Some Thoughts on the Pre-eminence of Roman Law

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MANY of you will have already heard the saying that if Greece has given us the statue, Rome has given us the obligation and I daresay that few of us have considered that these two great relics of the past share a particular quality in common : namely their solidity; for, while the Greek statue is in itself an expression of solidity, in matter and in design, the Roman *viculum iuris* is in itself a powerful tie, a *ligatio* of the very person, solid in content and in form. Of course, the Roman legal heritage does not consist only in the law of Obligations; however, in the general notion of the obligation, I am at present visualising the binding force of all law, since in all its manifestations,speaking generally, law does not do any more than create rights and correlative obligations. It is by means of the existence and enforcement of the obligation that we see law put into effect and it is exactly in that quarter that our greatest debt to the Romans lies. In point of fact, the obligation is the legal counterpart of the well-known *Romana fides* which was a solid rock on which Roman Republican civilization reclined.

Men have repeatedly asked the question : why is it that the Romans were able to develop a private law which has been held in great esteem for many centuries and which is still the prototype of countless systems of law? As a race, the Romans do not seem to have been great original thinkers. In philosophy and scientific method, they were followers of Greek learning and in vain do we try to find in their ranks, a Socrates, an Aristotle or a Plato. They never developed, or even attempted to develop a legal philosophy of their own. With a few exceptions, they held aloof from the legal history, were completely disinterested in comparative law and never treated law from a sociological point of view, although, as Schulz says, (R.L.S. p. 70) the Greek contribution in this direction was already worthy of attention. They do not seem to have ever cared to probe the intricacies of Roman Constitutional law. Nevertheless, with all these failings, chief of which was the narrowness of their outlook, the Roman jurists succeeded in developing a law which has justifiably been

held in veneration. Why should this have come about? Th the question which I am putting to myself to-day and I hope will bear with me, if I try to apply the lesson we infer from investigation to our modern condition. A lawyer is often inc to be somewhat positivist in outlook and turn his gaze tc past with an eye on the future.

Let me hasten to state that the fact that Roman private has been applied in many countries does not mean much; at rate, it must not be over-stressed. It is true that, as Disrael it: "A faked greatness does not last", but in legal matters, servatism is very often imperative, as even a reform, which be good in substance, might easily provoke wholesale confu Lt us imagine that the present system of real rights over here in Malta were to be supplanted by some other system, be more logical and more in conformity with present com cial requirements. The confusion which would arise can e be envisaged. Owing to this inevitable conservatism, system law are very rarely discarded *en block*, and you will no d agree that the fact that a bad law continues to be observed sh not be taken to confer upon it any particular merit. It is r the same with rogues: an old rogue cannot pretend to be pectable just because he is an old one.

Roman law was enforced in the whole of the Roman pire for no reason other than that it was introduced and imp by the Romans themselves. Nothing but Roman law could ply to *cives Romani* and after the 212 A.D. Constitution of tonius nicknamed Caracalla all the free inhabitants of the pire became citizens. The reason underlying such benevol was to make the inhabitants of the Empire share in the ho of paying taxation, but it also had the effect of imposing Ro law on the greater part of the known world. Then came the of Justinian which saved Roman law from the complete wrec which could have otherwise resulted; here again, we find a rect and rigorous imposition. The Code of Justinian, and notl but that Code, was supposed to be the law for the whole pire and no one was allowed to make comments on the C let alone to criticise it.

So far, it was perfectly natural that Roman law be follo by all—*nolentes volentes*—independently of its intrinsic m or demerits. But immediately circumstances arose in which man law was put to the test and had to rely on its merits a

for future recognition and application. I am referring to the so-called Barbaric Invasions. One might easily have expected that the ruins of the Roman Empire of the West included also the remains of classical jurisprudence, but the truth is, rather surprisingly, that the unrefined Northern Invaders regarded the law of Rome with the greatest respect. I have always felt some astonishment, not unmixed with admiration, in reading over the history of some of the Barbaric Codes. I need mention only one instance: the Edict of Theoderic the Great, the king of Ostrogoths. Despite the fact that he was a conqueror, Theodoric regarded himself as a sort of viceroy for the Roman Emperor of Constantinople and that was the reason why he called his law an Edict. In his legislation, he sought for inspiration in the works of Iulius Paulus and in Roman constitutions and he not only applied that law to his Roman subjects, as other Nordic kings had done, but also to the Ostrogoths themselves. This was indeed a case in which the law of the vanquished in its own turn vanquished the victor: "capta ferum victorem cepit".

Roman law then faced a protracted and insidious danger under the guise of the ignorance and indifference prevailing in the Middle Ages. The Roman tradition was of course carried by word of mouth as customary law but the legal science was almost extinct until it was revived by the Italian glossators and post-glossators, by the French and Dutch humanists and by the German Pandectists. But, even so, a great following was not secured, until after the Napoleonic Codification which succeeded in converting a very elusive legal system into a semi-standardised form, conveniently vague at times but nonetheless a suitable instrument by means of which the fundamentals of the Roman tradition could be imparted to the outside world. Those countries, such as Malta, in which Roman law had been followed for centuries, would have retained it, whether the Code Napoleon had seen the light of day or not; but it is quite safe to say that had it not been for the *Code Civil* Roman law would certainly not have attained its present position as a sort of a common denominator of all legal learning. It would similarly not have had such wide expansion It is not quite clear, for instance, that it would not have found its way into Russia or Japan?

I hope I have made my point clear. Unassisted, Roman law would not have received the widespread expansion which the world has had to behold during the last century and a half. For

that expansion a great deal is owed to the Germans and French, but in order to find out something about its intrir merits, we must of course turn to other quarters.

Every body of laws is the result of a vast number of fact and can hardly ever be the work of one single individual. T can be safely said of all systems of law but it applies in a higl degree to those laws, such as Roman or English law, which hi grown up on a casuistic basis. Further, a law is an organism, complex in structure and content, that it is often the product diverse preiods which, in succession one to the other, make th own particular contribution. So, indeed, it was with Roman la As we shall see, even those periods which have traditionally be held in contempt have rendered some good service in the mou ing of Roman jurisprudence, as it has been transmitted to us.

If I were forced to point out concisely the factors which my mind were mainly responsible for the evolution of Rom law as a highly logical system of law, I would point out the f lowing two factors :

Firstly, in the formative stages ample opportunity was giv to a very wide circle of persons to exert considerable influence law-making.

Secondly, the constitutional changes affecting law-maki were particularly well-timed.

The first factor was produced by the Romans with pure c liberation; on the contrary, we owe the second factor mainly chance.

I must now amplify these two elements which really can treated together, since the well-timed constitutional changes al marked stages in the formation and development of Roman jur prudence. In the development of the law, the Republic cons tutes one period, the Principate i.e. until the time of Diocletia another period and the Dominate a third period. With tl changes in the constitutional regime, the characteristics and te dencies of jurisprudence invariably took new turns.

In the middle of the sixth century before the Christian e Rome already possessed a Code of Law : the Code of the Twel Tables—a Code which standardised some rudimentary principl of legal responsibility and of procedural and sacral law. Tl forms of action by means of which law-suits were commence were at that time still kept secret by the College of Pontiffs, wl however, were always prepared to divulge them to those wl

wished to initiate proceedings. These Pontiffs or priestly officials were also the official interpreters of the law and their interpretation often amounted to the creation of new rules of law. In this connexion, it is customary to mention one particular example; I am going to conform to the practice lest I be taken to disapprove of the example. At the time of the XII Tables, adoption was unknown and it was not possible for a father to free his son from life-long paternal authority. Now, in the XII Tables one provision read as follows: "Si pater filium ter venumduit, filius a patre liber esto". The provision was intended to penalise a father who for some reason or other gave his son *in mancipii causa* to other persons for three times. The Pontiffs, wishing to redress the need of the institutions of adoption and emancipation, advised persons seeking their opinion to carry out three consecutive sales, by means of which the desired result could be achieved. In this way, the institution of adoption was created. The Pontiffs often delivered their interpretations of the law in public and a group of persons interested in public matters and avid of public approval made it a point to attend these meetings and in the course of time became well-acquainted with matters legal. From such small beginnings, a body of jurisconsults gradually grew up.

It may be pertinent to recall that at this stage the Roman Republic was at its height and the Romans, on the whole, did enjoy great liberty of speech, even in political affairs. You all know what safeguards of individual liberty there were in the Roman Republican Constitution. I shall mention only one. The magistrates in peacetime held office for a very short period of time, ranging from one year to five years and were personally responsible for any unjust deeds they may have committed during their tenure of office. In this way, the jurists were absolutely free to give their candid advice, be it *de lege condita* or *de lege condenda* not only to private persons, but also to magistrates and to Judges who constantly required good counsel, since they were mere private citizens and generally possessed no legal education.

These jurists were somewhat aristocratic in temperament. They could not receive payment for their services. Indeed, they are supposed to have shunned direct payment; whether they shunned the indirect form or not, I do not know. They refused to plead in Court; such work was left for the *oratores*, like Cicero, who knew little law but were well versed in rhetoric. They generally belonged to the higher and walthier classes and they

seem to have retained a certain dignified aloofness. Strangely enough, this attitude did have also its good results, since it left the jurists free of strong partisan spirit, which would have been inevitable had they made it a practice of pleading in Court; it also ensured them absolute independence of thought and action. Goethe has told us that to think is easy : to act is more difficult : but to act in accordance with one's thoughts is the most difficult thing in the world. Perhaps, these Republican jurists came very near this goal, since there was nothing to hamper their thoughts and actions as far as legal development was concerned.

The jurists could indirectly influence the course of litigation and above all, their opinions did affect the drafting of the magisterial edicts to a considerable degree.

We must here stop to say a word or two about the magisterial edict. You may be aware that to-day in order to initiate proceedings in Court a special form is bought from the Registry the barrister fills it up with a concise statement of the facts and claim and then the Judge signs it. A copy is sent to the defendant and the case starts. In this way, the issue of a writ of summons takes place. In Republican days, the summons to appear was made privately. The XII Tables had in fact provided : "Si in ius vocat, ito..." but, after the appearance of the parties, the position was not altogether different from the modern one. The parties appeared before the praetor, narrated to him the main points of the controversy and he had to decide not who was wrong or right, but whether the case was such as to warrant a reference to a private citizen—the *iudex*—for a decision on the merits. In this way, the keys of the administration of Justice were held by the praetor. He had to decide which cases deserved judicial protection and also what sort of judicial protection was to be meted out in every particular case. In the exercise of these functions the praetor knew no control, save public opinion and his future personal responsibility, if he acted in bad faith. In order to introduce some stability in the exercise of his discretion, the praetor issue edicts which were proclamations of his intentions during his tenure of office. If the praetor happened to be a jurist, he would draft the Edict himself, otherwise, he would consult his *consilium* which invariably contained one or more jurists.

At rock bottom, the Edict was the result of the jurists' private initiative. It was the joint effort of successive generations of jurists which was responsible for the working out of the so-

called *Edictum tralacticium* that is that *corpus edicti* which was handed over from praetor to praetor for many decades in semi-standardised form. It was not the work of one brain, but of hundreds. It was not formulated by a group of studious theoretical persons who would be inclined to forget practical necessities; rather it was formed gradually, as cases arose: every new case called for a new remedy and of course a new remedy in fact meant the creation of new law. A modern jurist often yearns for those good old days when one could plead in the name of Equity for Equity's sake. Equity in the administration of Justice to-day is often a word without meaning, a concept without practical application, and a modern Judge finds himself often bound to commit injustices, since it is his duty to apply the law, however it may work in particular cases. It is true that to apply a corrective to these injustices there are the legislative organs, but these are generally too slow, too intricate and often out of touch with daily occurrences in the Courts. If we only had something analogous to the praetor and his *consilium*, the law would never find itself lagging decades and centuries behind current events.

The individual jurist possessed also another instrument by means of which he could "make law"—namely the *responsum* which was a written opinion which he issued upon request. For some time after Augustus, the Emperor used to confer the so-called *ius publice respondendi* upon the jurists he fancied and, in this way, these jurists who gave advice with the Emperor's benediction possessed no doubt augmented authority. Originally, their opinions were not binding but from Hadrian's day a unanimous opinion made law. How this unanimity was taken is a moot point but it is a fact that under the conditions presumably specified in a Rescript of Hadrian's, the mere private opinions of the jurists formed law. This was even more so, in later law. In the fourth century A.D. it was established that the majority opinions of a set of jurists had also the force of law and in certain cases also opinions where there was no majority on either side were binding. I need not enter into details. I am mentioning these instances in order to show to what extent the legal profession *auctoritate propria* without anybody's sanction could make new law. The respect to the jurist's work was great during his life but it often turned into veneration after his death. Indeed, the most important part of Justinian's legislation is the Digest, which is no more than a collection of juristic writings. These

writings were cut short and partly modified but they becar law; so that, ultimately, what Salvius Julianus or Aemilius P pinianus wrote in their offices became law. I am sure that su instances are unparalleled in the history of any other law syste

It is important to appreciate that in the Republic and in t Principate—that is in the periods when legal doctrine was bu up and written down—the jurists were no mere theorists. Sor abstraction was no doubt inevitable but they were concern with practical cases and they built up their law on a purely c suistic basis. Schulz describes the process in a most attracti maner: "In the beginning was the case. But every decision a special case is given in the conviction and with the intenti that, should the case recur, it will be decided in the same wa Now it is impossible that the new case should coincide with t old in all its details, so that every decision implies that not on one case is decided, but also that an abstract principle is evolv from the case itself by a process of abstraction in which certa special circumstances of the case are ignored. A further ste often more than one, is needed before this abstract result can formulated in the words" (Principles—p. 40).

I am not suggesting that precisely the same system can introduced with safety to-day. Life has become so complicat and so speedy that it would be dangerous to allow anything interfere with the certainty of the law. But, if we were in t course of the developing and correcting some law, I can imagi no more efficient method than that employed by the Romans. has been well said that fortunately there is something in m which rejoices in escaping regimentation in thought and in actio The life of every lawyer is crowded with instances when the la falls short of real justice and he would certainly feel the weight l ing removed from over his conscience if means to redress the rem dy were put at his disposal. In this way, the most crying needs w quickly come to the limelight and the enactment of necessa legislation will not depend on any accidental brainwave of Mini ters or Law Officers. It is incredible, for instance, that in t year of Our Lord 1952, our fellow-citizens can be relegated idle away their time in a prison cell, just because they happ to be unable to meet their debts, even if their honesty is unta nished. When business is good, the Government shares in t good fortune, and when business is bad, of course, the Gover ment pays no part of the debt and besides, allows the poor fe

low to be sent to prison. And when these unfortunate people are locked in their prison cells, they are handed over some half a crown per day to live on. They have to live on it in the most literal sense of the word, since no prison warder is allowed to procure food for them nor are they allowed to fetch it themselves. Well, that is the law as practised. Should we ever repeat the experiment which the Romans used of giving the Bench and Bar direct control over law-making, one can feel quite sure that the cobwebs in the legal system will quickly disappear.

Let us now pass to the second factor: the timing of the constitutional changes. I must repeat that the timing of the constitutional changes was purely accidental and was certainly not connected with the course of legal development. However, it is fact that these changes were remarkably well-timed and exerted a decisive influence on the Roman jurisprudence. In England, for example, the law, in form, is in a stage similar to that of the Roman law prior to Justinian's Codification. English lawyers appreciate this point very well indeed; some of them are happy that their law has retained such flexibility, as, for instance, Sir Patrick Hastings who advises the future rulers of Britain to leave English law alone; others decry the hopelessness of making English law knowledgable to the general public and advocate a codification of the law evolved by generations and generations of Judges, for in England, you know, every judgment makes law for future similar cases. In English Constitutional history there was never any sudden break of any long duration, with the result that the continuity in the Constitution carried with it continuity in legal development. Had the Constitution of England suffered the cataclysmic changes which resulted in the course of Roman History, English law would certainly not have remained so elusive and so liable to constant change, so incomprehensible to the layman, as if it were still law in its early period of formation.

Every period of Roman history afforded the proper atmosphere for the law's formation, for its standardisation, for its codification, as the case may be.

In the early Republic, the Romans were mostly concerned with the abolition of class distinctions and the establishing of a legal process open to all. Hence we have the law of the XII Tables in 451 B.C. and the publication of the forms of action in 307 B.C.—after which the law was no secret of a class and all

those who felt inclined to contribute to legal development v free to do so with the methods which I have already descri At this stage, a litigant, whoever he might be, could at leas sure of receiving a fair deal within the narrow range of an e crude procedural system. But when trade relationships with reign countries began to be established, the need was felt of dulging in some form of abstraction for the co-ordination of rules still being evolved. For this purpose, what influence c there have been better than that of Greek philosophy which a dentally was exerting immense influence at this stage on the w of Roman life. "'The strivings of the last century of the Rep lic after an abstract and systematic statement of the law are tainly attributable to Greek influence" (Schulz, Principles 129). Roman law, before that time, could not claim to be organised Science, and the Greek dialectic method was emplc to put it on a proper foundation.

We must now pause to consider briefly the dialectic met which I have just mentioned. It was dialectic which turne mass of practical rules into a legal science worthy of the na It was dialectic which established the general structure of l institutions, by creating those categories and distinctions, wl characterise Roman Law and which have made it so understa able and attractive to the outside world.

The dialectical system was Platonic in origin and was w ly used in all fields of science. It aimed substantially at the duction, in Cicero's words of "quod est diffusum et dissipatun certa genera" (de orat. I. 142). Pomponius tels us that Quir Mucius, the pontifex, was the first jurist to classify the wl *ius civile* into *genera*. Servius Sulpicius Rufus continued extended the same system and we find in Cicero's works str laudations of the contributions of Servius in this direction, though perhaps it may be suspected that Cicero's praises of S vius formed part of the policy of running down Quintus Muc The scope of the dialectical method is the making of distincti and subdistinctions within the whole field of any partic science and the making of such classifications, which often volved a good deal of abstraction, can surely be regarded as important means which the Republican jurists adopted in t effort to put the law on a sound and rational basis for fur development. In La Pira's words · "La scienza, ars, si costru partendo dai principi deducendo da essi more sillogistico, o

nizzando ad unità, ad immagine del corpo, il sapere; divisio per genera, species, partes: sono queste le tre operazioni del metodo scientifico, e con esse che logici, geometri e giuristi hanno saputo creare sistemi scientifici di imperitura bellezza" (studia et Documenta (1935) p. 348).

The classifications drawn by the Republican jurists were followed by the lawyers of the early Empire, chief among whom were Antistius Labeo and Massurius Sabinus. At the same time with the growth of the Empire and consequent expansion of trade, the law had to be evolved in such a way as to make it applicable with fairness to foreigners and Romans alike and what instrument could have been more suitable for that purpose than the Greek notion of *ius naturale* which was transformed by the Romans into positive law under the guise of *ius gentium*.

It verily seems that in the Republic all the elements had conspired to create what I may call a good breeding ground of law.

After several centuries of development based on the private initiative of praetors and jurists, occasionally assisted by *leges* of one of the *Comitiae* or by *plebiscita*—it became necessary to curb the speedy course of legal development and, so to say, canalise it. For instance, some jurists thought that there were four types of theft, others said that there were three, others insisted that there were only two. This was no theoretical discussion, for it could easily produce substantial divergencies. The time had come when a strong hand was needed to restrict these wayward tendencies of legal discussion. And fate intervened by ushering the Augustan pseudo-Republican regime which, as you know, heralded the Principate.

From then onwards, authority gradually centred round the Senate. The Senate gave instructions to the magistrates and individual authority gradually declined. Even the jurists felt that it was advisable to gather in groups, so that their voice could better be heard and hence we have the Sabinian and the Proculian Schools of jurists. It is true, the jurists could only give individual *responsa* but we find that all through the Principate, especially during the earlier half, the jurists belonged to these two groups. And, it is by no means improbable that the clannish sentiment underlying the formation of these two groups under two recognised leaders who provoked by the more methodical outlook on legal development which prevailed in the Principate. The prin-

ceps and the Senate in fact were also distrustful of praetorian i tiative and in the 2nd Century A.D. the Emperor Hadrian dered the jurist Salvius Julianus to make a compilation of t Edict. From then onwards, the Edict became standardised a this most wealthy source of Republican jurisprudence was su stantially truncated. This was not a period of formation as t Republic had been. It was what we may call the period of r gistration. It was necessary to put down in writing the resul which had been attained, and work out practical rules to the n nutest detail. This task was undertaken by Domitius Ulpian and Julius Paulus whose voluminous works discussed a vast nur ber of practical cases. They treated no theories: their intere was solely in giving solutions to hard practical cases—solutio which had to pass the test of rigid logic.

With the end of the Principate and birth of the Dominat individual initiative in legal development came to an end. The was only one real source of law: the Emperor's will: "qu principi placuit, legis habet vigorem" and, of course, the will the Emperor had to be made clear. Constitutions were oft issued to deal with new contingencies but the general body of t law was still to be found in the standardised Edict and in t juristic commentaries on it. It became necessary to cut dow this vast bulk of legal material. Such was the task that nothir but the autocracy of Imperial Rome could cope with such d mand upon it. Theodosius II made a first unsuccessful attemp More than a century later, Justinians' compilers with the a sistance of revised editions and summaries of legal writings m naged to cut down the legal works to 1/15th of their origin length. This consummate piece of vandalism, produced the D gest or Pandectas which is the backbone of the Corpus Juris Justinian.

In the Corpus Juris of Justinian the Christian influence w extremely strong and a genuine attempt was made by the com pilers to temper the strict logicality of the rules bequeathed t them with ideas of Equity. The result stood in marked contra with the earlier rule. Let us take for instance the doctrine Liability. The earlier rule was that if an artificer happens to b cutting, say, a diamond and the diamond is accidentally broke well, he is liable for damages unless he proves that the diamon was defective in its structure. Justinian's compilers held this t be too severe. They said that the artificer will not be liable if h

succeeds in proving that he has taken all necessary precautions and exercised the degree of skill which could reasonably be expected of an artificer. Let us take the case of wills. The earlier jurists held that a will should speak for itself and no outside evidence should be taken to explain it. Justinian's compilers thought that a testament, as an act of volition, should be interpreted as much as possible in accordance with the testator's will and were quite prepared to allow any type of evidence which could throw light on what the testator might have intended by the wording of the will. This latter attitude opened the doors to prolonged litigation on the interpretation of wills, so much so that it became dangerous to make a will. After all, some witnesses are forgetful while others are deliberately untruthful and it is not very difficult for some people to cook up a story about a dead man's intentions. A detailed study of the Corpus Juris reveals the working of the two distinct attitudes the effects of which are laid bare before the eyes of modern legislators—who are thus literally spoon-fed about the more plausible choice.

Had it not been for the gradual transformation of Roman political life from Republicanism to Imperialism, Roman law would not have initially been developed so logically and so fairly, as it was, and in the end it would not have been codified. In England, for example, there were no such political transformations, with the result that the law has remained uncodified.

Without a Corpus Juris Roman Law would have undoubtedly perished. Indeed, despite the Codification, it almost succumbed to the ravages of time. One can very well imagine what would have happened without a Corpus Juris. May I repeat the fine words of Wharton : "Many programmes are born of enthusiasm, only to die later of neglect and usually this happens not because the programme isn't good but because it is too good, too big, too ambitious and too impractical".

If I said that Roman Law was not the work of one man, I would be repeating a platitude more than once. But I hope you will agree that Roman history itself helped in the construction of this work of genius.

What is the real lesson which is imparted to us by what we know of Roman legal development? Is it that individual initiative should be given a great say in legislation and judicial discretion in the decision of cases? My answer is certainly in the affirmative. However, the answer is not unqualified. Solutions of

practical difficulties were worked out so minutely by the jurist that within the orbit of those rules, the greatest certainly wa ensured and in this way discretion could only serve as a safety valve against injustice. Whether stress was laid on one side o on the other depended on the characteristics of the particula age. When law is inclined to become stereotyped, as it was a the time of the Twelve Tables—then it needs a Republic in whic individual opinion and initiative are given full play. When, o the other hand. legal development runs out of control, then th curbing hand of a centralised government becomes necessary fo certainty's sake.

Many a time to-day do we come across blatant injustice being committed beneath the shadow of the blind figure of lega Justice and in such cases we do feel like yearning for judicial di cretion, and for the initiative of the Bar in legislation. If we ac cept the Romans as our masters in the substantive rules of law why should we not also try to learn something from them fron the point of view of legal method, bestow upon the successors o the praetors and the jurisconsulti the Bench and the Bar—a defi nite role in the initiation of legislation and try to perfect th *magnum opus* bequeathed to us in the Roman way?

Owing to the fact that access to official documents is dif ficult (thanks mainly to superabundant red tape) Dr. Alber Ganado's fourth instalment on "The History of the Crimina Code" will appear in our next issue and not in this number a stated previously.