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EDITORIAL

IT is with a keen appreciation of the vision and spirited activity of the law students of previous courses who started the Law Society and strove to fulfil its aims that we take over the management of the Law Journal. Varied activities in the form of lectures, debates and reading of papers on legal topics particularly marked the first flush of life of our society. This year two very interesting lectures were delivered under the auspices of the Law Society. Prof. W. Buhagiar, who for about the last three years has been Federal Counsel at the Attorney General's office in far-away Malaya, recorded his personal impressions of life in the Federated States against a background of that country's history and constitutional development. Another lecture on "The Privy Council, Criminal Appeals", was delivered by Prof. A. Mamo, who in his usual lucid way of self-expression gave an account of the constitution, purpose and working of the highest court of appeal in the British Commonwealth. Prof. Mamò had a good opportunity of getting a first-hand knowledge of the subject he treated during his visit to the Privy Council in connection with the now famous Connell Case (1944). We have to deplore, however, the poor attendance at these lectures, not only on the part of members of the Law Society but also of members of the legal profession. Former students of law could sensibly help the University Students' Law Society by subscribing to the Law Journal. An increased circulation of our Journal amongst them would help us meet the very heavy printing expenses for which the University yearly grant is altogether insufficient.

MALTESE IN TRANSLATION

The right use of Maltese in translation raised the pitch of parliamentary verbal duels when some members of the former Legislative Assembly moved amendments to substitute certain words adopted in the Maltese text of "The Diplomatic Privileges (Extension) Bill. To forge out of the latent possibilities of our language a serviceable medium, at once pliable and trustworthy enough to convey the nicety and clearness required in legal procedure and documents has been the aim of all those who hailed

with enthusiasm the official adoption of Maltese as the language of the Courts in 1934. The Maltese language has withstood the trial of sixteen years experience marked by the smooth administration of justice. But among certain individuals there still lingers an unjustifiable fad which would shun or reduce to a minimum legal words and expressions of foreign origin. In an effort to substitute the undesirable aliens by other words of native origin, clarity and simplicity are sometimes needlessly sacrificed. All languages have their own set of rules. Words of native origin which make sense when used in their proper context will prove to be objectionable if used out of their usual setting. We might remark, with Swift, that "Proper words in proper places make the true definition of style".

We will mention some words amended in the Maltese text of the said Bill. The word "tmiem" in our language can only mean "the end" of a book, a speech, a thing and it does never convey the meaning of "purpose, view, aim or design", which import the translator forced it to carry in the phrase "għat-tmiem ta' dan l-att" (for the purpose of this act). In this case, the proper word is the one amended, namely "skop". Another example of bad taste in the choice of words is the translation of "compile a list" which can be rendered simply by "tagħmel lista", by "ihejji werrej". We would like to stress, however, that our criticism is not an ill-natured picking of holes in the mass of good translation from English into Maltese ably carried out by the translators. It is rather a counsel of perfection to ward off in time the barbed darts of spiteful criticism.

DISENTAILMENT BILL:

The lively exchange of views in the Press following the introduction of a Bill in Parliament, providing for the abolition of entail is an index of the great importance attached by all to this bold step of the Government. Without fail, the Disentailment Bill is the most drastic measure affecting the domain of legal institutions that the Labour Government passed during its term of office. No other judicial system in our islands had put up such a determined fight for survival as the time-honoured institution of fideicommissum. Its history is not without interest. In Malta its origin dates back to the Middle Ages but the creation and evolution of entail took place far back in Roman times. Under Roman Law landed property, mainly agri-

cultural, could be enjoyed by the person to whom it was bequeathed though he could not dispose of it. On his death it passed on to his heirs, remaining within the family circle. The inevitable result of such a system whereby property was quite shut out from the general circulation of wealth, caused its abolition as being anti-economical. Indivisible entail developed later than divisible entail as a result of property being bequeathed to the first born of the family, usually enjoying a title of nobility to help him maintain the rank and status of the family name.

In Malta, the Code de Rohan abolished indivisible entail and limited divisible entail till the fourth generation. By a law which came in force in 1865, the creation of new entails was prohibited. Since 1919, seven attempts to free land held in tail, competently estimated to amount to about 1/15 of the whole landed property in Malta, have foundered in the face of adverse circumstances, strong opposition and delaying tactics. In 1922 a Disentailment Bill after having passed the second reading came to nought owing to the prorogation of parliament. The latest Bill survived the fall of the Labour Government by a few months and became law last May.

In spite of all the arguments and reasons that can be brought forward in favour of the retention of entail, we believe that the complete freedom of the disposal of wealth is demanded by the spirit of modern economic theory. We do not share the view that entail should be retained in our legal system as a part of national heritage on account of its great antiquity and widespread diffusion amongst all classes of the population. An argument which deserves greater consideration is that which admits no derogation, on principle, to the inviolability of the will of the testator in disposing of his property as he likes. In reply to that line of argument it is important to note, however, that in practice our Courts themselves have rarely refused to accede to the requests of those interested parties, who wishing to dispose, sell or grant in emphyteusis the entailed property, have applied for the necessary authorization to do so. The practical effect of the Disentailment Law is that of embodying with the binding force of written law a usage which has long been honoured by the decisions of our Courts of Law.

CONTRIBUTIONS TO LEGAL STUDIES:

One thing the University Students' Law Journal can pride itself upon is that it provides the proper and only medium in our Island for the contribution of useful studies on legal matters. The various articles that have appeared in the issues of our journal prove how large and diverse are the possibilities offered by the field of research work and study to students of Maltese Law. Probably no other field of study in Malta is so rich and so little unexplored as that of law. There may be reasons to account for the paucity of solid contributions to the knowledge of law here in Malta. One reason is that professors in Malta, unlike their colleagues in England and other foreign countries, cannot possibly abandon the daily tiresome work in the Law Courts owing to the insufficient remuneration which they receive for their lectureship. Another stumbling block is the scant encouragement and certain financial loss that would harass any person venturing to write on technical subjects, such as law. Likewise, in Malta, we have never heard of grants or scholarships bequeathed by government or munificent members of society to render possible research work contributing to the study of Law.

Judge Debono's "Storia della Legislazione di Malta", and "Sul Fallimento nel Diritto Maltese", and Judge Cremona's commentary on every article in our Criminal Law stand out as the three great landmarks of the legal contributions, few and far between, of the Maltese Bar and Bench. Future law-students who will have to submit a thesis to obtain a doctorate according to the radical reform carried out in University studies last year, can be confidently expected to enlarge the bounds of legal studies. If this much-criticized reform will bring practical results in the shape of an increased knowledge and research works in matters of legal character, it will have been justified. This does not necessarily mean that we approve of the five years interval which has to elapse between the graduation of the law-student and the time when he may submit his thesis.

The Public Library should take steps to have the most important manuscripts of research value photographed to guard against any loss. A mass of inherited material bearing on law and kindred subjects is jealously guarded in private collections whose owners, generally speaking, are loath to give oppor-

tunities to research workers to make use of it. Would it be too dictatorial were the government to photograph these manuscripts and have them placed in the Public Library? A wealth of untapped legal material lies in the archives of Imdina Cathedral but it is difficult of access.

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NEWS AND VIEWS

The Malta Bar and Bench was represented at the International Congress of Comparative Law held recently in London by Judge Professor E. Ganado, C.B.E., LL.D. At the Congress which was attended by jurists from all over the world, Judge Ganado read a report touching on Maltese Law and the legal duties of executors and administrators. We extend to him our congratulations for the signal honour done to our Island by his presence at this Congress of Jurists and particularly at his being chosen President of its Civil Law Section.

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Mr. George Montanaro Mifsud, Rhodes Scholar for 1950, has left for England, where he intends reading for a Degree in History. We wish him full success in this subject as we remember only too well the great interest he showed in History all the time he was in the University.

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The Society would likewise like to congratulate Mr. G. Gouder, LL.D., who some months back was appointed Magistrate in the Gozo Courts of Law and has since been transferred to the Law Courts in Malta.

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Mr. J. Ganado, B.A., LL.D., and Mr. J.J. Cremona, B.A., D.Litt., LL.D., will shortly take up their duties at the Royal University as lecturers in Roman Law and Constitutional Law respectively. All students and colleagues heartily wish them success in their lectureship.

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ACKNOWLEDGEMENTS

MELITA THEOLOGICA — A review of the Royal University Students' Theological Association. Vol. II, No. 1.

SECOND ANNUAL REPORT, 1st. August, 1948 — 31st. July, 1949, of the Institute of Advanced Legal Studies: University of London.

Law-Making and the Roman Jurists

By PROF. J. AQUILINA, B.A., LL.D., PH.D. (LOND.)

THE "Law Journal" published by the Students' Law Society bears on its cover the very significant motto *legum servi sumus ut liberi esse possimus*. The motto is very significant. It may be considered as the historical synthesis of Man's efforts to establish the very basis of personal freedom within an organised community regulated by a set of laws, which guarantee him such freedom at the price of a partial restriction of his own liberty of action within the same society.

The word *lex*, derives probably from the same root *licet*, because laws to be effective must be binding upon us all, and for this reason the infringement of a law carries with it, as an inevitable consequence, a more or less serious punishment. And yet, as the Latin quotation says, in spite of the restriction of action that is inherent in every law, we are the willing servants of the *lex*. We willingly accept the *command* of the law-giver, the *obligation* imposed thereby upon us, and the *sanction* that is incurred in the event of disobedience. We accept the yoke of the law because survival without it is impossible, because where there is no law there is what is known as "anarchy", a Greek word meaning "without ruler". This blind hatred of a ruler who lays down the law restricting absolute freedom whether in the name of social security or morality, has found a poetical exponent in that great visionary Percy Bysshe Shelley, whom Matthew Arnold has aptly described as "an ineffectual angel beating in the void his luminous wings in vain". Unfortunately, less angelical anarchists than Shelley may be met with even in our troubled times, men whose anarchy being purely theoretical or philosophical, are otherwise harmless and law-abiding, and others, the really dangerous because they are the anti-socials, who blow up bridges or the headquarters of constituted authority for no better reason than that they cannot tolerate the existence of a law with its inevitable commands and sanctions. However, humanity as a whole, excepting the anti-social element, which is a social pathological incidence like any other disease of a people or nation, is instinctively the willing servant of the law for the very fundamental reason that, the alternative to law being anarchy, the preservation of the species

would otherwise be threatened with annihilation. Therefore we can describe the genesis of the law as Man's first weapon of self-defence and self-preservation against the attacks upon him and upon his dependents and his belongings from inside or from outside the community. For this reason, the judicial concept implied in the word *law* must have come into being ever since Man organised his family and his tribe into a communal unit deriving its life and strength from its own co-operation and co-prosperity even at the risk of such personal disadvantages of individual freedom as were necessitated by the larger interest of the communal unit as a whole. Hence, anarchy, though it may have always been a concomitant reality as a theoretical concept, like the two concomitant realities health and disease, has otherwise always been rejected and actively banned by social Man. I am not implying that the genesis of modern society as we know it to-day has had its beginning in a self-imposed contract, as expounded by Rousseau. The growth of law within organised society arose naturally as a matter of instinct with the very beginning of conscious human life. Had there been a time when man had no laws to regulate his actions, at least within his own family group or tribe, he would not have survived the impact of attacks mutually inflicted because everyone would be exhausted in the murderous struggle.

Speaking of law amongst primitive people this is what Sir E. B. Taylor says in his work "ANTHROPOLOGY" (Watts, Vol. 11, p. 134): "Among the lessons to be learnt from the life of rude tribes is how society can go on without the policeman to keep order. It is plain that even the lowest men cannot live quite by what the Germans call "faustrecht" or "fist-right", and we call "club-law". The strong savage does not rush into his weaker neighbour's hut and take possession, driving the owner out into the forest with a stone-headed javelin sent flying after him. Without some control beyond the mere right of the stronger, the tribe would break up in a week, whereas in fact savage tribes last on for ages." Maine's contention that the early phenomena of law may be traced back to Themis of the Greek Homeric poems, the assessor of Zeus, who inspired kings to settle disputes by a sentence, is far-fetched. The more logical conclusion is that the law in its primitive genesis is an instinctive expression of human self-defence and self-preservation. This contention explains the fact why in early ancient laws purely religious and

civil matters are mixed up and dealt with together. Indeed, that mixture of religion and very often the super-imposition of religious matters on purely civil affairs and behaviours, arose later with the growth of priestcraft and the fear of the gods.

Laws must not only be made but transmitted; for in transmission lies continuity, the basis of which is tradition. Lycurgus, reputed founder of the Constitution of Sparta, who flourished about 800 B.C., did not permit his laws, which were few and simple, to be written. Men learned these laws from their parents and their masters and so they were handed down orally from one man to another.

Before Man found out that he could luckily perpetuate his thoughts by means of an alphabet, he had been transmitting the laws of the country orally within the community from generation to generation. Thus we find that the earliest human law is unwritten or customary law, which is of a vital importance to the study of written law that came into being long after, because customary law provided the first material of written law. Indeed, the famous XII Tables drawn up by the Decem Viri according to tradition, in 451-458 B.C., is considered to be the embodiment of customs orally transmitted. More than a thousand years after, Justinian wrote: "*Ex non scripto ius venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur*" and also in the Digest "*quod rectissime illud receptum est, ut leges non solum suffrage legislatoris, sed etiam tacite consensu omnium per desuetudinem abrogentur*". And again, making a strong defence of custom as the unwritten law of the people Julian says: "Since statutes themselves bind us only because they have been accepted by the judgment of the people, it is right that what the people has approved without any writing should be binding on all. For what does it matter whether the people declares its wishes by vote or by its actual conduct?"

Even the code of Hammurabi, about one thousand seven hundred years earlier than the XII Tables of Roman Law, which over four thousand years ago "served to mould and fire the ideas of right throughout the great empire (Babylon)" is presumably a reduction in writing of previous unwritten laws. This marvellous Code deals with such subjects as adoption, adultery, assessment of damages, oaths, privileges and responsibilities of doctors as well as dowry, not to mention other advanced ideas confirming our contention that the growth of law and human so-

ciety are simultaneous and concurrent phenomena.

Other codes of laws arising from unwritten or customary laws are books like the Hebrews' Deuteronomy and the Leviticus, which governed and regulated the communal behaviour and relations of the Jewish people, and Solon's code of Greek laws which followed, and improved upon, the very severe code of Draco (C. 621 B.C.) said to have been written not with ink but with blood though it was no more severe than other early codes of law.

The degree of a people's civilisation cannot be judged from the mere existence of social or communal life but from the degree of social complexity which underlies the structure of society. Now the structural complexity of a social organisation is determined by the relative provisions that it makes for its spiritual and material maintenance. A comparative study of early and later laws involves a comparison in the growth of Man's spiritual aspirations and material ambitions. This leads back to the highest examples of ancient social organisations that have left a permanent stamp on modern society and paved the way for the Roman Jurists. I have in mind the organisation of the Greek and the Roman states to which the world owes so much of its cultural legacy. You cannot assess the work of the Roman Jurists if you leave Greece out of the picture. Indeed, Greece and Rome are complementary to each other, the former being pre-eminent for its philosophical speculations and spiritual insight, the latter for its military exploits. Greece preceded Rome in the cultural field and when the latter vanquished her on the battle field, Greece in her turn led Rome captive with her art and her philosophy. The Greeks, who preceded the Romans in their role as torch-bearers of civilisation in a world still largely shrouded in the darkness of ignorance, unlike the hard-headed unspeculative Romans, were temperamentally philosophical, and their intellectual leaders, wonderful men like Socrates and his great pupil Plato, concerned themselves with the why and the wherefore of life and from these deep considerations which have taxed the finest brains of the world, they deduced guiding principles bearing upon the conduct of man. In this way Greek philosophers prepared the intellectual foundation of progressive laws based upon considerations of right and wrong.

Juristic morality is relative to Man's progress in thought and environment. Indeed, juristic morality may be considered as a people's temperamental reaction to social environment, and this

explains why certain norms that are repulsive to us were sensible and normal to other peoples, religiously advanced like the Hebrews or philosophically enlightened like the Greeks. To show how judgments regarding the punishment of crime vary according to the standard of a people's civilisation and the quality of its religious and political beliefs, I quote the following extract from A. F. Tytler's *Universal History* (Bk. 1, ch. , p. 34) who writes thus: According to the penal laws of Egypt whoever had it in his power to save the life of a citizen and neglected his duty was punished as his murderer..... If a person was found murdered, the city within whose bounds the murder had been committed was obliged to enbalm the body in the most costly manner, and bestow on it the most sumptuous funeral. Perjury was justly held a capital crime for there is no offence productive of more pernicious consequences to society. Calumniators were condemned to the same punishment which the calumniated person either had, or might have, suffered, had the calumny been believed. The citizen who was so base as to disclose the secrets of the state to its enemies was punished by the cutting out of his tongue; and the forger of public instruments or private deeds, the counterfeiter of the current coin, and the user of false weights and measures, were condemned to have both their hands cut off. Emasculation was the punishment of him who violated a free woman, and burning to death was the punishment of an adulterer". But most of their fundamental ideas were progressive and the Greek thinkers provided the basis of Greek legislation which was in time embodied in the code of Solon, which in its turn is believed to have influenced later Roman jurists and legislators.

The XII Tables, though largely based on the customary laws of Rome herself, show evidences of Greek influence and "the traditional story includes an embassy to Greece to study the laws of Solon and Ephesian named Hermodorus, is said to have assisted the Decemvirs" (1).

The legal motto on the cover of the "Law Journal" reminds me of Socrates, the great master of a great disciple Plato, whose speculations led him not only to be a most willing servant of the laws of the state, but when these laws were turned against him, also their most submissive and uncompromising victim. Socrates,

(1) Jolowicz, *Historical Introduction to Roman Law*, p. 108,

as you know, on a charge by Meletus, a young man and a minor poet, that he had corrupted the young and held no doctrine, was condemned to die by a majority of sixty votes out of a jury consisting of about five hundred men. Crito, who was convinced that Socrates was condemned unjustly, tried in vain to persuade the great philosopher to run away from the prison and thus save his skin. Socrates's uncompromising argument was that he had no right to evade the very laws which had before protected his person and his property. Here is an example of the philosopher identifying the law with social morality. But let us hear Socrates himself explain to Crito his reverence for the laws: "Then the laws will say: 'Consider, Socrates, if we are speaking truly, that in your present attempt you are going to do us an injury. For having brought you into the world and nurtured and educated you, and given you and every other citizen a share in every good which we had to give we further proclaim to any Athenian by the liberty which we allow him that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance he may go where he pleases and take his goods with him. None of the laws will forbid or interfere with him. Anyone who does not like us and the city and who wants to emigrate to a colony or to any other city may go where he likes retaining his property. But he who has experience of the manner in which we order justice and administer the state and still remains, has entered into an implied contract that he will do as we command him. And he who disobeys us is, as we maintain, thrice wrong: first, because in disobeying us he is disobeying his parents; secondly, because we are the authors of his education; thirdly, because he has made an agreement with us that he will duly obey our commands; and he neither obeys them nor convinces that our commands are unjust; and we do not rudely impose them but give him the alternative of obeying or convincing us; — that is what we offer, and he does neither'."

Another example of respect for the laws of the State is shown by the following anecdote quoted from Gibbon's "The Decline and Fall of the Roman Empire" (ch. 22, p. 403): "During the games of the circus, Emperor Julian had, imprudently or designedly, performed the manumission of a slave in the presence of the consul. The moment that he was reminded that he had trespassed on the jurisdiction of *another* magistrate, he condemned himself to pay a fine of ten pounds of gold; and em-

braced this public occasion of declaring to the world that he was subject, like the rest of his fellow-citizens, to the laws, and even to the forms of the republic."

The Greek historian Thucydides (c. 464-404 B.C.) wrote: "Did justice ever deter anyone from taking by force whatever he could? Men who indulge in the natural ambition of empire deserve credit if they are in any degree more careful of justice than position demands." This statement might be described as applicable to political morality, such as might have guided the legislators and jurists of imperial Rome. Indeed, while the name "Greece" stands for philosophy and subtle speculation, from which moralists drew norms for individual and special rights and duties of the state and viceversa, the name "Rome" stands for a well-knit military empire.

The landmarks of Roman political and national history are the traditional foundation of Rome by Romulus and Remus about 753 B.C. and its growth from a tribal kingdom to a republic and finally, to a majestic empire. But the history of early Rome is one of incessant warfare, on the right bank of the Tiber with Etruscan tribes and in the mountains with troublesome and turbulent raiders who frequently carried out operations similar to those carried out by their modern equivalents, the bandits and the guerillas, till, in about 338 B.C. Rome obtained control over the League of Latin cities as well as of the Greek cities in Campania as a first step towards the growth of an Empire and by the third century B.C. this control extended over the whole peninsula. After that followed the development and consolidation of the Roman Empire overseas especially after the complete destruction of her formidable rival, Carthage, in the last of the three famous Punic Wars which took place about 146 years B.C. Then came the Christian era till we reach Augustus (63 B.C.-14 A.D.) who established the *Pax Romana* within the Empire till Diocletian (284-305 A.D.) reconstituted all the imperial Institutions dividing the Empire into an eastern and a western hemisphere, and Constantine in 330 A.D. deprived Rome of her political preeminence which he transferred to Byzantium calling it Constantinople after himself. Thereafter the tempo of the decline of the Roman Empire was quickened and by the end of the fifth century Italy was overrun by the Goths and in 410 Alaric sacked Rome which the Vandals plundered in 455. And that was the end of Imperial Rome, the external façade of which

was later revived under Charlemagne, sole king of the Franks since 771 who in 800 founded the Holy Roman Empire.

In this rapid sketch of Roman history we have seen the stupendous growth of Rome from (1) a tribe broken up by incessant warfare to (2) the unity of various tribes under the leadership of the powerful tribe of Latium, whence the name Latin, (3) the political unity of the whole peninsula till finally (4) the growth of a unique empire overseas. Now such political phenomena could not have taken place unless the various tribes were knit together by a set of laws which protected their individual and collective rights by inflicting adequate punishments on transgressors more or less proportionate to the infringement thereof according to the needs of the times. Thus within the tribe arose customary law which we finally see embodied in the mentioned XII Tables (451—448 B.C.) introducing the earliest period of written laws and thereafter the jurists who interpreted them and adapted them to the ever-changing conditions of the times.

Amongst other rules those relating to *patria potestas* and *sui haeredes* were taken over bodily from custom. Such was the importance of these XII Tables that according to Cicero they had been learned by boys at school. Now only fragments of these laws survive in various important quotations because the bronze or wooden tablets were very likely destroyed by the Goths when they burnt Rome in 390 B.C. These laws were brief and simply worded, containing a series of imperatives and in this sense they must have read like the Decalogue of the Old Testament, but with a greater stress on matters of a civil nature. In this connection Sir Henry Maine writes: "A body of law bearing a very close and instructive resemblance to our case law..... was known to the Romans under the name of the *RESPONSA PRUDENTUM*. The form of these responses varied a good deal at different periods of the Roman jurisprudence but throughout its whole course they consisted of explanatory glosses on authoritative documents; and at first they were exclusively collections of opinions interpretative of the XII Tables" (p. 27). The learned in law, or lawyers, who explained and interpreted the existing laws and their writings form a body of juristic literature which we call jurisprudence. These *prudentes* or eminent lawyers of the time answered questions upon points of law giving counsel's opinion (*respondere*), drawing up pleadings (*cavere*), acting for clients in suits (*agere*) and conveyancing (*scribere*). So great was the im-

portance of these jurists that their studied opinions were considered binding upon judges. As pointed out by Jolowicz (ibid. p. 91) "that these *juris prudentes* were not professional lawyers in our sense is clear; not only did they not receive any remuneration for their services, but they were public men who devoted only some of their time to law, and indeed did so as part of their public career. Many of them were consuls, which means that they had gone through the whole *cursus honorum*, and some were distinguished as generals and as provincial governors." Naturally, with all the best intention and competence in the world, uniformity of juristic opinion has always been, and still is, a desideratum, and difference of expert opinion among Roman jurists was on many occasions embarrassing. In order to avoid the embarrassment caused by conflicts of authoritative opinions the Law of Citations of Theodosius II published in 426 A.D. laid down that the works of Papinian, Paulus, Ulpian, Modestinus and Gaius were the principal authorities and by enactment of Valentinian III (1) any opinion of Papinian, with whom we shall deal further on, must be considered binding upon the judge, (2) when Papinian did not express an opinion the majority of opinions was to be taken and (3) if the opinions were equal, the judge could choose the one he considered best.

Jolowicz has divided the periods of Roman law into six classes: namely (a) the period of conjecture, including the period of the monarchy and of the early republic up to 451-450 B.C. when the XII Tables were inscribed, (b) the period from the XII Tables to the end of the Republic which saw the beginning of Roman Law, (c) the first century of the Empire which brought about very little change in private law, (d) the Classical period, covering the 2nd century and the first half of the 3rd Century, when Roman law reached its highest development in the hands of the great lawyers, this fourth period being subdivided into (1) an earlier classical period covering the reigns of Hadrian and the Antonine emperors and (2) a later classical period under the Severi, (e) the post-classical period down to the reign of Justinian, marked by a rather sudden decline in the value of the legal work, and finally (f) the reign of Justinian when the mass of existing authorities was reduced to one uniform code.

Indeed Justinian, in his Digest and his Code, included a considerable number of decisions from authoritative jurists and

in this way he salvaged the essentials of the legal jurists of previous times, thus replacing the previous legal compilations, namely (1) the institute of Gaius, (2) the Gregorian Code, (3) the Hermogenian Code, and (4) the Code of Theodosius II.

Following these historical divisions of Roman law we have the following classes of jurists: (1) the Pontiffs and earlier lay jurists whose chief work consisted in the interpretation of the XII Tables; (2) the Jurists coming after the period of interpretations; and (3) the Classical Jurists.

The Pontiffs were members of the sacred college called the College of Pontiffs out of whom one was annually elected to superintend disputes between citizens. Their business was to interpret the XII Tables and explain the law of which they had the monopoly. It is an early period of jurisprudence in which law and religion are treated together indiscriminately. Before the XII Tables were published at the request and insistence of the common people who objected to the monopolisation of the law, the Pontiffs were the only depository of customary law which they handed down orally and traditionally within the same college. Speaking of the period preceding written law, Sir Henry Maine (*ibid.* p. 10) says: "Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be approximated to. Their genuineness was, as far as possible, insured by confiding them to the recollection of a limited portion of the community."

But as we have said, the monopoly of the Pontiffs who were drawn from the patrician class, was considered objectionable till the famous *Lex Ogulnia* admitted plebeians to the sacred college, and these, naturally, used their influence inside the college to weaken the patrician hold.

The second class of jurists, that is, those following the period of interpretation are known as the *Veteres*. In this period something very important happened. C. M. Flavius, secretary to Appius Claudius, who was Censor in 312 B.C., appointed and published a collection of *legis actiones* made by his master Appius Claudius very likely at his own instigation or with his connivance. This publication was thereafter known as the *ius Flavianum*. This really finished the monopoly of the Pontiffs and once the law was made public many men devoted themselves to legal studies and were known as *iores consulti* and *ius juris prudentes*.

tes. This is the period of plebeian pontiffs, of the democratisation of the Sacred College of Pontiffs, the first of whom, Tiberius Coruncanius, about 50 years after the promulgation of the *Jus Flavianum*, gave advice on legal questions publicly. In the year 204 B.C. Sextus Aelius published the legal formulae for actions for the second time, together with the XII Tables and their interpretation and his work was known as the *Jus Aelianum*, also called *Tripertita* because of its threefold division. This was another hard blow aimed at pontifical legal monopoly because in this way the knowledge of the laws was also extended to laymen from whom we have the class of "Early Late Jurists" who occupy an intermediate position between the Pontiffs and the classical Jurists, whom Gaius and Justinian described as "the makers of the law".

In the early empire the most important jurists of the time were: *Antistius Labeo*, a lawyer of original and independent mind who died before 92 A.D., leaving a library of 400 Volumes. A considerable number of quotations from his work can be found in later writers as well as in the Digest. He wrote, amongst other works, a treatise on Pontifical Law, a commentary on the XII Tables, and on the urban and peregrine edicts. This jurist was politically a republican, the son of a republican father who had committed suicide for political reasons. In legal studies he was an innovator, in this sense opposed to the other famous jurist Capito, who was a staunch conservative in matters juridical, resting on ancient authority while politically he was an adherent of the Imperial regime and, if his character has been dispassionately described by his biographers, also at times severe. He is the author of about 8 books of *coniectanea* (a miscellany); 7 books of *de iure pontifico*, and one *de officio senatorio*. Thus Labeo and Capito together represent in juristic literature two opposite attitudes, two schools of thought with which we shall deal at greater length later on.

Another famous and considerable jurist was *Massurius Sabinus*, born of humble parents, still alive when Nero was in power; he held no public office and earned his living teaching the law to his pupils. Because this jurist was upright, and no less learned in law, Tiberius granted him the *ius respondendi*. The author of several authoritative works, he was held in such high esteem that the satirist Persius Flaccus considered his rubric as a compendium of all the jurisprudence of the time;—

“*Cur mihi non liceat, jussit quodcumque voluntas?
Excepto si quid Massuri Rubrica vetavit*” (satyr. 5).

Cocceius Nerva, designated as “the father” to distinguish him from his son, another little known jurist of whom we only know from Ulpian that he began to give *responsa* at the age of 17, was a follower and staunch supporter of Tiberius; was so honest and patriotic, that when he saw his country being overwhelmed with corruption he committed suicide in order to escape the possibility that he too might be exposed to corruption. Only a few fragments from his works have been preserved.

C. Cassius Longinus, head of the Sabinian School, of which more anon, consul in 30 A.D., governor of Asia in 40-41 and of Syria in 47-48 was related to Cassius the republican who murdered Julius Caesar. Because this Cassius Longinus was careless enough to keep amongst other images the image of his republican ancestor. Nero had him exiled to Sardegna but not before having ordered that his eyes were to be flushed out. His chief work was a treatise on the *ius civile*. Then came *Proculus*, a famous man, because he gave his name to the school of jurists originated by Nerva. He was the author of *epistulae* used in the Digest and of notes on Labeo. Some fragments of his work have been preserved in the Pandects. Though we have no records of his life, there is no doubt about his juristic importance. R.G. Pothier in the preface to Vol. I of his Pandects writes that “we can form an opinion of his great authority amongst jurists from the fact that the school of Labeo, abandoning the name of its original author, assumed instead the name of Proculeans”.

The period of the Classical Jurists includes the Jurists who flourished in the time of Hadrian (117-138 A.D.) and Modestinus (middle of 3rd Century A.D.). A prominent jurist of the time is *Salvius Julianus*, author of the *Aedictum Perpetuum* and a Digest in 90 books, and presumably also of the *Interdictum Salvianum* which bears his name, and, according to Cutajus, of the interdict *De Conjungendis cum emancipatis liberis eius*.

Other prominent jurists are: *Africanus*, whose identity has not been definitely ascertained yet, wrote nine books on *Quaestiones*, many fragments of which have been preserved in the Pandects. He was so subtle and his vocabulary so obscure that students of Roman Law used to say: “This is the law of Africanus, therefore it is difficult”; *Terentius Clemens*, a follower of Salvius Julianus, wrote twenty four books on the new laws, the

Lex Papia, the *Lex Julia*, many fragments of which have been preserved in the Pandects; *Gaius* lived and wrote at the time of Marcus Antonius. Such was the authority of this *juris prudens* that before Justinian's time his work was used as a textbook in the schools and Justinian's institutes are partly based on his institutes and his *Res Cotidianae*. According to T. H. Erskine Holland (Institutes of Justinian 1892, 2nd. Edit.) "his fame was doubtless rather that of a teacher than of a practising lawyer and his manuals became the received textbooks in the regular course of legal study. About 15 works are attributed to him." Recently, fragments of a parchment manuscript of Gaius's Institutes according to Jolowicz, "the most important single addition to our knowledge of Roman legal history since the discovery of the Veronese manuscripts in 1863", was discovered in Egypt and various books, giving the text and the translation have been published since. English-speaking students will find all the interesting material in Professor De Zulueta's *Supplement to the Institutes*" (Oxford 1935). Buckland has included the new knowledge in his *Manual of Roman Private Law*.

Sextus Pomponius flourished under the Antonines. His work *Liber Singularis Enchiridii* (Single Volume Handbook) provides the only source for the jurists of the earlier republic. He is the author of 35 or 36 books *Ex Sabine* under Hadrian, and 39 *Ad Q. Mucium* under Pius, a commentary on the praetorian and Aedilician Edicts and several other works. In his work he showed very little creative power. *Quintus Cervidius Scaevola* perhaps the greatest of all the Roman Jurists was extolled for his legal proficiency by the Emperors Modestinus, Theodosius, Arcadius and Honorius. Many fragments from his works may have been preserved in the Pandects. *Papinianus*, believed to be a Syrian by birth, lived and wrote at the height of classical jurisprudence. Under the Emperors people seeking advice on points of law submitted petitions to the emperors and a special department concerning itself with such petitions was called *A Libellis*. Naturally the Head of the Department must possess legal knowledge and Papinian like *Ulpian* was one of the distinguished lawyers who held the post. We have already mentioned that in the *Valerian Law of Citations* Papinian's opinion tipped the balance. It is said that he held official posts ever since he was eighteen years old, wrote 37 books of *Quaestiones* and 19 books of *Responsa* till, in 212 A.D. he was executed by Caracalla,

Speaking of Papinian's fame and high esteem, Pothier writes: "St. Jerome mentions Papinian to indicate the *Jus Civile*, and when he compares the human law with the divine law, he contrasts him with St. Paul saying: '*Aliud Paulus noster, aliud Papinianus praecepit*', and amongst other jurists, the learned Cujacus 'venerated Papinian' as if he were a deity of jurisprudence to such an extent, he said, that were it lawful for a Christian to do so he would have raised him an altar and sacrificed him victims"!

Tertullianus is another jurist whose identity has not been definitely established. He flourished under Severus. Some have identified him with the Christian theologian whose work, especially the sixth chapter *De Anima* abounds in legal phrases. The church historian Eusebius (264-340) describes Tertullian, the theologian, as "most proficient in the laws and Roman institutions". Pothier too identifies the jurist with the theologian while Jolowicz (ibid p. 40) says that "whether he is identical with the famous name is very much disputed." He wrote *De Castrensi Peculio* and 8 books of *Quaestiones*, the former mentioned by Ulpian. If Pothier's contention that the jurist and the theologian are the same person, is true, the jurist must have written his work before his conversion to Christianity because this is what the fiery theologian says in his work *De Pallio*: "*Ego nihil foro, nihil campo, nihil curiae debeo... nulla Praetoria observo... jura non conturbo: causas non elatro, non judico.*"

Julius Paulus, an eminent lawyer who flourished under Alexander Severus and was for some time Papinian's assessor when *Praefectus Praetorio* and a holder of various official posts turned out a greater number of juristic literature than any other jurisprudent. From Paulus' writings about 10,000 laws have been taken and included in the Institutes. He wrote a commentary on the Edict in 80 books, 16 books *Ad Sabinum*, 23 books of *Responsa*, 26 books of *Quaestiones*, commentaries on a number of *Leges* and *Senatus Consulta*, works on the duties of various officials, notes on Julian, Scaevola and Papinian; two collections of *Decreta*, and some elementary work. A voluminous writer, he seems to have shared with Africanus, but on a smaller scale, obscurity and awkwardness of diction. Jolowicz (ibid. p. 401) says that "Jhering regarded him as a doctrinaire, capable of denying the facts of life if they conflicted with his theory" and this statement agrees with the opinion expressed by G. Gro-

tius in *Vita Pauli* quoted by Pothier. But other writers have held him in high esteem and the same Jolowicz adds that "his reputation and his influence was immense. About a sixth of the Digest is taken from his works; the *Sententiae* enjoyed particular popularity and their inclusion in the *Lex Romana Visigothorum* meant that they became one of the chief sources from which the nations of the West drew their knowledge of Roman Law" (ibid. p. 402). He was exiled by Heliogabalus and later recalled by Alexander who made him one of his chief counsellors. With Papinian and Ulpian about whom we are going to write now, he was one of the most eminent lawyers of the time.

Ulpian, the next great lawyer of the splendid triumvirate, was a native of Syria, very fond of his country, believed to have been exiled by Heliogabalus and later recalled by Alexander who protected him from the hatred of the soldiers who disliked him because he advised the Emperor Alexander to deprive them of privileges that Emperor Heliogabalus had granted them. After several unsuccessful attempts on his life, Ulpian was murdered by the soldiers. He was an upright and a learned man. Pothier quotes Lampridius's opinion that "Alexander was a great emperor because he governed the republic according to the advice of Ulpian". Unfortunately, this learned and upright man was the bitter enemy of the Christians whom he distrusted and persecuted even as Marcus Aurelius, the Christian-minded Emperor-philosopher persecuted the Christians in good faith and the Athenian Amytus, one of the most generous and disinterested leaders of Athenian democracy persecuted Socrates. Ulpian turned out a voluminous literature almost equal to that of Paulus. His chief works are 83 books on the Edict, 51 books *Ad Sabinum*, 4 books *De Appellationibus*, 10 books *De Disputationibus*, 6 books *De Fideicommissis*, 10 books *De Omnibus Tribunalibus*, 2 books of *Responsa* and treatises on special offices. Ulpian's ambitious aim seems to have been to cover the legal ground so extensively as to make it possible to dispense with previous authorities. His style is clear and his treatment exhaustive which explains why the compilers of Justinian's Digest drew upon his work much more than on those of any other writer. About one third of the whole compilation consists of excerpts from his work.

Aelius Marcianus, a younger contemporary of Ulpian and Paulus, wrote his work during and after the time of Caracalla. It is possible from what he says in his work *Ne De Statu De-*

functu that he served as an assessor, or as a president, in some tribunal. Many fragments of his work have been preserved in the Pandects. He was the author of 16 books of *Institutiones* and 5 of *Regulae*. *Haerennius Modestinus* one of whose students in law was *Massiminus Junior* who later became an emperor, is believed to have flourished principally under Alexander, living till the time of Giordanus. He is the author of many works, some of them in Greek.

The few names of the *jurisconsulti* we have mentioned does not exhaust the whole list of distinguished lawyers though they are the most important of the series. For a complete and exhaustive list read Pothier's Preface to his edition of Justinian's Pandects where the whole series of *jurisconsulti*, 92 in all, is distributed according as they flourished (1) at the time of the free Republic, (2) at the time of Cicero and at the end of the Republic, (3) under Augustus (27 B.C.—14 A.D.) and the succeeding emperors till the reign of Hadrian (117-138 A.D.), (4) from the time of Hadrian to that of Giordanus.

The list of jurists presents a variety of competent and authoritative lawyers who, as I have already pointed out, did not always reach uniformity in their *Responsa* because till the time of Gaius the jurists belonged either to the school of *Labeo* or to the school of *Capito*, the former an innovator in law who never accepted authority blindly, the latter a traditionalist who would not budge an inch from the teachings of the ancient lawyers. According to Pomponius "*hi duo, primum veluti diversas sectas fecerunt: nam Ateius Capito in his quae ei tradita fuerant perseverabat, Labeo, ingenii qualitate et fiducia doctrinae, qui et caeteris operis sapientiae operam dederat, plurima innovare instituit*". The respective schools, however, took their names not from their originators but the school of *Labeo* from *Proculus*, one of his disciples, whence his followers were known as the *Proculeans* and also as *Pegasians* from the name of *Pegasus*, another of his disciples, whereas the followers of *Capito* were known as *Sabinians* and also as *Cassians* from *Massurius Sabinus* and *Cassius* respectively, two jurists belonging to that school of thought.

It seems that the *Proculeans* far from accepting the decisions and pronouncements of ancient authorities re-submitted them to a critical examination in which they not only studied the merit of the question again, but even tried to find out the original idea of the law from what they thought was the histori-

cal etymology of the words used. At that time when scientific philology was unknown, some of the Proculeans' absurd derivations make amusing reading. Thus they derived *furtum* from *furvus* (dark) because they argued "theft is perpetrated secretly and by night" or from *ferendo* (carrying away) from which they laid down the rule that there could not be theft of immovables, but of movables only, since immovables could not be removed secretly and hidden away. Again, deriving *possessio* from *pedem* or *sedis positione*, Labeo argues that "the same thing cannot be possessed by two persons, just as you cannot be in the place where I am now or sit in the place where I am sitting." Needless to say, that this Proculean etymology is absurd, because *fur* like Greek *for*, links up with Sanskrit *Chur*, to steal, whereas *possessio*, from *possidere* is made up of *pot* the root or *potis* and *sedeo* from *sedere* which links up with Sanskrit *sad*, to sit. This absurd etymology notwithstanding, the Proculeans, like most innovators, are believed to have been more progressive and subtle, whereas the Sabinians who disregarded etymology and distrusted innovation, thought that two persons could claim possession of the same things by two different titles, and that there could be theft not only of movables but also of tenements.

We have also seen in our short notes on individual jurists that while Labeo was a staunch republican, Capito was a supporter of the imperial regime. But there is no evidence that their followers retained their political disagreements, because while some followers of Labeo were imperialists, other followers of Capito were republicans.

From the evidence available, it seems that though one school has been described as progressive and the other as conservative the real difference between them was not so substantial as to justify the existence of two schools in opposition to each other. Indeed, as Buckland points out (A Manual of Private Roman Law, p. 17) : "it has never been determined what if any was the basic difference of principle which divided the schools. Many differences are recorded, for the conflict seems to have been continued till the middle of the 2nd century but they are not enlightening. Of the many views the most recent is that the Proculeans (*analogists*) sought to make the law more logical, while the Sabinians (*anomalists*) rested on authority". And further on, "these are known to have been such *stationes docendi* in Rome and it may be that these were two famous *stationes* found-

ed by Proculus and Sabinus and the differences of doctrine may not express any fundamental difference of opinion at all".

The important point to remark in expressing our debt to the Roman jurists is not their differences and conflicts of opinion but the fact that they contributed to the growth of Roman juristic literature, which consisted of (1) *Institutiones* or *Enchyridi* dealing with the Civil Law and the *Jus Honorarium*; (2) *Definitiones* or *Sententiae*, more loosely arranged than the *Institutiones*, to which they bear a strong resemblance; (3) Treatises on the *Jus Civile*; (4) Commentaries of the Edict; (5) the *Gesta* which were treatises on the law as a whole including also criminal law (*De Judiciis Publicis*); (6) *Responsa*, *Quaestiones* and *Disputationes*, the first being a collection of answers, given by the writer in the course of his practice while the others are the subject matter of discussions with his pupils; and finally (7) Commentaries on individual *leges* or *Senatus consulta*.

Such a considerable volume of juristic literature threatened to get out of hand and by this time we should have lost most of it; as we have lost many early classics, had not Justinian very providentially appointed a commission in February 528 A.D., that is, one year after his accession to the throne, in order to prepare a code of the imperial constitutions which, on promulgation, superseded the previous compilations of Gregorius, Hermogenianus and Theodosius. On December 15, 530 Justinian, of whom Gibbon has said "that his genius like that of Bacon, embraced as his own, all the business and knowledge of his age", began to choose law professors to compile a Digest of Pandects of Juristic Literature. Subsequently Justinian requested the three principal Digest Commissioners, that is, Tribonian himself, Theophilus, Professor of Law at Constantinople, and Dorotheus, Professor in the Law School at Beyrouth, to compile the famous Institutes which were promulgated on the 21st November 533 A.D. On November 16, 534, owing to the growth of more juristic literature, and promulgation, a new edition of the Code was issued. In the Proem we read that the institutes have been compiled "*ex omnibus antiquorum institutionibus, et praecipuo ex commentariis Gaii nostri, tam institutionum quam rerum cotidianarum aliisque multis commentariis*". They explain "*et quod antea obtinebat, et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est*". The instructions of the compilers were: "*quatenus libris quos veteres composuerunt, qu*

prima legum argumenta continebat, et institutiones vocabantur, separatim collectis, quidquid ex his utile et aptissimum et undique sit eliminatum, et rebus quae in praesenti aevo in usu vertuntur consentaneum invenitur, hoc et capere studeant et quatuor libris reponere". An ambitious work marking an unforgettable landmark in the history of Roman Law, especially if we consider that about two thousand books by various jurists had to be read and reduced by the Commissioners who accomplished their task in the record time of three years only.

Not without reason Justinian's work has been described as a salvage operation, which rescued the learning of Roman Jurists from the ruin and obscurity that time would otherwise have inflicted upon it. Those countries which, like Malta and Scotland, have laid the foundations of their Civil Laws on Justinian's Code owe a great debt to the eminent lawyers of Rome who, hundreds of years ago, prepared the way for the still more logical and liberal laws that Christianity and Canon Law in their turn gave to the civilised world in a more polished and humane form. They sought to be the servants of the law so that we might be the masters of our property and person.

WORDSWORTH AND LAWYERS:

A Lawyer art thou?—draw not nigh!
 Go carry to some fitter place
 The keenness of that practised eye,
 The hardness of that sallow face.

Psychiatric Approach To The Study And Treatment Of The Adult Offender

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

THIS paper deals with certain psychiatric principles underlying the problem of crime and its remedy, and tries to present tentative suggestions, in broad outline, as to how such principles may be applied in the treatment of the law breaker. It offers no fool-proof solution of the eradication of crime but it is hoped that it will induce others to explore in all seriousness the various channels that may lead to a better understanding of the psychology of the offender and to a more efficacious penal system.

A revaluation of present penal measures is bound to arouse resistance from persons who are reluctant to break away from traditional methods of punishment. The reason is perhaps to be found in the fact that the management of offenders appears at first sight to be a simple matter. Experience has shown us, however, that the subject is more complex than some people think. It is to be expected, therefore, that a certain amount of opposition will be met at any attempt at the introduction of new remedial measures for the rehabilitation of the offender. After all, resistance to new ideas is characteristic of the history of social progress, while it is the fate of those who venture to suggest new practices and procedures to be looked upon with some mistrust.

It is well to bear in mind that progress in criminology and penology has been slow. It is interesting to note that medieval ideas of justice and retribution persisted right into the early nineteenth century. In Malta the punishment of torture had only fallen in disuse at the beginning of the last century following the British occupation of Malta but its formal abolition did not take place until 1814 (1).

In 1807 Guzepp Camilleri was executed for murder and his head was afterwards severed from his body and exhibited for a long time on a stone pillar set up for the purpose on the road to Naxxar. In 1825 a certain Guzepp Grech was not only hanged but had his hand cut off from his corpse and exhibited in a

(1) Ganado, A. — "The Historical Development of the Criminal Code", in "Law Journal", Vol. II, No. 4, April 1949, pages 216-217.

niche on the Naxxar road. Incidentally it was later on found that he was innocent of the murder imputed to him. In the year 1828 five offenders, who were found guilty of being accomplices in a murder case, were sentenced to life imprisonment with a chain round their ankles after they were publicly whipped in the streets of Mosta (2).

Things were no better in England. Thus in 1831 a boy of thirteen years was hanged for theft (3). In all, one hundred and eighty crimes were followed by the death penalty in England up to one hundred years ago (4). I have given these few instances to show that any system of punishments reflects the ideas current at any particular time in a given social group. To-day, crimes, which in the past were severely punished, are dealt with more leniently, because ideas and methods that have proved inadequate or cruel have been discarded in favour of more useful and humane ones. The progress so far achieved, however, should not induce us to believe that present penal methods cannot be improved upon. On the contrary, we must bring ourselves to analyse and criticise them if we really wish to deal properly with anti-social behaviour. Consider for instance the following manner of dealing with young offenders at the present time.

During the financial year 1948-1949, four juveniles under 16 years of age were sent to prison for the following offences:—

- (1) Acting as unlicensed hawker. Fine of 5s. converted into 2 days detention.
- (2) Acting as unlicensed hawker. Fine of 7s. 6d. converted into 3 days detention.
- (3) Throwing stones. Fine of £2 converted into 2 days detention.
- (4) Committing theft. Eighteen months hard labour (5).

It seems incredible that, in the year 1950, a boy should be sent to prison for throwing stones and another two for acting as unlicensed hawkers. It would certainly have been more sensible to explain to the boy why the law requires that a hawker should

(2) Anon. — "Il-ġurijiet kapitali tal-mewt li saru f'Malta minn żmien l-Ingliżi", 1927.

(3) Watson, J.A.F. — "British Juvenile Courts", 1948.

(4) Pailthorpe, G.W. — "Studies in the psychology of delinquency", London, 1932, page 11.

(5) "Report on the Malta Prisons for the year 1948-49", G.P.O., Malta, 1950.

have a licence, and then to grant him a licence and make him pay the the fine imposed on him, if necessary even by instalments, out of his subsequent profits.

Occasionally boys under sixteen years of age are also sent to prison while awaiting trial. Two such cases were admitted to prison during the year 1948-1949.

Though this paper is concerned with the study and treatment of the adult offender, it may not be out of place to point out that in England persons under 21 years of age who are charged with an offence and are not released on bail are sent to a remand home where they do not come in contact with older persons who may be hardened in crime. Only under very exceptional circumstances they are sent to prison. As regards imprisonment of juveniles, English law lays down that no court can impose imprisonment on a person under 21 years of age unless the court is of opinion that no other method of dealing with him is appropriate. In order to determine the appropriateness or otherwise of any other method, the law requires that the Court should take into account any information about the circumstances of the case, and about the character and the physical and mental condition of the person charged (6).

There is need for a similar provision in our criminal code as statements about the mental make-up of prisoners amply show. Thus we read in the Prison Report for 1948-49 that "a large percentage of the juvenile offenders between 16 and 20 years, who form roughly 20% of the prison population, are of sub-normal intelligence and many of them have shown anti-social behaviour since their early years". And yet these individuals, in spite of their intellectual handicap, are submitted to the same penal methods that are applied to normal offenders, and are expected to derive an equal benefit from a prison sentence as the more intelligent prisoners.

Psychology and psychiatry, though both are still young sciences, have already given us a valuable insight into the motivation of human behaviour. This knowledge can be of great use to us if we are prepared to tackle the problem of the treatment of delinquency in an open-minded, unprejudiced way and if we are ready to approach it from the psychological and psychiatric angles—the only rational way of approach, since all penal pro-

(6) "Criminal Justice Act, 1948", Sec. 27 and Sec. 17.

cedures depend for their effect upon the psychological influence they exert on the mind of the offender. In other words there is more likelihood of success in the fight against crime, if, instead of asking ourselves: "What punishment shall we award?" we put that other question: "Why has this person behaved anti-socially and what kind of treatment does he need to make him behave in a socially approved way?"

As far as I know, no one has yet taken the trouble to study the Maltese delinquent. Contributions to the social history of the Maltese people are conspicuously few, and it is no wonder that we lack the material and the facts on which to base an efficient penal system. We know that 451 convicted men and women entered our prisons during 1948-49. But we will not know what will be their subsequent career when they leave prison at the expiration of their sentence. Have we any idea whether imprisonment will be for them a salutary experience? Why do so many of them relapse into crime? Does a delinquent specialise in a set type of crime or are his criminal tendencies non-specific? I would like to know also where I can find a follow-up study of first offenders, and of juvenile offenders who have passed through the Approved School in Malta. I pose these questions in order to show how ignorant we are about the facts of delinquency in these Islands and how impossible it is to assess fairly the value of current penal methods which we continue to rely on, day after day, in spite of our ignorance of the results obtained. It is obvious that the study of the offender is of fundamental importance. Such a study consists in a painstaking and detailed investigation of his life history. It is a biography which takes into account the psychological and social development of the individual and the influence of environmental factors upon him. This is the usual method of studying personalities among psychiatrists, but for those who are not familiar with these methods, I will give an outline of how such a study must be carried out.

The psychological investigation includes the individual's reactions from birth onwards. We will want to know when he passed such milestones as walking and talking, and gaining control over his excretory functions; whether as a boy he was subject to fits or temper tantrums; whether he is an only child, and, if not, what is his position among his siblings and what were his attitudes towards each new addition to the family—was he jealous of his brothers and sisters, or cruel to them, or did he adapt

himself to the new familial situation easily and without difficulties? Was he a liar, a bully, a thief, or a management problem?

The attitude of his parents towards him as an infant and as a child is also to be looked for. Infants and children are very sensitive to the emotional nuances of those around them, and their future behaviour will vary according to the nature of their early personal environment. Therefore we want to know whether his birth was a welcome addition to the family or whether he was an unwanted child; whether he was surrounded with enough love and care as an infant and as a child; and whether he sensed his early environment to be indifferent or hostile to him; whether he was compared favourably or not with his siblings; or whether emphasis was laid by his parents and other grown-ups on some undesirable characteristics which he may have had (such as a squint, an uncouth figure, speech defect, etc.) and which may have implanted in him the unpleasant feeling of being different from others.

Then we wish to discover the kind of family he comes from. This leads us to a study of his early home environment—was it a happy home or a broken one? Was there constant friction between the parents or scenes of aggression between them? What is the social standing and financial position of his parents, and what influence, if any, have these factors had upon the formation of his character?

Having considered the individual and his family environment in his early years of life, we pass on to obtain data about his reactions to his ever widening social horizon as he grows up. When did he start going to school, how long did he stay there, how did he behave, and did he profit from schooling? Reports of teachers about this phase of life constitute an essential part of the investigation. What were his hobbies, did he show any special aptitudes as a school-boy, what were his ambitions, was he a lonely boy or a good mixer? Was he a bully, a leader or one who was easily led? What kind of friends did he make?

His work record will next engage our attention. We want to know the nature of his work, whether he likes it or whether he feels he could do better in another job; whether he sticks to one job or else keeps flitting from one kind of work to another without reasonable cause. Is his relationship with his work mates and his employers satisfactory, and, if not, why? What are his earnings? Are they sufficient to meet the needs of his

family?

After work comes leisure. What are his pastimes, is he fond of drink or addicted to gambling?

By the time we have reached this stage of our enquiry we are in a position to assess not only his emotional make-up but also the grade of intelligence of our examinee. Sometimes, however, we will need a more exact estimate of his intellectual endowment than such a history can provide, and to obtain this we resort to the various kinds of intelligence testing.

If the examinee has fallen foul of the law on previous occasions we must ascertain the nature, the circumstances and the gravity of his offences.

His family history (a short biography of his parents and siblings) is also important as it may show evidence of emotional instability, social inadequacy, or anti-social patterns of behaviour.

The offender's sexual life is also dealt with in detail, especially in the case of sexual crimes.

Finally we study the offence against the personal background thus obtained.

Having decided that it is necessary to investigate the personality of the offender on the lines outlined above, the next step is to determine the time when such an investigation may be carried out most profitably. At present there are no facilities for the study of the personality of the delinquent. The utmost we can do is to obtain the life history of the offender after he has been sentenced and sent to prison. Such a measure is unsatisfactory because the offender's complete cooperation is difficult to gain under prison conditions. It is a fundamental requirement of all psychiatric work that we must secure the confidence of the examinee, inspire in him a feeling of goodwill towards us, and give him the impression that we are genuinely interested in his welfare, in order to overcome his indifference or mistrust in us. Once, however, an offender has been committed to prison, the psychiatrist becomes, in the prisoner's view, just a prison official, and is therefore, regarded with mistrust and suspicion. He is looked upon as a sort of spy to whom one must not confide his innermost thoughts and feelings. Apart from all this, even if we were to succeed in obtaining the full confidence of the prisoner, we can give him little help to overcome his antisocial tendencies once his fate has already been decided upon and he has been convicted to prison. Such a procedure would be tantamount

to first treating a patient and then diagnosing his ailment — a procedure which is as futile as it is illogical.

It has been suggested that the best time to study the offender's personality is after the establishment of his guilt but before the pronouncement of the sentence (7). Thus the psychiatrist will not only be in a position to form a truthful picture of the offender's personality, but will be able to recommend to the court the best corrective treatment for that particular offender. Prof. D.K. Henderson, who holds the Chair of Psychiatry at Edinburgh University, approves of the division of the trial into a guilt finding phase and a treatment phase. For the latter purpose it has been proposed that the judge should consult persons who have had practical experience of sociological, educational and psychological problems (8). It is of great interest to learn that this proposal has been seriously considered by legal men in America. In fact the Federal Judges of the U.S.A. are at present working out a plan by which there will be a substantial pause after the verdict of guilty so that advice may be obtained from so called "Treatment Boards", composed of experts in delinquency, before they pass sentence on serious offenders (9). If such a procedure is followed, then the court will be in a position to deliver that sentence which would be appropriate not only to the nature of the offence but also to the character of the offender — a view that has gained acceptance among psychiatrists and penologists, and that should form the basis of a rational penal system.

Psychiatrists have, since many years, stressed the wide variations of the normal personality, and, as a consequence, have recognised the fact that one person's needs may be quite different from another person's requirements. As long ago as 1910, Havelock Ellis advocated the application of this view to the management of offenders when he wrote "that our treatment of offenders must be as far as possible individualised and directed not so much towards the crime as towards the criminal" (10). Ellis's idea found an echo in the words of the Rt. Hon. Viscount

(7) Hon. Viscount Samuel — "Is the criminal to blame or society?" 1938.

(8) Radzinowicks, L. and J.W.C. Turner — "Mental Abnormality and Crime", 1944, pages 120-121.

(9) "The Listener", 26th February, 1948, page 353.

(10) Ellis, H. — "The Criminal", 1910, pages x-xi.

Samuel, pronounced twenty-eight years later: "The lesson that society should have learnt very early—but it has proved to be one of the latest—is that individuals differ, and that we ought not to treat them alike under a standard tariff of punishments apportioned merely to the character of the crime... We realise now that we must study the offender first before deciding how to deal with him. Not every patient needs a dose from the same bottle" (11).

It is gratifying to know that these ideas are upheld by the Professor of Criminal Law of our University (12). Unfortunately, however, they have had no influence so far on our penal system. The latest report to be drawn on the treatment of Maltese offenders was submitted to Government by Mr. A. Patterson in 1944 (13). While admitting that a prison sentence should aim at the training of a man's character, Mr. Patterson made no recommendations for the individual study and treatment of offenders. With us a retaliatory attitude towards the criminal still prevails. Generally speaking, the nature of the offence determines the form and duration of the punishment awarded. Imprisonment with or without hard labour, fines and detention are the remedies we apply for the reform of the criminal. Mr. Patterson has suggested the adoption of the probation system, but, here again, he proposes this form of treatment for first offenders irrespective of the personality and the psychological requirements in each particular case.

While individual study and management is necessary in all types of delinquents, it becomes a "sine qua non" in the case of sexual offenders and of recidivists.

The sexual offender is not always a depraved man. As regards the homosexual, we must bear in mind that he may be the victim of biological and psychological variations for which we cannot logically hold him responsible. The suffering which some of them go through because of their abnormality can be intense and quite a number of them are anxious to get rid of their anomaly. Sometimes they even resort to castration in order to free themselves from their sexual impulses. It is true that some of

(11) Hon. Viscount Samuel — op. cit., page 22.

(12) Mamo, A.J. — "Some Thoughts on Crime Treatment and Prevention", 1949.

(13) Patterson, A. — "Report on the treatment of the offender in the Maltese Islands", G.P.O., Malta, 1944.

them become callous and show no concern for the harm caused to others; but this indifference may well be a reaction to the attitude of the community towards their sexual and psychological make-up. We must remember that sex is one of the most difficult instincts to control, and that while the heterosexual person has various outlets for his sexual urges that are not punishable by law, the homosexual is denied similar outlets by legal measures and social conventions. What the male homosexual resents, too, is the fact that the law ignores female homosexuality, so that it is no offence for two women to indulge in homosexual practices together in private.

Sexual offences committed by men of late middle age and by seniles, also need psychiatric investigation. It may be that a number of these offenders may have been indulging in the same conduct for years before they are brought to court, but some of them may be men with a decent past history, who owing to climacteric or senile changes, succumb to sexual stimuli that previously had no effect on them.

As long ago as the beginning of this century, Krafft-Ebing recognised the inefficiency of punishment for the sexual offenders under consideration. He stated that punishment "does not deter from crime and has no corrective influence, for pathological manifestations are not removed by penal remedies" (14); while Mannheim is of opinion that punishment "is likely to make the offender profoundly anti-social and to produce the mentality of an outlaw" (15).

Out of 451 offenders admitted to prison during 1948-49, 303 (i.e. two-thirds of prisoners) were recidivists, 95 of them being convicted twice, while the remaining 208 were convicted three times or more (16). It is probable that many of these recidivists are persons on the border line between mental normality and abnormality, while a certain number of them may well be definitely mentally abnormal. The problem of the recidivists is a critical one, but as data are lacking on this point no dogmatic statements can be made. Only a thorough investigation based upon the personal history of offenders, as outlined at the beginning of this paper, can throw light on this problem. This much,

(14) Krafft-Ebing, R. — "Psychopathia Sexualis", 1906.

(15) Mannheim, H. — "Criminal Justice and Social Reconstruction", London, 1946.

(16) "Report on the Malta Prisons for the year 1948-49", Malta, 1950.

however, is known — that chronic alcoholics are the most frequent relapsers while psychopaths also contribute to swell the ranks.

Alcoholism has long been regarded as a vice in legal quarters, but the roots of alcoholism lie buried in other than ethical spheres of the personality. It is not proposed here to go into the various causes of alcoholism as such an inquiry will lead us away from the subject of this paper into the realm of psychopathology. It is enough to state that alcoholism is the expression of an abnormal personality that cannot face the common problems of life, or the reaction of a normal personality to an abnormal environment. In each case alcoholism is a form of temporary escape from a feeling of personal inadequacy or from unpleasant circumstances. Such being the case mere imprisonment will not cure the alcoholic of his addiction. Indeed some alcoholics have been in prison more than a dozen times during a year (17). Alcoholism is a sign that the personality has failed in its adjustment to emotional or social requirements, but where and why the personality has failed can only be revealed by a study of its affective and intellectual development, and of its environment. I do not wish to imply that from the medical angle, alcoholism is easy to cure. On the contrary the solution of this problem still baffles us, but we clearly realise to-day that punishment is no deterrent for the alcoholic and that repeated short spells of imprisonment are futile.

That other recidivist — the psychopath — resembles the chronic alcoholic in that he is also immune to current penological measures. But since he is more difficult of detection than the alcoholic, he deserves to be considered in some detail.

Psychopaths are individuals who are unable to build up a social and personal conscience because they lack those innate qualities that are essential for the formation of a healthy conscience and for the experiencing of normal feelings of guilt. These individuals are not numerous but their disruptive influence on society is out of proportion to their numerical strength. They constitute a big problem for the penologist and the psychiatrist. To the credit of the latter it must be stated that this type of difficult personality was recognised and described as long as one hundred

(17) "Report on the Malta Prisons for the year 1947-48", G.P.O., Malta 1949.

years ago. This type of person was then labelled "moral deficient" and continued to be so called up to quite recent times, when the term "psychopathic personality or state" was substituted, after it was discovered that this kind of personality showed defects in its structure other than in the moral sphere. Thus besides an absence of ethical standards the psychopath also shows emotional immaturity which is manifested in his lack of judgment about the ordinary circumstances of life, in his tendency to act on the spur of the moment, regardless of the consequences, in his inability to fit himself into the economic structure of society, in his rebellious attitude towards authority, in his ideas of self-importance, and in his failure to accept the indifference of the world to his personal fate—a failure that sometimes drives him to suicide.

Psychopaths show these emotional disturbances and anti-social trends from an early age, and, therefore, a number of them come in conflict with the law early on in life. They form a large part of the so called "social problem group" which includes drunkards, sexual offenders, and tricksters. Although the psychopath is a pathological individual, the public and many legal men have not yet been able to recognise this type of person among offenders, except in cases where his behaviour is grossly impaired or his crime is of such enormity as to leave little doubt in the layman's mind that the accused is mentally ill. Very few of these offenders show evidence of mental disorder as the layman understands this malady, with the consequence that many of them pass as normal but wicked individuals who must have their wickedness thrashed out of them by a prison sentence. Yet a detailed investigation of these cases will convince us that what they require is not mere imprisonment but intelligent care. Some psychopaths are referred by the Criminal Courts to the mental hospital and thus they are removed from harm's way while being given a chance of receiving adequate treatment. Unfortunately, however, a number of psychopaths who are brought before the courts for minor offences and non-capital crimes do not come within the purview of the psychiatrist with the consequence that they are sent to prison, wherefrom they are released after a shorter or longer period and thus become free to commit fresh offences against society.

Here is a short account of the life-history of a psychopath, who was finally referred by one of our Courts to the mental hos-

pital because of his abnormal personality make-up.

Mr. X. Y. is 23 years old. He was born normally and at term, started to walk and talk at the usual times and has never been seriously ill. His father was addicted to drink and died during the war on active service in the Navy. His mother is alive and well. There are five brothers living; another three died in infancy. His family history, apart from the father's alcoholic addictions, shows no evidence of mental disorder.

His conduct at school was unsatisfactory. He played truant and for this reason he was never able to derive any profit from schooling. He was so unruly and short-tempered that his teacher had asked to have him removed from her class. On one occasion he threatened to assault the teacher because she had tried to take away a penknife from him. He always used vulgar and obscene language and stole small sums of money from home. At thirteen years of age he was admitted to the Approved School as a "potential criminal", but was discharged on conditional release some months later when the Approved School had to close down at the outbreak of war. He was readmitted to this school when it reopened in 1941. Here he was arrogant, aggressive and over-excitable. He succeeded in escaping from the school and, on his recapture, he promised to alter his ways. Actually, however, his conduct underwent no change and he remained a problem to the school authorities. When he was eventually discharged from the Approved School at the age of eighteen he started drinking heavily to such an extent that he was unable to take care of himself while under the influence of drink. At home he was morose, reticent and lost his temper on the slightest provocation. He neglected his religious duties. Whenever his relatives tried to persuade him to change his ways he refused to listen to their advice.

During the short period of two-and-a-half years that he spent in the Army, he was court marshalled twice because in each instance he had disobeyed orders and had aggressed his sergeant. The first time he attempted to shoot at his sergeant but having failed to load his rifle in time, he threw the bayonet at him instead; on the second occasion he again tried to aim at the sergeant but the trigger of his rifle got locked. He never showed any signs of guilt for these attempts; on the other hand, he only expressed regret that he had failed to hit his target twice.

He never contributed any money for the home. He did not even care to find a job and his mother did not dare to insist on

his doing so as she was afraid that he might be tempted to rob his employer. In fact he did commit thefts on several occasions and each time he was sent to prison. Here he was reluctant to occupy himself and often tried to shirk work by complaining that he was not feeling well. He flew into a rage easily, and sometimes was sulky and fault finding.

He finally came under psychiatric observation and was subsequently admitted to the mental hospital.

This short biographical sketch shows very clearly some of the characteristic features of the psychopathic state — such as anti-social behaviour since an early age, aggressiveness on the least provocation, emotional instability leading to impulsive acts, lack of appreciation of the consequences of his acts, absence of feeling of guilt for errors committed, defective moral sense and an excessive indulgence in alcoholic drinks. Owing to this personality disorder psychopaths are incapable of profiting from past experiences, and punishment has no beneficial effect upon them. On the contrary they do not fail to be deterred by punishment, but owing to the absence of guilt feelings they are unable to see that they deserve any punishment at all with the result that a prison sentence merely serves to enhance their rebelliousness and aggression against society. Besides, their temperamental make-up renders them unsuitable to ordinary prison discipline and consequently they become a source of trouble to the prison staff, and sometimes so unmanageable that they have to be removed to the mental hospital.

For the psychopath, therefore, imprisonment and punishment are not efficient remedies. On the other hand, as in the case of the alcoholic, we are unable, in the present state of our knowledge, to prescribe any specific medical treatment that will cure him of his abnormality. The best principle we can follow is to guard society from such offenders while at the same time protect the offenders themselves against their own character anomalies. This can be done by (I) a timely diagnosis of the psychopathic personality. In this, the first screening worker cannot be the psychiatrist but the lawyer and the judge. Hence the necessity for legal men to possess enough psychiatric knowledge as will enable them to recognise the psychopath when they come across him; and (II) providing custodial care, not in a prison, but in an appropriate institution which is administered on psychiatric lines, more or less on the pattern of a mental hospital.

It is very difficult to determine at the outset the duration of custodial treatment required in the case of psychopaths and chronic alcoholics. For this reason it has been suggested that an indeterminate sentence of preventive detention should be passed by the court with powers to release the offender at any time when it is felt that this can be safely done (18). Such a scheme will replace the present usage of submitting psychopaths and chronic alcoholics to repeated spells of imprisonment which have no deterrent effect on the offender and do not protect society in an adequate way.

Detention for an indefinite time was adopted by Denmark in 1933 when "special places of detention" were brought into use for certain types of offenders. Such a place is the Psychopathic Institution at Herstedvester, which receives offenders (the majority of whom are relapsers) who have committed such crimes as murder, rape, corruption of minors, theft, forgery, etc. The nature and function of this Psychopathic Institution are best described in the words of Dr. G. K. Sturup, its medical superintendent (19):—

"The Herstedvester Institution is neither a hospital nor a prison. I believe it may well claim to be something quite different from either of these two things, a unique social-psychiatric institution which because it is unique, must apply a special form of treatment if it has to solve the problems it is tackling. The problem is twofold: first, the preventive detention to protect society from the threat to public security to which it would be exposed if the inmates of the institution were at large; second, within these limits, to let the patients undergo a treatment specially adapted to their psychological needs so that they may be able to fit themselves for their return to normal life as free citizens... Detention is not a punishment but a security measure... The same court which has passed sentence decides whether the detainee may be released. Release is always subject to parole and the period of parole is likewise not defined. During the parole, the paroled is subject to supervision directly from the institution. This supervision is carried out by officers specially trained by the

(18) "British Medical Association Reports on Mental Deficiency" in "British Medical Journal", 17th May, 1947, page 101.

(19) Sturup, G.K. — "Treatment of Psychopathic Criminals in Denmark" in "Danish Psychiatry", Copenhagen, 1948.

institution... Final release is likewise only obtained through the same court which ordered detention and parole. For this reason there must, of course, be an intimate cooperation between the court and the psychiatrist who is responsible for the treatment given during the detention... The institution is under the leadership of a senior psychiatrist together with three assistant psychiatrists and two nurses. A teacher takes care of the detainees' education, spare time activities and the library. The welfare work is in the hands of a trained sociologist who has three assistants. The supervision staff consists of warders with a special mental hospital training. We have one member of the staff for every two detainees... In the treatment from day to day we attach great importance to inculcate in the detainee the feeling that he himself is responsible for his future, that it is useless for him to think that others will carry his burden for him but that others, i.e. the doctor, can help him to carry his burden so that it will be less troublesome for him, as it otherwise would be. His chances of making a good career depend largely on his power to accustom himself to regular work, and especially of his rational use of his leisure time. There is an opportunity for working in gardening, printing, book-binding, joinery, toy-making, tailoring and all sorts of building repairs. The daily work is eight hours in one of the workshops, and the detainees are paid for their work, and if possible, they have piece-work... It is important to find the sort of work for which the detainee is best suited, and which he can grasp and completely master; and his leisure, occupation, his work in the class-room and his practical work in the workshop all aim at this... We largely leave the psychotherapy to the patient himself. This implies, among other things, that we exploit moments of particularly strong emotion and situations where passions are aroused to explain to the detainee his reactions in such situations, and to draw analogies with previous, especially criminal, situations in which he has found himself. It may be some sort of a matter of discipline, a complaint about life in the institution, a bitter attack against the system, a fight or a refusal to work, etc. We call him in to bring him to his senses and to discuss the trouble, and from our intimate knowledge of the man's past history we are often able to point out the factors which brought him to react in the way mentioned... Sometimes they reconcile themselves fairly quickly, sometimes it takes one or two days or more, but sooner or later

they come, as a rule, to thank us for our advice and often tell us that in the meantime they have thought the matter over, and they agree that in fact it was rather in the way we had described that things also turned out on other occasions. The time will come when the discussion can be continued, and so we are sometimes able to explain to him how, in the world outside, he had landed himself in criminal activities through such distortion of realities. In other cases, involving fights and so on, there will, as a rule, be a useful opportunity of showing him how, in most cases, it is possible to keep his violence under control until a more appropriate occasion for exercising it crops up, so that it will not be at the sacrifice of other people... Detainees who have proved themselves diligent and behaved themselves well throughout the year can get permission to go out for eight hours once a month. He is accompanied by one of the institution's welfare-officers, and may meet his relatives, visit museums, cinemas, go shopping and keep himself in touch with his private affairs... As regards the general results of treatment it may be said that more than 50% of the detainees go back to normal life in the community."

I have quoted extracts at some length from Dr. Sturup's account of the Herstedvester Institution to show how a very progressive country is dealing with some aspects of the problem of delinquency, and to demonstrate how the psychiatric principles outlined in this paper may be put into practice with gratifying results. In Malta, forensic psychiatry is still exclusively concerned with the criminal responsibility of accused persons. We hope that the time will come when the forensic psychiatrist will be consulted as to the disposal of the offender and entrusted with his treatment. Admittedly, the psychiatric management of offenders is still in the experimental stage, but what to-day seems baffling is bound to become clearer as further experience is gained, and when the motivating forces at play in the production of anti-social behaviour are recognised in their true perspective by both the medical and the legal professions.

The Historical Development of the Criminal Code (3)

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

AFTER the departure of Mr. John Kirkpatrick, the three remaining Commissioners undertook the completion of the Commission's work. The revision of the Code of Criminal Law was taken in hand. The initial stages of revision were marked by Stoddart's change of attitude towards Dr. Bonnici and Dr. Bonavita, and an atmosphere of calm and politeness prevailed. This gave the Maltese Commissioners to understand that Stoddart's previous objectionable conduct had been provoked by personal spite against Kirkpatrick, due perhaps to the preference the Government had given to the latter's suggestions, or to the peremptory and energetic manner with which Kirkpatrick had opposed him during the sittings of the Commission (1). Later events were to show that Stoddart's conciliatory attitude was ephemeral.

Ponsonby, the Lieutenant Governor, was anxious to forward to England the draft Criminal Code as soon as possible. By a letter of the 12th April, 1832, the Commissioners were informed accordingly, and the hope was expressed that the whole of the Code would be ready for transmission to the Secretary of State by the month of July. It was further stated that if any part of the project was in a fit state to be printed, the sooner such part was sent to the Governor the better. The Commissioners assured the Governor that they would proceed to the completion of the Code with all diligence and with as much speed as was consistent with the delicacy and importance of the duty committed to their charge. Moreover they expressed their opinion that it would be useless to print any of the revised portions of the work, as it often became necessary in the progress of their labours to revert to the earlier parts of the Code for the purpose of correction so as to preserve the symmetry and requisite connection of the whole (2).

During this period, Stoddart limited himself to asking for

(1) V. Bonavita—"Storia del Codice Criminale", loc. cit.—fol. 9 tergo.

(2) V. Despatch no. 28 and letter annexed thereto—18th April 1832—Lieutenant Governor to the Secretary of State.

the substitution of certain Italian terms in order to render easier their translation into English when the Commission should start the translation of the draft. In order to avoid the repetition of previous incidents, the Maltese Commissioners used to give way with little opposition whenever no substantial changes were involved (3).

On the suggestion of the Secretary of State for the Colonies, the composition of the Commission was changed on the 17th August, 1832 (4) by the addition of Mr. Robert Langslow as one of the Commissioners. By Letters Patent constituting his office, Langslow had previously been appointed His Majesty's Attorney General in and for the Island of Malta and its Dependencies (5).

The draft of the Criminal Code had been drawn up by the Commissioners in the Italian Language, as, at the time, Italian was the official language of and the medium used in the Law Courts. Langslow did not know a word of Italian, and in consequence he found himself quite unable to follow the work being done. Thus he accepted Bonavita's offer to give him the necessary elucidations. When Bonavita translated to him what had been done, and explained the principles upon which the Code was based, Langslow praised the brevity and the precision of the provisions of the Code which had been modelled on the provisions of continental codes. He also drew the contrast between them and the excessively verbose style of the English laws, full of useless and harmful specifications. He observed that the Code, though concise, was quite complete and embraced the whole subject matter. Moreover, he spoke favourably of certain notions and principles in the draft Code which differed from English law (6).

Revision was proceeded with. But fresh trouble arose, with Langslow taking Stoddart's part against the Maltese Commissioners. It was only after the greatest difficulty, waste of time

(3) V. Bonavita—op. cit.—fol. 10.

(4) V. Malta Government Gazette—22nd August 1832.

(5) Mr. Langslow came to Malta to take up his duties on the 14th June 1832. His appointment was made known by a Government notice of the 5th July 1832. On the 4th March 1834, he was appointed Advocate of the Admiralty in the Vice-Admiralty Court of Malta. On the recommendations of Mr. Austin and Mr. Cornwall Lewis, the Royal Commissioners of 1836, he was removed from office when the post of Attorney General was abolished by Ordinance I of 1839.

(6) V. Bonavita—op. cit.—fol. 9 t. and 10.

and no little irritation that the revision of the Code was at last carried to completion. Only a final general reading of the draft was required before the Commission could pass on to the drafting of the Code of Criminal Procedure.

When the Commission was requested to send the draft to the Government, with a literal translation of the same, Stoddart and Langslow pretended that the translation which had been made by Mr. Henry Fletcher (7) would not be understood in English, and they undertook to make it themselves. The most unpleasant scenes to date took place on this occasion within the Commission. Stoddart openly disavowed having anything to do with the Italian draft, and declared that nothing would induce him to put his name to it. Bonavita pointed out to him that, not only in the substance, but also in the Italian wording of the Code, he (Stoddart) had had as much part as the other Commissioners, so much so that there were Italian terms which had been altered for the worse at Stoddart's suggestion, and to which Dr. Bonnici and himself had only agreed in order to avoid interminable discussions.

(7) Mr. Fletcher was appointed on the 18th November 1831, one of the Secretaries of the Commission for the formation of new Codes of Law for the Island of Malta. The other Secretary appointed was Mr. Vincenzo Mamo.

On the 15th June 1814, Maitland suppressed the post of Pro-Secretary to Government and appointed instead three "Assistants in the office of the Chief Secretary to Government". Mr. Fletcher was appointed "First Assistant"; Mr. Mamo "Second Assistant". On the 6th July 1814, both were also appointed Joint Registrars of the Supreme Council of Justice. Mr. Fletcher was appointed Secretary in matters of Bankruptcy on the 1st December 1828, and Assistant Crown Advocate in 1839. Mr. Fletcher died in Malta in 1848. He was also acting Commissioner for taking evidence, and Chancellor of the Danish Consulate in Malta. Vin. Mamo, as Registrar of the Supreme Council of Justice was, on the 1st November 1821, appointed an ex-officio Registrar of the Court for the trial of Piratical Offences. On the 11th March, 1822, he was appointed Taxer of costs in matters of Bankruptcy, and on the 11th April 1825, a Member of a board to revise the regulations in regard to public brokers. On the 15th March 1855, he was appointed Collector of Land Revenue, and on the 1st November 1855, Cashier of the Treasury; in virtue of these offices he became an official member of the Council of Government. He was also acting First Assistant in the Office of the Chief Secretary, Acting Superintendent of the Post Office, and, on several occasions, Acting Clerk of the Council of Government. After he had been in the public service for over 56 years, Mr. Mamo asked to retire in 1858, on account of failing health.

The sitting was adjourned, and the Commission started working upon the translation. But Bonnici and Bonavita immediately perceived that the most material changes were being proposed and insisted upon by Stoddart and Langslow who seemed to have the intention of creating a new original code. Moreover, as they thought it absurd to be obliged to have to discuss all over again what had been the result of the first compilation and its revision, they declared that they could not be of any assistance in a translation such as the one being made, and they proposed absenting themselves from the Commission till such translation was finished.

Finally, it was agreed that changes meant to be made by the translators should be communicated to Bonnici and Bonavita in the shape of proposals, to which the latter were to give an affirmative or negative answer, without any further discussion. Such proposals were drawn up and transmitted to the two Maltese Commissioners, but the latter could not approve of the mania the other two Commissioners had for definitions and for the most minute style of specification, peculiar to English Law and Jurisprudence. Moreover, the great contempt the English Commissioners had for the Neapolitan Code, and their wish of drafting a code, original both in the plan and in the enactments, became even more evident (8).

In March, 1833, Bonavita submitted to Ponsonby a report on the workings of the Commission. He prefaced that the members of the Commission were not in agreement on the spirit, the general plan, and the fundamental principles of the work in which they were engaged. This could only lead to the formation of a heterogenous body of laws, to the great disadvantage of the people of Malta.

Bonavita then expressed his general view on the matter in dispute. He recalled that the Commission, in adherence to the despatch by which it was constituted, had to compile a Code of Laws upon the principles and rules of the most approved modern codes. These codes were all founded upon the spirit, plan and principles of the French Code, which in its turn was based on

(8) V. Bonavita—"Carte Relative al Codice Criminale del 1854"—Vol. 1—Enclosure L—Letter of the 28th June 1833, sent by Dr. I.G. Bonavita to Mr. John Kirkpatrick, who at the time was in London.

Roman Law and Jurisprudence. Even the terminology adopted by the modern codes was Roman, and thus many definitions of words and many general ideas were omitted, as their common import had already been established by the Roman system of Jurisprudence. Consequently, the Commission should not indulge in the long and useless labour of defining every term used in the Code. Nor would it be proper to draft the provisions with that minuteness of detail and express distinction of every variety of circumstance to be found in English Statutes.

For instance, Bonavita continued, some of the Commissioners (obviously meaning the English Commissioners) suggested that it should be enacted that "the opening of a letter, or paper closed and secured with a seal, whether by cutting, or tearing the paper, whether by melting or softening the wax, or wafer, or in any other similar manner, shall be comprehended under the term breaking". Instead of all this detail, the Neapolitan Code simply said "rottura di suggelli", and the French Code "bris de sullet". It then rested with the tribunals, under the French and Neapolitan systems, to decide whether the fact constituted breaking or not, according to the known rules of interpretation.

Moreover, the modern codes were not in any manner founded upon the same principles as the English Law, and the despatch of Lord Goderich did not countenance the introduction of these principles into Malta. This notwithstanding, some of the Commissioners had too much recourse to texts of English Jurisprudence, and even proposed to change the denominations of certain crimes in order to bring them in line with English Law. This would produce a mixture of two opposed systems of jurisprudence; it would create a code of no symmetry or utility; it would constitute a retrograde step for Malta in contrast to the ameliorations being introduced in other civilized countries.

The great danger of recurring to the English Law in the formation of the Maltese Codes (especially the Civil Code), and the indescribable confusion that must follow any attempt to introduce it into Malta, required no demonstration. The Civil Law of Malta had no similarity with English Law, and it was on this branch of Jurisprudence that the security of property was based. On the other hand, the Criminal, Civil and Commercial Codes on the Continent contained principles in perfect harmony with our own.

Consequently, the draft drawn up by the Commission should be founded upon the principles and rules of the best codes of the Continent of Europe, and not upon those of English Law.

The writer then put forward some practical suggestions for the successful completion of the various Codes of Law. Firstly, the Commissioners should examine one by one the articles of the modern codes taken as a model, in order to see how far each article might be applicable to the local circumstances. Secondly, the adoption or rejection of any article should not be decided upon in view of its concordance or otherwise with English Law. Thirdly, alteration of the terminology of the model code should be resorted to only in cases of strict necessity. Lastly, as much of the existing Law of Malta as was compatible with the principles of the new code should be inserted in the draft.

He acknowledged that by following these rules the Commission would not be able to lay claim to any originality. But, what was more important, Malta would have made an advancement in Jurisprudence by possessing Codes of Law well adapted to local circumstances, and possibly better than any Code of Law yet promulgated.

In conclusion, Bonavita stated that he was making these suggestions in the persuasion that the modern codes of the Continent were entitled to great admiration. They were works entailing much labour and talent, and they constituted the only groundwork upon which a beneficial amelioration of the Jurisprudence of Malta could be effected. Whether his opinion was correct or not, it was essential that the Commissioners should act upon an unanimous understanding on such vital a point (9).

Before Ponsonby could take any action, a new question was one day sprung upon the Maltese Commissioners. Stoddart with much calm and apparent ingenuity asked whether, on the promulgation of the Codes, the original text was to be Italian or English. The Maltese Commissioners very naturally were taken aback at this strange and untimely question. They did not

(9) V. op. cit.—Vol. 1.—Enclosures M. & N. Also Ms. 1042 Malta Public Library. Dr. Bonavita first submitted to Ponsonby a report on the work of the Commission in the Italian language. At the latter's request Bonavita made a summary in English of this report and sent it to Ponsonby on the 28th March 1833. Enclosure M above mentioned is a copy of the report in Italian. Enclosure N and the copy to be found in the Public Library are in English.

hide their surprise from Stoddart and pointed out to him that all that had been done up till then by the Commissioners had been couched in Italian; that no other than the draft in the Italian language had been drawn up; that all the discussions had been based on the meaning which the expressions used received in their Italian form; that, in any case, if the original text had to be the English one, the point should have been made clear at the outset, and not at the termination of the work.

Reaction was met with reaction, and the Lieutenant Governor had to be informed of the deadlock. As is quite natural, both Ponsonby and Sir Frederick Hankey, the Chief Secretary, at first instinctively felt inclined towards the English text. Still, Ponsonby was always open to conviction, and after a conversation with Bonavita he acknowledged the importance of the matter in dispute and the weight of Bonavita's arguments. He thought that the subject merited mature consideration, and thus he directed the four Commissioners to reduce their reasons to writing, in order that the Colonial Secretary to whom he intended to refer the question, might give the decision of His Majesty's Government (10).

All four Commissioners sent their respective views on the dispute. Bonnici agreed with Bonavita that the original text should be Italian. Stoddart and Langslow were in favour of the English original. Meanwhile, the sittings of the Commission were suspended.

In Malta, as far as I have been able to ascertain, only the report submitted by Bonavita exists. This is the report which has the greatest importance as it formed the basis of the decision of the Colonial Secretary.

In the opening part of his memorandum, Bonavita observed that, in examining the point at issue, it was scarcely necessary to observe that in so delicate a task as that of framing a Code of Laws, the utmost vigilance should be observed in order to prevent any expression therein being perverted or otherwise construed into a meaning different from that which was intended. As little room as possible should be left for future discussions on the interpretation of the provisions of the Code, in the interest of the administration of justice. In view of these principles, he

(10) V. Bonavita—"Storia del Codice Criminale"—loc. cit.—Fols. 10 t. and 11.

conscientiously could not but hold that no language could be so well adapted for the legal text of the new codes as the Italian language.

Then he passed on to discuss in detail the arguments in favour of his proposition. The first reason why the text should be Italian was the positive fact that the draft Criminal Code had been drawn up, and the proceedings and deliberations of the Commission had been conducted exclusively in that language. The English translation should not be the original text of the law as it was universally admitted that translations in general lose much of the spirit of the original, and, owing to the difficulty of finding exactly equivalent terms, they sometimes fell short, and at other times went further, than the original would warrant. This must be the case were the Code to be translated into English; great inconvenience and serious embarrassment of justice would be the result. The difficulties involved could not be overcome by the use of circumlocution or borrowed expressions.

Secondly, the labours of the Commission had been conducted, Bonavita pointed out, in terms of the despatch of Lord Viscount Goderich in conformity with the leading principles of modern codes, which were all based on the same Roman Law which prevailed also in Malta. Thus, it was to be presumed that the Secretary of State intended not so much to change the Law of Malta as to improve the ancient legislation by modern experience and enlightenment. If the English translation were to be considered as the original text, it would be but natural to make use of English law terms, to which that meaning would be attached, and those principles would have to be applied as in English Jurisprudence which was not in any manner derived from Roman Law.

In order to show the difference in meaning between English and Italian terms, one could quote innumerable instances. Thus, for example, whereas in English Law stealing was qualified as "Theft, Grand Larceny, Petty Larceny, Robbery, Burglary", etc., the modern codes made use of one single term "Furto" which was divided into "Furto Semplice" and "Furto Qualificato", the latter being subdivided into other various species. Again, "Forgery" did not convey the meaning of "Falsum" in Roman Law, as the Italian word "Falsità" did.

If use were to be made of English technical law-terms in their natural signification in place of a literal translation of the

Italian words used in the modern codes, the interpretation given to the terms of the Code should conform to the Jurisprudence of Great Britain. But this would mean a dangerous departure from that ordinary meaning attaching to the idiomatic phraseology of the Roman Law and of the modern codes.

Besides, in this manner, the laws of England would tortuously, if not directly, be introduced into Malta, contrary to the spirit and meaning of the despatch of the Secretary of State. Such introduction would not be in harmony with the general features of the Code, but would be a forced and violent departure therefrom. This would lead to a series of conflicting interpretations and decisions, which would embarrass the Bar, disturb the Bench, and greatly injure the welfare and security of the public. A Code made on those lines would deprive the Maltese people of the fundamental principles of the legislation which for many centuries had protected their lives, property and honour, and in conformity with which their institutions, habits and manner of thinking had been formed.

All this went to show that the English law language, in its natural and accepted sense, could not with propriety be made use of as the legal text of the new Code. Therefore, if it were insisted upon that the original text should be in English, one of these two inconveniences must, as a matter of course, arise: "either that the English Law-terms must receive a strained meaning, in order to make them approach the expressions in the Code, or new words must be introduced into the English phraseology". If either of these expedients were resorted to, would any advantage accrue to the administration of justice to counterbalance the disadvantages which would certainly result?

As far as the first alternative was concerned, one had only to consider what had been done by those eminent English lawyers who had written upon, or translated, the Justinian Institutes and Roman Jurisprudence, such as Wood, Strahan, Harris and Brown. These writers could not but see the impracticability, nay impossibility, of making clear the sense of Roman Jurisprudence by the use of words peculiar to the English Law, which, though perhaps they meant nearly the same thing, might admit of a dubious legal interpretation. Thus instead of translating the Latin word "relegatio" into "transportation", "libellus accusatorius" into "indictment", "furtum" into "larceny, burglary,

etc.", "iniuria scripta" into "libel", they had adopted the terms relegation, accusation, theft, written injury.

Innumerable such examples might be quoted, but those mentioned were enough to show the absurdity of attempting to give new meaning to old English law-terms. Moreover, in our particular case, insuperable difficulties must instantly arise under such a system whereby the same English word was made to signify, under a strained construction suited to the Code, one thing in Maltese and another in English Law. Inextricable confusion and uncertainty would be the consequence, especially in cases of appeal to the higher tribunals of Great Britain. Even the study of the law in Malta would become complex and puzzling. In one word, it was in vain to look for advantages to overcome the serious evils arising out of such an adoption.

On the other hand, should recourse be had to the second alternative of introducing new words into the English phraseology by making a literal translation of Italian law-terms? If such a literal translation were to be declared the original text, this would lead to the paradox that, contrary to fact, Malta would be said to possess an English Code of Law. For, such a code would not be worded with that legal precision which might be expected from the English Jurisprudence and language, but it would abound in borrowed or forced idioms, or in expressions invented for the purpose, but such as no English lawyer, not habitually versed in the laws of Malta, could understand, though they appeared in a Code apparently written in English.

Such an anomaly might, it is true, be authorized by an Act of Government, but in practice it would be nugatory, for no law could prohibit a reference to the original from which such terms were taken on the part of those who chose to dispute or doubt their meaning. The universal rules of logic and reasoning, against which no argument could prevail, would take one back to the original writing, to which one would find he had arrived by a roundabout course, instead of by a direct and reasonable one. Thus, this system did not confer any advantages and was devoid of any utility.

Bonavita continued: "These incongruities and difficulties will be more numerous in the Civil Code. The property of the inhabitants of these Islands is entirely regulated by the principles of Roman Law. The acquisition of this property from times

beyond the memory of man, its continual transfer, its descent from generation to generation, its actual possession under ancient wills, entails, trusts, and innumerable other original dispositions (*fondazioni*) or titles are all founded on the principles of Roman Law, and all rights and titles to the same are expressed in Italian or Latin technical terms such as : *Enfiteusi, laudemio, canone, censo, dotario, legittima, ben acquisto, diritto di rappresentazione, servitù, novazione, ipoteche, sostituzione volgare, etc.*, having strict analogy to that law, and used with the intention of expressing and carrying with them the precise meaning which belongs to them in reference to that law alone.

“It is well known how very different the Roman Civil Jurisprudence is from that of England in these respects. What English technical law-terms, in a Code written originally in that language, could be substituted or attempted to be placed as an equivalent for such various terms derived from the Roman law and in no case conveying more or less meaning or a different meaning than that which attaches to them in Roman Jurisprudence?

“No such English terms could be attempted without the risk or rather the certainty of introducing fatal misunderstandings, forced constructions, and legal tergiversations, all endangering the wills, deeds of trust, entails, original dispositions and other titles; such an attempt would moreover paralyse the professional labours of the Public Notaries of these Islands, the very elements of which rest on the Roman Law alone, and thus the property of the inhabitants would for a long series of years become unsettled, and consequently insecure.”

A third reason brought forward by the writer in favour of his thesis was that after the promulgation of the modern codes of Europe, both in France and in Italy, numerous works of learning on those codes were published by several commentators; and, if Italian was not to be the original text of the Code, the legal learning contained in those works would lose much of its value for us in Malta. For, in order to interpret the precise meaning of the English technical law-terms appearing in an original code in that language, one would naturally have recourse to English writers and commentators, who, however inestimable their labours might be in the peculiar field of English Law, did not keep in view either any of the modern codes or the system of simplicity and precision found therein. Indeed, the majority of

English writers were not, perhaps, always familiar with the Roman Law itself.

Fourthly, Bonavita continued, when a code was promulgated, the object was that of making generally known, as extensively as possible, and in the most obvious manner to the inhabitants at large, those laws under which they lived, to which they were amenable, and by which their lives and property were protected. In order to meet such an object "a Code ought to be written in the language of the country, which in respect of these Islands is positively Italian."

To contradict this fact the argument had been adduced that in Malta there existed a particular dialect, Maltese, which had a mixed derivation from the Punic, Arabic and other tongues. Such an argument might at first sight mislead or make an erroneous impression on the Secretary of State for the Colonies who lived in the Mother Country and who therefore could not appreciate local conditions. Thus, Bonavita felt it his duty, since his humble opinion on the subject had been solicited, to set forth the following facts and reasons proving what no Maltese had ever doubted, namely that although a particular dialect, principally confined to the lower classes, did exist in Malta, nevertheless, the Italian language and no other had always been considered as the written language of the country:—

"1) If Italian were not the language of the country, it must at once be admitted that the civilisation of these islands could be hardly said to exceed that of barbarous nations, inasmuch as the Maltese language neither is nor can be written for want of a known and established alphabet.

"2) The existence of a particular dialect in Malta does not the less render Italian the language of the country, any more than the distinguishing dialects of Genoa, Lombardy, etc. can be said to prove that Italian is not the language of those states. The same observation applies to the Welsh, Irish and Gaelic, as also to the local languages by which most, if not all of the European States, are provincially marked.

"3) That language, of which no written use can be made even for the purposes of the most trivial note, can never in a legal sense be termed the Language of the Country. In Valletta, and among the respectable classes of the inhabitants, the Maltese is not generally spoken, a prejudice existing in good society against

the use of a tongue in which many of them are so deficiently versed that, even under constraint, they would not venture to make their dispositions in it, in a Court of Law; in fact a resort to the Maltese Language, except in those of the lower classes, is avoided as a work of ignorance, and is considered a vulgarity; it is a tongue, indeed, in which no public or private documents, inscriptions, or records exist, or are known to have ever existed, and which is so poor in itself, as to have received a large admixture of Italian, Spanish, Sicilian, and French terms, and of late years even of English ones. In fact, it is well known that many of the natives, in any way educated, are far from expressing themselves with facility in Maltese, which is a tongue that limits itself to the material wants and purposes of man, and presents but few terms for the expression of compound and metaphysical ideas.

“4) Malta and Gozo have always been considered as Islands connected with Italy, being adjacent to the Italian coast, and for several centuries shared in the political condition of Sicily, participating with her also in the Italian Language, which in that Island, notwithstanding that the Sicilian dialect is written, and subject even to rules of Grammar, is the ruling Language of the Country.

“5) The public and private schools of Malta and Gozo are conducted in Italian; the Municipal Laws and the various proclamations and enactments subsequent thereto, are in that language, as are also all wills, contracts and other public acts, as well as the whole of the proceedings in the Courts of Law; of course, too, in all matters of accounts or trade, correspondence etc., and the like no other medium of writing is resorted to by the natives. In Italian are the edicts and all other publications of the Spiritual Power, such as by the canons of the Church are not required to be in its universal language: the Latin. Sermons in the churches are in the Italian, except such as delivered to an audience which is supposed to be composed of the very lowest class.

“6) When the ancient legislators of these Islands, the Grand Masters of the Order of St. John of Jerusalem, following the example of other European States determined on the disuse, in many public matters, of the Latin, which was before in use, they took Italian, as a matter of course, that being the written language always adopted in the country.

“7) When the proceedings of the Courts of Justice in many European countries, as well as in Malta, where the Roman Law prevailed, were carried on in Latin, the language of the then existing Commercial Court of Malta, where the parties themselves were allowed to plead their own causes without the assistance of an advocate, was expressly ordered by law to be Italian, and, even in those courts where the proceedings were in Latin, any notes, records, etc. which by dispensation were not required to be in Latin, were written in Italian, as the only written language of these Islands.

“8) Such native Maltese writers as have authority of works to the public in poetry, as well as prose have composed and printed them in Italian, with the exception of some very few, who wrote in Latin, as the language formerly belonging almost exclusively of all others to the republic of letters.

“9) It is true that for several years all new laws and regulations have been promulgated in English and Italian, a circumstance extremely proper in itself, but which at the same time shews, that while the English indispensably is not the language of the country, the Italian is; and in only one instance has the English been declared to be (and in case of doubt only) the original text. This occurs in the Bankruptcy Laws published on the 1st. of November 1815, and a very good reason may be given for this exception, those Laws being framed in the spirit of the English Law, consequently no other than English authorities can be referred to, for the purpose of clearing up any doubt that may arise therein. But the legislature in no previous or subsequent laws has made a similar enactment, the greater part of them being connected in substance with the general jurisprudence of the Island”.

In the fifth place, Bonavita observed that it could not be said with any good reason that, because there were many Maltese who understood neither Italian nor English, either language must to them be indifferent. For there was no native of Malta who could read and did not understand Italian, as Italian was the language through which he was taught to read.

On the other hand, the number of those who read and spoke Italian, and at the same time knew nothing of English, was out of all comparison with the number of those who understood the English language. Even most of the individuals particularly noted

for their superior attainments whether in literature or in science, were not at all versed in English. There was scarcely any part of the country districts, however remote, where persons competent to explain the law from the Italian text could not be found, whilst, throughout those districts, and even in the very populous villages of these Islands, scarcely a single person could be found having the slightest knowledge of English. Indeed, in the capital itself, there were persons who spoke that language in their unavoidable traffic and intercourse with English people; but very few of them were really conversant with it for any useful or practical purpose other than the daily transactions of their affairs.

A minority of civil servants could speak English. But as to other classes of the community, namely the nobility, the landowners, the ecclesiastics, the great majority of the merchants, the members of the learned professions, the Registrars of the Courts of Justice, and those employed under them, one could say that no progress in the language of the Mother Country had been made.

Lord Viscount Goderich had stated in his despatch that the wishes and the prejudices of the ancient inhabitants of Malta were to be respected. Bonavita asserted that he was confident no one in Malta wished the English language to be substituted to Italian in law matters, not even those exceptions who were able to write English fluently and correctly.

But even if the wishes of the Maltese were to be disregarded, the introduction of the English language would all the same be impracticable. For, the majority of His Majesty's Judges either had no knowledge at all of English or had not a sufficient knowledge of it to enable them without hesitation to give their absolute and conscientious decisions on the construction of English terms, new to them from a professional point of view. These judges would feel themselves particularly at a loss when confronted with an English advocate. Thus the great danger would set in of the public losing confidence in legal decisions which ought to be the pillar of all judicial systems and institutions.

The legal profession would also be sensibly affected by such a change of things. The education, study, practice and the labour of years of the lawyer would all be brought to naught. Some few lawyers indeed, under the pretence of knowing English, would put themselves forward, but the effects of their ignorance would

be prejudicial to the interests of their unfortunate clients.

If Lord Goderich was of the opinion that the introduction of a system of English law would be premature in these Islands, every reason which could be adduced in support of the soundness of that opinion might be urged in respect to the question of language; and the main reason was that independently of whether a time might or might not come for such changes the people were as yet not prepared for their introduction. Any advantages accruing to the Government by the adoption of English as the language of the Codes would be offset by the evident disadvantages to be suffered by the public.

Neither did it appear that any anomaly would arise from the use of the Italian as the text of the codes, as he was informed, Bonavita stated, that there were other possessions of the British Crown where English law and language did not predominate. Bonavita here opined that with the progress of time it must of course be desirable that these Islands should assimilate with Great Britain in laws as well as in language, "but the accomplishment of such a wish must belong to other generations, and must be preceded by those preparatory steps in education, especially by the establishment of public schools, which alone can lead to so desirable an end or render it welcome when attained." In fact, until the elements of education became mainly English, any change like the one under discussion would be constrained and inefficacious, prejudicial to the people, and destructive to a very numerous profession which, in those far from prosperous times, would be most undeservedly reduced to want.

The writer then passed on to show how little the Maltese were prepared for such a change. He quoted these facts to illustrate his statement: "In 1820 the Government declared that no advocate, attorney at law or notary should be admitted to practice, unless he could read, write and speak English; that all petitions and applications to Government should be in that language, and that a preference for employment should be given to natives so versed (11). This was repeated in October 1827 in regard to

(11) V. Minute of the 17th May, 1820.

attorneys (12), but the impracticability of the measure was soon perceived, and it has never been rigorously acted upon up to this day.

“Even the Admiralty sessions held for the trial of piratical offences (13) have been generally conducted in Italian, that being the readiest language for pleading and taking evidence, although it is decidedly a Court of English Law formed for the most part in its sittings of English members, and trying its cases by a jury.

“In the Court of Special Commission too, of modern institution (14), the address of the Honourable the Chief Justice of 15th February 1830, 18th January 1831, and 16th January 1832 (15) which appeared to have for their object an explanation of the general principles and practice of English Jury Courts, and were totally unconnected with any particular case or cases, were written and delivered in the Italian language which in the preliminary advertisement of the address of the 15th January 1830 was stated *as being the language most generally intelligible to the large audience present.*”

In this Court, Bonavita continued, the prisoner had the privilege of choosing to be tried either in the English or in the Italian language. Since 1829, when the court was established, there had been no case in which the prisoner asked to be tried in the English language. Maltese persons would not think of making use of such a privilege, and in the only case of an Englishman being brought before it (that of Patrick Moore who was indicted for the murder of his wife) the prisoner did not even demand the privilege

(12) V. Minute of the 1st October, 1827. Bonavita is not precise in stating that “this was repeated in 1827, in regard to attorneys”. In fact, the minute laid down that, with a view to further encourage the general study of the English language among the Maltese, sections 1 and 4 of the Minute of 1820, would be henceforth strictly enforced. Section 1 referred to Advocates, Notaries and Legal Procurators; section 4 mentioned the preference in appointments to be given to those versed in the English language.

(13) The Court for the Trial of Piratical Offences was established by His Majesty’s Commission of the 1st February 1815. V. Proclamation I of the 5th January, 1816.

(14) V. Proclamation VI of the 15th October, 1829.

(15) These three speeches were delivered by Sir John Stoddart in Italian, the language of the Courts. They were translated into English and published in London respectively in 1830, 1831 and 1832, by “James & Luke G. Hansard & Sons, near Lincoln’s Inn Fields”.

of being tried in his own language. In this case, it was not believed that those proceedings gave any dissatisfaction either to the English or native inhabitants of Malta.

Finally, if the Italian version was to be declared a translation of the English original, was it not obvious, Bonavita asked, that for all primary matters relating to conduct or property an almost universal use would be made of the Italian? "It will be only when dissension arises or delinquency occurs that those who followed the more accessible guide will find themselves and their actions subject to interpretation in a language with which perhaps they are unacquainted. If translations could be faithful to their original this would be unimportant; but a translation is too frequently, from necessity, an attempt to make the reader comprehend what is meant, rather than an infallible transcript of the meaning itself. If, on the other hand, the Italian should remain the original text accompanied by an English version as a translation, the latter which will be extremely useful and necessary, will be one step more towards the successful introduction into these Possessions of a language which one day may be the prevailing one."

In conclusion, Bonavita expressed his earnest desire that his countrymen might, at no great distance of time, possess the solid advantages of the general knowledge of the English language. But, although he himself was in some measure conversant with that language, he could not hesitate to express his opinion that its premature introduction by the measure proposed, would not only be anomalous in itself, but, in the state of poverty then prevailing, it would deprive hundreds of the respectable inhabitants of their only means of an honourable subsistence, hurt the feelings of the people universally, and introduce a system of jurisprudence strange to the learned, unintelligible to the generality of the population, and not at all suited to the present circumstances of the place or its ancient institutions (16).

This lengthy and elaborate treatise induced the Governor to change the opinion he had first formed on the subject. It is thus that we find him writing to the Colonial Office, backing up the points held by Dr. Bonnici and Dr. Bonavita. By reason of using the Italian language for the original of the code, he suggested to

(16) V. Bonavita—"Carte relative al Codice Criminale del 1854"—Vol. 1—Enclosure H.

the Colonial Secretary, "we should exclude English law terms and many other things which here would only serve to embarrass and perplex". He also agreed with Bonavita that English would be unjust to the people (17).

Some papers later submitted to Ponsonby by Stoddart to be forwarded to London did not make the Governor change his mind. It seems that in these additional documents Stoddart mentioned some irregularities in pleading as an argument against the use of Italian. Ponsonby pointed out to the Secretary of State that the Italian civil pleadings selected by Sir John Stoddart were not a fair specimen of the general pleadings in Malta. At any rate, he thought that any irregularity that might exist was not a sound argument in favour or against the use of any particular language (18).

Kirkpatrick at this period was in London. Bonavita presumed that he would be consulted by the Colonial Secretary before a decision was arrived at. So he informed him of all that was going on in order that Kirkpatrick might use his good offices in the competent quarters. Bonavita wrote that, from the papers officially referred to the Colonial Office, the dispute between the Commissioners appeared to relate only to the language of the Codes. But, in point of fact, the English and Maltese Commissioners could not see eye to eye on anything. They differed on the general plan, principles and rules to be observed in the framing of the Codes, on the real meaning of Lord Viscount Goderich's despatch constituting the Commission, on the source from which the basis of the Commissioners' work was to be derived, on the appreciation of the merits of the Continental Codes, and on the material benefit which would result were they to be adopted in Malta.

On the language question. Bonavita expressed his view that the change which the English Commissioners were advocating was not restricted to the Code, but they had every intention of making the language of the law, bar, and sciences, in a word the language of the Island in all matters, exclusively English. This was both premature and impracticable. It would create universal discontent among all classes. The only point gained by it

(17) V. Despatch No. 43—5th June 1833—Lieutenant Governor to the Secretary of State.

(18) V. Despatch No. 60—29th June 1833—Lieutenant Governor to the Secretary of State.

would be that two English lawyers in the service of the Government would find themselves more at home in Malta and would dispense with cultivating its language.

Many of Stoddart's assertions in the paper sent to the Colonial Office were qualified by Bonavita as baseless. Stoddart stated, for instance, that there were several folio volumes of law already published in Malta in the English language; but he omitted to mention that if one were to exclude all matters extraneous to the legislative branch, there would scarcely remain enough material to form one properly called folio volume; he also forgot to say that everything published in English was invariably published in Italian. Again, it was not true that the Italian language was on its decline in Malta; it was as well written as ever, as some recent Maltese publication could prove, whilst no one ever dreamt of publishing anything in English.

Bonavita was induced to write to Kirkpatrick as he wished to make it known that it was absolutely impossible to reach agreement with the English Commissioners. Moreover, he was anxious to vindicate the conduct of the Maltese Commissioners from any reflection which might be thrown on them at the Colonial Office where they were not personally known. His was the ardent wish to carry into effect one of the most beneficial measures which the British Government in Malta had ever intended to adopt.

"While you were present with us, our position was not so hopeless," Bonavita remarked, "as I believe I may say that yourself, Dr. Bonnici and myself acted upon a uniform understanding. If it were possible to hope for your presence and valuable assistance again, I should most confidently look forward to a successful termination of our labours." But should this be prevented by Kirkpatrick's other avocations Bonavita was of the opinion that it was utterly impossible for the Maltese Commissioners with all their zeal, Dr. Bonnici's talents, and his own little ability to fulfil the instructions of the Government in the sense they understood them.

"On the other hand, if it should be thought in England that the views of the English Commissioners were feasible and should be acted upon, a complete change of system would be the result. In this case, it would be better to leave the English Commissioners to themselves as the Maltese members of the Commission

would be of no possible assistance in framing a code altogether new and original. Indeed, for such a task, he felt quite incompetent, and he would be gladly relieved from the constant annoyances to which he was subjected during the Commission's meetings. He thought he could say as much for Dr. Bonnici (19).

Kirkpatrick communicated Bonavita's letter to Mr. Stanley, the Secretary of State for the Colonies (20), who from the abundant material submitted to him decided in favour of the Maltese Commissioners. Replying to Ponsonby, he stated: "I have considered with great attention the arguments which have been urged by the Commissioners, Sir John Stoddart and Mr. Langslow, in favour of the adoption of the English text, as well as the very learned and able argument of the Commissioner Dr. Bonavita in favour of the Italian text (to which the other Commissioner Dr. Bonnici entirely adhered), and I have no hesitation in authorising you to instruct the Commissioners to establish the Italian language as the authoritative text of the new codes, care being taken that it should be accompanied by a clear literal translation into English." The Commission was informed of this despatch by letter of the 21st August, 1833 of the Chief Secretary to Government (21).

Though the Maltese Commissioners had won the day, trouble for them was not yet over. What happened subsequently served no other good purpose than to exclude Stoddart and Langslow from forming part of any of other law-drafting Commission.

(19) V. Bonavita—*op. cit.*—Enclosure L—Letter of the 28th June 1833, sent to Kirkpatrick.

(20) V. Bonavita—"Storia del Codice Criminale"—*loc. cit.*—fol. 15 tergo.

(21) V. Bonavita's note annexed to Enclosure H above mentioned.

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