is properly vested, it is a very human affair after all. It has to do not with scientific axioms or scientific formulae but with the everyday concerns of ordinary citizens—MACMILLAN.

Sir IGNAZIO GAVINO BONA VITA*

(By JOSEPH M. GANADO, LL.D., B.A.)

THE life of every human being has been compared by a philosopher to the adventure of a traveller who strives to ford a broad, swiftly flowing stream, full of slippery rocks, hidden currents and treacherous quicksands... Sooner or later the pilgrim is swept away and submerged. Finally he sinks, leaving behind him perhaps no trace, perhaps a bubble on the surface, quickly dissolved and forgotten, or perchance a fragment of flotsam to be picked up by a later traveller." 1) No more than a fragment, which is the mark of insufficiency; and, this second traveller's task is indeed no easy one. He may endeavour to decipher the story which the fragmentary flotsam is able to relate; but a second cycle of obstacles comes his way and he will feel extremely happy, if he succeeds in giving same sort of realistic shape to the bubble or flotsam that he surveys.

Amid a plethora of difficulties, he finds himself confronted with the philosophy which is current in same spheres that men are to be looked at in the light in which they are regarded by others. Those who happen to dissent from such a desultory creed may be dubbed to be impostors, but, in the case of living men, they would have the actualities of life patent before them. This privilege is not given to the stray traveller who has come along a century later trying to uncover what has been long dead and buried. He has found voluminous writings which speak highly in favour of the subject in discourse; he has found descriptions of some of the "difficult" moments that life invariably presents and he has perceived that the Maltese nation did not give Sir Ignatius the share of regard he might well have deserved. It is true there was no hostility but, on the whole, the Maltese people were not fully appreciative Sir Ignatius' wholehearted effort to reform our Codes of law.

It is true, biographical work admits of great pliancy ; its easy adaptation is at the same time a source of difficulty and a tonic to further research, because one quickly realizes that a man's character cannot be pierced into as really as one may desire Besides, a man's life may submit to various interpretations, all true as far as they go, but all impotent to give a true picture of the Man. A master mind in biographical composition can make light of all this, but to others these shortcomings are unavoidable and terribly mortifying.

However, in spite of all, if the traveller mentioned above were compelled to make a synthesis of Sir Ignatius' life, he would not be unsatisfied with the words : "An indefatigable worker". His life was full of toil and trouble; he used to take criticism to heart and that was a great failing but in spite of all criticism he continued to enjoy the Government's confidence up to his very last days and he toiled not without achievement.

Born in the year 1792 amid the crescendo of revolutionary thought, his youth was spent during some of the most stirring moments in our Island's history, including Napoleon's occupation. The days that followed the gallant fight of the Maltese nation against the soldiers

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We wish to tender our thanks to the Hon. Mr. Justice Comm. R.F. Ganado and to the Hon. Mr. Justice Professor. E, Ganado for their assistance in the compilation of this biography. Our gratitude is also due to Dr. A.J. Ganado B.A. and to Mr. L. Sammut Briffa B.A.—Editor.

(1) J. Purves-Stewart : "Sands of Time".

of the French Republic were not very bright and this may have aided the formation of the conservative spirit underlying Sir Ignatius' character. No doubt, he was a renovator in law; but politically, it does net appear that he favoured any subversive ideal. Rather, his inclinations were distinctly for strong government, sufficiently powerful to curb the Press from expressing revolutionary ideas. Notwithstanding that such an attitude might have been illiberal, still the unsatisfactory standard of the journalism of those days stands fully in Sir Ignatius' favour. His opposition, to unrestrained journalism did not curry favour with the editing staffs and the consequences do not baffle investigation.

In 1812, he started practising at the Bar. He was Assistant to the Executive Police and later Protector of Prisons and defender of the Poor and, when in 1818, the post of Assistant Crown Advocate was created, he was the first one to be chosen. . Apart from important Instructions issued to the Deputy of the several Casals in the Island and the institution of the Most Distinguished Order of St. Michael and St. George, the enactments passed during his term of office were mainly of an administrative nature. Above all, one notes that the grant of impunity an King's evidence and of pecuniary rewards was the current practice; this does not reflect favourably on the state of Crime Detection but neither can one justly fulminate against the Law Officers of the Crown. It may be that crime was rampant amongst the poverty-stricken population, because whilst trade had flourished during the latter half of the Knights' stay, it had alarminglty decreased upon the initiation of British rule (2).

On the 8th of March, 1820, he was appointed Magistrate of Judicial Police for the first District (3). One is unable to call it a promotion, although the Magistracy is on a higher hieararchical level, and the reason of the change of office is not known. His successor was William Wright and, keeping in mind the strong wards used by Austin and Cornewall Lewis against the Administration of Sir Thomas Maitland, one may legitimately pronounce the claim of "smelling a rat".

During the period of his Magistracy he came in close touch with an eminent English Judge Sir John Richardson who has been praised by all the historians of the period. This English Judge had a great share in the reformation of the law during the initial stages of British rule and his efforts to ameliorate the laws then prevailing should command the unfailing gratitude of all. However, he was constantly assisted in his work by Dr. Bonavita who actually drew up long

(2) The populace seems to have gone cleptomaniac, One of the cases for, the detection of which a reward of 1000 scudi was promised is of particular interest. The *Bovo* "San Calcedonio" sailed from the Grand Harbour, Valletta, on Wednesday, 17th November, 1817, at 5.30 p.m. and headed towards Cape Passero. She was boarded by a Maltese boat at about six miles distance from the shore and six masked men rushed into the cabin and broke open a box containing upwards of 1800 dollars, besides other money. They cut the main haulyards, threw the mainsail and the oars overboard and then rowed in towards the Grand Harbour Lighthouse.

(3) The First District included "the four cities of Valletta, Cospicua, Senglea, and Vittoriosa and their respective suburbs, together with the Casals Zabbar, Zeitun, Tarscien, Nuovo, Asciak, Gudia and Luca, with their respective limits". And according to the organization of the Inferior Courts then in force there were to he four Magistrates for the First District and at least two of them were to be at all times Maltese.

memoranda to help him. Worthy of note is the Report on the Criminal Code written in 1823, a copy of which was also sent to the Governor.

Incidentally, one may remark that these Reports are not only important in connexion with the history of the Criminal Code but they also reveal some sides of the character of their author; of course, such writings may at times be misleading, because many unknown forces and motives may have been at work. But, none the less, one can also come across sure indicators of virtue or defect. For instance, in the 1823 Report, Dr. Bonavita speaks disparagingly of certain parts of British Criminal Law ; the Report in question was intended mainly to be of assistance to an English Judge and Dr. Bonavita could foresee that it would soon find its way to the Authorities in England and, therefore, the unequivocal manner in which he expressed his views disqualifies him completely from being in any way associated with the sufficiently numerous class of sycophants. He was then still very young, still aspiring to go higher up in the ladder of his profession and he is therefore fully entitled to receive a word of praise. Naturally, his stand by his opinion does not make of him a hero : he only did what was incumbent upon him to do and in so doing he showed that he was not devoid of the sinews of Character.

But, what is Character? A philosopher would say that Character is a quality, an attribute that controls without being controlled, that qualifies without in its turn being qualified. It is independent of failure or success and, to some extent, also of correctness; so that whatever an individual may think, be he friend or foe, be he right or wrong, he is to be revered, if he did have the courage to stand up in favour of his beliefs. The practical-minded may be inclined to regard the effect much more than the efficient cause and they would undoubtedly be at fault in all those cases in which the righteousness or faultiness of the cause demands particular regard.

"At times the insignificant may oust the significant" and, in Dr. Bonavita's case, this was partly true; in fact his career was decidedly speeded up on account of his knowledge of the English language. He was appointed Judge on the 27th September, 1827, upon the retirement of Judge Dr. Vincenzo Bonavita (4).

He was recommended both by Sir John Richardson and Sir John Stoddart, the Chief Justice, who on the 4th October, 1827 during a sitting of the Supreme Council of Justice in the presence of the Governor, the Chief Secretary and His Majesty's Judges delivered an address of introduction. "I am satisfied," he said, "that Your Excellency will find in Dr. Bonavita that inflexible integrity and that lively sense of personal and professional honour without which the laws cannot be administered worthily and conscientiously or independently, as they must be administered by every Judge who regards his duty to his Country, his Sovereign and his God." He went on : "Yet, when I consider the talent, skill and reputation which distinguished many of Dr. Bonavita's colleagues at the Bar and some of them his seniors in standing. I should perhaps

(4) Despatch No. 1032 to the Viscount Goderich— My Lord, Being convinced of the necessity, as stated by the Chief Justice, of filling up the vacancy in the Judicial Establishment occasioned by the retirement of Dr. Vincenzo Bonavita, I have appointed Dr. Ignazio Gavino Bonavita one of H.M.'s Judges who has long served as one of the Magistrates of the Judicial Police. This gentleman is strongly recommended by Sir John Richardson as the most fitting person to fill the situation from his legal knowledge and from his being able to write the English language and speak it fluently. (Signed) F. Ponsonby.

have hesitated to say that he was entitled to a preference over several, whose claims Your Excellency has had under consideration, had there not been one particular in which Dr. Bonavita stands far above all competition, and that is his very superior knowledge of the English language." Objectively, that was hardly any reason at all for an appointment to a Judgeship; so that, probably Dr. Bonavita who was then only 35 years of age was too young. It may be that had he been appointed Judge fifteen years later he would been more experienced and the claims of his "seniors in standing" would have been dealt with more justly. However, the appointment, as such, was not a mistake and, as years proved, Dr. Bonavita's tenacious character stood Malta in good stead.

His judicial functions were performed with a thoroughness of which the first volumes of the Law Reports stand in witness. The laws then in force were those enacted by the Knights of St. John which were inadequate and made frequent reference to foreign laws and jurisprudence. This made a detailed knowledge of Roman law and general jurisprudence on the part of the Judges an impellent necessity and prolonged application was inevitable, if one were ever to be reckoned as a sound exponent of the partly unwritten law. "Although still very young he showed on the Bench the wisdom and maturity of a profound jurisconsult and knew how to acquire the respect and confidence of the whole forum and public in general" (The Malta Times, 10th August, 1865).

Especially fond was Sir Ignatius of the historical aspect of the law, for it is revelatory of the real significance and bearing of all social currents, since laws follow one another in a more ordered sequence than political and economic events. The temporary abandonment of Roman law in the early mediaeval period; followed by its advent in a modified form under the, influence of Canon Law and finally its scientific grafting into the French Code— were all objects of weighty comment in his writings. In Malta, feudalism had a much longer life than it had on the Continent and his times may be considered as forming part of the transitional period between what Lord Justice Slesser calls the Age of Faith and the Age of Power. He retained the virtues inculcated by the former and was, by nature, not eager to entertain a more "modernistic" outlook. He speaks in very high terms of the historical researches made by Judge Vincenzo Bonavita and he deplores the fact that they were not published; his apprehension that they would ultimately get mixed up with the ravages of time has indeed verified itself, because Vincenzo Bonavita's works form part of the unexplored documents which Malta has. Let us hope that they have not been destroyed.

In 1831 a Commission was charged with the drafting of five new Codes of Law. At first, only Sir John Stoddart, Judge Baron Field and Judge Kirkpatrick were invited to sit; but Kirkpatrick, who was First Judge of the Ionian Islands, refused to serve on a Commission which did not include at least two Maltese jurists. His suggestion was finally acted upon and Judges Bonnici and Bonavita were selected.

A description of the activities of the Commission would get us involved in a historical analysis of the Criminal Code's development. For our present purposes it is sufficient to say that the Draft was mainly based on the Code of the Kingdom of the Two Sicilies with the infusion of certain liberal principles of English Public law, the need of which had even been mentioned by Sir John Richardson in his Reports. Judge Baron Field never attended the sittings; Judge Kirkpatrick thought that his time was being wasted on account of the endless procrastination coming from the Government's side and went away to England. The active

members were therefore Stoddart, Bonnici and Bonavita and later an Langslow, the Attorney-General. When the Draft was verging upon completion the English Commissioners expressed their determination to give up what had been done and to base their Project an British Criminal law exclusively. Their intention naturally courted opposition which actually was equally unabating and after lengthy correspondence the Maltese Commissioners won their point by reason of their having the support of the Secretary of State. The second round followed rapidly when the two English members wanted to qualify the English text as the authentic one, while the other two members insisted that the Italian text drafted by the Commission was the authoritative one; again their view made headway upon the intervention of His Majesty's Minister. These are however mere instances of the open warfare which went on, especially between Stoddart and Bonavita. The latter refers to "the want of urbanity and common courtesy" of the former, and, in a few words, the continuation of the task they had set upon themselves to do was impossible. In a letter to Kirkpatrick, Bonavita says that the two English Commissioners in pretending to translate the Code altered the substance of the provisions and made many material changes. "However great the theoretical and practical knowledge of our English colleagues," he goes on to say, "I must express my doubt whether they possess that superiority of talent which is requisite to make a Code of one's own creation."

On the other hand, in Dr. Bonavita's words, the English Commissioners "felt the greatest contempt for the Neapolitan Code." For their part the Maltese members opposed the adoption of English law as a model; "the great danger", they said, "of recurring to the English law in the formation of our Codes (particularly of the Civil Code), the indescribable confusion that must follow any attempt to introduce in Malta, or even to assimilate the Civil Code thereto require no demonstration, for this branch of the subject, an which depends the security of property, has in Malta very seldom a resemblance to English institutes, the introduction of which in it would change the whole system of possession whereas the Criminal, Civil and Commercial Codes of the Continent contain principles in perfect harmony with cur own and being founded upon the same Roman Law all are more or less easily to be adapted to Malta—indeed it may be said that they are no other in principle than the present Jurisprudence of Malta reduced to concise and clear axioms."

At length His Majesty's Principal Secretary of State for the Affairs of the Colonies signified to the Lieutenant-Governor His Majesty's Commands that the Commission for framing the new Codes of law be dissolved and on the 19th May, 1834 His Excellency dissolved the Commission. Six months later, Judge Claudio Vincenzo Bonnici, Judge Ignazio Gavina Bonavita, Dr. Falson, Dr. Torriggiani and Dr. Francesco Chapelle were entrusted with the compilation of the new Civil and Commercial Codes and of the Code of Civil Procedure. An outline of the Code of Criminal Procedure had already been drawn up, on the Governor's demand, by Judge Bonavita and, together with the Draft Criminal Code, it was forwarded to England to be examined by the U.K. Law Officers. Judge Bonavita was then invited to proceed to England in order to discuss certain matters with the Authorities and he left Malta in October, 1835.

History relates that the Project gained official approbation and the Governor was instructed to publish the Draft and to invite public comment. Judge Bonavita was informed beforehand of the Secretary of State's intention to forward such instructions to the Governor and by letter of

23rd December, 1835 he registered his negative view. The Government's attitude was admittedly in accordance with liberal tenets but, agitated as Malta was, Judge Bonavita thought that it would be preferable to enact the Project in spite of any eventual criticism. It is true he was, not unlike many of his brethren, not impassive under public stricture, but in this case other motives did exist. He was in a better position to estimate the reaction that would fulminate upon the publication of the Project, once public sentiment was at the moment passionately critical of anything that came from the Government's side. Eventually, the Secretary of State's decision was enforced and Judge Bonavita's apprehension that the whole Project would be wrecked proved true; in fact it took another 18 years before a Criminal Code was finally enacted. The interval was employed in serious, but intermittent, discussion naturally leading to more mature deliberation but one cannot be forgetful of the fact that Malta's submission to the universally condemned Criminal Laws of the Knights of St. John was in this manner prolonged for a considerable period.

Coming back from England with the insignia of Knight Commander of the Most Distinguished Order of St. Michael and St. George (5), Sir Ignatius was again engrossed by his judicial work. His restless energy is the most impressive feature of his life; we do not see it only in the volume of his writings, in his increasing endeavours at reforming the laws but also in his daily work at the Law Courts. There was in fact a correlative appreciation on the Government's part which finds its manifestation in the very distribution of judicial work. For instance, at one time the Government's attention was directed to the arrears in the Civil Court and, significantly enough, Judges Claudio Vincenzo Bonnici and Ignazio Gavino Bonavita were entrusted with the uninviting task of hacking at the arrears.

Let it be recalled that the Chief Justice, Sir John Stoddart, was all out against the enactment of the proposed Criminal Code and, during the period in which public comment was invited, he took occasion to animadvert upon, the Project, while performing his judicial functions, and in so doing he spoke rather unkindly of the members of the Commission. This took place during a sitting of the Court of Special Commission in which the Chief Justice in his address to the Jury, after having expressed words of encomium on the exemplary manner in which Maltese Jurymen had answered their nation's call, proceeded to a somewhat pointed attack an

(5) 28th April, 1836. "At the Court of St. James's — Ceremonial of the Investiture of Doctor Sir Ignatius Gavin Bonavita with the Ensigns of a Knight Commander of the Most Distinguished Order of St. Michael and St. George. At 3 o'clock Sir Harris Nicholas, Chancellor and Senior Knight Commander of the Order wearing his Mantle and Badge, received the Sovereign's Commands for an Investiture of the Order in the Royal Closet. By Command of the Sovereign Doctor Ignatius Bonavita was conducted with the usual manners to His Majesty, preceded by the Chancellor who (in the absence of the King of Arms) bore the Ribband, Badge and Star of the Order. The sword being delivered to the Sovereign and Dr. Bonavita kneeling, he was knighted therewith after which he had the honour to kiss His Majesty's hand. The Chancellor then presented to the Sovereign the Ribband and Badge which His Majesty was most graciously pleased to place round the neck of Sir Ignatius Bonavita when he had again the honour to kiss the Sovereign's hand and having received from His Majesty the Star of the Order withdrew. The Right, Hon. Lord Glenelg, H.M.'s Principal Secretary of State for the Colonial Dept., the Right Hon. the Chancellor of the Exchequer, the Rt. Hon. Lord Hill, Commander-in-Chief of the Forces and several high functionaries of the State assisted at the Ceremony."

those who had opposed the Jury system or who had proposed the adoption of the French model. The numerous assemblage greeted the address with applause, a most uncommon occurrence in a Court of Law (6). He also stated that the Draft Code was imperfect in many respects, because the Commissioners had attempted to finish it speedily. The adoption of French law as a model was erroneous and with reference to the institution of the Jury, French law had followed English law, so that the Project was "the shadow of a shade."

By letter of the 5th November, 1836 addressed to Sir Frederick Hankey, Chief Secretary to Government, Sir Ignatius protested against the quasi-personal references that had been made. The matter was brought to the notice of the Secretary of State, who thereupon expressed His Majesty's desire that Judges should abstain from introducing into their pronouncements anything extraneous to the matter in the suit and in a letter sent to Sir Ignatius he said that His Majesty's confidence in his ability and zeal for His Majesty's service and for his native country "rests upon grounds too firm to be shaken by the expression of opinions unfavourable" to him.

The Chief Justice, some time later, published the address together with the letters received from the members of the Bar (who had been invited to listen to the address) thanking him for his having advocated liberal modifications in the Code. It was also accompanied by comments on the correspondence occasioned by the address, his main contention being that there had been no reason to take offence far his having been critical and that it was "no unprecedented thing even in England for a Judge to deliver to his auditory in a charge to the Grand Jury or on any other like occasion certain general views on the excellence of the laws."

The perpetual strife was finally terminated by the removal of Sir John Stoddart from the Chief Justiceship. As Dr. A. V. Laferla remarks in his "British Malta", Sir John Stoddart's career in the political and journalistic fields was improper preparation for the burthen of his later days. His uncertain temperament made him the possessor of a venomous pen bent upon resorting to the sarcastic figure, that of itself incenses apposition. He must not be blamed for his having stiffly stood up for his views : but, apart from his having been trenchant in the execution of his intentions, he may not have borne adequate respect for the views of his antagonists. On the other hand, Sir Ignatius, made a formidable adversary, perhaps too quick in taking umbrage, perhaps too drastic in reaction. He eventually came out the winner, because he commanded the most "valuable" of all adherents—His Majesty's Government. Historians rejoice at the grand win ; and they are perfectly right, if it were true that the ultimate result is the sole index of merit. If the removal of a Judge, on grounds other than incompetence or bad faith, can be looked at as praiseworthy, then the win was indeed grand.

Austin and Cornewall Lewis referred to Sir Ignatius in their 1839 Report as a gentleman "of excellent sense and a sound and able man". Sir Ignatius' star was still in the ascendant and upon Sir John Stoddart's removal and the suppression of the Chief Justiceship Sir Ignatius was the first one to be appointed President of the Court of Appeal. History repeated itself and the aphorismal truth became once more tangible ; again, the appointment was pre-nature (Sir Ignatius being 47) and tradition has it that people in those days thought that his appointment.dealt an unjust blow to the two Judges who were Sir Ignatius' seniors and

(6) It may be stated that Sir Ignatius was not favourably disposed towards the Jury system. He says that it may be useful only in cases of a political nature.

who could occupy the post with equal honour and efficiency. The writer can not associate himself in any way with such or any other view ; he is a mere narrator; factual eloquence, if any, will have to do the rest.

On the 1st January, 1839, Judges Dr. Agostino Randon and Sir Claudio Vincenzo Bonnici presented their resignation. On the marrow Sir Ignatius was appointed President. (Incidentally twelve years previously it had been stated by Sir John Stoddart. "He pursued his studies under the direction of two gentlemen. Doctors Randon and Bonnici".) A few months later by Notice published on the 1st July, 1839, His Excellency the Governor was pleased to order "that Dr. Randon shall continue to enjoy the same rank and precedence amongst His Majesty's Judges to which he had been hitherto entitled." After a short interval he was created Grand Cross of the Most Distinguished Order of St. Michael and St. George.

The new President of the Court of Appeal, according to the law creating his office "retains at all times and for all intents and purposes the office of one of Her Majesty's Judges. He shall as President of the said Court also discharge the duties annexed to the office." Sir Ignatius, therefore, remained a Judge, but in virtue of his new appointment he ranked first among the Judges and was to preside in the Court of Appeal. He was also not subject to arbitrary removal, because he was no other than a Judge and, as such, covered by the law regulating the Judgeship.

During his long term of office, his elaborate judgments give testimony of deep juridical knowledge and untiring energy; naturally, they cannot go all to his credit, because one must not lose, sight of the contribution of the two other Judges : it is enough to say that Sir Paolo Dingli was one of them. However, Sir Ignatius mind was not dedicated merely to judicial work. On the 7th August, 1848 he was appointed one of the Commissioners who were to draw up a Code of Civil Procedure "with the especial object of establishing efficacious forms for the better ensuring the interests of particular individuals and for the more speedy and economical administration of Justice in civil matters."

After the publication of Jameson's Report in 1842, Sir Ignatius and Judge Chapelle were invited to draw up a Report on Jameson's suggestions; in short, in their Report to the Governor they said that they were afraid that some of the suggestions were hazardous. The previous laws, they said, were too old and therefore they advocated a cautious policy that would keep guard against a hasty transition from an old to a modern Code. And., in this regard, they showed themselves too much inclined to stick to their original Project. Sir Antonio Micallef, on the other hand, was in favour of many of Jameson's suggestions and states that Sir. Ignatius "non dissente dal pragetto eccetto in alcuni punti principali e che fortunatamente, come credo, possono essere facilmente risoluti."

A comparative study of the views expressed by Sir Ignatius on the one hand and Sir Antonio on the other brings home the latter's major capacity to understand the "other fellows' point of view. Without losing sight of the natural dislike of criticism (for it was Sir Ignatius and not Sir Antonio who had drawn up the original Draft) one unavoidably perceives in Sir Ignatius a deep-lying inclination to stand adamant by his original proposals. Such a trait in one's character may be harmless when accompanied by an otherwise intelligent understanding and, as far as one can see, such was the case with Sir Ignatius. Attributing shortcomings to others is most unpalatable and perhaps disquieting, for one's thoughts instantly get ntermingled

with the eternal queries of life and character that have not allowed too much probing by man's research.

"... Volle ai suoi personali vantaggi anteporre quelli del pubblico" (7). Words, indeed, of deep homage, deserving attention as they came from one who had personal contact with Sir Ignatius and published at a time when being encomiastic about persons in public life was considered to be dangerous. We can take these words as an epitaph explaining and illuminating Sir Ignatius' entire career. Honour on that score is not due solely to him but also to that noble profession which gave him occasion to work for the welfare of his fellow-countrymen in an atmosphere of serene privacy. "La amiamo (la professione legale) perche essa e bella poiche ci permette di penetrare negli animi di colaro che a noi si affidano e di conoscere le gioie, le trepidazioni e i dolari; perche essa e buona poiche ci da piu di una volta occasione di fare silenziosamente un poco di bene..." (8).

But forensic activities were not his only concern; he also kept in mind that the education of the rising generation was a precious asset in the ledgers of national life. In fact,, he drew up the Statute of the Royal University in 1839 in view of the proposed Reforms in Instruction advocated by the Commissioners Cornewall Lewis and Austin.

Retiring on the 27th December, 1853, he did not enjoy his well-earned rest undisturbed. The Rectorship of the University was offered to him but he did not accept, decidedly not from sheer laziness as is thoroughly proved by the fact that in October, 1854 he was elected to the Council of Government with a large majority in his favour, although it seems that there was a movement against him, since he refers to his having last many votes on account of the activities of some people. His stay in the Council was of short duration and he was not immune from the evil touch of political antagonism. It is true, his fame was by now already too deeply rooted in national conscience to be seriously affected by the trivialities of political life, but apart from the grant of the G.C.M.G. ambiguous, as it is no good to him or to others seems to have came out from his repentine sally into the political arena. But to all Posterity his example stands out as a noble self-committal to the nation's welfare, restricted by no limit of circumstance or convenience, actuated by purely altruistic motives.

When dealing with the life and character of those that have already landed on the Elysian shores, one should at least intensify one's labours in order to make mistake less possible, because in such cases there can hardly ever be refutation of some disparaging note or unfavourable comparison. And, therefore, any impression or subjective estimation must be taken for what it is worth.

Malta can look up to Sir Adrian Dingli as the typical jurist and statesman; to Judge DeBono as the impassive Judge; to Sir Antonio Micallef as the profound lawyer. Such heights indeed are not easily attainable and not all the "famous" can claim such unbounded veneration; but, none the less, one may think oneself not wrong in including Sir Ignatius in the august company. It is true, as he himself said, "si puo bene procurarsi una qualche

(7) Signor Gio Antonio Micallef: Nota nelle sue Riflessioni storiche critiche sull' Isola di Malta.

(8) Pierluigi : La vita dello Avvocato.

riputazione di abilita come di prodezza senza richiedersi percio di divenire uomini grandi o 1865) and, in so doing, "volle ai suoi personali vantaggi anteporre quelli del pubblico". (Micallef—Riflessioni). He was a devoted servant of the Crown, and he also deserves praise on this score, since he demonstrated much independence in the difficult moments he came across. No number of "ex parte" declarations would have been as significant as the remarkable stand against Sir John Stoddart or as the outspoken manner in which he pronounced himself in regard to law and social life.

These are all facts that speak highly in his favour and that every Maltese man should keep in mind. One must realize that a nation's life requires its individualization, so that national aspirations may be put to the fore, while otherwise they would be lost for ever in helpless obscurity. In the legal field, perhaps, Sir Ignatius was for his times what Sir Adrian was for his; the former's task was more difficult, since life was much more agitated, and, in spite of all, the work performed during the period running from 1817 to 1854 constituted a most important stage in the reorganisation of the law which was then a major necessity. The Criminal Code was ready ; the Code of Civil Procedure was awaiting promulgation and the Commercial Code was not far off from the proper legislative channels. The Civil Code had not been seriously interfered with, since Destiny had chosen a younger man to take charge of the immense adventure.

The "world", as we know it to-day,, is the resultant of manifold currents and under-currents that have inundated it several times over. As every time the waves recede, a new world emerges; but, since altitudes are unequal, the currents are not active in all places simultaneously, and they are often in need of some great mind to act as a sort of interlude between the Ages. Mediaevalism and Feudalism in Malta had a prolonged span and in the early nineteenth Century the break-away was in need of being registered in the Acts of the Legislature. Both the national and the international were good omens and Sir Ignatius was the one appointed by the Fates to be the rectifier of an unadjusted era, or, if one turns to Latin, "auspicium melioris aevi."

Sir Ignatius died on the 1st August, 1865. At the Addolorata Cemetery there is a large marble slab opposite the main entrance recording an appropriate salutation. The family coat-of-arms is also reproduced, together with its motto : "Auspicium melioris Aevi."

THE JUDGE.

Judges are of necessity isolated men.—Lord Justice Slesser.

EQUITY AND THE ORIGIN OF TRUSTS

(A paper read by PROFESSOR WILLIAM BUHAGIAR, LL.D., B.C.L. (OXON.), B.A.)

THE main object of this paper is to give an idea of Trusts in English Law; to do so, however, it is essential to introduce the subject by giving a short history of the developments of Equity. In dealing with any subject of English Law the principles can be understood and their logic appreciated only if we go back to 1066 and in many cases even further back. No satisfactory definition has been given of Trust but it has perhaps been best described by Underhill as "an equitable obligation binding a person to deal with property over which he has no control for the benefit of persons (who are called the beneficials or *cestui que* trusts) of whom he himself may be one and any one of whom may-enforce the obligation. The essential word in this definition is the word "equitable". It is imperative therefore to understand what we mean by Equity in English Law. Equity is not a conception but a definite source of law; it is a completely different thing from *aequitas* in Roman Law. In certain passages of the Digest *aequitas* is equivalent to *ratio*, the correspondence between a legal rule or institution and the spirit of civil or natural law; in other passages *aequitas* denotes (a) the agreement between rules of positive law and the natural sense of right or (b) the decision of a legal question with special reference to the circumstances of the case or (c) the mitigation of strict law in accordance with a higher sense of justice.

English equity is a system of established rules supplementary to the Common Law; it has been described by Dr. Brierley as consisting of a number of afterthoughts, not logically related to one another but each of them only intelligible when read in relation to some rule of the common law. Equity owes its origin to the difficulty or impossibility in which a person found himself in the old days of the common law of obtaining relief under the system then prevailing. These difficulties will be appreciated if it were to be pointed out that from the very beginning it was not the office of the King's Own Courts to provide a remedy for every wrong. In common Law there was no right unless there was a remedy. The remedy consisted in the form of a writ which was issued on application by the Chancellor from Chancery which was the Secretarial Department of the Crown ; it is by these Writs that actions are begun in a Court of Law. At Common Law a person could only obtain relief if there was a writ, a form of action applicable to his case. These forms of action were originally few and limited in their application. The consequence was that an unfortunate suitor who could not bring his complaint within the four corners of an official writ had no redress. The evil was so grave as to cry aloud for a remedy, and accordingly was dealt with by a clause of the Statute of Westminster II of 1285. This clause laid down "Whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case, under like law and requiring like remedy , is found none the Clerks of Chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree; and let them refer themselves until the next Parliament, that by consent of men learned in the law a writ shall be made, lest it might happen after that the Courts should long time fail to minister justice unto

complainants." From this time arose actions on the case, so called because the writs were framed *in consimili casu.* If the Common Law Courts had taken full advantage of the powers given them by enactment, there would probably have been no need for the Court of Chancery ; but they did not seize the opportunity and more than once refused to allow the validity of new writs. But the King is fountain of all justice and when a subject could not for some reason or other obtain redress far a wrong in the ordinary Courts he could address a petition to the King which would be considered by the King in Council. The Council was not bounded by law and used to "give redress to all men according to their deserts." In the petition the petitioner complains that he cannot get a remedy in the ordinary Courts of Justice; the reason may be that he is poor or sick or old or that his adversary is rich and powerful and will bribe or will intimidate the jurors or has by some trick or some accident acquired an advantage of which the Ordinary Courts with their formal procedure will not deprive him. The King is asked to find a remedy "for the love of God and in the way of Charity." In the course of the XIV Century the petitions gradually began to go straight to the Chancellor. The Chancellor was a very influential member of the Council. He was not then, as he is now, a judge; he was at the head of Chancery, Secretarial Department, he was we may say the King's Secretary of State for all Departments; he kept the King's Great Seal and the great mass of writing that had to be done in the King's name had to be done under his supervision ; he was usually a bishop and, what is very important in connection with the growth at equity, he was the King's Chaplain and as, such the Keeper of his conscience.

Though he was net a judge, the Chancellor by himself or his subordinates had a great deal of work which brought him into a close connexion with the administration of justice. The issuing of writs by which actions in court could be started, though not judicial business brought him in close contact with that business. Some of them were writs of course *(brevia de cursu)* which one obtained by asking for them of the clerks—called Cursitors—and paying the proper fees; but the writs in *consimili casu* meant that the Chancellor had to consider whether the case was one in which some new writ or some specially worded writ should be framed. But in cases where the Chancellor was satisfied that no remedy could be given in the ordinary courts—and this happened very often when the courts of law were given to quashing writs which differed in material points from those already in use—the Chancellor could, after considering the petition, order the adversary to come before him and answer the complaints; the writ whereby he does this is called a *subpoena*—because it orders the man to appear upon pain of forfeiting a sum of money, e.g. *subpoena centum librarum.* The writ tells the defendant what is the cause of action against him and he is to answer it. He appears before the Chancellor and answers on oath and sentence by sentence the petition of the plaintiff. This procedure is rather like that of the Ecclesiastical Courts and the Canon Law rather than like that of the old English Courts of Law; it was in fact borrowed from the summary procedure of the Ecclesiastical Courts for the suppression of heresy. The Chancellor decided questions of fact as well as of law. It does not seem that the Chancellors considered that they had to apply a body of rules different from the ordinary law of the land; they were administering that law in cases which escape the meshes of the ordinary Courts; but they were not bound by precedent; their jurisdiction was exercised on the ground of conscience and this; as Selden pointed out in his Table Talk, was likely to vary with each Chancellor even as his foot.

The Law Courts did not like this exercise of jurisdiction, nor did Parliament, chiefly because of the interference of the King's Council in criminal matters. The Chancellor was in fact, in the fourteenth century, warned not to hear cases which might go to the Ordinary Courts, but then it was also becoming plain that the Chancellor was doing some convenient and useful work that could not be easily done by the Courts of common law. He had in tact taken to enforcing *uses* of land, later known as trusts. Uses were popular, and the Chancellor was, in virtue of the procedure above referred to, a very appropriate person to enforce uses. Uses were fiduciary relationships and, if we recall that according to the procedure of the common law which never compelled or even allow ed the defendant to give evidence, and where all questions of fact were sent to the jury, it will be appreciated that that system was not competent to deal adequately with such relationships. It may here also be pointed out that the Ecclesiastical Courts (and the Chancellor was an ecclesiastic) had for a long time been punishing breaches of trust by spiritual censures, by penance and excommunication. The Chancellor exercised jurisdiction over conscience and on this ground the Chancellor continued to exercise jurisdiction notwithstanding the opposition of the Common Law Courts. As a result of this jurisdiction, new rights were in force, such as the uses or trusts; new remedies, unknown to the Common Law, were developed, such as the specific performance of a contract, an injunction to restraint or stay the repetition of an injury the appointment of a receiver to prevent a defendant from destroying or parting with property during the interval between the institution of proceedings and the trial of the action. It will be noticed that all these remedies were directed against the person; the Chancellor never claimed to interfere with the decisions given by the Courts; the Court of Chancery did not alter the common law, but it could prevent a person from exercising his common law rights where it was inequitable that he should do so. If a judgment wais given for the plaintiff in a case of a breach of contract or of iujury as a result of nuisance, payment of damages (the only remedy known to the common law) would not be sufficient; so the Chancellor, acting against the person, would, in appropriate cases, direct the defendant to perform the contract or issue against him an injunction.

In the course of the sixteenth century the jurisdiction of the Chancellor becomes more stabilised; he administers "rules of equity and good conscience." To show the nature of these rules, a few of the twelve basic maxims of equity may here be quoted.

1. Equity will not suffer a wrong to be without a remedy;
2. He who comes into equity must come with clean hands.
3. Equity looks to the intent rather than to the form.
4. Equity looks on that as done which ought to have been done.
5. Equity imputes an intention to fulfil an obligation.
6. Equity acts in personam.

During that century, Chancellors begin to follow precedents, and in 1557 cases in the Court of Chancery begin to be reported. The Court of Chancery, however, only dealt with what we may call equity cases, so that if a person wanted to get the performance of a contract rather than damages for breach of the contract, he hard to present his case before the Court of Chancery ; to approach the Common Law Courts would be fatal. This continued to be so until

the passing of the Judicature Act, 1875, which amalgamated all the superior Courts in one Supreme Court of Judicature, which for the more convenient despatch of business is divided into three divisions, that is, the King's Bench, Chancery and Probate Divorce and Admiralty.

It has been pointed out earlier, that uses were very popular and that the Chancellor had the procedure best adapted for enforcing them. They were the forerunners of trusts. A use arose when A conveyed land to B to the use of or in trust for or in confidence for C, or even for A himself. The Common Law Courts would not consider the trust or the confidence, and B would *vis a vis* the Common Law Courts be the legal owner, and C or A would have the beneficial interest or the equitable interest, it being a right which in equity the Chancellor would enforce. It may here be pointed out that the word "use" is derived not from the Latin "usus" but from "opus". Maitland has shown us that before Doomsday it was a common practice for one man to do something "ad opus" on behalf of another, as for instance where the Sheriff seized lands "ad opus Domini Regis" or where a Knight about to go to the Crusades conveyed his property to a friend on behalf of his wife and children. The word "opus" became gradually transformed into "oes" then into "ues" thence into "use".

Now in such circumstances as those indicated, one person could deal with land on behalf of or to the use of another; the question that inevitably occurred to men was "why one person should not, in a general way, be allowed to hold land to the use of another." The advantages of doing this will be pointed out later. The practice did not spring into life all at once, and Maitland believed that 1230 was the earliest time at which one man was holding land permanently to the use of another. "In the second quarter of the thirteenth century", he says, "came hither the Franciscan Friars. The rule of their Order prescribes the most perfect poverty : they are not to have any wealth at all... still despite this high ideal, it becomes plain that they must have at least some dormitory to sleep in. They have come as missionaries to the towns. The device is adapted of having land conveyed to the borough community to the use of the friars". Maitland makes reference to a manuscript at Oxford where Ricardus de Mouliniere *contuilt arem et domum comunitati villae Oxoniae ad opus fratrum.* By the fourteenth century, this curious method of land holding had become more extensive, and there is evidence that it was a common practice for a land holder to convey his land to a friend *ad opus suum*—to his own use.

Same of the advantages of putting lands in use may be mentioned :—

1. In the first place, lands became devisable. As a result of the English Land System of Tenure, land could not be given by will, and it is the natural desire that the power of testamentary disposition, which already applied to goods and chattels, should be extended to land which contributed more largely than any other factor to the rapid establishment of the use. The person to whose use land was conveyed, normally the same person who conveyed the land, could specify what the destination of the use should be after his death.

2. Secondly, by putting land in use, feudal burdens could be avoided. The most oppressive of the feudal burdens to which a tenant was liable at common law, were those which became

exigible at his death, namely, wardships, marriage, reliefs and primer saisin. If a tenant upon putting his land into use were to have only one feoffee to use it, his position as regards the feudal incidents would scarcely be improved for the feoffee in his capacity as tenant at law was caught in the feudal net and his death would entitle the lord to exact such dues as might be demandable. The usual practice however was to convey land to several persons as joint tenants. Now the rule of joint tenancy several that the share of a tenant who dies does not pass to his heir but accrues to the surviving tenants. He leaves nothing for which his heir can be made to pay a relief. He leaves nobody over whom the lord can claim the right of wardship or of marriage. The one essential in this respect was to ensure that the numbers of feoffees never fell below two. The death of the person to whose use the land stood, could not be subject to any feudal dues.

3. Thirdly, mortmain statutes could be evaded. In Feudal England, land could not legally be conveyed to corporations, so that if A wished to grant lands, to a monastery, he could convey his land to B to the use of the monastery of X. B took the legal estate but the monastery became beneficially entitled. This system of putting land into use gave rise to a duality of ownership on the same land, one legal and the other equitable, or as they were technically called the legal estate and the equitable estate; the legal estate confers the bare technical ownership, while its equitable counterpart gives the *cestuique use* beneficial ownership, one is the nut the other the kernel ; broadly speaking we may say that the legal estate was right *in rem*, while the equitable estate was *a jus in personam;* the remedy in respect of the use, a confidence resting in privity of person and estate, was only in a Court of equity.

MISUSE OF POWER.

The tragedies of history are the tragedies of the misuse of power:: the decline of nations inevitably follows the possesion of great power without the exercise of great leadership.—JOSEPH GREW.

THE GROWTH OF CIVIL LAW

(By S. CAMILLERI)

"THERE is nothing new under the sun" , declared wise Solomon. The truth of this dictum can be tested by its application to the various things and institutions that man has contrived to invent. There is a sort of 'continuum' going on around us — a 'continuum' taking place not only in the realm of beings that go to form the Creator's Universe, but also in the realm of things which, taken together, make up our homes, our cities, our nations, our world. In conformity with his nature, man follows the line of least effort so that he finds it more easy to improve that which already exists than to invent new things. To any one who cares to go to the bottom of things, a marked similarity exists between Past and Present, not only as regards the way of life and the relations amongst human beings, but also with respect, to objects, institutions and systems which men make use of. To illustrate what we mean by an example which immediately leads to the theme of this brief composition, the legal institutions obtaining in our clays are no more than an evolution — at times a repetition — of old ones. Our laws on Usufruct, on Emphyteusis and Consortium for instance, bear a strong resemblance to those of Roman Law. The similarity between past and present institutions is not always as pronounced as in the cases abovementioned for the simple reason that Law is not static — that it is an organism which is continually growing.

Law is a social science having for its object the government of human relations. The attribute 'social' immediately denotes this purpose: it correctly conveys the idea that law, like ethics, economics, politics, exists to regulate the dealings going on amongst the individuals forming a community. The social sciences reflect the conditions obtaining in a particular community ; they change, in fact, with the changing of these conditions, precisely because the object of these sciences is to make life better. The primary end of law is to ensure peace and order amongst the people, and this for the greater benefit, the greater freedom and well-being of the people themselves. Peace and order, as well as the welfare of the people can only be secured if the laws are equitable and just.

The growth of law is nothing but the development of the principle of justice as it evolved through the ages, the evolution of a few principles of conduct into a Code of Laws governing man's relations with man in all their aspects.

The present codes have their origin in past laws: past laws, of course, have been modified to suit the exigencies of the times; have been enlarged upon to contemplate new contingencies, have increased and become numerous just as life has become more complicated. Hence the importance of studying the 'Historical' part of the law. To know the law as a law student should know it, is to follow its growth, to examine the different phases through which it passed, to compare these phases and seek the reasons for the changes: by so doing the student becomes truly acquainted with the law. Leaving aside the historical part of his studies, the student would acquire a knowledge that is simply empirical. The historical aspect of the law is not only a fascinating subject itself ; it is not only important for the comprehension of past institutions, municipal, political, judicial and legal, as well as for the interpretation of old texts and systems of law, but it has equally a bearing on the study of the

juridical and scientific, of the purely positive or arbitrary part of the law. For past laws contain the germs of the present; they are the seeds out of which grew and flourished the tree of legal science.

To enter upon a study of the historical aspect of the law, however, may not always seem a paying job — indeed, it is often looked upon by many as waste of time and energy. Such a study entails a profound knowledge of old texts and a minute examination of the knowledge acquired : the results obtained by such study comprise much which, like a dead language, is not directly useful to the business and interests of mankind in the present days. But such study is not fruitless : through it one gets to the bottom of things, enters into the spirit of the laws existing in different eras, discovers the why and wherefore of such laws and the grounds upon which the same are based.

The study above referred to involves a knowledge of Roman Law : Roman Law is a necessary part of any general study of legislation and its growth ; for the student of Civil Law in particular, it is indispensable. We shall, therefore give a brief sketch of the beginning and growth of Roman Law, with a view to showing its influence on what may be called 'Modern Civil Law'.

A good system of laws presupposes an organised Society : a primitive community possesses no laws as the term is understood to-day. Rome, in its infant days, was no exception. In its early days Rome was governed by a Rex who, though possessing a degree of power and authority, could by no means act arbitrarily; on many points the people or their representatives had to be consulted. Under the 'reges', there was practically no literature, no music, no artistic achievements. Those that could afford it, got what learning could then be acquired from Etruria — this learning was far from being adequate and was not such as to influence anything carried on in Rome; it did not influence the 'laws' of Rome. These 'laws', if indeed one may so call them, were a set of customs and usages, mostly religious, which the superstitious mind of the Romans respected and obeyed. For about three centuries, these were the only rules of conduct in Rome. During this period, the said customs and usages were undergoing slow and gradual, yet steady, changes—changes necessitated by the change of conditions by the need of determined, well-defined rules for the government of human relations. Rome felt such necessity and Rome was not slow in providing the remedy. The said usages, often referred to as the 'leges regiae' fell into desuetude as Roman civilisation progressed. Very little is known of the 'leges regiae', of which, it is commonly believed, Papirius has left a collection known as the 'Ius Papirianum'. Gibbon questions the genuineness of this collection ; he seems to incline to the opinion that there existed no such collection at all, that what is referred to as 'Ius Papirianum' was not a commentary on old laws but an original work written at the time of the Caesars. In any case, only small fragments of the Collection remain ; it is moreover commonly believed that, the 'leges regiae' exercised no influence at all on the growth and development of Roman Law: they came to an end with the establishment of the Republic, 510 B.C., when a new era in the History of Roman Law started.

THE GROWTH OF CIVIL LAW

The Republic having been established, power passed to the consuls, who were patricians ; the patricians administered the uncertain and unwritten law, of which they had the secret, rather oppressively. A demand arose for limiting consular power and for defining the existing laws. As a consequence of this demand we have the first real act of legislation — the XII Tables. As Buckland remarks, the XII Tables, consisting mainly of Latin custom with a certain infusion of Greek law became the bases of Roman Law. Though the first act of legislation, the XII Tables were by no means the only act of legislation under the Republic. There existed at the time the 'comitiae' of which the 'Comitia Tributa' together with the 'Concilia Plebis Tributa' was in the later years of the Republic, the most important as regards legislation. Comitial legislation, however, is not regarded as a main source of Private Law : all the 'leges' enacted by the 'comitiae', or nearly all, were political and constitutional in character ; in the later years of the Republic, they mainly dealt with criminal matters.

Of the greatest importance as a source of legislation were the 'edicts Magistratuum'. Originally, the edicta were more or less statements on administrative rules already established as law. Gradually they were used as a mode of legislation and in the last century of the Republic, the 'edictum' was by far the most important source of new law. Buckland emphasises the; fact that by means of the 'edictum', the preator and other magistrates did not directly change existing laws or create new ones : outwardly, they were unconcerned with rights and obligations ; they speak in terms of procedure ; they do not give or deny rights, they grant or withold actions — actions, however, having for their object the enforcement of rights, they were in effect changing the law of rights and obligations. In this indirect manner, the praetors reformed the law in almost every branch, setting aside most of the crude and formalistic law which had become inadequate for the times.

It was through the 'edictum' that the greater part of the 'Ius gentium' came into being. By the middle of the third century B.C., Rome had attracted many foreigners, to whom the strict Civil Law, with all its forms and solemnities, did not apply. A Praetor Peregrinus was appointed to deal with the relations amongst such foreigners. This magistrate played an important part in the formation of the 'Ius gentium' : he set up a law, simple and unencumbered by useless formalities — a law, which, incorporating the simpler parts of the strict Civil Law, discarded its unnecessary forms.

The power of the praetor to effect such changes in the law comes to an end under Hadrian in the first half of the II Century A.D., when the edicts were given a permanent form. The 'Ius Honorarium', as the law created by the edict is generally called continued to exist side by side with the 'Ius Civile' until the VIth Century, when the two systems were practically fused together.

Another body influencing the growth of Roman Civil Law was the Senate. This body existed under the 'Rex', the Republic and the Emperors. Its character and its functions varied under the different constitutions : originally it was simply an advisory council of the 'Rex' ; so was it under the Republic, the advice being tendered to the magistrates : in this era, how ever, its authority steadily increased in such a way that by the first half of the third Century B.C., it dictated rather than tendered advice. On the other hand it had no authority to legislate : its

influence on the law was indirect — exercised through its hold on the magistrates. The authority of the Senate over the magistrates was favoured by Augustus and his successors. Under the emperors it was, outwardly at least, a very powerful , body. By the time of Hadrian it had the power to alter the law. The legislative function was exercised by the Senate, from the time of Hadrian, early in the second Century A.D., to the time of Probus, late in the third Century A.D., by means of Senatusconsulta. The word 'outwardly' above is used purposely ; though, to all appearances the Senate was legislating, the emperor, as Princeps Senatus, determined what legislative acts were to be considered. Augustus, following his method of appearing to the people as a real democrat rather than a powerful emperor, saw to it that power actually vested in him, not in the Senate. As legal historians point out, this practice of Augustus was continued by his successors until such time when the authoritative position of the Emperor was sufficiently asserted. Hadrian was the first emperor to claim legislative power ; his successors followed suit and the legislative function was discharged concurrently by the Emperor and the Senate for about a century afterwards. As already said, senatusconsulta ceased by the third century and henceforth the only legislator was the emperor, who discharged his function through 'edicta', 'rescripta' and 'decreta'. It is unnecessary to distinguish between these three forms of imperial legislation, since the emperor, as the sole legislator, could pass whatever law he liked.

We have so far dealt with the enactment of law by the various legislative bodies. Law, however, being so closely knit with the everyday doings of the people, one has to go further to discover its real import and significance : one has to examine the relations passing between the people and the way in which any litigation arising therefrom is settled : in other words an inquiry is to be made as to how the laws are applied in practice, how justice is administered. In the study of Roman Law, this can be achieved by perusing juristic literature.

As we have already remarked, the early usages and customs of Rome were religious in character. These customs were interpreted by priestly officials, members of the Collegium of Pontiffs, who made a professional secret of the rules elaborated by them. In the third Century B. C., Tiberius Coruncanius, the first plebeian Pontifex Maximus, divulged to the public the hitherto unknown laws. This step of Coruncanius marks a turning point in the growth of the law : in a short time, persons came forward from amongst the people, patrician and plebeian alike, who studied the law, and who, by giving advice on points of law, guided the growth and development of the law. The 'iurisprudentes', as they were called, held no official position; they did not act as advocates in Courts of law, but they prepared legal documents, pointed out the precautions to be taken in legal transactions and taught the practical part of the law to law students. More important still, many 'iurisprudentes' took to legal writing. They gave explanations of various provisions of law, at first not in a very systematic way ; but it was not long that juristic literature began to take a more comprehensive outlook and in a short time it assumed a definitely scientific aspect.

The literary work of the jurists was abundant : it is from their works rather than from express legislation that the laws of the 'classical' period are known. Already active under the Republic, the jurists became more and more so under the Emperors; their prominence and their influence on the law increased proportionately. It is the period from Hadrian to Caracalla that

is commonly known as the 'classical' age of Roman Law, but many writers, more correctly perhaps, regard as the classical age the period from Augustus right up to the third century, the last of the great jurists passing away at about A.D. 250.

The abundant juristic literature, coupled with the increasing number of imperial enactments made the legal practitioner's job quite a difficult one. As things stood then it was unreasonable to expect the practitioner or the law student to possess more than a confused knowledge of the vast legal writings and legislation. It was due to Justinian's Codification Scheme—the Corpus Iuris Civilis—that the bulk of the law was crystalised, collected and given a systematic form. Before entering on this scheme Justinian effected a number of law reforms by means of enactments known as the 'Quinquaginta Decisiones'.

Justinian's scheme had for its object not only the collecting together of the various laws, the introduction of an ordered and systematic text of juristic works, but also the bringing up to date of the said laws and works. It was done in the belief, it is said, that it was to be permanent and, though laws were passed in the years that followed they did not influence the further growth of Roman Law. The apex in that development had been reached in the classical period. Justinian, though himself a good administrator and a wise legislator, owes his greatness in the history of the Law to the Codification scheme : so does Tribonian and the other members called by Justinian to prepare the Digest.

As regards the substance, the contents of the law itself, the Civil Law of Rome hardly gains anything after the reign of Justinian. But its influence continued to be felt. It stimulated thought not only on the part of the Romans and the other peoples of Italy, but also amongst foreigners. It is long after the great days of Rome that Roman Law began to be studied as a science. In other words, though the body of rules and subtle decisions were there, yet Roman Law lacked scientific and academic treatment. This does not in the least detract from the excellence of the law as it then stood : such excellence has borne the test of Time : indeed it has asserted itself as time passed by. Roman Law has always been respected; it has been revered for the magnificent principles it lays down : in it one finds, above all, the profound reason, the wonderful common sense, of which it is a rich and apparently an inexhaustible mine. It is far this reason that the great English Judge. Lard Justice Bruce said that the decisions in the Pandects were such as an acute, wise, practical man would came to by the use of the rarest of 'common' things—Common Sense.

Roman Law, then, lacked the academic and scientific element and this, perhaps, because of the very character of the Romans themselves. The Romans, so it is often said of them, had a distinctive characteristic : they were practical in all their doings ; this tendency contributed much to that lustre which crowns their Civil Law. But, in a way it limited its growth : law, like other sciences, has a practical and a theoretical side : Roman jurists paid great attention to the former and neglected the latter. Even the way in which law students were taught denotes that the theoretical, side was completely disregarded in the study of Roman Law.

The academic element was made good in the years that followed the fall of the Roman Empire. The progress in this direction extends over a long period of years : once set on the

move, through the agency of the School of Bologna, commenced by Irnerius, it kept pace with the march of civilisation, with the growing needs of the expanding population, with the increasing transactions, with the complexities of human affairs, with the augmentation of legal knowledge in general, resulting from the progressive improvement of human society. After Irnerius followed the school of Accursius, that of Bartolus in the fourteenth century. that of Aciatus in the fifteenth century, followed in turn by the school of that great lawyer Cujacius in the sixteenth century. It is impossible to enumerate here the great jurists and commentators that followed in France, in Germany, in Italy, in Spain in all countries of Europe.

By the XVI Century, Roman Law occupied a very privileged position all over the Continent : in some countries, e.g. Germany, a 'reception' of R.L. took place; where this did not happen, Roman Law was all the same looked upon as the supreme achievement of human reason and its principles when not expressly excluded by local laws were appealed to. All over Europe it was studied and everywhere held in high esteem. This is why it plays so important a part in the growth of the laws of the several countries of Europe; this is why international Law, in its embryonic stages, turned to the rich mine of principles embodied in Roman Law; this is why some writers, such as Sir G. Bowyer, consider 'Modern Civil Law' to have been either directly or indirectly inherited from the Romans. Note that 'Modern Civil Law' is used as applying generally to the Civil Law of any and every country in Europe. Savigny to the same effect states : "Il diritto civile e il solo di cui si possa indicare istoricamente il passaggia negli *stati* moderni.....".

This glance at the preservation of the Law on the Continent shows the importance attached to Roman Law through the centuries, the great minds its study attracted, the influence it exercised in the formation of the various European systems of law which, as we have already remarked, derive either directly or indirectly from Roman Law. As a consequence the Law of the Romans was not simply preserved : it kept on growing and maturing towards perfection; its growth was strengthened by various factors. Besides remaining in force throughout Italy it was, in certain countries of Europe, declared to be the law of the land. Indeed, changes and modifications took place—we have said that its development continued—precisely because the needs of civilisation made such changes necessary. Roman Law was thus not only preserved as an academic subject; it was not simply studied by law students in order that their legal studies should be complete, but it was further applied in practice : for a number of centuries the great jurists and profound thinkers all over the Continent devoted their time to the interpretation of the law : the law courts of many States administered it ; the legal writers moulded it in a scientific form; the law courts gave it the practical life which springs from the needs of civilisation and society. Consequently, as Bowyer points out, what Europe inherits is a Civil Law, essentially based, substantially consisting of one might say, the notions the principles and rules of Roman Private Law, but modified and perfected by the labours of the several jurists that flourished at different times in the various countries of Europe.

An important phase in the history of Civil Law starts with hat may be called the era of Codes, commencing with the Code Napoleon, 1804. The influence of this Code was felt in a

number of countries. To give one or two historical illustrations : the Italian Civil Code is derived directly from the Code Napoleon ; the Spanish Civil Code, published July 1889, as Bianchi (Studio analitico sul Codice Civile Spagnuola...) and Lehr (Le Neouveau Code Civil Espagnuol) point out, is a reproduction of the Code Napoleon, revised of course and modified to suit the needs of Spain at the time of the Code's promulgation. Again, the Swiss Civil Code of 1907 was, to a certain extent, influenced by the Code Napoleon : the Swiss legislator, it is true, incorporated in the said Code, most of the laws and customs in force in the different Swiss cantons; but did not hesitate to borrow from French and German legislation.

In the study of what may be called Modern Civil Law, the influence of the Code Napoleon cannot be belittled : another Code which likewise, not to say to a greater extent, brought to bear on the growth and codification of Modern Civil Law is the German Civil Code, which came in force in 1909—a colossal achievement which is considered by Mazzoni as the 'ratio scripta', the most complete work of German jurisprudence, and the representation of the most perfect system of Modern Civil Law. No wonder, therefore, that these two Codes which for so many years have been the subject of so much praise, are the immediate source of the Civil Laws in force practically in all the civilised countries of Europe and America. As a consequence, the codes of the different nations broadly speaking do not differ greatly in substance since they owe their origin to the same source : there are noteworthy differences, however, in the systematic treatment of the matter as well as in the moulding of the various provisions.

It follows that the Civil Code of Germany or that of France is not a work representing national laws. They hardly could Modern Civil Law, we said, has its origin in Roman Law and, as Mazzoni observes, Roman Law itself , in its most elaborate form — as it was shaped by the 'ius gentium' — was applicable to all persons irrespectively of race or creed. It was a law for human beings rather than the law of the City of Rome — "romana fattura", says Mazzoni, "pel genere umano. Roma mise il lavoro, l'umanita la materia". The growth of Roman Law never ceased. As it went on developing throughout the existence of the Roman Empire, so, through the agency of the 'ius gentium', its development continued after the fall of Rome, such development conforming to the progress of humanity in its intellectual, moral and juridical spheres. To return to the German Civil Code, a 'reception' of Roman Law took place in (inter alia) the German States. Local laws and consuetudinary rules in the said States were not completely driven out : indeed, even if they had been, new customary rules would have come into being, and new customs, as one expects, did spring in the years following the reception. Civilisation had moved ahead; conditions, social, economic, and political had become definitely better ; the influence of Christianity had tempered the severity of the Past : these factors tended to modify the laws inherited from the Romans not only in Germany, but all through the civilised world. The unbending severity which characterises early Roman Law relaxed; the strict rules of law were mingled with rules of humaneness and by the XVIIIth Century, German legislation (as well as that of France and other States) though based on the general principles of Roman Law was modified to a great extent by the spirit of humaneness and the consideration for individual liberty which began to be strongly felt. The laws passed in Germany in the XVIIIth Century and subsequently are a fusion of the strict rules of Roman Law with the rules of equity — a mixture of Roman and local rules (as regards Civil Law). We

find such a mixture in the Codes of the different German States : in the 'Codex Maximilianus', enforced in Bavaria, 1756; in the 'Allgemeines Landrecht', promulgated in Prussia, 1794, and in the Austrian Civil Code, 1811. The Codes of the various German States were substituted in 1900 by the German Civil Code of that year which was imposed on the whole German Empire.

The growth of Civil Law in France followed much the same lines. Before the Revolution, the different cantons had their own laws : some of the cantons were governed by written law, others by customary law. As regards Civil Law, the former consisted mainly of Roman Law, the latter, of the different usages observed in the various localities. This state bf the law could hardly survive the Revolutionary era. France felt the need of having one single system of law, applicable throughout the length and breadth of the country. In an age when liberty and equality were being preached, praised and claimed by every citizen, one cannot reasonably think that any citizen would suffer a kind of legal protection in one place, and another kind in another — even though such protection could not always be relied upon in that era of reform.

The need for introducing a uniform system of law was felt by the Constituent Assembly, the Convention and the Directory: all three bodies planned to modify and unify the various laws into a single Code ; but the times were troublesome and violent, not altogether suitable for carrying out a systematic law reform. It was not long, however, that the wave of violence somewhat subsided and the law reform attempted previously by the said three bodies was successfully carried out under Napoleon. The Code Napoleon was published in 1804 : it is substantially, the one now in force ; alterations made since then are few and such as were necessitated by the change of conditions : in 1807, for instance, the Republic being replaced by the Empire, some alterations were made ; so also with the fall of Napoleon in 1814 and with the advent of the Constitution of 1848. But these alterations affected the form rather than the substance of the law. As in the case of the German Civil Code, so in the Code Napoleon we find the principles and rules of Roman Law modified by rules of equity which had developed in France. As Mazzoni points out, the best authorities and commentators of the French Civil Code declare that the source of its contents is Roman Law as modified by the rules of equity found in the customary law of France.

The Code Napoleon is a manifestation of the genius of its compilers : their wisdom in selecting the many provisions and in wording them, in the systematic treatment of the whole subject deserves praise, but — so Romano says — one should not lose sight of the fact that the editors of the Code Napoleon were guided by the works of Domat and Pothier. Often, they copied whole provisions from Domat and Pothier, (whose, writings deal with Roman Law, both as it originally existed and also as later modified by rules of equity). The debt of French Civil Law to Roman Law is thus apparent. Pisanelli says : "Il Codice Civile Francese, nelle principali sue parti, e la rappresentazione piu splendida della sapienza romana". Praising the, sound, principles and the common sense rules of the Code Napoleon, Professor Buonamici enumerates among the causes that contributed towards making the Code Napoleon the great work it is "l'unione feconda del passato col presente". The nature of the provisions of the Code Napoleon emerges clear from the following comment of Mazzoni : "..... la Rivoluzione Francese, la piu generale e profonda riformatrice della societa moderna, compie e scrisse

prima in codice la sintesi, l'ultims elabbrazione del diritto romana fatto, per l'influenza del ius gentium, equo piu che non fosse all'epoca Giustinianea : e v'introdusse l'elemento politico e l'elemento economico : in una parola, vi riassunse ed espresse i grandi principii della civilta, moderna."

A few words may here be said about the growth of Civil Law in Italy. Up to the French Revolution, the provinces of Italy were broadly speaking governed by Roman Private Law which, as in many other States of Europe, came to be regarded as the Common Law of the land : in certain provinces Canon Law was observed, in others, the enactments of some of the Conquerors of the several provinces were in force. It should be emphasised, however, that it was Roman Law that was the Common Law of the land in the majority of the provinces. Reform came with the French Revolution., the effects of which, felt in most of the State of Europe, extended to Italy. First applied to the provinces comprised in the Kingdom of Italy in 1805, the Code Napoleon was gradually introduced in practically all Italian provinces, some of which applied it in its entirety, others compiled codes on its pattern. With the unification of Italy, the need for one single code was felt. After elaborate discussions a code was compiled : the Italian Civil Code was first put in force in 1866. As Mazzoni points out, the sources of the Italian Civil Code are:

(i) Roman Law as modified with rules of equity and the passage of years—what we have called Modern Civil Law;

(ii) The French Civil Code—the immediate source of the Italian Civil Code;

(iii) The codes existing in the various provinces of the peninsula before the Unification of Italy ; and to a certain extent.

(iv) Canon Law.

A few words should be said about the development of Civil Law in Malta.

In tracing the growth of Civil Law in our island one practically finds a repetition of the process occurring on the Continent. The history of the Island differs from that of other European countries; but historical events in Malta ultimately led to similar results (at least as regards Civil Law). It is, in fact, correct to say that our Civil Law, like that of France, Germany, Italy, consists of the principles and rules of Roman Law as modified by rules of equity introduced from time to time as the spirit of greater liberty and humaneness assumed importance in the administration of Justice.

Roman Law found its way to Malta at a very early date—earlier perhaps than in any other European country with the exception of the provinces of Italy—and at that early date the foundations of our present laws were laid down. The Phoenicians, the first known settlers of Malta, might or might not have brought their customs, religious or otherwise, to the Island : indeed it is useless to try and ascertain whether they did or not. Life was then very primitive and so were the customs : the Phoenician customs could not have survived the introduction of Roman Law—the said customs, one might assume, fell into desuetude and ultimately perished before the superior qualities, the better common sense, the more practical laws of the Romans. Historians agree that Malta fully absorbed Roman civilisation and Roman Law. By the IInd Century B.C. Rome had already founded her empire. The countries bordering the

Mediterranean succumbed to powerful Rome and the Mediterranean Sea became a Roman lake.

The Romans were better colonisers than the Carthaginians who governed Malta before them; Roman laws were more humane and equitable and were gladly accepted in all countries conquered by the Romans. In Malta—which it is commonly believed, formed an integral part of the Roman province of Sicily (as such the Maltese were regarded as Roman citizens proper and treated accordingly)—the prevalent laws were those of Rome. The said laws were not imposed on the Maltese; they were gradually adapted by the inhabitants until, in the VIth Cenury, the Corpur Iuris Civilis was expressly declared to be in force in Malta, so that as Judge Debono remarks, Roman Law did *not simply influence* the growth of our Civil Law; it *formed,* and to an extent *still forms*, part of our written law.

The character of our civil laws, then, was determined at the time of the Roman domination, which came to an end in 870 A.D. For a period of ten centuries from the IInd Century B.C. to 870 A.D.; the Island was governed by Roman Law purely and simply. After the Roman domination our Civil Law suffered such alterations and modifications only as were necessitated by the change of circumstances. During the Arab Domination, 870-1090, there was almost no change at all : no traces of Arab law are found in our laws. From 1090 to the coming of the Knights of St. John to Malta there were only a few changes as a result of the introduction of the feudal system. The Grandmasters left the laws of Malta substantially as they found them and under the British rule, it being the practice of Great Britain to meddle as little as possible with the laws of a newly conquered or ceded colony whenever such colony happens to possess laws of its own, our Civil Law was almost unaffected although many alterations were effected in Criminal Law and in the Laws of Procedure.

Up to the time when our civil laws were collected in two Ordinances, viz : Ordn. VII of 1868 (relative to Things) and Ordn. I of 1873 (relative to Persons) we were directly the heirs of Roman Law. In compiling these two ordinances, our legislator turned to the French Civil Code. Like the Italian Civil Code, our Civil Laws have their immediate source in the French Code. As we have remarked above, however, the French Civil Code was itself founded on Roman Law so that the Civil Law of Malta like that of almost all civilised States may be ultimately traced back to the laws of the Romans.

The aim of the above sketch of the Development of Civil Law in the leading countries on the Continent is to show how the systems of Civil Law in Europe are all based an Roman Law. Though differing in details, they consist substantially of the same general principles of law : they may vary in form but not, broadly speaking, in substance. This holds good not only as regards the Civil Laws of Germany, France, Italy and Malta, but practically as regards those of all civilised States in Europe and America. It is such a consideration that lead many legal writers, such as Bowyer, to speak of Modern Civil Law generally, treating the Civil Laws of the civilised countries as if they made one single system of law ; it is this consideration that lead the same authors to state that Modern Civil Law is not the creation of any one single nation or of any one single age, that it is the product of the best minds living in different countries at different times—a product mature and perfected by the passage of centuries.

LAISSEZ-FAIRE AND THE CHILD

(*By* WALLACE GULIA, B.Sc., PH.C.)

THE doctrine of *laissez-faire* still plays an important part of our daily life ; several spheres showing that we still believe in the individual assertion of rights as against the arbitration between individuals through state action. That the doctrine of *laissez-faire,* however, does not conduce to the well-being of the individual or of the body politic generally, has been established in several states, amongst which Great Britain and the U.S.A.—countries whose tendencies appear to be diametrically opposed to any unwarranted, arbitrary infringement of individual rights ; to such an extent, that Professor D.L. Keir (1) feels justified in asserting that "the exponents of *laissez-faire* are in disorderly if stubborn retreat upon no immediate visible defensive positions."

The applicability of the doctrine of *laissez-faire* in our Islands with respect to the child makes interesting study. In the United Kingdom, mainly through a partly adoptive act of 1918 (Maternity and Child Welfare Act) the child "becomes the direct responsibility of Local Authorities" (2) from the moment of his conception. In this respect it is important to note that the Central Government exercises little direct control over local government to provide welfare services, though the practice of the "block-grant" and "ad hoc" grant systems is very effective to attain this end. Antenatal and post-natal clinics, hospitals for nursing mothers and children up to five years of age, convalescent homes, home helps, lying-in homes, free meals and milk to necessitous parents, homes for abandoned and neglected children, are largely provided at a nominal fee, or at no fee at all. Though it is being felt that these conditions are not sufficient in the parent country, and a clamour is being raised for the further extension of these services, the State in Malta has not as yet taken any decisive step to ameliorate the lot of the Child in the early stages of his development. Voluntary effort, indeed, has succeeded to set up a network of such services, e.g., the St., Vincent de Paule Society, the Sisters of the Poor, etc., but one is immediately struck by the insufficiency of such services and by the fact that they are not provided for all. The precarious conditions of early childhood ask for continuous help and supervision — a function in which voluntary agencies are completely deficient. The Infant Protection Visitors of the United Kingdom have much to commend them (3).

The problem of education has locally involved the solution of the relationship between accommodation, teachers, and children ; and finally, a measure of compulsory education has been given statutory force, which provides for the instruction of children up to a minimum school leaving age of fourteen. Whilst the doctrine of *laissez-faire* seems to have lost ground in this respect, the advance made in Britain and on the Continent as a whole, show how inadequate our present provisions are: The Education Act 1944 of the United Kingdom *inter alia* provides for the raising of the school-leaving age to sixteen, and it has also been made compulsory for all to attend continuation schools for such amount of time as would constitute

(1) D. L. Keir : The Constitutional History of Modern Britain.
(2) A. Radford, B.Sc. (Econ.).
(3) Instituted by the Maternity and Child Welfare Act of 1918.

one day in any one week, until age eighteen has been reached. Nor has the state locally granted that necessary aid to Voluntary Agencies which would have made of them adequate provisions, where it itself has failed to provide. Though comparisons are odious, the aid which the Voluntary nursery schools have received in the United Kingdom must be contrasted, to obtain a clear picture, with the dereliction of the local *"tan-nuna"* schools which have received no state-aid, and which were developed years ahead of those in Britain.

With the problem of education is closely associated that of Child and Juvenile employment. The Children and Young Persons Act 1933, Part 11, Section 18, of the United Kingdom stipulates *inter alia* that no, child shall be employed:

a) So long as he is under the age of 12 years, or
b) Before the close of school hours an any day on which he is required to attend school; or
c) Before 6 o'clock in the morning or after 8 o'clock in the evening of any day; or
d) for *more than two hours* on any day he is to attend school ; adequate measures being also taken through the Act itself and through bye-laws to protect children against the evils of streettrading.

It is significant to note that these provisions of the English Law are reproduced in Ordinance VI of 1944—an ordinance aimed at regulating the employment of children in our Islands. But, though employment has been regulated and, as shown above, educational measures instituted, we are almost totally lacking in the systems of Vocational Guidance that have been so beneficial both in Britain and in the U.S.A.

Whilst many parents are incapable of advising them as to their future, owing to the limited education which they may have received in their own days, the State does not provide, as in Britain, any after-care visitors, or probation officers or "fit-persons" to care after the children who will form the nation of to-morrow. The child is allowed to develop on his own. It is not to be wondered at, therefore, that sometimes the mental condition of children is similar to that of a bodily arrested growth, and as such shows the evil circumstances attendent thereon.

Education, Employment and Recreational facilities must necessarily be thoroughly locked together so that happy youth and childhood might be nurtured in a nation. Hence it is that in Britain these three functions are coordinated through the activities of the Board of Education, the Juvenile Employment Exchanges, and the Juvenile Organisations Committee. The Board of Education is concerned not so much with the instruction as with the politico-social development of the child in the community, taking particular interest in the moral standards of the land. With this end in view the Juvenile Organisation Committee was formed by the Home Secretary during World War 1, and later transferred to the Board of Education. The functions of this Committee were mainly directed to the correlation of the activities of the various local youth and child organizations, e.g. Scouts, Brigades, Girl-guides; to do away with overlapping of work; to strengthen weaker units; to urge children to join such organisations; to provide premises for them, and in the lack of adequate premises to place schools at their disposal during the evenings. This body has succeeded to break down that barrier of competition between the respective organisations and societies to such an extent that they now constitute one of the major educational forces of the land, moving forward together—a condition which is

often conspicuous by its absence in our child organizations. The Juvenile Labour Bureaux attached to schools work hand in hand with the Board, whilst the Juvenile Employment Exchanges lead to the happy condition of less blind alley occupations and child sweating.

Education, recreational facilities and street-trading lead to a consideration of juvenile delinquency. Whilst we have recently adopted the Name of Approved School instead of the more obnoxious one of Reformatory School (a legacy of the unhappy and erroneous ideas with respect to child delinquency characteristic of the last century), and we have followed the lead of other nations by providing juvenile courts to show that juvenile criminals are in a completely different category from adult criminals, to provide different treatment, full of sympathy, understanding and practical guidance as shown by the Juvenile Courts of Britain (which, by the way are not to sit in any Juvenile the Courts of Law or in a Police Station), the Probation officer system of the U.K., finds no parallel amongst us, and the Borstal institutions which have been found to be such a powerful asset for the reclamations of juvenile and juvenile adults has not yet been given a trial in these islands (4).

The problem of the child in Malta seems to indicate that the doctrine of *laissez-faire* is being questioned and that a rebirth in the consideration of things is taking place. But it also tends to assert that in comparison with other nations, the assumption of responsibility by the state for the activities of the community ought to be more fully developed.

Laissez-faire—the product of an industrial age, suiting the industrial tendencies of the moneyed industrialists of the late 18th and early 19th centuries, stimulated by Mill's philosophy (5)—has been superseded, and indeed was never practised in its entirety except for a brief interlude when restrictive legislation was broken down e.g., Catholic Emancipation Act 1829, Reform Acts 1832, etc., Abolition of the Corn Laws 1846, the Navigation Acts 1849. But once the break down had been effected, *laissez-faire* could not maintain and sustain the nation. It appeared that the State must exercise some control over factory laws, sanitation, schools, insurance, etc. Nor was this control to be exercised as in a totalitarian state in order that its results might be effective.

The legislation regarding the Child in Britain is most of it voluntary : the State provides the services : the citizen of his own choice avails himself of them. In so far as the citizen is educated to appreciate and understand the value of these services, he realises the high degree of welfare that has been instituted for his use. This constitutes a test of citizenship : for the citizen that realises the benevolent autocracy of the state will not fail to understand the relationship that should exist between himself and the community. When that condition has been established unity in a nation will prevail *Laissez-faire* leads to individualism and egoism : it makes the individual take a limited view of his surroundings, and he sees the community as the basis of his personal profits, not as the amalgamation of all the population, in which *all* must retain a high standard of living that all might be happy (6). Hence it is that the theory of *laissez-faire* has been superseded in continental countries and in the New World. If we want to see instituted in our Islands a system of welfare that ramifies through all branches of the community we must follow on their lead : the progressive abandonment of *laissez-faire*.

(4) Though one must not lose sight of the wider powers enjoyed by the Juvenile Courts of Britain.
(5) J.S. Mill: "Principles of Political Economy".
(6) Vide Robson's: Social Security: "The Beveridge Report and After."

ADVOCACY.

Sir EDWARD MARSHALL HALL: "My profession and that of an actor are somewhat akin, except that I have no scenes to help me, and no words are written for me to say. There is no backcloth to increase the illusion. There is no curtain. But out of the vivid living dream of somebody else's life, I have to create an atmosphere—for that is advocacy."

* * *

SUMMING-UP.

A learned Judge cannot be too careful to introduce irrevelant matter into his address to the Jury, for there is always the possibility, remote at times, that the Jury will take him seriously.

Lord SUMNER.