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EDITORIAL

FAREWELL

It is with no self-conceit that on leaving the threshold of the Alma Mater we can look back with satisfaction on the activities of the Law Society during the past three years. The Law Society has done much to achieve its primary purpose, that of fostering among law students a lively interest in the studies they have adopted. It has been of the greatest help to them in efficiently organising and distributing notes on the subjects included in the various syllabi at little or no profit. This has been of great benefit to all law students as otherwise many would have been handicapped. The Law Society however derives its existence from the support of its members which was not in all cases given ungrudgingly though a number of moots and debates were held which have been reported in earlier issues of the law journal. It is to be hoped that this interest will increase and that the activities of the Law Society will extend further. One would like to see once more those series of lectures which some years ago started to be delivered by prominent members of the legal profession and which, provided due publicity is given and support is not lacking, might well be revived. The Law Journal has had a healthy existence during this period as witnessed by the varied and learned contributions as well as by its wide circulation. It has also found its way to England, Canada, the U.S.A. and Switzerland.

THE GRADUATION CEREMONY

On Saturday, 1st October, 1949, the Church of the Royal University was the scene of the first Graduation Ceremony since the war to be held with the usual pomp and splendour. It was also the first one to be presided over by our new Chancellor, H.E. Sir Gerald Creasy. The Very Reverend Professor P.P. Saydon celebrated Mass and then Professor A.J. Mamo delivered an oration on Penal Reform, after which the Vice-Chancellor conferred the degrees.

Professor Mamo outlined the evolution of penal policy during the last two hundred years or so, which has moved in

three stages. The principle of deterrence, which was crude and produced ferocious punishments gave way to the principle of retribution. This in its turn, standardising the behaviour of individuals was essentially impersonal and was consequently discarded in view of the advances in the medical and educational sciences. Hence arose the modern principle that punishments ought to be adapted to the criminal and not merely to the crime. This has found much scope in England, but in Malta, though its influence has been felt, there is still room for improvement. This is especially the case with juvenile offenders who may have been the victims of social, economic or educational insufficiency. Professor Mamo qouted the optimistic view of the late Sir Alexander Paterson with regard to the treatment of offenders in these Islands. But the solution of post war problems has not turned out as easy as was anticipated. Finally Professor Mamo made an appeal to the various graduates in Theology, Law, Medicine, Engineering and Architecture to help each in his respective sphere in the prevention of crime, and ended by saying that the ideal of a professional career should be that of the Christian Gentleman possessed of Christian charity.

THE ARCHIVES

Up to a few months ago the older records of our Courts were not to be found in the Archives at Valletta, but they were stored away in Mdina. So, whenever any of these records were required they were brought to the Archives at Valletta, and kept there indefinitely in a disorderly manner. We notice with satisfaction that the position is being remedied and that all the records are being transferred to Valletta. Though the manner in which this is being carried out cannot but result in damage to the greater part of the records we still hope that it is being properly supervised against any loss.

NEW TRIAL

A new trial is the abnormal way of having a judgment revoked or altered since it presupposes a 'res judicata'. For this reason it can only be availed of in a limited number of cases which are specifically laid down by the law. But what is equally abnormal about this procedure is that it is proposed and pro-

ceeded with before the same judge who delivered the previous judgement. It would seem that the provisions regarding recusation of judges do not apply here. In fact the law says at S. 817 "The demand for a new trial shall be made to the Court by which the judgement complained of was given, and the same judges or magistrates may sit". On the other hand S. 735 says "A judge may be challenged or abstain from sitting in a cause if he had previously taken cognisance of the cause as a judge or as an arbitrator."

This conflict would seem to go against the fundamental principle of the right of appeal that justice must not only be done but it must also appear to be done. A party to a suit seeking an alteration of a judgement cannot reasonably be expected to be content with a revision of the judgement by the same judge or panel of judges. This is however the predicament of our law. The position becomes more embarassing when the grounds for the new trial involve a criticism of the previous judgement. In such a case the judge himself might feel it his duty to abstain from taking cognisance of the case. On the other hand when the grounds of a new trial do not involve a criticism of the previous judgement as in the case of discovery of new documents, though the previous judge would be more adapted to conduct the new trial, for the reasons we have stated the right of recusation should be upheld. Our plea therefore is that the provisions regarding challenge and abstention of judges should also be made to apply to new trials.

THE BACCALAUREATE IN LAW

Students intending to join the course of law are still at a loss as to whether the provisions of the new statute according to which the degree of Bachelor of Laws has been substituted for the degree of Doctor of Laws, will after all remain *in vigore* or will be altered upon a more mature scrutiny of the situation. Various representations, official and otherwise, have been made on this subject but until now they have led to nowhere. Some thirty years ago an attempt was also made to introduce the baccalaureate instead of the doctorate in the course of law. But at that time the persons subjected to the innovation resented it more actively though in by no means a polite manner. By hook or by crook they obtained what they wanted and the position

remained unaltered up to the present amendment. The students affected thereby have now resorted to the polite way of protesting themselves against this innovation by sending a letter to the authorities concerned. It is to be deplored that up to now no answer has yet been received and the position of the students concerned is still in the balance. Mere lapse of time does not solve the difficulty, and the delaying tactics employed make a sad contrast to the favourable issue obtained some years ago by the censurable means adopted.

PROFESSOR J. ANASTASI PACE, B.Sc. (Econ.).

Since our last issue the Royal University has suffered a severe loss through the death of Professor J. Anastasi Pace. As Professor of Political Economy he was quickly marked out by his deep erudition, and his keen sense of humour and friendly disposition soon endeared him to all he came in touch with. Besides his duties at the University he was a prominent civil servant carrying out with increasing efficiency the heavy duties of Secretary to the War Damage Commission. In spite of these varied activities one wonders how he had the opportunity of broadcasting regular talks as well as of giving public lectures in the jovial way so characteristic of Professor Anastasi Pace. The service he has rendered in his brief span of life together with his virtues will surely be an inspiration to all and especially to those who were personally acquainted with him.

Ignorance of the law excuses no man: not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him — JOHN SELDEN, Table-Talk.

Memorandum on the Press Law *

FOR almost 150 years, since the Memorial which was submitted by the Maltese to H.M. The King in 1811, the necessity was felt of having an adequate law to regulate the Press in Malta. The subject was discussed by the Royal Commissioners of 1836, and since then also in the Legislative Assembly, but up to now no satisfactory position has been reached. Our present law, Ord. V of 1933, as subsequently amended, which in part follows Ord. XIV of 1889, is in many respects inferior to its model and far behind the progressive laws of modern democratic governments. For this reason the National Assembly in April, 1945, unanimously decided that the Press Ordinance of 1933 should be amended. The goal at which the present urge for a reform should aim lies in effectively guaranteeing freedom of the press and at the same time in preventing such freedom from degenerating into licence.

That part of Ord. V of 1933, which deals with criminal actions is merely complementary to the provisions of the Criminal Code dealing with the crime of defamation and with certain other particular crimes. The characteristic element of a criminal action arising from Ord. V of 1933, is that the offence must be committed by means of any printed matter. For the sake of convenience and consistency it is felt advisable that the relevant provisions of this Ord. be incorporated in the Criminal Code. A clear distinction should be made on the lines of English law between defamation committed orally, in writing or by printed matter. To the last form of defamation special provisions should be made to apply in the manner of Ord. XIV of 1889 and our present law.

Following this classification the graver offences should fall within the competence of the Criminal Court sitting with a jury. This would be in line with the corresponding provisions of Ord. XIV of 1889, which laid down that in the case of offences punishable with imprisonment for a term not exceeding

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* *Submitted by the Editor to the Press Law Revision Commission, on the 5th August, 1949.*

three months or with multa not exceeding £5 or with both, the action was to be instituted before the Inferior Court with a right to appeal to the Criminal Court consisting of one judge only; all other offences were cognizable by the Criminal Court consisting of one judge sitting with a jury. Trial by jury if at all advisable is to be applied in the case of offences against the Press law. In such offences more than in any others the main, if not the whole question to be decided is a question of fact depending upon the usual or necessary meaning which certain words connote. Such offences are punishable because of the influence the defamatory publication has exercised on the minds of others. If no prejudice is caused to the injured party then there is no libel, and the jury are in the better position to interpret the incriminating material according to the meaning intended by its author and to the meaning given to it by the public or by the persons to whom it was directed. It is submitted that the dangers formerly experienced when trial by jury was introduced in this branch of law are now a matter of the past. Once the gravest of political crimes — those against the safety of the government — are tried by jury there seems to be no special danger in introducing trial by jury for those offences against the press law which are also of a political nature. As regards the other offences it is hardly understandable why oral or written defamation should be privileged by trial by jury, whereas libel committed by printed matter should be treated differently.

It is submitted that the provisions of sections 41 and 42 are too drastic. S. 41 contains certain heavy penalties which the Court cannot do otherwise but apply with equal severity whatever the degree of guilt which is imputable to the person responsible. The Court has no discretion in adapting the punishment to the gravity of the offence. Likewise in S. 42 (i) the Court **shall** order the suspension of the publication of the incriminated newspaper for a period of two months on a first conviction for certain offences and on a second conviction the publication of such newspaper is suppressed. These punishments should be made awardable at the discretion of the Court, and a maximum and minimum penalty should be prescribed. It is also submitted that the deposit required by S. 41 (4) for re-publishing a newspaper which had been suspended is just,

but that also in this case a maximum and a minimum should be laid down.

In contrast to this curtailment of powers which are usually entrusted to the Court, S. 62 grants to the Governor the executive discretionary power of ordering the suspension of a newspaper pending proceedings, even before a declaration of guilt by the Court. Such a power destroys the presumption of innocence which always lies in favour of an accused and prejudices the ultimate issue of the proceedings.

It is earnestly hoped that the above suggestions will contribute towards the urgent need of amending our press law and in securing in Malta a freedom of the press worthy of a modern and liberal civilization.

THE HON. Mr. JUSTICE J. CARUANA COLOMBO, B.Litt., LL.D.

As we go to print we hear with pleasure of the elevation to the Bench of Magistrate J. Caruana Colombo to whom we extend our heartiest congratulations.

We also avail ourselves of this opportunity in wishing the Hon. Mr. Justice Prof. E. Ganado, the retiring judge, ad multos annos, and we offer to him the pages of our Journal for any fruit of his leisure hours.

Establishment of the Cadastre or Land Register and reform of the Law of Hypothecation in Malta*

By NOT. V. GATT, LL.D., *Commissoner of Inland Revenue*

THE CADASTRE (or Cadastral survey) is a register of the immovable property of a country with details of the area, burdens, name of the owner, indication of the title of ownership and value. Such register is supplemented with maps and plans of sufficently large scale.

2. The idea of the Cadastre, as a description of immovable property, is an old one. There is no doubt that a sort of Cadastre was kept in the Roman Empire. The census which Augustus extended to the whole Empire, and which was taken periodically, enumerated not only the members, but *also the property* whether movable or immovable, of every family, for the purpose of their civil status and corresponding liabilities. The English Domesday Book is an instance of Cadastral survey compiled for the purpose of ascertaining and recording the fiscal rights of the king on lands.

3. Particular Cadastres, known as "Cabrei", which are still extant, were compiled in Malta during the dominion of the Knights of St. John of Jerusalem. They consisted in an Inventory of the immovable property belonging to certain corporate bodies, such as the Foundations Lascaris, Cottoner, Manoel and others. Their compilation produced an important legal effect. Any person claiming real rights over the immovable described in the said Cadastres, was debarred from exercising such rights against the Foundation to which the Cadastre belonged, if he had failed to put forward a proper claim during the term prescribed in a "Bando" promulgated by order of the Grand Master. So, in this case, a Cadastre, besides describing the real property of a foundation, fixed irrevocably the real rights of third parties over

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The subject matter of this paper reproduces, with very slight modifications, a report submitted by the writer in his capacity of Director of the Public Registry, to the Government on the 15th February, 1940 and subsequently laid on the Table of the Council of Government.

the immovables described in a Cadastre, at the time of its completion.

4. The history of the Cadastre, as a description of all the immovable property of a country, dates, in modern times, from the French Revolution. When the National Constituent Assembly abolished indirect taxation on objects of consumption and made taxation on land, the principal direct taxation in France, it had also to order the compilation of a Cadastral survey of all the tenements, whether rural or urban, in that country for the purpose of assessing the land tax. But the functions of the modern Cadastre, which thus originated in France and was soon copied by other countries, received subsequently further important developments, when in several States that Institution was connected with the reform of the laws of hypothecation. and was adopted as the legal basis of a radical innovation in the system of registration (Trascrizione or Insinuazione) of the transfers of immovable property or of real rights thereon.

5. The old Jurisprudence in France, in other Latin Countries, in several German States and Principalities, as well as in Malta, was based to a large extent on the Roman Law, modified and expanded by Municipal Law, feudal customs and Canon Law. According to that Jurisprudence the distinctive characteristics of the ancient laws of hypothecation in the said countries were the following :—

(a) Every hypothecation was *general*, that is, it affected the present and future property of the debtor; and

(b) Every hypothecation was *clandestine*, that is, there was no regular system of publicity under the control of the State.

These characteristics hampered transactions on immovables to such an extent, that they have always been two of the main targets against which the attacks of legislative reforms were directed. Now the reforms of the laws of hypothecation initiated in France by the famous revolutionary laws of the 9th Messidor IIIrd year and the 11th Brumaire XIIth year and completed by the Code Napoleon, consisted mainly in the elimination of the said distinctive elements. The general hypothecation was abolished and substituted by a special one (that is by a hypothecation affecting specific immovables) in the case of mortgages by agreement (Ipoteche Convenzionali); while in the case of Legal

and Judicial mortgages (Ipoteche Legali e Giudiziali) the general hypothecation was maintained as an exception. Besides, a special registry was instituted in which all hypothecations and special privileges on immovables had to be recorded, in order that they might preserve their priority. These reforms were introduced in the continental States, in which the codification of the Civil Law followed the lines of, and improved upon, the Code Napoleon. Moreover such reforms were rendered possible by the compilation in those countries, of national cadastral surveys, as it was found impracticable to require that all hypothecations by agreement (Ipoteche Convenzionali) should be special, that is should affect specific immovables, unless there existed a register whereby every tenement in the country could be easily and unequivocally individualized. Later a very important step forward was made in some of the principal Continental States, when it was required that on the sheet reserved in a Cadastre for a particular immovable, there should be noted all the special hypothecations which the owner constituted on that tenement.

6. Another reform introduced by the said law of the 11th Brumaire, was the institution of the regular registration in a special Government Department, of the transfer of all immovables and of real rights thereon in order that such transfers might produce their legal effect with respect to third parties. Before that reform, the laws governing such registrations were everywhere very loose, imperfect and inadequate. The principle of publicity of transfers of immovable property and of real rights thereon, formulated by the said law of the 11th Brumaire, was not incorporated in the Code Napoleon, but was reintroduced in France by a special law promulgated in 1855. Such principle found its way in several Civil Codes of other States. It is important to note that originally the registration of the said transfers was everywhere effected and indexed under the name of the contracting parties, the tenement being described merely as the object of the transaction. But subsequently an important reform was introduced in several States on the example of the German legislation. According to that reform the registration of the transfers of immovable property or of legal rights thereon, was based on the institution of the Cadastre as it was required that every such transfer, to have full effect, not only with respect to third parties, but also between the contracting parties themselves,

should be recorded on the sheet of the Cadastre referable to the tenement conveyed.

7. In this way two systems of publicity of causes of preference and transfers of immovables were evolved, viz :— the system of *personal publicity* (publicità personale), and that of *real publicity* (publicità reale).

a) Personal Publicity

According to this system all hypothecations and privileges, as well as transfers of immovables and of real rights thereon, are recorded in separate registers, and indexed under the name of the contracting parties, irrespective of the indication of the immovabe which forms the object of the transaction. In most countries where this system prevails (e.g. France, Italy and Belgium), a cadastral survey is also kept; and every transfer and mortgage of an immovable, besides being recorded in the said registers, is also noted on the sheet of the Cadastre, referable to the said tenement. Under this system, the Cadastre, apart from **being primarily** an instrument for fiscal and administrative purposes, has, as regards publicity, a position subordinate to the said registers because it serves only as a means of individualising tenements and facilitating researches.

b) Real Publicity

According to this system no separate registers are kept for recording causes of preferences and tansfers of immovables and of real rights thereon; but the functions of the said registers are combined in the Cadastre which is called the "Land Register" (Libro Fondiario). In this case the Cadastral survey is organised exclusively on the indication of the immovable, independently of the name of the contracting parties, in the following manner. A sheet is reserved in the Land Register for every urban or rural tenement, which is considered a unity. This sheet contains the following particulars, viz : the description of the immovable with reference to the volume of plans; the value of the tenement; the name of the present and preceding owners with the quotation of the title of each; a detailed statement of the encumbrance of every kind which affect that immovable, such as servitudes, ground-rent and other burdens, and the name of the person who owns them; and the indications of the debts which en-

cumber that tenement, the cause of preference, and the name of the creditor. Under this system, the functions of the Cadastre or "Land Register", as regards publicity, are of primary importance, independently of the fact that it may serve at the same time as an instrument for fiscal and administrative purposes.

8. While the two methods of publicity above mentioned were developing, there arose two legal doctrines which attribute different legal effects to such publicity. They were known as the *French School* and the *German School*.

a) The French School

This School prevails in France, Italy, Belgium and in Malta besides other countries (French Law of the 23rd March, 1855; Italian Civil Code of 1865; Belgian Law of the 18th December, 1851; and Malta Ordinance No. VII/1868). According to this School, the deed or title entered into between the creditor and the debtor gives origin, by virtue of the consent of the parties, to the mortgage or hypothecation. Similarly the right of ownership, that is the real right (jus in re) over an immovable, is acquired by the deed stipulated between the purchaser and the vendor. In both cases it is the deed (title) and not the registration thereof that gives origin to the real right of hypothecation or ownership. Such registration is required in order that the deed be rendered effective with respect to third parties. The result is that a registered transaction on an immovable, either a transfer or mortgage, enjoys priority over an unregistered one, or over that which is registered after, as the date of the stipulation of the deed is not taken into consideration for establishing such priority.

b) The German School

This School prevails in Germany, in the countries which formerly formed part of the Austro-Hungarian Empire, and in other States. The famous legislation known as the Act "Torrens", which is in force in Australia, New Zealand and nearly in the whole of Canada, may be classified under this School. According to this legal doctrine the registration of a mortgage, or of the transfer of immovable property and of real rights thereon, is an *essential condition for the acquisition of the right itself.* The deed of mortgage or of transfer conveys a personal right

(jus ad rem). The real right itself (jus in re) is acquired either by the registration alone, as in Austria, or by the registration integrated by other formality, such as the investiture in Prussia. The registration is, therefore, indispensable in order that the motgage or the transfer of the immovable be valid and effective not only with respect to third parties, but also between the contracting parties themselves (inter partes). It follows that the registration has a *probative effect* either absolutely or with certain limitations; so that by means of the registration a person can prove his title of ownership of, or to a real right on, an immovable, without the necessity of producing other evidence.

9. The system of personal publicity, combined with the legal principles of the French School, is known as the "*Private Investigation of Title assisted by the registration of Deeds.*" Under this system the purchaser or the person who is to lend money on the security of an immovable "must satisfy himself by an exhaustive scrutiny and review of the deeds and events by which the property has been conveyed, mortgaged or leased during a considerable period of time, that no loophole exists whereby an adverse claim can enter or be made good", and consequently the conclusion of transactions is often delayed by complicated and costly researches and by legal difficulties. This system prevails not only in France, Italy and Belgium as it has already been stated, but also in the non-German cantons in Switzerland, in India, in almost all the British Dominions and Colonies including Malta, in most of the States of the American Union, in the South American Republics, in Scotland and Ireland, and in the English Counties of Yorkshire and Middlesex.

10. The German School based on the method of real publicity is called the system of *Registration of Title.* According to this system the purchaser or the person granting credit can see in a short time from the Land Register or from an authorised copy of it called a land certificate, who is the owner, what are the encumbrances and mortgages, who owns them, and other particulars all of which, under the system described in the preceding paragraph, it would take weeks and often months to search and trace; and so in a very short time the transaction can be concluded at a very small expense. Under this system, the Cadestre is not merely an instrument for fiscal and administrative purposes, but becomes the only legal basis of immovable

property, strengthens the security of hypothecations, thus stimulating credit, and ensures regularity and speed in all transactions on immovables. The Registration of Title prevails in Germany, Austria, Hungary, Bohemia, Poland, in Russia (before the revolution), in the German cantons of Switzerland, in Spain, Portugal, Sweden, Holland, New Zealand, in nearly the whole of Canada, in some estates of the American Union, in Tunis, Madagascar, French Congo, and is in the course of establishment in England and Wales. I may add that the tendency of reforms in France and Italy is decidedly in favour of the system of the Registration of Title.

11. In Malta a Cadastral survey of the immovable property does not exist; the general hypothecation is the rule in our legislation, special hypothecations being only constituted as an exception in the case of mortgages by agreement (Ipoteche Convenzionali), and both the system of personal publicity and the legal principles of the French School prevail in our laws. I shall, therefore, give an outline of the evolution of the Maltese law on hypothecations and on the system of registration of transfers of immovable property and of the real rights thereon (Insinuazione). Besides, I shall sum up as briefly as possible the criticism to which the Maltese system is open, and finally, I shall enumerate the principal reforms, particularly those based on the institution of the Cadastre, which in my opinion, it is time to introduce in these Islands.

12. In Malta, as it has already been pointed out, the jurisprudence on causes of preference among creditors (i.e. Privileges and Hypothecations) was characterised, until the reforms introduced under British rule over these Islands, by the two traditional and obsolete features, viz: — all hypothecations were *general*, and causes of preference of every kind were *clandestine*. The last mentioned characteristic was partially abolished by Proclamation No. 1 of 1822, which, having instituted the Office of the Public Registry, laid down that no priority of any kind claimed for any *hypothecary contract* was to be allowed, unless registration thereof was made in that Office. The principle of publicity of causes of preference as it now stands, that is, that privileges on immovables and all hypothecations, whether legal, judicial or conventional, do not produce their effect unless they are registered in the Public Regis-

try, was formulated for the first time, in articles 35 and 39 of Ordinance XI of 1856, which law amended and consolidated all the preceding laws relative to causes of preference among creditors. The said provisions were subsequently incorporated in articles 1799 and 1803 of Ordinance VII of 1868 (Maltese Civil Law on "the rights relative to things and the different modes of acquiring and transmitting such rights"). Moreover, the Public Registry, as the Registry of hypothecations and Privileges, was reorganised by Ordinance no. XII of 1856 which was repealed and re-enacted with amendments by Act No. XII of 1927. The said laws passed in 1822 and 1856, however, did not make any provision as regards those hypothecations and privileges constituted before their promulgation, and known by the appellative of *tacit* (Ipoteche e Privilegi taciti), which continued to obtain their full legal effect, nothwithstanding that they were not recorded in the Public Registry. A law was, therefore, promulgated (Ord. XIII of 1895) which required that the said *tacit* hypothecations and privileges had to be registered in the Public Registry within a certain period, in order that they might continue to produce their legal effect as causes of preference among creditors. So in Malta the cycle of reforms as regards publicity of causes of preference was closed by the promulgation of the said Ordinance XIII of 1895; but the total or partial abolition of the general hypothecation was never attempted.

13. For the purpose of registering a hypothecation or a privilege on an immovable it is necessary to present in the Public Registry a document called a Note in accordance with the form prescribed by Act No. XII of 1927. This Note must contain the particulars required by the law to identify the creditor and the debtor, the amount of the credit (such indication not being always necessary in the case of Legal Hypothecations), the rate of interest, the term for which the credit is granted, the indication of the cause of preference, the description of the immovable property affected in the case of special mortgages and privileges, the date of the deed which gives origin to the cause of preference and the signature of the Notary who received such Act or of the Registrar in case of judicial mortgages. The Notes thus filed in the Public Registry, are indexed only under the name of the debtor and are registered in a special volume. The Maltese method of registration of cause of preference is, there-

fore, the personal system combined with the French School.

14. The registration of transfers of immovable property and of real rights thereon, as well as of certain other acts, was first introduced in these Islands under the name of *Insinuazione* in the year 1681 on the example of the Statutes of certain Italian Principalities, by a law known as "Prammatiche del Gran Maestro Caraffa", which was an attempt to codify the municipal laws of these Islands. Those laws, however, did not create for the purpose a public office under Government control, but required that a Notary be deputed to receive the registration of the said transfers and certain other acts. Such registrations were very concise and imperfect. It seems that they were made simply for purpose of record, and that they were meant as an instrument to facilitate the research of deeds without any special legal effect being attached to them. The system established by the laws of Carafa was incorporated, with slight modifications, in the Code de Rohan promulgated in the year 1784. That system of registration, although in practice it proved to be imperfect and inadequate, remained in force till the promulgation of Ord. No. VII of 1859 by virtue of which the Office of "Insinuazione" was reorganised and consolidated in the Public Registry. At present that Office is governed by the Public Registry Act. No. XII of 1927, and to some extent also by the Notarial Profession Act No. XI of 1927. Moreover, the legal effect of a registration is enunciated in Art. 702 of Ord. VII of 1868, which lays down that with regard to third parties "the effects of contracts whereby the ownership of immovable property or of another right on such things, is transferred, commence only, in either case, from the time when such contract is registered in the Public Registry."

15. The registration mentioned in the foregoing paragraph is effected by means of a Note filed in the Public Registry, where it is transcribed in a special volume. The Note contains the date and title of the Act, the particulars of the contracting parties, the description of the immovable transferred, the consideration of the conveyance and the signature of the Notary who received the Act. All Notes are indexed under the name of the parties, independently of the indication of the immovable. The Maltese method of publicity is, therefore, also in this case, the *personal system* based on the legal principles of the French School.

16. The Maltese system is open to very sharp criticism which has never been satisfactorily answered. It is an intricate maze which hampers and delays transactions on immovable property and the grant of credit on the security of a mortgage, owing to the complicated and costly researches which have to be made, the consequent legal difficulties which often arise and the unavoidable delays which ensue; so that the circulation of wealth, instead of being stimulated, is continually handicapped. To be sure of the title of ownership of an immovable property, it is necessary to make exhaustive researches going backwards for a long period of years, (often 40 years or more, according to circumstances), for the purpose of reconstructing the series of successive transfers, in which no link must be missing. All the wills, deeds "inter vivos", judicial Acts, and events by which the property has been successively conveyed and mortgaged, have to be examined. This notwithstanding, it is not always possible to find all the links of the series. For example, the law does not provide for the enrolment (insinuazione) in the Public Registry, of devolution of immovable property "causa mortis". This defect renders researches quite fruitless when a tenement has passed from one generation of persons to another in the same family, by way of succession "ab intestato", as it often happens. In such event it is almost by chance that the deed "inter vivos" whereby property was originally acquired, can be traced. Besides, the registration of transfers of immovable property was irregularly made and indexed before the year 1859; so that researches which have to be made prior to that year, to ascertain for example, whether the tenement on sale is subject to entail or emphytheusis, are, in the majority of cases, fruitless. Other factors which it would be too long to enumerate contribute to render researches an exhausting and expensive enterprise; so that it can be affirmed without hesitation that in several cases the proof of ownership ("la prova del dominio") for a long period of years is a "prbatio diabolica". I may add that in the absence of a Cadastral survey supplemented with plans and maps, it is sometimes very difficult to individualize immovable property by means of the particulars stated in Notarial Acts, as, in certain localities of the Island, street numbers of urban tenements are often changing, the structure of such tenements is subject to alteration, and the man-

ner of indicating the boundaries of fields and sites is not reliable. In France, Italy, Belgium and other Countries where the personal system of publicity prevails, the inconveniences of such system are to a large extent mitigated by the existence of the Cadastre, which, though it primarily serves administrative and fiscal purposes, is a valuable help for individualizing tenements and tracing their successive owners. The intricacies in which one can easily find one's self entangled in tracing the title of ownership of immovable property are seriously aggravated by the complicated situations which not seldom are caused by the General Hypothecation. Researches of liabilities secured by mortgages have to be made against the vendor of a tenement or the person who asks for credit. These researches have frequently to be implemented by other exhaustive researches regarding the debts of the preceding successive owners of the immovable on sale, or against the "decujus" from whose inheritance that property has devolved. The result of all the researches has to be carefully studied and the purchaser is bound to pay the creditor who enjoys priority. Such payment, however, does not secure him from an eviction, as any other creditor enjoying a general hypothecation has the right to subject to judicial sale (subasta sperimentale) the property acquired by the said purchaser in the hope that he might be paid the sum due to him, if the said property will be resold for a higher price. It is a small consolation to the purchaser or his successor who is thus evicted from his property, notwithstanding the exhaustive and scrupulous researches made, that in such case he has the right to be reimbursed of the price and expenses. I may add that the creditor enjoying a general hypothecation can exercise the said right (subasta sperimentale) any time during the period of ten years from the original sale; and moreover, he can repeatedly extend such period by means of a judicial Act called "Protesto Ipotecario" which is not recorded in the Public Registry, as it ought to be in the interest of third parties. Moreover, the general hypothecation, besides being the cause of serious complications and perplexities, generates incertitudes and doubts on the economic efficiency of persons, and for these and other reasons, it has always been unsparingly criticized by Continental Jurists and has been abolished in foreign Codes. Finally, the consideration must be borne in mind, when researches for liabilities are made,

that owing to the indivisibility of the groundrent, the owner of an urban tenement is bound to pay the groundrent not only of the site on which his property has been built, but also of other adjoining sites which may belong to other persons, but which together with the former site are subject to the same emphytheusis. The dark picture I have given is a faint representation of reality.

17. The first reform to be made in the Maltese system should consist in the abolition of the General Hypothecation, that is the mortgage over all the present and future property of the debtor, and the substitution thereto of the special hypothecation which, by encumbering specific tenements, simplifies researches, removes some of the most serious inconveniences abovementioned, and for these reasons stimulates credit and transactions on immovables. The proposed reform may either follow the example of the Italian Civil Code of 1865 in which the General Hypothecation has *in all cases* been abolished and substituted by a special one, or be made on the lines of the French Civil Code which has not gone so far, but has restricted such abolition and substitution to conventional mortgages only, while maintaining the General Hypothecation in the case of Judicial and Legal mortgages (Ipoteche Giudiziarie e Legali). In connection with this reform it would be advisable to consider whether the statutory period at present required for the prescription of hypothecations and privileges should be reduced. As the law stands, all conventional and judicial hypothecations and privileges on immovables, if they are not renewed before the lapse of thirty (30) years, cease to produce their legal effect as causes of preference. Special conditions govern the legal hypothecations, the life of which, in certain cases, may extend beyond the said period of thirty (30) years. Moreover, I venture to suggest incidentally that it is in the interest of Government Departments that a Legal Hypothecation in favour of the State be introduced in our Civil Law. Such a hypothecation which is to be *General*, in case the example of the French Civil Code be followed, should be accorded for the payment of all sums due to Government Departments either as fees, taxes and other impositions leviable in virtue of fiscal laws, or as rents for the lease of Crown property, and in security of the punctual fulfilment of obligations deriving in favour of the Government from Contracts (Appalti) of sup-

plies or works. Such a reform would not be a complete innovation for Malta, but merely an extensive application of the principle already formulated in paragraph 4 Article 34 of the Succession and Donation Duties Odinance No. XVIII of 1918. I may add that in Continental legislation such legal hypothecation is enjoyed by the State.

18. Secondly, important reforms should be introduced in the Maltese system of publicity. Such reforms may consist in the adoption of one of the following alternatives based on the compilation of a cadastral survey, viz :—

(a) The introduction of the system of Registration of Title which is a combination of real publicity with the legal principles of the German School; (b) the establishment of real publicity based on the French theory, which is deeply rooted in the Maltese Legislation; or (c) the institution of a Cadastre as a supplement to the prevailing system of registration. The system of Registration of Title, whose advantages have been outlined in paragraph 10, is universally held to be the best; its outright adoption in Malta, however, is objectionable, as the application of the teaching of the German School, which is not in line with the legal traditions of the Island, would cause a dangerous upheaval in our Civil Law. The third alternative is to be discarded, as the establishemnt of a Cadastre having the functions of a supplement to the system of registration at present prevailing, would simply reduce the reform to an eclectic combination of methods in which personal publicity, which is most objectionable, remains predominant. The second alternative seems to be the most suitable for Malta. The adoption of the system of real publicity would be a great benefit in itself, while, by maintaining in our laws the principles of the French School, any semblance of extreme radicalism would be removed from the proposed reform. Moreover, the adoption of the second alternative, besides being a very useful improvement, would pave the way for the establishment of the system of Registration of Title in the future.

19. The establishment of a system of publicity based on the Cadastre would have to be implemented by a *radical reorganization of the Public Registry* and by several other reforms in the law such as the following, viz :—

(a) The enrolment in the Public Registry of hypothecary protests (Protesti Ipotecari) and other judicial Acts meant to interrupt the prescription of any kind on immovable property and real rights thereon, under the sanction that, in default of such registration, they shall not produce their legal effect with respect to third parties;

(b) The enrolment (insinuazione) in the Public Registry of all successions "causa mortis". For practical purposes, such enrolment can be connected with the Notice of Succession which the heirs and legatees are bound to give to the Collector of Imposts in compliance with the Succession and Donation Duties Ordinance No. XVII of the year 1918. The difficulty arises in establishing the legal sanction for the omission of the said enrolment. It is not conceivable that such omission can be made to affect in any way, the validity of the succession even with respect to third parties, as the devolution takes place either by virtue of the will or by law (Successione testamentaria or "ab intestato"). Under the circumstances an indirect sanction is the only one practicable, such as, for example, to forbid Notaries from executing deeds of transfer of immovable property or of real rights thereon which derive from an hereditary succession, unless that succession shall have been enrolled in the Public Registry. Another form of indirect sanction can be formulated on the example of the new project of the Italian Civil Code, by providing that the Director of the Public Registry shall refuse the Registration of transfers of immovable property and of real rights thereon effected by the heir or the legatee, unless the succession from which the property derives shall have been enrolled in the Public Registry. The latter suggestion is only practicable under a system of real publicity based on the Cadastre. In this manner a continuous series of registrations of transfers of immovable property will be secured;

(c) The declaration of the opening of a succession (apertura di succesione) in favour of an individual in pursuance of a decree of the Second Hall of H.M.'s Civil Court, and all judgments delivered by H.M.'s Superior Court relative to the claiming of an inheritance (petizione di eredità) should be enrolled in the Public Registry by the Registrar of the Superior Courts at the request of the party interested, under the same legal sanction which will be provided for the omission of the enrolment mentioned in (b);

(d) The automatic cessation of the indivisibility of the ground-rent (canone) in the event of structural improvements being made on a site which are adequate to guarantee the payment of the relative groundrent;

(e) The division of tenements, whether urban or rural considered as a unity in the Cadastral Survey, should be forbidden beyond a certain limit.

20. The question of establishing in Malta a system of publicity by means of the Cadastre or Land Register, will raise several objections either based on the consideration that such reform is impracticable owing to the fractioning of immovable property in Malta, or animated by a spirit of stagnant conservativism which considers every innovation as useless since we and our forefathers have been able, in a way or another, to carry on under an obsolete system. To the first set of objections, I reply that the fractioning of property would render necessary a considerable amount of administrative and technical work of detail in planning and executing the Cadastre. This factor, however, is not an unsurmountable obstacle, provided one is willing to work with courage and determination. As regards the second set of opponents, they will be silenced by the unfailing advantages of the proposed innovation. Such objections and the amount of legislative work which will be required to introduce the improvements suggested, should not deter the Government from undertaking a monumental reform which will be highly beneficial to the present and future generations.

21. Finally I must say a few words on the expense required for the preparation of a complete Cadastral Survey. Any estimate of such expense must ncessarily be imperfect owing to the novelty of the work and to factors which cannot be foreseen; but such expense, if fairly distributed on all tenements in proportion to their value. would not be a heavy burden on the landlords, who will be the first to reap the advantages of the proposed reforms. Moreover, the recurrent expenditure required to run the system can be set off by a revision of the Public Registry fees. It may be objected that the present financial situation of the Island is an obstacle to the compilation of a Cadastre; but, if the proposed innovations are accepted in principle, it will cost no money to study and prepare the administra-

tive plans and laws required for the compilation of Cadastral Survey of these Islands, to reform the law on hypothecations in the manner suggested in paragraph 17, to introduce the measures enumerated in paragraph 19 and to pass other preliminary legislation to pave the way for the future adoption of one of the alternative systems of publicity proposed in paragraph 18. In this manner financial difficulties will not be an obstacle to the reform of the Laws of Malta.

Get out of the notion that the man who cites the most law and reads the most reports is the best lawyer...... It is not the most learning, but the most wisdom, that wins — Judge DONOVAN.

Whatever it may once have been, be assured that the day is passing, if it have not passed, when a **tricky** advocate was popular with clients; and one reason of this is, that the law itself has become less **tricky**; a cause depends more upon its merits and less upon quibbles, and therefore its advocate must take a different tone. They will be the most prosperous for the future who see the change and conform themselves to it. — WROTTESBY, J.

The Historical Development of the Criminal Code (2)

By ALBERT GANADO, B.A., LL.D.

IT will be remembered that when the Criminal Court was constituted, in 1814, it was to consist of two judges. Rules were also laid down on the manner of proceeding in that Court (1). In 1825, the Government found it expedient to increase to three the number of Judges in the same Court (2). One of the said three Judges was to sit in rotation to try and determine all offences where the maximum punishment provided by law did not exceed three years hard labour with chains, or simple imprisonment for the said period, or a fine to the amount of five hundred scudi. For offences of a higher nature, all three Judges were to sit, and the decision lay with the majority. As previously, the decision was to be final and without appeal.

The new enactment further laid down that if any doubt upon a question of law should arise in any trial before a single judge, or before the three judges, as the case may be, the Court was to proceed to ascertain the fact of the case, and was to reserve the question of law to be argued by the respective advocates on an early day, before the three judges of the Criminal Court who might decide the same; or the said three judges, either before or after argument, might, if they thought proper, apply to His Excellency the Governor to direct that two other persons, Members of the Supreme Council of Justice, being lawyers, or persons respectively holding the rank of Assessor to Government or of one of His Majesty's Judges be included in the composition of the Court. These five members, or a majority thereof, were then to decide upon such question of law; and thereupon one of the Judges of the Criminal Court was to deliver in open Court the reasoned

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(1) Vide "The Law Journal"—Vol. II, No. 4—April 1949— page 217.

(2) Dr. Claudio Vincenzo Bonnici, who was to take later on a prominent part in the drafting of the Criminal Code, was appointed, on the 11th April, 1825, to sit in the Criminal Court with the other two judges.

decision arrived at, and pronounce the sentence of the Court accordingly (3).

When preparing the confidential report of 1824, Richardson noted some serious inconveniences in the laws of evidence. He observed that, in criminal matters, two witnesses were in general considered to be necessary to prove guilt; objections were allowed by law to the competency of witnesses, in some cases, and their credit in others, on the mere ground of connection or relationship with the parties; objections were also sometimes successfully made, and material witnesses in consequence excluded from giving evidence, on the ground of their having omitted to receive Holy Communion at the preceding Easter. He pointed out to the Secretary of State the inconveniences which arose from the application of these rules, and suggested that they should be advantageously rectified by a legislative proclamation, of which, in the same report, he enumerated the principal heads. The Colonial Secretary approved of the idea: Richardson prepared the substance of such a proclamation: its immediate enactment as a law was carried into execution by Governor Hastings (4).

(3) Proclamation VII—11th April, 1825. Owing to a considerable arrear of causes in His Majesty's Criminal Court these rules were again amended by Proclamation VI of the 15th June, 1827, with a view to expedite the decision of the said causes, and to prevent a like accumulation in future. The number of sitting judges in the said Court was increased to four by Proclamation X of the 3rd October, 1827. Minor amendments respecting the powers of the Courts of Magistrates and the exercise thereof were also introduced by various enactments, namely Proclamation IV of the 8th May, 1826, Proclamation VII of the 22nd April, 1828, and Ordinance I promulgated on the 8th April, 1840.

(4) Vide Richardson—op. cit. page 8. This law was promulgated on the 25th April, 1825 (Proclamation (VIII). Besides remedying the inconveniences mentioned by Richardson, it laid down other provisions on the law of evidence applicable either in Civil or in Crimnal cases, or in both, many of which are still in force to-day. After its promulgation, Richardson, upon a perusal and consideration of this law, thought that section 14, relating to the admissability of the evidence of witnesses who do not or cannot appear in open Court, was deficient in perspicuity, and perhaps in correctness. In order to render this section more clear and precise he drafted an amendment, which he annexed as an appendix to his report of 1826. (V. Richardson—op. cit., page 11. Also appendix A, No. 2—page 50). His draft became law by Proclamation III of the 10th March, 1827.

It has been stated in the previous chapter that Dr. Ignazio Gavino Bonavita was of opinion that the time was not yet ripe for the introduction in Malta of the system of trial by jury. Some years previously, Maitland had also expressed himself in a similar strain. He declared that, though he was not quite sure whether the minds of the people of Malta were, at the moment, exacly fitted for the same beneficial effects which the people of Great Britain enjoyed, yet it was a condition in which, when circumstances would admit of it, he would be proud to lend his aid to place the inhabitants of these Islands (5).

On the 2nd of June, 1826, His Majesty by Warrant under the Sign Manual placed Sir John Stoddart at the head of the Judicial Department in these Islands (6). He arrived in Malta, together with Lady Stoddart (7), on the 16th November of the same year, on board the Neapolitan schooner "Concezione" from Syracuse, Sicily, after a voyage of four days (8). On taking his seat, for the first time, as President of the Court of Appeal, he delivered, on the 22nd November, 1826, an address in which he acknowledged that the law of England was not in every respect adapted to the customs, interests and wishes of the Maltese: although he thought that certain institutions in the English law were fit to be taken as models for bringing to perfection the law of Malta. One of these institutions deserved particular consideration: that is, trial by jury.

The decision of twelve jurors on matters of fact as practised in England was justly admired, even by foreigners, Stoddart con-

(5) V. "Address of H.E. the Governor to the Judges, Consuls, and other legal authorities, assembled at the Palace of Valletta, January, the 2nd, antecedently to the opening of the first term of the Courts of Law for the year 1815". (Published in Proclamations, Minutes etc. 1813—1820 at the Government Printing Press in 1821—page 95). V. also "Charge of H.E. the Governor, First Commissioner under H.M.'s Commission of Piracy, to the Grand Jury: delivered the 16th of November, 1815. (Published in the same volume of Proclamations etc.—page 137).

(6) On the 5th July, 1826, Stoddart was appointed Judge of the Vice-Admiralty Court in Malta by a Commission issued from the High Court of Admiralty in England; and, by Government Notice of the 16th November, 1826, he was appointed by H.E. the Governor to be Senior Member of the Supreme Council of Justice. — V. Malta Government Gazette, 22nd November, 1826.

(7) Lady Sarah Stoddart was William Hazlitt's first wife.

(8) Malta Government Gazette, 22nd November, 1826.

tinued. Candidly speaking, he thought that this mode of procedure was not so well adapted to the situation of Malta at the time, and he was certain that the Sovereign would not direct the establishment of a system, however perfect in itself, should it be found opposed to the interests, or even to the prejudices, of his subjects. But, in the future, it might be found practicable to conciliate with the principles of the Maltese Laws some modification at least of the admirable proceedings by jury (9).

Subsequently, Sir John Richardson, in his report of 1826, had also pointed out the inconveniences of introducing this system of trial immediately. But he expressed the hope that after the lapse of a few more years such a change in local circumstances might be perceptible as to warrant the introduction of some kind of Jury in certain cases. He recommended that, when that time should arrive, the experiment be at first made on a small scale, and confined to the graver descriptions of criminal offences, perhaps to capital cases only; that the jurymen be not more than five or six; and that these, after hearing the law explained by the judges in a public charge, should deliberate and decide conjointly with the judges, on the question of fact (10).

On Hastings' death, which occurred in the same year, Malta was placed on the establishment of a Lieutenant Governorship, in order that the heavy charge upon the revenue of the Island might be lessened. On the 15th February, 1827, Sir Frederick Gavendish Ponsonby assumed the administration of the Government. He decided to tackle the question of trial by jury and resolved to act on Richardson's suggestions. Stoddart was called upon to make the necessary arrangements : besides being a judge he was, at times, a legislator.

The principle on which Stoddart proceeded, and which was finally adopted by His Majesty's Government, was that the "spirit and substance" of the English institution should be retained, but that it should be conciliated, as far as possible, with "the principles of Maltese law". If the former condition were violated, the law could be rendered intelligible to those who were to carry it into effect. No scheme, however, containing these two conditions, could form a permanent, and much less a perfect sys-

(9) V. Malta Govt. Gazette—29th November, 1826.
(10) V. Richardson—op. cit., page 7.

tem of procedure. It must, in the very nature of things, be intended to be progressive, adopting first what was practicable in Malta, and then approximating to what was practised in England (11).

The plan prepared by Stoddart was laid, by the Lieutenant Governor, before the Secretary of State, who, at Stoddart's request, communicated it to Sir John Richardson. That eminent judge in the course of a long correspondence with Stoddart contributed greatly to its improvement. When the draft was fully approved by the King's Government, it was returned to Ponsonby, who referred it to Stoddart and the six Maltese Judges for final revision. The whole body, after a week's separate consideration of the plan, discussed it section by section, at a general meeting, and, after a few slight corrections had been made, approved it unanimously (12). It was promulgated as law by Proclamation of the 15th October, 1829 (13).

Trial by jury was thereby introduced into the criminal branch of procedure, though it was confined to the graver description of offences, namely to those "punishable with death, or with any punishment continuing to the end of the offender's

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(11) V. Stoddart's "First Report on the Law of Malta, and the administration thereof" submitted to the Secretary of State for the Colonies on the 10th February, 1836—Para. 42. (Published as a Supplemental Appendix, marked "B", to the "Case on behalf of the Crown Advocate of Malta in the Privy Council in the matter of the validity of certain mixed and unmixed marriages at Malta").

(12) V. "Copy of Correspondence between the Marquis of Normandy, Sir John Stoddart, the Commissioners of Inquiry and the Governor of Malta, respecting Sir John Stoddart's claim for compensation".—Ordered to be printed: 18th June, 1839.—No. 123—page 44.

(13)) This law was subsequently amended by the Regulations of the 31st May, 1830, and by the Proclamations IX of the 2nd August, 1830, IX of the 26th September, 1831, VII of the 26th April, 1832, II of the 8th August, 1836. Proclamation IV of the 30th October, 1838 introduced some provisions for the trial of collateral issues in the Court of Special Commission, and for the due care of persons found by competent authority to be insane. Other additions and amendments to the principle law were made by Proclamation II of the 24th January, 1839, and by Proclamation I of the 5th March, 1845.

natural life" (14). Accomplices in the said offences, whatever the punishment prescribed by law against them might be, were to be tried in a similar manner. The "Court of Special Commission" was constituted; it was presided over by the Chief Justice, who was to sit with three or more judges of His Majesty's Superior Courts, and a jury, consisting of a foreman and six common jurors, three of which were to be drawn from the "Maltese class", and three others from the "British class".

The trial was to be conducted in the English or Italian language, at the choice of the prisoner. Until the delivery of the verdict, the jurymen were precluded from communicating with any person. The members of the jury were to decide, by a majority of votes whether the facts alleged in the indictment had been "Proved" or "Not Proved", and they could qualify their verdict by the explanations they thought necessary.

Should the verdict be "Proved", it lay at the discretion of the Court either to give sentence immediately, or reserve the question of law arising thereupon for further deliberation. In the case of an erroneous verdict the Court might order a new trial to be held; the accused could also ask for the same benefit. The sentence of the Court was final and not subject to appeal. Sentence of death could only be pronounced either where the accused persisted in pleading guilty, or where the jury returned a unanimous verdict of guilt. These are the general lines of the jury system established by the law of 1829.

But Magistrate Ignazio G. Bonavita was dissatisfied with the piecemeal sort of criminal legislation which was being enacted, and advocated a speedy reform and codification of the whole Criminal Law of Malta. Too much confusion was prevailing in that law at the time, and Bonavita was convinced that, in order to do away with that confusion effectively and in the shortest possible time, the only remedy lay in adapting for Malta one of the best Penal Codes of Europe. This he had already submitted to Richardson, and he continued to press for this solution with

(14) The law made the jurisdiction of the Court depend on an annual Commission. The terms of the Commission issued for the first year were directed to include only certain specified crimes of the gravest kind; but for every following year, it was left to the Governor's discretion to extend the limit of jurisdiction to such offences as he might think proper. At time, some slight extention did in fact take place.

influential Government Officials, especially after his elevation to the Judicial Bench on the 1st October, 1827.

In his opinion, the jury law of 1829 could well be said to have been premature; the system had added to prevailing confusion, amid the general discontent of the public (15). This state of affairs induced him to submit a Memorandum "On the present state of the Maltese Law" to the Lieutenant Governor, Ponsonby, wherein he observed that, in contrast to the fixed and invariable rules of procedure obtaining in England, Malta was still encumbered in the practice of its Courts with a system made up of conflicting elements, which consequently led to much embarrassment. For, the laws by which these possessions were governed consisted of:

1. the Constitution of the Courts of 1814;
2. the Municipal Law or Code de Rohan;
3. the Civil or Roman Laws;
4. the precedents of the most eminent foreign tribunals.

In practice such a system was incomplete, contradictory, uncertain, and, sometimes, even absurd.

He pointed out that it was undeniable that Maitland's *Constitution of 1814* effected a considerable and very material change in judicial proceedings, but it only embodied the general principles on the subject. Subsequently proclamations made partial additions and improvements, but the whole, besides being dispersed in several laws, was very far from being a complete Code of Procedure.

On the other hand, *the Municipal Laws* of de Rohan did not even deserve the imposing title of "Code". They were nothing more than a collection of a few unconnected statutory laws, compiled without any method, and framed more to interpret or modify some of the Roman Laws and prevailing opinions of writers upon a few matters of that Jurisprudence, than to lay down the fundamental laws which were to rule the island, and which might with propriety be styled 'a Code of Laws'. Moreover, the reforms introduced in 1814 and in the subsequent years had rendered a great part of those laws obsolete.

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(15) V. Sir Ignazio Bonavita—"Storia del Codice Criminale"—Fols. 1 and 2. This history exists in manuscript in the first of the three volumes of "Carte relative al Codice Criminale del 1854" mentioned in Chapter I.

The part of the Code de Rohan dealing with Criminal Law made reference only to a limited number of classes of crimes, and was framed upon the principle that the judges "ex justa causa" had the power to moderate or increase the punishment inflicted by law—a principle which was now expressly abolished. Finally, nothing was to be found in the Code de Rohan "of the subjects constituting the preliminary matters which ought always to precede Criminal Codes, such as enactments relative to persons capable of committing crimes, to accessories, or to acts, which, although prejudicial to others, are nevertheless not to be imputed to criminal intention, etc.".

The value of *Roman Law* considered as the source of the fundamental principles of modern legislation was too much appreciated to admit of any additional praise. But if one looked upon the Roman Laws as forming the statutes or written law of any country in the present day, wrote Bonavita, they must appear absurd and not at all adapted to any legislature whatever since no modern nation was placed under the same local circumstances, spirit of Government, habits or usages, as the Romans. In truth, the Island was less ruled by the Roman Laws than by the individual opinions of those writers who had commented upon and interpreted them; and the doctrines of those writers were very often extremely contradictory. By saying this, he did not mean to infer that the principles and substance of this branch of our Jurisprudence ought to be changed.

With regard to *the precedents of the most eminent* foreign tribunals, Judge Bonavita observed that it was not even established which were the most eminent and the most worthy to be quoted among the foreign tribunals; consequently, every lawyer was left at liberty to pick and choose such as suited best his convenience or purpose. It was also important to bear in mind that neither the proceedings of the Courts of Justice in England nor those of our own Courts were looked upon as having the binding force of law here. Furthermore, however wise might be the decisions of any of the Courts of Rome, Florence, Naples, France and Spain, they could never be considered *wholly* applicable to cases in Malta, as particular usages, particular established opinions or statutes not in consonance with any of ours might have influenced the decision of these Tribunals.

This confusion which existed in our laws called for an urgent remedy, and, with this end in view, Bonavita submitted a number of suggestions. As far as judicial proceedings were concerned, he thought it advisable to consolidate the Constitution of the Courts of 1814 and all procedural laws enacted thereafter; to provide for the defects which would result from such consolidation by the introduction of rules taken from the Municipal Laws, or collected from former practice and from the Roman Law, where they were considered reasonable and coherent with the principles and spirit of the Constitution and of the subsequent laws, or by laws framed on what might be suggested by justice and the experience of the past; to draw up an index of the whole. By so doing Malta would soon have a coherent and permanent Code of Judicial Proceedings, uniform in its application.

Bonavita then passed on to the consideration of the Commercial and Criminal Laws. On the latter he said: "The circumscribed extent of the criminal branch of jurisprudence affords a still greater facility for the compilation of a Criminal Code, and, what has already been prepared by Sir John Richardson, in conjunction with many modern Codes published during the last twentyfive years, furnish a vast number of good materials for an excellent Code upon the most important branch of legislation, and which, perhaps, at present is the most defective which we have".

Finally, he suggested that the compiling of the three Codes of Judicial Proceedings, Commercial Laws, and Criminal Laws, be entrusted to three different persons, or separate committees, composed of as few competent individuals as possible. One could not expect these compilations to be at once a correct, wise and complete set of laws, but by their publication a great stride towards the achievement of this end would have been made. For the further improvement of the Codes, the Judges might be instructed to transmit to Government the decisions of all such important questions of law as were by them determined. The compilations might also be periodically referred to the said respective Committees, which would then be rendered permanent, in order that they might be able to submit suggestions for new enactments. By the adoption of this method, Maltese legislation would considerably improve, and positive, permanent and

unquestionable principles would be laid down for it. Thus would "the door be shut to useless litigations, discussions, and, sometimes, irretrievable errors" (16).

Ponsonby was impressed by Bonavita's comments and suggestions. He sent for Judge Bonavita and presented him with a printed draft of the Criminal Code which was being drawn up at Corfù. He directed him to examine it, and report whether and how far it was possible to draft a similar Code for Malta (17). Bonavita faithfully carried out the mission entrusted to him, and he submitted his report in due course.

Before passing to examine in detail chapter by chapter and some articles of this Draft Code, Bonavita premised some observations of a general nature. He proposed that anything relative to titles, institutions, regulations and localities peculiar to the Ionian Islands, and not existing in Malta, should be left out; and when our Island offered anything substantially equivalent to them, although under a different name, it should be substituted to them.

Certain punishments awarded by the Ionian Code, but not practicable in Malta, were not to be adopted. The punishment of death in that Code was established more frequently than necessary; such a severe punishment was seldom requisite in Malta, where high treason was a crime nearly unknown, and hienous crimes were very rare. With the exception of the quality of punishment, the most substantial parts of the Ionian Code corresponded precisely to the laws obtaining in Malta, with the difference that what was stated with certainty and precision in a few pages of the Ionian Code, has to be sought for in innumerable and voluminous books of jurisprudence in Malta.

One of the guiding principles for the drafting of our laws was to be this: when any of the enactments of the Ionian Code were found to relate to matters, on which either our Code de Rohan contained particular provisions, or Sir Richardson had suggested particular enactments, the latter were to be consulted and compared with the Ionian Laws, with the purpose of making in these laws such additions and improvements as would

(16) A manuscript copy of this Memorandum (undated) is also to be found in the said first volume of papers relating to the Criminal Code of 1854, marked Enclosure "C".

(17) V. Bonavita—"Storia del Codice Criminale"—Fol. 2 tergo.

be considered necessary for their adoption here (18).

At this period of Bonavita's activity, the Lieutenant Governor in a letter to the Under Secretary of State for the Colonies proposed to adopt Sir John Richardson's Criminal Code, and to fill up its "vacuities" with enactments conceived in the same English spirit as the parts completed. Ponsonby subsequently communicated this letter to Stoddart, who not only acquiesced in the idea, but suggested that it might be applied to the reform of the whole system of local Jurisprudence, by expunging many old blots which still disfigured that system, and carefully and gradually introducing in their place such principles and institutions of English Law as might be suitable to the circumstances of the mixed British and Maltese population.

The Lieutenant Governor requested Stoddart, the Chief Justice, to undertake the task. Stoddart asserts that Ponsonby's choice fell upon him, because he was fully sensible that no Maltese lawyer was sufficiently versed in the Law of England to be able to form a practicable plan for such a purpose. Stoddart started on the work with his usual vigour. He compiled the necessary statistics, and incorporated them in a "plan for the gradual and systematic reformation of the whole law of Malta". Moreover, he recommended that the measure, if approved, should be carried into effect by one or more British lawyers to be sent out from England with a Commission for that purpose; to them he was prepared to afford all the information and assistance in his power (19).

Ponsonby transmitted Stoddart's "Plan of Legal Reform" accompanied by a report to Lord Goderich, the Secretary of State, who referred it to the consideration of the Lord High

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(18) V. "Observations on the Ionian Criminal Code in as much as it may be applicable to the Island of Malta and its Dependencies). A manuscript copy of this Memorandum (undated) is also bound in the first volume of Bonavita's papers relating to the Criminal Code of 1854, marked Enclosure "J".

(19) V. Correspondence respecting Stoddart's claim for compensation (op. cit.)—page 50

Chancellor of Great Britain (20). Afterwards, when writing to Ponsonby, Lord Goderich referred to this plan with encomium. He stated that it was impossible not to perceive, and it would be unjust not to acknowledge the great industry and clearness with which Stoddart's project had been drawn up, and the comprehensive view which it exhibited of a subject not less intricate than it was important. In his view, it embraced at once the general principles of legislation for the protection of private rights and the punishment of crimes, with a consideration of the local peculiarities by which the adoption of those principles at Malta should be qualified (21).

The course of proceeding decided upon by the Secretary of State for the general revision of the Maltese Codes of Law was that Stoddart should receive the cooperation and assistance of Mr. Barron Field, the First Judge of the Supreme Court at Gibraltar, and of Mr. Kirkpatrick, the Chief Judge of the Ionian Islands. The latter two Judges were to correspond with Stoddart on the subject and would occasionally join him for the sake of personal conference. Moreover, should Ponsonby and Stoddart agree that with such aid the scheme could be prudently undertaken, His Majesty would be ready to impart to Stoddart and the two Judges any such powers as might be requisite; and should it be thought that this plan was fit for adoption, Stoddard should be requested to prepare the form of any Commission and Instructions which he might deem right to have addressed to himself and to the two learned Judges alluded to. These decisions were transmitted to Ponsonby by a despatch of the 3rd June, 1831.

Ponsonby delayed to communicate this despatch to Stoddart as he had not yet received the determination of His Majesty's Government on some propositions connected with the subject which he had submitted to the Secretary of State. It was necessary for him to learn the Colonial Secretary's decisions on

(20) V. Stoddart's letter to the Chief Secretary to Government dated 17th September, 1831. (Enclosed in Despatch No. 58—1st October, 1831—Lieutenant Governor to the Secretary of State).

(21) V. Correspondence respecting Stoddart's claim for compensation (op. cit.)—page 50—"Extract of a Despatch from the Secretary of State (now Earl of Ripon) to the Lieutenant Governor of Malta, 30th June, 1831".

those propositions before he could make up his mind on the scheme transmitted to him by the said despatch, and offer his opinion thereon. Ponsonby then had to leave the Island for a short period.

In the meantime Mr. Barron Field by direction of the Secretary of State proceeded to Malta. On his arrival here, he communicated to Stoddart a copy he had received from the Colonial Office of the despatch of the 30th June. In a letter to Colonel Augustus Warburton, the Acting Lieutenant Governor, Stoddart expressed his clear and distinct opinion that the course of proceeding recommended by Lord Goderich was one of the most judicious that could be devised for the attainment of the objects which it had in view. It would procure for the Island of Malta all the benefits which could be derived from the united experience of all the Chief Judges in the Mediterranean. He enclosed with his letter for transmission to the Colonial Secretary the Draft of a Commission and Instructions he had drawn up in accordance with the latter's directives.

Stoddart's letter with its enclosure was immediaely forwarded to Lord Goderich by the Acting Lieutenant Governor, who thought that as he was only temporarily administering the Government he should abstain from submitting any remarks on the enclosed papers. But he deemed it his duty to state that he was aware that Ponsonby entertained a strong opinion that it would be expedient to have as member of the Commission for the Revision of the Codes at least one of the Maltese Judges who would be found useful in tempering the changes so as to adapt them to the state of society in Malta (22).

John Kirkpatrick, the Chief Justice of the Ionian Islands also arrived in Malta on the 1st September, presumably, like Barron Field, on instructions received from the Secretary of State. When Kikpatrick was informed as to how the Commission was to be composed, and what was the form of the proceedings as recommended by Stoddart in his draft "Instructions" he strongly objected to both, and he wrote to the Secretary of State that, as the new laws were destined to govern a civilised country which already possessed its own laws, forum, and judi-

(22) V. Despatch No. 53 of the 28th August, 1831, from the Lieutenant Governor to the Secretary of State, and its enclosures.

cial organisation, it was degrading for the natives of the Island that no one of them should form part of the Commission. He added that he would not take part in the work unless two of the Maltese Judges were appointed members of the Commission. Moreover, if the form of proceedings suggested by Stoddart were to be adopted, the Commission would take a century to complete its work, whilst reform was urgently required (23). Finally, he explained the mode in which he conceived that the revision of the Codes might best be accomplished (24).

After mature consideration, Lord Goderich sent the directions of His Majesty's Government to Warburton; his very important despatch merits publication in its entirety. The Secretary of State pointed out that the question arising out of the different views submitted to him was whether it was convenient that the proposed Maltese Codes should be framed in such a manner as to induce the closest resemblance which circumstances admit between the Law of England and the Law of Malta; or in such a manner as to embody the best and most applicable provisions of the Codes recently promulgated on the continent of Europe. The latter course was simpler. He fully acknowledged the great advantage of introducing English institutions into every settlement annexed to the British Crown, but he could not press on towards this great object to the disregard of all the principles which stood in its way.

"If it be necessary to establish in Malta", he wrote, "the legal maxims of this kingdom, it is not less necessary to respect the wishes, nay, even the prejudices of the ancient inhabitants. If it be wise to act upon large views which extend to a remote futurity, it is also essential to protect the interests of the existing generation." Thus Stoddart's scheme appeared to be objectionable as it overlooked the exigencies of the times, in order to provide for the wants of a successive generation. Sir John Stoddart wished to take the law of England as his basis. But it was superfluous to say that from that law he could draw little beyond mere suggestions; for English law consisted of a body of customs, statutes and judicial decisions founded upon and inseparably united with the habits and social manners peculiar to Englishmen.

(23) V. Bonavita—"Storia del Codice Criminale"—Fol. 3.
(24) V. Despatch No. 23—October 6, 1831—S. of S. to Lt. Governor.

It was true that with all its admitted defects English Law formed one of the noblest monuments of human genius. "Still, however, it must be conceded that the law of England is less fitted than that of any other civilised country for transplantation to a foreign soil. Sir John Stoddart would scarcely find in it a single tenet which could be transferred without mutilation into his proposed code."

On the other hand, the great jurists of France had brought together an admirable body of laws, and their five codes had been adopted in Belgium, in many States of Germany and Italy, and more recently in the Ionian Islands. "To withhold from the Maltese the same boon, because we hope that a day may come when a more nearly English system may be established, were to exact from them a sacrifice, which I cannot think that the relation in which this Kingdom stands towards them would justify." Consequently, the first step in the progress towards an ultimate settlement of the question should be to complete the Criminal Code which had been commenced by Sir John Richardson, and then also a Civil Code. This would not be considered as a final measure, "but as preparatory at some future period to the introduction of so much of the law of England as could be advantageously reconciled with the feelings, interests and peculiar circumstances of society at Malta."

With regard to the authority to be given for the undertaking of this enquiry, Lord Goderich intimated to the Malta Government that the Commission was to be transcribed from that granted to Sir John Richardson, with no other variation than those which the greater range of enquiry and the greater number of the Commissioners might render indispensable. The Commission was to be issued to Sir John Stoddart, Mr. John Kirkpatrick, Mr. Barron Fied, Dr. Claudio Vincenzo Bonnici and Dr. Ignazio Gavino Bonavita. These Commissioners were to be instructed "to take into their consideration the best method of establishing for Malta a Civil, Criminal and Commercial Codes, with Codes of Civil and Criminal Procedures grounded upon the reports of Sir John Richardson, and upon the principles and rules of the most approved Codes of foreign countries, provision being made for all those cases and exigencies in which local reasons may require the preservation of existing laws, but so that the entire Code may be consistent and symmetrical."

Every possible assistance was to be given them in the execution of their respective duties, and they were to report to the Head of Government any difficulty that might arise and the progress of their work.

The Secretary of State for the Colonies ended his despatch by expressing the hope "that the gentlemen to whom this duty is committed, will engage in it with their wonted zeal for the public service, and that no further obstruction will arise to delay the completation of a design of so much importance to the welfare of the Island of Malta and its Dependencies" (25).

The policy outlined by Lord Goderich was fully endorsed by the Acting Lieutenant Governor, Colonel Henry Anderson Morshead, who expressed his admiration "not more of the reasoning in the despatch of itself so just, than of the wisdom and benevolence of the decisions it contained". The Maltese had laboured for a long period under a defective and complicated system of Jurisprudence; but His Lordship, Morshead opined, had indicated a mode of remedy which could not fail, and for this the faithful Maltese stood deeply indebted to him (26). A copy of the Colonial Secretary's despatch was sent to the five Commissioners by the local Government; they were also informed that the first step to be taken in pursuance of His Majesty's Order was to frame the Commission itself and the Instructions (27).

Meanwhile, on the 5th November, 1831, the public was informed of the institution of a Commission for the framing of the Maltese Law Codes, and of the members of which it was composed (28). Ten days later, the Commission which the Commissioners had drawn up was issued under the Great Seal of the Island of Malta (29). The terms of this Commission stated that it was the desire of the Sovereign "to make provision for the

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(25) Ibid.

(26) V. Despatch No. 67—October 26, 1831—Acting Lieut. Gov. to S. of S.

(27) V. Letter of the 3rd November, 1831 sent by Frederick Hankey, the Chief Secretary to Government, to the Commissioners (Enclosed with Despatch No. 72--30th November, 1831—Acting Lieut. Governor to S. of S.).

(28) V. Malta Govt. Gazette—9th November, 1831.

(29) Published by Minute of the 19th November, 1831. V. Malta Government Gazette—23rd November, 1831.

complete improvement of the law, and for the speedy and economical administration of justice" in the Island of Malta and its Dependencies. With this end in view, the five Commissioners were directed to draw up successively five Codes of Law, to wit, a Code of Criminal Law, a Code of Commercial Law, a Code of Civil Procedure and a Code of Criminal Procedure. The directives contained in the despatch of the Secretary of State were also embodied in the Commission.

Moreover, the Commissioners were instructed to transmit each Code, as the same should be completed, to the Head of the Government, with such comments as might seem necessary to them. Full power and authority was given them to call and examine any person including the Governor and the Bishop. They could also administer the oath to any appearing before them, and could order the production of any documents, official or otherwise, which they might require. In the case of absence of one or more of the Commissioners, or of his or their ill-health, or other lawful impediment, the Commission was legally constituted so long as two members were present.

The Commissioners, with the exception of Mr. Barron Field, who never attended the sittings of the Commission (30), immediately commenced on the important undertaking which had been to them entrusted. They met for the first time at the Government Palace, Valletta, on the 18th November, 1831 (31). At this sitting the Commission was formally read out in the presence of the Acting Lieutenant Governor and the Chief Secretary. It was agreed that three sittings were to be held every week, and each sitting was to commence at 9 a.m. From the very first Stoddart showed little interest in the work being done, and used to arrive always an hour late at the Commission's meetings. This attitude was interpreted by Bonavita as being due to the fact that Stoddart was piqued because his plan had not been adopted, and because his ascendancy over the Mal-

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(30) Mr. Field had arrived in Malta on the 18th August, 1831, and remained here for about two months. During that period Stoddart laid before him a variety of documents relative to the Law of Malta, and held frequent consultations thereupon with him, preparatory to the business of the intended reform. After Field's departure Stoddart consulted him by letter on various matters relating to the Commission. (V. Correspondence respecting Stoddart's claim for compensation—op. cit. page 50).

(31) V. Malta Government Gazette—23rd November, 1831.

tese Bench had been broken by his being obliged to sit on a Commission with two Maltese Judges. Obviously, he was seeking to prolong the work so much that Kirkpatrick's duties would call him back to Corfù and he would thus be left with an open field in which to deal with the Maltese Judges.

The Commissioners first directed their attention to the drafting of the Codes of Criminal Law and of Criminal Procedure as they considered their promulgation to be a most urgent necessity, and as the drafting of the other Codes would be more difficult of fulfilment. In the beginning, the Commission accepted Stoddart's proposal that the penal Code which was being drawn up in the Ionian Islands by a Commission of which Kirkpatrick formed part be taken as the model and the basis for our Criminal Code. But this was subsequently set apart as it was still in too primitive and imperfect a state; the Code of the Two Sicilies, on which the Draft of the Ionian Code was based, was substituted therefor.

The question of the mode of proceeding the Commission should follow was then opened. Bonavita, Bonnici and Kirkpatrick insisted that the plan of the Sicilian Code be adopted; that the sections of that Code which would not be considered suitable should be left out, that other provisions taken from existing Maltese Laws, or from Richardson's suggestions, or others which the Commission would deem to be advantageous should be inserted. Stoddart objected on the ground that the classification and order of the Titles and Chapters of the Code of the Two Sicilies was defective, and that some provisons which that Code included under a heading or title should fall under another heading or be inserted under another title. Kirkpatrick pointed out that, though admittedly the Code in question was not perfect, the same criticism as that made by Stoddart could be levelled against any other Code; and, in his opinion, it would be better to follow the classification of that Code than to create a new one which might turn out to be even more imperfect.

Interminable discussions followed. Every word pronounced by either party developed into a heated argument, and led to the use of strong expressions by both sides. Gone was the calm and tranquillity of mind required for the sort of work on which the Commission was employed!

The punishment of flogging was another subject which added to the charge of the threatening atmosphere. This revolting form of repression was in certain cases ordered by the laws then in force, and thus the judges had no option but to award it in a sentence of conviction. But, on the recommendation of the sitting judge, the Executive branch of the Government invariably commuted this punishment. Now, the Maltese Commissioners and Kirkpatrick wanted to abolish it altogether. Stoddart also seemed to be averse to its retention; but he insisted that the two senior judges of the Court of Appeal who did not form part of the Commission be consulted. It was evident that Stoddart was persisting in his delaying tactics, and the Commissioners feared that he was trying to create a precedent, and thus introduce the practice of consulting with those two judges on any difference of opinion, however slight and unimportant, which might arise in the course of the Commission's work.

Consequently, they were not prepared to let Stoddart have his own way. They objected that the matter in dispute involved no difficult point of law for the determination of which it was necessary or desirable to call upon the assistance of persons not forming part of the Commission. On the other hand, the right solution of the point at issue was quite manifest. Stoddart himself had not expressed himself against the abolition of that sort of punishment. In any case, whatever the opinion of the two senior judges might be, Bonavita, Bonnici and Kirkpatrick were determined to stand unshaken in their opinion.

Notwithstanding these unfortunate incidents, and the time lost by Stoddart, who, besides being always late, persistently indulged in long digressions on matters irrelevant to the question at issue or to the work in hand, the Maltese Commissioners and Kirkpatrick, by the sheer weight of their number succeeded in almost competing the first draft of the Code of Criminal Law (32). This draft was divided into three books, which dealt respectively with punishments, crimes and contraventions. Though the draft was almost completed, it was not yet in a state to be laid before the Government as several points had been re-

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(32) V. Bonavita—"Storia del Codice Criminale"— Fols. 5-9.

served for further consideration both as to substance and arrangment (33).

Meanwhile, Mr. Kirkpatrick had to return to Corfù, where his presence was required during the Session of the Ionian Parliament. He left Malta on the 27th January, 1832 (34). Before his departure, the Government of Malta assigned to him a sum of money in remuneration of the services he had rendered. Kirkpatrick declared that he had accepted the Commission given him without any idea of pecuniary compensation, but solely because he wished to be useful, within his possibilities, to the Maltese. Thus he directed the Government to employ the amount awarded to him for charitable purposes (35). A truly generous gesture!

Thus the first phase of the Commission's work came to an end. Bonnici and Bonavita had lost the valiant help of a perfect gentleman. The one who took his place did not prove to be a worthy successor.

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(33) V. Despatch of the 29th February, 1832 sent by the Acting Lieut. Governor to the Secretary of State.

(34) Ibid.

(35) V. Bonavita—"Storia del Codice Criminale"—Fol. 9.

The Insane Offender in Maltese Criminal Law *

A HISTORICAL AND CRITICAL REVIEW

By DR. PAUL CASSAR, M.D., B.Sc., D.P.M.

WE need not go very far back in Maltese history to trace the origin of the present statutory measures with regard to the relation of mental derangement to offences against the law of the land, and to study the progressive steps by which they have advanced. Indeed it was only during the last century that express legal provisions on the subject were enacted. This is not to be wondered at if it is borne in mind that previous to the nineteenth century the conception of mental disorder was still vague, with the consequence that instances of mental illness were often mistaken for wilful wickedness and perversion. It is also to be remembered that even if the law had made allowances for the insane offender, the treatment he would have received as a patient would not have been much different from that meted out to the sane criminal, except, perhaps, in cases where the death penalty was involved.

Previous to the cession of Malta to the Order of Saint John of Jerusalem, the Island must have been governed by the laws of the different invaders who occupied Malta at various periods of her history (1). The Phoenicians, Greeks, Carthaginians, Romans, Arabs, Normans, Suabians, Angevins, Aragonese and Castilians succeeded one another in the possession of the Island. Unfortunately, few documents and monuments have come down to us relating to the history of Maltese legisation from the earliest times to part of the Middle Ages (2) though it is known that Roman and Sicilian laws have left their mark on our legal codes.

(*) *I wish to thank Dr. A. Ganado, B.A., LL.D., for advice and criticism in the preparation of this paper, and for the loan of the various documents which are marked (A.G.) in the footnotes.*

(1) Debono, P. "Sommario della storia della legislazione in Malta", Malta, 1897, page 6.

(2) Debono, P., op. cit., page 127.

Domination of the Order of St. John of Jerusalem

Malta did not possess a municipal code of her own until the advent, in the sixteenth century, of the Knights of the Order of St. John of Jerusalem who made Malta their home till the end of the eighteenth century.

A number of statutes and ordinances were enacted by successive grandmasters. The first body of laws to be printed was the Code of Manoel de Vilhena (1723). The Code de Rohan, published in 1784, represented an advance over previous collections of laws, but it made no reference to the question of the legal responsibility of the insane offender.

A commentator of the Code de Rohan, writing as late as 1843, pointed out the need for its "almost total reform", but he had no suggestions to offer regarding the omission in the Code of provisions relating to the imputability of the insane (3). This omission, however, should not be interpreted as meaning that no special regard was paid by the courts to insane offenders. That some advantage could be reaped by insane persons in a criminal court of law is shown by the fact that accused persons sometimes tried to evade the law by feigning insanity, and to obviate such a contingency the Code de Rohan laid down the punishment to be meted out to an accused person who simulated insanity when he was up for trial before the court (4).

The reason why the Code de Rohan contains no specific reference to the culpability of the insane is to be found, perhaps, in the fact that the code was supplemented by the Roman laws which constituted the common law of the land. Unfortunately, no sources of information are available as to how such laws which dealt with the question of the criminal responsibility of the insane were applied in Malta.

French Occupation

Following the surrender of the Island by the Order to the French in 1798, Napoleon, in his first order of the 13th June, 1798, instructed the Commission of Government, which he had

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(3) Micallef, A. "Diritto municipale di Malta compilato sotto de Rohan or nuovamente corredato di annotazioni". Malta, 1843.

(4) "Del Dritto Municipale di Malta", 1784, Libro II, Capo 1, articolo 33.

set up, to organise the Civil and Criminal Courts of Justice on the lines of the French system (5).

The French occupation of the Island was, however, a brief and stormy one. The Maltese rose against the French in September 1798, and two years later the French capitulated.

The attempt, therefore, to introduce legislative measures based on the French model had to be abandoned and the administration of justice continued to be conducted as in the past (6).

British Domination

After the expulsion of the French from the Island, the old laws of Malta, which obtained under the Order, were retained by the British Government (7).

In 1823, Dr. Ignazio Gavino Bonavita (later Sir I. G. Bonavita, President of H.M. Court of Appeal), wrote a memorandum on the criminal legislation of Malta which was later on submitted to Sir J. Richardson. He offered various suggestions for the revision and reform of the laws of his time but he did not occupy himself with the question of the imputability of the insane. We know, however, that he approved of the special consideration shown by the Court to "somnambulists, infants and those who were deprived of their reason" (8).

In 1824, Sir J. Richardson, a distinguished English judge, was commissioned to inquire into the laws of the Island and he reported two years later (9). He was the first jurist to attempt the introduction into our criminal code of specific statutory provisions bearing on the legal aspects of mental disorder. He devoted a whole chapter of his report to the consideration of the criminal responsibility of the insane. His proposals on this subject, though they were not adopted in their entirety at the time, have formed the basis of subsequent legislative measures on the matter.

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(5) Scicluna, H.P. "Documents relating to the French occupation of Malta in 1798-1800", Malta, 1923.

(6) Micallef, A. op. cit., Vol. I, page XI.

(7) Borg, G. "The Influence of the Laws of England on Maltese Legislation" in "Scientia" of April-June 1942.

(8) Property of Dr. A. Ganado, B.A., LL.D.

(9) Richardson, U. "Report on the Laws of Malta", 19th August, 1826. This report was never published (A.G.).

Richardson opined that "idiots and persons of unsound mind" were, like infants of both sexes under the age of seven years, incapable of committing offences. The court was to decide from all the evidence adduced at the trial whether the accused was "capable" or not at the time of committing the alleged offence. If, at any time before the trial, the court had reason to believe that the accused was at that time "incapable" by reason of insanity or idiocy, the trial was to be adjourned. The same procedure was to be adopted if the "incapability" of the accused appeared during the trial, unless there was reason to believe that by proceeding with the trial the party would have been acquitted, in which case the trial was to be continued with a view to such acquittal.

Richardson envisaged the possibility that the refusal to plead on the part of the accused might not always be due to viciousness, but could well be the result of unsoundness of mind. He therefore proposed that when the sanity of mind of the accused was in doubt, the court was to inquire into the mental state of the accused by the examination of witnesses or "skilful persons" on oath and decide whether the refusal was due to insanity or obstinacy. In the former case, he suggested that the trial be adjourned as aforesaid, but, in the latter case, the trial was to be proceeded with as in other instances of refusal to plead.

The disposal of the insane criminal also engaged his attention and he proposed that in the event of acquittal or adjournment of the trial on the grounds of insanity or mental deficiency, the person concerned was to be detained and taken care of at the discretion of the executive government.

In 1831, a commission was set up to draw, among other codes, a Code of Criminal Law and a Code of Criminal Procedure. The commission was instructed to base its work upon the report of Sir J. Richardson and upon the "principles and rules of the most approved codes of foreign countries" (10). The new Neapolitan Code, which had been promulgated in 1819, in the Kingdom of the Two Sicilies, and which in its turn was based on the reformed French Code, was adopted as a model (11). At first the Criminal Code prepared for the consider-

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(10) V. Government Gazette, 23rd November, 1831.
(11) Laferla, A. "British Malta", Volume I., pages 154-155.

ation of the Ionian Legislature was selected as the basis of their proceedings, but the Neapolitan Code was subsequently chosen by the Commissioners "owing to its being in the Italian language (the written language of these Islands) and for many other weighty considerations" (12). The commission reported to Government in 1835, and, in the following year, the first Draft Code of Penal Laws to be drawn up under British rule was published.

Article 61 of the Criminal Code of the Two Sicilies laid down that there was no crime when the person committing the act was in a state of unsoundness of mind ("demenza") or fury ("furore") at the time of the act.

In our draft penal code, it became article 60 and was rendered as "No person is liable to punishment for an act committed or omitted by him when he is of unsound mind or in a state of fury". Apart from minor alterations in wording, the Commissioners thought fit to add the words "or omitted by him", which represented an imprvement over the Neapolitan article. As a corollary to the principle laid down by them, i.e. that where there is no crime, there is no imputability, it was established that any allegation of insanity was to be decided upon by a jury before the accused was submitted for trial (13).

In his comments on this draft code, Dr. A. Dingli proposed the addition of provisions regulating the extent of the culpability of individuals charged with offences committed during a state of somnambulism. In general he considered that the somnambulist was not responsible for his acts committed during sleep. He maintained, however, that if a somnambulist, who was aware of his mental abnormality, failed to take all reasonable precautions to prevent himself from committing an offence during sleep, he became liable to some form of punishment (14).

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(12) Jameson, A. "Report on the Proposed Code of Criminal Laws". Government Printing Office, Malta, 1844, page 3.

(13) "Rapporto sui progetti di leggi penali e di organizzazione e procedura penale per l'isola di Malta e sue dipendenze", dated 30th September, 1835, pages XXXVII to XXXVIII.

(14) "Osservazioni sul progetto delle leggi penali" (A.G.) The culpability of the somnambulist was a controversial question at the time. See on this point A. Chauveau & E. Faustin's "Teorica del Codice Penale", Napoli, 1858, cap. XIII, pag. 240.

The draft code was submitted to the Royal Commissioners of Enquiry of 1836, who suggested its revision by the Maltese Commissioners before its promulgation.

In the meantime, an ordinance of the Governor in Council for the trial of collateral issues in the Court of Special Commission and for the due care of insane offenders was issued on the 2nd August 1838 and promugated on the 31st October of the same year. This ordinance laid down that in the case of offenders, who by reason of insanity were found in an unfit state to be arraigned or tried or judged, such allegation of insanity was to be tried by a jury. If the offender was declared to be insane at the time of the trial or of the alleged offence, the Court was empowered to order him to be kept in strict custody until the pleasure of H.E. the Governor was known. This proviso was subject, in the case of an offender who was found insane but who had not been tried for the offence charged against him, to the right of putting him on trial for such an offence whenever the competent court, on the application made to it by the public prosecutor or the prisoner, thought him in a fit state to be so tried (14a).

The revision of the first draft penal code took place in 1842, the project being published in 1844.

Article 60 underwent no change except that it was renumbered article 32. New provisions were introduced:—

1. The plea of insanity could be made at any time during the trial (art. 379).

2. Any allegation of insanity was to be decided upon by the Court, or, in cases of trial by jury, by the jury (art. 516).

3. The opinion of the majority of the members of the jury was to form the declaration of the jury (art. 517).

4. When the plea of insanity was raised during the trial, the Court was to suspend the proceedings of the trial until the allegation of insanity had been decided upon (art. 519).

(14a) Our Courts had been acting on these principles long before the promulgation of this ordinance. In fact among the records of the Permanent Committee of the Charitable Institutions (vol. containing correspondence between 1. 1. 1816 to 31. 12. 1829) I have found a letter of the 30th September 1818 from the Chief Secretary to the Governor instructing the Permanent Committee, on the direction of H.E. the Governor, to detain into the "madhouse" until further orders, the accused V. Romeo who was found insane by the Criminal Court and ordered to be "confined in a proper place of security".

5. Upon the declaration of the insanity of the accused, the Court was to order that he be kept in strict custody in the asylum for the insane, giving immediate information thereof to the Head of the Government, who was to make such arrangements for the care and custody of the insane person as he deemed fit (art. 520) (15).

The influence of Richardson's recommendations of 1826, is clearly evident in these provisions. By means of articles 379, 519 and 520 three principles were established: first, that a person may be insane at the commission or omission of his act and also at the time that he is brought up for trial, but that his insanity may not be apparent at the commencement of the trial and may manifest itself later on during the court proceedings: secondly, that a person may be sane at the beginning of the trial, but may become insane during the trial: thirdly,

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(15) The Italian text reads as follows:—

"379. Qualunque eccezione d'incompetenza della corte, di nullità dell'atto di accusa, di errore incorsovi, e qualunque altra eccezione preliminare fuori della contemplata nell'articolo 376, dovrà essere data e dalla corte decisa dopo la lettura dell'atto di accusa, e prima della risposta dell'accusato sulla reità imputatagli.

Le eccezioni contemplate nel titolo settimo del libro secondo di queste leggi di procedura criminale (cioè casi di demenza e di pregnanza) potranno essere date in qualunque tempo, come si dispone in tale titolo.

(Art. 376. Posto l'accusato alla sbarra, qualunque sospicione di giudice sarà proposta e dalla corte decisa prima della lettura dell'atto di accusa.)

516. Qualunque allegazione di demenza... sarà preventivamente decisa dalla corte; nei casi di competenza della corte con un jury la decisione sarà data da un jury.

517. Il jury sarà costituito e procederà colle regole stabilite in queste leggi pel jury: ma la determinazione della maggiorità formerà la dichiarazione del jury.

519. Quando l'allegazione si facesse nel decorso di un giudizio, la corte sospenderà l'ulteriore procedura su quel giudizio fino alla dichiarazione collateralmente contestata. Nel caso che l'allegazione dovesse essere decisa da un jury, la corte potrà per la medesima incaricare lo stesso jury già costituito pel giudizio dell'atto di accusa.

520. Dichiarata la demenza dell'imputato in qualunque dei casi contemplati negli articoli precedenti di questo titolo (Titolo VII), la corte potrà decretare che egli venisse trattenuto in rigorosa custodia nell'asilo dei lunatici, con rendersi tosto informato di ciò il capo del governo, il quale darà quelle disposizioni che egli credesse convenevoli per la cura e custodia del demente."

that it was not enough to ascertain that no insane person should be punished for acts beyond his control, but that it was equally important to safeguard the community from further possible hazards on his part, and to provide him with the necessary care that an insane person requires for the benefit of his health. Hence his admission to the mental hospital.

The project of 1842 was submitted to a Scottish advocate Mr. A. Jameson, who drew a report on it in 1843 (16).

He made no suggestions for the amendment or suppression of the sections of the Code bearing on the question of insanity, but he proposed the addition of the following new paragraph to article 32 :— "This exception shall not apply to the case of persons who have committed offences in a state of intoxication unless the same has been occasioned without the fault of the offender or results from other persons unconnected with the offence."

Jameson must have envisaged that art. 32 could be adduced as an excuse by drunken persons to escape punishment for offences committed by them while under the influence of alcohol, and in order to forestall such a possibility he proposed the addition of the above paragraph. Jameson's suggestion implied a distinction between the wilful and the accidental drunkard, holding the former to be responsible and the latter to be non-responsible for his acts committed during intoxication. The end result of alcoholic intake on the minds of both types of drunkards is identical, viz., loss of inhibitory control, but the wilful drunkard is supposed to realise the consequences that may follow the drinking bout on which he is bent and to possess the will power to desist from drinking; in the case of the accidental drunkard, as envisaged by Jameson, none of these factors enter into operation, and therefore he cannot be held responsible for acts committed in a state of inebriety produced without his knowledge and the concourse of his will.

Undoubtedly, Jameson's proposal would have rendered art. 32 more precise and more practically efficient, but it would have made it unnecessarily complicated.

When Dr. Ant. Micallef, who was then Crown Advocate,

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(16) Jameson, A. "Report on the proposed Code of Criminal Laws", 29th September, 1843. Printed Malta, 1844.

examined Jameson's report (17), he was of opinion that Jameson's additional paragraph to art. 32 should be suppressed, but suggested its insertion as a provision "ad hoc". But while he disagreed with Jameson's proposal, he did not escape its influence for he re-introduced the same idea in a different form. In fact he recommended the recasting of art. 32 as "No person is liable to punishment for an act committed or omitted by him when he was in a state of unsoundness of mind or fury or any other involuntary alienation of mind ('o di qualsiasi altra alienazione di mente involontaria')". By this additional phrase he meant involuntary drunkenness as he himself explains:— "inebriety in its extreme degree is a true alienation of mind, which cannot be considered to be imputable.... when it is completely of an involuntary character."

Dr. A. Micallef's revision of the Code went up for discussion by the Council of Government in 1845, after which it was reported upon a second time by Jameson in 1846 (18), and subsequently approved by the Council of Government. In this revised draft code, published in 1848, Jameson's and Micallef's proposals were not incorporated. Articles 32, 379, 516, 517, 519 and 520 were renumbered 30, 387, 520, 521, 523 and 524 respectively, but underwent no further change.

The uncertainty as to what the legislators had in mind when they drafted article 30 had not been allayed. The interpretation of this article was the cause of protracted and heated arguments in the Council of Government when the draft code came up for discussion in 1850 (19). Dr. A. Dingli (at the time an elected member of the Council, afterwards Sir Adrian Dingli, Chief Justice and President of the Court of Appeal), said that under "demenza" some authors included "total drunkenness" ("ubriachezza assoluta"). He was not sure whether art. 30 was intended to cover this mental condition besides insanity. As it stood the article in question was ambiguous as it could be interpreted either way — both to include or to exclude drunkenness as an excuse for non-imputability. He

(17) "Osservazioni dell'Avvocato della Corona sul Rapporto del Sig. Jameson intorno al progetto di Leggi Criminali". 1844 (A.G.).

(18) Jameson, A. "Report on the Revised Draft of the Proposed Code of Criminal Laws for Malta". 22nd May, 1846 (A.G.).

(19) Sittings of 14, 21, 23 February, 1850. In "Potafoglio Maltese".

also criticised art. 30 because it made no distinction between persons who were totally insane, and weak-minded persons who were not "completely insane" ("assolutamente imbecilli"). He, therefore, moved an amendment to art. 30 with the intention of making it clear that cases of total, but transitory, mental confusion due to drunkenness were liable to punishment, unless the accused became drunk on account of causes independent of his will. He also proposed recasting art. 30 in such a way as to introduce the principle of partial responsibility.

The Principal Secretary to Government (Sir Henry Lushington) opposed Dr. Dingli's amendments but he suggested that H.M. Judges should be consulted on the matter and asked to state whether they considered art. 30 to be sufficiently clear and also to explain what was meant by the words "demenza" and "furore". His suggestion was agreed to and the Judges attended the sitting of the 21st February to give their opinion.

Sir Ignazio Bonavita (President of the Court of Appeal) and Judges Satariano, Chapelle and Grungo declared that art. 30 was sufficiently clear for the cases contemplated by the law and they considered that Dr. Dingli's amendments were unnecessary and prejudicial. They said that the words "demenza" and "furore" were to be understood in the sense attached to them in the Codes of France and Naples, on both of which the Draft Code under discussion was based. They added that these words were intended to be given the widest meaning and to comprise every state of mental alienation on account of which the accused was deprived of the power of knowing and willing, which are the indispensable elements for the constitution of a crime and for rendering a person accountable for his actions.

Evidently, this declaration implied that the effects of alcoholic intoxication were to be regarded as a form of mental derangement which rendered the offender legally irresponsible. Judge Paolo Dingli dissented from this view. He stated that their definition of "demenza" was not in conformity with the connotation hitherto attached to this word in the Maltese Law Courts, where, as far as he knew, "demenza" had never been employed to indicate the deprivation of the power of reasoning due to drunkenness. This form of mental alienation had always been known as drunkenness or inebriety. He opined, therefore, that if art. 30 was intended to cover cases of insanity

only, its meaning was quite clear, but if it was meant to comprise also cases of inebriety it was not sufficiently clear.

Judge G.P. Bruno was of a similar opinion. He considered that art. 30 was not intended to cover such states of mind as drunkenness, sleep, somnambulism, violent passions and deaf-mutism. However, he did not declare himself in favour of Dr. Dingli's amendment.

This disagreement among the Judges made it abundantly clear that art. 30 could be made to include or to exclude drunkenness according to the interpretation given to it by the presiding judge at a trial. It justified Dr. Dingli's stand, who, in his reply to Sir I. Bonavita, pointed out how the Judges had involved themselves in contradictory statements. In fact, while they declared that "demenza" and "furore" possessed the same meaning in the Draft Code as was attached to them in the French and Neapolitan Codes, the explanation of these terms given by some of the Judges was couched in such a way as to include the effects of drunkenness under the designation of insanity. This view was inconsistent with the principles contained in the French and Neapolitan Codes, according to which drunkenness did not confer non-imputability on the offender in cases of intoxication (20).

In order to clarify these points Dr. Dingli proposed a further consultation with the Judges, but his proposal was not accepted. Art. 30 was put to the vote and passed as originally recommended. Articles 387, 520, 521, 524 and 528 were adopted without discussion.

The Criminal Code was finally promulgated in 1854. It contained the following provisions relative to the issue of insanity in criminal cases (21) :—

"Art. 32. No person is liable to punishment for an act done or omitted by him when he is of unsound mind or in a state of madness.

Art. 531. Any allegation of insanity, or of any other point of fact, by reason whereof, if true, the person accused ought

(20) See also Canofari, F. "Commentario sulla parte seconda del Codice per lo Regno delle Due Sicilie". Napoli 1819 ;and Roberti, S. "Corso completo del Diritto Penale del Regno delle Due Sicilie". Napoli, 1833.

(21) "Criminal Laws of the Island of Malta and its Dependencies". Government Printing Office, Malta, 1854.

not to be, whether at the time or at any future period, called upon to plead to the indictment, or to be put on his trial, or to undergo punishment, shall be previously decided upon by a jury.

Art. 532. The determination of the majority (of the jury) shall form the declaration of the jury (22).

Art. 533. In the cases contemplated in Art. 531, the allegation shall be made in writing on the part of the person accused, and, if such allegation be disputed by the Crown Advocate, he, the said Crown Advocate shall signify the same in writing.

Art. 534. It shall be lawful for the Court to commit the decision on any such allegation to the jury already impanelled for the trial of the indictment.

Art. 535. Upon the declaration of the insanity of the accused in any of the cases contemplated in the preceding articles of this title (Title VII of Second Book) it shall be in the power of the Court to decree that he be kept in strict confinement in the asylum for lunatics giving immediate information thereof to the Head of the Government who will give such directions as he may deem proper for the care and custody of the insane person.

Art. 536. When the Crown Advocate shall not dispute any of the allegations contemplated in this title, the Court shall proceed as if the truth of the allegation had been declared.

Art. 537. In all cases where by reason of any declaration contemplated in the preceding articles of this title, the trial of a case may have been stopped or its continuation interrupted, or execution suspended, the proceedings of the trial shall be resumed or the sentence be executed, as the case may be, as soon as the impediment shall cease."

A part of art. 390 and the whole of art. 430 also dealt with the question of insanity. They laid down as follows:—

"Art. 390. All preliminary exceptions shall be made, and by the Court decided after the reading of the indictment and before the answer of the accused as to the guilt imputed to him. Nevertheless, in all cases where the jury shall have declared that some point of fact, punishable according to law, has been

(22) This was an exception to the rule that a two-thirds majority was required to form the declaration of the jury.

proved against the accused, it shall be competent to the accused, at any time before the Court decides on the application of the law to the guilt so declared, to make exceptions whether in respect to the incompetence of the court, or to the nullity of the indictment, or to a previous conviction or acquittal and also any of the exceptions contemplated in the seventh title of the second book of these laws of criminal procedure" (among which is included the plea of insanity).

"Art. 430. When the accused person shall have been declared not guilty on the grounds of insanity at the time of the alleged offence, it shall be in the power of the Court to decree that he be kept in strict confinement in the asylum for lunatics giving immediate information thereof to the Head of the Government, who may give such directions as he may deem proper for the care and custody of the insane person.

In such cases there shall be subjoined to the declaration of 'not guilty'. the grounds. namely insanity, on which such declaration was made, and if the jury shall omit to subjoin such grounds. the express question shall be put to them whether it was on that account that they declared the accused not guilty; and the jury shall answer affirmatively or negatively according to their opinion".

No further changes in the provisions bearing on the issue of insanity took place until the beginning of the twentieth century when Ordinance XI of 1900 was promulgated on the 4th of July. This ordinance introduced important amendments and additions.

By article 10 of this ordinance, article 32 of the Criminal Laws was revoked and substituted by the following :—

"33. No person is liable to punishment for an act done or omitted by him,

1st. If such person was of unsound mind or maniac.

....

Among other provisions, article 67 laid down the following procedure to be adopted by the Court of Instruction when there were an allegation or reasonable grounds to suspect that the accused was insane at the time of the offence or during the instruction :—

"362a. The Court shall appoint one or more referees to

examine the party accused or the facts constituting the mental infirmity of the latter.

"Whenever the report of the referees establishes the mental infirmity of the party accused at the time of the offence, the Court shall order the transmission of the acts of instruction to the Crown Advocate within the term prescribed in the last paragraph of the preceding article (23) and shall give the order indicated in article 535.

"The Crown Advocate, having received the acts of instruction, and wishing to dispute the mental infirmity of the party accused, may within the terms established in the first paragraph of article 373 (24), remit the said acts to the Court of Instruction and require in writing that the instruction be continued on the merits of the charge; or he may, by way of a petition filed within the said term, bring the matter before Her Majesty's Criminal Court, in order that action may be taken in the manner established in articles 531 and 532.

"If the report of the referees establishes the mental infirmity of the party accused at the time of the instruction, the court shall resume the instruction on the merits of the charge.

"In the cases contemplated in the two preceding paragraphs the instruction may be also continued in the absence of the party accused; and if he is not assisted by counsel, the provision of article 440 shall obtain (25)".

Article 76 revoked the provisions contained in the first and second paragraphs of article 390 and substituted the following instead:—

"390. The following exceptions shall be alleged and decided by the Court after the reading of the indictment and before the answer of the party accused as to his being guilty or not:—

1. Incompetence of the Court.
2. Nullity or error in the indictment.
3. Extinction of action.
4. Previous conviction or acquittal.
5. *Insanity of mind of the accused at the time of the trial.*

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(23) i.e. within three days.

(24) i.e. within six days, which term may be prorogued first by the Court, then by the Governor.

(25) i.e. the appointment of a defence counsel by the Court.

6. Any other point of fact in consequence of which the trial could not be held at the time or any future time.
7. And, saving the provision contained in the first paragraph of article 387, any other preliminary exception.

"The insanity of mind of the party accused at the time of the offence or any other point of fact which may exclude the imputability of the party accused shall not be alleged after the declaration of the jury."

"However, the exceptions contained in the preceding paragraphs barring the exception against the judge and of error in the indictment, may be alleged after the declaration by the jury and before the sentence, whenever the necessity arises from any fact or circumstance of fact expressly declared by the jury.

"Any point of fact which, without excluding the imputability of the accused or his capacity to be sued, precludes him from undergoing the punishment, may be alleged even after the declaration of the jury.

Article 430 was revoked by article 78 and the following was substituted therefor :—

"430. When the party accused shall have been declared not guilty on the ground of his mental insanity at the time of the offence, such ground shall be stated in the declaration of the jury.

"If the statement of such ground was omitted, the Court shall put to the jurors a specific question on that point, and the jurors shall answer in the affirmative or in the negative, as they shall have determined.

"If the majority of the jurors shall answer affirmatively, the provision of article 535 shall obtain."

By article 90 of the ordinance in question the following heading and provisions were added after article 556 of the Criminal Laws :—

"CHAPTER II

Of referees.

556a. In all cases where for the examination of a person or of an object special knowledge is required, a reference to experts shall be ordered (25a).

The choice of the referees appertains to the Court.

As a rule the number of referees shall be uneven.

The Court, whenever it be necessary, shall give them the necessary directions, and allow them a term for the drawing up of the report.

556b. Referees shall be excepted against only on the same grounds for exception against a judge.

The exception shall be pleaded in the form and terms laid down by the Laws of Organization and Civil Procedure in regard to the exception against referees in civil causes.

556c. Referees shall be summoned in the form established for witnesses, and shall swear to perform faithfully and honestly the duties assigned to them.

556d. Referees, on completing the task and experiments required by their profession or art, shall make their report, orally or in writing, according to the orders received from the Court.

The report shall in any case state the facts and the circumstances on which the referees shall have based their conclusions.

If the referees, during their operations, shall have received information of fact from other persons, such persons shall be named in the report, and shall be examined in the hearing of the cause like any other witness.

In matters within the competence of the Court of Judicial Police, the said persons may be examined by the Court on oath, even during the operations of the referees.

(25a) It may be pointed out that for many years before the promulgation of this ordinance our tribunals had made it a practice of appointing medical referees to report on the mental state of the accused when a doubt as to his sanity of mind arose. See in this respect the decree of the Criminal Court of Magistrates of the Islands of Gozo and Comino dated 16th July, 1838, from which we learn that two doctors were appointed to examine the mental condition of the accused M. Angelo Micallef. Prof. V. Vassallo drew my attention to this document which is to be found in the archives of the mental hospital at Attard.

The report, if made orally, shall be taken down by the Re-istrar or by the person acting in his stead.

556e. Each party, the Court, and in the cases within the ompetence of Her Majesty's Criminal Court, each and every iror may require from the referees further information on their eport, and in regard to such other points as they may hold use-il for the purpose of making their opinion clearer.

556f. Whosoever is to judge is not bound to abide by the onclusions of the referees against his own conviction.

556g. The provisions contained in the fourth and fifth pa-agraphs of article 394 apply to referees (26)."

When the Code was renumbered in 1901, the numbers of ie above articles were changed as follows :—

1854	*Ord. XI of 1900*	*1901*
32	33	35
531	—	586
532	—	587
533	—	588
534	—	589
535	—	590
536	—	591
537	—	592
390	—	442
430	—	482
—	362a	396
—	556a	613
—	556b	614
—	556c	615
—	556d	616
—	556e	617
—	556f	618
—	556g	619

During the debate in the Council of Government on the Criminal Laws Amendment Ordinance of 1909'', the Crown dvocate introduced, in the sitting of the 23rd June, an amend-

(26) These paras. dealt with the procedure to be followed when, with-it adequate motive, the referee failed to appear in Court or left the ourt before being ordered to do so; and when he happened to be related the accused party.

ment to article 590 (previously 535) of the Criminal Code. This amendment laid down that the expense of the care of a criminal patient was to be defrayed by the Government subject to recovery from any property belonging to such patient or from any person liable for the maintenance of the patient. The expense to be charged was to be assessed at the rates obtaining at the time at the hospital. This provision was to be applied to the case of criminal patients confined to the mental hospital by an order of either H.M. Criminal Court or the Court of Judicial Police.

During the debate that followed the motion of the Crown Advocate, a discussion arose about the unsatisfactory conditions under which criminal patients were alleged to have been cared for in the mental hospital; and four of the elected members voted against the amendment of the Crown Advocate as a sign of protest against the "prison conditions" prevailing in those wards of the hospital where the criminal patients were housed. In spite of this opposition by the elected side of the Council, the Crown Advocate's amendment was carried by a majority of six votes, as all the official members present voted in its favour. It appeared as article 58 in Ordinance No. VIII of 1909 enacted by the Governor on the 24th September of that year.

A further amendment of the same article (which was renumbered 599 in 1911) was introduced by the Crown Advocate (Sir V. Frendo Azzopardi Kt., C.M.G., LL.D.), at the sitting of the Council of Government of the 5th June 1914. He proposed to alter the words "it shall be in the power of the Court to decree" into "the Court shall order" to make it clear that that wording was not permissive but imperative. He wanted to leave no doubt that when a verdict of insanity was returned by a jury it became imperative for the Court to order the detention of the accused person in the lunatic asylum. He said that he would have left the law untouched but for the fact that some persons might conceive the possibility of an insane criminal being permitted by the Court to be left at large to the danger of the community (27).

The Crown Advocate's motion was carried nem. con. and by Ordinance XII of 1914, para. 14, the article in question was amended accordingly.

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(27) Debates of the Council of Government 1914-17, Vol. 38, page 38.

It will be remembered that Jameson was the first jurist to forsee in 1843 that article 35 (previously 32) lent itself to such a wide interpretation that it could be made to cover cases of drunkenness. In fact, subsequent events showed that Jameson's misgivings on the subject were amply justified. We have seen how vague and contradictory were the answers of the judges in 1850 on the relationship between inebriety and insanity. Considering the confused state of the legal mind on the question of insanity at this period, it is relevant to point out that a few years earlier Dr. T. Chetcuti, the director of the mental hospital, had endeavoured to convince the legal men of his time of the necessity of utilizing the contribution that psychiatry could offer in the elucidation of criminal behaviour (28).

It is difficult to imagine why either Jameson's or Micallef's suggestions were not adopted, much more so when the Neapolitan Code, on which the draft of 1844 was based, contained specific provisions on inebriety. It was only in recent times that provisions relating to drunkenness were introduced in our criminal code, although the principle that drunkenness was not held to excuse the commission of any crime had been accepted many years earlier.

Ordinance XIII of 1935, published on the 12th March, provided for the insertion of the following article after article 35 of the principal law:—

"35a. (1) Save as provided in this article, intoxication shall not constitute a defence to any criminal charge".

This ordinance not only established a principle regarding the culpability of the drunkard, but also recognised the fact that sometimes drunkenness passes into a pathological state in which the individual ceases to be responsible for his conduct.

Hence it laid down that intoxication shall be a defence to a criminal charge if by reason thereof (a) the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing, and (b) the person charged was insane, temporarily or otherwise, at the time of such act or omission (art. 35a (2) (b).

It stated further that when a defence is established under

(28) Chetcuti, T. "Discorso recitato il 16 ottobre 1847", Malta, 1847.

subpara (b), the provisions of what are now articles 616 to 619, and 621 to 624 shall apply.

For the purpose of this article, intoxication is deemed to include a state produced by narcotics or drugs.

The following comparative table shows the changes in the numeration of the articles bearing on the question of insanity since the appearance of the original Code of 1854:—

1854	*1901*	*1914*	*Present Code*
32	35	35	34
—	—	—	35
390	442	448	461
—	396	401	414
430	482	488	500
531	586	595	616
532	587	596	624
533	588	597	617
534	589	598	618
535	590	599	619
536	591	600	621
537	592	601	622
—	613	623	646
—	614	624	647
—	615	625	648
—	616	626	649
—	—	—	650(29)
—	617	627	651
—	618	628	652
—	619	629	653
445	497	503	519

Present Position

The principle underlying all the provisions of our Criminal Law is expressly sanctioned by article 34(a) of the Criminal Code which lays down that no person is liable to punishment if,

(29) This article was added by Ord. XXX of 1934, para. 23. It states: "In cases within the jurisdiction of the Court of Judicial Police as Court of Criminal Judicature, it shall be lawful for the official expert, if so empowered by the Court, to examine witnesses on oath, regarding facts connected with his investigation, and he may be called upon by the Court to be present at the hearing of the cause in order to advice the Court provided that all witnessess shall be heard and the advice given in the presence of the accused".

at the time of the act or omission complained of, such person was in a state of insanity or frenzy. The legislator, in order to guarantee the application of this principle in accordance with the tenets of natural justice, has established special rules of procedure for cases in which the insanity of the accused is raised. Since the promulgation of the Criminal Code, in 1854, these rules have been greatly improved upon.

The present state of the law as illustrated by jurisprudence is as follows:—

(a) At the inquiry (Court of the Judicial Police sitting as a Court of Criminal Instruction).

If it is alleged by the accused or by the prosecution, or if there is reason to believe that the accused was insane at the time of the offence or that he is insane at the time of the inquiry, the Court shall appoint one or more experts to examine the accused and the facts relating to the alleged insanity (art. 414 (3)). Normally the Court orders that the accused be taken to the mental hospital to be kept there under observation until such time as the experts are ready to file their report in Court; such time is in the Court's discretion.

If from the report of the experts it appears that the accused was insane *at the time of the commission of the offence*, the Court shall order that the record of the inquiry be transmitted to the Attorney General within the term of three working days, and shall order the accused to be kept in strict custody in the mental hospital and shall cause information thereof to be forthwith conveyed to the Governor, who will give such directions as he may deem fit for the care and custody of such insane person. In such cases the expenses of maintenance of such person are borne by the Government, saving the right of recovery of such expenses as will be explained further on (art. 414 (4), 619 (1) (4)).

The accused has the right of appeal against the Court's decree (30).

The Attorney General may disagree with the report of the experts. Thus the law provides that if, upon receipt of the record, the Attorney General decides to contest the finding of

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(30) See Criminal Appeals: — Police vs. Bigeni, 16. 12. 1946; Police vs. Briffa 9. 6. 1947; Police vs. Bonnici 31. 7. 1948; Police vs. Bezzina 16. 4. 1913; Police vs. Cassar 10. 6. 1939.

the experts that the accused was insane, he may, within the term prescribed by the law, either send back the record to the Court of Criminal Inquiry with a written request that the inquiry into the merits of the case be proceeded with, or file an application before His Majesty's Criminal Court submitting the issue to that Court for determination by a jury (art. 414 (5)).

On the other hand, if, from the report of the experts, it appears that the accused was insane *at the time of the inquiry*, the Court shall proceed with the inquiry into the merits of the charge. In this case, as also in the case referred to in the previous paragraph, the inquiry may, by way of exception, be continued in the absence of the accused; but, if he is not assisted by an Advocate or Legal Procurator, it devolves upon the Court to see to the adequate defence of the accused person (art. 414 (7)).

Whenever, during proceedings conducted before the Court of Criminal Instruction, the question of the insanity of the accused is raised, the term for the conclusion of the inquiry, the term for the transmission of the record to the Attorney General, the term for completing a fresh inquiry, or the term for rectifying the record of inquiry, as the case may be, shall be held in abeyance (art. 414 (1)).

(b) At the trial.

On the termination of an inquiry, the record is transmitted to the Attorney General. If he is of opinion that there are sufficient grounds for subjecting the accused to a criminal trial, he shall present a bill of indictment against him before His Majesty's Criminal Court. This Court sits with a jury.

According to law, the accused must be present during the trial (art. 455 (1) (2)). Should he be absent on account of illness, the trial is not proceeded with and an adjournment is granted. In Rex vs. Micallef, the accused, who had been for observation for mental disorder at the Hospital for Mental Diseases, was so ill that he could not appear in Court on the day appointed for the hearing of the case. The medical experts informed the Court on oath that his life could be endangered if he were to be brought to Court to stand trial. The Court held that though there was no rule of law providing for such a case, the Court could issue directions on humanitarian grounds and give a long adjournment, provided that the case was to be immediately restored to the list

when the experts or the Attorney General declared that the accused's physical condition had improved to such an extent as to allow of him being brought to Court (31).

Article 34 merely mentions that no person shall be liable to punishment if such person was in a state of insanity or frenzy *at the time of the commission or omission of the act complained of*. No reference is made to a person who is in a state of mental disorder *at the time of the trial for the alleged offence*. This rule, however, is supplemented by another provision of law (art. 616) which has been interpreted in the sense that no person can be called upon to plead to the indictment, or be put on his trial, or made to undergo punishment if he is insane at the time of the trial (32).

When a person is being submitted to a trial by jury, the plea of insanity of the accused *at the time of the trial* may only be raised and shall be decided by the Court *in limine litis*, that is after the reading out of the indictment and before the accused pleads to the general issue of guilty or not guilty (art. 461 (1) (a)). The plea of insanity of the accused *at the time of the offence* can be raised at any time up to the verdict of the jury (art. 461 (2)), but if the necessity arises from any fact or circumstance of fact expressly found by the jury, the plea of insanity either at the time of the offence or during the trial may be brought forward even after the verdict of the jury but before the final judgment of the Court (art. 461 (3)).

It has been held that when the plea of insanity of the accused at the time of the offence is set up after the preliminary stage and in the course of the speech for the defence, it is to be dealt with together with the pleas on the merits (33). But it is not admissible for the accused to raise this plea after the Court's address to the jury and after the jury have formed their verdict,

(31) Harding, W. "Recent Criminal Cases Annotated", para. 10, Rex vs. Pawlu Micallef, 12 November 1940. The patient was eventually brought to Court on the 23rd September 1941, when he was declared by the jury to be of unsound mind both at the time of the offence and at the time of the trial.

(32) Cremona, G. "Raccolta della Giurisprudenza sul Codice Penale", Malta, 1935, page 62.

(33) Harding. op. cit., para. 12.

though it has not as yet been pronounced in Court (34).

The question of the insanity of the accused whether at the time of the offence or at the time of the trial may also be raised *ex officio* by the Court (35). When the plea of insanity is raised by the defence or set up by the Court, should the Attorney General not contest the allegation made, the Court shall proceed as if the truth of the allegation had been proved (36). On the other hand, when the plea of insanity was set up by the Prosecution in the case "Rex vs. Micallef", 12th November, 1940, the Court held that it could not proceed as if the truth of the allegation had been proved (on the basis of art. 621), and empanelled a jury to hear the evidence and to try the issue of insanity (37).

In the opinion of Mr. Justice Harding, it would appear desirable *in jure condendo* that the provision of art. 621 should be extended to all cases in which the medical experts find for the insanity of the accused, and both the Prosecution and the Defence accept the findings, irrespectively of whether the plea at issue is set up or raised by the Prosecution or the Defence or the Court itself. A proviso should nevertheless be added, according to the learned judge, empowering the Court to pursue the investigations further if it deems such a course necessary; for instance, if it is of opinion that the findings of the experts should be further elucidated, or if it considers that additional questions should be put to the witnesses heard by the experts (38).

When the accused is found to be insane, the Court shall order that he be kept in strict custody in the Hospital for Mental Diseases and shall cause information thereof to be forthwith conveyed to the Governor, who will give such directions as he may deem fit for the care and custody of such insane person. The expense for his maintenance and care is defrayed by the Government, saving its right to recover such expense from the property belonging to such insane person, or, in default, from

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(34) "The King vs. Nazzareno Abela", H.M. Criminal Court, 19. 1. 1927 (Law Reports Vol. XXVI, part 4, page 764).

(35) Cremona, op. cit., page 674; Harding. op. cit., para. 3, 14.

(36) Harding. op. cit., para. 3, fnt. 7. Also art. 621 of the Criminal Code.

(37) Harding. op. cit., ibidem.

(38) Harding. op. cit., ibidem.

any person liable for his maintenance. The said expense is charged at the rates laid down in the regulations for the Hospital for Mental Diseases, for the time being in force (art. 619 (1) (2) (3)).

Once a person is declared insane in a criminal trial he ceases to be treated as a criminal and he passes beyond the pale of the Courts of Law and is placed under the tutelage of the Head of the State. The Crown Advocate (Sir V. Frendo Azzopardi, Kt., C.M.G., LL.D.) at the sitting of the Council of Government of the 5th June, 1914 quoted the view expressed by the Supreme Court of Appeal, in a case that had come up for trial some time previously, in the following ruling :— "Nel caso in cui un accusato viene in esecuzione di sentenza di una Corte Criminale rimesso per causa di demenza nell'asilo dei lunatici, le funzioni della Corte cessano col detto provvedimento e nè la detta Corte, nè la Corte Civile hanno più giurisdizione per prendere cognizione di domande relative alla cessazione della demenza" [39]. Only His Excellency the Governor has the power to order the discharge from the mental hospital of persons sent there by order of the Court. If the patient no longer requires further detention or if he recovers, the Board of the mental hospital is empowered to recommend his discharge to the Governor.

If the accused is found not guilty on the grounds of his insanity at the time of the offence, such grounds must be stated in the verdict of the jury. If such ground is not stated in the verdict, the Court is bound to put the jurors a specific question on that point, and the jurors must answer affirmatively or negatively as they shall have adjudged (art. 500 (1) (2)).

For every verdict of the jury, there must be the concurrence of at least six votes out of nine (art. 479); but an allegation of insanity is to be determined by the jury by a majority of votes (art. 624). *Quid* when the plea of insanity is set up in the course of the speech for the defence and is to be dealt with together with pleas on the merits? This point came up for decision in Rex vs. Mifsud, 12th December, 1940. The issue of insanity was dealt with together with the merits of the case. The jury returned a unanimous verdict of guilty on all counts. The defence set up the plea of nullity of the verdict on the grounds that, according

(39) Debates of the Council of Government, Vol. 38, page 39.

to law, the plea of insanity must form the subject of a separate and preliminary decision. The Court held that a separate verdict was only to be delivered when the issue of insanity was raised as a special plea in bar. In this case it was enough that the jury had returned a verdict of guilty on the merits by a two thirds majority, as such a verdict necessarily implied that there was a *legal* majority which rejected the plea of insanity, and a *legal* majority included the simple majority which was sufficient in decisions on the issue of insanity (40).

The Court may refer the determination of an allegation of insanity to the jury already impanelled for the trial of the offence but, if necessary, it may impanel a new jury (art. 618, 623).

In all cases, where upon an allegation of insanity being proved, the trial cannot take place or is interrupted, or the execution of the sentence is stayed, the trial is to be resumed or the sentence carried into effect, as soon as the impediment ceases (art. 622).

As to the form in which the allegation of insanity is to be made, the law lays down that it is to be brought before His Majesty's Criminal Court by an application. On any such application, the Court shall make an order, appointing a day for hearing the application and the Attorney General, causing them to be served with a copy of such order. When the allegation is set up by the Defence or by the Court, and the Attorney General intends to contest such allegation, he must do so in writing (arts. 616 (3) (4), 617).

The provisions with regard to mental referees are to be found in Sub-title II, Title I, of Part III of the Code.

Only the Court has the right to appoint and to choose the mental experts (art. 646 subsec. 2). They are usually of an uneven number and they are given a specified time (which may be extended) within which to submit their report (art. 646 Subsec. 4 and 5). They must swear to perform their duties faithfully and honestly (art. 648). It has been recommended by the Court that whenever in the course of their enquiries, the experts obtain any information, the persons giving such information should be heard as witnesses and their information recorded in the form of statements. It was also recommended

(40) Harding. op. cit., para. 12.

that a regular "procès verbal" of the interrogatory of the patient, made by the experts, should be kept (41), but is not to be filed with the report (41a).

The report of the referees is read publicly and the referees may be submitted to a cross examination under oath. Those persons, also, who may have given information to the referees are also examined in the hearing of the trial like any other witness (art. 649 subsec. 3).

The Court may allow the medical experts to obtain on oath all relevant information about the accused from witnesses residing outside its jurisdiction. In Rex vs. Ed. Wilson Hall (1924) it was held "that it is the Court's duty to see that every provision be made so that the experts may have at their disposal all such informations as may enable them to give, in the interests of justice, a correct opinion" (42).

The Court, the prosecution, the defence and members of the jury have the right to ask for further elucidation from the referees on their report or on such other points as they may deem necessary in order to make the opinion of the experts clearer (art. 651).

The members of the jury are not bound to abide by the conclusions of the experts against their own conviction (art. 652).

DISCUSSION

Partial Responsibility

The first attempt at the introduction of the principle of partial responsibility in Maltese Criminal Law was made in 1850 by Dr. A. Dingli (at the time an elected member of the Council of Government, afterwards Sir Adrian, Chief Justice and President of the Court of Appeal).

It will be recalled that one of the criticisms levied by him in the Council of Government against article 30 (draft 1848), was its failure to distinguish between persons who were totally insane and a certain class of 'weakminded persons' whom he regarded as being semi-insane and therefore partially respon-

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(41) Harding, W. op. cit., para. 31. Rex vs. G. Cauchi (1942).

(41a) Rex vs. Connell (1945). This decision very wisely revoked a previous ruling, given by the Court in Rex vs. Cauchi (1942), that the "procés verbal" was to be filed with the report.

(42) Harding, W. op. cit., para. 25.

sible for their actions; consequently these persons were, in his opinion, liable to some sort of punishment. After pointing out that the codes of Parma and Sardinia recognised the principle of partial insanity and responsibility, he proposed to amend article 30 (1848) in such a way as to cover offences by the "partially insane". Offenders who were in a state of "complete imbecility" were not to be held responsible for their acts or omissions, but weakminded persons who were not "totally imbeciles" were to be subject to the same punishments prescribed by the law for minors of 14 years of age.

His proposals were not adopted by the Council of Government and the question of partial responsibility was not broached again until 1909, when it was raised for the second time by Dr. A. Mercieca (later Sir Arturo, Chief Justice and President of the Court of Appeal) during the discussion in the Council of Government on the amendment to the Criminal Laws (43).

Dr. Mercieca's arguments in support of his amendment to article 35 (previously 32) embodying the principle of partial responsibility may be summarised as follows:—

a) There is an intermediate stage between responsibility and non-responsibility — one of incomplete or partial responsibility. Maltese law, however, makes no provision for those cases in which mental illness produces only a partial impairment of the individual's intellectual powers.

b) Partial insanity minimises culpability but does not exclude it.

c) The principle of partial insanity, which implies partial imputability, has been accepted by the principal continental codes.

d) According to Maltese criminal law a criminal who is declared to be insane is sent by the Court to the mental hospital for an indefinite period of time which in practice means almost permanent detention. This would be avoided in cases of partial insanity if the principle of partial responsibility were to be accepted, as such cases would be awarded a diminished punishment instead of being remitted to the mental hospital.

The Crown Advocate, Dr. V. Frendo Azzopardi (subsequently Sir Vincent, Chief Justice and President of the Court of Appeal), opposed Dr. Mercieca's amendment. He main-

(43) Debates of the C. of G., sittings nos. 42 and 43, Vol. 33.

tained that it was difficult to admit the existence of such a state as one of "half madness" or "half soundness of mind", and to establish to what extent the mind of the accused might be sound and to what extent it might be unsound. He opined that if the principle of partial insanity and responsibility had to be accepted, the result would have been to send a partially insane criminal to the mental hospital for part of his term of punishment and then to prison for the remaining period of his sentence. Finally he stated that Dr. Mercieca's amendment meant condemning a man to prison to avoid sending him to hospital, thus subjecting him to punishment instead of treatment.

The elected members, Mr. F. Azzopardi (leader of the elected bench at the time) and Dr. A. Pullicino objected to Dr. Mercieca's amendment on the grounds that a partially insane man is a sick man and that it is unjust to condemn an ill man to prison. The only fair way of dealing with such a case is to have him sent to the mental hospital where he can receive the necessary treatment.

Dr. Mercieca's amendment was put to the vote but it was defeated, three members voting for it and fourteen against it.

From the psychiatric point of view, one cannot but agree with the opponents of the theory of partial responsibility, and uphold the views of Dr. V. Frendo Azzopardi, Mr. F. Azzopardi and Dr. A. Pullicino.

The mind functions as a whole and the least impairment of its processes influences the total personality. Once, therefore, we admit the existence in the individual of some impairment of mental function we have also to admit that his motivation is likewise affected, irrespective of the fact that his exterior conduct is indistinguishable from that of a normal person.

By prescribing a diminished punishment for the "partially insane" offender the theory of partial responsibility exposes the community to the risk of further criminal attacks on the part of the "partially insane" person, whose relatively short stay in prison does nothing to reform or cure him. The preventive aspect of crime is ignored and the right of society to protect itself from dangerous, irresponsible members is neglected. This theory, therefore, not only serves no useful purpose, but constitutes a positive danger to the security of the community.

Maltese law in conformity with current psychiatric thought has, wisely enough, never accepted the theory of partial responsibility. On the contrary, Maltese jurisprudence has established the principle that in mental illness there is a "total" disturbance of mind implicating the whole personality and involving all the acts of the individual's psychic life (44).

English Law on the Criminal Responsibility of the Insane

Considering the influence that English legislation has had on our Criminal Code (45), it is of interest to examine the differences that exist in the criteria of the criminal responsibility of the insane in the two countries. It is gratifying to find that, to our great benefit, Maltese law escaped the influence of English legislation on this subject (46).

The present English laws dealing with the culpability of the insane were laid down in 1843 in connection with the Mc Naughten case. According to the Mc Naughten rules, the fact that the accused is insane is not sufficient to obtain an acquittal. The accused must not merely be insane but he must be unable, in consequence of his disease of mind, to understand the nature of what he does and to know that his act is wrong for the acceptance of a verdict of not guilty on the grounds of insanity. In England, therefore, knowledge constitutes the test of legal responsibility. This view leaves out of account the factors of emotion and control which are certainly more important than knowledge of the nature and quality of the act committed, and which are the factors that are characteristically impaired in mental illness. In fact, a mental patient may well be aware that his acts are morally and legally wrong (as, for instance, the melancholic who commits an "altruistic murder" for which he surrenders himself to the police), but he is certainly incapable of controlling the morbid trend of thoughts and perceptions which motivate his behaviour and which ultimately cause him to clash with the law. But in England owing to

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(44) Rex vs. Briffa (1947).

(45) Borg, G. "The influence of the laws of England on Maltese legislation", in "Scientia" of April-June 1942.

(46) See C.S. Kenny's "Outlines of Criminal Law" and "Mental Abnormality and Crime" edited by I. Radzinowicz and J.W.C. Turner for an account of the question of insanity in English Criminal Law.

the existence of a legal test of insanity which ignores the affective and instinctual components of the human personality, an insane person may well be found legally responsible for his acts, when morally no psychiatrist would judge him so.

Such a situation arose recently, to mention but one instance, during the trial of Neville Heath (1946). N. Heath was declared by the psychiatrist brought as a witness by the defence to be suffering from a psychopathic state in which, owing to a diseased condition of mind, he was incapable of controlling his actions: yet he was quite aware of the nature of his actions and because of this awareness on his part the plea of non-responsibility on the grounds of insanity was rejected, and he was found guilty of murder and executed.

The superiority of Maltese law on this point over English law is obvious. In Malta there are no tests of legal responsibility in the case of insane persons arraigned before a court of law. Our legislators did not lay down any rules by which the line between sanity and insanity is to be drawn. They recognised the fact that this demarcation line is a delicate one and they left it to the medical experts to decide when a man ceases to be master of himself on account of mental disorder.

It is enough for the psychiatrist to show that the offender is mentally ill to exempt him from punishment. Admittedly the jury may not accept the psychiatrist's diagnosis of insanity and may judge the accused person to be sane in spite of the expert's opinion to the contrary, but the illogical situation of finding a person insane and at the same time legally responsible for his acts can never arise in a Maltese court of law.

English legislation and jurisprudence on the criminal responsibility of the insane is a century behind the times. The legal views on the subject have made no advance since 1843, when the Mc Naughten rules were first enunciated. There is, therefore, no justification for quoting English jurisprudence in our law courts when the issue of insanity arises, for English jurisprudence is not only outdated but is conceived on different lines from the Maltese provisions on the subject. Besides being obsolete it is also incompatible with the letter and spirit of our law. While Maltese legislation on the subject of insanity is clear in its simplicity and substantially in conformity with current psychiatric thought, English law and jurisprudence are con-

fusing, contradictory and at variance with psychiatric progress.

Another advantageous point of Maltese law over English law, closely connected with the one we have just discussed, concerns the calling of medical experts to testify as to the sanity or otherwise of the accused. According to our law, the appointment of medical referees to examine the accused when there is a serious doubt as to his mental condition, pertains to the Court alone. It has been maintained that it is not only the right but also the inescapable duty of the judicial authority to ascertain the state of mind of the accused, both at the time of commission or omission of the act complained of and at the time of trial. To deny such a right to the judicial authority is to ignore one of the fundamental principles of criminal justice and to run the risk of a conviction of a non-responsible person and of the nullification of the trial (47).

In England the onus of the proof of insanity is on the defence in accordance with the presumption that persons are legally sane until the contrary is proved. It is counsel for the defence, therefore, who has to produce a medical expert to testify to the existence of insanity in the accused. If the prosecution does not accept the evidence of insanity, it has the right of calling its own medical expert to examine the accused and give their opinion as to his state of mind. This arrangement can be a source of embarrassment to the administration of justice when the prosecution puts its own experts in the witness box to rebutt the evidence of insanity adduced by the experts called by the defence. The experts of both parties may be in perfect agreement that the accused is mentally ill from the medical viewpoint, but owing to the interpretations of insanity which the defence, the prosecution, and the judge may place upon the law, there may result a difference of opinion between the experts of the two parties as to whether the accused is insane within the meaning of the law.

The public discussion of such a complicated medico-legal question cannot but create confusion in the mind of the jury. It is also inevitable for the jury not to look upon the medical experts of either the defence or of the prosecution as biased and interested parties.

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(47) Cremona, G. "Raccolta della giurisprudenza sul codice penale". Malta, 1935, page 62.

Our own legal provisions with regard to the appointment of medical referees can not give rise to such perplexity and doubts in the mind of a jury. The psychiatrists are appointed by the Court and this ensures their absolute independence of both the defence and the prosecution. The psychiatrists are, therefore, as independent and as neutral as the judge. They are above any possible suspicion of bias either in favour or against the accused, and, what is equally important, there is an assurance that justice will not only be done but will be "manifestly and undoubtedly seen to be done."

Phraseology of Article 34 para (a)

While fully acknowledging the sagacity, in general, of Maltese legislation on the question of mental disorder in criminal matters, we cannot help making a few critical remarks on some of its clauses. These concern (1) terminology, and (2) the power of the jury and of the Attorney-General to oppose the diagnsis of sanity or insanity made by the psychiatrist appointed by the Court.

The phrase "in istato di demenza o furore" was taken verbatim from the Neapolitan Code (48). It was officially translated into English in the draft code of 1848 and in the code promulgated in 1854 as "of unsound mind or in a state of madness". In the Ordinance XI of 1900 it appeared as "of unsound mind or maniac". The present rendering is "in a state of insanity or frenzy". The Maltese version is "ġenn jew ferneżija".

We confess that we cannot see any difference between unsound mind, madness, mania, insanity or frenzy.

The origin of the Italian words can be traced back to Roman Laws which refer to mental illness as "dementia" and "furor". In Roman jurisprudence these two words had already lost any difference in meaning they may have originally possessed, as they had become interchangeable terms to denote mental disorder. Canofari (49) and Roberti (50), in their respective com-

(48) It is interesting to note that the French penal code of the time referred only to "demence".

(49) Canofari, F. "Commento sulla parte seconda del Codice per lo Regno delle Sue Sicilie", Napoli, 1819, Vol. I, pagina 159.

(50) Roberti, S. "Corso completo del Diritto Penale del Regno delle Due Sicilie", Napoli, 1833, Vol. II, page 70.

mentaries of the Neapolitan Code described "furore" as a more severe form of insanity than "demenza", in which the individual was liable to become violent and dangerous to self and to others. During the discussion on article 30 (1848) at the sitting of the Council of Government of the 21st February 1850, Judge P. Dingli and Judge G.P. Bruno had stated that the words "demenza" and "furore" were employed in our law courts indiscriminately to signify insanity. Dr. G. Falzon, writing in 1870, held that under these two words were included "oltre la demenza propria, anche la imbecillità, follia, insania, pazzia, stoltezza, ecc., ed altri gradi di malattie mentali importanti la perturbazione delle facoltà intellettuali...... sia completa o parziale questa perturbazione, sia permanente o passeggiera" (51). A recent commentator of our Criminal Code states that the word "demenza" is used in a general sense to designate the various forms of mental disorder. He suggests that the word "furore" may have been meant to denote that state of mind known to psychiatrists as "mania" (52).

At the present time, however, when the nature of mental disorder is better understood than it was when art. 30 (1848) was first drafted, the retention of the words "insanity" and "frenzy" (and "ġenn" and "ferneżija" in Maltese) to denote the same pathological condition is unnecessary. Both these words are popular terms which are used synonymously in common parlance. A more accurate vocabulary based on psychiatric principles would have been 'psychoses", "neuroses", "amentia", and "personality disorder", since these conditions have a different pathology and causation. It may be argued, however, that the legislator is not concerned with distinctions of a medical kind. That may be so, but such an argument does not justify the employment of a language which appears to create verbal differences where no essential medical and legal distinctions are involved. If a person is mentally ill it makes no difference to his culpability whether his clinical state is one of mania, stupor, apathy, or depression just as it is immaterial whether the diagno-

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(51) Falzon, G., "Annotazioni alle leggi criminali", Malta, 1870, page 219.

(52) i.e. motor excitement, elation and push of talk. See Vella, S. "Illustrazione del Codice Criminale Maltese", Malta, 1927, pages 59 to 60.

sis is one of schizophrenia, manic-depressive psychosis, paranoia, etc.

A change in terminology is, therefore, desirable to render the wording of section 34 para (a) of the present edition of the criminal code in conformity with current psychiatric thought. We would suggest replacing the phrase "such person was in a state of insanity or frenzy" with "such person was suffering from mental disorder". Maltese jurisprudence has recognised the fact that apart from mental deficiency and the major forms of mental illness, such disorders of the personality as "adolescent instability" (53) and "psychopathic personality or state" (54) also exonerate the accused from culpability. The suggested term "mental disorder" is therefore more suitable because it covers all forms of mental abnormalities as article 34 para (a) is meant to do, and thus conveys the intention of the legislator better than the present phraseology.

The Right of the Jury and the Attorney General to oppose the Mental Experts' Opinion

It has been shown that when there is a suspicion or when it is alleged that the accused was suffering from mental disorder at the time of the commission of the crime or during the time of the trial, the Court appoints one or more mental referees to examine the accused and report on his mental condition. This is fair and reasonable, but at the same time the Court empowers the Attorney General and the jury (in the case of H.M. Criminal Court) to dispute and even to turn down the conclusions of the psychiatrists who have studied the accused. A curious anomaly is thus created. We must remember that members of the jury are not chosen because of their medical knowledge—indeed it is possible that there may not be a doctor among them—and yet they are supposed by the law to possess the acumen and ability to weigh and judge the medical evidence submitted to them for or against mental disorder, and to return a verdict on the state of mind of the accused. This applies also to the Attorney General.

In the diagnosis of the mental condition of the prisoner, the law, as it stands, gives more weight to the opinion of a non-

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(53) Rex vs. Clo. Farrugia (1939).
(54) Rex vs. E. Schraner (1949).

medical section of the community than to the conclusions of the psychiatrists who have applied their training and devoted their time and energy to the study of mental phenomena. The legal view may be consistent with the tenets of democracy but it is certainly inconsistent with the progress of psychiatric knowledge and the general experience of mankind. Besides it runs counter to the accepted principle that the duty of the jury is to judge about the facts of the case; yet when a jury is asked to decide whether a person is sane or not they are being given the faculty not to make a declaration about facts but to interpret the significance of the proofs adduced as evidence of sanity or insanity, to judge as to the sufficiency of these proofs, and to decide whether the evidence submitted to them supports a diagnosis of mental normality or abnormality. This position is as untenable, from the medical view point, as that of the patient who consults a specialist about his illness and then calls in his neighbours to obtain their sanction as to whether he should abide by the consultant's advice or not.

This is not to claim that the psychiatrist is infallible, but if the psychiatrist is liable to make a misdiagnosis, one reasonably expects a layman to be even more unreliable and prone to commit mistakes in assessing the mental state of a person. The conception of mental disorder entertained by the layman in Malta is far from being a scientific one. The consequence is that a lay jury may very well fail to appreciate, and to be convinced by, the psychiatrist's opinion about the mental state of the accused. As has already been remarked the psychiatrist is appointed by the Court and is therefore, like the judge, impartial and objective in his attitude towards the accused. He is not influenced by the harangues of either the prosecuting counsel or of the defence. The jury, on the other hand, cannot be so detached towards the accused. Their opinions can be easily swayed one way or another, and they are liable to fall a prey to the emotional appeals of either the prosecution or the defending counsel. There is, therefore, the danger that they may oppose the conclusions of the psychiatrist which he has reached by means of methods of study and investigations of which the jury are completely ignorant. Thus in the cases Rex vs. Paris (1907), Rex vs. Pizzuto (1919), and Rex vs. Busuttil (1940), while the medical referees concluded that the accused in each instance was mentally

normal, the jury returned a verdict of insanity and the offenders were committed to the mental hospital.

The situation becomes even more clumsy when the plea of insanity is set up in the course of the speech of the defence. This happened in Rex vs. Mifsud (1940) when the issue of insanity fell to be dealt with by the jury without the latter having had the benefit of hearing any expert opinion on the state of mind of the accused. The plea of insanity was rejected by the jury in this case and sentence of death was passed by the Court (55).

Evidently an alteration of the law is needed to relieve the jury of the duty of deciding the question whether the accused is sane or not. The responsibility of reaching a decision on the mental state of the accused should rest exclusively with the mental experts who alone possess the necessary experience and skill to come to a correct conclusion.

It it said of Chief Justice Coleridge, of England, that he was first heard of through a famous murder trial, in which, while he was closing to the jury, the lights went out, and when re-lighted he added the forcible words; "The life of the prisoner is in your hands, gentlemen. You can extinguish it as easily as that candle was extinguished but a moment since; but it is not in your power to restore that life once taken as that light has been restored — Judge DONOVAN, **Tact in Court.**

(55) Harding, W. op. cit., para. 12.