First Year Criminal Law

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LL.B. I

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The organisation plays a pivotal role in law students' academic and social life at the University of Malta. The organisation has also been responsible for publishing the prestigious *Id-Dritt*, and the *GħSL Online Law Journal*.

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For further queries on this set of notes, as well as any other, please feel free to contact our **Resources Officer** at **resources@ghsl.org**.

A huge thank you to our fellow law student Christopher Aquilina who took the time to revamp and retype this set of notes, for the benefit of his colleagues.

CHETCUTI CAUCHI
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Advice from an Alumna

By Dr Priscilla Mifsud Parker

The law course is a long journey, but one that, if well-travelled, will lead to beautiful destinations. In an industry which is today attracting many young individuals looking to develop their career in law, it is important to stay ON the beaten track and remain focused. It may go without saying that it is of great importance for all students to attain good academic grades, to be dedicated to their work, as well as to be determined in this highly-competitive industry in order to fulfil their dream of becoming lawyers one day. However what is crucial is that as students and later on as professionals we are innovative by being sensitive to the changes around us. These changes might be political, economic, environmental, socio-cultural or others; what is for sure is that they all have an impact on the profession of a lawyer. We are members of a dynamic profession which is very sensitive to its surroundings. The type and 'genre' of advice which is required from us is all affected by what is being experienced by the receivers of this advice.

Work experience is considered as a vital part of the staple diet of any prospective lawyer in order to put into practice and refine the knowledge gained from the theorethical reality of the lecture halls and lawbooks into the skills required for a successful career in law. An internship will not only show future recruiters that you have a genuine interest in pursuing a career in this sector, but that you have the practical knowledge and skills to the succeed in your role.

Here are some personal suggestions that I feel helped me during my journey:

1. *Being Ambitious*

A powerful trait in any competitive industry, ambition will help you in your law course, in your career as a lawyer, as well as in your life. Whilst the law course can be quite intimidating and challenging, an ambitious individual who is dedicated to learning new things has the potential to understand and realize long-term goals. Do not view the journey as one whole insurmountable mountain but focus on the next small goal and once achieved move on to the next and goal by goal you will reach your final target point.

In this respect, gaining valuable work experience through an internship is an important step taken by an ambitious young lawyer who wants to attain certain skillsets, and remain a step ahead of his/her peers. By being inquisitive, analytical and humble enough to accept guidance and mentoring one is guaranteed a fruitful experience in a law firm. It is also not only a means to start focusing on the direction of your career and to build upon your chosen path, but will undoubtedly expose you to the international world. This is crucial, as most of the traditional legal sectors have been intertwined with new areas of legislation and all these together now present much more opportunity for intra-jurisdictional work.

2. Networking

By engaging with counterparty students abroad and in international fora one gains an insight into another reality and is exposed to different cultures, ways of communicating and is able to bridge

the differences between parties to a mundane discussion which will eventually become a transaction or a major project in professional life.

3. *Organisational Skills*

Organisation is key in any industry. Good organisation skills always stand out to a recruiter when considering potential applicants. Such skills can be obtained by gaining experience either through organising one's own work, study plan,student events or cultural/philanthropic events.

Going hand-in-hand with this, is having a study plan. By planning your studies ahead, one will have a sufficient amount of time to meet all the demands, while also being able to participate in productive outside activities. Reviewing notes or case briefs before class can also help you follow and participate in class discussions better , whilst following case-law allows you to apply them for specific situations. In view of the amount of material involved summarising and carving out the most crucial points is essential to then build your argument in papers.

4. *Taking your own class notes*

It is always important to take down your own notes as laws are always evolving and passed-down notes would provide the context but are not ideally used for the detail. Researching the particular topic and comparing Malta's law with that of other jurisdiction gives one a completely different outlook and commenting on these variances in an exam paper, dissertation or assignment would distinguish one student from another. Not to be overlooked are also the consultation papers, commentaries and other official public documents that are issued by local authorities from time to time on different areas of law and industry. Being abreast of what is happening in industry will help putting the particular law or regulation in context.

5. *Participation*

Participation is a main element of the learning process. Being actively involved during seminars and lectures and participating in legal debate sessions, mock trial competitions and moot courts are essential in order to improve your persuasive and presentation skills. If you find this very difficult (all of us have different characters and traits), then try to focus on participation in other events which will expose you to public speaking starting off in smaller groups in a more familiar environment and trying out new experiences and larger audiences as you go along.

6. *Practice is the key to success*

This leads us to our next point – practice. Attaining good grades is undoubtedly an important part of the law course, however, in themselves, they are not enough to show that you have substantial material to succeed. Working within a law firm introduces you to the world of work, and allows you to gainspecific industry-related skills which one will only ever be able to learn in a workplace setting.

Work experience can provide you with valuable insight which will help you decide what your career aspirations are and in which areas you would like to further delve into.

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Distinction between Criminal Offences and Civil Wrongs

Criminal Offences belong to the much wider class of legal wrongs. A legal wrong is an act which is contrary to the rule of legal justice and a violation of the law. It is an act which is authoritatively determined to be wrong by a rule of law and is, therefore, treated as wrong in, and for the purpose of, the administration of justice by the State.

In applying a sanction of the rules of Right, the tribunals of the State may act in one or the other of two different ways: they may either enforce rights or punish wrongs. In other words, they may either compel a man to perform the duty which he owes, or they may punish him for having failed to perform it. Hence the distinction between the civil and criminal justice. The former consists in the enforcements of rights, the latter in the punishment of wrongs. In a civil proceeding, the plaintiff claims a right, and the Court secures it for him by putting pressure upon the defendant to that end: as when one claims a debt that is due to him or the restoration of property wrongfully detained from him or damages payable to him by way of compensation or the prevention of a threatened injury by way of an injunction. In criminal proceedings, on the other hand, the prosecutor claims no right, but accuses the defendant of a wrong: the Court makes no attempt, as a rule[1], to constrain the defendant to perform any duty already disregarded and or to pay compensation for the right already violated as when he is hanged for murder or imprisoned for theft.

A wrong regarded as the subject matter of civil proceedings is a civil wrong; when regarded as the subject matter of criminal proceedings, it is a criminal wrong or a criminal offence.

But this is only a formal distinction between the two classes of wrongs. Any description of criminal offences which centres either in procedure or in the fact of punishment amounts only to a formal, not to a material definition. It is not enough to know that a criminal offence is a punishable wrong, that is, a wrong which exposes the doer to criminal proceedings designed for his punishment. The problem is why is such wrong punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?

[1] Exceptions to this rule are orders by the court for the abatement of a nuisance (Section 316, Code of Police Laws; 389 Criminal Code), and recognizances to keep the peace and be of good behaviour (Sections 395, 396, Criminal Code)

Many attempts have been made to answer these questions and to propound a general definition of a criminal offence which shall distinguish wrongs which are criminal from those which are merely civil. Indeed perhaps, nothing in Jurisprudence has led to more discussion than the true ground of such distinction. In juristic doctrine endless technical distinctions may be drawn without ever arriving at anything which satisfies the mind as a real distinction.

In attempting to frame a definition of a criminal offence which shall separate the illegal acts which are criminal from those which must be treated in another branch of the law of wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

I. In adopting this course, one way that most naturally suggests itself to a man's mind is the ordinary limitation of the idea of crime to those legal wrongs which offend our moral feelings. In fact, there is something more in the notion of most crimes than a mere breach of the legal rule. There is a strong element of morality in their wrongfulness. If popular language be any guide, it is clear that the word 'crime' denotes in its ordinary signification something which shocks deeply rooted instincts. We call a thing a crime when we wish to express the strongest disapprobation of it. The major crimes of 'aggression' are undoubtedly, to average moral judgement, peculiarly wrongful. To convey this idea of inherent wrongfulness, the philosophers of the seventeenth and eighteenth centuries defined these crimes as 'mala in se'. Their doctrine was that these wrongs were illegal because they were wrongful; because, in other words, they had been forbidden by a Divine Law which no human authority could possibly abrogate or abridge even if it desired to do so. "Crimes and misdemeanours", Blackstone tells us[2], "such as murder, theft and perjury are 'mala in se' because they contract no additional turpitude from being declared unlawful by the inferior legislature". (He means by the 'inferior legislature' simply the human lawgiver, the superior lawgiver being God Himself). And, indeed, throughout the criminal law of all the nations, there runs an unmistakable current of belief that certain kinds of conduct require direct repression by the State because they are evil in themselves.

Now there is no doubt that intrinsic wrongfulness in the moral sense is a characteristic of most crimes: they are wrong according to average moral judgement. But, Kenny says[3], "this is only

[2] I Comm. 54
[3] op. Cit. p.8

a rough test: it holds of 'grave' crimes in the mass, as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. Many crimes involve little or no ethical blame. Thus, for example, treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, it arises from mistaken virtue and, therefore, however highly criminal, cannot be considered disgraceful; - a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, many breaches of statutory regulations and bye-laws which, because they are punishable in criminal proceedings, must be classed as criminal offences, do not involve the slightest moral blame as, for example, the failure to have a proper light on a bicycle or the keeping of a pig in a wrong place, while conversely, an act that involves the greatest moral scandal may not be a criminal offence. Incest, for instance, though it is no doubt an offence against social morals and the purity of domestic life, is not per se a criminal offence in Malta: it is only punishable as an aggravation of another offence[4]. So, likewise, many grossly wicked breaches of trust are mere civil wrongs. Directors of a company may ruin it by the grossest negligence, bringing many shareholders to poverty, and yet incur no criminal liability. Conduct may, indeed, be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow pond would arouse universal indignation; but in England (and in Malta, unlike in France), he would have committed neither a criminal nor a civil wrong[5].

II. By many persons, the distinction between civil wrongs and criminal offences is identified with that between <u>private</u> and <u>public</u> wrongs. By public wrong is meant an offence committed against the State or the community at large and dealt with in a proceeding to which the State itself is a party, while a private wrong is one committed against a private person and dealt with at the suit of the individual so injured. Blackstone's statement of this view may be taken as representative. "Wrongs", he says[6], "are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are, therefore, frequently termed civil wrongs; the latter are a breach or violation of public rights and duties which affect the whole community considered as a community, and are distinguished by the harsh appellation of crimes and misdemeanours".

[4] Jameson's Report, p.83
[5] Kenny, Op. cit., p.9
[6] 3 Comm. 2

"But", as Salmond observes[7], "this explanation is insufficient". In the first place, all public wrongs are not criminal. A refusal to pay taxes is an offence against the State, and is dealt with at the suit of the State, but it is a civil wrong for all that, just as a refusal to pay money lent by a private person is a civil wrong. The breach of a contract made with the State is no more a criminal offence than is the breach of a contract made with a subject. An action by the State for the recovery of a debt, or for damages, or for the restoration of public property or for the enforcement of a public trust is purely civil, although in each case the person injured, and suing is the State itself. Conversely, and in the second place, all criminal offences are not public wrongs. Many offences are, according to law, prosecuted at the suit of a private person[8], yet the proceedings are undoubtedly criminal, nonetheless.

However, to quote Kenny again, the idea which Blackstone attempted to embody is one of great importance and deserves a very close scrutiny. Criminal offences, according to this idea, are such breaches of the law as injure the community. Now there can be no doubt that if we made a merely general contrast between crimes taken as a mass, and the remaining forms of illegal conduct taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even as early as in the days of the Roman Empire. Roman jurists who noted this especially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "delicta pubblica" and criminal trials "judicia pubblica". As a matter of actual history those phrases were not suggested originally by this; nor even, as Justinian fancied[9], by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crime were tried by the public itself, that is, by the whole Roman people assembled in the 'Comitia Centuriata'. Long after this form of trial had become obsolete, and the origin of the epithet consequently obscure, crimes still continued to be called 'public'. And the phrase did not end with Roman Law, but, as we have seen, plays a prominent part in the classifications and the definitions of Blackstone. Its survival was doubtless due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it - Kenny goes on - as a sufficient foundation for the precise accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing", telling us something that shall be true of

[7] 'Jurisprudence', Ed. 1930, p.119
[8] e.g. Section 526 of the Criminal Code
[9] Inst. 4. 18. I

every criminal offence and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define by mere help of the vague fact that they "usually injure the community". For every illegal act whatever, even a mere breach of contract, must be injurious to the community, by causing it alarm at least, if not in other ways also. Indeed, had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover, we cannot even make the question one of degree and say that criminal offences are always more injurious to the community than civil wrongs are. For it is easy to find instances to the contrary.....It is possible that, without committing any criminal offence at all, a man may by a breach of trust or by negligent management of a Company's affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is a 'crime'.

Moreover, Harris points out[10], an act which is of actual benefit to the public may be a criminal offence: thus, any unauthorised obstruction of a public street is punishable as a public nuisance, and the person who creates such an obstruction is liable to punishment even though it was created in the execution of some work beneficial to the public as, for example, in laying gas pipes.

Hence Kenny concludes - to speak of crimes as those forms of legal wrongs which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them; but it is not an accurate definition. (Yet, as we shall see, this 'public' aspect of crime is a dominant element in the best known 'material' definitions.)

III. Other writers have maintained that a wrong is merely civil if the injury caused thereby can be remedied, whilst it is criminal if the damage cannot be remedied. But this ground of distinction as a universal test is clearly fallacious, for, while for instance, the injury caused by the default of an insolvent debtor cannot be remedied, there are many criminal offences in which the injury can be remedied (e.g. offences against property) and others in which no actual damage is caused at all[11].

IV. Yet others consider that a wrong is civil where the injury could be avoided by the precautions which nature, common sense and the law provides to everyone; while it is criminal if the harm

[10] op.cit.p.4
[11] Vide Florian, 'Trattato di Diritto Penale', Vol. I, P.I, p.7

> cannot be avoided except by the threat of punishment. But rather than a fundamental distinction, this is merely a description of what sometimes, or perhaps often, is the case. It is, in fact, obvious that there may be wrongs of a purely civil nature which cannot be avoided however great the precautions taken; while, on the contrary, there may be criminal injuries which could be avoided with a minimum of precautions.

The failure of the most approved tests of criminality that are based on the nature or the natural consequences of the acts themselves may lead us to believe that there exists no intrinsic distinction between those acts which are criminal and those which are not.

Thus, we have to fall back and dwell yet a little further upon the formal or extrinsic test.

Nothing in the character of an act or omission — says Harris[12] -- enables us to determine whether it is a criminal offence: the only test is the nature of the liability which it entails. The essential characteristic of a criminal offence is that it entails liability to punishment: "the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common feature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished".

But — as Harris warns us — the fact that an act or omission may entail liability to punishment is not sufficient to make it a criminal offence unless the punishment is inflicted as a result of criminal proceedings. In fact, while punishment is the object of all criminal proceedings, it sometimes is the object of civil ones also. Thus, for example, when a Statute imposes a penalty upon an act or omission, it may or may not make that act or omission a criminal offence. Whether it has done so depends on the construction of the Statute and on the nature of the proceedings, that it authorises for the recovery of the penalty. In some cases, a penalty imposed by a Statute is recoverable at the suit of the Attorney-General, or some other Public Officer as a civil debt (e.g. penalties under the Stamp Duties Ordinance, the Succession and Donation Duties Ordinance). Such proceedings, although brought for the recovery of a penalty, are not criminal proceedings and the person liable to the penalty is not, therefore, guilty of a criminal offence. Again, in some cases punishment by fine or imprisonment may be inflicted for civil contempt of Court as, for instance, for disobedience of an injunction or an order of the Court made in civil proceedings[13]: in such cases the punishment

[12] op.cit.p.3
[13] V. Section 1013, Code of Organisation and Civil Procedure

is merely a civil process to enforce obedience to the order of the Court and does not make the disobedience or contempt a criminal offence[14].

The conclusion to be drawn from all this seems to be that no satisfactory 'a priori' test exists for deciding which acts must be considered as civil wrongs and which as criminal offences. The ultimate and sole real test is the law itself; regard being had to the nature of the sanction imposed and the mode of its enforcement.

Indeed, inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure. For almost every criminal offence admits of being treated as a 'tort', that is, a civil injury so that the person wronged by it can sue the wrongdoer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a civil injury[15]. So also, Section 3 of our Criminal Code lays down that "Every offence gives rise to a criminal action and to a civil action". But, of course, this cannot be the case with those offences which do not happen to injure any particular individual or where the course of an offence is checked before it has reached the point of doing any actual harm. However, in the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other men; and whenever this is so, the crime is also a civil injury. Criminal wrongs and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation[16].

This affinity between tort and crime is not in the least surprising when it is remembered how late in the history of law there emerged any clear conception of a difference between them. Even the Romans, for all their legal genius, but slowly developed a body of law which we should recognise nowadays as distinctly 'criminal'. In the broadest sense, with the exception of those crimes against the security of the State, for example, treason, which were always the concern of the people as a whole, we may say that the history of Roman Criminal Law is the very gradual and very imperfect emergence of public discipline out of private retribution. The same may be said of criminal law the world over. In primitive codes, true criminal law is unknown. Its place is taken by that portion of civil law which is concerned with pecuniary redress. Murder, theft and violence are not crimes

[14] Harris, ibid.
[15] 4. Comm. 5.
[16] Kenny, ibid.

to be punished by loss of life, limb or liberty, but civil injuries to be paid for: they merely create an obligation to pay compensation in kind, the exaction of which is the concern only of the injured person or his heir. As yet there is no conception at all that certain types of injury to an individual or his property may also be a threat to the security of the State. Only when offences worthy of punishment cease to be matters between private persons and become matters between the wrongdoer and the community at large and the offender has to answer for his deed to the State itself, will true Criminal Law be established and maintained.

It is thus that in the course of time the list of offences punishable by the State is widened and begins to include acts which, though in themselves merely private wrongs, are a menace to social order and the peace of the State, and the law-making power comes to regard the mere civil remedy for them as being inadequate: inadequate it may be on account of their great immorality, or for the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor to pay pecuniary damages (Kenny here says in a foot-note that the Musical Copyright Act, 1906, was enacted to check the sale of pirated music by penniless street hawkers).

And the process of turning private wrongs into public ones still goes forward in all civilised countries, whenever any class of private wrongs - or even of acts that have never yet been treated as wrongs at all - comes to inspire the community with new apprehension, either on account of its frequency or of some new discovery of its ill effects — "In sostanza, le sanzioni di diritto penale sorgono la' dove quelle del diritto private si manifestano insufficienti: il diritto penale colma le lacune e le insufficienze del diritto private ..... Quindi, il criterio qui imperante e' quello della relativita': l'estensione del reato in confronto col torto civile varia coi popoli e coi tempi a secondo delle necessita' sociali. Il territorio del diritto penale e' essenzialmente variabile ed anzi noi vediamo che esso si allarga di continuo parallelemente al progredire ed al moltiplicarsi dei rapporti giuridici in seno della societa'. Mano mano che una data forma di illecito tocca piu' vivamente gli interessi generali e la vita della societa', sorge e si afferma per esso la sanzione penale"[17].

[17] Florian, op. cit. p.4

Definition of a Criminal Offence

We have seen that the difference between criminal offences and civil injuries does not consist in any intrinsic difference in the nature of the wrongful acts themselves, and we have in consequence concluded that, with relation to positive law (de jure condito), the ultimate test to decide whether a legal wrong is a criminal offence or merely a civil injury, is the nature of the liability which it entails and the proceedings which are taken upon it.

A criminal offence may, therefore, be defined as "a legal wrong which exposes the doer to a punishment to be inflicted upon criminal proceedings". This is, of course, a purely formal definition. Indeed, it can be objected against it that it runs in a circle and begs the whole question. In fact, it merely amounts to saying that "a punishable wrong is one that is punished". But if one bears in mind that there cannot be a criminal offence which the law has not so expressly declared, and, further, that human laws are dictated by considerations of expediency which vary from time to time and from place to place, it will be seen that no better legal definition can be ventured. This, no doubt, was why certain codes which attempted to give at the outset a definition of their subject-matter, did not go beyond saying generally that “a crime is an offence against the criminal law" (For example, the Neapolitan Code of 1808: "Il delitto e' la violenza della legge penale").

The inquiry will naturally suggest itself: Under what circumstances is the State justified in issuing criminal prohibitions? Kenny says[18]: All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which, whether from selfish or philanthropic motives, they desire to see repressed. But Bentham has vividly shown that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question really injures his subjects. Before using threats of criminal penalties to supress a noxious form of conduct, the legislator should satisfy himself upon no fewer than Six points:

1) The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct or indirect, which the infliction of criminal punishment necessarily involves. Hence, he will not make a crime of mere lying unless it has caused a pecuniary loss to the deceived person and thereby become aggravated into fraud.

[18] op. cit. pp.26 et seq.passim

2) It should admit of being defined with legal precision. On this ground such vices as ingratitude, or extravagance or gluttony (unlike drunkenness), do not admit of being punished criminally.

3) It should admit of being proved by cogent evidence.

4) Moreover, this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence, drunkenness is not punished as a criminal offence unless seen in public.

5) And even if an offence is found to possess all these intrinsic conditions of illegality, the law-giver should not prohibit it**,** unless he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibitions would impose: just as in England at the present time - Kenny goes on to say - it is really by public sentiment and not by the unpopular Lord's Day Act of Charles II, that our habitual abstinence from trade and labour on Sundays is secured. Or, on the other hand, public opinion may regard an offence so leniently that the fact that a man has to undergo legal penalties for it, would only serve to secure him such a widespread sympathy as would countervail the deterrent effect of punishment. Criminal legislation must only aim at expressing, as Professor Ottley says, "the judgement of the <u>average</u> conscience as to the <u>minimum</u> standard of right". To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law: but it is a function which must be discharged slowly and cautiously. An admirable illustration of the caution which a wise legislator exercises in undertaking the tasks that the moral reformers commend to him, is afforded by the law of sexual excesses. It does not inflict criminal penalties upon all those acts which the ecclesiastical law prohibits: it selects out of them for criminal prohibition those alone in which there is also present some further element — whether of abnormality, or violence or fraud -- that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6) Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured

> to the community by the milder sanctions which civil courts can wield. Hence, breaches of contract are not criminally dealt with: for, even when intentional, they are seldom accompanied by any great degree of wickedness or any great public risk; or by any temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair.

But there are other forms of wrongdoing which the fear of damages and costs or other civil sanctions do not impose an adequate restraint. The harm done to the immediate victim of the offence may be such that it cannot be redressed by pecuniary compensation: as in the case of murder. Or, as is far more commonly the case, the gravity of the offence or the strength of the temptation to it, may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is beyond the immediate and direct victim who has been wronged, an unknown group of 'indirect' sufferers, who, if only because they are unascertainable, cannot have pecuniary compensation for the suffering that has been caused to them. Finally, there are a great many kinds of actions which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies, for the excellent reason that they are not private wrongs. If the State does not take measure to suppress them, nobody else will or can.

In all such cases the suppression of wrongdoing which thus injures the community at large must be controlled by the Public Authority as the guardian of law and order, and such control is supplied by Criminal Law very efficiently.

This 'public' aspect of crime, that is, that it injures the community as a whole is the dominant characteristic of Criminal Law in all modern societies. It injures the community either because, as we have said, it attacks the person or property or other rights of individuals in such a manner as to cause alarm to other individuals; or because it attacks some vital part of the organisation of the State. In addition, there are a large number of acts, chiefly but by no means all in the nature of 'contraventions' which are inexpedient and, therefore, penalised because they interfere with some part of the State machinery. There may be many reasons, economical, political, administrative, cultural, hygienic which make such acts undesirable: and as the machinery of Government becomes more reticulated, it can be made effective only by creating numerous penalties for non-compliance with it.

The traditional view of the English Law insisted much on this public aspect of crime. We have already seen that this aspect plays *a* prominent part in Blackstone's classification of legal wrongs. It features again very prominently in the following definition given By W. Blake Odgers: 'A crime is a wrongful act of such kind that the State deems it necessary in the interest of the public, to repress it; for its repetition would be harmful to the community as a whole..... A crime, then, is a breach of a duty imposed by law for the benefit of the community at large, -- the breach of a duty owed to the public and, therefore, a wrong done to the public"[19]. And in Halsbury's 'Laws of England', a crime is likewise defined as" an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person who has a remedy in civil action, it is as an act or default contrary to the order, peace and well-being of society that a crime is punishable by the State".

All this does not mean that Criminal Law is not concerned with the rights of the individual. It clearly is. Indeed, the State exists, and all law is intended better to ensure the safety and promote the prosperity of the individual members. These objects the law seeks to achieve by the threat of punishment. But once the offence is committed and the harm is done, the duty which the law vindicates, in inflicting the punishment on the offender, is not the duty to restore the specific right of the victim of the offence — a restoration which, in the nature of things, is often impossible — but the duty not to behave in a certain manner which is prejudicial to order and peace and the well-being of the community.

This indirect mischief to society (danno immediato) is also a vital element in Carrara's conception of crime. He says: "11 fatto che danneggiasse un solo cittadino senza menomare neppure nell 'opinione la sicurezza degli altri non potrebbe essere dichiarato delitto"[20].

The eminent jurist, therefore, defines a crime as follows:

"The violation of the law of the State promulgated for the protection of the safety of the subjects by an external act of man, whether of omission or of commission, for which the agent is morally responsible. (L'infrazzione della legge dello Stato, promulgata per proteggere la sicurezza dei cittadini, risultate da un atto esterno dell'uomo, positivo o negativo, moralmente imputabile").

[19] The Common Law of England, Vol. I, pp.101-4
[20] Programma 0 27

This definition introduces to us in a readily apprehensible manner, certain fundamental notions which we will have to elaborate in the course of our coming lectures. It would, therefore, be well to make a brief analysis of its elements. But before doing so, it is important to point out that hitherto, in this and in the preceding lectures, the terms 'crime' and 'criminal offence' have often been used synonymously of all acts or omissions entailing liability to punishment: the two terms are especially so used in our quotations from English text-books. Later on, we shall see that in our system of positive law the term 'crime' designates a species of the genus designated by the term 'criminal offence': it is appropriated to the more serious criminal wrongs. And it is in this restricted sense that the word crime is used in the translation of Carrara's definition. Venial offences in the nature of contraventions or breaches of 'Police' laws (transgressioni di leggi di buon governo), which are not in themselves morally reprehensible, do not enter into Carrara's theory of the Criminal Law[21]. However this may be, the important thing for the moment is that Carrara's doctrine confirms the point we have been stressing, that the dominant function of criminal justice is the repression of wrongs which are injurious to the community at large in such a manner that they cannot be effectually restrained otherwise than by the infliction of penal sanctions. Thus, although the element of 'public mischief' cannot alone, as we have seen, enable us to determine 'a priori' whether an act is a criminal offence or merely a civil wrong, inasmuch as there are also some civil wrongs which injure the community, still there can be no doubt that it is, as it has always been, the chief factor of importance in causing an act to be made punishable.

[21] V. Prolegomeni

Analysis of Definition

Violation of the Law

The general concept of every criminal offence is that it is a violation of a rule of law: for no act of man can be charged against him unless it is prohibited by the law. An act becomes a criminal offence only if and when it goes counter to the law. It may be morally reprehensible or mischievous or both: but if the law does not forbid it, it cannot be set up against the doer.

Of the State

But it is not the infraction of every kind of law that constitutes a criminal offence. There must be an infringement not of moral law, or of the (improperly) called laws of etiquette, or of honour, but a violation of the positive law enforced from time to time by the State in an organised system of society.

Promulgated

It would be unjust and absurd to require the subjects to conform to a law which has not been enacted and published in due form. But once so enacted and published, the law is presumed to be known by all those to whom it applies and, as we shall see more fully in due course, it does not avail the transgressor to say that he was not aware of it.

For the Protection of the Safety of the Subjects

Those words, in Carrara's view, connote the special characteristic of crime. The non-fulfilment of a civil obligation is a legal wrong, a breach of the law of the State intended to regulate the private transactions between individuals: but it is not a crime. An act is a crime when it violates the law which is designed to ensure the safety of the subject. And the word 'subjects' is used precisely to convey that crime is punished by the State because it injures also the community at large. An act which hurts one individual only without at least alarming the others to their own safety cannot be made a crime.

By an External Act

In Ethics, an evil mental condition would of itself suffice to constitute guilt: but in law no punishment can be inflicted upon mere internal feeling or mental condition. These are not amenable to positive criminal justice: "cogitationis poenam in fore nemo patitur". Mere thoughts or desires, however wicked, cannot injure any person unless there be some external act which shows that progress had been made towards maturing and affecting them.

Of Man

Only man can be guilty of violating the law. It was an aberration when, in by-gone days, mere blind association of ideas, drove the tribunals into the excess of punishing 'crimes' committed by non-ethical agents. Instances occur in the Mediaeval Ages, of punishments inflicted on animals for homicide and in the 'piacularity' attached in ancient Greece to even inanimate instruments of death that had accidentally slain a man[22].

Of Commission or of Omission

A man may become guilty of a criminal offence either because he does that which the law forbids or because he fails to do that which the law enjoins.

For which the Agent is Morally Responsible

Man is subject to the laws of the State inasmuch as he is endowed with the faculties of will and understanding. No man can, therefore, incur criminal liability for his act unless this is accompanied by the mental element required to constitute guilt. And it does not suffice that the wrong-doer knows that he is doing wrong, unless also he can 'help' doing wrong; for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding.

From this brief analysis we can deduce the following propositions:

[22] V. Robson: 'Civilisation and the Growth of Law', p.84 et seq.

1. There cannot be a criminal offence without a violation of a rule of positive law. (This will form the subject 4**.** of our lectures on the notion penal laws and their operation).

2. There cannot be a criminal offence unless man is the cause thereof. (With this we shall deal in our lecture on ‘The Subject of a Criminal Offence’).

3. There cannot be a criminal offence unless man is the cause thereof as a free and intelligent agent. (This matter will be dealt with in our studies of the elements of a criminal offence and the theory of criminal liability).

4. Every offence must be viewed not in the abstract, but in its concrete form, regard being had to all the circumstances which may aggravate or extenuate the responsibility of the agent. Such circumstances are inherent either in the act itself or in the person of the offender. (This will complete our studies of the subjects included in Part I of the syllabus).

The Classification of Criminal Offences

It is not necessary to mention all the various divisions and sub-divisions thought out by Continental jurists and text-writers: it is sufficient to notice the most important:

Offences of Commission and offences of Omission**.** A wrong doer either does that which he ought not to do or leaves undone that which he ought to do.

Formal (Formali) and Material (Materiali). A formal offence is one which is completed by the mere act or omission which constitutes the violation of the law[23]: such act or omission is sufficient in itself to complete the offence[24]. In other words, it is not necessary for the consummation of a formal offence that the injurious event intended by the offender should ensue or that the object desired by him should be accomplished. In such cases the act or omission is wrongful by reason of its mischievous tendency as recognised by law, irrespective of the actual issue. Thus, for example, calumnious accusation (Section 99, Criminal Code) is a formal offence because the crime is complete as soon as the offender maliciously lays infamation against another person whom he knows to be innocent, and it is not necessary that the person against whom the accusation is made be in fact proceeded against or wrongly convicted. Other familiar instances of formal offences are defamation, the forgery of public instruments, and generally all offences in which the achievement of the criminal purpose of the agent or the event of the injury is not an essential ingredient of the offence.

The offence is, on the other hand, material if it cannot be completed without the actual happening of the injurious event which alone constitutes the material violation of the law[25]. Here, the completion of the offence requires the accident of the event which, though the offender may have done all that he could to bring it about, may not materialise in consequence of circumstances independent of his will[26]. Thus, a homicide is a material offence because it cannot be said to have been perpetrated unless a man has in fact, been killed. Other instances of material offences are bodily harm, carnal knowledge, and similar offences, in respect of which liability for the complete

[23] Carrara, Programma § 50
[24] Mazzini, 'Trattato' p.563
[25] Carrara, ibid.
[26] Mazzini, ibid

offence depends on the actual accident of the injurious event. This distinction has practical importance in connection with the doctrine of criminal attempts[27].

Simple (semplici) and Complex (Complessi). An offence is said to be simple when it violates one single right; it is complex when it violates more than one right, as, for instance, when the same act or omission constitute an offence under two or more provisions of the same law, or under two or more different laws, or when acts constituting in themselves criminal offences are considered by the law as ingredients or aggravating circumstances of another offence[28].

Other writers, however[29], designates as a simple offence that which can be executed by one single act: ‘qui unico actu perficiuntur’ (e.g. oral defamation); and as complex that the perpetration of which requires a more or less complex series of acts forming together one single transaction. This distinction as defined by Carrara is of practical importance in connection with the theory of concurrent offences; and, as defined by other writers, it has practical importance in relation to the doctrine of criminal attempts. As Manzini says "the notion of an attempt is inconceivable in respect of a simple offence (as defined by him).

But it should be noted that the term 'simple’ offence is also used to denote the offence as primarily contemplated by the law, without aggravating circumstances: as when, for instance, our Criminal Code speaks of 'simple theft' (Section 297).

Instantaneous (istantanei) and Continuing (permanenti). This distinction has considerable practical importance both in relation to substantive law as well as in relation to adjective law, that is, Law of Procedure, and especially in connection with the application of transitory provisions, with the age of the offender and with prescription. Our Code, like all other codes, does not give a definition of either an 'instantaneous' or of a 'continuing' offence. It merely mentions 'continuing' offences in Section 686. But text-writers give various definitions which, in these notes, we cannot follow up in detail; and our case-law has noticed and dealt with the distinction on several occasions. It is essential to a clear notion of a continuing offence, as contrasted with the nature of an instantaneous offence, that we should not confuse the continuance of the effects of an offence with the continuance of the offence itself: There may be the former even if the offence is

[27] V. Criminal Appeal ‘The Police vs. Said’, 23. I.1939; also, Law Reports, Vol. XXVI, P.IV, p.768
[28] V. Carrara, § 52
[29] e.g. Manzini, op. cit. p.564

definitely instantaneous. Thus, for instance, homicide, bodily harm, theft, etc., are instantaneous offences, although the effects produced by them be permanent.

Nor should the concept of a continuing offence be mixed up with that of a continuous offence (reato continuato). The definition of a continuous offence is given in Section 20 of the Criminal Code and the relative doctrine will be expounded in due course. For the moment it is sufficient to point out that whereas a continuing offence pre-supposes an uninterrupted state of things which prolongs, over a more or less protracted period of time, the original violation of the law, a continuous offence postulates two or more violations of the same provision of the law committed at the same time or at different times, that is, in other words, a series of acts which may be regarded as apart, but which by a 'fictio juris' are considered by the law as forming one single transaction on account of the one and the same criminal determination or design which links them together.

Bearing this in mind, it is possible to make a clear, if concise, distinction between the two forms of offence under discussion.

An offence is instantaneous if the violation of the right or interest protected by the law is entirely completed so soon as all the elements constituting the offence actually concur. The effects of the offence may or may not continue after the perpetration of the act or omission constituting the offence: but if they continue, it is not because of any further act or omission on the part of the offender or of the permanence of his original act or omission, but merely as a result of such original act or omission: in other words, the continuance of the effects is not occasioned by the repetition or the continuance of the wrongful act or omission which gave rise to the violation of the right or interest protected by law. Instances of instantaneous offences are homicide, bodily harm, defamation, rape, theft, wilful damage, etc.

A continuing offence, on the other hand, is one which consists in a state of things subjectively and objectively and uniformly contrary to law in every moment of its duration. Here the injury or the violation of the right or interest protected by the law continues and is repeated uninterruptedly even after the completion of the or omission giving rise to the offence, so long as the said state of things continues. Thus, the ingredients of a continuing offence are two:

(a) A wrongful conduct (that is, act or omission) protracted uninterruptedly and without any change in its constituent elements for a length of time; and

(b) A state of things contrary to law or the violation of a right or duty likewise continuing without interruption and uniformly, co-extensively with the continuance of such wrongful conduct.

Instances of continuing offences are illegal arrest or detention (Sections 85, 86), certain contraventions against the laws relating to the erection of buildings, etc.

In order to determine in a particular case whether an offence is an instantaneous or a continuing one 'the soundest criterion' - as Mr Justice Harding puts it – 'is that of adverting to the fact which the law intends to repress and of deciding the issue according to the nature (instantaneous or continuing) of that fact'[30].

By far the most important distinction is that made with reference to the nature and gravity of the offence. Some Codes divide offences into three classes. Thus the French Code classifies them into 'crimes', that is, grave offences triable in a Court of Assize and punishable by 'peines afflictives ou infamantes1; 'delits', that is, less serious offences triable by the Correctional Court and punishable by 'peines corectionelles; and 'contraventions', that is, petty offences tried by professional magistrates and punishable by 'peines de police'.

In English Law, offences are divided into 'indictable offences'| that is, those which admit of trial by jury, and non-indictable offences, that is, those which can be tried summarily by justices of the peace or other magistrates sitting without a jury. To some extent, however, these two classes overlap, as some indictable offences may be tried summarily and vice-versa[31]. Indictable offences are sub-divided into Treasons, Felonies and Misdemeanours.

Crimes and Contraventions - Our Criminal Code (Section 2) divides offences, according to their degree of importance, into Crimes and Contraventions: the more heinous offences are crimes, the less heinous contraventions. But no definition or explanation is contained in the Code to distinguish the one group of offences from the other. In practice no difficulty arises where the offence is expressly contemplated in the Criminal Code itself; for in that Code crimes are dealt

[30] V. "Recent Criminal Cases Annotated", § 91; V. also ibid. 83, and the precedents therein quoted
[31] V. Harris, op. cit. p.10

with in Part II of Book First separately from contraventions which are dealt with in Part III. So, from the place which the offence occupies in the Code, it can be decided whether it is a crime or a contravention. Nor can any difficulty arise in respect of offences created by special laws (that is, penal laws other than the Criminal Code) where the law itself determines the nature of the offence thereunder, as, for instance, the Food, Drugs and Drinking Ordinance (Cap. 54, which provides that all offences against its provisions are to be considered as contraventions, irrespective of the punishment applicable, and the Spirits Ordinance (Cap.64 which lays down that all offences under its provisions are to be considered as crimes. The doubt arises where the special law creating the offence is silent as to its character. In such cases it may be most important in practice to decide to which of the two classes the offence properly belongs, for several reasons of which the most important are the following:

i. Forfeiture of the 'corpus delicti', etc. is a consequence that necessarily ensues upon the infliction of any punishment for a crime but cannot be ordered except in the cases expressly laid down by the law in respect of contraventions. (Section 24).
ii. An attempt to commit a contravention is not punishable except in the cases expressly determined by law, whereas in respect of crimes the rule is that an attempt is always punishable. (Section 42).
iii. The previous conviction of a crime precludes the application of Section 23 (first offender's benefit); previous convictions of contraventions do not.
iv. A previous conviction of a contravention does not make the offender a recidivist on a subsequent conviction of a crime. (Section 50).
v. The prescriptive period, that is the time within which Criminal action can be taken is of three (3) months in respect of contraventions but ranges between two (2) and twenty (20) years in respect of crimes. (Section 683).

But how is one to decide?

One theory, very prevalent among continental jurists, is that regard must be had to the intrinsic character of the act itself forming the subject-matter of the incrimination. According to this theory those acts which are inherently wrongful and produce an actual injury to a private or a public right are crimes, whilst those acts which, though in themselves are harmless and are committed without malice, are yet made punishable to prevent an apprehended danger to public peace and order or the rights of others, are contraventions. It may happen that the private of public right has not in

fact been actually hurt: nevertheless, if the act directed to the injury of such right has actually exposed the same to a real and imminent danger, the act is still a crime. On the contrary, an act which merely gives rise to a potential and indeterminate danger, is a contravention. In the case of crimes, the law says, for instance, "do not kill": in the case of contraventions, the law says: "Don't do anything which may expose other people's life to danger"; in the former case, the law says: "do not injure other people's property"; in the latter case it says: "Don't do anything from which injury may derive to such property".

But this test is not conclusive. The doctrine is, no doubt, useful as a guide to legislators, in the sense that, in the enactment of the laws, those acts which are morally wrongful and cause actual injury of a grave nature, should be classified as crimes, while those others which merely represent a potential danger and are not inherently reprehensible should be allotted to the class of contraventions. Yet legislators may sometimes find it expedient for reasons of social utility or expediency to depart from this rule, and therefore, enacted law does not always follow any invariable 'a priori' principle of separation. Which means that 'de jure condito' any distinction based exclusively or even primarily on the nature or natural consequences of the act itself is fallacious. And in fact in the category of crimes there are facts which are not immoral by ethical standards (for example, Section 84) while, conversely, in the class of contraventions there are facts which are positively morally blameworthy (for example, Section 352 (x) and (y) and Section 353 (k) and (1). Again, there are crimes which do not injure nor expose to actual danger any subjective right (for example, Section 300) while there are contraventions which do cause an actual injury (for example, Section 354. Lastly, there are acts which are dealt with by the law both as crimes and as contraventions, the difference being only one of degree, for example, slander. (Section 265 and Section 353(e)).

This last observation recalls another theory which found favour with some other writers (Impallomeni, Florian). These make the distinction between crimes and contraventions not one of nature but one of degree, that is to say, they found the basis of distinction upon the respective importance of the individual or social conditions of existence which the offence affects. There are offences which directly impinge upon primary and essential conditions of existence (life, liberty, etc.) and occasion a serious disturbance of the legal system: while there are other offences which merely imperil and in a slight degree disturb the legal establishment, or cause only a negligible damage and interfere with conditions of existence that are of minor secondary importance (comfort, amenities). The former offences constitute crimes, the latter contraventions.

But it is not difficult to see that this second theory is even less conclusive than the first. Everyone, of course, senses in his own way that there are conditions of life which are more important than others: but the criterion is much too arbitrary and indeterminate to be made the basis of a legal distinction[32].

The truth would seem to be that in relation to positive law no decisive distinction of principle can be made. The most reliable test is the quality or degree of the punishment which the particular offence attracts, on the reasonable assumption that the legislature has imposed the harsher penalties on those offences which are more serious and the less heavy punishments on those offences of a venial nature or slight importance. In order to avoid all questions, some Codes (for example, the Italian Code of 1931) laid it down expressly that, in case of doubt, the distinction is to be made on the strength of the punishment applicable: "Il progetto assume a criterio distintivo, tra delitti e contravenzioni, le specie di pena comminata. Adottando tale criterio non ho creduto disconoscere la diversita' ontologica delle due categorie di reati, ne' rinunziare a classificare i fatti antigiuridici nell'una o nell'altra categoria, secondo il loro sostanziale carattere; ma ho creduto mettere in evidenza il criterio piu' sicuro per identificare le contravvenzioni, tenuto presente che la lunga ed interessante elaborazione dottrinale e giurisdizionale, che ha seguito l'attuazione del codice del 1889, non e' ancora riuscita a suggerire una formula di distinzione che raccolga adesioni tali da farla ritenere almeno prevalente. In verita' e' da riconoscere che il legislatore classifica i fatti nella una o nell'altra categoria di reati, non solo in base a principii di scienza giuridica, ma anco secondo necessita' di politica criminale: cosi' che spesso non e' possibile riportare la classifica nell'orbita di una teoria preordinatamente accettata ed applicata"[33].

Our Criminal Code does not lay down any express rule. But at Section 7 it specifies the punishments which are applicable to crimes and the punishments which are applicable to contraventions. If the criterion of punishment is relied upon, it will be easy to judge from the punishment attaching to the particular offence in question whether it should be considered a crime or contravention. It is true that even this test is, in some exceptional cases, negatived in the Criminal Code itself; there are therein offences, being crimes, which are, in certain specified circumstances, made liable to the punishments established for contraventions (for example,

[32] (For other theories, see: Manzini, Trattato di Diritto Penale, 1933, Vol. I, p.535 et seq.; Lucchini, 'Ancora e sempre contro la tripartizione dei reati', in Riv. Pen. Vol. XXII; Impallomeni, 'Il Sistema Generale delle Contravvenzioni, ecc.' in Riv. Pen. Vol. XXVIII; Rocco, 'L'Ogetto del Reato', p.349 et seq.).
[33] Relazione ministeriale sul progetto del Codice Penale, I, p.82

Section 240 (c), Section 301 and Section 265 (2)). But, as a rule, the distinction based on the kind of punishment can be relied upon.

And it has, in fact, been adopted by our Courts in all cases, one may say[34] in which the question arose for decision. Thus, in re Francesco Azzopardi P.L. v. Enrico Mizzi[35], His Majesty's Court of Appeal said:

"Il criterio pratico indicato della dottrina e seguito nella giurisprudenza, si' locale che estera, per distinguere i delitti dale contravvenzioni, e' appunto la qualità della pena comminata per i vari titoli di reato".

The same rule was followed in the learned judgement delivered by Mr Justice Camilleri L.A. in re 'The Police vs. Charles Gatt' (Criminal Code of Appeal, 27.3.1942) where it was decided, on the strength of the punishment applicable, that offences against the Malta Defence Regulations were crimes. (See also decision in re 'The Police vs. Cataldo Vella', Criminal Court of Appeal, 26.11.1943.) Finally, in re 'The Police vs. Joseph Mifsud'[36], a review is made of all previous judgements and the whole matter of the distinction between the two classes of offences is again fully discussed.

[34] In the case 'Rex vs. Salvu Vella' (28.10.1943) H.M.'s Criminal Court held offence against Regulation 26 of Government Notice No.223/1940 (combined with Section 25, Criminal Code) to be a 'contravention' notwithstanding the nature of punishment prescribed in Section 10 of Ordinance VII of 1936.
[35] Law Reports, Vol. XXIII, P.1, p.570
[36] Criminal Court of Appeal, 9.2.1944, per Mr Justice Harding

Penal Laws

Contents - Necessity - Interpretation.

We have seen that perhaps the most important function of the State is that which it discharges as the guardian of order, preventing and punishing all injuries to itself and all disobedience to the rules which it has laid down for the common welfare. In the discharge of these functions, the State proceeds by an enumeration of the acts which it considers injurious to the maintenance of order and the common welfare, coupled with an intimation of the penalty to which anyone committing such acts will be liable.

Such enumeration and intimation from the contenta of the Substantive penal laws of the State.

Every penal law, thus, consists of two elements, that is to say, the ‘precept’ (‘preceptum legis’) whereby the State prohibits or commands the doing of a certain act, and the ‘sanction’ (‘sanctio legis’) whereby a punishment is threatened against the transgressor. Very often - not to say as a rule - the precept, that is, the command or prohibition, is implied in the sanction. Thus, for instance, in the provisions concerning offences against the person, the penal code does not premise the prohibition "Do not kill" or "Do not cause bodily harm". It defines what constitutes homicide (Section 225) and what constitutes bodily harm (Section 228) and determines the penal consequences thereof. In all such cases the rule of conduct "Do not kill", "Do not cause bodily harm", to which the law attaches the sanction, is implied in such sanction.

Now, a great body of theoretical writers have maintained that Criminal Law should have its source in Natural Law or Moral Law which supplies the universal rules for the governing of the external conduct of mankind and is said to be written in man’s own heart, commanding what is right and prohibiting what is wrong. "Criminal Law", says Blackstone, "should be founded upon principles that are permanent, uniform and universal, and always conformable to the dictates of truth and justice, the feeling of humanity and the indelible rights of mankind"[37].

On these principles it might appear that the necessity of the enactment of formal penal laws by the States is not the obvious truism it looks. Man might be left to be guided by tradition and custom

[37] 4. Comm. 14

and by his own instinctive appreciation of the promptings of reasons and of the general principles of right; and the tribunals might be trusted to dispense justice according to what is naturally right and just in the case in their own eyes.

In simple and primitive communities, it is no doubt possible that rulers and magistrates execute judgements in such a manner as best commends itself to them. Early law is conceived as ‘Jus’ (the principles of justice) rather than as ‘Lex’ (the will of the State). The function of the State in its earlier conception is to enforce the law, not to make it. The rules to be enforced are those of right which are found realised in the immemorial customs of the people or which are sanctioned by religious faith and practice, or which have been divinely revealed to man.

But as the State grew up and the machinery of Government became more complex, the thing became different; and in almost all modern countries, legislation by the State has asserted its exclusive claim. This is true of all branches of the law but is particularly important in respect of Criminal Law.

And, in fact, on the one hand the principles of justice are not always clearly legible by the light of mere reason: and, therefore, for the sake of uniformity and certainty, it is now universally admitted that Moral Law has no claim to recognition as an independent source of Criminal Law, except in so far as its principles have been recognised as fit for compulsory enforcement by the State through the instrumentality of its laws.

On the other hand, as we have already seen, the State finds it often necessary in the general interest of the community to prohibit or command actions which have nothing to do with intrinsic rightfulness or wrongfulness. As Professor Malinowski says: "There must be in all societies a class of rules too practical to be backed only by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency"[38]. These rules must be sanctioned by a definite social machinery of binding force.

Hence the necessity of positive enactments by the State whereby it authoritatively declares the rules which it intends to enforce and intimates the penalties which the breach of those rules will entail.

[38] Crime and Custom in Savage Societies', pp. 67-68

The enactment of such laws is a guarantee of the rights of the individual. Every member of the community has complete freedom of action so long as he does not unjustly interfere with any rights of others protected by the State. And he cannot, therefore, be subjected to punishment for anything done by him except in as much as he knew the action to be a violation of a rule of conduct which the State required to be observed. On the other hand, the State cannot have the proof of such guilty knowledge unless it has previously authoritatively declared the rules which it intends to enforce. Such formal declaration is a conditions precedent to the application of the sanction in Courts of justice.

Thus, legislation satisfies the requirements of natural justice that laws should be known before they are enforced.

Moreover, the State has the duty of preventing offences before resorting to punishment. The threat of a pre-determined penalty for every breach of the rules of right recognised by the State furthers the interests of social security by denying to every potential offender all hopes of a light penalty and thus preventing the commission of offences by operating as an effective restraint.

Finally, such pre-determined penalties safeguard the interests of the offender himself by securing him against the unlimited and uncontrolled discretion of the individual judge.

From what we have been saying, the following basic principles emerge:

1. No act or omission can be considered as a criminal offence unless it has been so declared by the law of the State: "Nullum crimen sine lege" - "Nullum crimen sine praevia lege poenali".
2. No punishment can be inflicted which is not prescribed by the law: "Nulla poena sine lege". This means:
   (a) That the form of punishment imposed by the Court must be one of those which the law permits.
   (b) That the offence cannot attract a punishment which is higher than, or different from, that which the law expressly provides.

Thus, enacted or statutory law, that is, the law made by the formal and express declaration of the legislative authority, is - at any rate in our system - the only legal source of Criminal Law. Here, usages and customs have not, as in Civil matters, the force of a subsidiary law. "Consuetudo" in

the sense of judicial precedents may still be "optima legum interpres"; in other words, the "auctoritas rerum similiter judicatarum" may be a helpful guide to the interpretation of enacted law: but custom, as custom, can have no value as an independent source of Criminal Law.

It is now, likewise, the universally accepted doctrine that a law does not become inoperative through desuetude or obsolescence: these can never accomplish the abrogation of a law in force however old or out of date it may appear to be. Nothing but repeal can disembarrass the law of any matter which has become obsolete.

Interpretation[39]

The operation of enacted law is not automatic. It has to take effect through interpretation, for, in order that the appropriate legal rule may be applied, it is necessary that the law shall be properly construed and interpreted.

The object of all interpretation is to determine the exact meaning of the legal rule, that is to say to ascertain the real will and intention of the law in relation to a determinate case. In other words, the purpose of interpretation is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. It was well said: "The law is the will of the legislature and the most fundamental rule of interpretation, to which all others are subordinate is that a statute is to be expounded according to the intent of them that made it."

This being the essential object of interpretation, that is, to ascertain the true meaning of the law, it is clear that from an objective point of view, that is to say, considering it in itself, - apart from the means used and the results obtained, - there cannot be different kinds of interpretation. This can only be good or bad, true or false.

From a subjective point of view, that is, in relation to the interpreter, continental text-writers distinguish three kinds of interpretation which they describe as:

i. Doctrinal,

[39] Attention is drawn to Section 33 of the Malta (Constitution) Letters Patent, 1947 and Section 16 (3) of the Malta (Office of Governor) Letters Patent, 1947, according to which, if there is any conflict between the English and the Maltese texts of any Bill or Law, the English text shall prevail.

ii. Authentic, and
iii. Judicial

Doctrinal Interpretation

"Doctrinal" interpretation has nowadays but an indirect influence on the application of the law. In Roman days, on the contrary, the theoretical opinions of jurists were a direct and objective source of law; and in medieval times effect was given to them to supplement and integrate the rules of law. One must not confuse, however, this kind of interpretation derived from the writings or opinions of one or more jurists with those canons of construction which, though indeed collected in textbooks and treatises, have been constantly recognised and applied by the Courts and now constitute a jus acceptum, legal norms of binding effect.

Authentic Interpretation

The "authentic" interpretation is that provided by the legislature itself as in what are called "interpretation clauses" of an enactment, or in a comprehensive interpretation law (e.g. the English Interpretation Act, 1889), or in an opposite subsequent enactment where doubts have arisen as to the meaning or effect of a previous enactment. This kind of interpretation is binding on all: in fact, it is hardly, strictly speaking a form of interpretation. It is rather a rule of law, the imperative effect of which can completely override and exclude even the obvious and logical meaning of the words or expressions defined. It can give to such words or expressions the meaning it chooses and not that which would naturally be assigned to them. In the light of this it is clear - Manzini says - that it is vain to attempt to fix "a priori", as certain writers have tried to do, rules for this kind of interpretation, the only limits of which are the powers of the legislature.

A special characteristic of an "authentic" interpretation made by a subsequent law is that, in so far as it does not change pre-existing law, it has, unlike other laws generally, a retrospective effect even without any express declaration for the purpose by the legislature. The subsequent law, declaring the meaning and purport of the previous law, consolidates itself with it without creating any new legal rule. As Tolomei says: "Nella interpretata e' già compresa la interpretativa"[40]. Consequently, it applies to all facts and transactions in regard to which there has not been in the

[40] Diritto Penale, p.92

meantime a "res judicata" or other irrevocable conclusion. All this, of course, holds good unless the interpretation law itself otherwise provides. Also it is quite clear that if the interpretation law does not limit itself to declaring the meaning of the pre-existing law but proceeds to provide for supplying the deficiencies of that law, then in such a case new rules are created which do not by themselves have retrospective effect.

Judicial Interpretation

But here we are concerned especially with the "interpretation judicialis", that is, the interpretatio to be given by the Courts in the application of the law to the particular cases coming before them.

The Chief characteristic of enacted law is its embodiment in authoritative formulae. The very words in which it is expressed - the litera legis - constitute an essential part of the law. Hence it is that a process of interpretation is necessary in order that the Court may ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed. Although at times the meaning of the law may appear evident, a process of interpretation is always requisite, in so far as the formula, conveying the will of the legislature, has necessarily a general and abstract character and, to adapt it to the individual concrete case, it is, in the first place, necessary to determine its precise meaning and import.

This interpretation of enacted law is a science of itself and we cannot here attempt anything like an exhaustive survey of it. Some considerations especially applicable to criminal law will be discussed later. But first we will glance at some general leading principles.

Unfortunately, it cannot be pretended that we have any complete, stable and consistent system of principles of statutory interpretation in our law or jurisprudence. Our Courts apply Continental or English rules. The matter is a difficult one and such rules are not always clear, categorical, stable and consistent, with regard to the English rules Allen[41] observes: “This branch of our law exhibits inconsistencies which suggest radical weakness somewhere. This is evident in any of the standard treatises on the subject. There is scarcely a rule of statutory interpretation, however orthodox, which is not qualified by large exceptions, some of which so nearly approaching flat contradictions, that the rule itself seems to totter on its base.” Complaints of a like kind are not

[41] Law in the Making”, 5th. ed. p.494

often also made by continental jurists as to the formulation and application of principles by the Courts: "Generale e' il lamento per l'instabilità e per la contraddittorietà della giurisprudenza della Corte di Cassazione, alla quale si e' assegnato il carattere di corte regolatrice"[42].

Nor is there any uniformity in juristic doctrine because the subject is not easily capable of being resolved by absolute rules: "Intorno alla interpretazione della legge penale sono discordi le dottrine..... Forse il problema e' arduo a risolversi con una forma assoluta".

In spite of these difficulties inherent in the subject, it is perhaps possible to trace some principles regarding which there is, generally speaking, a wide measure of agreement.

A. Literal Interpretation.

We have already said that, of interpretation considered in itself, there cannot be various kinds. But having regard to the means or method used in the process of interpretation, we may distinguish two kinds which continental writers described as literal or grammatical and logical. The former is that which regards exclusively the verbal expression of the law. It does not look beyond the "litera legis". Logical interpreter, on the other hand, is that which seeks beyond the letter of the law for evidence of the true intention of the legislature, or in other words, seeks to determine the actual intention enshrined in the law in relation to the apparent intention resulting from the letter.

Now there is no doubt that the literal interpretation must precede every other, for it must be presumed that the legislature has said what it meant and meant what it said: "nam quorum nomina, nisi ut demonstrarent voluntatem dicentis?" "Ita scriptum est" is the first principle of interpretation.

In the process of grammatical interpretation words are primarily to be construed in their ordinary and popular sense unless there should be strong indication that some other meaning was intended by the legislature. "Nec aliter a propria verborum significatione recedendum, quam cum manifestum est id sensisse legislatorem"[43]. In other words, if there is nothing to modify, nothing to alter, nothing to qualify the language which the law contains, the words and sentences must be

[42] Manzini, op. cìt. Vol. I, p.275
[43] Leg. 69 D

construed in their ordinary and natural meaning, given to them by usage, regard being had to the time of the enactment of the law. This is particularly applicable to Criminal Law which lays down rules of conduct for all which all must understand, and where, therefore, it is usual to use ordinary language intelligible to all rather than legal or technical language. As was said by an English Judge: “In dealing with matters relating to the general public, laws are presumed to use words in their popular sense: uti loquitur vulgus." Sometimes of course, unusual and technical meanings of words must be adopted if it is clear that such meanings were intended by the legislature. In the case "Unwin v. Hansen"[44] Lord Esher observed! "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

In general, it is to be assumed that no word in the law is meaningless or superfluous, unless this should appear absolutely evident.

Also, unless the contrary intention appears, words importing the masculine gender include females and words in the singular include the plural and words in the plural include the singular.

But words are meaningless in isolation and their context must always be taken into account. "Words", writes Professor H.A. Smith, "are only one form of conduct, and the intention which they convey is necessarily conditioned by the context and circumstances in which they are written or spoken. No word has an absolute meaning, for no word can be defined "in vacuo" or without reference to some context. The practical work of the Courts is very largely a matter of ascertaining the meaning of words, and their function, therefore, becomes the study of contexts." Words used with reference to one subject-matter or set of circumstances may convey a meaning quite different from that which the same words used with reference to another set of circumstances and another subject-matter would convey. General words admit of indefinite extension or restriction according to the subject to which they relate and the scope and object in contemplation. That is why it is so necessary to interpret the words according to their context having regard to the subject-matter being dealt with. Moreover, the provision to be interpreted must be examined as a whole, having regard to the other provisions of the law: "incivile est, nisi tota lege perspecta, una aliqua particula

[44] 1891, 2 Q.B.p.119

eius proposita iudicare vel respondere"[45]. As was said by Du Parcq L.J. in "Butcher" vs. "Poole Corporation"[46]: "It is, of course, impossible to construe particular words in a statute without reference to their context and to the whole tenor of the Act."

Now, if upon the literal analysis of the provision according to the rules just outlined, the language is not only plain but admits of but one meaning, the task of the interpreter is clear. Such language must be accepted, without more, as declaring the intention of the lawgiver and to be decisive of it - "index animi sermo". It matters not in such a case what the consequences may be, for, where by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The duty of the Court is not to make the law but to expound it as it stands, according to its plain and unequivocal meaning: "Non de legibus sed secundum legis judicandum". As Allen remarks[47]: "When the sense gathered from the actual words is plain and unambiguous," - the French rule, and indeed the rule of nearly all countries, is the same as the English - "the words must be loyally accepted and the law applied accordingly, however inconvenient the consequences". This principle is well established in our jurisprudence. In re 'The Police vs. Vella'[48] the Court said: Where the language of the enactment is clear, no interpretation is permissible which is inconsistent with the clear meaning of the expression: for the Court cannot substitute its own judgement for the will of the legislature".

B. Logical Interpretation

But language is rarely so perfect as to be absolutely "plain and unambiguous". To adhere to the literal and primary meaning of the words in all cases would be to miss their real meaning in many. As is remarked in Maxwell[49]: "If a literal meaning had been given to the lave which forbade a layman to 'lay hands' on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life would have been liable to punishment. On a literal construction of his promise, Mohamed II's sawing the Venetian governor's body in two was no breach of his engagement to spare his head".

[45] L. 24 Dig., I,3
[46] (1942) (2 All E.R. 572)
[47] op. cit. p.491
[48] Cr. App. 27 xi. 1943
[49] On the Interpretation of Statutes" 10th Ed., 1953, p.17

The literal construction then, has, in general, but prima facie preference. There are cases in which the "litera legis" need not be taken as conclusive and in which the true intention of the law may be sought from other indications. This happens when the letter of the law is logically defective on account, for instance, of its ambiguity (the word of the law instead of meaning one thing may mean two or more different things), or its inconsistency (the law instead of having more meanings than one, may have none at all, the different parts of it being repugnant so as to destroy each other's significance), or its incompleteness (the text though neither ambiguous nor inconsistent, may contain some "lacuna" which prevents it from expressing any logical complete idea). It may also happen that the text leads to a result so unreasonable that it is self-evident that the legislature could not have meant what it has said.

In all such cases it is obviously necessary to determine the true intention of the legislature. To arrive at this, continental practice[50] - which we generally follow in the matter – permits enquiry to be made into:

a) the aim and object of the law (ratio legis), that is, the principles inspiring it and the mischief or defect for which it is intended to provide (which must not be confused with the transient contingencies of fact which may have occasioned the enactment of the law);
b) the historical legal background, in particular the state of the law before the enactment to be interpreted was passed;
c) the parliamentary history of the law or what, in France, are called the "travaux préparatoires" (lavori preparatorii), that is, the projects or Bills and the expositions of their objects and reasons, the reports on such projects and Bills, and the debates in the Legislative Chambers;
d) the study of comparative law, that is, the study of those foreign laws which may have had a direct or indirect influence on the law to be interpreted, or deal with the same matter (though it is recognised that this study has but a subordinate and merely complementary importance for the purpose of interpretation.

Now, in general, when the true intention of the law has been duly ascertained, such intention ought to prevail over any inadequacy or imperfection of the letter of the law: "scire leges non est verba earum tenere, sed vim ac potestatem". In Civil matters, no doubt, the Courts of Justice may

[50] As to the position regarding this in England, see Allen, op. cit. p.487 et seq. Even continental writers do not consider the practice as always a blessing and advice great caution in the use of that means of interpretation.

supply these defects in order to give effect to the intention of the law. The rule may be stated to be that, unless the language used is absolutely intractable, the Court will reject a strict literal and grammatical construction which leads to manifest contradiction of the purpose of the enactment, or to some inconveniences or absurdity, hardship or injustice not intended. But in Criminal Law the position is somewhat different in certain important respects.

Rules Peculiar to Criminal Law

In bygone times the Courts allowed themselves the greatest freedom of construction and application even in regard to Criminal Law. Under the guise of satisfying the "spirit" of the law and the true intention of the legislature, they not only often extended the defective letter of the enactment to cover cases not falling within it, but they also, in the total absence of an express provision of law concerning the matter of inquiry, supplemented the omission by themselves creating new rules of law on the strength of real or fancied analogy. This unlimited licence, which was a real and serious danger to the liberty of the subject, naturally alarmed the philosopher-reformers of the eighteenth century. But the reaction carried some of these to an opposite extreme. Thus Beccaria wanted to proscribe every form of interpretation: he preferred the inconveniences arising out of a rigid and uncompromising adherence to the letter of the law to those arising out of a lax and variable application of it according to the personal judgement of the individual judge. If the letter of the law left any doubt whatever as to its true meaning, it was not for the Court - Beccaria said--- but for the legislature to put the matter right.

But it is clear, as we have already said, that to deny to the Courts the right and the power properly to interpret the abstract formula of the statute would amount in many cases to denying them the power and the duty of applying the law. The truth is merely that in criminal matters the freedom of interpretation should be more carefully regulated and that, as Pessina put it, "1'interpretazione deve aggirarsi nel riconoscere che un dato fatto speciale può categorizzarsi come realtà concreta sotto l'ipotesi generale ed astratta della legge"[51].

Modern doctrine and modern practice would seem to follow the rules hereunder.

[51] op.cit.p.79

Interpretation in case of Doubt

It may happen that the examination of the literal meaning of the word combined with the examination of the intention, leaves the matter in doubt. In such case it is commonly taught that the solution of the problem is provided by the principle "in dubio pro reo", so that a construction is to be applied which appears more favourable to the accused. As Humphreys, J., put it in "Binns v. Wardale"[52] "if an Act of Parliament is so drawn that it is really difficult to say what the legislature intended and what facts came within it, the benefit of that obscurity should be given to the accused person." The rule may be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to express itself. This solution is founded on the excellent consideration that the liberty of the subject is the rule and the restrictions of such liberty represent exceptions to such rule: consequently, only such restrictions can be admitted as result without any doubt from the law. If they do not so result, the Court is bound to declare that the law does not contain them.

Declaratory Interpretation

But though the word of the law may be by itself indefinite or capable of more than one meaning, yet the canons of interpretation may establish that one of such meanings, rather than any of the others, answers the intention of the legislature. The resulting interpretation, in such cases, is described by Italian jurists as merely declaratory. Such an interpretation may be narrow (stretta) or wide (lata) and, inasmuch as it arises exclusively out of the indefiniteness or ambiguity of the expression, it must not be confused with the "restrictive" or "extensive" interpretation to which we shall presently refer and which has for its subject-matter words or expressions having a definite and precise meaning but which do not exactly correspond to the intention of the legislature.

The expressions of a given provision are to be interpreted in a narrow or a wide sense according as to whether the law intended to use them in the one or the other, independently of the nature of the provision: "Si statum fiat per verbum quod habet plures significationes, intelligitur secundum significationem quae convenit subiectae materiae". As Manzini affirms[53], this rule holds good even in regard to Criminal Law. "The proposition that penal laws must be construed narrowly is", he

[52] 1946 - K.B. 451
[53] op. cit. Vol.I, p.296

says, "wholly mistaken, because it confuses the declaratory interpretation with the question of the extensive or restrictive interpretation".

Of course, the choice as between the wide and narrow meanings is possible only where both meanings fairly fit the expression. In other words, the Court ought not to do violence to the language to bring the case within it by attributing a meaning which the words do not have. But, conversely, if the wider of the two meanings of which the language is fairly capable better effects the clear purpose of the law, then the Court ought to adopt that wider meaning.

This is not only the modern doctrine on the Continent but appears to have been the general tendency in England for over one hundred years. As far back as 1864, Pollock, C.B. said: "The distinction between a strict construction and a more free one has, no doubt, in modern times, almost disappeared, and the question now is: What is the true construction of a statute? If I were asked whether there by any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law"[54].

Again in "Dyke v. Elliot" (1872) James L.J., delivering the judgement of the Judicial Committee, said: "Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument".

Mr Sidgwick, in his book on Statutory and Constitutional Law (p.326) says: "The rule that (penal statutes) are to be construed strictly is far from being a rigid and unbending one; or rather it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment: the Courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced by them, and on the other, equally refusing, by any verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope".

[54] Att. - Gen. v. Sillem and others, 2 H.C. 431, PP.509, 510

While, therefore, the rule remains that no case must be held to fall within a penal provision which does not fall within the reasonable meaning of its language as well as within the scope and purpose of the enactment, it by no means imposes that a restricted meaning should be imposed on the words to withdraw from the operation of the provision a case which falls both within its scope and the fair sense of the language. This would be to defeat, not to promote, the object of the legislature, to misread the statute and misunderstand its purpose. The sense to be adopted is that which best harmonises with the context and promotes in the fullest manner the object and policy of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and to permit the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.

The modern trend of construction is thus summed up in Maxwell[55] on the strength of the judicial authorities therein cited: "The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty and this tendency is still evinced in a certain reluctance to supply the defects of language or to eke out the meaning of an obscure passage by strained or doubtful influences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

Extensive and Restrictive Interpretation

The question we have just considered must be distinguished from that relating to extensive and restrictive interpretation (interpretazione estensiva e restrittiva). Whereas the former concerns language which, apart from the intention of the legislature, is indefinite and capable of various

[55] "On the Interpretation of Statutes", 10th Ed. (1953), p. 284

meanings, the latter concerns language which in itself conveys a definite idea and is capable of only one certain meaning but which does not faithfully represent the true intention of the legislature. In any such cases there is a divergence between what the law expresses and what it intended to have expressed. If the letter of the law is stretched, that is to say, given a wider than its natural signification in order wholly to cover what appears to have been the intention of the legislature, the interpretation is said to be "extensive"; if, on the contrary, the full literal meaning is not given to the language of the law in order not to go beyond the intention of the legislature, the interpretation is said to be "restrictive".

Now although divergent opinions have been from time to time propounded by even authoritative writers, the rule commonly accepted is that an extensive interpretation, as above defined, is not permissible in regard to penal provisions, that is, any provisions creating liability or providing punishments. It is not allowable to extend the provision of any such law so as to bring within it any case which is not covered by the reasonable meaning of its language. As we have already said, the liberty of the subject should have no limits other than those fixed by the law and, therefore, a provision of law which imposes any such restrictions must not be extended beyond the cases which it expressly contemplates. In other words, if the legislature, though intending to cover the case in question, uses language which, in fact, leaves the case uncovered, the Court should refuse to correct the language or supply the defect.

It does not follow that the interpretation must always be "restrictive" as is sometimes very wrongly said. As Manzini says: "Fallace e' la regola, tanto diffusa nella pratica, per cui le legge penali..... dovrebbero sempre essere interpretate restrittivamente".

As we have already said, the Court is not bound to, indeed must not, narrow down the natural and ordinary meaning of the words; but must, as a general principle, accept the meaning which is consonant with the ordinary use of language, having regard to the intention of the legislature. Should there be sufficient indications that the words used are in their natural meaning wider than what the legislature intended, then, indeed, the interpretation must be restrictive. In other words, a penal enactment cannot be extended on the strength of the "spirit of the law" to cover cases which do not fall within the express language; but it must be narrowed down if this should appear to be in accordance with the spirit: "Non si punisca l'azione che non è colpita dalla lettera della legge, quantunque a voi sembri essere nello spirito, perchè manca nell'agente la volontà

criminosa; non si punisca Inazione che il legislatore non volle colpire, quantunque essa cada sotto la lettera, perchè vi manca la volontà del legislatore"[56].

But the rule that an "extensive" interpretation is not permitted must not be understood as preventing the extension of a provision to other cases which, though not expressed therein, must 'a fortiori' be considered as comprised in the case expressly mentioned. Otherwise the law would be brought to obviously illogical and absurd conclusions. Thus, for instance, Section 203 of our Criminal Code deals with the crime of bigamy which is committed by a person who, being still lawfully married, contracts a second marriage. But no one will doubt that this provision extends also, and with stronger reason, to the case of a person who, while the first marriage still subsists, contracts a third or other marriage. It is clear that the word "bigamy", which properly signifies being married twice is used in the law synonymously with the word "polygamy".

Analogy

In particular a penal law cannot be applied by analogy.

Analogy must be distinguished from an extensive interpretation. In fact, it presupposes that the case in hand is not, even impliedly, covered by a legal provision. Strictly speaking, analogy is not a form of interpretation at all.

In spite of the fact that legislative techniques suggest the use of the most general and comprehensive formulae and avoid casuistry, it is inevitable, owing to the limitations of human foresight and the ever increasing complexities and developments of social relationships, that certain cases which, indeed, require to be provided for, remain in fact out of the contemplation of the legislature. These omissions in the law are usually described as "lacunae" or "casus omissi". Now analogy seeks to supply these omissions and to provide a rule to govern a case which has not been either expressly or implicitly dealt with by the law, by relating it to a similar case which is governed by a legal rule and applying to it the principle on which such legal rule is based.

This method of supplying omissions in the law is generally accepted without question in civil matters. If a dispute cannot be decided with reference to a precise provision of law governing the

[56] Carrara, Prog. para. 890n

case, regard is had to provisions which regulate analogous cases, and, indeed, should there not be any such provisions or should they not provide a solution, the dispute may be decided in accordance with the general principles of law. The judge in a civil action is called upon to determine the rights and obligations of the contending parties and he cannot abstain from deciding the issue merely because the written law is silent. Clause 37 of Chapter VIII, Book I of the Code De Rohan expressly laid down: "Nè potranno (i giudici) servirsi di veruna potestà arbitraria quante volte non sarà regolata da quello che si dispone dalle leggi municipali, ed in loro difetto dale leggi comuni, e nei casi controversi e nei dubbi dalle opinion abbracciate nei supremi e più accreditati Tribunali". It has been held that this provision is still applicable[57].

In Roman times analogy played a most important part in the formation even of Criminal Law, precisely because penal legislation remained for many centuries scant and rudimentary. We have already seen what use and abuse of analogy in regard to criminal matters was made by the Courts in most countries up to, say, the eighteenth century. And yet Farinaccio had already written: "Statuta et constitutiones poenales ultra eius verba non extenduntur nec trahuntur ad casus similes"[58]. In modern times the application of penal laws by analogy is proscribed in all civilised systems of positive law. If the case before the Court has not occurred to the mind of the legislator and is not dealt with by the law, the Court cannot supply the deficiency by invoking a rule of law laid down in respect of a similar case. The maxim "ubi eadem ratio ibi idem jus" has no application in such cases. Thus, if an enactment makes provision as to sheep which, in common sense, ought to have been extended to goats also, this is the affair of the legislature, not of the Courts. The reason for this is the already quoted principle that penal laws cannot be extended beyond the cases expressed therein, in consequence of the other fundamental principle: "nullum crimen sine lege", "nulla poena sine lege".

But, of course, not every provision contained in the Criminal Code or other law containing provisions of Criminal Law, is to be considered a "penal law" in respect of which analogy is prohibited. That expression in this connection refers only to those provisions of Criminal Law which create offences or prescribe restrictions or punishments. "Il divieto dell'applicazione della legge penale per analogia deve non prendersi alla lettera bensì' intendersi dentro confini razionali. Rispetto alla dichiarazione dei reati e delle pene il divieto deve funzionare in modo completo ed assoluto: ma le lacune diverse da codeste, che eventualmente si riscontrino nella legge, possono

[57] v. Law Reports, Vol. XVIII, P.II, p.120; Vol. XXVI, P.I, p.l8l
[58] Cons. LXV, n.23

essere colmate in quanto il Sistema della legge lo comporti"[59]. Instances of application of provisions of the Criminal Code (not being "penal provisions" as above defined) by our Courts are the judgements which extended to H.M.'s Criminal Court and to the Court of Magistrate as a Court of Criminal Judicature, the power to order evidence to be taken abroad on commission which expressly is conferred only on the Court of Magistrates as a Court of Enquiry.

The elaboration of our doctrine of "formal concurrence" of offences was also, in effect, an application by analogy of doctrinal principles and legislative precedents followed in other countries.

Finally, it must be observed that the prohibition of analogy does not prevent the application of even penal provisions of old laws to new things which, for the excellent reason that they did not then exist, could not have been contemplated by the legislature, but can yet be brought within the language of the old law. "New social conditions of scientific discoveries may create new judicial requirements for which it is certainly permissible to provide by adapting the existing laws, but not beyond the limits permitted by the text of those laws themselves"[60]. In such circumstances, although the particular case arising for decision was not, indeed could not have been, specifically included, yet it is possible to apply the law to it if it falls within its general indication. In England, for some time the view was that, while remedial laws may extend to new things not "in esse" at the time of making the statute, penal laws may not. But, as Maxwell observes[61], "this degree of strictness may be regarded as extreme. It could hardly be contended that printing a treasonable pamphlet was not an offence against the Treason Act, 1351, because printing was not invented until a century after it was passed, or that it would not be treason to shoot the monarch with a pistol". As illustrations of the more reasonable view he quotes the case in which it was held that the repealed Engraving Copyright Act, 1734, which imposed a penalty for piratically engraving, etching, or otherwise, or in any other manner copying prints and engravings, applied to copying by photography, though that process was not invented till more than a century after the Act was passed; and the case in which bicycles were held to be "carriages" within the provision of the Highway Act, 1835, against furious driving, and tricycles propelled by steam to be "locomotives" within the Locomotives Act, 1865, though not invented when those Acts were passed.

[59] Florian, op. cit. Vol.I, p.I62; v. also Manzini, op. cit. Vol.I, p.309
[60] Manzini, ibid. p.278
[61] op.cit., p.272

Operation of Criminal Law

i. Limitations by Time ----- ii. Limitations by Territories
iii. Extradition —- iv. Exemption of Certain Persons.

Positive law is not, like the principles of Natural Justice on which it is largely founded, immutable, universal and absolute. Its force is limited by time (because human laws are altered from time to time), and by territory (because as a general rule it applies only in the country in and for which it is enacted). Moreover, certain exceptions are made to the principle of the equality of all men in the eyes of the law.

Limitations by Time

The life of every penal law, like that of any other law, runs from the date of its commencement to the date of its expiration or repeal. Its binding force is limited within the span of its period of validity.

A law comes into being as soon as it is enacted in due form by the authority in which the function of legislation is vested. In England, the present rule is that a Statute, as soon as it has received the Royal Assent, unless a future date is fixed for the commencement of its operation (as is frequently done), is at once applied by the Courts; it is binding on all the King's subjects at once. The same rule applies in Malta, in fact, under our Letters Patent of 1947, Bills passed by the Legislative Assembly become law as soon as the Governor assents thereto in the name and on behalf of His Majesty and signs the same in token of such assent, or as soon as his Majesty's assent is given by an Order in Council or through the Secretary of State. Any law enacted by the Governor comes into operation on the date on which the said assent is given unless another date is appointed for its commencement.

But natural justice requires that the law should not be enforced before it has been made known. This is why continental theory requires that every law passed by the legislature and declared a law in due form, must be ordered to be published before it comes into operation. In England and in Malta publication of the law is not a condition precedent to its operation; but it is, of course, well known that arrangements are all the same made for giving publicity to every law newly enacted. Section 3d of our Letters Patent provides that the Governor shall cause every law enacted thereunder to be published in the Government Gazette for general information. (In this connection

it is not amiss to mention that Acts of the British Parliament and Orders-in-Council applicable to Malta do not require any special publication in the Island in order to be effectual therein. -— V. “Rex vs. Joseph Abdilla et”, 4.XII. 1943, which quotes with approval “Dr Parnis vs. Arpa” reported at pages 36-37 of Vol. XIII of our Law Reports.

Once having come into operation, the law is presumed to be known to all those who owe obedience thereto and it remains effectual until it either expires or is repealed. We have already seen that modern doctrine does not recognise to custom any power to abrogate from a Statute in force: a Statute does not go into disuse by a posterior contrary custom or through obsolescence: it cannot be set aside or modified except by another law which repeals or amends it. The repeal may be expressed or implied: the latter takes place when the new law is inconsistent with the existing law: “lex posterior derogate priori”.

Now from the rule that a law is binding when its existence is presumed to be known, there follow two principles

1. Ignorance of the law is no excuse for breaking it: “ignorantia juris neminem excusat";
2. The law operates for the future and not retrospectively: “lex non habet oculos retro”.

These two principles which are common to all kinds of law have a particular importance and receive special applications in the field of Criminal law. Let us examine them further.

1. We said that the law is presumed to be known when it has been duly brought into operation. The extent to which in criminal matters this presumption should apply has formed the subject of wide discussion by both old and modern writers. Roman jurists made a distinction between what they called 'probrum natura’ and what they termed 'probrum civiliter et quasi more civitatis', whence arose the notion of 'delictum juris gnetium', that is, of those crimes which naturally according to the dictates of reason, are considered everywhere and at all times inherently wrongful. Later writers[62] taught that an exception to the rule that ignorance of the law is no excuse should be admitted in respect of those offences which are merely an infringement of the positive law of the State and not also of the rules of Natural Justice.

[62] Donello “De jure civili", Lib. I, tit.22; --- Cremani, “De jure Crim. “Lib. I, CL 3, 89

Modern legislations either make no exception at all or make exceptions in very special cases of minor importance and apply the rule to every individual subject to the law of the state. The exceptions that are made in some systems of law concern offences consisting in the breach of local or police laws when committed by foreigners who are newcomers to the place.

In English legal practice the above-mentioned rule is absolute and the presumption irrebuttable: no inevitable ignorance or error will serve for justification. An alien who commits a criminal offence is punishable in the same way as a British Subject, and his ignorance of English law is no defence, though it may be a ground for mitigation of punishment[63]. This rule, while in general sound and plainly necessary as a matter of utility, does not seem, in its full extent and uncompromising rigidity, to admit of any sufficient justification.

We shall revert to this subject in Considering Mistake generally as a ground of defence. (See Mistake of Law & Mistake of Fact).

2. Already in Roman days it was laid down that the laws provide for the future and not for the past[64], and with particular reference to criminal liability, Ulpian wrote that wrongs should not be subjected to the punishment imposed by the law in force at the time of the trial but to the punishment prescribed by the law in force at the time of the commission of the wrong[65]. Canon Law applies the same principles which have since been substantially accepted by the great majority of modern authorities and in almost all systems of positive law.

   In fact, legislation by which the conduct of mankind is to be regulated ought to deal with future acts and not to change the character of acts done upon the faith of the existing law. In England, says Allen[66], there is no principle known to the law which actually prohibits such legislation: but an Act to make that unlawful which was lawful when it was done would be regarded so unfavourably that it may be considered for all practical purposes prohibited.

   An apparent exception to the rule that a penal law cannot have retrospective effect occurs where a new law enacted after the commission of the offence is less severe or more advantageous to the offender than the law in force at the time the offence was committed.

[63] Harris, op. cit., p. 353
[64] L. 7, C. De legibus
[65] L. 1., pr. D. de poenis
[66] 'Law in the Making', 2nd. Edition, p. 276

The hypothesis is twofold:

a) The law against which the offence was committed is subsequently repealed, so that the act is no longer criminal.
b) The law against which the offence was committed is subsequently amended or changed so that, though the act is still criminal, the punishment or the conditions of liability and prosecution are varied.

A. The principle accepted in continental doctrine and practice, which we follow in this matter, is that, if the law on which the charge is framed is repealed without any qualification while the proceedings are still pending, such proceedings fall to the ground and no sentence against the accused can be pronounced. If before the man is tried the legislature cancels the criminal character of the act with which he stands charged, there is no longer any justification for inflicting punishment upon him. The action of the State, in repealing the former law which prohibited the act, clearly shows that the public peace and order and the public welfare are no longer endangered or harmed by such type of act and that, therefore, the State has no longer any interest in repressing it, and, consequently, no right to punish it.

Older writers took the view that this principle constitutes an exception to the rule that penal laws should be exclusively prospective. Their doctrine was that the repealing law is given retrospective application to the matter of inquiry arising under the repealed law, by way of an indulgence to the accused. But modern writers do not accept this explanation and contend that the principle in question has a true juridical foundation. Their argument is that, rather than an exception to the rule of non-retroactivity with regard to the new law, the said principle is an affirmation with regard to the former law, of the other rule that a law cannot operate after its repeal. In fact, in the hypothesis under discussion, though the liability was contracted while the former law was still in force, the prosecution and sentence would be carried on and pronounced after such law has been repealed. So that, if such law were to be applied to such prosecution and sentence, it would be given an effect beyond its legal limit of operation. It is thus not by way of an equitable retrospective application of the new law but rather on the grounds that the operation of the old law cannot extend beyond its repeal (divieto di ultra-attività) that, in this hypothesis, the criminal proceedings cannot be

maintained in respect of the act which, at the time of the trial, has ceased to constitute a criminal offence.

Now, ‘quid juris’ if the law on which the charge was framed is repealed after the offender has already been tried and sentenced? There is no unanimity as to the reply to be given to this question. There are those who maintain that even in such case the repeal should have the effect of cancelling the effects of the conviction and of remitting automatically any unexpired or outstanding portion of the sentence or penalty. Thus, Article 3 of the Italian Code of 1889 expressly laid down that "if a new law cancels from the class of criminal offences an act which was considered as an offence by the previous law, all the effects of the trial and of the sentence shall cease ipso jure"[67]. It is stated in support of this view that it would be unjust to continue to punish the prisoner for his act at a time when the State does not consider it any longer necessary to attach any penal sanction to that kind of act.

The opposite view is that the repeal should have no legal effect on the result of a final and absolute judgement. This solution appears to be more acceptable and is more commonly adopted in modern systems of law. And, in the absence of any express provision in our Criminal Code on the lines of Article 3 of the Italian Code aforequoted, we are bound to say that, in Malta, the repeal of a law does not in any way affect, as of right, any judgement passed thereunder which has become a ’res judicata'. The only remedy the prisoner can have in such circumstances is the exercise in his favour of the Prerogative of Mercy. Such Prerogative is conferred on the Governor by the Letters Patent in force from time to time providing for the constitution of the Government of Malta.

If, on the date of the repeal, an appeal from the sentence or conviction is still pending, then the principle above-stated concerning the effect of repeal on pending proceedings, applies.

We shall presently see that though this principle is not expressed in terms of any provision of our law, it can be inferred from, and has been applied by our Courts on the strength of, Section 28 of the Criminal Code which contemplates the hypothesis we are now proceeding to consider.

[67] Vide Article 2 of the Code of 1930

B. This concerns the effect of a subsequent law (that is, a law enacted subsequently to the commission of the offence) which does not cancel the criminal character of the act but alters the law on which the charge is framed by varying the penalty or the conditions of liability or prosecution in respect of that act.

The 'communis opinio' among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is more favourable to him. This means that if the law in force at the time of the trial is less favourable to the accused than the law in force at the time of the commission of the offence, it is the latter law that should be applied retrospectively to his prejudice. If, on the contrary, the new law is more favourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied; for, if the old law were to be applied, it would have, as to the excess of punishment or other aggravation, an effect beyond its limit of valid operation.

Section 28 of our Criminal Code provides that “if the punishment prescribed by the law in force at the time of the trial is different from that prescribed by the law in force at the time of the commission of the offence, the less severe of the two punishments (Old Italian Text: "pena di qualita’ meno grave”) shall be applied.

In practice it is sometimes difficult to decide which of the two punishments is 'less severe'. In this connection regard must chiefly be had to the nature or quality of the two punishments, rather than to their duration. Every punishment causes a suffering and deprives the offender of some right: therefore, of two punishments, that one is less severe which causes less suffering and deprives the sufferer of a less important right. It is only when both punishments are of the same nature or quality that the longer or shorter term thereof is a truly decisive factor in comparing their severity. A nice point arises where the subsequent law lowers the 'maximum' of the other: such a procedure would be an infringement of both laws and not the application of the more favourable law. What should be done is to assess the penalty which under each of the two laws would be adequate to the fact as proved with all its circumstances and then to decide which is the less severe on a comparison of the two results.

(v. Pessina, op. cit., p. 87; Canonico, 'Del Reato e della Pena in Genere', p. 96; Roberti, 'Corso Completo di Diritto Penale', Vol. II, p. 31, 8 312 n.).

The above-quoted provision of our Criminal Code applies 'expressis verbis' where the difference is between the punishment as at the time of the commission of the offence and the punishment as at the time of the trial. This means that if, when the new law reducing the punishment comes into force, proceedings in respect of the offence have already been definitely concluded, such new law does not affect the sentence already awarded: saving, of course, even in this case, the Prerogative of Mercy. If, however, when the new law comes into operation an appeal from the sentence is still pending, then the accused is entitled to the benefit of the less severe punishment[68].

An interesting judgement explaining the true meaning and effect of the said Section 28 of our Criminal Code was delivered by His Majesty's Criminal Court in its Appellate Jurisdiction in the case 'The Police vs. Agostino Bugeja'[69]. It was there held that, although the said section contemplates only the case in which the punishment provided by the law in force at the time of the trial is different from that provided by the law at the time of the commission of the offence, and no express provision exists concerning the case in which, at the time of the trial, the act complained of has ceased to be an offence, nevertheless 'arguendo a fortiori' from the section, it is clear that the accused should go free from all punishment in the latter case (as we have already seen). Sir M.A. Refalo C.J. said: "L'interpretazione del principio sanzionato col detto articolo 28 delle nostre Leggi Criminali, che cioè, quando vi ha differenza fra la legge penale anteriore e la nuova, un'azione commessa prima dell'attuazione della legge nuova ma sottoposta a giudizio posterioremente, deve essere giudicata con quella fra le due leggi che nel confronto apparisco piu' mite, non deve intendersi letteralmente ristretta al solo caso in cui la legge posteriore commini una pena meno grave, ma di logica, e di giustizia deve intendersi anche al caso in cui la legge posteriore dichiari che il fatto punibile sotto la antica legge non costituisce piu' reato: di logica, perchè maggior mitezza può dirsi non solo per riguardo a quella legge che commini una pena minore, ma eziandio per riguardo a quella che non commini alcuna; di giustizia, perchè la legge non puo' contraddire se stessa per dare efficacia retroattiva alla legge

[68] V. Crim. Appeal 'The Police vs. S. Chircop et', 13-XI. 1943; Roberti, op. cit. Vol. II, 8 315
[69] Vol. XXIV, P. IV, p. 941

posteriore solo quando questa stabilisce una pena meno grave e negare poi tale efficacia retroattiva alla legge posteriore la quale, piu' che diminuire, elimina qualsiasi pena".

Now the principle we have stated, namely, that as between the law in force at the time of the trial and the law in force at the time of the commission of the offence, that which is the more favourable to the accused shall be applied, holds good also ---------- according to the most generally accepted writers ---------- where the conflict is between more than two succeeding laws. In other words, if between the law in force at the time of the commission of the offence and the law in force at the time of the trial, there has been another law dealing with the same offence, which was more favourable to the accused than either of the other two laws, then it is that intermediate law which must be applied[70]. The reason usually given in support of this solution is that if the accused had been brought to trial with greater despatch, he would have benefitted by that milder law: he cannot, therefore, be deprived of that benefit through the slow notion of the machinery of justice. But this reason is far from convincing. In fact, it is probably true to say that there is not any true juridical justification for the application of the intermediate law, and that this is merely a concession granted to the accused solely 'humanitatis causa'.

In conclusion it needs hardly be said that the principles above set forth concerning the application of the more favourable law may be set aside by an express provision in the repealing or amending law. This is, in Malta, commonly done, especially in respect of enactments which operate for a short period at a time and are at short intervals amended or repealed and re-enacted. In such cases the necessity is obvious of saving unprejudiced any liability or proceedings incurred or instituted under the law so amended or repealed.

In England, the general rule is, now, that the repeal of a statute has no effect on pending proceedings. Prior to 1889, by the unqualified repeal of the Statute on which an indictment was framed, the proceedings fell to the ground and no judgement could be pronounced. A prisoner indicted for an offence against an Act which was repealed after the offence was committed, but before the prisoner was tried, could not be sentenced under the repealed Act. But as to Statutes passed since 1889, the Interpretation Act, 1889[71] provides that where an Act "repeals any other enactment, then unless the contrary intention appears, the repeal shall not ....

[70] Pessina., ibid. Canonico, ibid.
[71] 52 & 53 Viet. C. 63, S. 38, Ss. 2

..... (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding or remedy in respect of any such .....penalty, forfeiture or punishment as aforesaid", and that "any such investigation, legal proceeding or remedy may be instituted", continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed". Particular clauses to the like effect were common in prior statutes[72].

The scope of operation of Adjective Criminal laws or laws of criminal procedure will be considered more fully in our lectures on that subject. It is here sufficient to say that in matters of procedure, the general rule is that the law to be applied is always that in force at the time of the trial, notwithstanding that at the time of the commission of the offence, the mode of proceeding may have been governed by a different law and irrespective of whether such former law was more, or less, favourable to the accused.

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Limitations by Territory

According to modern ideas, a system of law applies not to a given race, but to a given territory. We speak not of the Law of the Maltese, the Law of the English, etc., but of the law of Malta, the Law of England. The proposition that a system of law is in force in, and belongs to, a defined territory means that, normally, in the absence of special circumstances, it applies to all persons, things, acts and events within that territory and does not apply to persons, things, acts or events elsewhere. This refers to every system of law generally. The general rule is that "extra territorium jus dicenti impune non paretur". With reference to Criminal Law; in particular, the above principle means that it normally applies to all offences committed within the territory and does not apply to offences committed elsewhere. To this general rule there are many exceptions: there are several offences with which the Courts of the State will deal and to which they will apply the law; of that State, although committed elsewhere. These exceptions, however, do not affect essentially the general principle that Criminal Law; is territorial in its nature and its application.

While this general principle is now universally accepted, the question as to which exceptions to it should be admitted has been the_ subject of controversy and has been variously settled in

[72] Arch. 'Pleading, Evidence and Practice in Criminal Cases", Sd. 1931, PP. 8-9

practice. Indeed, one school of thought would have it that the Criminal Jurisprudent of each State should be absolutely and exclusively 'territorial' without any exception. The slogan of this school of thought, of which Beccaria was the chief exponent, is that "the place of punishment should be the place of the commission of the offence and no other". It denies to the State any jurisdiction to deal with and punish offences committed outside its territory, under whatever circumstances.

Now, it is clear that this theory of territorial jurisdiction, in this rigid and uncompromising form, is inadequate to Secure the due punishment of crime. Its insufficiency to provide for the punishment of criminals who have escaped from the territory in which their offence was committed is only partially redressed by Treaties of Extradition, under which such offenders are returned to the 'forum delicti patrati'. Moreover, it fails to provide for the punishment of Certain offences which one State nay have, to the exclusion of all others, a sole interest in repressing or punishing although committed outside its territory.

The 'territorial' theory, therefore, needs supplementing by other principles.

Three main theories have been propounded with a view to supplementing the deficiencies of the 'territorial' theory:

1. The first of these, which may be described as that of 'Cosmopolitan Justice' looks merely at the 'forum deprehensionis', ascribing to each State the right of punishing any criminal who may come within its power. It is founded on the principle that a criminal offence is a wrong everywhere, and that, therefore, the offender ought to be punished wherever he takes refuge, because it is the duty of all States to aid each other in the maintenance of the universal law of order. An eminent exponent of this doctrine was Carrara who, affirming the solidarity of all States in their obligation of maintaining law and order and the rules of right, observed that it is indifferent whether the sacred mission of vindicating such rules of right is carried out by this or by that State, as all States are equally the instruments of Supreme Law of Order which requires the punishment of wrong-doing.

   This theory has long found favour with reference to pirates on the ground that they have thrown off their subjection to any political authority. Persons guilty of piracy 'jura gentium' are treated as the common enemies of all mankind, and any nation that can arrest them may exercise

jurisdiction over them, whatever their nationality and wheresoever their crime may have been committed, even within the territorial waters of some other nation[73].

But the exponents of the theory under discussion claim for it a far wider application. Vattel, for instance, extends it to all “ces scelerats qui, par la qualitè et la frequence habituelle de leurs crimes, violent toute surete' publique et se declarent les ennemis du genre humain"[74]. Others, as we have said, wish to see it applied in respect of all serious crimes generally. The Italian Code of 1889 contains a provision for the punishment of serious offences committed abroad by aliens in case the State to which the alien belongs or in which the offence was committed shall have refused to take him in extradition, with a view to punishment (Art. 6, para. 3). A more or less similar provision is contained in the Italian Code of 1930 (Art. 10).

Now, the theory of 'Cosmopolitan Justice’, for purposes of general application, belongs to the ideal rather than to the real. Its adherents do not disguise the serious practical difficulties which, at the stage civilisation has reached or will ever reach, impede its general application[75]. The laws of the different States vary considerably as regards both substance and procedure: and, in any case, the function of social punishment in accordance to modern ideas ----- as we shall see more fully hereafter —- is not merely, if at all, to satisfy the demands of retributive justice by causing a suffering to the wrong-doer on the grounds that he has done wrong. So that the social punishment may be justified, it is essential that it should be necessary for the maintenance of law and order within the State whose laws have been violated.

2. According to the second theory, which may be described with Professor Holland[76] as the “personal theory of Jurisdiction", each State has a right to the obedience of its own subjects wheresoever they may be. It follows that a subject may be tried on his return to his own country, or even in his absence, for an offence against its laws committed while within the territory of another State. This theory is very variously applied in practice. England and the United States use it but sparingly as introducing a very limited list of exceptions to the standard principle of territorial jurisdiction. It is thus provided by Act of Parliament that a British subject may be indicted for murder, manslaughter or bigamy whether committed within the King's dominions or without. Besides these, there are a few other exceptions made by modern Statutes

[73] Vide Kenny, op. cit., p. 417
[74] Droit des Gens, i, 233
[75] V. Canonico, op. cit. p. 101
[76] 'The Elements of Jurisprudence', p. 401

empowering the Courts in England to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil[77]. But as a general rule, England (like the United States) prefers in nearly all cases to adhere to the principle that crimes are local matters to be dealt with where they are committed.

The continental States agree in punishing offences committed abroad by a subject against the Government or Coinage of the country to which he belongs but differ widely in their treatment of offences of other kinds. Thus, the French Code of 1808 punished offences committed abroad by Frenchmen against Frenchmen. The Italian Code of 1889 punished acts of its subjects committed abroad when they constituted offences of a certain gravity.

We shall see that this 'Personal Theory of Jurisdiction' has, to a limited extent and subject to certain conditions, been adopted also in our Law.

3. The third theory, described by Professor Holland as the 'Theory of Self-preservation', is in some continental systems, considered in certain cases to confer a jurisdiction which, since it is neither 'territorial' nor 'personal', has been called 'quasiterritorial'. It allows that the Courts of a State may punish offences although committed not only outside its territory but also by persons who are not its subjects. Such jurisdiction is usually asserted with reference to offences against the Government of the State or against its public credit.

   The French Code, as revised in 1866, provided for the trial and punishment of any alien who, having committed abroad an offence against the safety of the State, or the offence of counterfeiting the State's Seal, or an offence against the French Coinage or Paper money, came afterwards, voluntarily or by means of extradition, within the French territory. The Italian Code of 1889 contained similar articles.

   At its Brussels session in 1879, the 'institut de Droit International', after much discussion, adopted a resolution to the effect that every State has the right to punish acts committed outside its territory and by foreigners against its Criminal Laws, when such acts constitute an attempt upon the social existence of the State concerned, or endanger its security, on condition that such acts are not provided for by the Criminal Law of the State in whose territory they have been committed. The 'Institut' rejected a resolution extending the right to other cases. The

[77] For a list of these, vide Kenny, op. cit. p.419

substance of the said resolution was again affirmed by the 'Institut' at its meeting in Munich in 1883. The question was again studied by the League Codification Committee in 1926.

As we shall see, this theory finds no application under Section 5 of our Criminal Code.

Now, it is obvious that the adoption by a State of one or another of these theories of jurisdiction, or of a combination of several of them, will determine not only the exercise of its own criminal jurisdiction with reference to a given set of acts, but also its recognition of the rightfulness of the exercise by other States of their jurisdiction with reference to the same set of acts. In cases where it recognises the concurrent competence of several States, it may or may not regard the decision of the Court of any one of them as final, so as to give an offender the benefit of the maxim "ne bis in idem". Provisions to this effect are not uncommon in Continental codes[78].

Let us now examine the system adopted by Our Law. Section 5 of our Criminal Code provides that:

"Criminal proceedings may be instituted in the Island of Malta and its Dependencies, according to the laws thereof:

1. against any person who shall commit an offence in the Island of Malta and its Dependencies, or upon the sea in any place within the territorial jurisdiction of the Island of Malta and its Dependencies.
2. against any natural born or naturalised Maltese, who shall commit an offence upon the sea beyond such limits, on board any vessel or boat belonging to the said Island of Malta and its Dependencies.
3. against any natural-born or naturalised Maltese who shall have in any other country committed an offence against the safety of the Government, or the offence contemplated in Section (63, 64, 65 and) 131 or forged any Government debentures mentioned in Section 203 of this Code, or any other offence against the person of a subject of His Majesty, provided that he shall not have been tried for the same out of the Island of Malta and its Dependencies.
4. against any person who, being in those Islands, shall become a co-principal or so accomplice in any of the crimes mentioned in Section 312, although committed outside of these Islands".

[78] V, Art. 8 & 9 of the Italian Code of 1889 and corresponding articles in the Code of 1930. In English Law there is authority for saying that an acquittal by a competent jurisdiction outside England is a bar to indictment for the same offence before any tribunal in England - V. Arch. op. cit. p.163

It will be seen at once that the basis of this system is naturally the ’territorial' theory: but in paragraph 3 important concession are made to the personal theory of Jurisdiction.

Before proceeding to examine the above provisions in some detail, it is not amiss to point out that they enumerate only the cases in which proceedings can be taken in these Islands in respect of offences against the laws of these Islands, that is, all laws whether of the local legislature or of the Imperial Government or Order-in-Council in force in these Islands. They do not include those other cases in which the local Courts nay exercise jurisdiction in pursuance of powers vested in them by or under certain other Imperial enactments.

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Section 5 Paragraph 1

In accordance with the principle of the territorial nature of Criminal Law, it is here provided that criminal proceedings can be instituted in these Islands, according to the laws thereof, against any person who commits an offence in these Islands or upon the sea in any place within the territorial jurisdiction of these Islands. This provision implies that:

a) within these Islands there is no place which is not subject to the operation of our Criminal Law and to the jurisdiction of our Criminal Courts. The right of ‘Sanctuary’ enjoyed by certain sacred places, by retiring to which the offender was secured against arrest, was abolished in these Islands by Proclamation No. VI of 1828, which laid down that “no local privilege or immunity whatever shall be in any manner available to prevent due execution of the law in matters criminal". In any case in which a person who has committed, or is suspected to have committed an offence shall seek refuge in any place formerly considered as affording sanctuary, any officer of the Executive Police shall demand the fugitive at the outer door or gate of such place of refuge, and if the fugitive is forthwith given up the said officer shall not pass within such outer door or gate; but if the fugitive is not given up on demand then the Police Officer can enter and search the place and remove the fugitive with the least possible scandal or disturbance;
b) No person within these Islands --------saving the exceptions to be mentioned later on **----** is exempt from the operation of our Criminal Law and from the Jurisdiction of our Courts by reason of his occupation, or profession, or by reason of his rank, whether civil or ecclesiastical, military or naval, or by or on account of any other privilege (V. Proclamation No.V of 1928

which, however, provided that 'if it shall become necessary to execute any temporal process against any ecclesiastical person, all due regard shall be had to the sacred character of such person";

c) Foreigners or non-Maltese British Subjects, whether domiciled in those Islands or resident therin or merely in transit, are amenable to the Criminal Law and Jurisdiction of these Islands, in respect of offences committed within these Islands or the territorial waters thereof in the same manner and to the like extent as natural-born or naturalised Maltese**;**

d) It makes no difference whether the person injured or aggrieved by the offence be a Maltese, or a non-Maltese British Subject, or an alien.

e) Where the offence is committed at sea within the territorial waters of these Islands, no distinction is made as to the nationality or port of registration of the ship. (The special treatment accorded to ships of war under International Law will be mentioned presently).

As to 'territorial waters', the Statute 41 and Viet., C. passed by the British Parliament, August l6, l878, provides that an indictable offence committed by a person, whether he be or be not a subject of Her Majesty, on the open sea, within such part of the sea adjacent to the coast of the United Kingdom, or to the coast of some other part of Her Majesty's dominions, as is deemed by International law to be within the territorial sovereignty of Her Majesty, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who has committed such offence may be arrested, tried and punished accordingly by British officials. "Within the jurisdiction of the Admiral" means, for the purposes of this Act, <u>any part of the open sea within one marine league of the coast, measured from low-water mark</u>.

Subsequent Statutes transferred to the common Law Courts the jurisdiction formerly possessed by the Admiralty[79].

Finally, in connection with this first paragraph of Section 5 of our Criminal Code, it is relevant to notice the last paragraph of Section 225 where it is laid down that "in any case in which the offender shall have <u>within</u> the limits of the territorial jurisdiction of the Island of Malta and its Dependencies, given cause to the death of the said person (i.e. a person wilfully killed), the homicide shall be deemed to have been wholly committed within the limits of the said jurisdiction notwithstanding that the death of the said person shall have occurred <u>out</u> of such limits." As

[79] Hillocks' 'International Law', Vol. I, p, 159; and V. The Colonial Courts of Admiralty Act, 1890

pointed out in the 'Annotatazioni alle leggi Criminali' (per cura di un giovane Avvocato Maltese), this paragraph was added by Ordinance No. V. of 1868, in pursuance of the Imperial Act 23 and 24 Vict. C. 122 passed in the United Kingdom on April 28th, i860, entitled the 'Admiralty Offences (Colonial) Act, i860, whereby the legislatures of Her Majesty's possessions abroad were enabled to enact a law similar to the provisions contained in Section 8 of the Imperial Act 9 Geo. IV, C. 31. This section briefly provided that when a person who has been feloniously stricken, poisoned or otherwise hurt in the United Kingdom, dies of such stroke, poisoning or hurt, upon the sea or at any place out of the United Kingdom, every offence committed in respect of any such case, whether the same amounts to murder or manslaughter, or to the offence of being an accessory to murder, or manslaughter, may be dealt with, enquired of, tried, determined and punished in the country or place in the United Kingdom, in which such stroke, poisoning or hurt has happened, in the same manner in all respects, as if such offence had been wholly committed in that country or place.

Now a last word about ships of war. The more commonly accepted doctrine of International Law is that such ships, even when within the territorial waters or in the ports of a foreign State, are nevertheless exempt from the local jurisdiction: and that, therefore any offence committed on board any such ships must be tried by the authorities and in accordance with the law of the State to which the ship belongs[80].

Section 5 Paragraph 2

Under this paragraph our Courts have jurisdiction to try and punish, in accordance with our law, offenders being natural-born or naturalised Maltese who commit an offence against our Criminal Law beyond the limits of the territorial jurisdiction of these Islands on board a vessel or ship belonging to these Islands. Thus, in respect of offences committed on the high seas, the jurisdiction of our Courts is dependent on the nationality of both the offender and the ship.

Normally, according to the principles of International Law, private ships belonging to sovereign States are, on the high seas, subject to the jurisdiction of the State to which they belong. But as regards Colonial ships the English rule is that they are subject to the local colonial laws only so long as they are within the limits of the territorial jurisdiction of the colony to which they belong,

[80] For a full and clear statement of the position of these ships in International Law, vide Oppenheim, "International Law", 7th. Ed., 1953, Vol. I, p. 764.

but become subject to the British Merchant Shipping Laws as soon as they go beyond such limits. But referring to the provision under discussion, the Commissioners of the Draft Code of 1842 wrote, at page 11 of their report, that it was inserted in pursuance of an opinion given to the Secretary of State for the Colonies by the Law Officers in England to the effect that a local law could extend the jurisdiction of our Courts to offences committed on the high seas provided the offender was a Maltese and the ship on which the offence was committed was likewise Maltese.

Here the enquiry suggests itself: What happens where the offence is committed outside the limits of our territorial jurisdiction:

a) by a person who is not a natural-born or naturalised Maltese, on board a ship which belongs to the port of Malta; or
b) by a person who is a natural-born or naturalised Maltese, but on board a ship which does not belong to the port of Malta?

The matter is regulated by the Merchant Shipping Acts of the United Kingdom, Section 686 of the Act of 1894 provides that "where any person, being a British Subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong -- or not being a British Subject is charged with having committed any offence on board any British ship on the high seas and that person is found (that is to say, is found to be at the time of his trial ------[81]) within the jurisdiction of any Court in His Majesty's dominions which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed". This provision ends with the following words: "Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849". This Act was made to solve the difficulties of dealing with offences committed at sea where the ship did not put into port in England immediately, but touched at some port in a British Colony. To avoid the unsatisfactory process of bringing the prisoner to England to be tried by the Central Criminal Court ------- or, at the time, by the Court of Admiralty ---- the said Act[82] laid down that all persons charged in any colony with offences committed on the sea may be dealt with in the same manner as if the offences had been committed upon waters within the local jurisdiction of the Courts of the Colony. The Act of 1849 also contained provisions for the trial of murder and

[81] V. Arch, op, cit,, p. 34
[82] 12 & 13 Vict. C. 96

manslaughter where death ensues in the colony or at sea, following injuries inflicted on the sea, etc.; in such cases the offender may be tried as if the offence had been wholly committed in the Colony.

Finally, the Courts (Colonial) Jurisdiction Act, 1874 (37 & 38 Vict. C. 27) provided at Section 3 that when, by virtue of any Act of Parliament, a person is tried in a Court of any colony for any crime or offence committed on the high seas or elsewhere out of the territorial limits of such Colony and of the local jurisdiction of such Court, or if committed within such local jurisdiction, made punishable by that Act. such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the Court; provided that, if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the Court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.

Section 5 Paragraph 3

By this paragraph the operation of our law and the Jurisdiction of our Courts are extended to certain offences (which we shall now specify) committed abroad by a person who is a natural-born or naturalised Maltese, provided such person shall not have been tried for the same out of these Islands.

We have already pointed out that if the principle of the territorial nature of Criminal Law and Criminal Jurisdiction were absolute, the consequence would have been that a State could never try and punish any person who, outside the limits of its territorial jurisdiction, became guilty of any offence against its criminal law. But, as it has already been remarked, there are cases in which the State is justified in taking punitive action in respect of such offences. Evidently we are not here referring to any punitive action carried out by the State concerned outside its own territory, as, for instance, by forcibly removing the criminal from the foreign State in which the offence was committed or by following and arresting him in the State in which he may have taken refuge: any such action would clearly be a violation of the territory and sovereignty of such other State. Here we are speaking of the punitive action exercised by the offended State within its own territory when the offender returns to or is found in such territory.

This right of each State to prosecute offences committed on foreign soil in certain well-defined circumstances, is nowadays commonly recognised: but, in determining those circumstances, the various systems of positive law and text-writers differ considerably.

According to one school of thought the question whether an offence committed abroad should or should not be punished by the State in which the offender is found, depends on whether the State in which it was committed would or would not, in like circumstances, have punished the same if it had been committed in the former State. The Basis of this doctrine is ‘reciprocity'.

A second school of thought seeks to apply by analogy the maxim of civil law: 'ubi te invenio, ibi te convenio''. These writers argue that if a person can sue everywhere for a civil debt, he should 'a fortiori' be able to prosecute for a criminal offence. Therefore, when the offender and the person injured or aggrieved meet in the same country, it should be possible for the latter to move for the institution of criminal proceedings before the local tribunals against the offender who injured him abroad.

A third theory relies on the nationality of the person injured by the offence. The argument is that wherever the persons, for whose protection the laws of the State to which they belong are intended, betake themselves, they should continue to enjoy the benefit of such protection. The foreigner who injured a subject abroad is not entitled to any exemption in the State of such subject: nay, his impunity in such State would add insult to injury in the face of the victim of the offence.

A fourth theory considers criminal law as part of the personal Statute of the offender. The subject remains, wherever he goes, amenable to the law of his country: therefore, wherever he offends against such law to which, as a subject, he owes obedience, he contracts a liability for which he must account on his return to his country.

Finally, there are those who found the right of the State to punish offences committed abroad on the nature and gravity of the offences themselves: and recognise such right in respect of those offences which seriously endanger the political or economic life of the State or profoundly shock public opinion.

Our own system is a combination of the three last mentioned doctrines; that is to say, it extends the jurisdiction of our Courts to offences committed abroad in consideration of the Maltese Nationality of the offender as well as in consideration of the nature and gravity of the offence, and, in regard to one class of offences, of the British Nationality of the victim of the offence.

Let us now examine our provision in some detail under the two following headings:

1. Offences in respect of which Jurisdiction is exercisable; and
2. Essential conditions for the exercise thereof.

1. Offences in Respect of which such Jurisdiction is Exercisable

These offences are the following:

Once it is granted that the principle of the territorial nature of Criminal Law must admit of certain exceptions in those cases in which over-riding considerations of public expediency justify the action of the State in repressing offences committed abroad, surely the first of such exceptions should be in respect of those offences which jeopardise the very political life of the State. This has the right and the duty to defend itself against any attempt directed against it even outside its territory and such right appears even more legitimate when it is considered that the State in which the offence was committed may either not have any interest at all in punishing the offence, or, worse still, may have a political interest in abetting or concealing it.

The offence under Section 131, that is, the offence of any public officer or functionary who divulges or discloses or in any manner facilitates the disclosure of documents or facts possessed by or known to him by reason of his office, and which should have been kept secret.

Here again the exception is dictated by the paramount interest which the Government has that its official secrets should not be improperly divulged, especially outside these Islands.

It is interesting to note in this direction that up to 1914 the reference in the part of the paragraph under discussion was to "the offences contemplated in Articles 63, 64 and 65 and in Article 130". When the said sections 63, 64 and 65 were repealed by Section 13 of Ordinance No. VI of 1914 (since repealed and re-enacted by the 'Official Secrets Ordinance, 1923) and

substantially reproduced in that Ordinance, the reference to those articles in Section 5 was not deleted. But in the reprint of the Laws of Malta and in the separate reprints of the Criminal Code in 1925, the said reference was omitted. Such reprints, however, never became and had no authority as a revised authentic text of the law: and it is, therefore, submitted that the old reference to Articles 63, 64 and 65 of the Criminal Code should now be construed as a reference to the corresponding sections of the said "Official Secrets Ordinance".

The offence of forgery of Government debentures mentioned in Section 174 or of any of the documents mentioned in Section 175.

These offences directly undermine the economic life of the State: they violate the public faith which is attributed by the Government itself to those documents.

The Offence of Bigamy.

Bigamy is a crime which involves an outrage on public decency and morals and creates a public scandal by the prostitution of a solemn ceremony which the law intended to be applied only to a legitimate union. Moreover, the offender might have gone outside these Islands precisely to be able with greater facility to commit the crime; and, in any case, it is within these Islands that the evil effects of the crime make themselves more directly felt. Even in England, which, as we have seen, prefers to adhere to the principle that crimes are local matters to be dealt with where they are committed, bigamy is one of the few statutory exceptions to such rule.

Any other offence against the person of a subject of His Majesty.

This last exception is founded on the consideration that the local laws should, as far as possible, continue to extend their protection to the vital rights of His Majesty's subjects wherever they may be.

2. Essential Conditions for the Exercise thereof.

The essential conditions for the institution of criminal proceedings in and according to the laws of these Islands in respect of the offences above-mentioned committed abroad, are:

(i) That the offender is a natural-born or naturalised Maltese; and
(ii) That he has not been tried for the same offences outside of these Islands.

As we have already said, many States hold the view that a State may not try foreigners for offences committed outside its territorial jurisdiction[83]. But International Law leaves to the States an unlimited right to punish their own subjects. Such right is justified not only by the fact that the State is fully authorised to require that its subjects shall respect its laws wherever they may be and, especially, such laws as it deems most essential to its safety and to the public good, but also by the fact that, if the subject, on his return to his own country, after having committed the offence abroad, were to be left unpunished, such impunity would be in itself a threat to the public peace and a scandal. This explains why our Code extends the operation of the provisions above quoted and the jurisdiction of our Courts in respect of offences under those provisions committed abroad, when such offences have been so committed by persons who are natural-born or naturalised Maltese.

But the taking of proceedings in these Islands is rightly made dependent on the condition that the offender shall not have already been tried for the offence outside these Islands, that is, presumably in the place where the offence was committed. This is a proper concession to the general principle of the territorial nature of Criminal Law and Criminal Jurisdiction, in as much as the State in whose territory the offence was committed has a prior claim to deal with the offender if it so chooses. Therefore, if such offender has already been tried once, whether he was acquitted or, if convicted, whether or not he has served his sentence, no further proceedings can be taken against him in these Islands. Thus, rather than an application of the rule 'ne bis in idem', this is an affirmation of the said principle of the prevalence of the territorial jurisdiction, as against which the jurisdiction of our Courts is merely subordinate and supplementary. It is thus clear that under these provisions, our Courts have no jurisdiction to try foreigners for offences committed abroad.

Section 5 Paragraph 4

[83] The exception regarding piracy which is universally allowed has already been noted.

Under this paragraph criminal proceedings may be instituted in these Islands, according to the laws thereof, against any person who, being in these Islands, shall become guilty, whether as coprincipal or as an accomplice, in any commercial or industrial fraud contemplated in Section 312 of the Criminal Code, although the crime is committed outside these Islands. It is immaterial for the purpose of this paragraph, whether the person who is thus a co-principal or an accomplice, is a Maltese, or a non-Maltese British Subject, or an alien.

General Observation

It is, in conclusion, to be noted that when proceedings are instituted in these Islands under Section 5 in respect of offences committed abroad, the punishments to be applied on conviction shall be those prescribed by our laws. Some systems provide in similar cases that the punishment applicable shall be the lesser punishment between that prescribed by the law in force in the country in which the offence was committed and that prescribed by the law in force in the country of trial. But, however laudable in theory may be the desire to avoid inflicting on the offender a higher punishment than that which he might have incurred if he had been tried in the country in which the offence was committed, it is clear that in practice this doctrine cannot be, very often, applied without serious inconveniences. Each country has its own body of penal laws not merely because they have been enacted by its legislative authority, but also because they best conform to the social conditions and peculiar characteristics of its people. One State cannot, therefore, apply in its own territory the penal laws of another State without disturbing the legislative and judicial order in such territory. And, above all, a State punishes acts committed in a foreign State not because such acts constitute an offence against the law of the foreign State, but solely because they constitute an offence against its own laws.

Extradition[84]

Definition - History - Basis - Individuals subject to extradition - Crimes in respect of which extradition may be granted - Some common rules - In Malta - Surrender of fugitive offenders between different parts of the British Commonwealth.

[84] Vide Oppenheim "International Law", 7th Edition, Vol. I, pp. 643 et seq. from which large extracts are included

Definition

Extradition is the delivery of an accused or a convicted individual by a State, on whose territory the alleged criminal happens for the time to be, to another State in order that such individual may be tried or suffer the sentence. It is a system of common action and reciprocal assistance among States against criminals which, to some extent, takes the place of the system of cosmopolitan justice which, as we have seen, is in practice inapplicable, desirable though it may be theoretically. As Beccaria wrote, the conviction that there is no place conferring immunity from the consequences of crime is a most effective means of preventing it. The interest is common both to the requesting State as well as to the extracting State: if the interest of the first is the supreme one of punishing the crime committed on its territory, the interest of the second is that of reciprocity. What it does today in favour of the requesting State, this will do tomorrow in its favour in like circumstances. And yet writers are not lacking who deny every justification for this institution. They are ready to recognise a right in the State where the criminal has taken refuge to punish him; but such State is not justified in extraditing him because, as these writers say, the right of asylum is sacred and inviolable. Now the answer to this sort of reasoning is, of course, clear. The right of asylum is indeed sacred but on two conditions: (a) that the person seeking it is worthy of it; and (b) that it does not endanger or harm the State in which asylum is sought. Criminals are not the sort of people entitled to this benefit and their impunity in any State is not only undesirable but injurious.

Notwithstanding this, however, States in practice always uphold their competence to grant asylum to foreign individuals as an inference from their territorial supremacy; and there is no universal rule of customary international law which commands extradition. The rule of Grotius that every State has the duty either to punish, or to surrender to the prosecuting State, such individuals within its boundaries as have committed a crime abroad, although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, has never been adopted by the States, and has, therefore, never become a rule of the Law of Nations.

History

Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for the more

important crimes, political crimes excepted, are in fact always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is a product of the nineteenth century only. It is true that vestiges of extradition arrangements may be traced even in ancient times. Some practice of extradition (deditio) existed also in Roman days. But history shows that the development of the institution was obstructed by the right of asylum on the one hand and an exaggerated sense of territorial sovereignty on the other. In the Middle Ages extradition was practically unknown. Before the eighteenth century, extradition of ordinary criminals hardly ever occurred, although some States used then to surrender to each other political fugitives, heretics, and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated for extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel[85] is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But special treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then, and in consequence of this, that the conviction was forced upon the States of civilised humanity that it was in their common interest to surrender ordinary criminals regularly to each other. Special treaties of extradition became, therefore, a necessity, and there is a tendency towards the conclusion of general extradition treaties.

Basis

But the institute of extradition is not founded solely upon the obligations deriving from treaties. It is true, as has already been stated, that apart from treaty, extradition is not obligatory upon any State. But there is a higher and fundamental principle legitimising the treaties themselves, that is, the common interest of the States to give mutual assistance for the suppression of crime. It is therefore commonly accepted that, while extradition treaties bind the States between which they are concluded to the reciprocal delivery of criminals, such delivery may be granted and is

[85] ii p.76

sometimes granted even without any treaty obligations, and it can be so granted because extradition is above all an act of sovereignty, though in modern times the procedure has assumed a prevalently jurisdictional character. Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the granting of extradition, the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted special Municipal Laws which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws furnish the basis for the conclusion of extradition treaties. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that Great Britain followed the example given by Belgium. British public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. Great Britain possessed, therefore, before 1870 a few extradition treaties only, and they were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass an Extradition Act. This Act, which was amended in 1873, in 1895, in 1906, and in 1932, has furnished the basis for extradition treaties between Great Britain and a very large number of other States. Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave to their Governments to conclude extradition treaties according to their discretion. And in those countries the Governments are usually competent, as we have said, to extradite an individual, even if no extradition treaty exists.

Individuals Subject to Extradition

Since extradition is the delivery of an accused or a convicted individual by the State on whoso territory he happens for the time to be to the State which has a prior right to subject him to trial or sentence, extradition should be available in respect of any individual, whether he is a subject of the prosecuting State, or a subject of the State which is required to extradite him, or of a third State. But the practice among States on this respect is by no means uniform. Many States, such as France and Germany, have adopted the principle of never extraditing one of their own subjects to a foreign State, but themselves punishing their own subjects for grave crimes committed abroad. The same principle was adopted in Italy under the Penal Code of 1889. But even in those countries many authoritative writers maintain that the said principle has no real foundation whatever, does not stand criticism and is destined to disappear, like so many other old prejudices,

as civilisation progresses[86]. The Institute of International Law at its Oxford session in 1880 resolved that the extradition of a subject should be admitted between States whose penal laws are founded on analogous basis and which have mutual confidence in their judicial institutions. By the Italian Penal Code of 1930, the traditional principle was somewhat modified and the extradition of nationals was made possible "if expressly agreed in international conventions" (Art.13).

Other States, as Great Britain and the United States, have not adopted the said principle, and, in the absence of treaty provisions to the contrary, make no distinction between their own subjects and other persons who are alleged to have committed extraditable crimes abroad. Thus in 1879 Great Britain surrendered to Austria, where he was convicted and hanged, one Tourville, a British subject, who, after having murdered his wife in the Tyrol, had fled home to England.

The object of extradition is an individual who is alleged to have committed a crime abroad, whether or not he was during the commission of the criminal act physically present on the territory of the State where the crime was committed.

Crimes in Respect of which Extradition may be Granted

Unless a State is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a State is bound by an extradition treaty, it can refuse extradition for any crime. Such States as possess extradition laws frame their extradition treaties conformably therewith and specify in those treaties all those crimes for which they are willing to grant extradition.

Political criminals are, as a rule, not extradited, and according to many extradition treaties, military deserters and persons who have committed offences against religion are likewise excluded from extradition.

Before the French Revolution the term ‘political crime’ was unknown both in the theory and practice of the Law of Nations, and the principle of non-extradition of political criminals was likewise non-existent. As Oppenheim writes (loc. cit. passim):- “It was indirectly due to the French Revolution that matters gradually underwent a change, since this event was the starting point for

[86] V. in Giacchetti, op. cit., p.283

the revolt in the nineteenth century against despotism and absolutism throughout the western part of the European continent. It was then that the term ‘political crime’ arose, and Article 120 of the French Constitution of 1793 granted asylum to foreigners exiled from their home country ‘for the cause of liberty’. On the other hand, the French emigrants, who had fled from France to escape the Reign of Terror, found an asylum in foreign States. However, the modern principle of non-extradition of political criminals did not even then conquer the world. Until 1830, political criminals were frequently extradited. But public opinion in free countries began gradually to revolt against such extradition, and Great Britain was its first opponent. The fact that several political fugitives were surrendered by the Governor of Gibraltar to Spain created a storm of indignation in Parliament in 1815, where Sir James Mackintosh proclaimed the principle that no nation ought to refuse asylum to political fugitives. And in l8l6 Lord Castlereagh declared that there could be no greater abuse of the Law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes only. The second in the field was Switzerland, the asylum of many political fugitives from neighbouring countries, when, after the final defeat of Napoleon, the reactionary continental monarchs refused the introduction of constitutional reforms which were demanded by their peoples. And although, in 1823 Switzerland was forced by threats of the reactionary leading Powers of the Holy Alliance to restrict somewhat the asylum afforded by her to individuals who had taken part in the unsuccessful political revolts in Naples and Piedmont, the principle of non-extradition went on fighting its way.

On the other hand, in 1833 a reaction set in when Austria, Prussia and Russia concluded treaties which remained in force for a generation, and which stipulated that thenceforth individuals who had committed crimes of high treason and Lèse-majesté, or had conspired against the safety of the throne and the legitimate Government, or had taken part in a revolt, should be surrendered to the State concerned. The same year, however, is epoch-making in favour of the principle of non-extradition of political criminals, for in 1833 Belgium enacted her celebrated extradition law, the first of its kind, being the first Municipal Law which expressly interdicted the extradition of foreign political criminals. As Belgium, which had seceded from the Netherlands in 1830 and became recognised and neutralised by the Powers in 1831, owed her very existence to revolt, she felt it her duty to make it a principle of her Municipal Law to grant asylum to foreign political fugitives, a principle which was for the first time put into practice in the treaty of extradition concluded in 1834 between Belgium and France. The latter, which until 1927 had no municipal extradition law, has nevertheless since 1831, in her extradition treaties with other powers, always stipulated the principle of non-extradition of political criminals. The other Powers followed gradually. After 1867

this principle is to be found in nearly all her extradition treaties. It is due to the firm attitude of Great Britain, Switzerland, Belgium, France, and the United States that the principle has conquered the world[87].

Although the principle became, and is, generally recognised that political criminals should not be extradited, serious difficulties exist concerning the conception of 'political crime'. This conception is of great importance, as the extradition of a criminal may depend on it. It is unnecessary here to discuss the numerous details of the controversy. It suffices to state that, whereas many writers call such a crime 'political' as was committed from a political motive, others call 'political' any crime committed for a political purpose; again, others recognise such a crime only as 'political' as was committed from both a political motive and at the same time for a political purpose; and, thirdly, some writers confine the term 'political crime' to certain offences against the State only, such as high treason, Lèse-majesté, and the like. To the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will, probably, for ever exclude the possibility of finding a satisfactory conception and definition. The difficulty is caused through the so-called 'relative political crimes' and délits complexes — namely, those complex cases in which the political offence comprises at the same time an ordinary crime, such as murder, arson, theft, and the like. Some writers deny categorically that such complex crimes are political; but this opinion is wrong and dangerous, since indeed many honourable political criminals would have to be extradited in consequences thereof. On the other hand, it cannot be denied that many cases of complex crimes, although the deed may have been committed from a political motive or for a political purpose, are such as ought not to be considered political. Such cases have aroused the indignation of the whole civilised world and have indeed endangered the very value of the principle of nonextradition of political criminals."

The reason usually given for the exclusion from extradition of political crimes is that such crimes are socially and politically relevant only in relation to the existing conditions in the State against which they are committed, so that their success may in that State itself absolve and justify the offender or actually make of him a hero and a martyr. As everything is or is deemed to be perfectible it cannot be presumed that any political regime is perfect: it is consequently generally recognised that acts which are according to certain principles directed to modify the existing order,

[87] The Italian Penal Code of 1930 suppressed the exclusion from extradition of political crimes which was contained in the previous Code (v. Manzini, op. cit., Vol.I, p.422, para. I86).

though illegal and criminal in relation thereto, have nevertheless a different character from that of ordinary crimes which represent activities inspired solely by individual passions and interests. Although every State has the right to defend itself and its institutions, the other States have no duty to co-operate in the discharge of that function: and just as a sovereign State does not suffer the interference of other States in its internal political affairs, so it cannot claim the assistance of those States for the repression of crimes relating precisely to those affairs, except in case of special reciprocal arrangements.

The so-called 'Anarchist' or 'Terroristic' Crimes are usually distinguished from 'political crimes' for the purpose of extradition. The Institute of International Law at its Geneva meeting in 1892 resolved as follows: "Those criminal deeds which are directed against the basis of every social organization and not solely against one State or against one particular form of Government shall not be considered as political crimes'."

Some Common Rules

1. It is a general rule that for a person to be extradited it is essential that the deed charged against him is a crime not only according to the criminal law of the State which demands extradition but also according to that of the State which is asked to extradite[88]. However, it is not within the province of the Courts of the requested State to try the case on its merits, but merely to ascertain whether the evidence submitted justifies prima facie judicial proceedings against the accused. It is not necessary, of course, that in both States the crime shall fall under the same "nomen juris": "Per la possibilità dell'estradizione è sufficiente che il fatto sia represso da entrambe le leggi, non esigendosi che costituisca anche un identico titolo delittuoso"[89].
2. Extradition is granted only if asked for, and after the formalities have taken place which are stipulated in the treaties of extradition and the extradition laws, if any. An important question in this connection is whether in case a criminal is erroneously handed over, without the formalities of extradition having been complied with, by the police of the State into whose territory the criminal has escaped, to the police of the prosecuting State, the local State can demand that the prosecuting State shall send the criminal back, and ask for his formal extradition. This question was decided in the negative in February 1911 by the Court of Arbitration at the Hague in the case "France v. Great Britain" concerning Savarkar.

[88] Contrast with rule relating to surrender of fugitive offenders within the British Commonwealth: post.
[89] Tnozzi, op. cit. p.431

3. According to most extradition treaties, it is a condition of extradition that the surrendered individual shall be tried and punished for those crimes exclusively for which his extradition has been asked and granted, or for those, at least, which the extradition treaty concerned enumerates. But it is generally accepted that the duty of the prosecuting State to limit its jurisdiction solely to the fact for which the extradition was granted, does not imply that of not modifying the "nomen juris" of the crime as indicated in the act of extradition, provided the material fact remains always the same, the new charge is in respect of a crime comprised in the list of offences covered by the extradition treaty and this does not contain any express contrary provision.

In Malta

In Malta the matter of extradition is regulated by the Extradition Acts of the United Kingdom and the international treaties made by Her Majesty's Government with foreign States which have been extended to Malta as well as by the provisions of certain local laws.

The Extradition (Powers of Magistrates) Ordinance[90] provides that all powers vested in and acts authorised or required to be done by a Police Magistrate or any Justice of the Peace in relation to the surrender of fugitive criminals in the United Kingdom under the Extradition Acts are vested in and may in these Islands be exercised and done by any Magistrate of Judicial Police in relation to the surrender of fugitive criminals under those Acts.

Then there is the Extradition (Italy) Ordinance[91] which was enacted to make provision for extradition as between these Islands and Italy in pursuance of certain treaties entered into between the United Kingdom and that country[92]: Section 2 of this Ordinance contains an enumeration of the offences in respect of which extradition is allowed. Other salient features of the Ordinance are that:

a) Subjects of the requested State are excluded from the operation of the arrangements for extradition.

[90] Ord. IV *of* 1877, —- now Chapter 31 of the Revised Edition of the Laws of Malta
[91] Ord.I of 1863 as amended by Ord.IV of I880, — now Chapter 20
[92] The bilateral arrangements in question were, as a result of an Exchange of Notes between H.M.'s Ambassador at Rome and the Italian Foreign Minister revived with effect from 2/2/1950. Vide G.N. 241 of Mat 25, 1950

b) The person surrendered may not, until he shall have had an opportunity of leaving the country to which he has been surrendered, be tried or punished for any offence committed prior to his surrender, except that for which the extradition was granted or some other of the prescribed extradition offences;
c) The arrangements apply also to persons who, having already been convicted, escape before serving their sentence.

Lastly the Extradition Ordinance[93] contains certain general provisions relating to procedure in connection with the surrender of any person under any extradition law in force in these Islands. It lays down, among other things, that the decision of the Court of Judicial Police ordering the surrender of the fugitive, may be appealed from such person to H.M.'s Criminal Court. A right of appeal is also granted to the Attorney-General where the decision of the Court of Judicial Police disallows the surrender of the fugitive. On such appeals, the parties may produce evidence not produced before the Court below. H.M.'s Criminal Court has the power to order the discharge of the individual concerned if he is not actually surrendered within the prescribed time: but in all cases in which such individual is discharged either by the Court of Magistrates or by H.M.'s Criminal Court, he remains liable to be again apprehended even for the same offence for delivery to the requesting State on the discovery of fresh evidence.

Surrender of Fugitive Offenders between Different Parts of the British Commonwealth

Under the Fugitive Offenders Act 1881 of the United Kingdom[94] a *system of* extradition exists by which fugitives from any one part of H.M.'s dominions may be apprehended in another part and sent back for trial to the part whence they fled. The statutory provisions apply to all persons accused of having committed an offence in one part of H.M.'s dominions who, having left that part, may be found in some other part of those dominions. These provisions apply in like manner to convicted persons unlawfully at large before the expiration of their sentence. These provisions apply to treason and piracy and to every offence which is for the time being punishable in that part of H.M.'s dominions in which it was committed by imprisonment for twelve months or more, or by any greater punishment, and they so apply although the offence charged is no offence at all in that part of H.M.'s dominions in which the fugitive is or to which he is, or is suspected of being on his way.

[93] Ord. IV of 1880, —Chapter 30
[94] 44 & 45 Vict, c. 69

Exemption of Certain Persons

The Law, being a general rule of conduct, is essentially impersonal and, subject to the limitations on its operation by time and by territory, it should operate impartially and uniformly overall, without any distinction of rank or position. This is what in English doctrine in known as "The Rule of Law" which, as expounded by Dicey, includes, inter alia, the subjection of every man, whatever his rank or position, to the ordinary law of the land and his amenability to the jurisdiction of the ordinary tribunals: all men are equal in the eyes of the law.

However, both the internal Public Law as well as International Law impose certain limitations on the said principle. Thus, for instance, in all countries the Head of the State is not amenable to the jurisdiction of the ordinary Criminal Courts of his State. In England the law of the Constitution clothes the person of the Sovereign with supreme sovereignty and pre-eminence. By the common law he is regarded as incapable of doing wrong or of thinking wrong or of meaning to do any improper act. So, the person of the Sovereign is immune from all suits and actions at law, either civil or criminal.

Likewise, a Sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for as long as he is there in his capacity as sovereign. He cannot be proceeded against either in civil or criminal tribunals and the members of his suite enjoy the same personal immunity as himself. So also a diplomatic envoy cannot be tried for a criminal offence by the Courts of the State to which he is accredited: if he commits a crime, whether against individuals of the State application must ordinarily be made to the State which he represents to recall him, or, if the case is serious, he may be ordered to leave the country at once[95].

In addition to the diplomatic persons above-mentioned upon whom immunities are conferred by customary International Law. There are other classes of similar status. See in this connection the Diplomatic Privileges (Extension) Act 1950. As regards the special position of American Forces in Malta see the United States of America (Visiting Forces) Act 1942 applied to Malta by Order in Council.

[95]Hall, A Treatise on International Law', 6th Edition, Chapter 4, passim

The immunities of a consul are of somewhat uncertain Extent. Practically he is entitled to have his archives and other official documents treated as inviolable and to be exempt from such personal liabilities (such as serving on juries) as could interfere with the continuous discharge of his duties[96].

For further details on the subject of such privileges and immunities generally, we must refer to the studies on Constitutional and International Law.

In these Islands all privileges of class or caste were definitely abolished by Proclamation No. V of April 10, 1826, intended to ensure, inter alia, that in temporal matters all classes of Her Majesty's subjects be amenable to Her Majesty's lay tribunals. Section 6 of that Proclamation lays down that:

"No person inhabiting or residing in these Islands, save and except His Excellency the Governor or the Head of the Government for the time being, and, in all criminal matters, His Grace the Archbishop of Malta, or the bishop of Malta 'pro tempore' shall be exempt by reason of his rank, position or profession whether civil or ecclesiastical, military or naval, or by or on account of any other privilege whatever from suing or being sued in the temporal courts, for any temporal right or from prosecuting or boing prosecuted in the temporal courts for any temporal offence, or from being in all other respects subject to the jurisdiction of the same courts provided that such suit, prosecution or jurisdiction be carried on before a temporal court. Judge or Magistrate competent in the subject-matter of such suit, prosecution or jurisdiction".

The immunity from criminal proceedings was extended to the Bishop of Gozo by Ordinance No. VIII of 1850.

The proviso of Section 5 of the Criminal Code now lays down that "no criminal proceedings shall, in any case, be instituted against the Head of the Government for the time being, the Bishop (now Archbishop) of Malta or the Bishop of Gozo."

These exemptions do not mean that the persons on whom they are conferred enjoy an absolute immunity from liability. The Statutes 11 and 12 William III C. 12 and 42 George III C. 85 regulate the mode and the place of proceeding against Colonial Governors for offences committed by them

[96] Ansom, 'The Law and Custom of the Constitution', 4th Edition, Vol. II, P.II p. 136

in the Colonies under their charge[97]. The Bishop would, of course, be amenable to the sanctions provided by Canon Law.

In conclusion mention may be made of the special immunity from legal proceedings accorded to Members of the Legislative Assembly in order especially to ensure to them freedom of speech in the discharge of their duties. (See Sections 2 and 12 of the "Legislative Assembly (Privileges and Powers) Ordinance (Chapter 179).

[97] See Arch. op. cit. p.29

The Subject of a Criminal Offence

(Subjectum Criminis)

We have seen in Carrara's definition that the subject of a criminal offence, that is the doer of a criminal wrong who can be held responsible for it, can only be a person endowed with the faculties of will and understanding. Man alone is regarded by law as capable of penal responsibility, for it is only his actions that can be lawful or unlawful. Archaic Codes did not scruple, it is true, to punish with death in due course of law, the beast that was guilty of homicide; "if an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten"[98]. It was a common thing in the Middle Ages for animals to be subjected to judicial process either as sole offenders or as the accomplices of human beings in the commission of crime. Judgments have been found pronounced against cows, pigs, mules, horses, etc. In ancient Greece, not only animals but also inanimate objects were held responsible for wrong-doing in appropriate circumstances. Thus, the Court of Prytaneum had jurisdiction to try senseless material objects which had in some manner caused injury to a human being. A similar kind of belief underlies the English Law of 'deodands'. The 'deodand' was the unhappy instrument which caused the death of a man. The law required that it should be forfeited to the King to be disposed of in pious uses by the King's Almoner "for the appeasing of God's wrath", as Copo put it. It was not until 1846 that this law was abolished by Statute as "unreasonable and inconvenient"[99].

But all conceptions such as these pertain to a stage that is now past. Past also is the aberration of inflicting punishment upon dead bodies, and also upon persons yet unborn for crimes committed by their parents: dead bodies and persons yet unborn may be the objects of the law's protection (thus wilful abortion and the slander of dead persons are criminal offences), but they cannot be the subject of criminal responsibility. The principle is to-day patently obvious that only a living person can answer for a criminal offence.

Now the law knows two kinds of persons distinguishable as natural and legal. A natural person is a being to whom the law attributes personality in accordance with reality and truth. Legal persons are beings to whom the law attributes personality by way of fiction.

[98] Exodus, XXI, 28
[99] V. Robson, op. cit., pp. 84-86

The only natural persons are human beings. Legal persons – termed also fictitious, juristic, artificial or moral persons – being the creation of the law, may be of as many kinds as the law pleases. In the English system of law those which are actually recognized all fall within a single class, namely corporations or bodies corporate[100].

The question arises: can a legal person be the subject of a criminal offence?

In England, corporations formerly lay outside the criminal law. If a crime were committed by a corporation's orders, criminal proceedings for having thus instigated the offence, could only be taken against the separate members in their personal capacities, and not against the corporation as itself the guilty person. It was urged that a corporation, as it had no actual existence, could have no will and, therefore, could have no guilty will. And it was further urged that, even if the legal fiction which gives to the corporation an imaginary existence may be stretched so far as to give it so an imaginary will, yet the only activities that could consistently be ascribed to the fictitious will thus created, must be such as are connected with the purposes which it was created to accomplish. If so, it could not compass a crime, for any crime would be necessarily "ultra vires". Moreover, a corporation is devoid not only of mind but also of body, and, therefore, incapable of the usual criminal punishments.

But under the commercial developments which the last two generations have witnessed, corporations have become so numerous that it was felt in England that there would have been grave public danger in continuing to permit them to enjoy the said immunity. The various theoretical difficulties were, therefore, brushed aside and it is now settled law that corporations may, in an appropriate court, be indicted by the corporate name and that fines may be, consequently, inflicted upon the corporate property. By Section 2, subsection 1 of the "Interpretation Act, 1889", "in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after" January 1, 1890, "the expression 'person' shall, unless a contrary intention appears, include a body corporate."

The fact that a corporation cannot be hanged or imprisoned sets a limit to its criminal liability. Therefore, a corporation in England can be prosecuted as such for offences which can be punished by a fine. Where the offence is too great to admit of being visited by a merely pecuniary

[100] Salmond, op. cit., p.

penalty, and is committed by the order of a corporation, the various persons by whom it was ordered must be indicted individually in their own names and punished in their own persons[101].

Although this is now established law, Salmond[102] thinks that the theoretical basis of the liability of corporations is a matter of some difficulty and debate. For it may be made a question whether such liability is consistent with natural justice. In fact, to punish a body corporate either criminally or by the enforcement of penal redress, is in practice to punish the beneficiaries on whose behalf the property is held for the acts of the agents by whom it fulfils its functions.

These theoretical objections are very strongly insisted upon by continental writers, who almost unanimously hold that there cannot be, on principle, any criminal responsibility apart from that of individual members: in fact the external act constituting the physical element of a criminal offence cannot be done or omitted by the mere fiction that is the corporation but only through the agency of a human individual: so likewise the guilty state of mind constituting the formal element of the offence can only be ascribed to the individual wrong-doer. Where all the individual members forming the legal person concur in giving the order for or authorising the commission of the offence or executing the misdeed, the responsibility is of each of them separately and each accounts for his own part in the transaction: "singulorum proprium est maloficium". When on the other hand, not all the members do so concur as aforesaid, the liability attaching to those of them who instigated or designed or executed the offence cannot be extended to the others: "peccata suos teneant auctores". The State indeed can take preventive or disciplinary action against the legal person, as for instance by dissolving it: but beyond that no sanction of a criminal nature can be imposed upon it. The liability of the association may be civil but not criminal for any punishment inflicted upon it in its corporate name would only apparently be suffered by it. The fine (the only form of punishment possible) would indeed be paid out of the corporate funds, but in reality the sufferers would be the individual members, both those guilty and those innocent.

The only conceivable theoretical justification of the liability of bodies corporate is that of considering it as an instance of vicarious responsibility and explaining it on the same principles that are applicable to the vicarious liability of a principal for the unauthorised acts of his agent. A company is held liable for the acts of its directors because in truth the directors are the servants of the shareholders.

[101] Kenny, op. cit., p. 74; Arch., op. cit., p.9
[102] op. cit., p.345

Our Criminal Code does not contain any general provision on the subject. But it may be noted that in some cases special laws make the directors or the managers of an association, company or partnership answerable for the wrongs of the association, company or partnership. Thus Section 3 of the George Cross Ordinance, 1943, lays down that when a company or society is guilty of a contravention against section 1 (i.e., makes use of the emblem for trading purposes without a licence) every director, manager, secretary and other officer of the company or society who is knowingly a party to the contravention shall be guilty of an offence against the Ordinance. A similar provision is contained in the Geneva Convention Act, 1911, which makes the director, etc., liable "without prejudice to the liability of the company or society": this Act applies to Malta[103].[104]

Now, as a rule, the law designates the subject of the offence by the expression "whosoever", "whoever", "any person" or other similar expressions. It is only exceptionally, that is to say in respect of determinate offences, that a particular personal condition is required which serves to individualise the offence of which it is an essential ingredient: (e.g., ‘public officer’ in relation to the crime of 'embezzlement’ - Section 125, Criminal Code).

Generally, also the subject of an offence can be one person acting alone - apart from the application of the rules of complicity where other persons also participate in the offence. Occasionally, however, the nature of the fact constituting the offence requires necessarily a plurality of offenders, e.g., adultery, conspiracy.

The said expressions "whosoever," "whoever", "any person", include both males and females. Moreover, legal science and legislation do not make, as a rule, any discrimination between the sexes in relation to criminal responsibility. This does not mean, of course, that the consideration of sex may not have important judicial consequences in particular cases (e.g., according to modern ideas, in the application of punishment).

Finally, old age, however advanced, has no importance in relation to the subject of the offence except in so far as it may, in the particular case, affect the state of mind of the offender.

[103] See Government Gazette of 1912, p.266
[104] See also Reg. of the Finance Regulations published by G.N.214/42 which makes the body corporate itself liable for the fine

Theory of Criminal Liability[105]

He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrong-doer and the remedy of the wrong. This 'vinculum juris' has its source in the supreme will of the State, vindicating its supremacy by way of physical force in the last resort against the unconforming will of the individual. A man's liability consists in those things which he must do or suffer, because he has already failed in doing what he ought. It is the ultimatum of the law.

Liability is either civil or criminal. The nature of this distinction has been already considered. We saw that civil liability is an exposedness to successful civil proceedings, and that a civil proceeding is one whose direct purpose is the enforcement of a right vested in the plaintiff. Criminal liability, on the other hand, is an exposedness to successful criminal proceedings, and a proceeding of this nature is one whose direct purpose is the punishment of a wrong committed by the defendant.

We have now to investigate the leading principles which determine the conditions, the incidence and the measure of responsibility for criminal wrong-doing.

The general conditions of criminal responsibility are indicated with sufficient accuracy in the old legal maxim: "actus non facit reum, nisi mens sit rea". The act alone does not amount to guilt: it must be accompanied by a guilty mind. That is to say, there are two conditions to be fulfilled before criminal responsibility can rightly be imposed, and we may conveniently distinguish these as the material and the formal conditions of liability. The material condition is the doing of some act by the person to be held liable. A man is to be accounted responsible only for what he himself does, not for what other persons do, or for events independent of human activity altogether. The formal condition, on the other hand, is the "mens rea", or guilty mind, with which the act is done. It is not enough that a man had done some act which, on account of its mischievous tendencies or results, the law prohibits: before the law can justly punish the act, an enquiry must be made into the mental attitude of the doer. For although the act may have been materially or objectively wrongful, the mind and will of the doer may have been innocent. The distinction between the material and formal wrong-doing has long been familiar in moral philosophy. The material badness of an act depends on the actual nature, circumstances, and consequences of it. Its formal

[105] This chapter is largely adapted from Salmond, op. cit., pp. 377 et seq.

badness depends on the state of the mind or will of the actor. The madman who kills his keeper offends materially but not formally; so also, with him who in invincible ignorance breaks the rule of right. Material without formal wrong-doing is no ground of culpability.

We shall see later that the ‘mens rea’ or guilty mind includes two, and only two, distinct mental attitudes of the doer towards the deed. These are intention and negligence. Generally speaking (we shall consider the special cases of ‘contraventions’ later on) a man is criminally responsible only for those wrongful acts which he does either wilfully or negligently. Then and only then is the ‘actus’ accompanied by the 'mens rea’. Then and only then do the two conditions of liability, the material and the formal, co-exist. In this case only is punishment justifiable, for it is in this case alone that it can be effective. Inevitable accident or mistake - the absence of both of wrongful intention and of culpable negligence - is in general a sufficient ground of exemption from criminal responsibility. "Impunitus est", said the Romans, "qui sine culpa et dolo malo casu quodam damnum committit"[106].

Material Condition of Liability

The material or physical condition of criminal liability consists, we have said, in an 'act' of man. Here the term 'act’ is used in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will. As to the nature of the will and of the control exercised by it, it is not for lawyers to dispute, this being a problem of philosophy or physiology, not of jurisprudence.

Of acts as so defined there are various species. In the first place, there are either positive or negative, either acts of commission or acts of omission. A wrong-doer either does that which he ought not to do, or leaves undone that which he ought to do.

In the second place, acts are either internal or external. The former are acts of the mind, while the latter are acts of the body. To think is an internal act; to speak is an external act. We have already seen that criminal law is not concerned with merely internal acts. A bare intent to commit a crime is not amenable to criminal justice: some outward act must be superadded to constitute a crime: "the imagination of the mind to do wrong without an act done is not punishable in our law"[107] and Lord Mansfield laid it down that so long as an act rests in bare intention, it is not

[106] Gaius, III, 211
[107] Hales vs Petit, Plwod, 259 a.

punishable. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it or towards maturing and effecting it. At first sight it might appear that the crime of conspiracy (Sections 57 and 58, Criminal Code) is an exception to this principle: but the exception is only apparent. It is true that the conspiracy itself is a purely mental state - the mere agreement of two or more men's minds; but it would be impossible for two or more men to come to an agreement without communicating to each other their common intentions by speech or gesture; and thus, even in conspiracy, a physical external act is present[108].

Every act is made up of three different factors or constituent parts. These are:

1. its origin in some mental or bodily activity or passivity of the doer,
2. its circumstances, and
3. its consequences.

Let us suppose that in practising with a rifle, I shoot some person by accident. The material elements of my act are the following: its origin or primary stage, namely a series of muscular contractions, by which the rifle is raised and the trigger pulled; secondly, the circumstances, the chief of which are the facts that the rifle is loaded and in working order, and that the person killed is in the line of fire; thirdly, the consequences, the chief of which are the fall of the trigger, the explosion of the powder, the discharge of the bullet, the passage through the body of the man killed and the death. A similar analysis will apply to all acts for which a man is legally responsible. Whatever act the law prohibits as being wrongful is so prohibited in respect of its origin, its circumstances, and its consequences. For unless it has its origin in some mental or physical activity of the defendant, it is not his act at all; and apart from its circumstances and results it cannot be wrongful. All acts are in respect of their origin indifferent. No bodily motion is in itself unlawful. To crook one's finger may be a crime if the finger is in contact with the trigger of a loaded pistol: but in itself it is not a matter which the law is in any way concerned to take notice of.

The harmful consequences of an act prohibited by the law need not always, however, be actual: they may be merely anticipated. In other words, an act may be mischievous in the eye of the law in two ways - either in its actual results or in its tendencies. Criminal wrongs commonly belong to the latter class, for the law punishes even an attempt. Criminal liability is usually sufficiently established by the proof of some act which the law deems dangerous in its tendencies, even

[108] Kenny, op. cit., p.38

though the issue is in fact harmless. The formula of the law is usually: “If you do this you will be held liable in all events”, and not: "If you do this you will be liable if any harm ensues”. We have already mentioned the distinction between ‘Formal Offences’ and ‘Material Offences’: the former, as we have seen, do not require proof of the accident of the event intended by the agent: and, in respect of material offences, which require for their completion the accomplishment of the harm which in fact ensues from the act, even an unsuccessful attempt is a ground of criminal liability as we shall see more fully in due course.

Formal Condition of Liability

We have seen that the conditions of criminal liability are sufficiently indicated by the maxim "actus non facit reum nisi mens sit rea". A man is responsible not for his acts in themselves, but for his acts coupled with the mens rea or guilty mind with which he does them. Before imposing punishment the law must be satisfied of two things: that an act has been done which, by reason of its harmful tendencies or results, is fit to be repressed by way of penal discipline; and secondly, that the mental attitude of the doer towards his deed was such as to render punishment effective for the future and, therefore, just. The first is the material, the second is the formal condition of liability. This ‘mens rea’ may assume one or other of two distinct forms, namely, wrongful intention (dolus), or culpable negligence (culpa). The offender may either have done the wrongful act on purpose, or may have done it carelessly, and in each case the mental attitude of the doer is such as to make punishment effective. If he intentionally chose the wrong, penal discipline will furnish him with a sufficient motive to choose the right instead for the future. If, on the other hand, he committed the forbidden act without wrongful intent, but yet for want of sufficient care devoted to the avoidance of it, punishment will be an effective inducement to carefulness in the future. But if his act is neither intentional nor negligent, if he not only did not intend it, but did his best as a reasonable man to avoid it, there could be no good purpose fulfilled in ordinary cases by holding him liable for it.

Yet there may be exceptions in which the law sees fit to break through the rule as to ‘mens rea’. It may hold a man responsible for his acts, independently altogether of any wrongful intention or culpable negligence. Wrongs which are thus independent of 'mens res’ are distinguished by Salmond as wrongs of absolute liability.

It follows that in respect of the requirement of ‘mens rea’, offences may be of three kinds:

1. Intentional or Wilful offences, in which the ‘mens rea’ amounts to intention, purpose or design.
2. Offences of Negligence, in which the ‘mens rea’ assumes the less serious form of mere negligence as opposed to wrongful intent.
3. Offences of absolute liability in which the ’mens rea' is not required, neither wrongful intent nor culpable negligence being recognised as a necessary condition of responsibility.

We shall deal with these three forms of liability in the order mentioned.

Nature of Criminal Intention

Intention, in general, is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it, such fore-knowledge and desire being the cause of the act, in as much as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accomplished. "Intent", says Holmes (Common Law, p.53), "will be found to resolve itself into two things: foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act". An act, therefore, is truly intentional when every part of it corresponds to the precedent idea of it, which was present in the actor’s mind and of which it is the outcome and realisation: the issue falls completely within the boundaries of the intent.

Intention generally is thus the combined operation of the intellect and the will: it is the striving of the will towards a certain end represented as desirable by the intellect.

But in Criminal Law it is clear that the word ’Intent’ is used in a wider sense. For the purpose of our science, Carrara makes a distinction between ‘Direct’ and ’Indirect’ intention. His definition of direct intention corresponds substantially to that given above: ”E’ diretta la intenzione quando l’effetto si previde dall’agento e si volle calcolandolo come conseguenza dei propri atti, i quali si eseguirono precisamente al fine di precacciare in un modo piu’ o meno certo cotesta conseguenza". Intention does not cease to be direct whenever the consequence of one’s act is foreseen and desired, though the means used to bring about that consequence can only probably achieve the purpose. There is equally a direct intention on the part of that husband who, with the purpose of poisoning his wife, directly administers the poison to her, as on the part of that other

husband who, with the same purpose, puts into the house food mixed with poison in the hope that she might eat such food and die. In this and similar cases the intention is always direct because the act done, although liable to miscarry, has been done with the direct purpose of producing the desired effect. For intention does not always involve certainty of expectation. I may directly intend a result which I know to be improbable. Direct Intention is the foresight of a desired issue, however improbable, not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man a mile away, I may know that there is a probability of my not hitting him; nevertheless, I intend to hit him if I desire to do so. He who steals a letter containing a cheque, intentionally steals the cheque if he hopes that the letter may contain one, even though he may know that the odds against the existence of such a circumstance are great. In short, whenever the consequences of one's act are foreseen as certain or even as probable and desired, the intention is direct.

The intention, according to Carrara, is 'indirect' when the event was merely a possible consequence of one's act, which event was either not foreseen at all, or was foreseen but not desired. If such an event was foreseen, and notwithstanding such foresight the means were desired although the event itself ensuing upon the use of such means was not desired, the 'indirect' intention is said to be 'positive'; if, on the other hand, the possible event was not only not desired, but not even foreseen, the indirect intention is said to be negative.

Direct intention and (in appropriate cases) positive indirect intention give rise to 'dolus', i.e., criminal intent. Negative indirect intention gives rise to 'culpa', i.e., negligence, or to 'casus', i.e., accident or misadventure[109].

Carrara defines criminal intent (dolus) as "the more or less perfect intention of doing an act which is known to be contrary to law". This does not mean that in each particular case it is necessary to enquire whether the defendant actually knew of the existence of the law prohibiting the act; for, as we have seen, knowledge of the law duly enacted is presumed and ignorance of the law is not an excuse. Nor is it necessary that the intention of the doer should be directly that of breaking the law. Indeed, no man in his senses does wrong for the love of violating the law. The thief who decides upon and commits a theft has not the purpose of infringing the law: his purpose is to take somebody else's Property. Manzini[110] quotes the case of certain sacrilegious Neapolitan thieves

[109] Programma, 63 et eq.
[110] op. cit., p.6l0

who glibly recited prayers while they despoiled holy images of all valuables. What is essential is that the agent knew of his doing a wrong; in other words, that his act was injurious to a right of others protected by the criminal law: "in all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be illegal"[111]. This element requires:

a. The power of volition: i.e., the offender must be able to "help doing" what he does.
b. knowledge that what the offender is doing is wrong; wrong, either intrinsically or, at any rate, in prospect of such circumstances as he has grounds for foreseeing.
c. foresight of such circumstances.

It might seem[112] that rule thus rendering the existence of a complex mental element necessary to create this legal liability would, usually, cause the prosecutor much difficulty in obtaining evidence of it. For, to borrow the saying of a medieval judge, which Sir Frederick Pollock has made familiar to modern readers, "the thought of man is not triable, for the Devil himself knoweth not the thought of man". But this difficulty seldom arises in practice: for in most cases the law regards the criminal act itself as sufficient 'prima facie' proof of the existence of criminal intent. "Dolus enim, cum interna sit actio, latet occultus in animo delinquentis, aliorumque hominum aciem effugit. Unde non aliter a nobis argui potest, quam ab externibus actionibus, quae indicia sunt et argumentum internarum actionum, a quibus istae proveniunt"[113].

In England, the settled principle in this matter is that "Every sane adult is presumed to intend the natural or necessary consequences of his wilful conduct". The law treats as intentional all consequences which the actor foresees as the probable results of his wrongful act. The known consequences of an illegal act are imputed by the law as intentional. No man who knows that certain results will flow from his illegal act will be suffered to say that he did not intend them. Thus it has been judicially said in reference to the offence of wilful damage to property: "A man must be held to do a thing wilfully when he does it either intending to cause damage or knowing that the acts that he commits will cause damage"[114]. Kenny says: "Purpose always involves the idea of a desire. So also in popular parlance does intention ..... For a man is not ordinarily said to intend any consequences of his act which he does not desire but regrets to have run the risk of.

[111] Kenny, op. cit., p.39
[112] Kenny goes on to say, p.40
[113] Renazzi, "Elem. jur. crim.", Book I, Chap. 5, § 4
[114] Roper vs. Knott (1898), 1 Q.B. p.871, per Russel, L.C. 5

Yet in law it is clear that the word 'Intention'..... covers all consequences whatever which the doer of an act foresees as likely to result from it, whether he does the act with an actual desire of producing them, or only in recklessness as to whether they ensue or not"[115].

But the presumption that every man knows and intends the natural and probable consequences of his act is, no doubt, rebuttable. Indeed, many writers now regard the rule as being merely an evidential presumption, a common-sense inference that may be drawn from circumstances and not a principle or proposition of law[116]. Thus, if the accused can show that the consequence which has in fact resulted, though physically inevitable, was not, in the particular case, an obvious result of his act, or if he can show that the result which has happened was probable only when certain circumstances co-existed and that he was not aware of the existence of such circumstances, then in both these cases the presumption is rebutted and he cannot be held to have intended that result. Again, if he can satisfy the Court or the jury that the possibility of such a result never occurred to his mind, then - although such heedlessness will probably render him liable to a charge of criminal negligence - he cannot be held to have intended that result. But if he was aware that certain consequences might follow the act which he contemplated doing, and yet deliberately proceeded to do the act, he must be taken to have intended those consequences to follow, even though he may have hoped that they may not. (This is what Bentham called 'Indirect Intention').

Again, the presumption will be (of course) rebutted by proof that the accused, at the time he committed the act, had not a mind capable of forming an intention[117]. But in connection with this last observation it is to be pointed out, with Carrara, that for a man to be held liable for a completed crime to which he has given cause, it is not necessary that his wrongful intent be contemporaneous or co-incident with the last act of completion of such a crime. In some cases, the act from which the criminal responsibility of the agent arises is separated by a long interval from the actual completion of the crime by that further act which brings about the intended event but which is executed by another person. A, for instance, has determined to kill B who lives very far away: so, he sends him a box of sweets containing a deadly poison. The act of sending the poisoned sweets does not complete the crime, which is completed, perhaps days after, when they reach their destination and are eaten by B who, in consequence, meets his death. A is accountable for this murder and he is so accountable for the act of having sent the sweets and for the wrongful intent which accompanied that act. Now let us imagine that in the interval between

[115] P. 158
[116] V. Williams, "Criminal Law" (1953) P. 77 et seq.
[117] Blake - Odgers, "The Common Law of England", Vol. I, p.112

the sending of the sweets and the day of B's death, A falls victim of a 'delirium tremens' which makes him utterly irresponsible, and is still in such a state when his victim dies: subsequently A recovers. Can he escape responsibility for the murder by saying that at the time the crime was completed he was 'dolo incapax'? Certainly not, for his responsibility proceeds from the act which caused the event, and to hold him responsible it is sufficient that he was of a murderous intent at the time he committed the act which was the cause of B's death. This is what is meant when it is said that it is not always necessary that the wrongful intent on the part of the agent should continue or persevere to the time of the actual completion of the crime.

The same rule applies in all cases in which the last act of consummation is not performed by the defendant but by the victim himself, or by a third party not concerned in the crime or by a co-offender (e.g., a hired assassin). In all such cases it may happen that at the time in which the intended crime is completed the person who designed or planned or ordered or, in any other manner, was the efficient cause of the crime, is not 'dolo capax', or has repented his original criminal intent. All this will not exonerate him from his responsibility which arises out of the wrongful intent which accompanied the causative act, although it no longer subsists when the event ensues[118].

Now it is to be noted that this criminal intent about which we have been speaking is an essential ingredient of every crime except where the liability arises from negligence or where it is an exceptional case of absolute liability. Yet it is only in respect of some crimes that the definitions of them certain words specifying this mental element - such as (section 24, Criminal Code) "knowingly", "maliciously" (Section. 249 and Sect.261), "wilfully" (Sect. 320), "fraudulently" (Section. 108). In other cases, no such words are used. But it is not to be thought that in such cases the requirement of this element is dispensed with. Kenny says[119] that words so general (knowingly, maliciously, etc.) seldom add in any way to the degree of "mens rea" requisite. Usually, they merely alter the burden of proof with regard to it, their effect being to throw on the crown the obligation of proving the ordinary "mens rea" by further evidence than that mere inference from the "actus reus" which, as we have already seen, may ordinarily be sufficient to prove it. Indeed, where the law does not make use in the definition of a crime of any such words as aforesaid, it is because of the fact itself "prima facie" bears on the face of it the stamp of deliberate wrongfulness: "res ipsa in se dolum habet". In respect of such acts, the law authorises

[118] For a fuller exposition of the doctrine of "actiones liberae in causa" cfr. Manzini, op. cit., pp.612 et seq., and the authorities he quotes
[119] op. cit., p.43

the inference of criminal intent because as Roberti points out, it is usually impossible that they could be committed except knowingly and wilfully[120]. A practical illustration taken from the same writer will make this point clearer. Section 187 of our Criminal Code lays down that "any public officer .....who shall, in the exercise of his functions ..... commit forgery by false signature, by the alteration of any act, writing or signature, by inserting the name of any supposititious person or by writings made or entered in registers or any other public acts, after the formation or completion thereof shall be punished .....etc."; the following section (188) lays down that "any public officer ..... who, in drawing up acts within the scope of his function, shall fraudulently alter the substance of the circumstances thereof, whether by inserting stipulations different from those dictated or drawn up by the parties, or by declaring as true that which is false, or as acknowledged facts, facts which are not so acknowledged shall be punished ..... etc." It will be noted that in the former provision use is not made, as in the latter provision, of the word "fraudulently", because the false signature, the insertion of the names of fictitious persons, etc., are facts which by themselves manifest "prima facie" the criminal intent, the "dolus" and it is difficult to imagine that the public officer could innocently and without wrongful intent affix a false signature or insert in the act new clauses after its execution, etc. On the contrary, the falsification that can take place in the cases envisaged in Section 188, may at times be the result of an error, or a misunderstanding, or unskilfulness on the part of the public officer; and therefore the law expressly requires the ingredient of wrongful intent in order that the fact may constitute the crime of forgery. Thus, in the former case it is sufficient for the prosecution to prove the material fact from which criminal intent can be inferred; whereas in the latter case it is necessary, in addition to that proof, for the prosecution to bring into evidence other circumstances calculated to show the intention of wrongful intent on the part of the defendant.

Of course, in all cases the basic conditions of criminal liability, such as competent age, sanity, freedom from certain kinds of coercion and mistake, must exist before there can be any guilty mind[121].

Intention and Motive

A wrongful act is seldom intended and desired for its own sake. The wrong doer has in view some ulterior object which he desires to obtain by means of it. The thief who appropriates another

[120] Roberti, op. cit., Vol. II, pp. 148 and 426
[121] Harris, op. cit. p.19

person's property or money, may have the ulterior intent to buy food with it to satisfy his hunger or to pay his debt. This ulterior intent is called the motive of the act.

Now to a wrong doer, intention, if he has one, is his purpose to commit the wrong: his motive is his purpose in committing it. Every wrongful act may raise two distinct questions with respect to the mental attitude of the doer. The first of these is: How did he do the act - intentionally or accidentally? The second is: If he did it intentionally, why did he do it? The first is an enquiry into his intention, the second is connected with his motive.

In Halsbury's Laws of England[122], the distinction between intention and motive is thus put: "Intention is an operation of the will directing an overt act: motive is the feeling which prompts the operation of the will, the ulterior object of the person willing; e.g., if a person kills another, the intention directs the act which causes death; the motive is the object which the person had in view, e.g., the satisfaction of some desire such as revenge, etc."

In other words, a man's intention is his determination to do or not to do a particular act; his motive is his reason for forming such determination. He intends to do that which he means and tries to do; his motive is what makes him intend to do that act - it is the spur which stimulates him to action.

Now, on the question of 'guilty' or 'not guilty', English Law as a rule disregards the prisoner's motives, though they may affect the amount of the punishment. It is the intention and not the motive which gives the character and quality of an act. "The intention to do the act exists for all criminal purposes where it is wilfully done, although the act itself was merely intended as a means for obtaining some ulterior object"[123]. If a man has done an act which is forbidden by the law, it will be no defence for him to urge that he had a laudable motive. No act otherwise unlawful is excused or justified because of the motives of the doer, however good, e.g., a theft is not less criminal because the ulterior motive of the thief may have been to obtain money for charitable purposes. So also, if a man publishes a pamphlet which is manifestly obscene, he thereby commits a criminal offence, and it is no defence that his motive was to expose practices which he deemed pernicious[124].

[122] Vol. IX, p.15
[123] 'Criminal Law Commissioners', 4th Rep., p.15
[124] Harris, op. cit., p.22

The same general principle is accepted in Continental Jurisprudence. "Secondo la commune opinione, la contemplazione del fine propostosi dall'agente è estranea alla nozione del dolo: il movente ed il fine non entrano come requisiti e condizioni essenziali della imputabilità: essi possono funzionare soltanto come co-efficienti che agiscono sulla quantità del reato: "La moralità dell'azione può' abbassare, ma non sopprimere la dolosa natura dell'atto'"[125].

And just as a good motive does not generally exonerate from responsibility, so likewise a bad motive is not as a rule of the essence of criminal intent. This we have defined as the determination to do an act which is known to be illegal. It is clear - as Carrara points out[126] - that, under this definition, the 'animus nocendi' is not an essential and constant ingredient in criminal intent. And this is why it is important, as Impallomani warns us[127], not to confuse the notion of 'wrongful intent' (dolus) - 'malice' in its technical legal sense with 'malice' in its popular sense of ill-will, spite or malevolence. In English Law the word 'malice' means 'wrongful intention': such intention is not excluded by the inexistence of 'malice' in its popular sense. The absence of malice in this latter sense of a wicked motive ('animus nocendi') excludes wrongful intent only when it amounts to a justifiable belief to do an act which is not contrary to law[128]

The above general rule that in law a man's motives are irrelevant, is subject to certain important qualifications: for occasionally it is material to take the doer's motives into account. We have already seen that such motives may affect the amount of punishment. If a man steals a loaf of bread to feed his starving children, he nevertheless commits a theft: but it is clear that he should be punished very much less than a man who steals from an improper motive.

Again, while in general the motives and the specific purpose of the agent are irrelevant to the common notion of wrongful intent which, as we have said, ordinarily consists in the consciousness and the will, i.e., the determination, to commit an act against the law, sometimes the law itself expressly has regard to the specific purpose or object of the doer committing the offence. With regard to these particular provisions in our Code, it would appear that the purpose of the agent is taken into account under the following aspects:

[125] Florian, op. cit., Vol. I. Pt. I, p.314, § 32
[126] Programma, § 69
[127] 'Istituzioni di Diritto Penale', p.247
[128] Carrara, loc. cit.

a) Special purpose required in addition to the ordinary intent, and which forms part of the definition of the crime and constitutes, as such, an ingredient thereof (e.g., Sections 68, 84, 91, 93, 219, 252, 263, 265, 309, 335). In all such cases the ulterior intent or purpose of the agent is the source, in whole or in part, of the mischievous tendency of the act, and is, therefore, material in law[129]. Here the wrongful intent includes the purpose or object of the agent and becomes a specific intent, the proof of which lies on the prosecution[130].
b) Special purpose which, by reason of its turpitude or wickedness, operates as an aggravating circumstance of the offence and, therefore, of the punishment (e.g., Sections 86 (e), (f) and (g), 99 (2)).
c) Special purpose which, conversely, by reason of its less blameworthy character, extenuates the offence and the punishment (e.g., Section 213): 'Abduction for the purpose of marriage').

Finally, as Harris says[131], in some cases the presence or absence of a particular motive may be the test as to whether conduct is criminal. Thus if A strikes B with intent to wound him, his motive in intending those consequences is of the utmost importance in determining whether he has committed a criminal offence: if, for example, his motive was that of self-defence, such a motive excuses or justifies his conduct (V. Section 230, Criminal Code).

And, in conclusion, the absence of any apparent motive may be some ground for urging that the prisoner is insane, or that there has been a mistake as to identity, and that the prisoner is not the person who committed the crime in question. The general principle, however, remains that if a man who is of full age, sane, sober and free either to act or abstain from acting, is proved to have done an act which is criminal, he is liable whether his motive was good or bad, or whether he had none[132].

Kinds of Criminal Intent

Generic and Specific. This is a distinction which we have already mentioned. The intent is said to be generic (dolus genericus) when it consists simply in intending to do an act which is known to be illegal. True intention, we have said, is the foresight of a desired issue: but we have seen to what extent intention in criminal law is of wider scope than intention in fact. This ordinary generic

[129] Salmond, op. cit., p.405
[130] Florian, op. cit., V. I, Pt.I, p.320, § 210
[131] op. cit., p.22
[132] Blake-Odgers, op. cit., p.110

intent is the necessary and, as a rule, sufficient psychological element for imputability in respect of wilful crime. But in some cases, a particular or specific intent is required by the definition of certain crimes: this specific or particular intent is constituted by the special purpose which the doer actually had in committing the crime. It sometimes serves to distinguish between them, offences the matter whereof (i.e., the right violated whereby) is the same or similar: e.g., a person who takes for the purpose of converting to his own use a movable thing belonging to others commits a theft: but if the unlawful taking is in the exercise of a claimed right, the offence is that dealt with in Section 84.

Determinate and Indeterminate. There is the first when the issue falls completely within the boundaries of the intent: in other words, when the idea and the fact, the will and the deed, the design and the issue, are completely co-incident. Here the event corresponds in every part of it to the precedent idea of it which was present in the agent's mind and of which it is the outcome and realisation: the crime committed corresponds precisely to the crime intended: A wants to kill, and not merely to hurt B, and actually kills him.

When, on the contrary, the agent wrongfully intended and desired to produce one result but had present before his mind the possibility of producing a more serious result without, however, positively wishing to produce such graver result, then if such graver result in fact ensues, the intent of the agent with reference to the event is said to be indeterminate[133][134]: e.g., A shoots at B intending to cause him a bodily harm but not shrinking from the possibility which he foresees of killing him.

The distinction has hardly any practical importance, for, as Impallomeni points out[135], all authorities are in agreement that an indeterminate intent entails the same degree of liability as a determinate intent: "Dolus indeterminatus determinator eventu".

This is also the English Law which, indeed, would appear to go even much further. Under the law criminal liability may exist although the offender had no intention to commit the particular crime

[133] It is of interest to note that other writers (Florian, op. cit., Vol. I, Pt. I, p.321) (Manzini, op. cit., Vol. I, p.625) give of indeterminate intent (dolo indeterminato) a definition somewhat different from that given by Carrara. According to those writers, a person is said to act with an 'indeterminate intent' when he wishes to obtain any one of two or more possible results of his act, either alternatively (e.g., A wants to kill or wound B) or eventually (e.g., A shoots at B desiring to wound him but not shrinking from the possibility of killing him).
[134] Carrara, § 70
[135] op. cit., 251

which he did in fact commit, and it suffices if he had an intention to commit a crime at all, whatever it were, or even an act that was simply illegal without being criminal[136].

Good Faith

From the notion which we have given of wrongful intent, the concept of its opposite, good faith, emerges clear. As the former consists in the fore-knowledge and the desire, i.e., the intention of causing an event which is contrary to law, so by "Good Faith" is meant the reasonable belief of the lawfulness of the event which is voluntarily caused. In other words, a man is said to have acted in good faith who has done an act which is materially or objectively contrary to criminal law, not only without any intention of violating such law but also without any intention of committing a wrongful act at all. But in order that such a defence may be available, it is essential that the subjective state of the doer should not be the result of the ignorance of, or an error as to, the existence or the operation of the penal law and, further, that the case be not one in which the law imputes to the doer the consequences, even if undesired, of his voluntary act. Good faith, therefore, always resolves itself into a mistake of fact or a mistake of law, but other than criminal law[137].

It is to be clearly noted that ‘doubt’ is neither ignorance nor mistake, but knowledge, inasmuch as certainty is not an essential attribute of guilty knowledge. Doubt, therefore, does not exclude wrongful intent, unless of course in some particular case the law, either expressly or by clear implication, requires certainty of knowledge on the part of the agent for the imputability of a given act. So, if an accused person proves, for instance, that in taking and carrying away a thing belonging to others, he thought reasonably that he was taking and carrying away lawfully his own thing, he cannot be found guilty of theft or of any other crime. Not so, however, if he merely proves that he had a doubt.

But, on the other hand, it is not essential that the good faith be 'absolute’. A man who commits an act absent-mindedly or thoughtlessly, cannot be said to have acted with 'perfect’ good faith; but he cannot be said either to have acted with wrongful intent. Absent-mindedness or thoughtlessness may, at most, amount to negligence which, however, is not criminally punishable except in the cases expressly laid down in the law.

[136] Kenny, op. cit., p.41
[137] This distinction will be made clearer later on.

The question whether there has been good faith is one of fact which has to be considered in each case with reference to all the surrounding circumstances.

Criminal Negligence

We have considered the first of the three forms of criminal liability, namely, that which arises from wilful or intentional wrongdoing. We have now to deal with the second, namely, that which arises from negligent wrong-doing.

The analysis of the conception of negligence (culpa) is a matter of some considerable difficulty and it is advisable to take account of the principal theories on the subject.

The traditional theory, first propounded by Carmignani and then elaborated by Carrara[138], and generally accepted by Continental text-writers, has a subjective character[139]. According to this theory, negligence is a subjective fact, or in other words, a particular state of the mind. It consists essentially in inadvertence: that is to say, in a failure to be alert, circumspect, or vigilant, whereby the true nature, circumstances and consequences of a man's acts are prevented from being present in his consciousness. The wilful wrong-doer is he who knows that his act is wrong; the negligent wrong-doer is he who does not know it but would have known it were it not for his mental indolence.

So Carrara defines negligence as the voluntary failure to take care in estimating the probable and foreseeable consequences of one's acts; or again as "the will to do an act which is contrary to law without the consciousness of its wrongfulness, which consciousness could, however, have been had if the agent had used greater care in reflecting upon the possible consequences of his act".

In these definitions the essence of negligence is made to consist in the "possibility of foreseeing" the event which has not been foreseen. The agent who caused the event complained of, did not intend or desire it, but could have foreseen it as a consequence of his act if he only had minded: so his negligence lies in his failure to foresee that which is foreseeable. It is important not to confuse the notion of "foreseeability" with that of actual foresight: A man may not foresee at all an

[138] Programma, § 80 et seq
[139] Cfr. also, Austin 'Lecture XX'; Clark, 'Analysis of Criminal Liability', Ch. 9

actual result which subsequently ensues; or he may foresee such a result as possible but hopes to avoid it. According to Carrara there is mere negligence in both hypotheses, provided the act was done ‘animo mocendi’. If, in the second hypothesis, the act was done 'animo nocendi', the event will be imputable as intentional, inasmuch as the original wrongful intent extends to the whole transaction: but if the act was done with an innocent purpose, there is mere negligence in respect of the effect produced because not to foresee that a thing may happen and to foresee that it will not happen amounts to the same thing. Carrara illustrates the point by the following example: I fired my gun at a wild beast in the thick of the forest: in the back-ground there was a man and I killed him. I had not foreseen at all that the man was there, but if I could have foreseen it, then I am guilty of negligence: this is the first hypothesis. I fired at the beast: at a great distance from it there was a man: I saw him: I made an estimate of the chances and I foresaw that, in view of the distance between the man and my target, the shot would not hit him: it happened, however, that the shot did hit him: I am to blame but merely for negligence: this is the second hypothesis. It would be erroneous to object that I foresaw the possibility of hitting him and that, therefore, I acted with wrongful intent (dolus): for what I foresaw was that I would not have hit him. I made a mistaken assessment of the chances and here lies my negligence because it was possible for me - if I had taken greater care to ascertain - to have foreseen what actually happened: but it is wrong to identify the foresight of not hitting with the foresight of hitting.

The matter would be different if I fire at the man intending to wound him but not to kill him, but on account of the distance, I foresee as clearly possible that my shot may kill him. Should his death in fact ensue, I am in a state of indeterminate wrongful intent with respect to such homicide. I am not liable for mere negligence because my act was done with the criminal purpose of causing harm. A man who acts with such purpose can never be guilty of mere negligence: because his negligence in respect of the more serious result is tainted by the original wrongful intent.

We have now to consider another theory which may be termed the objective theory. According to this, negligence is not a subjective, but an objective fact. It is not a particular state of mind, but a particular kind of conduct. It is a breach of the duty of taking care, and to take care means to take precautions against the harmful results of one’s actions, and to refrain from the unreasonably dangerous kinds of conduct. In this theory the question whether the event complained of could or could not have been foreseen and avoided is irrelevant: what is essential and sufficient is that defendant has been responsible for conduct falling short of the standard of care which every man living in society is expected to use in his actions, and that such conduct has a direct and efficient

causal connection with the ensuing harmful result. If these two conditions are fulfilled it is not further necessary to prove that the event was foreseeable; inasmuch as negligent crimes are punished not because the injurious result was more or less foreseeable but because the law in making it an offence to be careless, imprudent, etc., laid down specific rules of conduct the violation of which, in so far as harmful results ensue therefrom, constitutes in itself a criminal wrong[140].

The very great majority of writers agree that this theory is not acceptable. If the enquiry into the state of mind of the agent is set aside it becomes in many cases impossible to distinguish between negligent wrong-doing and accident on the one hand, and between negligent wrong-doing and intentional wrong-doing on the other. The neglect of needful precautions or the doing of dangerous acts is not necessarily wrongful at all, for it may be due to inevitable mistake or accident: it may have been impossible for the doer to foresee that harmful results could ensue. On the other hand, even when it is wrongful it may be wilful instead of negligent. A trap door may be left unbolted, in order that one's enemy may fall through it and die; poison may be left unlabelled, with intent that someone may drink it by mistake. In none of these cases, nor indeed in many others, can we distinguish between intentional and negligent wrong-doing save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences.

If such consequences were foreseen and desired, the offence is intentional; if they were not foreseen nor desired, but could have been foreseen, the offence is negligent; if they were not foreseen nor desired, nor could have been foreseen, then there is no offence but sheer accident: "Il non aver previsto le consequenza offensiva sconfina la colpa dal dolo. Il non averla potuto prevedere, sconfine il caso dalla colpa"[141].

There are some writers who, while accepting in principle the subjective theory of negligence which, as we have seen, makes this consist in thoughtlessness or inadvertence, that is to say, in the culpable failure to foresee the foreseeable harmful results of one's actions, yet hold that this theory is not wholly adequate. This is doubtless, they say, the commonest form of negligence, but it is not the only form. If I cause harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no

[140] Cfr. Stoppato 'Evento Punibile', p.211; Manzini, op. cit., Vol. I, p.644
[141] Carrara, § 84

danger, I am certainly guilty of negligence. But there is another form of negligence in which there is no thoughtlessness or inadvertence. If I drive at a furious speed down a crowded street, may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly expose them to the danger. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted - the said writers say - not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently. Nothing that is not desired, however foreseen, can be said to be truly intended.

Now the answer to this may be found in what we have already said in dealing with the nature of criminal intent. We have there seen that for the purpose of Criminal Law, such forms of negligence are not, generally, treated as negligence at all. He who does a dangerous act, well knowing that he is exposing others to a serious risk of injury, and thereby actually causes an injury - will be dealt with as if he had intended the injury. The criminal law treats as intentional all consequences due to that form of negligence which is commonly termed recklessness - all consequences, that is to say, which the actor foresees as the probable results of his wrongful act: "magna culpa dolus est". This appears to be the English doctrine. This is also the Continental doctrine as we have also seen. Such cases of recklessness where the consequences of one's act are foreseen, though not positively desired, come within the definition which we have given of 'Indeterminate Criminal Intent': "Sequando si omise di calcolare tutti gli effetti possibili del proprio atto si fosse preveduto (o come possibili o come probabili) che quello effetto ne potesse derivare, si avrebbe un dolo indeterminato, ma non piu' una colpa"[142]. The conclusion is that liability by mere negligence arises not where the harmful consequences of one's acts have been foreseen, but only where such consequences have not been foreseen although they could have been foreseen. Later on, we shall see that this proposition holds good subject to the condition that the said consequences could have been foreseen by the use of ordinary care.

Negligence Under Our Criminal Code

Having considered the principal theories as to the nature of negligence in abstract, we now pass to see how the matter is dealt with in our Criminal Code.

[142] Carrara, Programma, § 8l n.

The method commonly followed by modern Codes is that of refraining from giving any definition of negligence in the general provisions, and of creating liability by reason of negligence, not in respect of all crimes but only in respect of certain particular crimes expressly specified. This is also the method adopted by our Code.

In the provisions concerning the particular crimes in respect of which liability is contracted by reason of negligence, our law sometimes makes use of the single word 'negligence' (e.g. Section 142 (2)). At other times it uses the two words 'negligence or imprudence' (Section 151). In yet other cases - the most important - responsibility for the crime is incurred on account of "imprudence, carelessness, unskilfulness in an art or a profession or non-observance of regulations" (Sections 239, 342). Now the words 'negligence, imprudence, carelessness', are not defined, but it is clear that by them the law means generally the absence of such care and precautions as it was the duty of the defendant to take in the circumstances. As to the other two expressions, viz., 'unskilfulness' and 'non-observance of regulations', they are self-explanatory. We shall make a fuller exposition of the precise meaning of each of these words and expressions in dealing with the particular offences next year. Here it is sufficient to notice that no negligence in respect of those offences is criminally liable unless it manifests itself in one or another of these forms[143].

Now the question arises whether in the system of our Code it is essential, in order that there may be liability for a negligent offence, that the harm caused should have been foreseeable by the defendant. It would appear that the answer to this query should be in the affirmative for the following reasons:

In the first place, our provisions dealing with crimes of negligence are modelled upon, or, at any rate, similarly worded substantially as the corresponding provisions of the Italian Code of 1889 and its predecessors. Now it is true that the traditional subjective theory of negligence above outlined has, in more recent years, been strongly challenged and controverted, so much so that Zanardelli, reporting on the draft Code of 1887, wrote: "II concetto della prevedibilità dell' evento in addietro pacificamente ricevuto dalla dottrina, e' oggidi' scosso dalle nuove indagini, e vien giudicato empirico e fallace"[144]. Still that theory continued to find favour with writers of the highest authority[145] and to receive practical application by the Courts: "è sempre il concetto della

[143] Vide Maino, op. cit., Vol. III, § 1623; Chaveau et Helie "Teorica.....", Vol. II, Pt. II, p.6
[144] Relazione, II, para. CXLVII
[145] e.g., Impallomeni, Vol. III, § 1622

previdibilità dell'evento, quantunone oggi scosso da nuove indagini scientifiche, quello su cui si fondono, se non esclusivamente, almeno principalmente e la teorica di diritto e il codice positivo nei reati colposi"[146].

In the second place, 'negligence', 'imprudence', and 'carelessness' are subjective facts. They connote the subjective attitude of the offender towards his acts and their consequences, which attitude prevents him from acquiring foresight and consciousness of them and but for which he could have acquired such foresight and consciousness. When the law requires in order that punishment may be inflicted that the event should have been caused by negligence or imprudence, it means that the objective or material causation is not enough but that an enquiry has to be made into the mental attitude of the doer in order to ascertain whether his mind was at fault in failing to appreciate and, therefore, to guard against the harmful consequences of his act.

According to Maino this subjective element is necessary even when the negligence consists in the non-observance of regulations": "Riguardo alla prevedibilità s'incontra qualche volta l-osservazione che si debba far distinzione tra l'inosservanza di regolamenti e le altre forme di colpa: inutile ricercare se l'agente poteva prevedere da se', quando egli ha offeso la previdenza della legge: e' solo per le altre forme di colpa che il Giudice ne deve ricercare a proprio criterio gli elementi nelle circostanze di fatto e di persona[147]. Ma se ben si riflette, è questo un modo inesatto di porre la questione, perchè anzitutto non si deve scambiare la prevedibilità con la semplice previsione: e posto la questione della prevedibilità, l'inutilita' della ricerca non dipende gi' da ciò che vi possa essere colpa senza prevedibilità, bensì deriva dalla considerazione che la prevedibilità e' gia' per se stessa insite nel fatto in modo tale d'aver potuto la legge assumerla a base di prescrizioni generali e di divieti generali. Il che tuttavia non toglie che nel caso - pure in via d'eccezione possibile - dell' imprevedibilità d'un evento verificatosi dopo un'inosservanza di regolamenti si debba escludere in rapporto a quell' evento il titolo di delitto colposo"[148].

All this means that whatever the form the negligence takes, if the ensuing harm was not only unforeseen but also unforeseeable, there cannot be any question of criminal liability in respect of such harm: "pro casu fortuito habendum erit"; saving, of course, any liability contracted by reason of the fact itself constituting the negligence (e.g., the non-observance of a regulation) in so far as such a fact constitutes an offence known to the law (e.g., driving a car without a licence).

[146] Cassazione: 13. V. 1907 in Giust. Penale, 1907, 772
[147] Nicolini "Quiste di dir.", P.II, Con. 11. III, § 6-7; see also in the same sense Florian, op. cit., Vol.I, Pt. I, p.347.
[148] Op. cit., Vol. III, § 1622

And when we say that the event was unforeseeable, we do not mean that it was unforeseeable absolutely: we mean only that it was unforeseeable by the standard of care which the law requires every man to use in his actions. Now, what is this standard?

Standard of Care

Negligence is not a ground of criminal liability except in the cases expressly laid down in the law: for, speaking generally, crimes are wilful wrongs, mere negligence being deemed an insufficient ground for the rigour of criminal justice. The reason for the exceptions which the law makes is that certain types of conduct which are particularly harmful (e.g., to human life, public safety) require to be repressed. In these cases, the law is not satisfied with the mere absence of any intention to inflict injury or to cause harm but demands the positive use of such care as is calculated to avoid the possibility of such injury or harm.

The question is: What measure of care does the law demand?

It does not demand the highest degree of care of which human nature is capable. I am not liable for harm involuntarily done by me merely because by some conceivable exercise of prudential foresight I might have anticipated the event and so avoided it. Our Code - as Impallomeni aptly remarks with reference to the Italian Code[149] - makes negligence consist in imprudence, carelessness, unskilfulness in an act or profession, etc., and imprudent is he who is not prudent, not he who most prudent; unskilled is he who is not skilled, not he who is not skilled in a superlative degree. The law demands not that which is conceivably possible but that which is reasonable. Were men to act on any other principle but this, excess of caution would paralyse the business of the world. Inasmuch as the carrying of fire-arms and the driving of horses or of cars are known to be the occasion of frequent harm, extreme care and the most scrupulous anxiety as to the interests of others, would prompt a man to abstain from these dangerous forms of activity. Yet it is expedient in the public interest that those activities should go on: consequently, the law does not insist on any standard of care which would include them, as such, within the limits of culpable negligence.

[149] 'Colpa e omicidio colposa', p.14

The amount of prudence or care which the law actually demands is that which is reasonable in the circumstances of the particular case. This obligation to use reasonable care is very commonly expressed by reference to the conduct of a 'reasonable man' or of an 'ordinarily prudent man', meaning thereby a reasonable prudent man: "negligence", it has been said, "is the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do". "We ought", it has also been said, "to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe ..... The care taken by a prudent man has always been the rule"[150].

What amounts to reasonable care depends entirely on the circumstances of the particular case as known to the person[151] whose conduct is the subject of enquiry. Whether in those circumstances, as so known to him, he used due care - whether he acted as a reasonably prudent man - is in general a mere question of fact as to which no legal rules can be laid down.

Degrees of Negligence

Writers who found their conception of negligence on the criterion of the foreseeability of the event, distinguish between gross negligence (culpa lata), ordinary negligence (culpa levis) and slight negligence (culpa levissima). There is the first were the event could have been foreseen by all men; the second, where it could have been foreseen by reasonably prudent men; the third, where it could not have been foreseen except by the use of an extradordinary and uncommon care[152]. Their doctrine is that slight negligence does not give rise to criminal liability[153].

More modern writers[154] do not like the way the above is said. According to them, this distinction, for the purposes of Criminal Law, is idle and arbitrary, whatever else it might be for the purposes of Civil Law. The Criminal Law itself does not make any distinction: it recognises only one standard of care and, therefore, only one degree of negligence. Rather than saying that slight negligence is not a ground of criminal liability, one should say that, where the harm could not have been foreseen and prevented except by the use of extraordinary and uncommon precautions, there is

[150] V. Judgments of the English Courts quoted in Salmond, op. cit., p.4l6; see also the elaborate Judgment delivered by Harding J. in "The Police vs. G. Debono", Criminal Appeal, 4/3/1944.
[151]Carrara, Programma, § 87n.)
[152] Carrara, § 88
[153] V. Impallomeni, 'Istituzioni di Diritto Penale', p. 258; Maino, op. cit., Vol. III, § 1621
[154] (**) V. Stoppato 'Evento Punibile', p.144-149; Cogliollo, 'Considerazioni circa la considetta Culpa levissima' in Cass. Un., IX, 169; Manzini, op. cit., Vol.I, p.646, § 261; Florian, op. cit., Vol. I, P.I, p.344.

no negligence at all, for, as we have seen, what the law requires is the use of reasonable care and no man is negligent merely because he does not show more care: negligence either exists or it does not: if it exists, it is always punishable.

The controversy is not one of practical importance: it is one of words rather than of substance: the practical result in both cases is the same, that is, that no man is punishable because he has not used any degree of care higher than that which could be expected of a reasonable man in the same circumstances.

Contributory Negligence

Criminal liability in respect of negligent offences arises where there is an efficient causal connection between the negligence and the event complained of. If the particular negligence imputed to the defendant was not the efficient cause of the event, he cannot be convicted.

It is, however, no defence that the mischief was caused by the negligence of others as well as of the defendant. If the mischief occurred by the negligent act or default of several persons, they are all guilty. The fact that other persons besides the defendant were also negligent does not avail him, because were this not so, each negligent party would raise the same defence and no one would be responsible.

Similarly, contributory negligence on the part of the victim is not a ground of defence. "If the prisoner's negligent act or omission was the proximate and efficient cause of the death, the fact that the deceased was himself negligent and so contributed to the accident or other circumstances by which the death was occasioned, does not afford a defence to an indictment for manslaughter"[155]. Andrew Gib[156] so comments upon this rule: "This doctrine is based on sound common sense. Contributory negligence is no defence to a criminal prosecution because the Crown and not the deceased or his representative is the plaintiff". Manzini[157] says the same thing in these words: "Irapporti penali non intercedono tra privati, ma tra gli individui e lo Stato il quale tutela gli interessi di tutti; e la trasgressione di una persona non puo' costituire, ne' moralmente

[155] Hals., op. cit., Vol. IX, p.445
[156] 'The Law of Collisions on Land', p.244
[157] op. cit., Vol. I, p.675

ne' giuridicamente, ragione sufficiente per sanare la trasgressione dell'altra e per privare l'ordine giuridico generale della tutela che il nostro diritto gli appresta".

Contributory negligence on the part of the deceased may, perhaps, be a ground for lightening the sentence, and "evidence which in a civil case[158] might be given to prove contributory negligence, might in a criminal case be relevant to show that the death of the deceased was not due to the culpable negligence of the accused"[159].

The above appears to be the English doctrine. In Continental Jurisprudence there is authority for saying that if the negligence of the defendant would not have by itself caused the injury without the contributory negligence of the victim, then the defendant is not liable[160]. This principle, however, proceeds only where the act or omission of the victim was deliberate and voluntary, and not necessitated or provoked by the original negligence of the defendant; or where it was the victim himself who gave the first cause to the injury suffered by him, by an unlawful conduct without which the injury to himself would not presumably have happened.

We shall say more about this question in dealing with the provisions relating to involuntary homicide and bodily harm to which this doctrine more especially refers.

Offences of Absolute Liability

Subjective Element in Contraventions

In English doctrine, the expression 'absolute liability' is used with reference to the offences for which a man is responsible irrespective of the existence of either wrongful intent or negligence. These offences are the exceptions to the rule "actus non facit reum nisi mens sit rea". As we have seen, criminal liability, in all ordinary cases, is based upon the existence of 'mens rea': for no man should be punished criminally unless he knew that he was doing wrong, or might have known it by taking care. But there are exceptions to this rule. These are usually created by statutory enactment where:

[158] (*) Cfr. Sections 1092-1094 Civil Code (Chap.23): where the person injured has himself contributed or given occasion to the damage; he cannot recover full damages.
[159] Arch., op. cit., p.911; See also Criminal Appeal, 'The Police v. J. Debono', 4.3.1944)
[160] Cfr. Carrara, § 1100, Parto Speciale, Vol. I; Impallomeni, op. cit., p.260; Maino, op. cit., Vol. III, p.288, § 1625.

(1) the penalty incurred is not great (usually not more than a petty fine imposed by a petty tribunal).
(2) the damage caused to the public by the offence is, in comparison with the penalty, very great; and where, at the same time.
(3) the offence is such that there would usually be peculiar difficulty in obtaining adequate evidence of the ordinary "mens rea".

The following are instances of this exceptional kind of criminal liability

a) Possessing for sale unsound meat, though without knowing it to be unsound.
b) Selling an adulterated article of food, though without knowing it to be adulterated.
c) Selling intoxicating liquor to a drunken person, though without noticing that he was drunk[161].

In respect of offences of this kind, the doctrine is that a person doing the prohibited act is liable to punishment however innocently he may have acted: no ignorance or mistake of fact can afford any justification or excuse[162]. In determining whether an Act does create this more stringent prohibition, regard must be had to the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed, and the person upon whom the penalty is imposed. In general, where the words of a modern statute amount to an absolute prohibition of a certain act without any reference to the state of mind of the actor, 'mens rea' is not an essential ingredient of the offence; and in such a case any enquiry as to the intent which actuated the accused would be immaterial - except, perhaps, with a view to the mitigation of punishment[163].

Analogous to - but not precisely identical with - the above doctrine on the English Law, is the Continental and our doctrine concerning 'contraventions'. We have already seen that our law distinguished criminal offences into 'crimes' and 'contraventions'.

The latter class comprises, generally speaking, offences of a venial nature liable to small punishments and triable by a Court of Magistrates. Now the traditional doctrine in respect of crimes has always been that the definition of them always requires, either expressly or by necessary implication, the element of wrongful intent, as already defined, except where liability is

[161] Kenny, op. cit., p.44
[162] Harris, op. cit., p.28
[163] Blake-Odgers, op. cit., Vol. I, p.114

contracted by reason of negligence. On the contrary, in respect of contraventions evidence of wrongful intent is not, as a rule, necessary. We say 'as a rule', because occasionally the law itself requires a particular intent as an ingredient of a determinate contravention as, for instance, in the case of the contravention contemplated in Section 352 (ff), Criminal Code, which is committed by a person who with intent to mislead the authorities produces to them genuine documents falsely attributing the same to himself or to others.

And just as evidence of a wrongful intent is not, as a rule, necessary, so likewise it is not, as a rule, necessary to prove negligence on the part of the defendant. But this rule also is subject to exceptions, for sometimes negligence is made by the law a constituent part of the contravention: e.g., the contravention committed by a person who through carelessness or want of due attention throws water or dirt upon another person (Section 353(f)).

The rule, however, remains that acts or omissions constituting the subject-matter of contraventions are prohibited and, consequently, made punishable in themselves irrespective of any mischievous purpose or culpable negligence on the part of the agent. This rule, it is true, is not laid down in terms in our Criminal Code, but it is well enshrined in our Case-law, based on continental legislation, doctrine, and practice. These are all in the sense - apart from interminable disquisitions on niceties of detail – that with regard to contraventions every man is responsible for his act or omission even though there is no evidence that he intended to commit an act contrary to law[164]. This does not mean that the material act or omission is in itself sufficient to constitute guilt. It is always necessary that the act or omission was voluntary, that is to say done or omitted by the defendant in pursuance of a determination of his will. The offender must have actually known that he went through or omitted the act and did this voluntarily though it is not further necessary to prove that he had the consciousness and the will to contravene the law[165]. And that the act was voluntary is presumed until the contrary is proved[166]. Here lies precisely the difference with respect to the mental element between crimes and contraventions: "mentre nei delitti occorre, salve le eccezioni stabilite dalla legge, la provata volontarietà del fatto costituente il delitto, nelle contravvenzioni non si richiede la prova che l'agente abbia volute il fatto contrario alla legge, oggetto del reato; basta che siasi commessa l'azione o l'omissione che ha determinato la contravenzione, la quale non puo' essere esclusa se non dalla prova di una volontà contraria. Fra delitti e contravvenzioni vi sarebbe un'inversione di termini e di prova: quel che solo per eccezione

[164] Art. 45, Italian Criminal Code of 1889
[165] Impallomeni 'Il sistema generale delle contravvenzioni ecc.', Revista Penale, XXVIII, 218.
[166] Manzini, op. cit., Vol. I, p.692, § 276.

negli uni si presume, si presume, per regola, nelle altre sino a prova contraria"[167]. Such presumption may be rebutted, for instance, by evidence of coercion, force majeure, or accident.

This doctrine, as has already been said, has often been applied in local judicial precedents. In the case 'The Police v. C. Gauci' (Criminal Appeals, 4th November 1936), Mr. Justice Harding said: "the doctrine now generally accepted is that liability for a contravention is incurred if only the fact in contravention is voluntary. It is sufficient that the accused was the voluntary efficient cause of such fact, and it is not necessary to show that he knew that the fact itself was unlawful. If the accused voluntarily committed the act then, once that that act constituted a contravention, he is answerable for it in the eye of the law" (Translation)[168].

Good Faith

In the case of contraventions, the fact that the act or omission is voluntary is, as we have said, sufficient to give rise to criminal liability, and any enquiry as to the intent with which that act or omission was done or made is immaterial. In particular it is not necessary for the prosecution to prove that the defendant acted with the consciousness of violating the law.

In view of this, good faith which, by negativing the intention to do that which is illegal, excludes wrongful intent in the case of crimes, does not, as a rule, afford any defence in the case of contraventions, precisely because wrongful intent is not of the essence of such offences. Good faith can only avail when it consists in the absence of any will at all to do that which materially was done or in a direction of the will positively contrary to that which materially was done: in such cases the event is not the result of an act of the defendant and it, therefore, cannot be put to his charge: for instance, the car sped furiously down the slope because the controls accidentally gave way and it got out of hand: or again, a horse with its rider on its back ran furiously in the street because it accidentally took fright and snapped the reins in the rider's hands. In these and similar cases, provided no negligence whatever can be imputed, no guilt attaches to the individual concerned, for the act objectively in contravention was not voluntary on his part.

[167] Maino, opc.cit., B Vol.I, p.103, § 182
[168] Cfr. 'Recent Criminal Cases Annotated', § 44

The defence of good faith was allowed in a case in which a man who had picked up a weapon found in the street with the intention of delivering the same to the Police, was found in possession thereof before he had time to carry out his intention[169].

As to good faith which consists merely in a mistake of fact, the rule is that it does not help the accused except where the mistake is inevitable and wholly accidental. If it is in any way attributable to negligence, it will not serve as a defence. Mistakes of law are not, of course, an excuse[170].

Vicarious Liability

Third-Party Responsibility in Respect of Contraventions

Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. Indeed, in primitive systems the impulse to extend vicariously the incidence of liability received free scope in a manner altogether alien to modern notions of justice. It was considered a very natural thing to make a man answerable for those who were akin to him[171]. In the patriarchal age, if a member of clan A injured or killed a member of clan B, the members of clan A were collectively liable in respect of the injury. The kindred of the injured man could not discriminate, in the attribution of liability, between the wrong-doer and his kindred. In the Mosaic legislation it was deemed necessary to lay down the express rule that "the fathers shall not be put to death for the children[172],[173]. In Eastern systems of law, the principle of vicarious liability occupied an important place in the Criminal Law until very recently. It reached its fullest development in Chinese Law. If a man committed a crime he was primarily responsible: but if he had fled or was undiscoverable, then the criminal's family were liable in accordance with the proximity of relationship to the wrong-doer[174]. Furthermore, so long as punishment is conceived rather as expiative, retributive and vindictive than as deterrent and reformative, there seems no

[169] Rev. Pen., XCVII, 554
[170] Cfr. Criminal Appeal 'The Police vs. G. Ciantar', 13-11-1937
[171] Salmond, op. cit., p.432
[172]"Neither the children shall be put to death for the fathers"
[173] Deut. XXIV, 16
[174] Recton, 'Elementary Principles of Jurisprudence1, 1930, p. 173.

reason why the incidence of liability should not be determined by consent, and therefore why a guilty man should not provide a substitute to bear his penalty and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment, but there is no reason why the victim should be one person rather than another[175].

All such modes of thought have long since ceased to pervert the law. It may be taken as a cardinal principle of modern law in general, only the person who commits an act is liable in respect of it. Criminal responsibility, indeed, is never vicarious at the present day, except - in some systems - in very special circumstances and in certain of its less serious forms. Thus, in England there are some statutory offences for which a master is liable although they are committed by his servants without his knowledge. Offences of this kind are frequently created by Statutes, which, for the protection of the public, impose regulations upon the sale of food, drugs, etc., and whose object would be defeated if a master escaped responsibility for their infringement by his servants[176]. Thus, for example, under the Licensing Act, 1910, a publican is held liable for the servants if they supply refreshments to a constable on knowingly permit any unlawful game or any gaming to be conduct of his duty; or if they carried on upon the licensed premises: for, as Grove J. said: “if this were not the rule, a publican would never be convicted. He would take care always to be out of the way”[177]. But, however expedient in the public interest it may be to hold the master responsible in similar cases, they constitute nevertheless a departure from the general rule of law: for - excluding, of course, the cases in which the master is conniving - the utmost blame that can be imputed to him is the comparatively trivial omission of not having originally secured a trustworthy servant and of not having subsequently kept him under constant supervision. Yet it is precisely this omission on the part of the master that constitutes the legal jurisdiction for imposing liability upon him: the law deems him guilty of ‘culpa in vigilando’.

Similar to these applications of vicarious liability in English Criminal Law, is the Italian doctrine of the 'Responsibility of Third Parties in Contraventions'. This latter doctrine is enshrined in an express provision of our Criminal Code. In fact, Section 25 lays down as follows:

"If any contravention is committed by a person subject to the authority, direction or care of another person, the punishment shall be awarded not only to the former but also to the latter, if the

[175] Salmond, ibid.
[176] Harris, op. Cit., p. l8
[177] Quoted in Kenny, op. cit., p. 47.

contravention is against some provision the observance whereof the latter was bound to ensure and the contravention could have been prevented by his diligence".

This provision is identical, word for word, with Art. 60 of the Italian Criminal Code of 1889.

Upon an analysis of the provision in question it appears clear that no fewer than three conditions must be satisfied in order that it may be applied. These conditions are

a) That the person committing the contravention be subject to the authority, direction or care of another person. Such authority, direction or care may arise from family relationship, or from relationship of employment, custody tuition, etc., or under the provision of a law or regulation. And, as the law makes no distinction, it is immaterial whether the authority, direction or care be permanent or merely temporary, provided, of course, it subsisted at the time the contravention was committed.
b) In the second place it is essential that the contravention be against a provision of law which it was the duty of the person having authority over or the direction or care of the contravener, to see that it was observed. The reference here is necessarily and obviously to some special duty, particularly inherent in the office, situation, undertaking or trade held or carried on by the person having the authority, direction, or care as aforesaid; and not to the duty, moral if not always legal, generally incumbent upon all citizens to ensure the observance of the law.
c) Finally, in order that liability may attach to the person having authority over or the direction or care of the contravener, it must be made to appear that the former could have prevented the commission of the contravention by the use of due care. This means that the provision under discussion will not apply if the contravention was committed by the subordinate in such circumstances that the person having the authority, etc., was in the impossibility of preventing it by the exercise of reasonable care.

So that, what the law punishes under this section is really the negligence of the superior in failing to prevent the breach of a particular provision of law, which he had a special duty to cause to be complied with. The law does not punish the superior for the wrong of his subordinate: but punishes the subordinate himself for his wrongful act or omission constituting the contravention, and punishes the superior for his own wrong in failing to take care to prevent the contravention. "Qui, dunque, si tratta di responsabilità non per culpa aliena, bensi' per culpa propria in vigilando"[178].

[178] Florian, op. cit., Vol. I, Pt. I, p. 349

In connection with this natter reference is made to the Judgement delivered by H.M.'s Criminal Court (Appellate Jurisdiction) in re 'The Police vs. Dalli' (27.11.1943). There the important rule was laid down that the person having authority over or the direction or care of the contravener may be prosecuted and convicted even though the contravener himself had not already been convicted.

Other provisions of our Law extending criminal responsibility to certain persons in respect of offences committed by others are Section 36 (5), and Section 38 (2), Criminal Code (Offences committed by minors); Section 40 (Offences committed by deafmutes); Section l6l, Code of Police Laws (Offences committed in hotels, etc.); Section 51, Police Laws, and Section 528, Criminal Code (liability incurred by owner of vehicle in connection with offences committed by driver); Regulation 21 of Government Notice 392/1927 (offences committed on premises licensed for sale of wine and spirits[179].

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[179] Cfr. Criminal Appeals: 'The Police v. Farrugia', 25.3.1939; 'The Police v. Cremona', 26.10.1940; 'The Police v. Major Bonello', 28.6.1941; 'The Police v. Chapelle', . .1943.

Exemptions from Criminal Responsibility and General Grounds of Defence

In dealing with the nature of criminal responsibility generally, we have assumed that the person accused of an offence had a mind capable of forming an intention and capable of understanding the nature of an act done by him: that is to say, that he possessed both will and judgement and was free to exercise both. In fact, criminal responsibility, generally, postulates by essential conditions, i.e., first that the criminal act, constituting the material and physical element of the offence, was committed or omitted by the person accused, so that it can be physically imputed to him as being his act; and, secondly, that such act was done by him as a result of a positive or negative determination of conscious volition, so that it can also be morally imputed to him. From this it follows that any cause which affects the will or the understanding must also necessarily affect the existence or degree of criminal responsibility. Indeed, Blackstone says:" All the several pleas and excuses, which protect the committer of a forbidden act from the punishment, which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will". (Note: the word 'will' here comprises both the faculty of volition and that of understanding). "An involuntary act as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable"[180].

We must now proceed to consider the principal conditions which, by negativing wholly or in part this moral element of every criminal offence, exempt wholly or in part from criminal responsibility. These conditions may be conveniently grouped under the three following heads:

1. When the agent has not the use or full use of his intellectual faculties.
2. When the will or the understanding is not directed to the deed; and
3. When the will is overborne by compulsions.

The Absence or Defect of the Intellectual Faculties May be Due to any one of Various Causes

[180] 4 BL. Comm. 21

Young Age

The child acquires the notion of right and wrong only by the passage of his growing years and the reasoning faculty develops by gradual stages. Criminal Law must take account of this fact in allocating and assessing responsibility.

By our Criminal Code, minors[181] are divided into three classes:

Those under nine years of age: There is a conclusive presumption that children so young are incapable of incurring responsibility for a criminal offence. Nothing, therefore, that they do can make them liable to be punished by a Criminal Court. And the same presumption cannot be rebutted by even the clearest evidence of a mischievous discretion or discernment, for under the age of nine years an infant is incontrovertibly deemed to be incapable of being endowed with any discretion. Section 36 (l) of our Criminal Code, therefore, provides that “minors under nine years of age are exempted from criminal Liability”.

But this does not mean that the law is wholly indifferent to wrongful acts committed by any such child. It is right enough not to inflict any punishment on so young an offender, for, besides that he is presumed to be 'dolo incapax', the effect of criminal punishment on him is apt to be degrading. But the law is anxious, in the general public interest and in the interest of the child itself, that the mischief shall not be repeated and that any evil tendencies in the child shall be checked and corrected. It, therefore, provides that, on proof of the facts attributed to the minor, the Court may bind over the parents or other persons bound to provide for his education, to watch over his conduct, under a penalty in case of default, of a sum proportionate to the means of the persons so bound over and to the gravity of the fact; or the Court may, where the act committed by the minor constitutes a crime, order that he be detained in an Industrial School or a House of Correction[182] for a stated period not beyond his age of sixteen years; or, finally, where the act committed by the minor consists in an offence liable to the punishment of a fine (ammenda), the Court may award this punishment to the parents or other persons bound to provide for the education of the child if it appears that the act could have been prevented by their diligence (Section 36).

[181] In English Crim. Law all these three classes of minors are styled ‘Infants’.
[182] House of Correction have never been established. See the Approved School Ordinance (Ch. 75)

Between nine and fourteen years: Even at this age a minor is still presumed to be incapable of distinguishing between good and evil and of appreciating the consequences of his acts; but this presumption is no longer conclusive: it may be rebutted by evidence: for the capacity to commit a crime and contract guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgement: "malitia supplet aetatem"[183] Yet the mere Commission of a criminal act is not, as it would be in the case of an adult, sufficient 'prima facie' proof of a guilty mind. The presumption of innocence is so strong that some clearer proof of the mental condition is necessary. A special proof of mischievous discretion or discernment must be made: it must be shown that the minor had the consciousness of the wrongfulness of his act and of its consequences: such consciousness may be shown, for instance, by the fact that the offender has been previously convicted of some earlier crime: or even by the circumstances of the present offence itself for they may afford distinct proof of a wicked mind[184]. If this proof of discretion is not made, then the child cannot be subjected to any punishment. But on proof of the facts charged against him, the Court may adopt any of the precautionary or disciplinary measures already mentioned with regard to minors under the age of nine years.

If, on the other hand, it is made to appear that the child acted with mischievous discretion, then he is liable to punishment, but the punishment which would normally apply to the offence is very considerably mitigated, a distinction being made between offences of omission and offences of commission. If the punishment to which the young offender is sentenced is one restrictive of personal liberty[185] the Court may direct that the sentence be served in a House of Correction; or the Court may, in lieu of passing sentence on the minor, adopt any of the preventive or disciplinary measures as in the case of infants under nine years of age - Section 38.

The reason why the full rigour of the law is not applied against a minor at this stage, notwithstanding that he has acted with discretion, is that, although he has sufficient capacity to be responsible for his acts, yet his mental faculties are immature, and his inexperience makes him an easy prey to temptation and passion.

The question whether a child has acted with discretion is a question of fact about which no legal rules can be laid down. It depends upon a moral assessment of all the circumstances of each

[183] 41 Bl. Comm. 23
[184] Kenny, p. 50
[185]The expression 'punishments restrictive of personal liberty' means hard labour, imprisonment and detention Section 7).

particular case, and it cannot be answered in the affirmative unless it appears clear that the minor has acted with the consciousness of the wrongful and unlawful character of his deed, or, in other words, with a guilty knowledge that he was doing wrong. The onus of proving this lies naturally on the prosecution, inasmuch as such guilty knowledge is an essential condition for attaching criminal responsibility to the agent.

Between fourteen and eighteen years: In Civil Law majority is attained on completion of the age of eighteen years. But a young person knows right from wrong long before he knows how to make a prudent speculation or to manage his civil affairs. Hence at fourteen a minor comes under full criminal capacity, that is to say, he is presumed by the law to be 'dolo capax', capable of distinguishing good from evil and is, therefore, with respect to his criminal actions, subject to the same rule of construction as others of more mature age[186]. But for the purposes of punishment, the law still extends to minors who have not completed the age of eighteen years, a privileged treatment. Section 39 of our Criminal Code lays down that "when the offender has completed his fourteenth year but has not attained the age of eighteen years, the Court shall diminish the punishment by one or two degrees, and, if the term of punishment awarded does not extend beyond the eighteenth year of the age of the offender, the Court may direct that the sentence be served in *a* House of Correction"[187].

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Old Age

By the Civil Law, old age is made a ground of certain disabilities. Thus, under Section 1838 of the Civil Code, a person who has completed the age of 70 years cannot make a donation of a value exceeding £50 without the authority of the Court of Voluntary Jurisdiction. But for the purposes of criminal liability old age, however advanced, has not by itself any relevance. In modern progressive systems of law, account may be taken of the old age of the offender for the purpose of fitting the punishment to him, that is for the purpose of choosing the appropriate form of punishment to be inflicted upon him, in pursuance of the modern doctrine of the individualisation of punishment. But this is a different matter from the question of liability with which we are now

[186] Arch., p.12

[187] (*) In connection with this subject of the age of the offender, a nice point may arise in respect of a continuing (permanente) or a continuous (continuato) offence which commenced in one of the stages into which minority is divided, as we have seen, and was protracted into a subsequent stage or after the completion of the eighteenth year of age. Maino (op. cit., Art. 56, § 265) decides unhesitatingly that in any such case, for the purpose of the application of the law, regard must be had to the age which the offender had when he completed the last act. This is also the doctrine most commonly accepted (But see: Manzini, cit., Vol. II, p. 76, No. 309).

concerned. Rather than accepting old age as a ground for extenuating liability, society has the right, as Carrara observes[188], to expect that by reason of his experience and of the cooling down of passion, an old man should show greater respect for the law: his wrongdoing is more harmful to the community from the point of view of bad example than the wrongdoing of a youthful offender.

Old Age may bring about decay or deterioration of the mental faculties amounting to 'senile dementia'. In any such case there will be a ground of defence, indeed, but by reason of mental infirmity and not by reason of age.

And yet it must be noted that when the question under reference was discussed at the Congress of the 'Union Internationale de Droit Penale' assembled at Budapest in 1889, the following resolution was adopted: "L'Union proclame que, endehors de l' alienation mentale declares, les changements intellectuals que la violesse provoque souvent, doivent etre pris en consideration particuliere dans le droit penal"[189].

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Deaf-Mutism

By many codes, deaf-mutes are assimilated to infants, inasmuch as in respect of the former as in respect of the latter, it is a physical or a physiological cause that induces the want or incomplete use of the mental faculties. A deaf-mute, deprived as he is of speech and hearing, cannot acquire but late, and perhaps never completely, the capacity to discriminate between right and wrong. Modern science, it is true, has devised means whereby intelligence can be conveyed to those unfortunates by signs and symbols. By these means which enable them to communicate with and be communicated with by others, the condition of many of them is alleviated and their mental faculties stimulated and evolved. But it is only in few cases that they attain the normal standard of intellectual development with regard especially to abstract ideas as are the notions of duty, right and justice.

Hence the necessity of special provisions concerning the degree of liability of deaf-mutes and the penal treatment to be muted out to them.

[188] Programma, § 231
[189] Cfr. Riviere, in 'Riv. Penitentiaire', XXIV, p. 116).

Ancient writers went so far as generally to declare deafmutes from birth absolutely exempt from all criminal responsibility; and in Roman Law they were treated in the same manner as imbeciles: "inter imbecillos numerandi"[190].

Modern doctrine may be summed up in the three following propositions:

i. That the period during which a person who is deaf and dumb is to be conclusively presumed incapable of contracting penal responsibility should be longer than in the case of a normal child.
ii. That after a deaf-mute has attained the age at which the conclusive presumption of criminal incapacity ceases, it should nevertheless always be necessary to ascertain whether he acted with mischievous discretion.
iii. That even when it is made to appear that he acted with mischievous discretion, a deaf-mute should never be held responsible to the same full extent as a normal person.

In strict accordance with these principles, our Criminal Code provides as follows:

Deaf-mutes who, at the time of the commission of the offence, have not completed their fourteenth year of age, are exempt from criminal liability. The absolute presumption of incapacity to contract criminal responsibility which, in respect of infants generally, is limited to the age of nine years, is thus, in respect of deaf-mutes, extended to the age of fourteen years. But here again the law wisely empowers the Court to apply any of the precautionary or disciplinary measures already mentioned in the case of infants who have not attained the age of nine years or who have attained the age of nine but not the age of fourteen years and have acted without mischievous discretion.

After a deaf-mute has completed his fourteenth year of age and whatever his age above that age, he is likewise exempt from punishment unless it is proved that he committed the deed with a mischievous discretion: In default of such proof the Court can only apply any of the measures above mentioned with this one difference that, if the deaf-mute is ordered to be detained in an Industrial School or a House of Correction, the Court may direct that he be there detained until he has completed his twenty-fourth year of age (in the case of normal infants the limit is 16 years). If, on the other hand, it is made to appear that the deaf-mute committed the deed with a

[190] Dig. L., 12, § 2, de judic.

mischievous discretion then, if at the time of the commission of the offence, he has completed his fourteenth year of age but not his eighteenth year, he is dealt with in the same manner as a minor between nine and fourteen years who acted with discernment, and the provisions of Sections 37 and 38 apply: if the deaf-mute has attained the age of eighteen years, the punishment which is ordinarily applicable to the offence is reduced as provided in Section 41 .

Now in connection with these provisions the question arises whether they apply only to deaf-mutes from birth (a nativitate) or also to deaf-mutes who so become later in life. In the abstract theory of law, it may seem that this physical defect should exclude or extenuate criminal responsibility only when it is congenital or contracted in early infancy. In fact, it affects liability only inasmuch as it is considered to impede or retard the development of the intellectual faculties at a time when the human organism is in a state of natural growth. A person who becomes deaf and dumb after he has already reached the age of discretion will have already had an opportunity of learning to discriminate between right and wrong and of understanding the penal enactments of the law.

But whatever may be the theoretical force of these arguments, the limitation does not appear consistent with the provisions of the law. Unlike the Codice Sardo, which expressly restricted the application of its corresponding provisions to deaf-mutes: and it is a well-known maxim of legal hermeneutics that "where the law distinguishes not, we are not to distinguish". In the commission appointed to revise the draft Italian Code of 1889, someone had suggested that the restriction contained in the Codice Sardo should be repeated: but the suggestion was turned down; for it was observed that the case of a person becoming deaf and dumb after childhood was very exceptional whereas the law was chiefly concerned with what ordinarily happens (id quod plerumque accidit). Moreover, no sufficient reason was seen for denying to any unfortunate person who contracted such grievous defect after childhood the same lenient treatment accorded to deaf-mutes from birth.

In English Law the position is stated to be as follows: "A person deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, is an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted and punished, although great caution should be observed in such proceedings"[191].

[191] Arch., op. ct., p.14

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Insanity

Absence of the formal element of crime and, therefore, of criminal responsibility may also arise, not from the natural and inevitable immaturity of young age or from the physical defects which we have discussed, but from a diseased condition of the mind.

"English Law"[192] - says Kenny[193] - "even in its harshest days, recognized insanity as a possible defence. On the other hand, it has never held (as a popular error imagines it to hold) that the mere existence of insanity whatever will suffice to exempt the insane person from criminal responsibility. Only insanity of a particular and appropriate kind will produce exemptions. For lunatics are usually capable of being influenced by ordinary motives, such as the prospect of punishment: hence they usually plan their crimes with care and take means to avoid detection.

Careful observation of insane patients, in various countries throughout many years, has now thrown light upon the mental processes of the insane. The world, it is now recognised, is full of 'warped' men and women, in whom there exists some taint of insanity, but who nevertheless are readily influenced by the ordinary hopes and fears that control the conduct of ordinary people. To place such persons beyond the reach of all fear of criminal punishment would not only violate the logical consistency of our theory of crime; but would also be a cause of actual danger to the lives and property of all their neighbours.

Hence English Criminal Law - Kenny goes on to say – divides insane parsons into two classes:

a) those over whom the threats and prohibitions of the Criminal Law would exercise no control, and on whom, therefore, it would be gratuitous cruelty to inflict its punishments; and
b) Those whose form of insanity is only such that - to use Lord Bramwell's apt test - they would not have yielded to their insanity if a policeman were at their elbow.

[192] For a full discussion of the English Law of insanity in regard to criminal responsibility, cfr. the 'Report of the Royal Commission on Capital Punishment', 1953 (Cmd. 8932.
[193] pp. 51 at seq.)

But the very great difficulty as to where the line of demarcation should be drawn between the two classes, is one upon which the law has undergone grave though gradual changes and cannot be said to have developed even now into a complete or even a perfectly stable form. Two centuries ago, a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be ignorant of what he was doing as a wild beast. But ever since the epoch-making speech of Erskine in defence of Hadfield more rational view has prevailed, which bases the test upon the presence or absence of the capacity to distinguish right from wrong in the crime committed.

The modern view was formulated in 1843 by a set of answers delivered by the Judges in reply to questions propounded to them by the House of Lords. One, Daniel McNaughton, had aroused public excitement by the murder of a Mr. Drummond, the private secretary of Sir Robert Pool, in mistake of that statesman. The acquittal of McNaughton on the ground of insanity provoked such widespread dissatisfaction that it became the subject of debate in the House of Lords (though the Case never came before that House in its judicial capacity.) In consequence of the debate, the Lords submitted to the Judges certain abstract questions respecting persons afflicted with insane delusions. The replies given by the Judges may be summed up thus:

i. Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime until the contrary be proved to the satisfaction of a jury.
ii. To establish a defence on the ground of insanity, it must be ‘clearly’ shown that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality[194] of the act he was doing, or (if he did know this) not to know that what he was doing was wrong morally;
iii. As to his knowledge of the wrongfulness of the act, the Judges say: "if the accused was conscious that the act was one which he ought not to do and if that act was at the same time contrary to the law of the land, he is punishable’. Thus, the test is the power of distinguishing between right and wrong not, as was once supposed, in the abstract, but in regard to the particular act committed.
iv. Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceal from him the true nature of the act he is doing, he will be under the same degree of responsibility as if the acts have been as he imagined them to be. He may, for

[194] Kenny here says in a footnote: "These two words (i.e., ‘nature’ and ‘quality’) are mere synonyms (though medical witnesses have often treated their meanings as dissimilar). They refer to the physical nature of the act, as distinguished from moral ..... ", e.g., the madman cuts a woman's throat under the idea that he was cutting a loaf of bread.

instance, kill under the imagination either that he is the executioner lawfully carrying out a judicial sentence, or, on the other hand, merely that the person killed had once cheated him at cards.

Sir James Stephen's consent upon these answers is that the questions were put in a very abstract form and that they could hardly have been meant to be exhaustive, because if they were so meant, the implication is that the effect of insanity upon the emotion and the will is left out of consideration and is not to be taken into account in deciding whether the act done by an insane person did or did not amount to an offence: which, if it were put in the form of a proposition would be contrary to experience[195]. Indeed, the questions put to the judges had reference only to the effect of insane delusions and insane ignorance. But insanity affects not only men's beliefs, but also (and indeed more frequently) their emotions and their wills. Hence since 1843 much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down after McNaughton's trial remain theoretically unaltered, the practical administration of them affords a wider immunity than their language would at first sight seem to recognise. For many forms of insanity, which do not in themselves constitute those particular defects of reason which the judges recognised as conferring exemption from responsibility, are now habitually treated as being sufficient evidence to show that one or other of those exemptive defects was also actually present.

The need for broadening the legal definitions of insanity with reference to criminal responsibility as given in the McNaughton rules is, as Archbold says[196], felt in the United States and the British Colonies where the tendency of judges and legislators is not to accept those definitions as adequate. In 'Rex v. Hay' (1889)[197], the Rt. Hon. Sir H. de Velliers, C.J., after hearing a full argument dealing with the law of England and the United States and the Roman-Dutch Law, laid down as the law of the Cape, and as the tendency of legal opinion elsewhere, the following rules:-

1. Where the defence of insanity is interposed in a criminal trial, the capacity to distinguish between right and wrong is not the sole test of responsibility in all cases.
2. In the absence of legislation to the contrary, the Courts of law are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct

[195] Cfr. Glaistor: "A text-book of Medical Jurisprudence and Toxicology", 5th Edition, p. 6l8.
[196] op. cit., p. l8
[197] (16, Cppe of Good Hope Rep. (Sup. Ct.), 290

and choosing between right and wrong, though he may have the mental capacity to distinguish between right and wrong;

3. The defence of insanity is established if it is proved that the accused had, by reason of such mental disease, lost power of will to control his conduct in reference to the particular act charged as an offence;
4. The capacity of the accused to control his own conduct must be presumed till the contrary is proved".

Thus, according to the learned Chief Justice of the Cape, the 'right and wrong test', as established by the McNaughton rules, is not the sole test of responsibility in all cases: it must be supplemented by the so called 'Irresistible Impulse' test: a person who knew he was committing an act which was morally wrong and prohibited by law may nevertheless be excused from responsibility if, by reason of his mental disease, he lacked the power of conscious volition and inhibition to resist the impulse to commit it. This view is specially favoured by modern scientists. All psychiatrists assert that there are cases in which mental unsoundness results in impulses which are sometimes quite uncontrollable. Some persons are assailed by most urgent desires, which they abominate, repel, and resist, to do things which are criminal and which they abhor. They are constantly urged, by some internal compulsion, to steal, to injure themselves or other people, to set things on fire, and to do other criminal acts. Scientists to-day agree that the power of volition and inhibition, or 'conation', is necessary for mental soundness, as well as the reasoning capacity, or 'cognition'[198].

Therefore, there is an ever growing tendency in modern countries to hold that disorders of the volitional powers, resulting in irresistible impulsions to commit certain anti-social acts constitute a defence to a criminal charge in the same manner as disorders of the intellectual powers resulting in the inability to understand the wrongfulness of such acts.

But What About Our Law?

Section 34 of the Criminal Code lays down that "no person is liable to punishment if, at the time the act was committed or the omission was made by him, he was in a state of madness or frenzy" ('demenza o furore').

[198] Weihofen: "Insanity as a Defence in Criminal Law", (1933), p. 45.

It will be observed at once that our law has not bound itself by any specific 'a priori' test of responsibility in insanity. It has refrained from any attempt to define the conditions under which a man can plead mental unsoundness as an excuse for wrong-doing, wisely leaving each case to be decided in the light of its particular circumstances, usually with the assistance of medical experts.

When the said provision of our Code was being discussed in the Council of Government in 1850, the opinion of Her Majesty's Judges was sought as to 'inter alia', the exact meaning and effect of the words 'demenzia o furore'. Hereunder is the relevant part of the reply given by the majority of the Judges (i.e., the chief Justice, Sir I.G. Bonavita, and the Judges Satariano, Chapelle and Grungo):

" ..... redatto il codice presentato al Consiglio (nella parte che concerno le leggi penali) come è evidente sul modello del codice delle Duo Sicilie, di cui, nonostante, le grandi od assai sostanziali variazioni fattevi, tuttavia conserva i caratteri ed il sistema generalo - e quindi redatto lo stesso sui principii e sullo spirito del Codice Francese, le parole 'Demenzià è Furore ..... devono naturalmente essere prese nel senso e significato in cui sono adoperate in tali due codici, da cui per intero sono tratte. La sola parola 'demenza', usata nel Francese[199], le parole 'Demenza o Furore' in quello delle Due Sicilie[200] - eglino opiniano essere usate nel più ampio significato come comprensive, cioè, la prima nel Francese, e le altre due in quello delle Due Sicilie, d'ogni stato in quel disordino mentale (nell'uomo che commette l'azione vietata od omette quella inculcata dalla legge) per cui egli si riconosce essere stato mancante delle facoltà di conoscere e volere, le quali sono elementi indispensabili per costituire in delitto un'azione ed omissione qualunque, e per renderlo imputabile di reato"[201]. (The other two Judges - Judge P. Dingli and Judge G.P. Bruno - in separate replies, expressed the opinion that "in the practice of the Courts, the two words 'demenza' and 'furore' were used promiscuously to denote mental derangement induced by disease". Indeed, the only difference that there is between them is that the former connotes a more or less permanent and fixed, the latter a temporary and transitory, mental disorder).

It is thus seen that our law imposes no 'a priori test'. The question, when it arises, is one of fact: it has, that is to say, to be decided whether the defendant had a rental disease and, if so, whether

[199] "IL n'y a ni crime ni delit, lorsque le prevenueotait en etat de demence au temps de l'action" (Art. 64)
[200] "Non esisto reato quando colui che lo ha commesso era nello stato di demenza o furore nel tempo in cui l'azione fu' eseguita"(Art. 6l).
[201] (**) Cfr. "Annotazioni sulla legge Criminale dell'Isola di Malta e Sue Dipendenze per cura di un Giovane Avvocato Maltese", pp. 212 et seq.

it was of such a character and degree, as to take away the capacity to know the nature of his act and to help doing it. There must be the two constituent elements of legal responsibility in the commission of every crime:

1. capacity of intellectual discrimination; and
2. freedom of will.

If it is true, as a matter of fact, that mental disease can so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and the wrong, although he perceives it, a person so affected is not responsible criminally for an act done under the influence of such controlling disease. The question whether it be true in fact that insanity may have this effect of subverting the will is one of fact: it is a scientific one for experts and the truth of their testimony concerning the existence of such disease is in each case a question for the jury. And that scientists assert the existence of such disease we have already seen. Maudsley[202] writes: "The nature of a crime involves two elements: first the knowledge of its being an act contrary to law, and, secondly, the will to do or to forbear doing it. There are insane persons who, having the former are deprived by their disease of the latter: who may know an act to be unlawful but may be impelled to do it by a conviction or an impulse which they have not the will or the power to resist."

Our Law, therefore, recognises insanity as an excuse not only when it deprives the victim of his power of distinguishing the physical and moral nature and quality of the act charged as an offence but also when it deprives him of his faculty of choice so as to exclude a free determination of his will in relation to that act. Insanity thus embraces all forms of disease of the mind, the word 'mind' being used as a general name for the combined operations of intellect and volition.

But it must be very carefully noted that emotional impulses resulting from violent passion do not in themselves, i.e., unless they are the offspring of some mental infirmity, afford any defence. A person who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned not by disease, but by anger, jealousy or other passion[203]. This rule is, of course, subject to those special provisions of law which expressly reduce the punishment ordinarily applicable to the offence, by reason of the fact that the accused committed the act in

[202] 'Responsibility in Mental Diseases', 4th Edition, p. 110
[203] Cfr. Maino, op. cit., p. 108; Manzini, op. cit., Vol. II, p.92; Pessina, op. cit., p. 217; Florian, op. cit., Vol. I, p. 378.

the first transport of a sudden passion or under the influence of mental agitation in consequence of which he was incapable of reflection (e.g., Section 24l (c)).

So also it is generally taught that the so called 'Moral Insanity' - i.e., disorder of the moral rather than of the mental powers - when a man's intellectual faculties are sound but his moral sense is affected or diseased - does not exempt from criminal liability. A man will not be excused because he has become so morally depraved that his conscience ceases to control or influence his actions[204].

Time when Insanity Must Exist

So far as regards criminal responsibility, the question is always whether the accused was so insane as to come within the exemption accorded by the law, at the time of the commission or omission of the act charged as an offence. Evidence of prior and subsequent insanity may be admitted, of course, as tending to throw light upon the defendant's mental condition at the time of the act, but the question at issue is always his responsibility or irresponsibility at the time of the act. This raises the question of the so called 'lucid intervals'. In Roman Law and in some old authorities it was held that if a person, though suffering from mental disorder, has what are called 'lucid intervals', he is liable for what he does in these intervals as if he had no deficiency. The view, however, has long prevailed that the so called 'lucid intervals' are merely intermissions of the morbid state: the phenomena of insanity are then latent, but the disease is still there and, therefore, one should not speak of criminal responsibility[205]. The solution might perhaps be different in respect of certain types of mental disorders, as the manic-depressive psychosis, in which there are, between attacks, 'remissions' during which the patient is to all intents and purposes perfectly normal. In such cases one may speak not of lucid intervals but of recovery with a tendency to relapse.

Conclusion

When the issue of insanity is decided in the affirmative, the accused is exempted from Criminal Liability, but nevertheless, the defendant is not 'discharged'. To set him free might constitute

[204] Cfr. Archbold, op. cit., p. 18; Wiehofon, op. cit. p. 54; Carrara, Programma, § 249.
[205] Cfr. Maino, cp. cit., Art. 46, § 191; Pessina, op. cit., p. 205; Impallomeni, op. cit., p. 284; Carrara, Programma, §250; Chauveau et Helie, Ital. Ed., 1895, Vol. I, p.430, §352.

danger to himself and to others. So, in all cases he is ordered to be detained in strict custody in the Hospital for Mental Diseases (V. Sections 35A (3), 401, 503 paras. 3, 599, Criminal Code)[206].

Semi-Responsibility

It is well known that there is no clear-cut line between the 'sane' and the 'insane'. The two grade into each other as day passes into night, and between the two extremes are certain twilight conditions, not serious enough to render the victim irresponsible for crime not even to require his confinement as an insane person in a mental hospital, but nevertheless rendering him incapable of sound, calm judgement, especially under the conditions of stress at which crime nay be restored to.

These border line types of mental unsoundness are sometimes referred to as 'partial insanity', which term, in connection with the subject we are new discussing means a mental impairment which is not so complete as to render its victim wholly irresponsible for his criminal acts.

Now it has been sometimes argued that these border line cases of mental unsoundness, though not sufficient to come within the total exemption from criminal responsibility, should nevertheless serve as an extenuation of responsibility and reduce the punishment. These individuals, it is said, may not be incapable of understanding the wrongfulness of their acts or of controlling their impulses, but they are less capable of doing so than normal persons, and the law should make allowance for this deficiency by punishing them less harshly than normal offenders.

This rule, that when a defendant is somewhat disordered mentally but not to such a degree as to relieve him from responsibility for crime, his punishment should be reduced, has been adopted in the Code of some Continental States. The Italian Penal Code of 1889**,** for example, provided (Art. 47) that if the defendant's mental infirmity was "such as greatly to diminish responsibility without, however, excluding it, the punishment prescribed for the crime committed is to be reduced.. ....." Similar provisions are found in the Italian Code of 1930 and in the Codon of Greece, Japan, Norway, Sweden, and the Swiss Cantons.

[206] V. Regulations concerning the Board for the Hospital for Mental Diseases (Govt. Notice No. 8 of the 4th January 1938: the Board may recommend to the Governor the discharge of patients detained by a Court order.

But this rule has not been accepted in our law, notwithstanding that a proposal for the introduction in our Code of this doctrine of limited responsibility was[207] twice made in the Council of Government, first, by Sir Adrian Dingli in 1850 and then by Dr (now Sir) Arturo Mercieca in 1909. It was considered that the acceptance or this doctrine would raise insuperable difficulties to determine the existence of such borderline disorder in the defendant and to decide whether and, if so, to what extent it was a contributory cause in his criminal conduct. Moreover, it is a rule of our law that the peculiar temperament, excitability, and idiosyncrasies of the defendant are not considered for purposes of responsibility. “Heat and passion" aroused by provocation are indeed permitted to mitigate certain offences: but the yardstick by which the law measures the adequacy of the provocation is wholly objective - to have the mitigating effect, the provocation must have been such as would arouse the passion of a normally reasonable man (Section 241 (c), Criminal Code.) In other words, this mitigation is a concession to the frailty of human nature, not an excuse for undue or abnormal irascibility.

The doctrine of semi-responsibility is not, either, accepted in English Law.

Intoxication

The abuse of alcohol by persons may bring them under certain circumstances within the category of insanity. This remark is not so much to illustrate the fact that alcoholism is one of the more direct causes of the insane condition, but to signify that insanity – perhaps of a temporary kind - may be induced by the direct effects of alcohol. Short of the condition of insanity, drunkenness produces confusion of mind, of various degrees according to the amount of alcohol taken and other circumstances.

Hence the necessity of considering drunkenness in relation to criminal responsibility.

Prior to the amendment made by Ordinance XIII of 1935, our Criminal Code did not contain any general provision as to the effect of drunkenness on criminal responsibility. Section 352 (dd) contemplated ‘drunkenness’ as a substantive contravention in the circumstances therein stated, and the same section at para (z) laid down in effect that no person guilty of the contraventions therein specified could plead drunkenness as an excuse. But apart from these special provisions

[207] Fr. Debates of the Council of Government, Vol. XXXIII, pp. 214 et seq.

no express rule of general application existed. This does not mean, however, that our Courts could not, in particular cases, take account of the state of drunkenness of the accused at the time of the act charged as an offence. As Mr. Justice Harding points out "if it (drunkenness) produced frenzy or insanity (dementia affectata) then, semble, it could be pleaded under Section 34 which exempts a person from punishment if, at the time the act was committed, he was in a state of frenzy or madness. Presumably prior to the afore-said amendment, Judges, in certain cases, took into consideration the state of intoxication in fixing the punishment within the latitude laid down in the law. The principles laid down in Continental Jurisprudence, distinguishing between accidental and voluntary intoxication, and, in the latter case, between habitual and pre-ordained intoxication, no doubt influenced their minds in assessing the punishment"[208].

By the said Ordinance No. XIII of 1935, a new section was added to our Criminal Code, viz., Section 35 which lays down as follows:

"Section 35

(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
(2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged, at the time of the act or the omission complained of, did not know what he was doing, and
    a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or
    b) the person charged was by reason of intoxication insane temporary or otherwise at the time of such act or omission.
(3) When the defence under sub-section (2) of this section is established, then in a case falling under para. (a) thereof, the person charged shall be discharged and in case falling under para. (b), the provisions falling under Sections 595 to 601 shall apply.
(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in absence of which he would not be guilty of the offence.

[208] Op. cit., § 37, Note 46, p. 76. According to the balance of authority, intoxication was not, under the French Code, assimilated to insanity within the meaning of Art. 64 (Dalloz, Rep. Tit. "Peine", § 402 et seq.) but it could be taken account of as an extenuating circumstance (Ortolan, 'Droit Penal', 1,5,323; Chauvau et Helie, 1,5,360). Under the Italian Penal Code of 1889 (Art. 48) intoxication, unless voluntary induced as to facilitate the commission of an offence or excuse for crime could exclude an

(5) For the purpose of this section, intoxication shall be deemed to include a stato produced by drugs.

These provisions follow the English Law of Criminal Responsibility in case of drunkenness as authoritatively declared by the House of Lords in the case Director of Public Prosecution vs. Beard (1820). The judgement stated that:

i. if actual insanity in fact supervenes even as a result of alcoholic excess, it furnishes a complete answer to a criminal charge as insanity induced by any other case ..... Insanity, even though temporary, is an answer.
ii. evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime, should be taken into consideration with the other facts proved, in order to determine whether or not he had that intent.
iii. evidence of drunkenness falling short of this, and merely establishing that the mind of the accused was affected by drink, so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

With reference to rule (ii) above, the judgement points out that this principle is not "an exceptional rule applicable only to cases in which it is necessary to prove a specific intent: for speaking generally --- and apart from special offences -— a person cannot be convicted of crime unless the 'mens' was 'rea'. A man's drunkenness may preclude him not merely from forming one of those specific intents but from forming any intent at all.

The judgement further points out that there is a distinction between the defence of insanity in its true sense produced by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, and the test of criminal responsibility, which is applied to the former, shall not be applied to the latter defence.

Let us now examine the afore-quoted provisions of our law a little more in detail.

The first rule is that ordinarily intoxication does not excuse the commission of any criminal offence. An offender under the influence of intoxication derives no benefit from a disability voluntarily contracted and is regarded as equally answerable to the law as if he had been sober at the time.

The justification for this rule is that law cannot allow any wrong act (i.e., the drunkenness) to be an excuse for another (i.e., the offence). Hence - as Kenny says (op. cit., p. 60) the gross negligence which has caused the fatal collision is punishable not only in a sober driver but also in a drunken one. And, if a man, when excited by liquor, stabs the old friend whom he never quarrelled with when sober, or steals the picture which never attracted him before, it is no defence to say that "it was the drink that did it". Indeed the old English Law looked upon intoxication voluntarily contracted as an aggravation rather than an excuse for any criminal misbehaviour, and in ancient Greece a law of Pittacus enacted that "he who committed a crime when drunk should receive a double punishment", one for the crime itself, and the other for the ebriety which prompted him to commit it (4 Bl. Comm., 26). "A drunkard", said Sir Edward Coke, "who is ‘deamon voluntarius’ hath no privilege thereby, but what hurt or ill so ever he doth, his drunkenness doth aggravate it". Certain modern Codes (e.g., Italian Penal Code of 1930, Art. 92) impose an increase of punishment in respect of crimes committed in a state of drunkenness, where such drunkenness was contracted with a view to facilitating the commission of the crime or to procure an excuse therefor or where the drunkenness was habitual, i.e., resulting from continued habit of drinking alcoholics.

Our law has not imposed any such aggravation. But the general rule remains that intoxication is no excuse for crime. This rule is, however, subject to the following exceptions

a) Intoxication does afford a complete defence when it is purely ’accidental’, i.e., caused without the consent of the accused by the malicious or negligent act of another person, provided that, by reason of such intoxication, the accused, at the time of the act or omission complained of, was incapable of understanding and volition. Thus, for instance, if a man, through the unskilfulness of the physician, or the contrivance or fraud of a third party, or through a mischievous joke practised upon him, is, without his consent, made so drunk as to be incapable of distinguishing right from wrong or to appreciate the nature and the quality of his act or to know what he is doing, he will not be liable to be punished for any offence committed by him under the influence of such intoxication. Two conditions are thus required to be satisfied in order to exclude responsibility, that is to say, the intoxication must be ‘accidental’ in the sense afore-said, and 'complete’, that is, rendering the person for the time unconscious of his acts or incapable of understanding and volition. For, if notwithstanding that the agent was drunk and that drunkenness was accidental, he nevertheless was still capable of controlling his conduct, of knowing what he was doing and of knowing that what he was doing was wrong, the

drunkenness will not afford him any defence: it may, at most, be taken into account in mitigation of punishment. "La ubriachezza accidentale - Carrara wrote - ..... . o è complete e distrugge ogni imputabilità, o è incomplete, e restando all'agente una cognizione attuale si mantiene la imputazione del fatto come doloso salvo la minorazione del dolo. ..... "[209].

b) The second exception which our law makes to the rule that intoxication is not an excuse, is where at the time of committing the act or making the omission, the accused was, by reason of such intoxication insane, temporarily or otherwise, to such an extent as to be incapable of knowing that such act or omission was wrong or of knowing what he was doing. Thus, it is not every mental aberration or derangement induced by drink that excludes responsibility, but only mental derangement of the degree and intensity required by law as is the case with any other form of insanity. Where insanity of the required degree or intensity in fact supervenes as a result of drink, then it furnishes as complete an answer to a criminal charge as insanity produced by another cause. And it is immaterial whether the drunkenness was voluntary or involuntary. A man is not liable to be punished for any offence perpetrated by him under the influence of insanity even when this is produced by frequent intoxication or drunken habits. If a man by drunkenness brings on a degree of madness, even for a time, which would relieve him from responsibility if it had been caused in any other way, then he would not be criminally responsible: the man is a mad man and is to be treated as such, although his madness is only temporary. Thus 'delirium tremens' caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for any act committed by him while under its influence[210].

Many other codes either do not admit any exemptive effect to intoxication, when this is voluntary, even when it results in temporary insanity; or merely reduce the punishment; and this is for the reason that in such cases the insanity has originated in voluntary misconduct and, therefore, should still call for penal repression (e.g., the Italian Code of 1889 and that of 1930). But this argument is clearly fallacious. The fact that intoxication was voluntary may be a reason for punishing the intoxication as an offence 'per se', but not a reason for punishing the offence committed under the influence of insanity resulting from such intoxication[211]. The systems which admit intoxication as an excuse only when it is involuntary or accidental wrongly

[209] Programma, § 344
[210] op. cit., Archbold, p. 21
[211] V. Maino, op. cit., Art. 48, ss. 206

have regard to the time when the intoxication was contracted; whereas regard should properly be had to the time when the offence was committed. If at this latter time the agent was irresponsible by reason of his insanity, the original cause of such insanity is irrelevant for the purposes of criminal liability. In this connection Carrara very aptly remarks: “Imputare chi non ebbe coscienza dei propri atti sarebbe un soggettare alla legge penale la sola materia. Nè varebbe l’opporre che l’uomo siasi condotto di propio arbitrio a questo stato di transitoria alienanzione mentale, volontariamente ubriacandosi. Se alcuno per crapule e dibosci si fosse ridotto ad una vera ed insanabile pazzia, soggettereste voi alla legge penale i fatti di codesto infelice, per la speciosa ragione che egli fu causa della sua miserabile condizione? ebrezza quando er giunta a cotesto grado potrà dirsi che e’ transitoria ma è un vero stato di alienanzione mentale”[212]. Where a defence under this second exception is established, the accused is not, however, discharged or set free. He is dealt with as any other insane defendant and so, therefore, ordered to be detained in the Hospital for Mental Diseases, during the Governor’s pleasure.

c) In the third place the said section 35 provides that intoxication must be taken into account for the purposes of determining whether the accused had formed any intent, whether specific or otherwise, in the absence of which he would not be guilty of the offence. We have already seen that all wilful crime generally and, exceptionally, certain contraventions, require the concurrence of a wrongful intent and that some particular crimes require a specific intent. Now intoxication which so obscures the mind as to render the person incapable of forming the requisite specific or generic intent or which shows that he did not in fact form such intent, is a defence to the offence charged: it affords a defence for the ‘actus reus’ by being evidence that no guilty state of mind existed. The more complex the intent required by the definition of the particular offence, the more likely is drunkenness to be useful in disproving the presence of some element requisite to it. Thus intoxication which does not avail the defendant under the two exceptions already discussed, because it was not 'accidental’ and did not result in insanity, may yet afford him an answer to the offence charged by negativing the existence of the requisite intent without which there cannot be that offence. In these cases of absence of the indispensable intent as aforesaid, intoxication excludes liability for the particular offence charged, of which such an intent is an essential ingredient: it does not, however, necessarily exempt the defendant from all liability. Thus a drunken man's inability to form the specific intent to kill or to put the life of another person in manifest jeopardy at the time of committing a

[212] Programma, § 340

homicide may, in appropriate circumstances, reduce his crime to the lesser offence of causing grievous bodily harm from which death ensues (Sect. 234) which offence does not require a specific wrongful intent, or to the offence of involuntary homicide (Section 239) which does not require any intent at all[213]. Moreover, intoxication may cause - even on grounds slighter than could reasonably lead a sober man to the same erroneous conclusion - a mistake of fact such as is incompatible with wrongful intent: e.g., the drunken man fancies someone else's umbrella to be his own; or supposes an innocent gesture to be an assault and hits back in supposed self-defence[214].

Finally, the doctrine of criminal responsibility in case of drunkenness due to alcohol, is equally applicable to mental or bodily conditions caused by the drinking of narcotics or exciting drugs or their hypodermic injection.

Intoxication, it should always be remembered, is but a relative term: it does not lend itself easily to definition and, therefore, the standards by which the existence of the state is gauged are very variable. It is a question of degrees, ranging from mere exhilaration down to unconsciousness: hence the division into four successive stages - jocose, bellicose, lachrymose, comatose. To say even when a man is drunk is the most difficult problem: he may be too drunk to do this act properly, yet sober enough to do some other. Further it is a matter of popular observation that the physiological effects of alcohol differ in different individuals: consequently, it is imperative, when intoxication is pleaded as an excuse for a criminal offence, that the whole facts must be laid bare before the Court.

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Somnambulism and Hypnotism

The acts committed in sleep by persons who are the victims of somnambulism may at first sight present the appearance of being conscious, deliberate acts: yet they are merely mechanical, automatic acts, undirected by volition and unaccompanied by consciousness. The old notions that such acts are but reactions to and the reflex of the man's thoughts and intentions when awoke, finds no support in modern science: and, in any case, criminal law is not concerned with mere

[213] Cfr. also, Carrara, op. cit., § 344.
[214] Kenny, op. cit., p. 6l

thoughts and intentions, if at the time of the overt act which caused the violation of the law the agent had not the use of his will and understanding. For which reason almost all writers, old and modern, are in agreement that no man can be held criminally liable for anything done by him in his sleep. Some writers, it is true, have suggested that such a man might conceivably be held accountable by reason of negligence (culpa) if, knowing himself to be subject to the somnambulistic habit and being able to foresee that this might lead him to violate the law, he did not take the necessary precautions to prevent this happening[215]. But in any such exceptional case, any punishment which the law could inflict at all, would not be for the act done in sleep, but for the failure to take the necessary care when awake. It is for this same reason that a mother may be guilty of involuntary homicide who, in her sleep, overlies and kills her baby whom she negligently put to sleep by her side.

Closely allied to the phenomenon of somnambulism are those of hypnotism. Although this has apparently been known since ancient times, it is only since the last seventy years or so that it has received considerable attention by scientific observers. Hypnotism is difficult to define. It may be said to be a sleep-like condition, which is capable in apt subjects of being induced by artificial means or by suggestion, the condition being based upon physiological states of the brain and the nervous system, not yet, however, well understood[216]. During this state the subject is under the influence of the suggestions of the operator. It would appear as if on the part of the subject no degree or volition remains, except that which is originated and determined by the will of the operator.

In the present state of our knowledge, however, it is still an open question whether criminal suggestions may be conveyed to hypnotised persons. In fact, it is held by some that the execution of improper deeds or crimes cannot be suggested to persons of rectitude or law-abiding persons in the hypnotic state, who are protected from so acting by their moral consciousness[217].

If, however, it is in fact possible in the hypnotic condition to reduce a person to a state in which there is absolute loss of volitional power and incapability of resistance, and utter loss of knowledge of what happens while the person is under its influence/then it is clear that such person cannot be held responsible for his acts committed under the influence of such post-hypnotic suggestions. He would be a mere instrument in the hand of the operator, who would be the real and sole

[215] Carrara, Programma, § 192; Roberti, op. cit., Voi. I, P. II § 397.
[216] Glaister, op. cit., 1931, p. 639
[217] Vide Glanville Williams, "Criminal Law" (1953), p.12, § 5.

offender. Doubt may arise where the subject has voluntarily submitted to the process with a view precisely to committing the crime: it is thought that in such case he would rightly be held answerable[218].

Where the Will or The Understanding is Not Directed to The Deed

So far, we have considered the cases in which criminal responsibility is excluded or reduced by reason of the fact that the agent had not the use or the full use of his intellectual faculties at the time of committing the deed. We will now consider the case in which, as Blackstone puts it, "there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done", which is the case of all offences committed by mistake or ignorance.

It has been said that 'ignorance' is the complete lack of knowledge about a thing, and 'mistake' or 'error' the inexact, deficient, or otherwise wrong notion about that thing. But for the purposes of criminal law, the two terms are synonymous and the same rules apply to both. Indeed, mistake has been aptly described by a Jurist as the "ignorance of that which is and the knowledge of that which is not".

A distinction is to be made between mistake of law and mistake of fact:

Mistake of Law.

It is a principle recognised by all legal systems that ignorance of the law is no excuse for breaking it. The reason given for this rigorous principle is, as Blackstone says, that "every person of discretion, not only may, but is bound and presumed to know the law". In the first place, the law is - at any rate in legal theory - definite and knowable, and it is the duty of every man to know that part of the law which concerns him. Secondly, the law is, in most instances, derived from and in harmony with the rules of natural justice: it is a public declaration by the State of its intention to maintain by force those principles of right which have already a secure basis in the moral consciousness of man. Thirdly, if ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve and which would render the administration of justice next to impracticable[219].

[218] Florian, op. cit., Vol, I. § 242
[219] Austin, 'Jurisprudence', ii, p. 171

Salmond[220], while conceding that each of the considerations afore-stated is valid and weighty, thinks that they do not constitute an altogether sufficient basis for so stringent and severe a rule. He says: that the law is knowable throughout by all whom it concerns is an ideal rather than a fact. That he who breaks the law of the land disregards at the same time the principles of justice and honesty, is, in many instances, far from the truth: in a complex legal system, a man requires other guidance than that of common sense and good conscience.' Finally, that it is impossible to distinguish between invincible and negligent ignorance of the law does not seem wholly true. It may be doubted whether this enquiry is materially more difficult than many which the Courts of Justice undertake without hesitation. The fact seems to be - he concludes - that the rule in question does not, in its full extent and uncompromising rigidity, admit of sufficient justification.

Still the rule stands in all legal systems, as we have said. Professor Henry Sidgwick regarded it "not a realisation of ideal justice but an exercise of Society's right of self-preservation".

In many Codes - unlike our own - this rule is embodied in an express provision. Thus, the Italian Code of 1889 (Art. 41) laid down: "no one can plead in his defence ignorance of the criminal law"[221].

This rule is absolute. Therefore, no invincible ignorance or error will serve for justification. In England it is applied with rigour. A sailor who convicted of an offence that had been forbidden only by an Act of Parliament of which he could not possibly have become aware, since it was enacted when he was far away at sea, and the offence was committed before news of its enactment could reach him. But, it is submitted, this is, perhaps, a too extreme application of the rule, for, as Manzini points out[222], the duty of knowing the law can only exist in so far as it is possible to discharge it: therefore, it is manifest that ignorance of the law should be available as an excuse when it is absolutely physically impossible to know such law, as, for instance, when it is published after the date appointed for the commencement of its operation.

Moreover, the said rule is general and applies both in respect of crimes as in respect of contraventions and both to subjects as well as to foreigners. With regard to foreigners some jurists think that an exception should be made in the case of 'contraventions' to police laws contemplated

[220] op. cit., p.427
[221] Art.41: "Nessuno può' invocare a propria scusa l'ignoranza della legge penale".
[222] Op. oit., Vol. II, p.28, § 292.

by the laws of their own country, when they have been only for a short time in the place where the contravention is committed[223]. But the 'communis opinio' is that no such exception should be admitted: and it is definitely not admitted in English Law[224].

A mistaken notion or view of the law amounts, for all practical purposes, to ignorance of the law and does not, therefore, afford any excuse. The principle that no one can plead ignorance of the penal law as a defence, is not limited to the mere existence of the legal provision but extends also to its interpretation. Otherwise it would be very easy to evade the observance of the law on the pretext of misinterpretation[225]. But it would seem that the principle requires some modification when applied to English Law. According to Harris "if there is a doubt as to a question of law, a person should not be convicted and subjected to punishment if he has merely acted on a mistaken view as to the law".

Now it must be clearly noted that when, in criminal matters, we say that ignorance of the law is not an excuse we refer only to the ignorance or mistake of the criminal law itself. There is overwhelming authority for the proposition that mistake as to private rights or ignorance of mere civil law may furnish an excuse by negativing the intentional element of the offence. Mr Justice Harding writes: "Carrara, dealing with the question of criminal responsibility with regard to mistake of law, observed that when the alleged mistake concerns the very law on which the charge is based and which creates the offence, then the rule 'ignorantis juris neminera excusat' is absolute. A different view should, however, be taken, the learned author goes on, if the alleged ignorance concerns other laws, that is, laws other than that creating the offence and on which the charge is based. In this case the ignorance is, in reality, a 'quid facti '"[226][227]. In other words, it does not help one who has voluntarily committed a criminal act, to say that he was not aware of the law that made that act criminal.

But where a peculiar intent or malicious direction of the will is an essential ingredient of any particular offence, a mistake even of the law but other than the criminal law, in consequence of which the agent finds himself in a state of mind which is incompatible with that criminal intent, may effectually take away the criminal character of the act. Thus, if a person takes a thing which he honestly, though at civil law mistakenly, believes to be his own, it is impossible to say that he

[223] Maino, op. cit., p.79; Carrara, Programma, § 259.
[224] Cfr. Harris, op. cit., p.26; Archbold, op. cit., p.23.
[225] Riv. Pen., XCIV, 568
[226] Monografia, "Della ignoranza come scusa" Opuscoli, Vol. VII, p.387 et seq.
[227] Op. cit., § 39, n.1

is guilty of the crime of theft, an essential ingredient of which is the consciousness of taking away somebody else's property. This view of the matter is also in accordance with English case-law. Thus, it was held that a mortgagor who, under an invalid but 'bona fide' claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of 'malicious' damage[228].

Finally, although mistake of law leaves the offender liable for the offence which he has blundered into, it may nevertheless afford good grounds for inflicting on him a milder punishment[229].

Mistake of Fact

While the rule is, as we have seen that by reason of his ignorance of the criminal law no man will be excused, a mistake of fact is often allowed to afford a good defence. Even the Romans said: "Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere"[230]. But in order that such a defence may succeed, the following conditions must be fulfilled

i. The mistake must be of such a character that, had the supposed circumstances been real, they would have prevented any guilt from attaching to the person in doing what he did. In other words, the mistake must, in the language of the Classical School of Italian Jurists, be an 'essential' mistake, i.e., "it must refer to a fact or circumstance the ignorance of which completely negatives in the agent the consciousness Of doing a criminal wrong. Thus, if a man kills his servant believing him to be a burglar, under such circumstances as would have justified the killing of a burglar, his mistake affords him a good defence. Likewise, a man who takes what he believes to be his own, is not guilty of theft.

   A mistake of fact which is merely 'accidental' i.e. of such a character that, had the supposed circumstances been real, the act would still have remained criminal, does not exempt from liability. Thus, it is no defence for a burglar who breaks into No.5 to show that he mistook it for No.6. Similarly, if a man intending to kill A, kills B by mistake, he will be liable for wilful homicide, because the criminal nature of the act is not changed by the mere change of the victim. Such a mistake may, at best, affect the degree of liability, and we shall see a practical application of this principle in dealing with the case contemplated in Section 248 Criminal Code, which lays

[228] Cfr. Kenny, p,69; Harris, p.46
[229] Manzini, op. cit., Vol. II, p.38, § 295
[230] D. 22. 6. 9 pr.).

down that "whosoever, by mistake or accident, shall commit homicide or bodily harm to the prejudice of a person other than that against whom his act was intended, shall have the benefit of any excuse which would decrease the punishment if he had committed it to the prejudice of the person against whom his act was intended".

ii. The mistake must be 'inevitable', that is, such that it could not be avoided by the exercise of reasonable care. In English Law, the same rule is expressed by saying that the mistake must be a 'reasonable' one. Kenny[231] quotes the following as an example of a reasonable mistake: A man, before going to Church fired off his gun and left it empty. But during his absence some person went out shooting with the gun and, on returning, left it loaded. The owner, later on the same day, took up the gun again and, in doing this, touched the trigger. The gun went off and killed his wife who was in the room. It was held that the man had reasonable grounds to believe that the weapon was not loaded. But, the writer comments: "the case might have been otherwise if weeks, instead of hours, had elapsed between his firing off the gun and his subsequently handling it without taking any pains to see whether it had meanwhile been loaded again.

The question whether a mistake is reasonable is mainly a question of fact: but, as Kenny goes on to say: "no belief which has now come to be currently regarded as an obsolete superstition can be treated as a mistake sufficiently reasonable as to excuse a crime. Thus, in 1895, men who had caused the death of the wife of one of them by holding her over a fire and searing her with a red-hot poker, in the honest expectation of thereby exorcising a demon that was supposed to possess her, were convicted and sentenced".

A mistake which is both essential and inevitable excuses from all criminal liability. On the other hand, a mistake which is essential but culpable (i.e., avoidable, or unreasonable), though it may exempt from liability in respect of wilful wrong-doing ('dolus'), may leave unimpaired the liability for negligence ('culpa'). Thus a man who, believing himself mistakenly to be the victim of an unjust aggression, kills the supposed aggressor, will not be liable for wilful homicide: nevertheless, if the mistake arose through his negligence or imprudence, he will be liable for involuntary or culpable homicide: "La miglior dottrina Italiana insegna che, escluso il dolo a cagione dell'errore di fatto, rimarne da esaminare la causa di tale errore. Se queste dipende dal fortuito il fatto non e'

[231] op. cit. p.67

imputabile: se, invece dipende da colpa, si ha punibilità a titolo di colpa, quando si tratta, naturalmente, di un delitto punibile per questo titolo"[232].

Accident

Closely akin to mistake is ‘accident’, which is commonly recognised by the law as a ground of exemption from criminal responsibility: "nullum crimen est in casu".

The term ‘accident’ - says Harris - is used in two senses, namely (i) of consequence due to some external agency over which the accused person had no control, e.g., where a person is killed in the street through a horse bolting against the will of its rider and without any default on his part, and, (ii) of unintended consequences of a voluntary act, as, e.g., where a man is working with a hatchet and the head by accident flies off and kills a person standing by.

In the first class of cases the accused person is not guilty of any criminal offence because there is no voluntary act or omission on his part.

In the second class of cases there is no criminal responsibility for unintended consequences of conduct which is neither unlawful nor negligent. For if the original conduct was negligent and was the efficient cause of the harmful consequences, then, in those cases where the law imposes liability for negligent wrong-doing, the accused will be answerable by this reason for such consequences. If on the other hand, the original conduct was malicious (dolosa), then the principle which we have already expounded should be remembered, namely that "a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does”. And even when the more serious consequences ensuing upon a criminal act are not the natural or necessary consequences of such act, the law, in special cases, takes account of such accidental circumstances in prescribing the punishment for the particular offence. Thus, for example Sections 234 and 245, Criminal Code, which deal with bodily harm causing death or becoming grievous "owing to a supervening accidental, cause”.

Where the will is overborne by compulsion

[232] Manzini, op. cit., Vol.II, p.48, N.2; cfr. also Carrara, Programma, § 263; Florian, op. cit., Vol.I, P.I, p.370, § 239.

The same principle which excuses or attenuates the criminal responsibility of those who have not the use or the full use of understanding or who perpetrate an offence through inevitable ignorance or mistake, protects from the punishment of the law those who commit an offence in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. Where the action is constrained by some external force or violence, the will of the agent, far from concurring with the deed, loathes and disagrees with what the agent is obliged to perform. Blackstone says: "As punishments are only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion"[233].

Coercion

Of this nature in the first place is physical coercion. An act done under physical coercion cannot be a criminal offence. If, for example, A seizes the hand of B and compels him by physical force to stab C, it is clear that no criminal offence is committed by B, because the act is not his. He is but an instrument in the hands of A: he does not act but is acted upon: "non agit sed agitur". Section 34 (b) of our Criminal Code lays down that "no person is liable to punishment for an act committed or an omission made by him ..... if he was constrained thereto by an external force which he could not resist". Now such external force may also take the form of moral coercion or compulsion (duress per minas) and we must now examine under what circumstances such compulsion may exempt from criminal responsibility. Moral coercion operates as a ground for exemption from criminal responsibility when it completely suppresses the possibility of a normal determination on the part of the person doing or omitting the fact. When it does not attain such a degree of intensity, but leaves to that person the possibility of determining himself one way or another, even if with an effort or at some sacrifice, then the old maxim of Roman Law "coactus tamen voluit" applies, and the fact is imputable, saving the discretion of the Court to mitigate the punishment within the latitude permitted by law, having regard to the particular circumstances under which the offence was committed[234] In other words, in order that there may be total exemption from punishment, the external force which has constrained the accused to do the act contrary to law, must be truly ‘irresistible’ and not merely ‘unresisted’. This is why most writers limit the notion of moral coercion to threats of death or serious personal injury: for it is only such threats that may deprive the victim of his freedom of choice and compel him to commit the offence.

[233] 4 BL. Comm. 28
[234] Manzini, op. cit., Vol. II, p.13, § 287.

Threats of injury to property are not considered sufficient. This view seems best to accord with the above quoted provision of our Code. This was modelled on the identical provision of Art. 64 of the French Code and of Art. 62 of the Neapolitan Code. With regard to the former, Chauveau et Helie wrote: "It is certain that the fear of a mere pecuniary loss cannot be considered as a force which the actor could not resist: there is nothing but the fear of death, or of grievous bodily harm which may supress the will and compel the determination. If, on the one hand, the law cannot expect from the accused a heroic firmness of character, it cannot either pardon a blameable weakness"[235].

And Roberti commenting on the provision of the Neapolitan Code wrote: “Ci contentiamo di proporre come regola generale, che possa esimere da imputabilità legale, quella necessita’ che I moralisti appellano estrema e per la quale intendiamo lo stato di violenza in cui l’uomo è obbligato a scegliere tra la perdita della vita, la mutilazione del corpo, o altre calamità annesse a dei tormenti che sembrano più acerbi della stessa morte, e la trasgressione della legge. Quei mali sono solamente a nostro credere, capaci di scusare, nel foro umano, la scelta di quest'ultima[236]

Other writers, dealing with the question of moral coercion in the abstract, that is, not by reference to a specific provision of the positive law, pretend to lay down principles of general application. Thus, Pessina, for instance, suggests that moral coercion excludes criminal responsibility whenever these three conditions exist: a) an imminent danger b) of a harm which the victim of the threat apprehends as more grievous than the harm to be caused by the offence, and c) which he could not avert except by committing the act contrary to law[237].

English Law concerning this defence remains - Kenny says (p.74) - to this day both meagre and vague. It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse some crimes that have been committed under the influence of such threats. It is impossible to say with precision for what crimes the defence will be allowed to avail. It certainly will not excuse murder. Harris, on the other hand, thinks that moral coercion can afford no defence for the commission of a criminal act "for the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal". The only exception to this rule occurs where rebels or rioters by fear of death or instant bodily harm compel others to take

[235] op. cit., Vol. I, p. 453, § 374.
[236] op. cit., Vol. I, p. 124.
[237] Op. cit., p. 175

a subordinate part in a disturbance. Here there is constructive physical compulsion, provided that physical force is directly threatened and available". (p.23)

Jus Necessitatis

Moral coercion may be exerted upon the will of a person not only by fear induced by threats of death or grievous bodily harm which leave no freedom of choice, but also where accident or force majeure place a person in such a condition that he cannot save himself without injuring the rights of some other person who has not done him any wrong.

The common illustration of this right of necessity is the case of two drowning men clinging to a plank that will not support more than one of them. Lord Bacon (Maxims V,) suggested that if one of them pushed the other off, he would be exempt from punishment, because his conduct was dictated by the fear of death and was necessary to save his life. Another familiar case of necessity is that in which shipwrecked sailors are given to choose between death by starvation on the one side and murder and cannibalism on the other.

According to Harris (p.25), the English rule is that “an act or omission which amounts to a criminal offence cannot be justified by mere personal necessity. Thus a theft is none the less theft because it is committed by a person who is under necessity for want of food or clothes} nor may a person in order to save his own life take away the life of another who is neither attempting nor threatening his life nor guilty of any illegal act towards him or anyone else. The leading case on this principle is that of "Rex v. Dudley and Stephens”[238]. Here the two prisoners, Dudley and Stephens, with another man who took no part in the actual commission of the offence, and with a boy, had been drifting for twenty days in an open boat from the shipwreck of the yacht 'Mignonette’, and were about 1,000 miles from land: they had been nine days without food and seven days without water. In those circumstances, Dudley, with the consent of Stephens, killed the boy and the three men fed upon his body until they were picked up by a vessel. It was held that the mere necessity for self-preservation was not a defence for their action and that they were guilty of murder[239].

Yet the defence of Necessity is viewed with favour and even expressly sanctioned in many European and other countries. Even English theoretical writers have been willing to accept this

[238] I4 Q.B.D. at pp. 281-283.
[239] Sentence of death was passed but was commuted by the Crown to six months' imprisonment without hard labour.

ground of defence. Sir James Stephen wrote: "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it: but these cases cannot be defined beforehand". Indeed, where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems almost futile for the law to continue the prohibition if the object of punishment be mainly to deter. For it must be useless to threaten any punishment the threat of which cannot have any effect of deterring[240].

The Italian Penal Code of 1889 expressly laid down (Art.49(3)) that no punishment shall be inflicted for any act committed by a person who was constrained thereto by the necessity of saving himself or others from a grievous and imminent personal danger to which the agent had not voluntarily given occasion and which could not otherwise be averted. This provision covers the case of moral compulsion induced by the threats of others, as well as the case of moral compulsion proceeding from the fear of an evil threatened by an accident or by force majeure. In order that a defence may be available in this latter case under the said provision, the following conditions must concur, namely

a) a serious and imminent danger
b) which is referable to the person of the individual concerned or of some other individual (not to property).
c) the danger must not have been occasioned voluntarily by the defendant.
d) the danger must be inevitable, that is, such as could not be averted by anything short of the offence committed to avert it; and
e) the offence must be proved to have been committed by the defendant in order to save himself or some other person. It is under this provision that Italian Doctrine considers a theft committed from want justifiable[241]. This is not the English view as we have already seen. Nor is it the view of Chauveau et Helie in their comment on Art. 64 of the French Code, identical with our Section 34(b), for under that Code, as under our law, it is essential in order that there may be exemption from punishment, that the agent should have been constrained to the deed by an external force which he could not resist: the coercion must proceed from without[242]. Other impulsions may serve only to mitigate the punishment but not to exclude it altogether.

[240] Kenny, p.78
[241] Maino, op. cit., Vol. I, p.139, § 229.
[242] This view was expressly accepted by our Criminal Court in "Rex vs. Azzopardi" (2/2/1943, Law Reports Vol. a XXXI, Part IV, p.334) where the Court held that in law personal necessity does not constitute a defence to a criminal charge, because according to law the maxim "necessitas legem non habet, sed legem sibi facit" applies only in the case of external compulsion. A plea of "necessity" was likewise excluded in Criminal Appeal "Police vs. Vassallo" (Law Reports Vol. XXXIII, Part IV, p.664) but in this judgement an element of some confusion was introduced by the suggestion that, in our law, Section 237 of the Criminal Code (which deals with legitimate defence) may authorise a plea of necessity in respect of a charge of homicide or bodily harm, which, of course, it does not.

In Continental countries, the defence of Necessity is afforded considerable scope because a fixed minimum is, as a rule, set to the punishment. In English Law, on the contrary, and now also in our law (since the amendment enabling our Court to reduce the punishment below the minimum in special cases) such a defence is only important where, as in capital offences, there is a fixed punishment. In all other cases the Court would take the extremity of the offender's situation into account by reducing the sentence to a nominal amount.

Legitimate Defence

The state of necessity which we have just considered arises, as we have said, where, owing to an accident or force majeure, a man finds himself in the necessity, in order to preserve himself, of injuring another person who is not guilty of any wrongful act towards him. The justification of legitimate defence, on the other hand, arises where a man repels by force the violence or aggression of another man against whom precisely the act of the agent is directed.

Our Criminal Code expressly mentions this justification only in connection with homicide and bodily harms. Section 237 lays down that "no offence is committed where a homicide or bodily harm is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person": and Section 238 specifies cases of such actual necessity of lawful defence.

But other Continental Codes[243] deal with the matter in the general provisions, that is, among the general grounds of defence and exemptions from criminal responsibility. It is argued, in support of this view, that legitimate defence may justify not only personal injuries, but also other acts objectively injurious to the rights of others: as, for instance, when a man apprehends, detains, and confines his aggressor. Moreover, the plea of legitimate defence can be set up not only in justification of an injury caused to the aggressor, but also, in appropriate circumstances, in justification of an injury caused to an innocent third party, as, when a man, hotly pursued by an aggressor, breaks into the house of another person[244]. Indeed, Maino asserts that even under the Codice Sardo, which, like our own, spoke of legitimate defence only in connection with homicide and bodily harms, the Courts had had to extend the effects of the same justification to other offences also.

[243] e.g. Italian, art. 49; Dutch, art. 41 et seq.; German, art, 52-54
[244] V. Manzini, op. cit., Vol. 2, p.282, § 399; Maino, op. cit., art. 49, § 212.

The common sense basis of this justification is obvious. Every person has a natural inherent right of personal security, consisting in the enjoyment of his life, his body, and his limbs. Where the nad of the State on account of the time or place in which the aggression takes place cannot intervene to protect him, every person is entitled to resist by force any wanton aggression. The repelling of aggression by force is a natural instinct: “Est haec non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus, ad quam non odcti, sed facti, non instituti sed imbuti sumus .....”[245]. Hence all laws have, at all times, recognised this right of self-defence, "for no human law can oblige a man to abandon his own preservation”[246]: "vim vi repellere omnes leges omnis iura permittunt”. It would be not only inhuman but also futile for the law to lay down any other rule save this: that it is the right of every person to use his strength for his own preservation. Indeed, civilised laws have not only laid down this rule but, in the name of human sympathy and solidarity, have sanctioned the use of private force even in the defence of <u>others</u> from unjust aggression, and when we say ’others’, we do not mean one’s immediate kindred only, but also anyone else who actually needs one’s protection.

But the law rightly imposes certain conditions in the absence of which a plea of legitimate defence cannot be successful. We will now mention such general conditions reserving to give fuller details in our comments on the relevant sections of our Code next year.

The evil threatened must be:

(6) <u>Unjust</u>
(7) <u>Grave</u>
(8) <u>Inevitable</u>[247]

<u>(1) Unjust</u>

This requirement fails, for instance, when the evil threatened is lawful, that is, commanded or permitted by the law; as for example, in the case of a man sentenced to death who, to save himself, kills the executioner or the goaler, or in the case of a man who resists by force the Police who, in the execution of their duties, proceed to his arrest.

[245] Cicero, ‘Pro Milone’, 10 et seq.
[246] Hobbes, ‘Leviathan’, Ch, 27.
[247] Carrara, Programma, 6 296 et seq*

(2) Grave

The act of defence must have been done only in order to avoid consequences which, if they had followed, would have inflicted upon the person 'irreparable' evil; and the law considers as 'irreparable', and consequently grave, that evil which threatens the life, the limbs, the body or the chastity of an individual. Mere interference with property will not usually justify a homicide or a bodily harm: such a justification will not arise unless the interference amounts to a crime which is violent, such as theft with violence or plunder, or which takes place under such circumstances as to raise a reasonable apprehension of danger to life or personal safety, as where the homicide or bodily harm is committed in the act of resisting, at night, the breaking into of one's residence. But of course, the 'gravity' of the aggression must be understood in relation to the defensive reaction and to the means at the disposal of the agent.

(3) Inevitable

The accused must prove that the act was done by him to avoid an evil which could not otherwise be avoided. In other words, the danger must be sudden, actual and absolute. For if the danger was anticipated with certainty, a man will not be justified who has rashly braved such danger and placed himself in the necessity of having either to suffer death or grievous injury or to inflict it[248]. In the second place the danger must be actual; if it had already passed, it may, at best, amount to provocation or, at worst, to cold-blooded revenge, and not to legitimate defence: if it was merely apprehended, then other steps might have been taken to avoid it. Thirdly, the danger threatened must be absolute, that is, such that, at the moment, it could not be averted by other means. It is still a disputed question whether a man, defending himself against immediate danger of grievous harm is bound to retreat, if possible, before killing or inflicting bodily harm. Recent 'obiter dicta' in England seem against his having the right to stand his ground. But such right has been recognised by the Supreme Court of the United States[249]. The best accepted Continental writers also hold this view: "Si discusse se la giustificazione si verifichi anche quando l'aggressione potesse evitarsi colla fuga: ma noi crediamo, coll'opinione prevalente, che cotesta condizione non debba ammettersi, non potendo la legge imporre la fuga: d'altronde l'animo agitato dell'aggredito difficilmente potrebbe

[248] But cfr. Maino, cp. cit., art. 49, § 225.
[249] Cfr., Kenny, p.104 n.1; but see Archbold, 906 & 907; also, Harris, p.193.

discernere il caso in cui la fuga fosse possibile"[250]. "Detached reflection cannot be demanded in the presence of an uplifted knife". Therefore, in deciding whether there was actual necessity of self-defence, the test should be 'subjective'. The danger against which the accused reacted should be viewed not necessarily as it was in truth and in fact, but rather as he saw it at the time. Thus in 'Rex v. Rose', where the prisoner shot and killed his father believing that the latter was cutting the throat of his mother, it was held that his act was justified if he believed honestly and upon reasonable grounds that his mother's life was in imminent peril and that his act was necessary for its preservation[251].

Finally, in order to obtain full justification, the means adopted to ward off an apprehended danger must be proportionate.

Thus, a person assaulted is not justified in using fire-arms against his assailant, unless the assault is so violent as to make him consider his life to be actually in danger. But here again regard must above all be had to the state of mind of the victim of the aggression. It is not given to the general run of men to keep a calm and balanced judgement in the face of a serious and imminent peril and, therefore, miscalculations and errors of judgement under such circumstances are inevitable. Our law very wisely provides that no punishment shall be applied if, though a person may have exceeded the limits imposed by the actual necessity of defending himself or others, such excess was due to the suddenness of the danger confronting him, or to fear or fright.

Civil Subjection

This is a form of moral coercion improperly so called (coazione impropria). It arises where, without any threat of immediate personal violence, a person is induced to commit an offence in obedience to the order of another person having authority over him.

Our Criminal Code does not contain any specific rule of general application on this subject. In the like absence of a general provision in the French Code, French writers dealt with the doctrine of civil subjection in their comments upon article 64 of that Code, to which corresponds Section 35(2) of our Code, that is, the provision which exempts from punishment any person who is compelled

[250] Florian, op. cit., Vol. I, P.I, p.419, § 271; Carrara, Programma, § 308; Maino, op. cit., art. 49, 8 225.
[251] 15 Cox 540 quoted by Harris, p.193.

to commit an offence by an external force which he cannot resist[252]. Other Continental Codes, however, make an express provision on the subject: thus Section 49 of the Italian Code lays down: "No person shall be liable to punishment for any act committed by him in pursuance of a provision of law, or of an order given by a Competent Authority and which he was bound to carry out".

Where an act, although materially injurious to the rights of others, is done in pursuance or in the execution of the law itself, it is clear that no criminal liability can be contracted by the doer. Familiar examples of such types of acts are arrests, searches of premises, opening of letters, etc., lawfully carried out by the Competent Authorities and by the members of the Police Force. In respect of homicides and bodily harms, Section 237 of our Criminal Code provides that "no offence is committed where a homicide or a bodily harm is ordered or permitted by the law...." But the doctrine of Civil Subjection does not properly refer to such acts commanded or permitted by the law: it refers to acts which are contrary to law and which are done by a person in obedience to an order of another person to whose authority he is subject. A distinction has to be made between Public Civil Subjection and Private Civil Subjection.

Public Civil Subjection (Subiezione gerarchica o politica).

This concerns the relationship of superior and subordinate arising from particular offices or functions of a public character or the relations between the subject and the Government.

One school of thought has it that all subordinates, especially members of the fighting forces, owe to their superiors a blind, unreasoning, passive obedience and, that, consequently, they are excused from any responsibility in respect of any acts which they perform upon the orders of such superiors.

But the best accepted authorities make considerable qualifications to this view. The general principle should rather be that where there is no actual coercion, the mere fact that a subordinate act in obedience to the orders of his superior does not of itself excuse him from personal liability. If a soldier, or constable, or public servant, unlawfully does any violence to any one or commits

[252] Cfr. Chauveau et Helie (1895), Vol. I., Chapter XV, § 337 et seq.

any other wrong, he cannot plead as defence merely that he was acting under orders from his superior officer. In order that such defence may be available it is necessary that:

a. the order should emanate from a competent authority, that is, a superior having the right to give such an order.
b. the order would be one which the subordinate is bound to obey in the course of his duties; and
c. the order should not be obviously improper or manifestly contrary to law.

In other words, the subordinate is excused from responsibility only if he can show that he carried out the orders of his superior without the consciousness of doing a wrongful act: "Le subiezione gerarchica elimina la responsibilità quando toglie la coscienza della criminosità dell'atto, quando, cioè, il superiore commanda, per un fine illecito a lui particolare, una cosa che era nelle sue attribuzioni di commandare, si' da indurre l'agente nella ragionata credulità di non delinquere"[253]. This means that, in all cases in which the order of the superior can afford any defence at all, it is not, properly speaking, because such an order has exercised any compulsion upon the will or the determination of the agent, but rather because it has given him grounds for supposing the surrounding circumstances to justify his conduct: it negatives the existence of 'mens rea'.

It need hardly be said that, if the act innocently committed by a subordinate in the execution of an order of a superior constitutes a criminal offence, the punishment therefore shall be applied to the superior who gave the order: for the offence is his, the subordinate being merely an irresponsible instrument in his hands.

Private Civil Subjection (Subiezione domestica)

This subjection which arises from family relations or from relationships of private employment, does not, of course, exempt from criminal liability. It does not avail the children, or the wife, or the servants, who commit a criminal offence, to plead that it was committed upon the command of the parents, or the husband, or the master respectively. Even in Civil Law, merely reverential fear does not invalidate a contract. (Section 1023, Civil Code).

[253] Programma, § 316.

In England, in the case of a married woman, the Common Law presumed that a felony, other than homicide, committed by her in the presence of her husband, was so committed under his coercion, even though there were no proof of any actual intimidation by him. This presumption of subjection was only a 'prima facie' one, rebuttable by proof that the wife took so active a part in the crime as to show that her will acted independently of her husband's. Now, however, by Section 47 of the Criminal Justice Act, 1925, it is provided that any presumption of law that an offence committed by a wife in the presence of her husband is committed under his coercion is abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence and under the coercion of the husband[254].

It may be convenient, though not strictly relevant, to mention here that there are a few cases in which even an act itself, otherwise criminal, that has been done by a wife or by a son, etc., will cease to be ’reus’ because of family relationships. Thus, under Section 61 of our Criminal Code, a person who fails to disclose to the Authorities the facts which may have come to his knowledge that a crime against the safety of the Government is intended to be committed by others, is, for the mere failure, liable to punishment: but Section 62 excludes from the operation of that provision the wife, the children and other relations of any of the principals or the accomplices in the crime not disclosed. Likewise, Sections 153 and 154 make it an offence for any person to assist in the escape of another person under arrest or sentence or to receive or harbour a fugitive from justice: but again, Section 155 exempts from punishment for any such act the wife, the children, and other named relations of the fugitive concerned.

[254] Harris, op. cit., p.23. Kenny, op. cit., p.73.

Criminal Attempts

We have seen that, speaking generally, two elements are essential to constitute a crime, i.e. the ‘mens rea’ and the ’actus reus’. Where there is merely the former, there is no crime at all. But though the 'actus reus' is thus necessary, there may be a criminal offence even where the whole of the particular 'actus reus' that was intended has not been consummated. If an assassin misses the man whom he shoots at, there is clearly no murder; but, nevertheless, criminal responsibility has been contracted, for the law punishes acts that constitute only a commencement of the execution of a crime.

Following the principles of the Neapolitan and French Codes, the first Draft of our Criminal Code distinguishes two kinds of attempted crimes, namely that denominated in Continental laws and jurisprudence 'crime manque' (delitto mancato), where the offender has done everything in his power to complete his criminal purpose which was, however, frustrated by some accidental cause independent of his will, and that denominated 'simple tentativ' (delitto tentato), where something remains yet to be done by the offender himself. This distinction, first propounded in Italy by Romagnosi, was at the time much insisted upon in the most authoritative treatises on Criminal Law.

But the sections of the said Draft which had given effect to that distinction were subsequently omitted by the Commissioners who prepared the Draft of 1841 upon the ground - as they say in their Report - "that it tended to occasion embarrassment, more especially in trials by jury, and the object of such a distinction was sufficiently attained by the extension of the mitigation of punishment, allowing a greater latitude of the discretion of the Court so as to meet the different degrees of culpability"[255].

The subject of attempted offences is now dealt with in our Criminal Code in section 42 which reads as follows:

"Whosoever, with intent to commit a crime, shall have manifested such intent by overt acts followed by the commencement of the execution of the crime if the completion of the crime shall

[255] Cfr. Jameson's Report, p.57. It is interesting to note that the distinction between 'reato mancato’ and ‘reato tentato’ which existed in the Italian Code of 1889 was suppressed in the Code of 1930 for the reason, expressly stated in the Ministerial Report, that "la soppressione della distinzione.....risponde al pensiero della piu’ autorevole dottrina ....." (Manzini, op. cit., Vol. II, p.396, n.2).

not have taken place on account of accidental circumstances independent of the will of the offender, shall suffer a punishment less by one or two degrees than that for the completed crime: if the crime does not take place owing to voluntary desistance of the offender, he shall be liable only to the punishment provided for the acts already committed by him; saving the exceptions expressly made by the law."

"Attempts to commit contraventions are not punishable except in the cases expressly determined by the law."

Upon an analysis of this definition, it will appear that that three elements are essential to constitute a criminal attempt, that is to say —

1. an overt act manifesting the intent to commit a crime
2. a commencement of the execution of the crime, and
3. The non-completion of the crime by reason of accidental circumstances independent of the will of the offender.

An Overt Act Manifesting The Intent to Commit a Crime

Every wilful crime has its first origin in the mind of the delinquent. But we have already seen that no man can be punished for his guilty purposes, save in so far as they have manifested themselves in overt acts which proclaim his guilt: "cogitatione poenam in foro nemo patitur". The guilty mind by itself does not give rise to criminal liability. It is only when such guilty mind is manifested in external conduct that liability may begin. In Ethics, of course, a vicious intention would of itself suffice to constitute guilt: hence, on Garrick's declaring that, whenever he acted "Richard III" he felt like a murderer, Dr Johnson as a moral philosopher retorted "Then he ought to be hanged whenever he acts it". But there is no such searching severity in the rules of law. They, whether civil or criminal. never inflict penalties upon mere internal feeling when it has produced no result in external conduct[256].

So, there must be some external or overt act but at the same time, such act must be done with intent to commit a crime. The existence of this intent is of the very essence of the attempt. The

[256] Kenny, p.37.

act in itself may be perfectly innocent but is deemed to be criminal by reason of the purpose with which it is done. To mix arsenic with food is in itself a perfectly lawful act, for it may be that the mixture is done for the poisoning of rats. But if the purpose is to kill a human being, then - subject to the concurrence of the other ingredients - the act becomes, by reason of this purpose which it manifests, an attempted murder.

And the act must manifest a clear, specific intent, to commit a determinate crime. It is not sufficient that it shows an intention to commit a breach of the accepted rules of morality, or a breach of any law other than the criminal law, in other words, to commit an act that is simply illicit, or illegal without being criminal. Nor even is it sufficient that it should be an indication of a generic, and indeterminate criminal intention; but it is necessary to show that the agent had formed an intention to commit a specific crime, so that no doubt may remain as to the crime which he contemplated.

A Commencement of The Execution of The Crime

And yet it is not every manifestation of this criminal intent by an overt act that makes a man guilty of a criminal attempt. The law requires that such an overt act should constitute or be followed by a commencement of the execution of the intended crime.

Although every attempt is an act done with intent to commit a crime, the converse is thus not true: every act done with this intent is not necessarily an attempt for it may be too remote from the commission of the crime contemplated to give rise to criminal liability notwithstanding the criminal purpose of the doer. I may buy matches with intent to burn a haystack and yet be clear of attempted arson. But if I go to the stack and there light one of the matches and, in the act of setting fire to the hay, am detected and prevented from doing it, my intent has developed into a criminal attempt. To intend to commit a crime is one thing; to get ready to commit it is another; to try to commit it is a third. We may say, indeed, that every intentional crime involves four distinct stages - Intention, Preparation, Attempt and Completion. Action in pursuance of the intent is not commonly criminal if it does no more than manifest the 'mens rea', nor if it goes no further than the stage of preparation. Words, threats, plans, instigation may, indeed, in certain circumstances, constitute an offence in themselves, but they do not amount to an attempt of the crime threatened, planned for or instigated:

L’intenzione per quanto scellerata, quando anco non sia un semplice atto interno di volontà, ma venga manifestata per via di minaccio, di concerti, d’istigazzione, di associazione di delinquere, non e’ ancora quell’atto esterno mediante il quale si commincia l’azione che, mettendo in pericolo uno speciale diritto tutelato dalla legge penale, importa una pena. I diversi fatti con i quali si manifesta l’intenzione di commettere un delitto, quando comprendono in se medesimi i caratteri del pericolo sociale, che e' fondamento dell’imputabilità politica, possono bensi' venir repressi come reati di per se stanti, ma non mai come conati del delitto risoluto. Chi minaccia di uccidere, chi si associa ad altri per delinquere, chi conferisce ad altri il mandato di commettere un delitto, non commincia ancora l'esecuzione del delitto minacciato, risoluto, istigato[257].

How then, are we to draw the line which separates immunity from guilt? What is the distinction between preparing to commit a crime and attempting to commit it? How far may a man go along the path of his criminal intent and yet be safe if the occasion fails him?

The distinction between acts of 'preparation' and acts of 'execution’ is of fundamental importance in the theory of criminal attempts. In practice, such distinction is often most difficult, and it has taxed the ingenuity of jurists and text-writers to try and work out a satisfactory abstract test of differentiation. The matter is a difficult one, as we have said, so difficult, indeed, that it appeared to Geyer[258] and Cohn[259] as hopeless and fruitless as the problem of “Squaring the Circle” and Buccellati[260] wrote that the problem was well-nigh insoluble because it is almost impossible to devise a general formula which could mark off with precision the dividing line between preparation and attempt. Similar confessions of impatience to give an abstract test have also often been made by English and American judges and text-writers: “It is impossible to lay down any mechanical or hard and fast rule for the drawing of the line between preparation and indictable attempts”[261].

It is impossible in these notes to follow up the many, and often conflicting, doctrines propounded by theoretical writers. It must suffice to give a brief outline of the theory of Carrara who more than any other laboured to devise a scientific abstract test of distinction.

At first this eminent jurist based the distinction on the ‘ambiguous’ or ‘unambiguous’ character of the act itself (Criterio dell‘univocità). An act which is in itself and on the face of it innocent, that is,

[257] Relaz. Zanardelli, 1887, n. LII. Cfr. also, Manzini, op. cit., Vol. II, p.370, S. 435.
[258] "A study on the Essence of Attempt", p.47 (German)
[259] "The Theory of Attempted and Incomplete Crime", P.103(German).
[260] Istituzioni di Diritto Penale, S.n.382.
[261] 41 Harward L.R. p.846

not necessarily referable to a specific crime or to any crime at all, cannot be an act of execution, however much it can be an act of preparation. So long as an act could be reconciled both with an intent to commit a crime as with an innocent purpose, the act is merely preparatory and cannot be charged as an attempt. But preparatory acts may be such either absolutely or conditionally. The former are those from which the character of 'commencement of execution' is absolutely absent, so that even if the agents own admission made it certain that they were directed to the commission of a crime, it would still be unjust to punish them in as much as they do not in themselves expose the right protected by the law to any 'actual danger'. Instances of such type of acts are the purchase of weapons, the procurement of poison, the endeavour to obtain information, the planning with others, etc. On the other hand, preparatory acts are such only conditionally when, with reference to the particular criminal intent of the agent, they represent a 'commencement of execution' of the crime and begin to expose the rights of others to an actual danger, but must nevertheless be considered as merely preparatory in view of their ambiguous character and allowed to go unpunished because it is not certain that they were directed to the commission of a crime. This being, however, the only reason for regarding such acts as preparatory, it follows that if they are accompanied by such material circumstances as manifest their undoubted direction to the commission of a particular crime, they can rightly be punished as an attempt. Thus, the unlawful entry into the house of others, if taken by itself, must be considered as a preparatory act, because it is not itself evidence of the intent to commit a specific crime. It may be punished as the substantive offence of 'house-breaking' (Violozione di domicilio), but no more. But if my mortal enemy, with a dagger in his hands, enters into the room where I am asleep; or if the rejected lover accompanied by two roughs, invades the house of the girl, or if notorious burglars, armed with pick-locks, skeleton-keys and other such-like implements, break into a house where there is a rich booty; the Court may well find in those acts an attempted murder, attempted abduction or attempted theft respectively*. The acts are themselves evidence of the criminal intent with which they are done: they bear the particular criminal intent on the face of them: "res ipsa loquitur". The criterion of the "unequivocal character" of the act is favoured by J.W.C. Turner: "Attempts to Commit Crimes" in "The Modern approach to Criminal Law"[262].

Later, however, Carrara himself discovered that the distinction between preparatory and executive acts, founded exclusively on the criterion of the 'unambiguous' character of the acts, was inadequate and uncertain. In fact, if such character was to be sought in the intention of the agent, then even the acts of preparation could be said to be 'unambiguous'. If, conversely, the

[262] 1945 pp. 273 et seq. But v. for a criticism of the theory William "Criminal Law" 1953 p. 141 et seq.

same character were to be sought in the physical nature of the acts themselves, it might not be possible to punish as an attempt except acts which all but consummate the crime.

Therefore, in his later works, Carrara insisted upon a different formula, "e cioè" - in the words of Maino[263] - "che si dovessero considerare atti preparativi quelli che si esauriscono sul suggetto attivo primario e secondario del delitto: atti esecutivi o consumativi quegli che si svolgono sul soggetto passive dell'attentato o della consuramazione"[264].

It must be remembered in order to understand this formula, that - as Maino goes on to say - "Carrara chiama ‘soggetto attivo primario’ del delitto la persona del delinquente: soggetto attivo secondarlo i mezzi o strumenti dei quali egli deve servirsi per commettere il delitto, 'soggetto passivo dell'attentato' tutte le cose o le persone sulle quali si estrinse un qualche diritto di terzi, ma non quel diritto la cui violazione costituisce il delitto consumato, e sulle quali cose e persone il delinquente deve agire per poter giungere alla perpetrazione del delitto" (e.g. the door or the safe which the thief must force in order to commit the theft, or the persons he has to overcome to be able to commit another offence), 'soggetto passivo della consumazione' le cose o persone sulle quali si estrinseca o si rappresenta il diritto la cui violazione costituisce il delittori consummata" (e.g. the thing stolen in the case of theft, the person outraged in the case of rape).

By way of illustrating his theory, Carrara takes the case of a man who, with the intent of committing the rape of a girl, has broken down the door of her house or gagged her maid. These acts, the writer says, constitute an attempt in as much as the offender has already thereby committed a violation of the rights of others. On the strength of this doctrine it was held that there was an attempted murder in the act of a man who, with murderous intent, has mixed poison with food destined for his victim, and an attempted aggravated theft, in the act of a person who, at night time, had got into the yard of a dwelling house with intent to rob the inhabitants thereof[265].[266]

Our law does not expressly mention 'preparatory' acts; by, requiring as it does that the 'intent' to commit a crime should be not merely "manifested by overt acts" but further that such overt acts should be followed "by a commencement of the execution of the crime", it is obvious that mere preparation does not constitute a punishable attempt. An attempt represents an intermediate

[263] Op. cit., Vol. I, art. 61 § 293.
[264] 'Sinopsi del conato’ (reminiscenze di cattedra e foro, p.261 et seq.); 'Atti preparativi' (Reminiscenza ecc., p.331, et seq.)
[265] Maino, ibid. An instructive judgement on the subject of the distinction under discussion was given by Harding J. in the case "The Police v. Roger Camilleri et." Criminal Appeal, 4.III.1944.
[266] For a criticism of the theory of Carrara, Cfr. Impallomoni, op. cit., p.344 et seq.

stage between the first manifestation into the outside world of the criminal intent and the fulfilment in fact of such intent. But in the intervening series of acts a distinction has to be made between those which form a constituent part of the criminal action and those which merely intercede and prepare such action. In all cases, says Rossi[267], there is always an act or a series of acts which alone constitute the object which the agent wants to achieve, the criminal action which he intends to perform. All that which precedes such action may have a more or less proximate connection with it, but it does not form part of it, for it may well take place without those antecedents or with different antecedents. It is, therefore, essential to distinguish this action from the acts which are not necessarily connected with it and do not form an integral part of it, these are the preparatory acts which lead up to, but do not initiate the criminal enterprise. Preparatory acts may raise a certain amount of apprehension, but without as yet any actual danger. This arises only when the first act of actual execution is done.

Luigi Masucci, after passing in review the principal theories propounded on the subject of the distinction between preparation and execution, sums up as follows:- So long as an overt act, whether in itself or by reason of the circumstances surrounding it, does not clearly show that it is directed to a criminal purpose, it cannot be regarded as an act of execution of a crime, because no act which in itself and in appearance is or can be innocent can be considered as a commencement of execution of another offence. When, however, it appears clear that such act was directed to a criminal purpose, then, in order to decide whether such act represents a commencement of the execution of the crime it must be seen whether it forms part of that series of acts which, in their natural completeness would constitute the actual commission of the crime. If the act forms an integral part of this series of acts which in their completeness would consummate the crime, that act is one of execution. If, on the contrary, the act merely precedes the criminal action, to which it was directed and is such that, however much repeated, it could never accomplish the consummation of that crime, the act is not an act of execution[268].

In conclusion to this part of our subject it must be remembered that, although mere preparatory acts cannot be punished as an attempt of the crime for the commission of which they were intended, yet some such acts (e.g. the manufacturing or keeping of explosives, the carrying of

[267] Traite de Droit Penale, p. 326.

[268] Cfr. Chauveau et Helie (it. Transl.) op. cit., Vol. I. P.I, Cap. XI, Appendix. The distinction between preparatory acts and acts of execution was emphasised in the Italian Code of 1930 which defines an attempt as consisting in the commission of "atti idonei diretti in modo non equivoco a committere un delitto, se l'azione non si compie o l'evento non si verifica".

fire-arms, etc.) may constitute in themselves an offence ‘sui generis’. This is not in any way an exception to the rule that mere preparation does not entail liability for an attempt, for what the law punishes in such cases is the breach, in itself complete, of the provision of law which, in the interest of the public or private safety, prohibits those acts in themselves and not as preparatory to another crime.

Later on, we shall consider an important question that arises in connection with the requirement of the commencement of execution of the crime. The question is: what shall be said if the act done with intent to commit a crime is of such a nature that the completion of the crime by such means is impossible: as when a man attempts to steal by putting his hands into an empty pocket, or to poison by administering sugar which he believes to be arsenic?

Non-Completion of the Indented Crime in Consequence of Accidental Circumstances Independent to the Will of the Offender

So that a man can be held liable only for an attempt it is, of course, essential that the intended crime should not have been already ‘completed’. And, lest one should mistake for an attempt that which is really a legally complete crime, it is necessary to have a clear notion of when a crime becomes completed.

A crime is completed or perfect when the offender has consummated the violation of the right protected by criminal law. “Il delitto è perfetto quando è consumata la violazione del diritto tutecato dalla legge penale” [269]. Carrara repeatedly insists upon the necessity of distinguishing between what he calls ‘obiettività ideologicà of the crime, that is the motive or ultimate purpose of the offender in committing it, with which he calls the ‘obiettività giuridicè which is accomplished so soon as all the legal elements required by the definition of the particular crime exist, without requiring that the offender shall have achieved the ultimate object at which he aimed in perpetrating it.

In this respect we have already seen that a distinction has to be made between 'formal’ offences, the completion of which postulates a given action but not a given issue, and 'material’ offences which cannot be completed without the accident of the actual event. Thus, perjury merely requires

[269] Carrara, Programma. § 349.

the act of knowingly giving false evidence on oath before a judicial authority: it is a formal offence and it is completed and not merely attempted even if the falsity, detected in time, could not influence the decision on the case in which the evidence was given. Homicide, on the contrary, is a material offence because it is not completed so long as the victim has not been actually killed. We shall presently see whether formal offences admit of an attempt.

Now a crime may remain incomplete either because it is interrupted or frustrated by accidental circumstances independent of the will of the offender, or because of the voluntary determination of the offender not to complete it. It is only in the former case that the commencement of the execution of the crime is punishable as an attempt.

According to our law, the circumstances which prevent the completion of the crime, must be, at the same time, both accidental and independent of the will of the offender.

Both such conditions were also expressly required in the Draft Italian Code of 1887 and in previous drafts. But this gave rise to a great deal of discussion during the final revision of the said draft. It was urged against the retention of the word 'accidental' ('fortuita'), that it was sufficient to require that the cause of interruption or frustration of the crime should be 'independent of the will of the offender'. This expression duly emphasised the true character of criminal attempt which ceased to be such precisely where the non-completion of the crime was due to the voluntary desistance of the offender himself. To require in addition that the cause of interruption or frustration should be accidental was not only superfluous but also misleading for it would make the provision inapplicable where, as often happens, the cause which prevents the completion of the crime was deliberately pre-disposed or opposed by others, as, for instance where the Police being informed of the intended crime, are on the spot to prevent its completion. These arguments finally prevailed and the word 'fortuita' was omitted when the Code of 1889 was enacted.

Put against the said arguments it was pointed out that the word 'fortuita' was essential in order to make it clear that the circumstances which prevent the completion of the crime must be accidental and casual circumstances supervening after the commencement of execution of the criminal enterprise which, for those circumstances would have been carried out by the offender. It was observed – quite rightly, it would seem - that the requirement of this condition did **not** have the effect of excluding those causes of interruption or frustration which were pre-disposed or opposed by third parties (e.g. the Police) or the intended victim, for even such causes with which the

offender has not reckoned in undertaking the execution of his criminal enterprise, wire, when viewed - as they should be -in relation to him, purely accidental and casual causes.

The accidental and casual causes which prevent the commission of the crime, against the will of the offender may be either physical (as when someone holds the hands of the aggressor who is about to strike the blow, or when the false key breaks in the key-hole, or when the victim of the aggression opposes a successful resistance) or moral which act by way of psychological compulsion upon the will of the offender compelling him to desist, though he would have wished to go on. Such moral causes are, naturally, in themselves physical events, but their influence on the offender is purely psychological, as when a man, being hotly pursued by an aggressor, shouts for help, and the hue and cry compels the aggressor to give up the chase[270].

In general terms it may be said that the law grants its indulgence to the attempt when 'voluntarily' 'abandoned' by the offender and not when 'impeded' or 'frustrated'.

We must now deal with a question which we have already touched upon but deferred for fuller consideration, namely the question whether the possibility of a successful issue is a necessary element in an attempt, or, in other words, whether there can be a punishable attempt when the act done with intent to commit a crime is of such a nature that the completion of the crime is impossible.

Before we refer to our law in particular, let us notice very briefly the main theories on the subject.

One school of thought which, in the theory of attempt, attaches overriding importance to the subjective element, that is to say to the criminal intent or criminal propensities manifested by the agent, holds that every attempt is punishable even if the completion of the crime by the means used was impossible. This would seem to be now also the English view. It was long supposed to be the law of England that there could be no conviction for an attempt unless the attempted crime were possible. It was considered that an attempt must be part of a series of acts and events which, in its completeness, would actually constitute the offence attempted. This doctrine has, however, been definitely over-ruled. It is now not necessary to prove that, if no interruption has taken place, the accused would have completed the offence attempted, for it is no defence to an

[270] Carrara, Programma, §385 et seq.; "Grado nella forze frisica del conato", §108 et seq., (Opus, Vol. I).

indictment for attempting to commit a crime to prove that it was physically impossible to commit the complete offence[271].

This subjective theory finds great favour with German writers and with the writers of the Italian Positive School of Criminal Law. These writers say a man who has not only formed the settled intent to commit a crime but has also manifested such intent by external acts and, indeed, has commenced the execution of the crime, by means, which he thought efficient and sufficient for the purpose, deserves to be punished even though, without his knowing it, such means were in fact inefficient and insufficient. The agent has done all that which he thought necessary to accomplish his criminal purpose and his error as to the efficiency of the means used by him cannot diminish his degree of guilt.

In opposition to this doctrine the Classical School and, generally, all writers who regard as more important the objective or physical element of the attempt consider the possibility of a successful issue as an indispensable ingredient. They argue that acts which in their nature cannot result in any harm are not mischievous either in their tendency or in their results and, therefore should not be treated as crimes. In the case of attempts the law punishes not the intent but the action, and such action cannot be punished except in so far as it has exposed the rights of others to an actual danger. But an effort to do that which it is impossible to achieve by reason of the means used, is a futile effort and as such cannot produce any actual danger which is the sole justification for imposing liability in respect of an attempt.

But the inefficiency of the means in order to exclude criminal liability must be absolute. Carrara thus makes out the distinction between absolute inefficiency and relative inefficiency, including in the latter term the inefficiency or inadequacy or defectiveness of the means, the inefficiency is said to be relative (indeneità relativa) when the means were not in themselves capable of completing the intended crime owing to the particular conditions of the person or things against whom or upon which the criminal action was directed, or owing to the exceptional circumstances surrounding the fact, but could well have and could complete that crime if they had been or were used against another person or upon another thing, or if they were accompanied by different circumstances. On the contrary, the inefficiency is said to be absolute, when the means used could in no circumstances injure the right sought to be invaded whoever or whichever the person or thing against whom or upon which they were directed. By way of illustrating this distinction,

[271] Archbold, op. cit., p. 1443; Harris, op. cit., p.l8.

Carrara gives the following examples: a burglar wanted to break into a house by forcing open the door thereof, and he dreamed that he could do this by a fragile reed. A man with intent to poison his enemy administered to him some flour believing that it had the effect of a deadly poison. A person, intending to kill another by shooting, thought that he could accomplish his intent by loading his fire-arm with a blank cartridge. In these and similar cases the efficiency of the means chosen is absolute, for whichever the doer attempted to be broken open by means of that reed, or whoever the person, however weak, sought to be killed by means of that flour or that fire-arm, the achievement of the wrongful purpose was always impossible. But if instead of a reed the burglar has used an iron lever to which, however, the door, on account of its solidity, did not give way, or if the would-be murderer had administered a truly poisonous substance which the strong physique of the intended victim resisted, or has fired the gun loaded with a bullet which, at a shorter distance, could have caused the death of the victim, then in all such cases the inefficiency of the means is not absolute but merely relative, because it is not inherent in the means themselves but arises out of the particular circumstances surrounding the fact.

Where the inefficiency of the means used is absolute, criminal liability for the attempt does not arise; and it does not make any difference that the agent may have firmly believed that he could carry out his designs by those means. For, as we have already said, it is not the intention, however mischievous, that gives rise to liability, but the mischievous tendency of the overt act itself done in pursuance of such intention.

'Tentativo con mezzi idonei' (Remin. di cattedra e foro p.505 - 307).

The same principle of non-liability extends to all cases in which the completion of the crime is absolutely impossible, because

1. The object of the crime (i.e. the person or thing against whom or which the action is directed) **is inexistent** (physical impossibility); as where the agent shoots at a shadow mistaking it for the intended victim, or, with intent to procure abortion, administers a drug to a woman who is not pregnant, or, with intent to commit a theft, breaks into a house which is absolutely empty,
2. **A legal obstacle prevents the completion of the crime** (legal impossibility), as where a man, with intent to commit adultery or to commit a theft, attempts to have carnal knowledge of a woman who turns out to be his wife, or attempts to steal a thing which, though he did not know it, was his own.

Having thus given in brief outline the two opposite theories concerning the question of impossible attempts, we must now enquire which of them is consistent with our law.

Unlike the Italian Code of 1889 and also of 1930 our Code does not expressly require that the commencement of execution of the attempted crime should be by efficient means ('Con mezzi idonei'). But it does require:

1. that the overt act manifesting the criminal intent should be followed by a commencement of execution, and
2. that the completion of the crime should be frustrated by circumstances that are both accidental and independent of the will of the offender.

Now the notion of 'commencement of **execution'** necessarily implies the possibility of completing the intended crime in the manner proposed. It cannot be said that the execution is begun if the act performed cannot absolutely lead, if completed, to the actual commission of the crime, or, in other words, if, in the circumstances, the consummation of the attempted crime was utterly impossible: the effort would be vain by reason of the absolute impossibility of causing the event[272]. In the second place, as Roberti points out in the comments on the French Law which, prior to the revision of 1832, was in this respect identical to our own, once the law requires, in order that a punishment may be inflicted in respect of an attempt, that the circumstances which prevent the event would be not only "independent of this will" of the agent, but also "accidental", it is clear that there can be no punishable attempt when the impediment was not accidental and posterior to the commencement of the execution, but pre-existent and resulting from the nature of things, that is from the absolute impossibility of the event[273].

An attempt has been aptly, described as a criminal action 'in itinere'. If the 'meta optate criminis', the desired issue, is absolutely unattainable the way the agent has chosen to go, no part of the distance separating the intention of the agent from the completion of the crime, can be really said to have been **covered.**

[272] Cheavuoau et Helie, op. cit., Voi. XI, Cap. XI, § 254

[273] Richiedendosi, per la punibilità del tentativo, la doppia condizione che la circostanza che impedì' l'evento fosse non solo indipendente dalla volontà dell'agente, ma fortuita, viene eliminata ogni imputabilità quando 1'impedimento non fu accidentale e posteriore al cominciamento dell'esecuzione, ma pre-esistente e derivante dalla natura stessa delle cose, dall' impossibilità assoluta dell'evento". (Dei Reati e delle Pene in Genere", p.104).

With reference to the crime of fraud in particular, our Courts have, on several occasions, affirmed that there cannot be a conviction for an attempt (or, generally speaking, for a completed offence), when the fraudulent devise used is so clumsy that it is not calculated to deceive anybody, and this on the strength of the principle that in order that there may be an attempt there must be a possibility of a successful issue[274], But, as was stressed in Pex V, Cassar[275], in order to exclude the attempt the impossibility of a successful issue must be absolute[276].

On this question of impossible attempts, we may, however, point out in conclusion that the "objective" theory, though accurate in strict legal consistency, is, in policy somewhat improvident. It may be right not to "punish" in the old connotatim of that word an act which could not issue in any actual harm. But that is hardly a sufficient reason for leaving entirely undealt with in the appropriate manner the person who has thus manifested himself criminally inclined. In fact, it may be said that everyone who attempts a crime, by known inept means, is to some extent a social danger. As Gianville Williams aptly observes[277]. "So long as the law was purely deterrent or retributive in its aim this circumspection of the offence of attempt was perhaps justified. At the present day, when Courts have wide powers of probation (as they have in England), there is much to be said for a broader measure of responsibility. Any act done with the fixed intention of committing a crime, and by way of preparation for it, however remote it may be from the crime" (is, however, impossible the completion) "might well be treated as criminal. The rational courses would be to catch intending offenders as soon as possible, aid set about curing them of their evil tendencies; not leave them alone on the grounds that their acts are mere preparation" (or could not lead to the intended result). The Italian Code of 1930 maintained, it is true, the "objective theory" in dealing with attempts. But it has provided against the inconvenience above noted by the remedy of what in the Code are known as "misure di sicurezza". Manzini thus writes; "Quando gli atti diretti a commettere un delitto risultino inidonei, cosi da rendere impossibile l'evento dannoso o pericoloso,1'imputato deve essere proscioloto perche il fatto non costituisce reato. Ma se il guidice ritiene che il prosciolto sia socialmente pericoloso, può ordinare che sia sottoposto alla libertà vigilata. Il magistrato farà bene a non trascurare questa disposizione, che in molti casi e' veramente provvida"[278].

[274] Cfr, Law Reports, Vol. XX, P. IV, p.25, Vol. XXII P.IV, p.
[275] C.C. 18-XI - 41
[276] (2) Cfr. Mr Justice Harding, op. cit., §19. See also ibid. § 26, § 30.
[277] op, cit. p.146
[278] op. cit. Vol.2, p.383

Punishment for Attempted Crimes

Under Section 42 of our Criminal Code, a person guilty of an attempted offence is liable to a punishment less by one or two degrees than that provided for the complete crime**.** This mitigation of punishment is in accordance with the best accepted principles, and the extension of the mitigation over two degrees is intended to allow a sufficiently wide latitude to the discretion of the Court so as to meet the different degree of culpability and, particularly, the degree of proximity to completion of the crime when the attempt was interrupted or frustrated. The law does not itself make any distinction between a proximate and a remote attempt, nor, as we have seen, between a 'simple tentativ' (delitto tentata) and 'crime manque' (delitto mancato). So soon as the intent to commit a crime has been manifested by overt acts followed by a commencement of the execution of the crime, liability is contracted: but it is left to the Court, within the latitude allowed by the law, to proportion the punishment to the particular attempt.

The French Code made every attempt punishable in the same manner as the consummated crime. This was founded on the view that malice (dolus' or criminal intent), which is the essence of crime, is as much manifested in the case of an attempt as it can be by the completion of the act: in the words of Pilangieri "the author of an attempt has committed the crime se far as he could commit it". But this severe conclusion never obtained the sanction of public approval and it is vain to expect that any law can be properly administered to which public opinion is generally hostile. It has always been felt that when the crime has not been consummated, the punishment of the offender ought to be less. This is consistent not only with humanity but with justice. Human law can only punish acts, not intentions, and, until the offence is committed it may be argued that the thought of a moment might make the criminal desist*. In other words, an attempt should not be dealt with as harshly as the completed crime. The mere 'danger' occasioned by the former cannot be compared with the actual 'injury' caused by the latter: the disturbance of the employment of a right is not equal to the actual violation of such right* Moreover, while it is true that the completion of the attempted crime is assumed to have been prevented by an accidental cause independent of the will of the agent, can it be said with absolute certainly that without such cause the crime would have been completed? The law may presume it, but it is always a mere presumption. The offender was on the way of committing a crime, but he could still desist: why not think that perhaps a sudden return of good feeling might have induced him to give up the criminal enterprise even if

this had not been interrupted or frustrated independently of his will? This doubt would by itself justify the mitigation of punishment[279].

The law, however, makes a few exceptions to the application of this reasoning in some special cases, as for instance, in Section 56, where an attempted insurrection is treated in the same manner as the complete offence. These exceptions result partly from the nature of the offences themselves and partly from the imminent danger of such attempts to the security of the State.

Voluntary Desistance

The punishment we have just now mentioned applies when the intention has not been completed in consequence of accidental circumstances independent of the will of the offender. If, instead, such crime was not completed owing to the voluntary desistance of the offender, then he is not liable to punishment as for an attempt, but is only liable to punishment for the acts already committed by him in so far as such acts are characterised by the law as a crime.

The provision to this effect was inserted in Section 42 of our Criminal Code upon the suggestion of Andrew Jameson. In fact, in the draft of 1842, the last part of the article dealing with criminal attempts was to the effect that, when the completion of the crime did not take place owing to the voluntary desistance on the part of the offender the punishment was to be reduced by two or three degrees. This was in accordance with the doctrine of Carmignani[280] that, in the case of voluntary desistance, the punishment for the attempt should be only mitigated and not excluded together.

But Jameson criticised this provision. He wrote:

“In the Neapolitan Code, in such cases, the acts executed are punished only in so far as they in themselves constitute known offences." It does not appear upon what grounds the example of the Neapolitan Code was not followed in this case as it generally is in other cases. The impunity of such attempts is a maxim generally admitted. It is contrary to the policy of the law to give so little encouragement to the operation of returning good feeling upon the conduct, and to make it the interest of the offender to complete the crime for his own sake by at once increasing his chances of complete escape when he only risks a slight addition of punishment for the completed act.

[279] Jameson’s Report, p.57 – 58
[280] Sic. Soc., Vol. II, p.192.

"This unreasonable rigour is by no means necessary for the public security. More alarm would probably be occasioned by the juridical investigation of such kinds of attempts which would otherwise likely be soon forgotten, than by dragging them from obscurity by inquisitorial enquiries".

"I have suggested that this part of the article be suppressed and a paragraph substituted to the following effect: "When the offence does not take place owing to the voluntary desistance of the offender he shall suffer the punishment for the acts already committed by him in so far as these are characterised by the law as offences".

"This is almost in terms of article 73 of the Neapolitan Penal Code and it is all that either justice or policy can demand in such cases".

There is thus a juridical reason as well as a reason of public expediency for the impunity of the attempt in such cases. The juridical reason is that the will to commit a crime, which is of the essence of every criminal attempt, is negatived by a contrary determination of the same will of the agent and this, at a time when no actual damage or injury has yet been caused. The reason of public expediency is that it is in the general interest of the community (and of the intended victim himself) that the would-be offender should be encouraged by the prospect of impunity to desist from the further commission of the crime. This utilitarian argument especially appeals to popular conscience which would find it difficult to justify the punishment of a man who voluntarily gives up the criminal enterprise though he could accomplish it, and would consider the punishment unnecessary to re-instate the rule of law which has been adequately re-instated by the fact of the voluntary desistance.

But for the proper application of this principle it is essential to have a clear notion of what is meant by Voluntary desistance. The law does not require that the desistance should be absolutely spontaneous, i.e. prompted solely by repentance or returning good feeling independently by any other motive. To have so required would have involved the matter into infinite minute enquiries into the working of the human mind and processes of volition which no judicial authority can undertake - The law is satisfied if the desistance is voluntary, or, in other words, if the determination of the agent not to prosecute the commission of the crime is made freely by him and not imposed upon him by external agencies independent of his will. We have said already

that the law grants exemption from punishment in respect of the attempt when it is ‘abandoned’ by the agent, and an attempt is abandoned when the agent desists either out of repentance, that is to say, a change of mind brought about by returning good feeling, or because of the fear of punishment, or of sudden pity for the victim, or of the good advice of a third party, or of any other cause which does not, however, amount to an ’impediment’ to the further execution or the completion of the crime. In the case; ‘The Police vs. Salv. Grech'[281], our Criminal Court of Appeal said: "Il solo fatto di aver il citate desistito dal tentativo per altrui suggerimento non rende la desistenza meno volontaria. La legge non esige l'assoluta spontaneità' ma solo la volontarietà' della desistenza: nè la volontarietà viene meno solo perchè la desistenza è salutare ed appunto quello il fine cui mira la sanzione della legge”.

The concept of voluntary desistance includes both the forbearance of the agent from doing further acts of execution of the crime, as well as the counter-action of the agent directed to undo the acts already done or to prevent their effects, as when for instance, A**,** after mixing poison in B’s food with intent to kill him, voluntarily prevents B from partaking of the food; or after administering the poison provides an antidote. But - Maino suggests[282] - one should be careful not to confuse desistance with what is merely the non-repetition of the attempt**.** One can speak of ‘desistance’(in the case of forbearance) when, apart from the act or acts already done, other acts would still be required to be done by the agent. When, on the contrary, the agent has done the act or the whole of the series of acts which could normally consummate the crime but the consummation of this has been prevented by an accidental cause independent of his will, one can no longer speak of desistance but only of non-repetition if the agent refrains from returning to the attack. A man who has attempted to kill another by shooting at him with a gun loaded with a deadly charge will not be exempt from punishment merely because the first shot having accidentally missed, he does not fire a second shot. Otherwise, - Maino thinks - most criminal attempts would remain unpunished.

Now, as we have already said, voluntary desistance removes liability for punishment in respect of the attempt, but if the acts already done constitute in themselves a crime, then the agent is liable to the punishment provided for such a crime. It would have been absurd to admit that a crime, which is complete in all its elements, should go unpunished merely because the agent had originally intended to commit a mere serious crime: "Quod factum infectum fieri nequit". Thus, a

[281] 10-XL-1917
[282] Op. cit., Art.61, § 310.

man who, with intent to kill another man, points a loaded gun at him, or, with intent to steal, breaks open the safe, will not be guilty of attempted murder or attempted theft if he voluntarily desists from the further commission of the intended crime, but may, if all other circumstances so warrant, be guilty of threats or wilful damage to property, respectively. (Note in this connection Sections 343 and 344 Criminal Code).

Finally, section 42 excludes from its operation "the cases expressly otherwise provided by the law". This saving refers to certain particular crimes in respect of which the law derogates from the principles which govern the matter of criminal attempts generally. To this class of cases belong sections 56 and 57 paras. 2, section 98, etc.

The Various Classes of Offences in Relation to the Notion of Attempt

The provisions of Section 42 **of** our criminal Code applies to all 'crimes' with which the notio**n** of criminal attempt is not incompatible, whether they are contemplated in the Code itself or in other special laws**;** unless, **of** course, it is specially otherwise provided in particular cases*,*

Involuntary or Negligent Crimes

The first class of crimes in respect of which according to all writers with **a** few solitary exceptions an attempt is inconceivable, is that of involuntary or negligent crimes. In fact, to attempt means to direct one's act to a pre-determined end. By the definition of our Code as well as of other Codes which is made to consist in the doing of certain acts "with intent to commit a crime" Now the essence of an involuntary or negligent crime is incompatible with this definition. It is true that the cause of the injurious event in crime of negligence consists in a voluntary act or omission but, this is done or made without any intention or desire to produce The event "Fra la colpi e il conato" – says Carrara[283] – vi è repugnanza in termini. Immaginare un attentato colposo è lo stesso che sognare un mostro logico." And Pessina[284]: "La colpe e il conato rappresentano un'antitesi perfetta: epperò non possono mai compentrarsi, escludendosi e vicenda"

Negligence which has not produced any harm may be punishable as an offence 'per se', but never as an attempt to commit another offence.

[283] Programma, Parte Generale; § 366,
[284] Op. cit., p.229.

Crimes from Sudden Passion

The principle which requires for the existence of a criminal attempt that the overt acts should represent in a clear and unmistakable manner a commencement of the execution of a well-defined design, has made some writers[285] assert that the notion of attempt is not admissible in respect of crimes committed in the first transport of a sudden passion or under mental agitation (reati d'impeto). They urge that sudden passion so disturbs the balance of the mind and so agitates the emotions that a person, acting in those circumstances, cannot form a clear and definite intention to commit a particular crime, or, at any rate, it must always remain doubtful whether his acts were directed to one crime rather than to another, whether they represented the end of the offender rather than the 'commencement of the execution of a more serious crime. For a man to be convicted of an attempted murder, it must be shown that his intention was positively directed to causing death or to exposing the life of the victim to a manifest danger; but where the act is committed in the excitement of a sudden passion which makes the agent incapable of reflection, and by an accident no actual harm ensues, how can it be said with certainty that such act was directed to causing death rather than to causing merely a bodily harm? Nor can - these writers say - the intent be in these cases inferred from the ‘means’ used, because the inference drawn from the means used presumes a calculation which a man in the grip of a sudden passion cannot make; he just takes hold of and uses the first thing he finds at hand. The only exception to this reasoning which Carrara admits arises where the act done could not lead but to one result: in this case it must need be assumed that the agent, whatever his state of mind, intended the only effect which could ensue from his act.

But other writers[286] whose doctrine is more generally accepted consider this question not as one of ‘principle’ susceptible of an 'a priori’ general and uniform solution, but rather as one of ‘evidence’ to be decided in each particular case regard being had to the special facts forming the subject of inquiry. It is no doubt difficult but by no means impossible to establish a determinate intent in a person acting from sudden passion. So if the special circumstances of the case lead to the conviction that the agent, notwithstanding the disturbed state of his feelings definitely aims, with suitable means, at a particular crime which was, however, accidentally frustrated, he can rightly be held guilty of an attempt to commit that crime. If the act done could have produced two

[285] Carmigani, ‘Jur, Crim. el,’ l. p.64., Romagnoei, ‘Genesi’ § 667, Carrara, Programma. § 368, Nani, Princ. di giuris. crim,’ 108.,
[286] Roberti, op cit., §788 et seq., Arabia, ‘Principii di Diritto, Penale’. Il p. 134; Pessina, op. cit, p.229, Paoli, ‘Nozioni, elemtarii di diritto penale’. p. 32

possible results, the one graver than the other (e.g. death or bodily harm), great caution will have to be taken, in view of the state of mind of the doer, in deciding whether the graver result was intended rather than the less serious result. The Judge cannot attribute to the agent any intention, which is not established beyond doubt by the evidence. And should come doubt as to which of two or more crimes or which of two or more injurious events the person accused had intended to commit or cause remain, then, in these cases of sudden passion and mental agitation even more than in ordinary cases, it must be presumed that his intention was directed to the less serious or the less injurious event in accordance with the principle 'semper in dubiis id quod minimum est eligendum'.

Crimes Consisting in Omissions

The principle that there cannot be a criminal attempt unless there has been a commencement of the **execution** of the crime, must not be understood as meaning that an act of omission cannot constitute an attempt. For when the inaction is the means of accomplishing a criminal design the person who maliciously abstains from doing those acts which alone can prevent the crime and which the law enjoins him to do, evidently **executes** the crime. If a person who has the custody of another who is helpless, leaves that other without food with intent to cause his death, and in fact causes his death, he is guilty of murder. And, if by an accident independent of the will of that person, that other is saved, the former is, without any doubt, guilty of attempted murder[287]. Intentionally to omit to do that which it is one's duty to do, is the same thing as doing that which the law forbids[288].

Simple Crimes

By simple crimes is here meant those "qui unico actu perficiuntur" (e.g. slander - ingiuria verbale - perjury). The notion of attempt is consistent only with those crimes the commission of which requires a series of facts. An attempt is, therefore, impossible in respect of simple crimes the process of execution of which is not susceptible of division. Such crimes are complete so soon as there is a commencement of their execution[289].

Formal Crimes

[287] As to the abandoning or exposing of children under seven years, See sections 259, 260, Crim. Code.
[288] Pessina, op. cit., p.234, n.2; Carrara, Programma, § 358, n., Masucci, op. cit., p.307.
[289] Crivellari, op. cit., Vol. IV, p.11.

We have already seen that a formal crime is one for the consummation of which the accident of the event intended by the offender is not essential (e.g. calumnious accusation). Most writers think that these crimes do not admit of an attempt[290].

But this generalisation is not admitted by Manzini who says that there are certain formal crimes in respect of which an attempt is possible[291].

Contraventions

With regard to these, section 43 of our Code expressly provides that attempts to commit the same are not liable to punishment except in the cases expressly laid down by the law.

[290] Crivellari, ibid., Cfr. Also Law. Rep. Vol. XXVI, P. IV, p. 768.
[291] op. vit., Voi. II, p.400

The Parties to a Crime (Complicity)

There are certain offences which, by their very nature, cannot be committed without the concurrence or participation of two or more persons, e.g. conspiracy, adultery. But quite apart from these offences it often happens that an offence which could be committed by one single person, is, in point of actual fact, the product of the joint activity of two or more persons (concursus delinquentium).

The various modes of taking part in the commission of an offence and the variety of ways in which several persons may be concerned in it, gave rise to varying conclusions and conflicting opinions in the systems of positive law and in legal doctrine, and the matter has often been rendered obscure and uncertain by the variety of denominations used to designate the several persons taking part in the commission of an offence and the degree of their guilt.

In English law four several ways of taking part in a felony are recognised. A person may be implicated in a felony either:

i. as a principal in the first degree,
ii. as a principal in the second degree,
iii. as an accessory before the fact,
iv. as an accessory after the fact.

Very briefly –

I. A principal in the first degree, is the actual perpetrator of the crime; the man in whose guilty mind lay the latest blameable mental cause of the criminal act[292].
II. A principal in the second degree, is one by whom the actual perpetrator of the felony is aided and abetted at the very time it is committed.
III. An accessory before the fact is one who, actively procures, counsels or commends the commission of a felony*
IV. An accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists the felon*

[292] Harris, op-, cit., pp.36 et seq.; Kenny, op. cit., pp.84 et seq., Archbold, op. cit., pp. l445 et seq.

The distinction between principals and accessories applies to felonies.

In Treasons all who, in felonies, would be accessories before or after the fact are principals.

In Misdemeanours and offences punishable on summary jurisdiction:

i. those who aid, abet, counsel or procure their commission and, in case of a felony, would be accessories before the fact, are, at Common Law, and by Statue (Section 8 of the Accessories and Abettors act, 1861, and Section 5 of the Summary Jurisdiction Acts, 1848), liable to be tried and punished as principal offenders;
ii. those concerned after the fact are not punishable unless they commit some substantive offence, such as obstructing arrest*.

Our Criminal Code recognises only two ways of taking part in an offence, that is, either as a principal or an accomplice.

Principal (autore) is the person who is the actual perpetrator of the act constituting the offence. Almost always he is the man by whom this act itself is committed, but occasionally it is not so. The act may have been committed by the hand of an innocent agent e.g. a child under nine years, or a person who is not criminally responsible by defect of understanding, ignorance of the facts or other cause. In such a case, the man who employs such an innocent agent for the commission of the offence is the real offender. Thus, if a physician provides a poisonous draught and tells the nurse that it is the medicine to be administered to her patient and then by her administration of it, the patient is killed, the murderous physician –and not the innocent nurse - is the 'author' of the crime. Similarly, if a man sends a six-year old child into a shop to steal something out of it for him, he will be the sole offender

There may, of course, be more than one principal in an offence: thus, all the members of a gang of thieves may have fired simultaneously at the owner who has surprised them. They are 'co-principals' (co-autori), (correi), they have all taken part in the killing which constitutes the crime of murder.

All others who, without taking part in the actual perpetration of the act which constitutes the offence are never-the less concerned in the commission of such offence, in any of the ways specified by law are ‘accomplices’.

General Rules Applicable to All Forms of Participation in an Offence

Speaking of the subject of a criminal offence we have said that he is the person who is the physical as well as the moral cause of the act against the criminal law: he is the person who willed and committed the offence. Now, the notion of participation in an offence implies that while one and same is the offence committed, the subject responsible therefore are several and, consequently, there must be fulfilled in respect of each of them, the conditions required to constitute the subject of an offence. The two or more persons concurring in the offence must be shown to have intended one and the same offence and to have done something towards committing it. When this is shown the punishment for the offence is not divided or apportioned among the several confederates; for, although there is objectively only one offence, yet this is subjectively multiple, in that it reproduces itself in respect of each of the parties. The punishment must, therefore, likewise reproduce itself in respect of each of them. But the degree of guilt of each of the parties may vary by reason of the circumstances of the offence and is to be determined independently of that of the others engaged in the same offence.

From this we may draw the two following principles which form the basis of the whole doctrine of ‘concursus delinquentium’:

1. A man may be held responsible for an offence, even though he may not have done the act which constitutes that offence, if he had done some other act which has helped towards the commission of the offence and had done the act in pursuance of a common design to commit that offence: "nihil interest occidat quis an causam mortis praebeat”,
2. Each of the parties to an offence is liable to punishment in respect of that offence but only in proportion to his individual guilt**:** “tot injuriam quot et personae injuriam facientium".

The rule above laid down that a man can be said to have concurred in an offence only in so far as he willed and intended that offence and has done something towards its commission, leads to the following conclusions:

i. There cannot be a 'concursus delinquentium' without a common design to commit a specific offence. The general principle that a man is responsible for an offence only if the act was voluntarily and knowingly committed by him, applies to each of the parties to the offence. Therefore, a merely physical participation in the act without a participation in the criminal design cannot be the ground of criminal liability. In other words, no matter how effectively the act of one person may have helped another in the commission of an offence, the former is not responsible as a co-principal or an accomplice, unless it can be shown that he did the act with the purpose of assisting the perpetration of that offence. Thus if a man does an innocent act of which another takes advantage to commit an offence, that man does not in any legal sense participate in the offence: as when, for instance, A lends a sporting gun to B for shooting birds, but uses the gun to shoot a man; or A, deceived by plausible pretexts, supplies in good faith a poisonous substance to B who uses the same to commit a murder. In those cases, there is clearly no 'dolus criminis' in A, and there is therefore, no participation by him in the offence committed by B: "voluntas non fertur in incognitum". There are, indeed, some acts which bear the 'conscientia sceleris' on the face of them, e.g. the instigation to commit an offence. But there are other acts which are not in themselves evidence of a guilty will and, in respect of these, it is essential to prove guilty knowledge on the part of the agent.

   The requirement of a common design among the parties to an offence raises the question whether there can be true criminal participation in respect of:

   a. involuntary (negligent offences) and
   b. offences committed from sudden passion or under mental agitation. We will discuss this question later on.

ii. The mere manifestation of a criminal intent without some active proceeding to cause it to be carried out, does not amount to a criminal participation. A defendant charged as an accomplice must be proved to have <u>done</u> <u>something</u> in furtherance of a common purpose, i.e. he must procure, incite or, in some other way specified in the law, encourage or assist in the act done by the principal. Thus, if A had formed the intention of killing B and had manifested such an intent but had done nothing in furtherance thereof and, at the same time, C actually kills B**,** C is the author of the crime: A who had merely intended the same crime and had manifested such an intention without doing any act towards the execution of it, is not in any way connected with the murder. In order that it may be said that a man has concurred in an offence committed

by another, it is necessary that he should have done some effort for the offence to be committed, so that a causal connection can be traced between such an effort and the commission of the offence.

From this it follows that:

i. 'negative' participation is inconceivable. In fact, the essence of participation lies in active co-operation between the parties so that they are all joint causes of the offence. But no man can be the cause of anything which he did nothing to bring about: For instance: A has manifested to B his intention to kill C. B who himself desires the death of C rejoices at the idea and so does nothing to prevent the murder to apprise the victim of his danger, or to disclose the fact to the Police. If C is, in fact, killed by A, the law cannot punish B for his inaction: his attitude towards the crime was purely 'negative' for he did nothing to aid or encourage it. The bare concealment of an offence contemplated by another or a tacit acquiescence does not make the person concealing or acquiescing a party to the offence.

   It must, however, be noted that there are some cases in which 'to do nothing' to prevent the commission of an offence, is in itself treated as an offence by the law. Thus, an officer of the Post Office who 'suffers' or 'connives at' the unlawful opening or detention of a postal article, is guilty of an offence (Sections 146,148, Criminal Code). So also, is any person who knows that an offence against the safety of the Government is contemplated by others, and does not disclose the facts to the Authorities (Sec. 61). But outside such cases in which the law expressly imposes a specific duty on all citizens generally or on an individual or a class of individuals to help to prevent the commission of certain offences, mere 'inaction' cannot amount to participation in the offence. But the notion of 'negative' complicity must not be confused with that of complicity by negative acts of omission which create a state of things favouring or facilitating the commission of an offence: as when, for instance, the servant omits to close the door of his master's house in order that his confederates may let themselves in to commit a theft. This is not 'inaction' but a very positive contribution to the commission of the offence.

ii. Concurrence <u>after the fact</u> is impossible. All that comes after the event cannot be the cause thereof .....it is extraneous to its happening whatever its connection with it. Thus, to receive stolen articles, or to harbour a fugitive from the prisons, or to conceal the dead body

of a murdered person, cannot in themselves be considered as a participation in the respective crimes. All such actions may be, in fact are, made punishable by the law as offences 'sui generis'[293], but it would be absurd to regard them as forms of accession to the crime. Nor can it be objected that such actions are very often but the carrying out of a previous promise; for, in any such case, the antecedent promise being made to appear, it would be such promise made before the event that would constitute complicity, as we shall see, and not its fulfilment after the fact.

iii. A third fundamental rule is that participation in an offence cannot be punished unless an offence has in fact been committed. It does not matter whether the offence has been completed or has merely reached the state of an attempt. But necessary it is that the result of the common design and the joint effort should be something in itself criminal and punishable at least as an attempt, in order that the several persons concerned may be held co-responsible. It is true that there are cases in which the instigation or incitement to commit an offence is made punishable even though no offence has been committed as a result thereof. (Section 59, 68, 69, 70 Criminal Code). But this is not a derogation to the principle above-stated: for the law punishes the instigation or incitement as an offence in itself in view of the danger it involves to the safety of the State or to the public good order: and not as a form of complicity. We shall return to this subject again later on and we shall consider the question whether there can be an attempted participation in an offence.

Finally, to the doctrine of the respective liability of each of the parties by reason of the circumstances of the offence, we shall devote particular attention in due course.

Acts of Complicity

Section 43 (combined with Section 48) of our Criminal Code provides as follows:

"Accomplices in an offence are:

1. those who have given orders for its commission

[293] Cfr. Section 155, 156, 253, 348, Criminal Code.

2. those who have instigated the offence by means of gifts, promises, threats, machinations, or culpable devices, or by abuse of authority of power, or who have given instruction for its commission
3. those who have procured the weapons, instruments or other means of which use has been made in the commission of the offence, knowing that the same were to be so used
4. those who, not falling under nos. 1, 2, 3 above, have in any way whatsoever aided or abetted the perpetrator or perpetrators of the offence in the perpetration or consummation thereof
5. those who have incited or strengthened the resolution to commit the offence or promised to give assistance, help or reward after the fact."

Concerning these provisions[294] (then Art.39 of the draft of 1842), Jameson wrote:

"This is the definition of acts of complicity in the French and Neapolitan Codes".

"The law of complicity includes, therefore all that is understood in English Law as coming under the term of principals in the second degree, i.e., present aiding and abetting the act to be done, and what is understood by accessories before the fact by counselling, commanding or instigating the offence. It justly includes, besides this, all knowingly furnishing of means or assisting in any of the preparatory steps adopted for the commission of offences".

"As to what are strangely enough called accessories after the fact in the law of England which is an offence quite different in character and degree of criminality from that of accomplice and consists in aiding the offender to escape from justice, that is properly treated as a different offence in those provisions of the project which relate to the obstruction of public justice. In cases where subsequent co-operation may legally infer previous participation in the offence, it will fall under the proof of complicity".

"This appears to be a more reasonable law of complicity than that of England and it is infinitely m 'e simple and natural".

These provisions which specify the several modes in which a person may become an accomplice in an offence committed by another, cannot be widened by any extensive interpretation or by analogy, and, therefore, any act which does not fall within the terms of those provisions cannot

[294] Except sub-para.5 which was added by Ord. VII of 1909

be considered as an act of complicity. "Moralmente parlando", says Carnot, "posso o esservi altri fatti colpevoli, mercè i quali può ciascuno rendersi complice di un reato: ma non può' darsi complicità legalmente punibile all' infuori di quella che entra in uno dei casi precisati dal detto art. 60. (Similar to our section 43). Non si può anche su tal punto ammettere analogia veruna, malgrado che passa sembrar grande"[295].

Now, proceeding to examine in fuller detail each of the forms of complicity recognised by the law, it will be convenient to group them under the two headings of 'complicity by Moral participation' and 'Complicity by Physical participation'. This is a distinction which is made by all continental writers who bring within the first group all those which execute, instigate, influence or encourage the determination of the principal to commit the offence: and within the second group all those acts which air or facilitate the material execution of the offence.

Complicity by Moral Participation

The first and most direct mode of becoming an accomplice in this way is by giving orders for the commission of an offence. What our law expressly contemplates in the first sub-paragraph of section 43 is the procurement or hiring of another person – the principal[296] - to commit the offence on behalf and in the interest of the procurer or hirer. In continental legal doctrine, this form of complicity is termed a mandate (Mandatum).

The three elements of Mandatum are:

a. the order, offer or proposal
b. the acceptance
c. the execution.

It is immaterial whether the make be gratuitous or for a reward. What is essential is that there should be a compact or agreement between the mandant (the accomplice) and the agent (the principal) for the perpetration of the offence. If the order or proposal is not accepted no question

[295] V. "Commentario al Codice Penale di Francia" tom, 1, p.I80.
[296] It should be noted that in Criminal Law the word 'principal' suggests the very converse of the idea which it represents in mercantile law. In the former, as we have seen, an accomplice proposes an act and the 'principal' carries it out. But in the law of Contract, the 'principal' only authorities an act and the 'agent' carries it out. For example, if by an inn-keeper's direction, his chambermaid steals jewels out of the guest's portmanteau, the maid is the principal in the crime whereas the master is an accomplice.

of complicity can arise. So also if, after a refusal, the person to whom the order was given or the proposal made, changes his mind and, without consulting the person who had given the order or made the proposal, commits the offence, he is solely responsible, for no connection as of cause and effect would exist in each case between the would-be procurer and the offence and, in the theory of complicity, such causal connection is essential to impose on the accomplice joint liability with the principal. If, notwithstanding the acceptance, the order or proposal is not in fact executed and no offence is committed, the would-be procurer is not liable to any punishment as an accomplice, for the simple reason, already stated, that there cannot be any question of complicity where no offence has been in fact committed or, at least attempted.

The procurement is this form of complicity must be continuing for if the procurer repents and actually countermands his order and the principal notwithstanding commits the offence, the original contriver will not be an accomplice. But this exception takes place on two conditions, namely:

i. The counter-manding of the order must be brought to the notice of the principal. If, for any cause, even if any accidental, the principal remains unaware of the revocation of the order, the fact of such revocation will not avail the procurer
ii. Notice of the counter-manding of the order must reach the principal in good time. The original contriver remains responsible if such notice is given to the principal when it is too late, because he has already completed or attempted the offence[297].

The procurement may be personal or through the intervention of a third person; in the latter case the intermediary, if aware of the offence contemplated, becomes himself an accomplice. It may also happen that the person engaged to commit the offence, after accepting the proposal, is unable or unwilling to carry it out himself and engages a third party to do it. It is clear that by so doing the former becomes in his turn the mandant of the latter and, therefore, an accomplice"[298].

The second form of complicity by moral participation consists, according to our law, in instigating the act of the principal by means of gifts, promises, threats, machinations or culpable devices, or by abuse of authority or power. These are all means which, in the eye of the law, are calculated to foster in the person instigated the will to commit the offence and to supply the necessary

[297] Cfr. Roberti op. cit., Voi. II, p.294 § 375 et seq* Pessina, op. cit., p.274
[298] This is the question discussed in Italian Text-books under the caption 'Comlicità di Comlicità (Cfr. Maino, op. cit. Vol. I, art. 64, p.219).

impulse for so doing by overcoming the natural repugnance which everyone feels to wrong-doing and to the consequent punishment. Mere instigation, unaccompanied by any of these circumstances, as by evincing a liking, approbation, or assent to another's criminal design of committing an offence is not sufficient to constitute this form of complicity*[299].

The gifts, promises, threats, etc., must be efficient, that is to say, such as are in fact calculated to determine the principal to commit the offence. With regard to promises it is generally taught that they must refer to something which the promisor himself engages to give or to do and, which present, at least, the apparent possibility of fulfilment on the part of the promisor. The mere representation of the advantages which could eventually accrue to the promise from the offence, independently of anything to be given or done by the instigator, could not constitute a 'promise' Nor would the promise of something which, on the very face of it, is incapable of fulfilment by the promisor.

In such cases one must needs conclude that the offence, is committed through the uninfluenced determination of the perpetrator himself who could not have been induced thereto by promises which he knew to be absolutely frivolous and which could not raise in him any expectation of advantage[300].

Likewise, as regards 'threats' the apprehension of the evil threatened must be real: for if the threats are on the face of them vain in view of the absolute incapacity of the contriver to carry them out, it cannot be said that the perpetrator of the offence could have been influenced thereby. Conversely, threats of personal violence, or of death, may constitute such moral coercion as to excuse the doer of the act from all liability: in which case no question of complicity will arise: the doer will be an irresponsible agent in the hands of the person using such coercion who would be the sole author of the offence.

The same thing may be said concerning the 'machinations or culpable devices' which induce in the doer such a mistake of fact as effectually relieves him of all liability. The person practising the deceit would solely be responsible for the offence.

[299] Cfr. Maino, op. cit. p.208; Roberti ibid. § 608.
[300] Roberti, ibid., p.338, § 612.

The instigation may also be by "Abuse of authority or power". This generally takes the form of a "command" to commit the offence. But there are also other ways in which a superior, without giving a direct order, may by specious pretexts, under the colour of his authority, induce a subordinate to commit an offence[301]. The extent to which obedience to superior orders may afford a defence has already been considered.

A third mode of concurring in an offence without actually taking part in the physical parts thereof, is by "giving instructions" for the commission of the offence. An advice in general terms unaccompanied by any instructions and not referable to a specific offence would not be sufficient to constitute this form of complicity. By 'instructions' the law; means information as- to the place, the time, the persons and other circumstances of the offence, and directions as to the means which may facilitate the offence.

The last form of complicity by moral participation is that of sub-paragraph 3 of Section 43 and consists in inciting or strengthening the resolution of another to commit an offence, or in promising to give assistance, help or reward after the fact. This sub-paragraph was added by Section 4 **of** Ordinance VIII of 1909. When this was being discussed in the Council of Government, the Crown Advocate (then Dr V. Frendo Azzopardi, C.M.G.) thus explained the difference between the forms of complicity covered by the terms of sub-paragraph 2 and the form now under discussion: "These cases are different from what is known as instigation to commit a crime. There is a substantial difference between inducement to commit a crime and the incitement or the strengthening of -the resolution of the offender. In the case of inducement, it is assumed that the idea to commit the crime is the effect of the inducement. In the case of the incitement or the strengthening of the offender's resolution it is assumed that the idea to commit the crime is already conceived in the offender’s mind, but he lacks courage carry it into effect, and somebody else strengthens his will. As regards the promise of help to be given after the fact, I may observe that it is a principle of criminal jurisprudence that no one can become an accomplice in a crime after the perpetration of that crime. We do not admit of that form of complicity known as accession after the fact. But if before the fact a promise is made of some help to be given after the fact, then that promise becomes a form of complicity because it encourages, the author to perpetrate the offence"[302].

[301] Roberti, op. cit., 616.
[302] Debates of the Council of Govt., VOL.XXXIII, C.145, 296; Cfr. Maino, cp. cit., art.64 § 343-344 •

Now it will be observed that in all the definitions of complicity so far considered, the law does not make use of any such words as ‘knowingly', 'maliciously', etc., to denote that the order, the instigation, or the incitement to commit the offence or the promise to give help after the fact must proceed from a wrongful intent on the part of the accomplice. Nor, was the use of any such words necessary. As we have already pointed out, the general principle that no one is liable for any offence unless he intended the same, applies also to accomplices. But above all you cannot conceivably order or instigate or incite a man to commit an offence unless you have the intention that it shall be committed: you cannot strengthen the resolution which another man has to commit an offence or give instructions as to how best another should commit an offence, unless you are aware that that offence is contemplated and you yourself desire that it be committed.

Complicity by Physical Participation

The forms of complicity which we have considered consist in words or acts which create or encourage another person's intention and determination to commit an offence. They are referable to the moral or formal element of crime. Those other forms of complicity which we will now consider consist in the performance of physical acts which materially assist in, or facilitate, the perpetration or execution or completion of the offence and are referable to its physical or material element.

The essential conditions common to those forms of complicity by physical participation are:

a. that the accomplice should be conscious of the offence contemplated by the principal and have the intention of assisting him in committing it;
b. that the accomplice should have done some act in furtherance of the criminal design which he shares with the principal;
c. that the act of the accomplice should have in fact helped in the commission of the offence.

Now, according to our law, a person may become an accomplice in the way, either:

i. by procuring the weapons, instruments or other means of which use has been made in the commission of the offence, knowing that they were to be so used; or
ii. by knowingly aiding or assisting in any manner the principal or principals in the acts of preparation or commission of the offences.

A person who procures to another the means with which to commit an offence clearly contributes materially to the carrying out of the criminal design. But, the procurement of the means is not by itself alone sufficient to constitute complicity. In accordance with the principles above-stated, two other conditions must concur. The first is that the means should have been procured with the knowledge that they were to be used for the commission of an offence: the second condition is that such means have in fact been so used.

The former of these conditions is a logical consequence and an application of the principle that there cannot be guilty participation in an offence without a common design. The act of a man who, unaware of the criminal purpose of another, provides him with means which the latter uses to commit an offence, does not make that man an accomplice in this offence. Guilty knowledge on the part of the person supplying weapons, instruments or other means must be clearly proved: but very often the nature itself of the means supplied (e.g. a dagger or a false key) will furnish a clear indication of such knowledge.

The necessity of the second condition is also evident: for, where no use has been made of the means procured, even though with a wrongful intent, in or for the commission of the offence, it cannot be said that they have in any way contributed to the violation of the law by the act of the principal without the use of those means. Just as participation by instigation or incitement is not punishable unless it has in some degree influenced the will and determination of the perpetrator of the act, so likewise participation by physical acts does not constitute complicity when it has in fact had no influence whatever upon the happening of the criminal event : "I mezzi somministrati devono presentare il carattere dell' idoneità allo scopo ed avere esercitato una reale efficacia nell Esecuzione del reato. L'Efficienza dell'atto - dice con formula sintetica il Carrara – e' element indispendabile della complicità"[303].

It must, however, be noted, as Roberti points out[304], that it is not absolutely essential that the means provided should have fully served the precise purpose for which they were supplied. If, for example, the accomplice has procured a weapon to the thief to be used by him in case of opposition or resistance to the theft, and the thief has succeeded in committing the crime without making an actual use of the weapon, the accomplice is nevertheless liable if the weapon has in

[303] Maino, op. cit., art.64 § 346.
[304] Op. cit., § 653.

any way whatever been of use, as by intimidating the victim or even only by giving confidence to the thief. And, likewise, it is not essential that the thief should have consummated the theft, it being sufficient that he should have attempted it.

We shall say a little more about this in discussing the question whether an attempted complicity is punishable. The other form of complicity by physical participation consists, as we have said, in knowingly aiding or assisting in any manner the principal or principals in the acts of preparation or consummation of the offence. Here again it is essential that the accomplice should have acted "knowingly", that is, with the consciousness and intention of co-operating for the perpetration of the offence. If a man does an innocent act of which another takes advantage to commit an offence, that man is not guilty as an accomplice. After all this is only an application of the general principle, we have already mentioned that there cannot be guilty participation without proof of a 'common design' between the parties for the commission of the offence.

And the act of the accomplice must have not only been done 'knowingly', but it must also have 'in fact' helped the principal in the preparation or the consummation of the offence. "L'assistenza dev'essere cooperativa, tale cioè che abbia esercitato una influenza nell'uno, o nell'altro degli indicati fatti"[305].

When, in this form of complicity, we speak of aid given in the preparation of the offence, we assume of course, that such preparation is followed by, at least, a commencement of the execution of the offence on the part of the principal: there cannot be complicity, as we have seen, unless there has been at least an attempted offence.

And when we speak of aid given in the acts of consummation of the offence, we assume that the aider has not himself taken an active part in the very act that constitutes and consummates the offence; for in that case he would be a co-principal and not an accomplice.

Mere 'presence' may be sufficient to constitute this kind of complicity: as, for instance, where the accomplice stands outside the house, watching to prevent surprise or the like, while his companions are in the house committing a crime. Similarly, 'words' which assist directly the

[305] Roberti, op. cit. § 662.

commission constitute material complicity; as when the victim by deceitful words to the place where lies in waiting[306].

Special Questions

Having examined the general rules applicable to all forms of 'concursus delinquentium', and the several acts which constitute complicity under the law, we are now in a position to furnish an answer to the following questions:

1) Whether there can be a true concursus in respect of:
   a. Involuntary (negligent) offences, and
   b. Offences omitted from sudden passion
2) Whether there can be an attempted complicity
3) Whether complicity in a criminal attempt is punishable.

We will deal with these questions in the order given.

1A. Involuntary Offences

In view of the fundamental rule that there cannot be true participation in an offence unless the parties have acted in pursuance of a common design, or, in other words, unless the party charged as a co-principal or as an accomplice has 'knowingly' aided or abetted or in some other way as aforesaid encouraged or incited the commission of the offences by the principal, so that the mind and the will of both of them were directed to the same offence, it is generally held that the notion of a 'concursus deliquentium' is incompatible with the definition of an involuntary offence. Pessina writes: "Nei fatti colposi non vi può' essere concorso al reato, perocchè mancando in essi la 'volunt s sceleris', ma può esservi concorso di più voleri in un solo e medesimo proponimento criminoso"[307]. Where an involuntary crime is the result of the concurrent negligence of two or more persons, each of them is accountable for his own act: as where A leaves a loaded fire-arm about which, being imprudently handled by B, goes off and kills another person; or where several persons imprudently light artificial fires in an inhabited area and cause a fire to break out[308].

[306] Maino, ibid., §347
[307] Op. cit., p.248.
[308] Maino, op. cit., p.201

But it may be noted that in the Italian Penal Code of 1930, participation in negligence crimes was expressly recognized. Section 113 provided that when ”in a negligence crime (delitto colposo) the event has been caused by the co-operation of two or more persons, each of them is liable to the punishment prescribed for the same crime itself,” In support of this provision it is stated that, while it is true that there cannot be criminal participation in an offence unless this is committed in pursuance of a common design it is nevertheless obviously possible to find this common design in the case of a negligence crime if the voluntary participation is viewed with reference to the fact constituting the negligence, imprudence etc., and not to the event (damage or injury) caused by that fact. Thus if A cuts the wood, B collects it, C sets it on fire, in a dangerous place, all three acting with the common purpose of warming themselves, and a fire is caused, they are guilty as co-principals in the involuntary crime in as much as it was their joint actions which produced the negligent fact from which the event complained of ensued. So, likewise, if a coach-driver runs over and kills a road-traveller while driving the carriage at a furious speed at the instigation of his master who is riding at his side, both would be guilty of involuntary homicide, the driver as principal and the master as an accomplice. “Se è naturale che nei delitti colposi non vi sia concorso ne di volontà ne di azione rispetto all’ evento, e altrettanto ovvio che possa esservi partecipazione nel fatto costitutivo della condotta colposa causale”[309]

In England it was held that if two persons driving carriages incite each other to drive furiously and one of them runs over and kills a man, it is manslaughter in both. Even a mere passenger in a vehicle may be liable as a principal in the second degree for manslaughter where a common design that the vehicle should be driven in a reckless manner exists between him and the driver and death ensues from his reckless driving. So also if three persons amuse themselves by shooting with a rifle at a target without taking proper precautions to prevent injury to others, and one of the shots kills a man, all three are guilty of manslaughter although there is no proof which of the three fired the fatal shot[310].

1B. Crimes from Sudden Passion

Some writers hold that concursus is impossible in respect of offences which are unpremeditated and committed in the transport of a sudden passion (reati d’impero). This argument is that the

[309] Manzini, op. cit., Vol. II, p. 476.
[310] Archbold, op. cit., pp.1442-; Hals., op. cit., Vol. IX, p.30, n (h).

state of mind and the feelings of the person acting in such circumstances rules out the possibility by the existence of a common design between them. In respect of offences so committed by several persons each one of them answers for his own act without reference to the acts of the others: "ictus uniusquisque contemplari oportet". The opinion, however, prevails that - as with regard to attempts - the question is not one of law but one of fact and evidence, and cannot be determined by a general and abstract rule. It is not impossible that two or more persons may have formed an instantaneous common intention to commit one and the same offence, although both agitated by sudden passion. What the law requires to impose joint responsibility is not necessarily a pre-concerted plan or calculated premeditation: a common purpose formed on the spur of the moment is sufficient[311].

2. Attempted Complicity

We have already seen that there cannot by any question of complicity unless the offence which it was sought, to instigate, encourage or assist has in face been committed or, at least, attempted. From this it follows that there cannot be such a thing as a punishable attempted complicity. The instigation, etc., may be punishable as an offence in itself (e.g. Sections 68 (1), 69, 70 Criminal Code) but not as an attempted complicity. Allorché il crimine, alla esistenza del quale l'agente ha voluto contribuire, non ha ancora ricevuto un princìpio d'esecuzione, un tentativo di partecipazione non può' ammettersi, per la ragione che ò impossibile di aver tentato di co-operare ad una impresa che non è stata mai cominciata"[312]. This view is concurred in by all the best accepted writers[313].

And even where the offence which it was intended to incite or abet has been actually committed, there would still be a merely attempted complicity not liable to punishment if the act of the accomplice has not in fact had any influence whatsoever in regard to the commission of the offence. "Niuno porge veramente aiuto al delinquente se non colui il quale fa qualche cerna eho torni utile all'attaziene dei reato} sicche* l'aiuto solo in quanto si è avverato come un dato vento può' agevolare il malefizio e concatnarsi ad esso"[314]. Carrara illustrates this by several examples: for instance. A wrote to B telling him of his anger at the discovery that his wife was unfaithful to him. B wrote back inciting A to kill her and giving him instructions as to the best way of doing it,

[311] Pessina, op. cit. p. 248; Maino, op. cit., pp. 200; Manzini, op. cit., Vol. II, p. 48l.
[312] Hans, 'Princ. Gen. de droit penal belge' t.l.n. § 500.
[313] Carrara, 'Grado ecc.' § 329 (opuscoli, Voi. I); Pessina, op. cit., p, 278; obert, op. cit., V.II §; Dalloz, V. Tentativo N. 104
[314] Possina, ibid; Orivellari, op. cit., art. Vol. 4 p.92 § n.92.

but B's letter reached A when he had already killed his wife. Or again: A confided to B his intention of killing C by poison and asked him to provide it for him. B procured the poison and gave it to A; but A, instead of poisoning (J, stabbed him. In neither case says Carrara, is B guilty ns an accomplice, for neither his letter which reached the principal when the murder had already been completed in any way assisted such murder; nor the poison procured by him assisted the stabbing. B's action in both vases is morally reprehensible but does not constitute any legal guilt, it amounted to an attempt on his part which did not, in any way, avail the principal[315].

3. Complicity in an Attempted Offence

The question whether complicity in an offence which has not been completed but has been attempted is liable to punishment, must evidently be answered in the affirmative. A criminal attempt is punishable as an offence though it is but an incomplete or inchoate offence, and if objectively there is an offence, responsibility thereof is contracted by all those who have concurred in it. The accomplice who has effectually contributed to an event which in made punishable by law, necessarily shares the liability in respect thereof. The fortuitous event which prevents the consummation of the offence, naturally avails the accomplice as it avails the principal, in the sense of reducing his liability but not in the sense of excluding it completely.

In dealing with the subject of criminal attempts we have seen that the offender may be exempt from, punishment even after committing acts which amount to an attempt, if the offence is not completed owing to his voluntary desistance. It is now asked whether the voluntary desistance which so avails the principal offender, benefits also his associates.

There is, of course, no doubt that if the person instigated, incited, aided or abetted, repents and gives up the criminal enterprise before there is any commencement of the execution of the offence, his repentance benefits also the instigator, contriver, aider or abettor. In such case as there would be no offence committed, there cannot be any guilty complicity. We have already seen that attempted complicity is not admissible as an offence in itself in the special cases established by the law.

[315] But see Maino, op. oit., art. 64 § 348.

As to what happens when the principal offender repents and turns back but after he has already committed acts which objectively constitute an attempt, opinion among the writers is divided.

Impallomeni thinks that even in such case the desistance of the principal offender should avail not only himself but also his associates[316]. Carrara takes a different view. In any such case, according to this eminent jurist, the attempted offence objectively subsists, and this is enough to give rise to the liability of the accomplice. The principal offender who desists in time, escapes punishment because the non-prosecution of the criminal action is, in his respect, due to a voluntary cause.... But as regards the instigator, aider or abetter, the desistance of the principal offender is an accidental cause independent of his will and, therefore, while it no doubt avails the accomplice to escape punishment for the completed offence just as any other fortuitous circumstances preventing the completion of the offence would have availed him, it will not help him to escape punishment for the attempted offences[317]. This view is supported by Maino[318], and Crivollari, and appears to be the more consistent with our law. In fact, section 42 does not say that, in the case of voluntary desistance, the acts already done shall, as such, cease to be punishable. But it refers in personal terms to the effects of voluntary desistance, saying that the person (offender) who had undertaken these acts shall only be liable to the punishment for the acts done if they in themselves constitute an offence, when the intended crime has not been committed owing to his voluntary desistance. This language tends to show that the benefit of exemption from punishment in respect of the attempt does not avail others.

To complete this part of our subject we must now consider how the desistance or repentance of the accomplice himself affects his own liability.

A man commanded another to commit an offence but then countermanded his order. Discussing the first form of complicity under section 42 (i.e. the 'Mandatum') we have already seen that if the agent became aware in time of the revocation of the order given to him and, nevertheless, proceeded to commit the offence, he only is accountable for it. But if the person who gave the order did not make his change of mind known to the agent in time, he remains co-responsible for the offence: this was determined by him and he must blame himself if he did not change his mind or get busy earlier so as to render ineffective the original order by him[319].

316 "Codice Penale Illustrato", Vo. I. p. 215
317 'Grado della forza fisica del delito' § 342, 343, Opuscoli, Voi. I.
318 Op. cit., art. 63, § 332.
319 Chaveau et Helie, Vol. I, Cap. XII, n. 279.

Carrara applies the same principle to all other forms of participation in an offence. But he makes this distinction: if the act of complicity consisted merely in creating or fostering in the actor the intention of committing the offence, the timely repentance of the accomplice and his representation to the actor of a contrary intention will effectually break the original criminal compact and sever all connection of the accomplice with the offence committed by the actor all on his own. If, on the other hand, the act of complicity consisted in facilitating the commission of the offence, as, for instance, by aiding in the preparation of the offence, or by giving instructions or providing the moans necessary or required for the commission of the offence, or by giving instructions or providing the means necessary or required for the commission of the offence, then the effects of such complicity continue to subsist notwithstanding the repentance or change of mind of the accomplice who, therefore, cannot exonerate himself from liability in respect of his participation unless he proves that he did all that it was possible for him to do to prevent the offence, or, in other words, to negative the effects and check the consequences of his original participation and assistance[320].

Crivellari[321], and Roberti[322] do not concur in the view that an accomplice who had given counsel or instructions (or provided the means) to the principal for the commission of the offence can save himself from punishment by anything he might do to prevent the offence, unless he has, in fact, succeeded in preventing such an offence; “per quanto siansi (i complici) ad operati as impedire il delitto, pel quale avevano dato consigli ed istruzione, se questo avviene, sara sempre una conseguenza del loro operato dovranno quindi rispondere della loro co-operazione avanti la giustitìa penale. Il pentimento potrà attenuare non togliere la responsabilità poiché rimangono per sempre la causa del delitto avvenuto.”

Punishment of Accomplices

"Accomplices in a crime” - says Section 44 of our Criminal Code - “are liable to the punishment established for the principal, unless the law in particular cases, otherwise provides”. This rule, as Jameson pointed out in his report, is in accordance with the law of France and that of the United Kingdom. In England but little practical importance now attaches to the distinction between

[320] Programma, § 496, 497; ‘Grado della forze fisica del delitto’, § 346 (Opuscoli Vol. I); Pessina op. cit., p. 275.
[321] Op. cit., Voi. IV, p. 132, n. 58.
[322] Op. cit., Voi. II, p. 371, § 645.

principals in the first degree, principles in the second degree and accessories before the fact, for the maximum punishment prescribed for any given crime is the same in the case of all the three classes. In modern times, the only important surviving difference between the various grades of accomplices consists in the fact that a much more lenient punishment is awarded to the man who is only an accessory after the fact. Instead of being, like accessories before the fact liable to the sane heavy maximum of punishment as the principal ho is punishable with nothing more than two years imprisonment, with or without hard labour (except in the case of murder where the maximum punishment for an accessory after the fact is penal servitude for life[323].

We have already seen that accession after the fact is not a form of complicity recognised by our law. The system of making accomplices liable to the same punishment as the principal offender is criticised by many writers. Blackstone, following Beccaria (Cap. 73), thought that "perhaps if a distinction were constantly to be made between the punishment of the principals and accessories, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself, as his danger would be greater than that of his accomplices by reason of the difference of his punishment"[324]. Apart from this utilitarian argument (which is not, in fact sound), other jurists point out that justice itself requires that the punishment of each of the several persons concerned in an offence should be proportionate to the more or less important share taken by him in the commission of the offence.

But on the other hand, it is important to prevent that concert and mutual assistance among delinquents without which the greater number of offences would not be perpetrated. More ever, it is extremely difficult, not to say impossible, to distinguish in the abstract the cases in which the accomplices should be liable to the same punishment as the principal offender from those in which they should be liable to a lesser punishment. And, in any case, if there should be any hesitation as to the reasonableness of placing the accomplice in all cases on the same level with the actual perpetrator, the latitude of punishment allowed by the provisions of the law is practically sufficient to admit of an appropriate distinction, if such shall appear in evidence. For, it must be clearly noted that, although by the express provision of the law, an accomplice is liable to the same punishment prescribed for the principal offender, it does not follow that the accomplice must necessarily in every case be sentenced to or awarded the same amount of punishment as the

[323] Kenny, op. cit., p. 90. Incidentally it may be noted that in England all distinctions of imprisonment have boon abolished by the Criminal Justice Act, 1948.
[324] 4, Comm. 40.

principal offender. It rests with the court which has the opportunity of assessing the degree of culpability of all the persons participating in the offence, according to the more or less prominent part taken by each of them, to award to each the appropriate amount of punishment within the latitude allowed by the law[325].

The trial and punishment of an accomplice is independent of that of the principal. Section 47 lays down that "when the material existence of an offence is established, the accomplice shall be liable to be punished independently of the principal and notwithstanding that such principal shall die or escape or be pardoned or otherwise delivered before conviction, and this even in the case in which it is not known who in particular is the principal"•

This is a wise provision. In England the mischievous rule of the Old Common Law, that the accessories to a crime could not be convicted until their principal was convicted, has long ago been abolished by Statute: so that now all accessories may be indicated even though the principal felon has not yet been convicted, or even is not amenable to justice[326]. But so that the accomplice may be proceeded against and punished it is absolutely essential that the material existence of the offence be established. In other words, it must be proved that an offence against the criminal law has objectively been committed. We have already seen that unless a criminal offence has in fact been committed i.e. completed or at least attempted there cannot be any question of criminal complicity: "socius delicti non intelligitur sine auctore delicti". But once the material existence of the offence is made to appear, it is not further absolutely essential that the principal should have been already tried or convicted or should have suffered the punishment: nor is it essential that it should be known who, of the two or more persons concerned in the offence, actually perpetrated the act. This last proposition deserves particular attention.

Our law has sanctioned by positive enactment the doctrine, first elaborated by Neapolitan case-law, of the so-called ‘correlative complicity’ (complicità corrispettiva or correlativa). This means that when two or more persons have determined to commit an offence in common and, in the act of carrying out the common design, only one of them actually perpetrates the act constituting the offence (i.e. is the author or principal) but it is not possible to ascertain who it is, they are all punished as accomplices[327]. This doctrine arose under a system of law which, it would seem,

[325] For a very interesting discussion on this point, cfr. ’Debates of the Council of Govt., 1908-1909, Voi. XXXIII, pp. 314, 334,980; cfr. also Chauveau et Helis, Voi. I, Cap. XII, n 287.
[326] 28 and 29 Vict. C. 94, ss l. 3.
[327] Cfr. Pessina, op. cit., p. 265

made accomplices liable to a lesser punishment than the principals: in fact, it was but an application of the maxim "in dubio pro reo." In the absence of clear evidence as to who, among the two or more persons known to have concurred in the offences, was the principal, it was considered unjust and excessive to consider them all as co-principals and subject them to punishment accordingly: they were, therefore, all considered as accomplices: "La cosidetta teoria della 'complicità' corrispettiva non e' quindi altro se non un' applicazione della massima 'in dubio pro reo': una questione di prova. E' certa la reita* di tutti: non si conosce chi sia l'autore: si puniscono tutti come complici, e cioè nei Limiti dello prove raccolte".....[328]..... "il che import applicare a tutti indistintamente fra due ipotesi la meno severa[329]." And, in fact, section 378 of the Italian Penal Code of 1889 which applied this doctrine of correlative complicity in respect of homicides and bodily harms, provided a punishment which is considerably less than that which would have been awardable to a known principal.

This historical basis of the doctrine under reference, has no correspondence to our law, which, as we have seen, makes accomplices liable to the same punishment as the principal offender. The aim of our law seems merely to have been that two or more persons accused as 'co-principals' in an offence which is proved to have been committed by one or more of them shall not be acquitted and escape punishment merely because it cannot be proved who of them it was who actually committed the offence: they are all considered as accomplices and punished accordingly, provided it appear on the evidence that all of them took a sufficient part in the offence to qualify them as accomplices.

This 'correlative complicity' contemplated in section 478[330] of our Criminal Cade, differs from the case of homicide or bodily harm caused in an accidental affray dealt with in section 251. For the theory of correlative complicity to be applied it is essential that the persons standing trial should be proved to have been guilty of actual sets of complicity as defined by law; whereas in the case of homicide or bodily harm caused in an accidental affray the law visits with a special punishment all those actively asking part in the fight in opposition to the person killed or injured, for the more possibility or presumption of their guilt[331]. In conclusion the doctrine of correlative complicity in our law applies to all offences generally and not only to homicides and bodily harms.

[328] Maino. Op. cit., art 64 § 355.
[329] Pessina op. cit. p. 265
[330] Pessina op. cit. p. 265
[331] Maino, ibid, § 355.

Respective Liability of Each of the Parties to an Offence

Although the rule is, as we have seen that accomplices are liable to the same maximum punishment as the principal offender, yet our law wisely provides that in the trial of offences, where two or more individuals are concerned, the relative guilt of each is to be determined independently of that of the others engaged in the same offence. This is a proper restriction upon the generality of the previous provisions[332].

It is, therefore, laid down that:

When two or more persons concur in an offence:

a. Personal circumstances relating solely to any one of them, whether he be a principal or an accomplice and which, in regard to him, exclude, aggravate or mitigate the punishment neither benefit nor prejudice the others concerned in the same offence.
b. Any act which aggravates the offence committed, by one of them, be he a principal or an accomplice, is imputable only:

i. to the individual himself who has perpetrated it.
ii. to those with whose previous knowledge it has been perpetrated
iii. to those who, having knowledge thereof at the time of perpetration and being able to prevent it, did not do so.

These provisions reproduce with certain improvements articles 76 and 77 of the Neapolitan Code of 1819 and deal with the important doctrine of the ‘Communicability of the circumstances of the offence’ (Teoria della responsabilità dei condelinquenti in ordine alle circostanze). By 'circumstances' of the offence is meant, in general terms, those incidents and conditions accompanying or surrounding the wrongful act which the law selects as being relevant and having a bearing on the degree of guilt of the parties to the offence. They are said to be personal if they are inherent in the person of the offender and material if they are inherent in, or form a constituent part, of the criminal act itself.

[332] Jameson, ibid., p. 61

Personal Circumstances

The law states that circumstances which are solely relative to the person of any of the parties to an offence and which, in regard to him, exclude or diminish or aggravate the punishment shall neither avail nor make worse the position of the other parties.

It will he noted that the law does not mention those personal circumstances which constitute an essential ingredient of the offence, so that, if the act were committed by some other person who has not that personal quality, it would not he criminal: e.g. the condition of a 'husband or wife' in the crime of adultery (section 206, 207), or the condition of 'trader1 in the crime of bankruptcy (sections 198, 199). Such personal condition in the principal is a constituent element of the definition of the particular crime and, to relieve the accomplices in such cases of the consequences arising out of the personal conditions of the principal, would he to grant them impunity : which is absurd[333].

But all other personal circumstances which, without being an essential ingredient of the offence itself, exclude or reduce or increase the punishment in respect of one of the parties to the offence are not 'communicable' to others. This rule, clear as it is in itself, is not free from difficulty in its application.

There are certain circumstances which are so intuitively personal that no doubt can possibly arise in respect of them, e.g. the age, the state of mind, drunkenness, deafness and dumbness, certain family relationships, etc. If one of the parties to an offence is, by reason of any of these circumstances, exempt from punishment or liable to a lesser than the ordinary punishment, the same benefit does not evidently extend to the other parties in whose respect the same defence or excuse cannot be set up. Thus if a minor over fourteen years of age, but under eighteen years and another person over eighteen years of age commit an offence together as co-principals or as a principal and an accomplice, the adult will not benefit by the diminution of punishment accorded to the minor under section 3. Likewise, if two or more persons are concerned in the offence of assisting in the offence of harbouring a fugitive from justice under sections 155 or 156, the person who is the husband or the wife, or brother or sister, etc., of the fugitive is exempt from punishment (section 157), but the co-offenders who do not themselves stand in such relationship to the fugitive

[333] Carrara, Opuscoli, Voi. I., § 367

do not share in that exemption. To have extended the benefits of such personal circumstances would have offered to delinquents an easy means of securing impunity or a reduction of punishment by the simple expedient of associating with themselves in the criminal enterprise other persons to whom the law accords its special indulgence by reason of such circumstances.

While this rule with regard to personal circumstances which exclude or extenuate the punishment in respect of any one of the parties is concurred in by all the writers and in all systems of law, some controversy exists concerning personal circumstances which aggravate the punishment. One school of thought maintains that when the aggravating personal circumstance is known to the other confederates who concur in the same offence, the increase of punishment should be incurred by all of them. But the very great majority of jurists hold the more rational view that just as the extenuating or exempting personal condition of one of the parties does not benefit the others so justice requires that an aggravating personal circumstance should only prejudice the party in whose respect it exists and not also the others. Thus, if one of the parties to a crime is a recidivist, the other parties who concurred with him in the offence and who are not themselves recidivists do not suffer the increase of punishment which the law attaches to that personal condition.

Now in most cases the law aggravates the punishment in consideration of certain personal circumstances of the offender because, in view of them, he violates a greater duty especially incumbent upon him and not incumbent upon others. For instance, the crime under section 217(defilement of minors) is punished more heavily when it is committed by an ascendant or by the guardian of the minor in view of the special duty which the ascendant or the guardian has towards the minor. Again, the punishment of bodily harms is increased when they are committed upon the person of the father, of the mother, of an ascendant or of a brother or sister (section 236) in view of the special duty of love and respect which was owed by the offender to such intimate relations. In all these cases the aggravation of punishment does not affect an outsider concerned in the same offence as a co-principal or an accomplice.

But in some other cases the law prescribes an increase of punishment in consideration of the personal condition of the offender, not because or not merely because he violates a special duty incumbent upon him, but because his personal condition facilitates and serves as the means of the commission of the offence. This occurs for instance, where the thief succeeds in gaining entry

into the house where the theft is committed because the servant of the owner of the house, acting in concert with the thief, took advantage of his situation and left the door open.

As to the circumstances of this kind, there is considerably controversy among the writers. The great majority of Italian Jurists vote for the opinion that the penal consequences arising out of such personal circumstances are incurred not only by the party in whose respect they exist but also by all the other parties "perchè messe a profitto da tutti i comparte cipi si trasformano in condizioni di fatto, condizioni reali al pari delle circostanze materiali e, agevolando il reato, non rimangano estrane all' obbiettività di questo la quale colpisce tutti coloro che scientemente vi prendono parte ..... Cosi si comunica la qualità di 'domstico' nel furto, perchè l'abuso della fiducia derivante dale scambievoli relazioni di prestazione d'opera fra il delinquente e il derubato serve all' esecuzione del furto e quindi al raggiungimento dello scopo criminoso comune ai partecipi, e per identità di ragioni I compartecipi dovrebbero subire le conseguenze penali della qualità di 'pubblico ufficiale', quando per abuso di questa sia stata commessa una sottrazione da luoghi di pubblico deposito, o un peculato, o una concussione: poiché in tutti questi delitti . se la qualità di pubblico ufficiale aggrava la pena perchè il malfattore ha violato un maggior dovere incombente a lui e non ad altri, essa inoltre ha servito all' esecuzione del reato; perciò deve comunicarsi al compartecipante"[334].

Indeed, section 65 of the Italian Code of 1889 expressly laid down that "Circumstances and conditions, whether permanent or temporary, inherent in the person, by reason of which the punishment of any one of the parties to the offence is increased shall be charged also against those who were aware of them at the time of participating in the offence, if such circumstances or conditions have served to facilitate the execution of the offence.

However, it must be noted that section 45 of our Criminal Code does not make any such distinction: it lays down in general terms that circumstances relative solely to the person of any one of the parties to an offence do not operate either in favour or to the prejudice of others. Nor does it seem that any such distinction was made under the old Neapolitan Code, under which it was held, for instance, that the aggravation arising out of one of the confederates being, in a crime of theft, the 'servant' of the person robbed or, in the case of a crime of forgery of a public document, a 'public officer', did not extend to the other confederates[335].

[334] Cfr. Crivellari, op, cit., Vol IV, pp. 191-192; Maino, op. Coit., art 65, § 362; Carrara, Programma, § 509
[335] Roberti, op. cit., Vol. II, p. 455 § 696, n.

In view of this there would not seem to be any justification for holding that, under our law, a personal circumstance in one of the associates in a crime which aggravates the punishment in his respect, can operate to the prejudice of the other associates even if it might appear that the reason for such aggravation is that such personal circumstance facilitates the commission of the crime. The matter is not, however, free from some doubt. In 'Rex vs. Victor Fava et' (6-VII-1943) His Majesty's Criminal Court held that the higher punishment applicable in the case of forgery under section 191 of the Criminal Code, when committed by a 'public officer', did not extend to an accomplice not being himself a public officer. But the reason premised to this decision, viz: "That in such case the aggravation is not based on the ground that the personal circumstance facilitates the commission of the offence, and, therefore, as a purely personal circumstance, it is not communicable", might imply that the Court might, in an appropriate case, hold that a personal circumstance may be communicable if it facilitates the commission of the offence.

Material Circumstances

To this class belong the means, the time, the place, the mode of execution, etc. of the offences.

In some cases, these circumstances constitute an essential ingredient of the offence itself. Thus, for instance, instigation to the perpetration of crimes against the Safety of the Government, constitutes a crime under section 59 of the Criminal Code, when it is by means of speeches delivered in public places or meetings the contravention of uttering scandalous or indecent words, is committed when the words are uttered publicly. In these and similar cases it is the circumstance of means, place, etc., that makes the act criminal, so that the same would not be punishable unless accompanied by such circumstance.

But in other cases, the said circumstances merely aggravate the offence, whether because they constitute in themselves separate offences or because they manifest a greater degree of malice and perversity in the offender. Thus to be in possession of a fire-arm or other offensive weapon without a licence is an offence in itself; but when such firearm or weapon is made use of to inflict a bodily harm, then the use of those moans, aggravate 'the punishment for the bodily harm (section 231. Again, bodily harm is an offence in itself; but when it is committed in the act of perpetrating a theft, it becomes an aggravation of the theft, (Section 275).

Here we are concerned with those circumstances which aggravate the principal offence and with, those acts committed by one of the parties which constitute a more serious offence than that forming the subject of the original common design.

Under the French Code, when several persons combined together to commit an offence, each of them was held answerable for any graver offence resulting from the act of any one of them, even if the aggravating act was done without the knowledge or connivance of the others.

Our law makes a far more equitable and just provision as follows:

"When two or more persons concur in an offence, any act which aggravates the offence committed by any one of them, be he a principal or an accomplice, is imputable only."

i. to the individual himself who perpetrated the act
ii. to these with whose previous knowledge it was perpetrated
iii. to those who, having knowledge thereof, at the time of perpetration, and being able to prevent it, did not do so.

That the aggravating act would be imputable to the perpetrator himself requires, of course, no explanation. Nothing is more natural than that a man who actually commits a graver offence than that which he had originally combined with others to commit, should be held answerable for such grader offence. But so that the liability for such graver offence may be extended to his confederates, it is essential to prove that they had ‘knowledge’ of the aggravating act, either previously to or at the time of the commission of the act: for they are only answerable for such acts committed by their associate as were done in execution of the common design or with their consent or connivance. Knowledge acquired subsequently to the commission of the act will not aggravate their position. Therefore, a receiver who, prior to the commission of a theft, has promised to assist the thief by concealing the stolen property, though no doubt an accomplice by reason of that promise, will not be liable for the aggravation of ‘breaking’ if, neither at the time he made the promise nor at the time of the commission of the theft by ‘breaking’, he was aware that the thief would have used such means.

And where the aggravating act did not form part of the pre-concerted plan, but became known to the other parties only at the time of its perpetration, such knowledge alone will not make them

liable for the aggravation; it must also be shown that, being able to prevent the act, they did not do so. Thus, if the theft contemplated by the parties, degenerates into a murder owing to the unsuspected presence of the owner in the house invaded by the thieves, those of them who, while one of them grapples with the owner and inflicts the mortal blow, stand by and do nothing to prevent it, are liable with the actual perpetrator for the graver crime.

But lest the rule requiring knowledge of the aggravating act on the part of the confederates should be carried to absurd consequences, it must be remembered that the law requires proof of such knowledge for no other reason than the judge may be satisfied that even the aggravating act fell within the

contemplation of such confederates. Therefore, a man who knowingly supplies false keys or pick-locks for the purposes of the commission of a theft will not be suffered to say that he is not liable for the aggravation of means, and it is not necessary to enquire whether, at the time, he was certain that the thief would have found the safe locked and would have found it necessary to make use of these instruments. Likewise if a man, with the object of aiding the commission of a theft, assists the principal to enter into the house, knowing that he had provided himself with a weapon for the purpose of facilitating the theft if it should be found so necessary, will be co-responsible for the theft aggravated by ‘violence’, if the principal actually 'makes use of that weapon in perpetrating the theft. Nani* puts the rule in the following words: "Se la scienza del complice non si estendesse alla qualità del delitto medesimo, non potrebbe a lui comunicarsi quella distinta imputabilità- la quale è inerente alle qualità ignorante del delitto, e conseguentemente non potrebbe essere colpito, da quella speci da quell grado maggiore di pena che la legge avesse riservato al delitto cosi qualificato . . . . Questa scienza per altro dovrebbe presumersi per le qualità connesse col delitto conosciuto o talemento dipendenti dalla non ignorata commissione del medesimo che la commissiono del delitto importasse ancora la pre videnza delle qualità medesima

‘Principii di Giurisprurdenza Criminale’., §155, n.

The rules above enable us to give an answer to the question we have already touched upon but re served for fuller treatment, viz. what happens when an accomplice orders or advises or instigates or helps in preparing one offence, but the principal commits another?

When the offence committed by the principal is the same offence actually ordered, or advised, etc., but is committed by different means from those commanded or agreed upon, no doubt arises as to the liability of the accomplice: as, for instance, when A hires B to poison C with intent to kill him and instead of poisoning him he shoots him, A is nevertheless liable as an accomplice to the murder.

But when the principal causes a more serious event or result than was in the contemplation of the accomplice, then the doctrine commonly accepted on the continent may be briefly stated as follows:

i. If the principal deliberately commits an offence which is wholly different from that ordered or advised by the accomplice, the latter is not liable for the offence committed. For instance, the principal is ordered or advised to burn a house and instead thereof he commits a theft.
ii. In all other cases, a distinction is made between what is called excess in the means ('eccesso nei mezzi') and excess in the purpose (eccesso noi fine) There is the former where the principal uses means different from those concerted between the parties: e. g. the original common design contemplated the use of a stick to beat a person, but the principal uses a sword and kills that person. In this case the responsibility for the more serious result is wholly of the principal. There is an excess in the purpose where, though the means used are those actually combined between the parties, they produce a more serious result than that originally contemplated In any such case, if the graver result ensues as a natural and foreseeable consequence of the means used or owing merely to the negligence(i.e. not to the deliberate intention) of the principle, liability for the graver result is contracted also by the accomplice: for, although he may not have expressly desired that result, nevertheless he maliciously wanted the means which by their very nature could cause that result[336]. This is, as Maino says, the doctrine universally accepted on the continent. With us it applies subject to the express provisions of our law which, as who have seen, extends liability in respect of the aggravating act to all parties to the criminal enterprise with whose previous knowledge it was perpetrated and even to those who, becoming aware of the aggravating act at the time of its perpetration, and being able to prevent it, did not do so.

[336] Carrara, Programma, S 500-504; 'Grado della forza fisica del delitto' S 350 351 (Opuscoli, Vol. I); Maino, op. Cit., arc. 63, § 339; Chauveau et; Helie, op. Cit., Vol. I. Part. I. Cap XII s 279

In English Law, if the accessory orders or advises one crime and the principal intentionally commits another, the accessory is not liable. But the accessory is liable for all that ensues upon the execution of the unlawful act commanded as, for instance, if A commands B to beat C, and B beats him so that he dies, A is accessory to the murder or, if A commands B to burn the house of C, and in doing so the house of D is also burnt; A is accessory to the burning of D*s house[337].

Concurrent Offences and Punishment

In the preceding chapter we have considered the question of the respective liability of two or more persons concerned in the commission of one and the same offence. (Concursus delinquentium). We are now going to consider the question of the liability of one and the sane person concerned in the commission of two or more offences concurrently (Concursus delictorum),

There is no doubt, of course, that the commission of a plurality of offences increases the criminal responsibility of the person who is guilty thereof. But this simple proposition makes two very difficult inquiries necessary. The first concerns the true notion of 'concursus delictorum' properly so-called, that is, as distinct from those other forms of criminal wrong-doing in which there is merely the appearance of a plurality of offences but, in reality, only cue single- offence.' The second inquiry concerns the method of punishing the offences in accordance with the exigencies of justice and humanity.

Notion of Concursus Delictorum

There is a true concurrence of offences when one and the same person is answerable for two or more offences which are distinct and independent the one from the other and in respect of none of which he has already been sentenced by a final and absolute judgement, or, in other words, when a person guilty of an offence for which he has not already been sentenced by a final and absolute judgement, commits another separate offence or other separate offences, The condition that the offender shall not have been already sentenced in respect of any of the offences committed by him when he commits the other offence or offences distinguishes the concurrence of offences from relapse (recidiva) as we shall see more fully hereafter.

[337] Archbold, op. cit. p. 1455

This true ‘concursus’ of offences which the writers denominate Real or Material must be carefully distinguished from that of that other form of concurrence which is denominated Formal or Ideal: in this latter term there is only the appearance of several offences but in reality there is only one offence.

Formal or Ideal Concursus

1. The first and typical form of this concursus arises where one and the same ‘face’ constitutes an offence under two or more provisions of the law, or, in other words, where the same ‘fact’ violated two or more provisions of law so as to give rise to various grounds of incrimination. This hypothesis was expressly dealt with in art, 78 of the Italian Criminal Code of 1889 which lays down that "a person who, by the same fact, violates divers provisions of law, is punished in accordance with the provision establishing the heavier punishment"[338].

   Two elements are thus necessary to constitute this form of ideal concursus, i.e. one fact and several violations of law.

   As to the former element it is of paramount importance to have a clear concept of the meaning of the word ‘fact’. This means not only the action of the agent, not only the event produced, but "both of them together with all the ingredients of the offence as defined by the law: for even one single action gives rise to a plurality of criminal facts.

   When it is intentionally directed to a plurality of criminal events: “er fatto bisogna intendere non soltanto; ’opera dell’agente, ne’ il solo effetto prodotto, ma quella e questo, con utti gli elementi constitutive del reato quali sono definiti dalla legge. E’ lunità del fatto non deve essere confuse coll’unità dell’azione sogettiva del delinquent: perchè anche un’azione unica da’ luogo a pluralità di fatti delittuosi quando sia intenzionalmente diretta e pluralità di effetti delittuoisi”[339].

   In fact, it amounts to the same thing whether A kills B and C by two shots one after the other, or by one shot at the same time, when he had the intention of killing both of them. The scene thing may be said when a person utters slanderous words which offend, at the same time, two persons if he had the intention of slandering both of them’.

[338] “Colui che con un medesimo fatto viola diverse disposizioni di legge, e punito secondo la disposizione che stabilsce la pene piu grave”
[339] Cfr. Maino, op. cit., art 78 S 418.

So, in order that the violations of the several provisions of law may constitute and be dealt with as one single offence, it is essential that they be the result of one single action on the part of the offender and of one of and the same criminal determination'. This is perfectly in conformity with general principles, for there cannot be one offence where the several violations of the law are accompanied with as many criminal determinations, but only where they are the product of one single criminal determination, or, in other words, are accompanied with one formal element of the offence. That which therefore, prevails in determining whether the fact was one is the assessment of the intention and the purpose of the agent.

But, on the other hand, it must be noted that the fact' may consist of several acts or of a series of acts which, being inspired by one single criminal purpose, constitute together one single deed or transaction: as, for instance, in the case of acts of resistance to the Police accompanied by slanderous words or threats.

Our law makes no explicit mention of this form of Ideal concursus: but our Courts have constantly accepted and applied the doctrine. In re 'Camilleri v, Cilia et' (2-XII-1839) the Criminal court of Appeal said: "It is a well-established principle of our jurisprudence that where the same fact, resulting from one and the same criminal determination, occasions several violations of the law, there are not several distinct offences, but there is only one offence, the smaller violations being merged into the graver violation"

The practical effect of this doctrine is that the accused cannot be punished for the several violations but can only be subjected to the punishment provided for the more serious violation. Thus, if a man gravely insults another, using indecent words in public, he commits an offence both against section 265 and against section 352 (z) of the Criminal Code: but he cannot be punished for two separate offences; he will only suffer the punishment for the graver offence. And, for any reason whatever the offender is charged with and sentenced or acquitted in respect of the less serious violation, it shall not subsequently be lawful to subject him again to trial on the charge of the more serious offence. This principle was first laid down by our Courts in the case 'Rex vs. Rosaria Portelli', Criminal Appeal, 25-II-1904[340]. The facts in that case were as follows:

[340] Law Reports, VOL. XIX. P. IV.

Rosaria Portelli had thrown an earthenware dish at Riccarda Borg with when she had been quarrelling. The missile had hit Riccarda Borg in the face, causing her a slight injury: But a fragment had gone on to hit the eye of John Borg who at the moment was standing at as short distance from Riccarda Borg and had cause him an injury of a grievous nature.

Rosaria Portelli was charged before the Courts of Magistrates with the slight injury cause to Riccarda Borg and sentenced to a fine. Subsequently an indictment was performed against Portelli before His Majesty's Criminal Court in respect of the involuntary grievous injury caused to John Borg. The court is allowing the plea of 'autrefois convict' set up by the defence said: Quando da un medesio fatto, determinate da unica intenzione criminosa, si violano piu diritti, non si ha pluralità di reati, ma un solo reato, rimanendo la violazione minore assorbità nella maggiore; dacche altrimenti un solo element ed un solo elemento fisico si imputorebbero, non, senza assurdo, piu' volta all' agente"; and, quoting from Roberti[341], the court went on to say: thus, if a man firs a shot to kill his enemy, he will not be answerable for two distinct offences if, by the same shot he kills his enemy and also injures another person standing nearby. Finally, the Court pointed out the "per fatto" – la legge intende il fatto principale in quanto meritevole di pena, o, come altri si esprime, non intende il fatto semplicemente storico o naturale.

Nei suoi diversi momenti, ma il fatto giuridico nel suo comlesso". This last observation is of particular importance: as we have already pointed out, account must be taken not of each single act done by the offender but of the whole 'fact' or enterprise or transaction. Several acts done in pursuance of one single criminal determination and forming part of one and the same criminal transaction constitute one single 'fact an gave rise to one single, though complex, offence. Thus, if a man who in the heat of a quarrel insults, threatens and finally wounds his adversary, is not guilty of three separate offences, but only of one offence, namely that of causing bodily harm[342]. Likewise a man who, in the act of resisting with violence a police officer in the execution of his duties , insults such officer in the execution of his duties, insults such officer, is not punishable for two distinct offences but only for the graver offence[343].

In England, the Interpretation Act, 1889[344], provides that "where an act or omission constitutes an offence under two or more acts or under and Act and at Common law whether any such

[341] Op., cit., n. 916
[342] Puccini, 'Codice Penale Toscano Illustrato', Vol. II, pp. 223-224
[343] Carrara, Programma, Parte Speciale, Vol. V, § 2786, 2790
[344] 52 & 53 Vict., c. 65 §. 33

Act was passed before or after January 1, 1890) the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at Common Law, but shall not be liable to be punished twice for the same offence"[345]. This enactment is substantially the same as the Common Law rule that a man must not be put twice in peril for the same offence.

2. Another form of concurrence of offences that is merely apparent is said by some writers to arise where one offence is committed as the means of perpetrating another offence. In this case, they say, it is true that there are two offences but ideologically, the transaction is only one, for the 'means' cannot be disjoined from the 'end', and the offender has only one end in view.

   The nexus between the offence which serves as the 'means' and the offence which represents the 'end' of the offender, unifies the two violations into one offence. Thus, these writers say, a man who unlawfully breaks into a house with the object of committing a rape therein, apparently commits two offences, i.e. house-breaking and rape; but the former was the means of perpetrating the rape, and this link between them consolidates the two violations into one single whole so that there is legally only one offence, the graver, punishable with only one punishment[346].

   More recently, however, an opposite theory has been propounded chiefly by Impallomeni. According to this jurist, when several legal injuries have been caused by several distinct facts there is a plurality of offences and not one single offence, notwithstanding the singleness of purpose does not prevent the occurrence of the ingredients of several offences, i.e. the plurality of legal injuries or violations of the law and, at the same time, the plurality of criminal intents. In fact, there is a criminal intent every time that the agent determines to do an act in order to produce a given criminal effect even though this effect may not represent the ultimate object which the agent set out to achieve by his action. Therefore, where the criminal effects which the agent determines to produce are several, it does not matter that the one of them is, in his mind, connected with the other or others as the means to an end: for, even so, he has the consciousness that this action is the cause of several offences in as much as he knows that he is producing several distinct criminal events or, in other words, several effects each of which

[345] Archbold remarks (op. cit. p. 161) that perhaps this enactment would have been clearer if for the world 'offence' at the end, had been substituted the words 'act or omission'

[346] Pessina, op. cit., Vol I p. 305 Carrara, Programma, Parte Generale, § 168-170

can be contemplated as a distinct offence irrespective of the other or others. Thus a man who arms himself with an offensive weapon which he prohibited to carry about without a licence, with the purpose of wounding another a man, and in fact, wounds such other man with that weapon, as the consciousness of contravening the law which makes it unlawful to carry certain weapons and knows, therefore, that he is committing an offence and he had also he consciousness of contravening the laws which prohibit the causing of bodily harms and, therefore knows that he is also committing another offence. Likewise if a man falsely accuses another of a theft, and then in order to lend colour to his false report, steals something from a third party, is answerable for two offences and not for one single offence even though the ultimate end of the offender was the false accusation and the theft was but merely the means to that end[347].

Of course, if the fact constituting itself an offence and committed as the means of perpetrating another offence, is considered by the law as a constituent part or aggravation of such other offence, then no punishment other than that prescribed for the offence of which that fact is a constituent part or an aggravation can be inflicted. For instance, the breaking of seals affixed by the competent authority is an offence per se under section 140 of the Criminal Code; but if this is done as the means of committing a theft, then only the punishment prescribed in section 291 can be applied, for the breaking of seals is contemplated by the law (section 141) as an aggravation of the theft.

These are the two main doctrines on the subject. We will now see how the matter stands in our law.

The question to what extent divers violations of the criminal law connected to one another as the means to an end constitute one single offence, was first examined 'ex professo' by our Criminal Court in 'Rex vs. Simler et', 11.III, (1921)[348]. The accused were three John Simler. Joseph Simler and Alfonso Tonna and the indictment contained four counts:

In the first, John Simler and Joseph Simler charged with the offence of having counterfeited banknotes issued by His Majesty's Treasury and being legal tender in these Islands.

[347] Impallomeni, 'Concorenza reale e conorrrenza formale dei reati' S11; 'Il codice penale italiano illustrato, VOL I. N 126 pp.265-266
[348] Law Reports, Vol. XXIV, P. IV., 910

In the second, Alfonso Tonna was charged with the offence of being in possession of more than three counterfeit banknotes acquired by him with the knowledge that they were counterfeit and for the purpose of uttering or otherwise putting off the sane.

In the third, Alfonso Tonna was charged with the offence of having, without lawful authority, knowingly kept in his custody tools exclusively, adapted and intended for the making of currency,

and

In the fourth, John Simler, Joseph Simler and Alfonso Tonna were finally charged with the offence of having uttered counterfeit bank-notes acquired by them with the knowledge that they were counterfeit

The preliminary issues raised for the Court's decision were:

(1) Whether the Simler were answerable for the two distinct offences charged in the first and the fourth counts, i.e. the offence of counterfeiting and the offence of uttering counterfeit banknotes, or only for one offence; and
(2) Whether Tonna was answerable for the two separate Offences charged in the second and fourth counts, i.e., the offence of being in possession and the offence of uttering counterfeit; banknotes, or only for one offence, i.e. that of uttering.

The Court said; Eminent writers, like Carrara, Pessina and, before them, Carmignani and Roberti, taught whenever several distinct; violations of the law are linked together as the means to an end, there is only one offence and the punishment provided for the greater violation can be inflicted. Recently, however, that doctrine has been strenuously controverted by other eminent jurists, among whom Impallomeni. Yet it is not correct to say that several violations connected the one to the other as the means to an end, are always to be considered as so many separate offences: for it may happen that the violation which serves as the means and that which represents the end of the agent, are so intimately linked together as to form one single whole so that the one cannot be committed without at the same time committing the other; in which case there is only one offence. This occurs when the two violations are inseparable. But so that such inseparability may cause the two violations to merge into one

single offence, it is necessary that it be natural or juridical and not merely accidental: in other words, it is necessary that the agent cannot will the one without necessarily and inseparably willing the other. Thus a man who makes a calumnious accusation (section 99, Criminal Code) against another, must needs attribute to such other person a specific slanderous facts yet, for all that, the man will not also be answerable for slander: here the two violations of the law are, by the very nature of things, inseparable (natural inseparability). Likewise, a public officer who embezzles public money violates the duties of his office at the same time as he commits a misappropriation (legal or juridical inseparability).

The matter is, however different when the two violations of the law are inseparable merely accidentally: that is to say when the violation which serves as the means is co-ordinated with the violation which constitutes the end of the offender, simply because he wanted and chose for this particular purpose to act in that manner here the nexus between the two violations is procured by the offender himself, whereas naturally and legally such violations are distinct and separate. Such is the case of the utterer of notes who has himself counterfeited the notes which he intended to utter: in this case the two infringements of the law are distinct and separate both naturally and legally, for one can utter counterfeit notes without himself counterfeiting the same and vice-versa; and the law contemplates and punishes the two offences separately. In short there is a true real concurrence of offences when the several violations, notwithstanding that these may be co-ordinated together. It is only when the divers violations are naturally or legally inseparable that they constitute one single offence of which the concurrent violations are merely constituent parts or ingredients.

This conclusion is not weakened by the fact that under section 18 (8) of our Criminal Code, where several offences which do not together constitute an aggravated offence are directed to the commission of another offence, only the punishment provided for the graver offence is to be inflicted: for one must hot confuse the question of the existence of a real and true concurrence of offences with the question of the determination, in a concrete case, of the punishment to which the person responsible may be subjected, "perchè altrimenti si correrrebbe rischio di spostare la questione dell'orbità dell responsibilità' del reo in quella dell applicazione della pena: dato un concorso reale di delitti altro e' parlare di uhcità di reato, altro e' dire di unicità di pena". In the said section 19 (h) our law has, merely for the purposes of punishment, adopted the system known on the continent as that of 'assorbimento'[349]: but, for

[349] Cfr. post

purposes of liability, it still considers the several violations as distinct offences unless the nexus between them is, as already stated, such as to make them naturally or legally inseparable.

An example of such natural inseparability is furnished, for instance, by the possession and the contemporaneous uttering of counterfeit coins, in the sense that a man cannot possibly utter the coins without being in possession thereof: and, therefore, the utterer cannot be charged the offence of uttering and, at the same time, with the offence of having been in possession of the counterfeit coins actually uttered by him.

The doctrine thus laid down in 'Rex vs. Simler' has since been quoted with approval and followed in several other cases by His Majesty's Criminal Court[350]. It was adopted and re-stated, for instance, in 'Rex vs. Victor Caruana', 27-1-1942. The accused was charged firstly with the offence of forging a Government Lotto Ticket (Sect. 173) and, secondly, with the offence of knowingly mailing use of the ticket so forged (Sect. 177). The plea set- up by the accused that the two violations constituted one single offence was dismissed by the Court which considered that the forging of a ticket and the knowingly making use thereof were neither logically nor juridically inseparable the one from the other in as much as the user need not necessarily be the same person as the forger and, when the user and the forger are one and the sauce person, the link between the two offences is merely accidental, i.e. created by the offender himself and it does not therefore, merge the two offences into one. Commenting on this judgement Mr. Justice Harding writes: "Although between the forgery of the ticket and the use thereof there is the nexus of the means to an end, still the inseparability of the two offences is not natural or juridical(in which case there would be a single offence) but accidental, that is, created by the offender himself who forged the ticket to make use of it himself. It may well be that the person who utters the forged document is not the same person who forged it, - and therefore, there is no natural or juridical inseparability"[351],

We may sum up by saying that, according to our case-law, a formal concurrence of offences occurs only

a) where the same fact constitutes an offence under two or more provisions of the law; and
b) where divers violations are linked together as the means to an end but in such a manner as to be naturally or juridically inseparable.

[350] Cfr. 'rex vs. Ant. Farrugia', 6-XII-1926; Law reports, Vol XXVI, P. IV, p. 751; 'Rex vs Salv. Caruana et, 16- XI-1928; Law Reports, Vol. XXVII P. IV p.590
[351] Op. cit. S 25; See also S1, ibid.

A point which is discussed by several writers in connection with the first form if Ideal Concurrence of offence is the following: 'Quid Juris' where the same fact constitutes an offence which can be prosecuted 'ex officio' and at the same time, also an offence which can only be prosecuted on the complaint of the injured party, assuming that the latter offence is subject to higher punishment than the former offence and that the party injured has not made the requisite complaint e.g. indecent assault (Sect. 222 punishable with hard labour or imprisonment from three months to one year) committed by immoral acts in a public place (Sect. 225) punishable with imprisonment for not more than three months and to fine-multa).

We know that in this form of ideal concurrence only one punishment, i.e. the punishment provided for the graver offence, can be inflicted But this does not Mean that if such higher punishment cannot be awarded on account of the absence of the requisite complaint, the fact must, therefore, remain wholly unpunished. According to the generally accepted opinion among continental writers, in any such case proceedings can be taken in respect of the offence which can be prosecuted 'ex officio',(in the example given, the lewd acts in public) and, of course, the punishment provided for such, offence, can be awarded[352].

Impallomeni does not share this view. He thinks that once the same fact constitutes not only an offence which requires the complaint of the party injured for its prosecution, but also at the same time, an offence which can be prosecuted 'ex officio', proceedings can be taken in respect of the graver offence and the higher punishment can be inflicted notwithstanding that the party has not made a complaint.

In our law the matter is placed beyond doubt (substantially to the effect of Impallomeni's theory) by the express provision of Sect 537 ad Sect. 538, Criminal Code. These lay down that the Police can proceed 'ex officio' without the necessity of any complaint on the part of the party injured, whenever the offence affects the public good order or the community in general, or is accompanied by another offence which affects the public good order[353].

But what happens if in case in which the same fact which constitutes an offence which can be prosecuted only by the injured party and an offence which can be prosecuted by the Police 'ex

[352] Cfr. Crivellari, op. cit., Vol. IV. P. 79 S 89; Masucci, quoted ibid., Florian, op. cit., Vol. I. p. I. p 572
[353] Cfr. 'Rex vs. Gius. Busuttil', Criminal Court, 10-IV-1919, Law Reports, Vol. XIV, P. IV. p. 884; Cfr, also Sec. 385, Criminal Code

officio', both the injured party and the Police institute proceedings on the respective offence? We have already seen (Ref. 'Hex vs. Boearia Portelli'; supra), that, if the person accused has already been convicted or acquitted in respect of one - whichever it may be — of the offences arising out of that fact, it is not lawful to bring him again to trial in respect of the other offence resulting from the same fact. If, however, the person charged has not already been convicted or acquitted in respect of any one of the offences, the question is this: which of the two actions must prevail and be disposed of the first? In re 'Camilleri vs. Cilia et' (2-XII-1939) His Majesty's Criminal Court of Appeal held as follows: If the two charges arising out of the same fact are of equal gravity, it seems that the proceedings brought by the Police should prevail, for the criminal action is essentially of a public character and, generally speaking, the prosecution and punishment of the offender should not be left to the discretion of private parties. If, on the other hand, one of the charges is graver than the other, then the principle that the minor charge is absorbed by the graver charge should apply and the action on the graver charge should, therefore, prevail.

Real or Material Concursus of Offences

This arises where the same person is answerable for two or more distinct offences, all committed before he has been for any one of them already sentenced by a final and absolute sentence.

That which distinguishes this form of concurrence of offence from relapse is, thus, generally speaking, the non-existence of a previous sentence. 'Il concorso o la recidivo considerano il delinquente in quanto sia autore di piu' reati; presupposto del concorso si è che ei, per tali reati, non abbia mai riportato condanna; presupposto dell recidiva, invece, si e' che il delinquente abbia commesso il nuvo reato quando già fosse stato condannato per un reato precedente e tale sentenza fosse passata in giudicato"[354]. (We shall presently see whether under our law it is also necessary for the application of the rules of concursus that the several offences be dealt with in the same trial.

The several offences may either not have any connection between them except that they have been committed by the same person, or they may be connected together because they may have been committed by the same person at the same time or in the same place, or because the one

[354] Florian, op. cit., Vol I. P. I, p. 557.

offence has been committed to facilitate to perpetration or completion of the other, or to cover the traces of or escape punishment of the other, or because the one has been committed to procure the means for committing the other.

In all those cases - except, of course, where the one offence is contemplated by the law as an ingredient or an aggravation of the other offence, and where the offences are naturally or juridically inseparable as aforesaid - there is a true or real concurrence of offences and the offender must answer for each and every one of them.

But the great problem is: by what rules and in what measure must the concurrent punishments prescribed for the several offences be applied?

Concurrence of Punishments

On this subject there is considerable divergence of opinion both among the writers and among the various systems of positive law. The theories which have been devised and followed are mainly three, known in Italian Criminal Science by the name of:

a) Cumulo Materiale,
b) Assorbimento, and
c) Cumulo Giurdica.

a) The first system is based on the old legal maxim “Nullum delictum sine poena; quot delicta tot poena”. The author of several offences should suffer all the punishments which he has incurred: the law provides for each offence a determinate punishment; therefore, the offender should be awarded all the punishments which he has deserved by his repeated wrong doing. But it is observed against this doctrine that the accumulation of all the various punishments attached to each of the several offences leads to absurd punishments of excessive harshness, both because such punishments would be very often life-long, or even such that a whole life-time would not be long enough for the entire execution of the aggregate punishments, as well as because the author of a few minor offences would often be subjected to a higher punishment than the perpetrator of a grave crime. It is further remarked that the aggregation of several punishments increases the intensity, of each one of them: for a punishment served consecutively after another is such more painful. Indeed, Mittermayer observed (though, as we

shall see, the argument is not conclusive) that the accumulation increases the punishment not in arithmetical but in geometrical progression.

b) To mitigate the severity of the first system, other jurists devised an opposite system which consists in prescribing that the punishment for the graver offence absorbs the lesser punishments; “Poena major absorbet minorem: punitur solummodo delinquens poena majoris delicti”.

But it is justly observed in opposition to this doctrine that, on the one hand, it does not justify the exigencies or justice, and, on the other hand, it encourages the commission of the offence. In fact, such a system gives total impunity to the offender in respect of all his offences other than the gravest one, and it metes out the same treatment to the person guilty of several offences as to the person guilty of one offence.

Moreover, it encourages the person who has committed one offence to commit as many more offences of equal or less gravity as he pleases, in the knowledge that he will not anyway puffer any punishment in respect of such ether offences.

c) The other system designed to overcome the objections made to the other two is an eclectic one. Its basis is the same as that of the material accumulation: “tot poenae quot delicta”, but it avoids its excesses either by reducing the various punishments applicable to the several offences or by increasing the punishment, awardable in respect of the graver offence having regard to the nature and duration of the lesser punishments provided for the less serious offences. In other word**s**, the system of juridical accumulation consists in this that the author of several offences is made to suffer a higher punishment than would the author of only one of such offences, but within the limits of an equitable proportion, that is, with an increase of punishment proportionate to the number and gravity of the offences committed. This method has the merit of avoiding, on the one hand, the exorbitant heaping up of the several punishments and, on the other hand, the scandal of total impunity for the lesser offences, by making it possible to take every single offence into account in assessing an adequate total punishment. Out of this third system there arose, propounded by Impallomeni, another system which he named; “Il metodo della responsabilità unica o della pena unica progressiva”. This writer observed that the several wrongful actions committed by the same person cannot be considered as independent the one from the other and, as such, subjected to corresponding

individual punishments, in as much as they have all a common feature which unifies them both objectively and subjectively: objectively, because all offences have a common general tendency, i.e. open resistance to the authority of the law; subjectively, because, though the criminal determinations are several, one and the same is the will which has revolted against the authority of the law. The penal responsibility of the offender increases the further he goes on the road of crime. It is true that the law, in seeking to protect the public good order, determines the responsibility of the offender in relation to each violation of its provisions. But this does not mean that the offender incurs so many distinct responsibilities as are the offences committed by him, for the object of criminal law is not the offence itself but the re-establishment of public good order and the authority of the law by the punishment of the offender. So, every fresh offence committed is not the source of a new responsibility but a further aggravation of the responsibility of offender. Considered in this light, the several offences are merely concurrent causes of the responsibility of the delinquent which, therefore, is more or less grave, but always one. The direct consequence of all this is that the several concurrent offences must be visited with a single unitary punishment and this must be progressive in proportion to the number and quality of the offences, but taking as a starting point the punishment provided for the graver offence.

This doctrine was, subject to a few exceptions, adopted in the Italian Code of 1889. It has since discarded in the Code of 1950 which, subject to modifications, reverted to the system of ‘cumulo materiale’ Thus in the ‘Relazione della Commissione della Camera dei Deputati’ it is stated, a propose of the relevant provisions of the draft: the guiding principle is that the offender must be subjected to the totality of punishment which, without being equal to the sum-total of the several punishments incurred for each offence, is nevertheless proportionate to the number and gravity of the concurrent offences. This principle, while it excludes impunity for the lesser offences, which would result if the punishment incurred for the graver offence were to absorb the lesser punishments, is, at the same time, opposed to the method of the material accumulation of the punishments. It does not rest on the doctrine of Mittermayer that more punishments undergone in succession increase the suffering not in arithmetical but in geometrical progression and that, therefore, it is necessary to reduce the punishments incurred for each single offence in order that their increased intensity mat he set off by their diminished extension. In fact, it may be retorted with equal truth that the longer the punishment lasts more the convict becomes accustomed to it so that the suffering is progressively less keenly felt. The said principle has, instead a strictly juridical foundation in as much as the several offences

operate a progressive social injury which does not multiply itself by the number of offences committed; for it is clear that the community does not experience, on account of two or more trivial offences, the same alarm which it would experience in respect of a serious crime. Once this is not the case and once the responsibility of the offender must be in proportion to the social injury caused by him, the sheer accumulation of punishments is devoid of any just basis for, if it were to be applied, it might precisely happen that the author of two or more small offences might be made to suffer a sum-total of punishments which would be equal to or even in excess of the punishments properly applicable to a hideous crime or would even exceed the normal span of a man's life.

The Positive school of Criminal Law does not approve of any of the said systems of measuring the punishments in the case of concurrent offences. This school considers, in accordance with its basic conceptions, that the number of offences committed reveals the dangerous character of the offender and is, therefore, a reason for providing for the perpetual or temporary seclusion of the offender and not a reason for discussing how and to what extent the several punishments should be mitigated or compounded.

Our Criminal Code at Section 19 provides:

"In the case of concurrent offences and punishments the following rules shall apply:

1. A person guilty of two or more crimes which are liable to temporary punishments restrictive of personal liberty one of which is perpetual, shall be sentenced to this latter punishment, with the addition of solitary confinement
2. A person guilty of two or more crimes which are liable to temporary punishments restrictive of personal liberty, shall be sentenced to the punishment for the graver crime, with an increase of from one-third to one-half of the aggregate duration of the other punishments, provided that the total awarded does not exceed twenty-five years;
3. A person guilty of two or more contraventions shall be sentenced to the punishment for each contravention provided that, if the offender is sentenced to detention, the aggregate duration of the punishment shall not in any case exceed three months
4. A person guilty of one or more crimes and of one or more contraventions shall be sentenced only to the punishment provided for the crime or resulting from the concurrence of two or more crimes as provided in the preceding numbers of this section, where the punishment

to be inflicted for the rime is not less than three months imprisonment or hard labour, where it is less, the court shall apply the punishment prescribed for the contravention or resulting from the concurrence of two or more contraventions as provided in the preceding numbers of this section;

5. Where the punishment of temporary interdiction is provided, that prescribed for the longer term shall be applied with an increase of from one-third to one-half of the aggregate duration of the other terms, provided the term applied shall not in any case exceed twenty years;
6. The pecuniary penalties prescribed for such offence shall always be applied in their entirety; provided that the amount awarded shall not exceed ten pounds in respect of contravention, and fourth pounds in respect of crimes; but there the pecuniary penalty prescribed for any of the contraventions is higher than ten pounds, or the penalty prescribed for any of the crimes is higher than forty pounds, those penalties shall, as the case may be, be awarded;
7. In the case of conversion of two or more pecuniary penalties into a punishment restrictive of personal liberty, the duration of these shall not exceed twelve months, in the case of multa and six months in the case of ammenda, and in the case of concurrence of multa and ammenda, the conversion shall be made into the punishment of detention or of imprisonment as the court shall direct;
8. Where diverse offences, which do not together constitute an aggravated crime, are directed to commit another offence, whether aggravated or simple the punishment provided the graver offence shall be awarded."

It will thus be seen that our law has not followed a uniform system in all cases. Generally speaking, in the case of concurrence of crimes, the method adopted is that of juridical accumulation or, more properly, of the unitary progressive punishment, but important concessions are made to the other two systems. Thus, where the two or more offences do not constitute together in aggravated crime (e.g. bodily harm for the purpose of theft – theft aggravated by violence) and are linked to one another by the nexus of means to an end, then, though each of the several offences retains its specific identity, only the punishment provided for the graver offence can be awarded.' Which is an application of the method of 'assorbimento'. Another application of the same method occurs in the case of concurrence of a contravention with a crime; here only the punishment prescribed for the crime can be awarded if such punishment is not less than three months imprisonment or not hard labour. If, on the contrary, such punishment is less than three months imprisonment or hard labour, then both the punishment prescribed for the crime and the punishment prescribed for the

contravention shall be applied; which means that, in this hypothesis, the method is that of material accumulation. The same method of material accumulation is, subject to certain restrictions as to the maximum, followed in the case of concurrence of contraventions, and in the case of concurrence of pecuniary penalties, whether in respect of crimes or in respect of contraventions.

Now an important question falls to be considered: do the above rules governing the assessment of punishments in the case of concurrent offences apply only where the several offences are dealt with in one and the same trial or do the said rules also apply where the said offences form the subject of separate trials?

As the system of assessing punishment in accordance with the said rules rather than accumulating all the several punishments, is generally speaking, a benefit accorded to the offender consistently with the exigencies of justice, it is held by the great majority of jurist that its application should not be made contingent upon the circumstance that the offender is sentenced contemporaneously for the several offences by the same judgement: “Ciò sarebbe manifestamete ingiusto poiché’ il diverso trattamento penale dei colpevoli dipenderebbe da un evento affatto indifferente ed affatto indipendente da lor, vale a diredal tempo in cui la giustizia riesce a scoprire I reati e dal tempo in cui I giudici istruttori conducono a tempo la compilazione dei processi. Onde, non potendo tollerarsi questa diversita di trattameto, parepiu conveniente l’ applicazione del cumolo giuridco della confusione delle pene, anche quando il reato venga a conoscersi nei giudizi successive”[355] Indeed, in the Italian Code of 1889 it was expressly laid down (art. 76). The same provision is repeated in act 80 o the present Code, that the rules relating to concurrent punishments applied even in the case in which after the sentence of conviction, the same person and to be tried for another offence committed before the sentence; they also applied in the case of an offence committed after a sentence to a temporary punishment restrictive of personal liberty and therefore such sentence was served or while it was being served.

Our law does not contain similar provision and in the absence of such provision, it would not seem that the Italian principles can apply. If an offence is committed by a person after he has already been sentenced by a final judgement for another offence, then the rules to be applied

[355] Crivellari, op. cit. Vol IV p.207

in awarding punishment for the second offence are clearly those of relapse (S 49) and not those of Section 19. And even if the second offence has been committed before the offender is sentences for another offence committed by him, then unless the two offences are joined in the same trial it does not seem possible to apply the rules of concurrent offences and punishments. It is, therefore, desirable in fairness to the offender known to have committed two or more offence, to have all the charges against him dealt with in one and the same trial, and section 589 provides that two or more offences committed by the same individual, even though there is no connection between them, may be charged in one and the same indictment and disposed of in the same trial notwithstanding that any such offences may be within the jurisdiction of a lower court.

In the matter of concurrent offences and punishments, the position in English Law is set forth in Archbold[356] briefly as follows: "Where the defendant is convicted of several offences on different counts of the same indictment or on different indictments in the same assizes or sessions, the Court as a general rule has power to direct that the sentence shall run consecutively or concurrently. So, where a defendant is charged with several offences at the same time, of same kind, he may be sentenced to several times imprisonment or penal servitude, one after the conclusion of the other. And where sentence shall be passed for felony on a person already in prison under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or penal servitude, the Court, if empowered to pass sentence of penal servitude, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or penal servitude to which such person shall have been previously sentenced, although the aggregate term of imprisonment or penal servitude respectively may exceed the term imprisonment or penal servitude respectively may exceed the term for which either of those punishments could be otherwise awarded. It is doubtful whether the 'subsequent offence' includes an offence committed before the offence for which the prisoner is undergoing sentence, but which he is tried subsequently to that offence".

[356] Op. cit., Ed. 1931 p. 243

Continuous Offences

So far, we have considered the position of a man charged, whether as principal or as an accomplice, with one single offence, completed or attempted.

We have also considered the position of a man guilty of two or more offences arising out of the same fact or linked together as the means to an end, as well as the position of a man guilty at the same time of several distinct and separate offences.

And we have fixed the rule that, broadly speaking, whenever the criminal intents of the agent are several, the violations of the law committed in pursuance of such several intents constitute as many distinct offences as there are violations.

This rule proceeds without any difficulty where the divers intents give rise to violations of divers provisions of the criminal law, as, for instance, where the actor commits a theft and a rape, even if in the same context of action: there is no doubt that he is guilty of two distinct offences.

But where the agent offends, by his repeated violations, against the same provision of the criminal law, then the several determinations accompanying the several violations seem to merge themselves, at any rate, in a general way, in one single intent, and this fact seems to create the necessity of consolidating the several violations into one single offence.

Hence arises the very subtle doctrine of continuous offence, to which our law; has given express recognition in section 20 of the Criminal Code.

This doctrine, as Mr, Justice Harding points out, derives from Continental Law and Jurisprudence. Indeed, the same provision of our Code, in the original Italian text, was a repetition, word for word, of article 79 of the Italian Criminal Code of 1809 which ran as follows:

“Più violazioni della stessa disposizione "di legge, anche se commesse in tempi diversi, con atti esecutivi della medesima risoluzione, si considerano por un sol reato: ma la pena”

This doctrine owes its origin to the Jurists of the Middle Ages who devised it in order to save from penalty persons guilty a third time of theft when the maxim prevailed "potest pro tribus furtis,

quamvis minimis, poena mortis imponi". These jurists argued that when a person, after a first violation of a provision of the law committed other violations of the same provisions, in pursuance of the very same original resolution, it could not be said that he became guilty of several offences. Every crime they said required essentially the concurrence of two elements i.e. the formal element and the material element. But in the said hypothesis though the material elements were no doubt several by reason of the several of the several violations, the formation or mental element is taken into account for the purpose of integrating the first offence, it cannot again, the said jurists concluded be considered for the purposes of the second or subsequent violations; otherwise one and the same mental element would be charged twice or several times over.

This reasoning is, no doubt, very specious. But the truth is that the doctrine in question is nothing more than a legal fiction, in as much as the law considers as one offence what, in fact and indeed, is a plurality of offences. This fiction represents a compromise between strict juridical logic and the claims of practical expediency and equity. It arose, as we have said, at a time when punishments were excessively severe and the death penalty was imposed in respect of a third theft: and its purpose was precisely to dodge the application of such penalty by considering as one single continual offence the several thefts committed in pursuance of the same resolution. In the elaboration of the Italian Code of 1930, there was a strong body of opinion favouring the abolition of this "abstruse and hybrid' kind of offence which had outlived its original practical usefulness. But the force of tradition prevailed.

Upon an analysis of the definition given by our law, it appears that a continuous offence requires the concurrence of these three ingredients, i.e.

1. A plurality of violations of
2. the same provision of the criminal law, committed in pursuance of
3. the same resolution.

We must now examine each of these three ingredients in some detail.

Plurality of Violations

It is in the first place essential that there should be a repetition of several actions, each of which represents a complete violation of the law and not merely a persistence or continuance of the

offence as happens in the case of a continuing offence. In other words, there cannot be a continuous offence unless there is a repetition of actions. It is not enough that the offender continues in the illegal state created by the offence, or fails to remedy the consequences thereof, or still enjoys the fruits of the offence: But it is necessary that by a fresh action he commits another violation of the provision of the law already violated by him.

In this connection Italian writers lay particular emphasis on the necessity of distinguishing between 'Actions' and ‘acts.' It is only the plurality of ‘ actions ‘ that can give rise to a continuous offence, and not the plurality of 'acts' done in the course of one and the same transaction (in uno stesso contest di azione), for often, notwithstanding the plurality of material acts done, there is only a single and not continuous offence. Thus, a man who breaks into a house and takes away various articles from different' chests of drawers or from different rooms, performs a series of acts, but one single action and therefore one single offence of theft which is not continuous. The same thing may be said in the case of man who, on one and the same occasion, slanders another by means of several slanderous words or outrages the modesty another by a series of indecent acts.

Now, as Carrara points out; the concurrence of several ’actions' required to constitute a continuous offence cannot otherwise be inferred than — to use an apparent paradox - from the discontinuity of the acts. If the acts are continuous it is more likely that they are but phases of one single criminal action and that, therefore there is only one single and not continuous offence but if the acts are discontinuous so that there is an interval representing an interruption of several distinct actions so that there is a continuous offence (subject, of course, to the concurrence of the other ingredients which we will now discuss.

The same provision of law

But so that the several actions may together constitute one continuous offence, it is essential that they should represent violations of the same prevision of the Criminal Law. In other words, it is essential that each of the several actions should give rise to the same offence or, as Carrara says, that the second and subsequent actions should constitute a fresh breach of the same provision of the law already infringed by the offender by his first action.

The expression "the same provision of the law must, therefore according to the best accepted authorities, be construed in a narrow sense as meaning not necessarily the same section of the

law if such section contemplates different hypothesis but that part of a section, or that section if it contemplates one hypothesis, which provided a determinate punishment in respect of a specific form of a particular offence. Thus, it was held that offences, although of a particular kindred nature (e.g. wilful homicide and bodily harm) cannot constitute a continuous offence because they are contemplated in different provisions of the law. It was also held that the theory of continuous offence does not apply in the case of concurrence of simple thefts with aggravated thefts. In other words, there is a continuous offence (subject, of course, to the concurrence of its other ingredients) not where the several actions injure the same subjective right considered in abstract (e.g. right of private property), but where such actions repeatedly injure the same subjective right in the same concrete manner. Therefore a man who, having made up his mind to appropriate to himself as much as he can of the property of B, one day converts to his own profit a sum which he had received from B on deposit, another day succeeds in defrauding B of a sum by false pretences, and finally robs B of a sum of money is guilty of three separate offences and not of a continuous offence, notwithstanding that the right injured is always the same the three actions do indeed represent violations of the same right of property belonging to the victim but each of such violations infringes a different provision of the law.

It cannot be said, however, that the authorities are all in agreement on this subject. Where fore, Maino concludes that "le difficoltà e le incongruenze alle quali da luogo nella pratica applicazione l'art 79 (identical to our sec. 20), fanno desiderare una riforma della teoria della continuazione nel senso di comprendervi tutti i fatti della stessa specie, quantunque di forma e di intensità diversa, come appunto - a comment della giurisprudenza formatasi sull'articolo 79 — si sostiene nell dottrina"[357].

Pursuance of the same criminal resolution

Finally, the several violations of the same provision of the law must be committed in pursuance of the same criminal resolution. Here it is essential to avoid two opposite extremes, that is, on the one hand, a too restrictive ' interpretation which considers that every single human action postulates a corresponding separate determination on the part of the agent; and, on the other hand, an extensive interpretation which accepts too readily the notion of the same resolution in respect of offences which have a separate existence in all their constituent elements. As to the

[357] Co. cit. Vol. I, p. 270, 5 432. In fact, the Italian Code of 1930 (art 81) now expressly provides that the several notation of the same provision of law may constitute a continuous offence even if they are "di diversa gravità'".

former view Carrara rightly observes that, for the purposes of determining whether the several violations were committed in the carrying out of one and the same resolution regard must be had to that which he 'calls ‘unicità generica ‘, that is to say ,to the concrete purpose which the agent has made up his mind to achieve. For, strictly speaking every action compromised in the series which constitute the continuous offence, is the result of a particular act of the will; but if each of such acts of violation were to be considered as a separate resolution the theory of continuous offence would at once be completely destroyed. Thus, for example a servant got hold of a false key which opens the safe of his master and has determined to steal the money therefrom by small amounts. He takes away money several times. This is clearly a case of a continuous offence. But strictly speaking each time he returned to steal he must have made a fresh determination; in fact, he could have said to himself: "enough now; I do not want to take any more. A fresh act of the will was, therefore, necessary for him to return to steal a third. And yet the third violation is, by the general consensus of opinion, considered as the result of the same resolution as the first two, simply because one and the same was the generic resolution, i.e. that of helping himself to his master's money as often as the opportunity offered. The successive special determinations were but the prosecution and phases of the first one. Wherefore it seems that it would have been more appropriate if, instead of saying that the several violations must be committed by means of acts done in execution of the same resolution, the law said in execution of the same design, in order to made it clear that the expression is not referable to each special determination or act of the will with which each of the several actions must necessarily be accompanied. The words "designo crimerose" are, in fact, not used in the present Italian Code.

But as we have already pointed out, one must not fall into the opposite extreme of confusing the resolution or design with the habit of or tendency to delinquency or with the ultimate motive which induces a man to commit several crimes: Otherwise it may happen that a band of highwaymen who had determined to commit as many crimes as they can, e.g. to rob, injure or kill all travellers they meet on the highway would be considered guilty of one continuous offence: and this would be absurd. So likewise, ‘if a pick-pocket goes about a common crowd at a public feast - and steals the watch of one man, the wallet of a second etc he is guilty of several thefts and not of one continuous theft. In fact it is clear that, in such cases, each aggression, each theft, is complete in itself; and a fresh resolution is formed in the case of the highwaymen, each time a new traveller appears on the highway - and, in the case of the pick—pocket, each time the movements of the

crowd offer him a fresh opportunity of carrying on his nefarious practices to the detriment of a neighbour[358].

Therefore, to constitute a continuous offence it is not sufficient that the several violations of the same provision of the law be the result of the same abstract and generic intention (e.g. to live at the expense of others) or of the same generic or abstract motive or purpose (e.g. to harm your foe as much as possible) but it is necessary that they should be the outcome of a clear and specific intention in the form of a well-defined criminal design or enterprise which it has been decided to carry out and in respect of which the several actions of the offender represent but as many phases in the process of execution. Such actions must have such a connection between them as compels one not to consider each action as separate juridically from the others but combined together with the others into one single offence. The most salient characteristic of a continuous offence is precisely this: that each action may be conceived as an offence per se, and yet is but the further persecution of a determinate offence so that all successive actions emanate therefrom and appear as the natural sequels thereof.

In conclusion we may point out that the question whether or not, in a particular case, the several violations constitute a continuous offence is a question of fact : ‘’e il miglior patto è quello di affidarsi al tratto giuridico del magistrato, il quale esaminerà in quale connessione psicologica e ideologica stiano sta loro i più fatti punibili, consulterà le circostanze personali del delinquente, e terra presente anzitutto che i lunghi intervalli di tempo sogliono interrompere la continuità del proponimento criminoso”[359].

No other requirement, besides the three above-mentioned, is necessary to constitute a continuous offence: in particular it is not necessary that the several violations should be committed at the same time or in the same place or, subject as hereunder, to the detriment of the same person or on the same thing. The question of time and place offers no difficulty: as to the time the law itself makes it clear that the several violations constituting the continuous offence may be committed at the same time, that is without intervals between them, or at different times. Indeed, as we have already seen, if the expression ‘at the same time’ is taken too literally, it can never come true in the case of continuous offence. As to place, it is perfectly immaterial whether the several violations are committed in the same place or not. Of course, the different times and

[358] Paoli, (nozirmil Elementari di Diritto penale), p* 92.
[359] Mittermaier, *Scritti Germ*, Voi. II, pp. 98-99*

places may, however, be important considerations to decide in a particular case, whether the very same original resolution continued throughout.

But the authorities are not in agreement on the question whether the notion of continuous offense can arise where several or different are the persons or things against or upon whom or which the several violations have been committed. The doctrine most commonly accepted is that no hard and fast rule can be laid down "a priori'. In the same way as the identity of the person or thing against or upon whom or which the several violations have been committed is not always an argument for concluding that such violations constitute one continuous offence so conversely, the diversity of such persons or things is not, as a general rule, an argument for concluding that such violations constitute several distinct offences. Notwithstanding the identity of the said person or thing several violations, even if of the same kind, constitute several offences and not a single continuous one if it is clear that they are not the result of one and the same criminal resolution e.g. the rape of the same woman committed twice with an interval of years between the first time and the second. Conversely the notion of continuous offence can well arise in respect of certain offences notwithstanding that the objects of the several violations and the persons injured thereby may be different: e.g. the theft committed on different days by the servant in his master's house of things some of which belong to the master himself and others to third parties; or the repeated misappropriation from a pawn shop of different pledges belonging to several depositors.

But serious controversy exists in respect of those offences which directly injure the person. Her Majesty's Criminal Court in "Rex vs Vincenzo Grima" (28.2.1938) accepted the theory propounded by Impallomeni and followed by Manio[360] and hold that "in crimes against the person the diversity of the victims excludes in all cases that possibility of the offences being deemed a single offence under the provisions of Section 20 of the Criminal Code. The expression "crimes against the person" must be taken to mean in this context not only crimes properly falling under that nomenclature, but all crimes wherein some attribute of the person is concerned, be it life, health, reputation, modesty, morals or liberty[361]. Impallomeni bases his theory on the consideration that in the case of offences against the person, where the victim of the divers actions are several, it is impossible that the agent can have perpetrated the same in the execution of one sole resolution: he cannot possibly have the consciousness of committing one single offence, for the events contemplated by him must necessarily appear to his mind as several and distinct and each fresh

[360] Op. cit., Vol. I., p. 275, s 437.
[361] Harding, op. cit., s6; Off. Also ''Rex Vs Azzopardi et'', 13, VI. 1944

action is inevitably accompanied by a fresh resolution. If several persons are wilfully killed or injured in the heat of a quarrel, there is a repetition of offences and not a single continuous offence: it is inconceivable that the death or injury of the several victims can have been the result of one single concrete act of the will. The same thing, on the contrary, cannot be said in respect of other offences and particularly of those against property; generally speaking, it is indifferent to the thief whether the things which he sets out to steal belong to one or to more persons and it cannot be said that he requires to make a fresh resolution each time he takes the several objects: the second and subsequent takings are only the prosecution of the original design.

Yet it must be noted that the law itself does not make any distinction: it does not expressly require that the several violations constituting a continuous offence should be directed against or be to the detriment of the same person: In the absence of any such condition in the law, Crivellari thinks that the matter cannot be settled by the absolute 'a priori' rule laid down by Impallomeni. He holds that, in practice, it is not absolutely impossible that several individuals may be injured in their person or their reputation etc. in pursuance of one and the same resolution and he, therefore, concludes that even in the case of offences against the person, though the victims may be different, the several violations of the same provision of the law may constitute a continuous offence: "Comunque sarà sempre questione di fatto, questione di apprezzamento : ma al giudizio sul fatto e perche L' apprezzamento possa essere esattamente giusto dovrà aversi, se non esclusivamente, però non ultimo riguardo 'alla risoluzione criminosa, è il magistrato (togato o non togato) ritiene che nelle piu violazioni della stessa disposizione di legge, identica sia stata la resoluzione criminosa, cioè che una stessa resoluzione abbia indotto l'agente a commettere le più violazione di una stessa disposizione di legge, avrà una guida abbastanza sicura per giudicare esservi continuazione di reato, senza riguardo che una o più sieno state le persone danneggiate, perchè, giova ripeterlo, il patrio legislatore non fece alcuna distinzione nell'articolo che abbiamo esaminato[362]''.

Punishment

The continuous nature of the several violations of the same provision of the law causes such violations to be considered as one single offence but the punishment may be increased from one to two degrees. The judge or Magistrate may, therefore, increase within these limits the

[362] Crivellari: "il Codice Panale" Vol. Iv., art. 79 p. 310, s 120;- Cfr. also in the same sense: Catori "Concorsi di reati e di penó", n. 77; in Cogliolo "Trattato", I, P. Penale" Voi. I., P. I., p. 563).

punishment which, in the ordinary way, he would have applied if the whole criminal event produced by the continuous offence had been produced by one single violation. This increase is not, as in the Italian Code, obligatory but discretionary.

Maino concurs in the opinion propounded in Pallomeni that, for the purposes of the increase of punishment, a distinction is to be made between those offences which are continuous by their very nature (the use of false ways and measures, or the sale of adulterated food) and those which are continuous only accidentally, that is to say, by reason of the mode of operation chosen by the offender (e.g. The several thefts committed by a servant's from, his master's safe). According to the said writers the increase of punishment can only be applied in the case of continuous offences in the latter class for as regards the offences of the former class, the legislator who contemplates the ''id quod pierumqui accidit'' necessarily has envisaged them in their most common and frequent form, that is as continuous and prescribed their ordinary punishment accordingly.

Finally, the doctrine of continuous offence, was, as we have already seen, devised by the practical jurists in order to mitigate the punishment which would otherwise be due to the offender in respect of the several violations. Viewed against this historical background this doctrine is thus a benefit granted to the offender and must not therefore, in any circumstances, according to many authorities to be turned to his disadvantage. It follows that the doctrine cannot be applied if as a result the Punishment to be awarded to the offender would exceed to the punishments awardable in respect of all the several violations or in other words, if by considering**,** the several violations, as one continuous offence, the position of the offender would be worse than if he were to be dealt with as guilty of all the several offences[363]. This point has specially practical importance in the case of thefts and other offences against property where the value of the things stolen or the value of the damage caused aggravates the punishments (e.g. Sections 292, 324, 339 Criminal Code):Thus a man who commits wilful damage to the property of others under Section 339 of our Criminal Code is punishable with hard labour or imprisonment from thirteen months to four years, if the damage exceeds one hundred pounds, and with hard labour or imprisonment from thirteen months to four years, if the damage exceeds one hundred pounds, and hard labour or imprisonment from five months to one year if the damage exceeds ten pounds but does not exceed one hundred pounds. Now suppose a man has in pursuance of the same resolution committed such damage on two separate occasions to a total value of £110 but so that each time the value of the damage caused exceeded £10 but did not exceed £100. If the two violations were

[363] Caruana, loc. Cit., Paoli "Fozione elementary di diritto penale" Cap. VI p.20

to be considered as one continuous offence - the whole amount of the damage caused being in excess of £100 - the punishment applicable would be that of hard labour or - imprisonment from thirteen months to four years plus a possible increase of one or two degrees in respect for the continuousness. Whereas, if each violation were to be dealt with as a separate offence the man would be answerable for two concurrent offences in each of which the value exceeds ten pounds but does not exceed one hundred pounds and the maximum punishment to which he would liable would be hard labour or imprisonments up to eighteen months(Section 339)(2) combined with section 19(2).

Under these circumstances, according to the authorities, above-quoted, the provision relating to continuous offences cannot be applied notwithstanding that all the ingredients of such form of offence concur: for its application would run counter to the traditional effect and meaning of that provision.

This doctrine is not accepted by a scale minority of writers who take the view that if the elements of a continuous offence are present, the Court is bound to apply the punishment appropriate thereto without any other preoccupation, and this especially as the law does not make any distinction of limitation whatever[364].

Courts which indeed, have laid down the principle that in the case of theft, the aggravation of 'amount' cannot be charged in the case of a continuous theft unless at least one of the takings was itself so aggravated[365]. In "Pol. vs. Depares"[366] that principle was generalised in those words: "In the case of several offences against property constituting one continuous offence, then, for the purposes of amount, regard must be had to the amount of that offence which is the greatest among the other amounts."

The more recent jurisprudence of Italian Courts seems to support the view taken by our Courts[367] but this jurisprudence is based on the express provisions of section 81 of the present Italian Code which lays down that in the case of a continuous offence the punishment which should be applied is that provided "per la piu gravo dello violazione commesse" increased up to three times[368].

[364] Florian op. cit. p. 565
[365] vide Cr. App. "Pol. vs. Spiteri" 30/9/1944 "Pol. vs. Tabone 17/11/1944" and "Pol. vo. Debono 7/4-/45"
[366] Cr. App. 6/5/1954
[367] cfr. Sofo Borghese "Il Codice Penale Italiano" (1953) pp. 113 and 129
[368] Cfr. also, Arturo Bantoro" le circostanze del Reato" 2 Ed. p. 226 no. 146

Special Conclusions

1. Section 20 of the Criminal Code refers to "offences" generally without distinction: and it therefore, applies both to "crimes" and to "contraventions"; and it applies not only to offences under the Criminal Code but also to those contemplated by other special laws unless such laws contain provision to the contrary, as where for instance, they prescribe punishment "for every offence" i.e.- "-for every single breach of the particular law"[369].

2. In the conflict between the penal laws under each of which the offender has committed some of the violations which together constitute one continuous offence, it has been consistently held that the punishment applicable to such offence must be that provided by the law in force at the time at which the last violation was committed, whether such law is more advantageous to the offender or more severe than the former law[370]. In support of this view it is stated that a continuous offence is completed when the last wrongful action of the series in committed: Therefore, if any of such wrongful actions is committed when the new law has already superseded the former law, this means that the offence was still in course of consummation when the new law came into force; and it is therefore this law that must govern the whole transaction.

3. For the same reason, if the series of wrongful actions constituting a continuous offence is commenced during infancy or during a given stage of infancy and continued during a later stage or during majority, the offence must be dealt with according to the status and the condition of the accused at the time in which he completed the last action.

4. As to prescription, Section 686 of the Criminal Code expressly lays down that in respect of continuous offences the period of prescription does not commence to run except from the day on which the continuity has ceased.

[369] Maino, op' cit., Vol. I. art. 79., S 36, 441.; Cri***ve***llari, op. cit., Vol. IV., art. 79, p.313,
[370] Maino, ibid, p.14, 442; Crivellari, op. cit., p.468

Offences Committed After Previous Conviction and Sentence (Recidivi)

The case of a man who commits an offence before he has been already sentenced for a previous offence falls; as we have seen, within the doctrine of Concursus delictorum'. The case is a man who commits an offence after he has already been sentenced for a previous offence belongs to the doctrine of "relapse" (Recidiva).

In the first draft of our Criminal Laws published in 1836, Sections 76 to 82 made general provisions concerning the aggravation in the case of offences committed after a previous sentence. In support of this general aggravation, the Commissioners who had prepared the said Draft wrote in their report as follows:

"The weaknesses common to all men and a thousand other circumstances, may make a person deviate from the right path once: but when the wrong doing is repeated in spite of the punishment suffered the first time, the offender shows a depravity of disposition, requires a more affective check upon his passions and consequently an aggravation of the punishments".

Subsequently, however, the commissioners, that is to say the two that remained (Sir Ignazio Gavino Bonavita, Chief Justice, and Judge Dr Chappinne) - changed their mind. It appeared to them that to provide an increase of the ordinary punishment in respect of a second or subsequent offence in all cases generally, might not be always just. They therefore limited the aggravation of punishment to particular cases only, that is to say, to those offences which appeared to be of more frequent occurrence and in which they thought such aggravation would operate as a more efficient deterrent[371].

So it was that in the Draft Code of 1845 the general provisions relating two offences committed after a previous sentence were omitted. But Andrew Jameson to whom this Draft Code was again referred before reprinting, in a report dated 23rd May 1846 remarked: "It may be proper to point out that there is no general provision in the Code in regard to subsequent offences or the repetition of offence after previous conviction This is an aggravation which makes itself obvious to the common sense of mankind and is accordingly recognised in some mode or other in most

[371] Deport dated 14th February 1842

countries. The practical consequence of the omission of this aggravation might be both inconvenient and injurious especially in the case of simple thefts and assaults which may be said to most common offences…. It is suggested that a general provision should be introduced in regard to subsequent offences or "recidiva" as it in termed in Italian in conformity with the examples of the Codes of Prance, Naples and the Ionian Islands, which were principally kept in view by the original framers of the project. The reasons which exist for retaining this aggravation are well stated in the report of the Commissioners to the Governor of Malta dated 30th September 1835.

The provisions contained in the Original Draft of these Laws printed in 1836, might be adopted but with this variation that instead of being made imperative the Court ought only to be empowered to award a higher degree of punishment. Jameson's suggestion was endorsed by the then Crown Advocate Sir Antonio Micallef and the provisions of the original Draft were, with the necessary modifications, re-inserted in the Draft of 1848.

The provisions of our Criminal Code which now deal with the matter generally are contained in Sections 49 and 54.

Although, as Jameson put it, the aggravation arising out of relapse into crime "makes itself obvious to the common sense of mankind" there were and are writers who maintain that there is no justification, in a strict justice for awarding a higher than the ordinary degree of punishment in respect of a second or subsequent offence. They argue that the previous offence or offences for which the offender was already sentenced were so many debts towards justice and society which he has already discharged: he cannot therefore be made liable except for the new offence which he has committed. The previous sentence offences have been completely wiped out by the previous sentence and they cannot therefore be taken into account in assessing the punishment for the second offence: "non bis idem". Moreover, these writers observe, relapse into wrongdoing depends to a large extent upon social conditions and circumstances for which the prisoner cannot be held responsible[372].

Against this view, it is pointed out that the aggravation inflicted in these cases is in no way in respect of the previous offence: but in respect of the evil disposition which the delinquent

[372] Carnot, "Commentaire sur le Cod, Pen, I., p. 196, N.I.*; Carmignani, "Teoria delle leggi della sicurezza sociale"; tom. III., Chap. XI; Pagano "Principi del Codice Penale"; Cap. XIV.; Pessina, "Elementi" I., pp. 316 - 317,

displaces by committing the second or subsequent offence. Such an offence, has objectively, or in itself, the same gravity as if no regard whatever were to be had to the previous offence: but the punishment requires to be more severe in. consideration of the personal character of the agent. The delinquent clearly shows, by his deed, that the ordinary punishment was not sufficient to restrain him from further wrong-doing, and therefore it is expedient to inflict upon him a higher degree of punishment. This increase is thus in no sense in respect of the previous offence, but in respect of his obduracy and impenitence, his contempt of the law, after he had been solemnly warned by the previous sentence of the consequences of wrongdoing.

This latter doctrine that a second or subsequent offence committed after a previous sentence should attract a stiffer punishment than a first offence is generally assented to by the most authoritative writers[373] and accepted in all systems of positive law.

Yet there is considerable controversy among the writers and divergence among the Codes of the different countries as to the limits within which it is proper to apply such aggravation. Two questions especially must be considered in this connection:

a) Is it necessary in order that an increased punishment may be awarded in respect of a subsequent offence that the agent should have in fact undergone or suffered the punishment to which he was sentenced for the previous offence or is it sufficient that he had been tried and sentenced, even though he may not have served the sentence?

b) Should the aggravation apply whatever the interval of time between the previous sentence and the subsequent conviction or should, rather, a limit of time be set beyond which the aggravation shall not apply?

As to the first question, those who profess the doctrine that the aggravation in the case of relapse is founded exclusively on the assumption of the insufficiency of the ordinary punishment in the face of the person who falls back into wrong-doing, maintain that the law cannot consider as a relapser and subject to a higher punishment a person who commits a subsequent offence unless he has already fully suffered the punishment awarded for the previous offence, for it is only then, they say, that it can reasonably be concluded that the

[373] Cfr. Carrara, "Stato della dottrina sulla recidiva"; opus. Vol. II., p. 129; Impallomeni, "La recidiva; secondo il codice penale italiano" in '' Rivista Penale"; XXX, 226 - 227.

ordinary degree of punishment has proved inadequate to restrain him. (Carrara, Canonico, Brusa, Crivellari).

Other writers (Lucchini, Pessina, Impallomeni, Manzini) base the aggravation on the consideration that a person who offends a second or subsequent time against the criminal law is more dangerous to the public peace than a person who offends only once. The second or subsequent offence is evidence of criminal habits end an evil disposition. The question, therefore, whether or not he had undergone the previous punishment before committing the second or subsequent offence is irrelevant, for, in either case, the previous sentence is there to tell against him, and it is precisely in view of the personal character and propensities of the relapse that a sterner punishment becomes expedient, furthermore, if the aggravation were to be made dependent upon the condition that the punishment for the previous offence should have been in fact already undergone, it may happen that an unjustifiable advantage would be given to the man who succeed in absconding or in some other way in evading the execution of the previous sentence. Finally, it is urged, the previous trial with all its surrounding formalities of arrest, interrogatories, discussion in Court, the pronouncement of sentence should have proved a sufficient warning: if, in spite of all this, the person concerned commits another offence, this is proof of his obstinate contempt of the operation of the law.

Our Criminal Code has embraced this latter doctrine. Section 49, in fact, defines a relapser as a person who, having been sentenced for an offence by a final and absolute judgement, commits another offence. This makes it clear that it is not necessary that the person should have actually suffered the punishment for the previous offence. But on the other hand, it is essential that he should have been sentenced i.e. awarded a punishment. It has therefore been held that a conviction or declaration of guilt followed by a conditional relapse under section 23 is not sufficient[374].

c) As to the question whether a sufficiently long interval between the previous sentence and the subsequent offence should exclude the aggravation of punishment, there are jurists mostly belonging to the "Positive School" who maintain that, whatever the interval intervening between the previous sentence and the subsequent offence the offender should always be considered a ‘’recidivist’’ for the purposes of the aggravation of punishment. Suppose, they say, the

[374] (*) Cfr. "Rev vs. G. Deguara" 11. XII. 1942; "Rex vs C. Aqulina’’, 10. VI. 1911; Criminal Appeal "The Police vs S. Portelli et’’; 30. IX. Cfr. also Harding, op. cit., 34 , N.41

offender has well behaved himself for five or six years. Well, if after this period he falls again into crime, have we not in this fact a clear indication of his criminal tendencies which were but waiting for a favourable opportunity to relieve themselves afresh?[375].

But against this doctrine it is pointed out that the commission of another offence cannot really be considered as evidence of an obstinate contempt of the law on the part of the offender when it takes place after sufficient time has passed for the impression of the previous sentence on his mind to be dimmed or obliterated. A Person who has, for a long time, been of good conduct, even if in the distant past he had gone astray , must not be treated in the same manner as a Person who falls back into wrong-doing after a short interval.

This latter is the doctrine followed by our law which required, for the purpose of increasing the punishment, that in the case of crimes, the subsequent crime should have be committed within ten years from the day on which the punishment for the previous crime was undergone or remitted if the term of such punishment exceeded five years, or within five years in other cases; and in the case of contraventions that the subsequent contravention should have been committed and within three months from the day on which the punishment for the previous contravention was undergone or remitted. And it must be remembered that in our law the Court is not bound to inflict a higher than the ordinary degree of punishment in respect of the second or subsequent offence but it is empowered to exercise its independent discretion on the matter, and to aggravate the punishment if it considers that the character of the offender and the circumstances of the offence so warrant: for relapse is not a certain index but merely a presumption of the greater perversity of the agent which the facts of the case may rebut: "larecidive n' est pas un indice certain de perversitè plus grande, illin'est qu'une presumption que le gaits de la cause peuvont dostruire[376].

If the two conditions, that is the previous sentence constituting a "res judica" and the prescribed limit of time are fulfilled, it is immaterial for the purposes of the aggravation, whether the subsequent offence be of the same kind or character of the previous offence or not. Strictly speaking and from a doctrinal point of view, there is true relapse properly so called when the subsequent offence is of the same nature **as** the previous one. This is termed in the textbooks 'specific' relapse, and old legislations did not consider except this form of relapse for

[375] Garofolo, "La Criminologia1" p. 337.
[376] Princ., "Science penale ecc." n. 511, p. 307*

aggravating the punishment. It was considered that it is the persistence in the same kind of wrongdoing that discloses the perverse character of the offender and makes him particularly deserving of a higher degree of punishment.

Nowadays, however, the opinion prevails that regard must also be had to 'generic' relapse, for this also tends to reveal the offender's disregard for the law and his contempt for his authority. ''Specific'' relapse is taken special amount of for increasing even further the degree in punishment in certain particular offences.(e.g. Section 302 Criminal Code which provides for an increase up to two degrees in the case of a second conviction of theft and an increase up to three degrees in the case of any subsequent conviction of the same crime).

But the general rule, we repeat, is that the aggravation may be applied even if the second or subsequent conviction is in respect of an offence of a different kind from the previous offence or offences. In this connection, however, the following provisions must be noted:

a) In deciding whether a person is or is not a recidivist within the meaning of section **49** and therefore, whether the aggravation of punishment can apply, no regard is to be had to sentences for involuntary or culpable crimes, in relation to sentences for other crimes, and vice versa: Thus, a man convicted of involuntary homicide (or any other negligent crime) is not a recidivist merely because he was previously sentenced for theft (or any other wilful crime), and conversely, a man convicted of theft (or any other wilful crime) is not a recidivist merely because he was previously sentenced for involuntary homicide (or any other involuntary crime). This is a sound rule which has in its support the authority of eminent jurists. In fact, there is nothing in common between the two forms of wrong-doing in as much as the subjective element in the one form (dolus) is fundamentally different from the subjective element in the other form (culpa).

   But it is to be noted that this rule holds good only when sentences for involuntary crimes are to be considered in relation to sentences for wilful crimes and vice versa: This means that account can and should be taken of sentences for negligent crimes in relation to other sentences, also for negligent crimes. In other words there is a 'relapse', in the legal sense, if on conviction for an involuntary crime, it is made to appear that the accused was previously sentenced for another involuntary crime: ''Ed invero, il fatto colposo ha il suo fondamento di imputabilità nella negligenza volontaria, e la società ha interesse che si reprima anche l'

abitudine della scioperataggine quando ne soffre la publica sicurezza. Persio quanto disconvercbbc il desumerò da un fatto doloso la recidiva in un fatto colposo, e vice versa, altrettanto sombra logico che tra fatto colposo e fatto colposo corra l'aggravio della recidiva"[377].

b) For the purposes of the aggravation of punishment no account is to be taken of sentence for contraventions in relation to sentences for crimes, and vice versa. Here again the reason is that the subjective element in crimes is radically different from the subjective element in contraventions, as we have already seen. But a person who after being sentenced for a contravention commits another contravention within three months from the day on which the punishment for the previous contravention was undergone or remitted, is liable to a higher degree of punishment.

In conclusion, Section 54 of the Criminal Code lays down that a person sentenced shall continue to be considered as such for the purpose of the provisions relating to recidivists, notwithstanding any pardon commuting the punishment to which he was lawfully sentenced.

The exercise of prerogative of mercy on such person's behalf where-by the punishment lawfully passed upon him was commuted, does not cancel or annul the sentence. Moreover, the person who, by committing another offence, shows himself ungrateful for the clemency previously extended to him, does not certainly deserve a better treatment than a person who served fully the punishment awarded him. "Improbissimus enim qui principis beneficio ad peccandi licentiam abutitur; cumque clementia animum e jus flectere nequiverit, severitate utendum"[378].

This provision of our Code was derived from Article 90 of the Neapolitan Code. But in England the same rule was laid down in the Criminal Law Act 1827 (7 and 8 Geo. 4, C. 28). Section 13 of that Act provided that where the King's Royal mercy was extended to any offender convicted of any felony punishable with death or otherwise, the pardon, whether free or conditional, in the circumstances contemplate in the Section did not prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon[379].

[377] Impaliomeni, op. cit., Vol. IV, p. 337; Carrara Stato della Dottrina sulla Recidiva", Pous, Vol. II., P. 154; Maino, op. cit., Vol I., P.298, S475
[378] Mattei, "De Criminbus".
[379] V. Archbold., op. Cit., Edit. 1931, p.280.

Finally, an interesting point in connection with the subject of relapse was decided by Her Majesty's Criminal Court in re "Rex vs Ellul et", 24th June 1941. The accused had been previously sentenced for theft; the Court now found him guilty of the Crime under Section 299 of the Criminal Code that is of having, he being a person previously sentenced in these islands for theft, been found in possession of stolen property without being able to give a satisfactory account of how he came by it. The point was: could the prisoner be considered "as a relapse" and therefore liable to an aggravation of the punishment provided in Section 302? The Court held that he could not, for as the fact of having been previously sentenced for theft was itself an essential ingredient of the offence of which the prisoner stood now convicted, it could not be again considered for the purpose of increasing the punishment of this latter offence.

Commenting on this decision, Mr. Justice Harding writes as follows: "The rule stated in this judgement apparently conflicts with previous authority. In the case 'Rex vs Filippo Azzopardi', 30th October 1916 per Frendo Azzopardi C.G., it was held that the effects of relapse should not be excluded merely on the ground that the offence forming the matter of the first conviction is also an ingredient of the subsequent offence. For the purposes of the relapse what matters was the fact that there had been a previous conviction for an offence whatsoever and the fact of the subsequent offence, whatever this may have been and in respective of its ingredients. The state of relapse is a purely personal circumstance and as much, it has no nexus with the ingredients either of old or of the new offence. In fact, the reason of the increase of punishment in the case of a second or subsequent offence is that the offender has persisted in crime, notwithstanding the first sentence, and the increase of punishment, therefore, does not run counter to the principle of 'ne bis in idem'.

Nevertheless, Mr Justice Harding goes, with all due deference to the learned Chief Justice who delivered this judgement, the following contrary considerations would appear to deserve attention.

In the case of the first offence the offender was punished for theft- in the case of the second offence there would not have been any conviction unless the fact of the commission of the first theft had been taken into consideration as an essential constituent of such second offence. It follows that if, over and above this, there were to be also an increase of punishment by reason of relapse, then the fact of the conviction of theft would fall to be considered twice i.e. firstly in the

liability to punishment in respect of the second offence by reason of constituting an indispensable ingredient thereof, and secondly in the increase of punishment by reason of the relapse[380].

In support of the rule laid down in “Rex vs Ellul” the following extract from Manzini[381] is noteworthy – “L’aggravante generale per recidiva rimane escluso quando il fatto della recidiva e gia valutato come element costitutivo o circostanza aggravanto di un determinato reato. E naturale che un elemento di imputabilità, considerato una volta, non possa esser altre volte rispetto al aedesimo reato”[382]. “E poi logico o giusto che non sia calcolata la recidiva nelle condanne pei reati che presuppongono gia una condanna[383].

[380] Op. Cit., S17 N.24.
[381] “Trattato di diritto penale italiano”, 1933, Vol. II., p.597., 506.
[382] V. Also Maino, op. Cit., Vol I., p.282, 448.
[383] Crivellari, op. Cit., Vol IV., p.389., 53.

Juridical Effects of a Criminal Offence

Having considered from all its general aspects the notion of a criminal offence and its elements, it now remains to consider its juridical effects, and this will land us to the Second Part of our syllabus which deals with the doctrine of punishment.

We have already seen that in so far as a criminal offence causes an injury to a particular individual, it is also a civil wrong which is dealt with at the suit of the party injured by way of action of damages or restitution; and in so far as the criminal offence is a public wrong which affects the State of the Community at large, it is dealt with in a proceeding to which, generally speaking, the State itself is a party and this proceeding has for its end and purpose the punishment of the wrongdoer. The law, in taking cognisance of offences has a double view, viz. not only to procure to the public the benefit of society by punishing the breach or violations of those laws which the sovereign power has seen proper to establish for the Government and tranquillity of the whole, but also to redress the party injured by either restoring him his right (if possible) or by giving him an equivalent. Reason itself demands that the two remedies, the criminal and the civil should be available concurrently and not merely alternatively, a thief should not only be imprisoned for taking away other people's property, but should also be compelled to restore the plunder or pay damages in lieu.

Our Criminal Code at Section 3 lays down that:

"Every offence creates a liability to a criminal and a civil action. A criminal action is prosecuted before the Courts of Criminal Jurisdiction and its object is the punishment of the offender. A civil action is instituted before the courts of civil jurisdiction and its object is the compensation for the damage caused by the offence".

Of course, the words "every offence" are not literally true in all cases: they are not true, for instance, with regards to those offences which do not happen to injure any particular individual right as when the offence is detected before it has reached the point of doing any actual harm. But in the vast majority of cases, he who commits a criminal offence does thereby cause actual hurt to the person or property of some other person end in all such cases both forms of legal remedy are, as we have said, available.

The right of criminal action is essentially of a public nature and is vested in the Government which institutes and carries on the proceedings in the name of Her Majesty through the Executive Police or the Attorney General as provided by law. Such criminal proceedings are instituted “ex-officio” except in those cases in which the complaint of the party injured is requisite to set the proceedings in motion or in which the law expressly leaves the taking of proceedings to private parties. In these exceptional cases the criminal action does not cease to be ‘public’: but, in view of the fact that the private injury swallows up, so to say, the indirect public harm caused by the offence, the State does not take the initiative unless it is moved by the individual directly affected by the offence. In our studies on Criminal Procedure we shall see why and in which cases the suit of the private party is required for the prosecution of criminal offences.

The two sections, i.e. the criminal and the civil, although, as we have said, available concurrently, are yet independent the one of the other. From this it follows that:

a) Each action is instituted separately before the appropriate Court of Competent jurisdiction. There are a few exceptions of minor importance to this rule. Thus under sections 51, 69 and 82 of the Code of Police Laws, the Court of Magistrates of Judicial Police, although proceeding in the exercise of its criminal jurisdiction but may also order him or, as the case may be, the owner of the vehicle by means of which the offence has been committed, to pay indemnity or damages to the person aggrieved by the offence.

   An express application of the principle of the independence of the civil from the criminal action is made by section 820 of the Code of Organisation and Civil Procedure.

b) The two actions may be instituted at the same time or at different times. It must be noted however that it may sometimes be expedient to postpone the trial on the charge of an offence until some intricate and important issues of civil law rising out of the charge of the defence are settled by the competent civil court. Thus, on a charge of bigamy it may be necessary to establish in the first instance the validity or otherwise of the first marriage; or, on a charge of adultery, the validity or otherwise of the marriage of the accused. In such case there the point arises before the Criminal Court it is usual to hold over the trial pending the decision of the Civil Court[384].

[384] Vide also section 611 of the Code of Organisation and Civil Procedure.

c) In the civil proceedings arising out of the offence, the hearing of the case takes its course "ex integro" independently of the criminal sentence[385]. The parties may, however, by mutual consent, agree that reference be made to the evidence collected before the Criminal Court[386].

d) A judgement of the Civil Court discharging the defendant from liability for damages is no bar to the institution or prosecution of the criminal proceedings in respect of the same fact: and conversely the acquittal of the accused in the criminal trial does not prevent the bringing forward or continuing the civil action for damages. An exceptional case of interference of the civil remedy with the criminal action is that contemplated in Section 400 of the Code of Organisation and Civil Procedure which lays down that "where a warrant of personal arrest, on account of deceit or fraud has been executed, no criminal action for deceit or fraud shall be maintainable against the party arrested in respect of the same debt". While it is true that imprisonment for debt is rather a "coercive" than a "punitive" measure, that is to say, is intended to compel the debtor to pay rather than to punish him for making default, the Law has considered that the debtor should not subjected to imprisonment twice for the same fraudulent act[387].

e) Section 27 of the Criminal Code expressly lays down that a sentence to a punishment established by law shall always be deemed to be pronounced without prejudice to the right of the Civil action.

f) The extinction of loss of the right of civil action (e.g. by prescription) does not, of itself, affect the criminal action, only conversely, the extinction or loss of the right of criminal action does not bar the right of civil action. Furthermore, the said section 27 of the Criminal Code provides that a pardon commuting or remitting a punishment lawfully awarded leaves the right of the civil action unprejudiced."

g) Finally, regarding the civil obligation of the defendant to make good the private damage caused by the offence, he can, if he so wishes, waive or forbear from setting up the plea of prescription which may have accrued in his favour and the Court cannot take notice of such prescription "ex officio". On the contrary, as regards the criminal action, if the accused does not plead the limitation of the action in his defence it is the duty of the Court to raise the point "ex officio" for

[385] V. First Hall: "Grima vs Camilleri" Law Reports, Vol. II., p.213.
[386] Law Reports, Vol. VIII, p.332.
[387] V. Judgements quoted in Cremona's "Raccolta della Giurisprudenza nel Codice Penale", p.43.

in criminal matters prescription is founded on grounds of public policy, and the accused cannot waive the benefit[388].

[388] V. Section 666 Criminal Code

Outline of the History of Criminal Law Administration[389]

"The process of civilization has been a process of evolving an ordered social life cut of the chaos of savagery"[390].

Unconscious as we are of the fact, it is probable that our attitude today towards the Criminal Law and those who violate its code is, to a considerable extent a legacy of the past. If we can see how the Criminal Law originated, the stages through which the perspective of our forefathers successively progressed, and the cruel injustice which resulted from their errors it will help us to appreciate that in the matter of this treatment of crime we are dealing with no new problem: we are merely at a certain stage of development; it is therefore the best reason to believe that this present stage is the last finality of human wisdom.

The first systematised code of conduct amongst primitive mankind was founded probably on the religious taboo. The taboo of tribal man was the ban placed by religious scruple upon the dein0 of some act. Thus, as an example of two original of a particular tribe, it might well happen that two or more members of a tribe might meet with injury in some wood, or in crossing some stream; the tribe would possibly assume that to enter that wood or to cross that stream *was* offensive to the deity of the place. In consequence a declaration would be made by the elders of the tribe that in future any entry or crossing so clearly displeasing to the spirit of the wood or stream was forbidden or taboo. As will be seen the taboo did no more than prohibit what in the opinion of the tribe were dangerous or injudicious acts. In the course of years, the origin, of a particular taboo became forgotten... it became rather a custom than any longer a religious observance that the tribe should not frequent a particular place or do a particular thing.

Customs so begun were multiplied. They required such authority as, in their aggregate, to govern the life of the community. They became in fact the law. In its first beginnings, therefore, law was not the formal expression of the will of any choice of any chief or ruler or even of the tribe itself, but rather an adherence to what was believed by the tribe to be right for the all sufficient reason that it was customary. Any departure from such custom must be wrong: wilful violation of habitual usage regarded as impious and, by raising the anger of an offended deity likely to bring disaster

[389] These pages are taken very largely from Leo Page's book 'Crime and the Community".
[390] Lord Macmillan "Law and Other Things", p.268

upon the tribe. Persistent disobedience to custom for this reason lead to the expulsion of the offender from the community.

There where, then, certain offences which not only shocked the religious susceptibilities of primitive peoples but were regarded by them as likely to endanger the whole tribe. For them the penalty was the complete rejection of the wrong doer as a member of the community. But in addition to these offences there were others which by primitive society were locked upon as injures committed by one individual against another and so giving to the individual injured certain rights, but not as the concern of the tribe at all. Offences by one member of the tribe against the person or the property of another were originally so regarded. An assault was believed to justify retaliation by the individual attacked, a homicide to be a reasonable cause for the slaughter of the offender and his relatives by the family of the dead man. Such things were held to be private injuries, and not public offence with which the tribe had any right to interfere.

The inevitable outcome of such a system was savage and unrestrained vengeance and the infliction of disproportionate penalties by the strong whenever they chose to consider themselves injured by the weak. An immense step forward in the development of civilization was taken accordingly by the institution of the next stage in the legal process the lex talionis. It is true that the blood feud by which the “lex talionis” was administered did indeed allow the taking of a life for a Life or a limb for a limb, admittedly, according to modern ideas its procedure was absurd and it permitted punishments utterly barbarous Nevertheless, its introduction was a great advance, for it put an end finally to the indiscriminate slaughter which previously had followed crimes of violence and restrained within confined limits not only the numbers permitted to take part in retaliation but the extent to which such retaliation might legitimately go. Above all, the overwhelming significance of the Lex talionis was that it constituted a recognition of the fact that an offence against one individual by another was the concern of the community as a whole.

The earliest offences were crimes of violence and for those in primitive times the remedy of personal revenue was natural and obvious. Later, as the notion of property developed and the ownership of cattle and ether gods come to be recognised as being vested in individuals, theft became inevitably a prominent offence. In such cases it was seen that the first essential of justice was the restitution of the stolen property;; where this wasn’t possible, similar stock in goods belonging to the thief could be taken soon there must have arisen the idea of taking from him goods of greater value than those stolen with the double object of his punishment and of

compensation to the injured party for the trouble to which he had been put. The institution of this system of payment of compensation in place of private vengeance was a further important step in the history of law. At its inception the custom was that the elders of the tribe declared the total sum which in all the circumstances they considered right that the offender should pay, and they would urge the injured person to accept this sum and to acquiesce in this settlement. But he was free to decline and to insist upon his right to the blood feud. The elders had no power to force him to accept compensation.

As has been said, the evolution of the system of payment of compensation to the victim of wrong was a great step forward. It was at first however limited by the circumstances that it was available only in private wrongs: it had no application to choose public offences which were considered to endanger the safety of the community. In the phraseology of the Teutonic tribes, those offences were described as bootless wrongs, i.e. as wrongs for which no boat, or payment, could atone. In this distinction between private and public wrongs we find the germ of the modern difference between crime - which it is the business of the State to pursue and punish - and civil offences, of which the remedy is left to the discretion of the injured party.

As society became mere highly organized, the ancient remedy for bootless crimes - expulsion from the tribe - was recognised as unsatisfactory in the interests of the community itself. Accordingly, new practice was introduced, the offender would be allowed to return on condition that he would submit to punishment. Possible the custom was at first adopted in the case only of men of special value whom the central authority was most anxious not to lose; its general extension would become later inevitable as its advantages were realized not only by the individual but by the chief or ruler, who was enabled to the payment of compensation a condition of redemption. From this custom of redemption from the forest on payment of a penalty sprang what was known in the Middle Ages as outlawry: the offender was for certain crimes deprived not only of his life but of his goods which were forfeited to the king.

The tendency to treat offences against individuals, even when like theft and homicide they were a serious menace to the general welfare, as merely civil injuries to be compensated for by damages, persisted for a long time. Even the law of Rome continued to the last to treat as civil delicts offences which would be regarded exclusively as crimes although, by a long course of unsystematic legislation it had also attached penal consequences to some of them. The prerogative of punishment in early times exercised by the king in the ‘comitia centurista’ and in

later times shared by the Senate, was usually delegated in each case to a Magistrate or body of Commissioners. The series of Statutes by which standing delegacies, ‘questiones perpetuae’, were instituted for the trial of offences of particular kinds, whenever they might be committed, commences with the ‘lex Calpuraia’, B.C. 149, time to time branded as criminal. The legislation of the Emperors, though it superseded the ‘questions’ by the simpler procedure of the ‘idicia extraordinaia’ followed the lines of the old criminal statutes and produced a body of rules large indeed but formless and owing hardly anything to the great men whose wisdom had interpenetrated every doctrine of private law.

The Teutonic view of even violent wrongs resembled the early Roman, in regarding them as concerning almost exclusively the person injured, to whom therefore, atonement was to be made by way of damages: "compositio”. When the idea began to be clearly grasped by the Germans that wrong-doing might injure not merely the individual but also the State itself, the found little assistance towards formulating it in the legal system to which they were most accustomed to turn for guidance. The criminal law of Rome, deeply tinged as it was with National idiosyncrasies, had never been prepared by juristic exposition for more general usefulness. Original legislation was therefore necessary, and the first essay was made in the "Constitutio Criminalis Cardinal of the Emperor Charles V. This attempt to provide a criminal law for the whole Empire was the fore runner of the penal code of all Germany which came into operation in 1872. Of the other great criminal codes, the “Code Penale” became law for France in 1810 and was imitated by the Latin races on the continent. Our own Criminal Code was, as is well-known, modelled on the Criminal Code of the Kingdom of the two Sicilies - which code was no mere than the French Penal Code – adapted to the circumstances of these Islands.

From this brief outline it will be soon that the administration of justice is the modern and civilised substitution for the primitive practices of private vengeance and violent self-help. In the beginning a man redressed his wrongs and avenged himself upon his enemies by his own hand, aided, if need be, by the hands of his friends and kinsmen; but at the present day he is defended by the sword of the State: Private Vengeance is transmitted into the administration of criminal justice; while civil justice takes the place of violent self—help. The evils of the earlier system were too great and obvious to escape recognition. Every man was constituted by it a judge in his own cause and might was made the sole measure of right. Nevertheless, the substitution was affected only with difficulties and by slow degrees. The turbulent spirit of early society did not really abandon the liberty of fighting out their quarrels or submit with good grace to the arbitrament of

the tribunals of the State. Only at a late stage, with the gradual growth of the power of Government, did the State venture to suppress with the strong hand the ancient and barbarous system, and to lay down the peremptory principle, that all quarrels were to be brought for settlement to the Courts of Law.

All early Codes show us traces of the hesitating and gradual method in which the voice and force of the state became the exclusive instrument of the declaration and enforcement of justice. Trial by battle which endured in some places until the beginning of the nineteenth century is doubtless a relic of the days when fighting was the approved method of settling a dispute, and the right and power of the State went merely to the regulation, not to the suppression of this right and duty of every man to help and guard himself by his own hand. In later theory, indeed, this mode of trial was classed with the ordeal as 'Judicia Dei", - the judgement of heaven as to the merits of the case made manifest by the victory of the right. But this explanation was an after-thought: it is not the root of the practice which as we have said was a relic of the times when it was the right of every man to do for himself that which in modern times is done for him by the State. As the power of Government grows in strength, however, the law begins to speak in another tone, and we sue the establishment of the modern theory of the exclusive administration of justice by the tribunals of the State.

NOTE of the several forms the divine judgment took in its most universal shape, viz. the ordeal, we shall say in dealing with the historical development of the forms of criminal trial.

Right of the State to Inflict Punishment

We have seen that the administration, of criminal justice is the modern and civilised substitute for the primitive practice of private vengeance. This is its historical justification. But, apart from this, is there a philosophical or natural basis for the right of the State to inflict criminal punishments? Such a query is by no means the obvious truism which at first sight it might appear. While one can seriously dispute the existence of such right there is by no means unanimity of opinion as to the fundamental principle on which it is founded. There are advocates of many schools of which we will briefly notice only the most important.

1. One doctrine has it that the State exercises its punitive functions in virtue of a transfer or delegation originally made to it by the individual members: Blackstone puts it as follows; "It is clear that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody, otherwise, the law of nature would be vain and fruitless, if none were empowered to put them in execution; and if the power is vested in anyone, it must also be vested in all mankind, since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him (Gen. IV. 14) expressing his apprehensions that whoever should find him would slay him. In a state of society this right is transferred from individuals to the sovereign, power, whereby men are prevented from being judges in their own causes which is one of the evils that civil government was intended to remedy. Whatever, power, therefore individuals had of punishment offences against the law of nature, that is now vested in the magistrates alone, who bears the sword of justice by the consent of the whole community. “As to offences merely against the laws of society, which are only mala prohibitia, and not mala in se, the temporal magistrate is also empowered to inflict coercive penalties for such transgressions and this is by the consent of individuals, who in forming societies did either tacitly or expressly invest the sovereign power with the right of making laws and of enforcing obedience to them when made, by exercising upon their non-observance, severities adequate to the evils. The lawfulness therefore of punishment such criminals is founded upon this principle, that the law by which they suffer was made by their consent: it is a part of the original contact into which they entered when first they engaged into society; it was calculated for, and has long contributed to their own security’.

   This doctrine is founded on the hypothesis **of** the ‘Social Contract’ so familiar to the philosophy of the seventeenth and eighteenth centuries, but now commonly rejected as a fiction. As long

as there has been con there has been some form of human society, for human society is coeval with mankind and the state of nature as envisaged by the philosophers of the social contract (Rousseau, Hobbes, etc.) never existed in the history of man, therefore, the right of the state to inflict punishment for wrong doing cannot have been “Transferred" or “delegated” from each single member of society in the process of passing from the state of nature to the civil state, nor is it the same right as that of private vengeance enforced by the individual in primitive communities although in the formation of the civil state it has supplemented that right. It is a right ‘sui generis’ inherent in every constituted society being essential to its very existence and to the discharge of its function as the guardian of the law and order. The doctrine we are discussing assumes that transfer or assignment of rights that are essentially inalienable. (Life and liberty).

2. According to a second school of thought the State possesses the right to punish offences against its own laws solely as a means of self-defence in the same manner as every individual has the right to react with violence against aggression. It is easy to see however, that society in inflicting a punishment for a wrong already committed cannot be likened to a man causing an injury to another in the very act of defending himself against the latter’s aggression. When for instance the state as a living collective body repels the contract of an invading or suppresses by force and insurrection, it does indeed proceed in self-defence: but when the proper organs of the state award a punishment to a wrong-doer after the mischief has already been done than this is not an act of ’defence’ in any real sense, for there can be no said-defence against a past assault; or even against an assault to come, but only against actual aggression.

   Moreover, if social defence were to be taken as the sole basis of the right of punishment, any excess of power on the part of the State to the detriment of individual right could be legitimated; the state could in the name of alleged social necessity or utility, provide and inflict any punishment however cruel and disproportionate to the gravity of the offence for it alone could be the sole judge and arbiter of what is necessary or useful in the allowed interest on self-defence.

3. A third theory is that the right of inflicting punishment upon wrong doers is necessitated by justice itself. Retributive justice, it is said, requires pain or of some sort to, be inflicted on a man who has committed a criminal wrong even if no benefit results to the injured or to the

community. Punishment is the just reward of iniquity and it is right and proper, without regard to ulterior consequences that evil should be returned with evil and that as a man deals with others so should he himself be dealt with. Punishment as so regarded, is not a mere instrument for the attainment of the public welfare but an end itself.

This conception of retributive justice flourished especially in the writings of theologians: but it did not lack advocates among philosophers. Thus, Kant declares that punishment "can never serve merely as a means to further another good, whether for the offender himself or for society but must always be inflicted on the offender for the sole reason that he committed a crime". He claimed that the law of punishment is "a categorized imperative".

The like opinion is expressed in Jolsoy's Political Science[391]: "The theory that in punishing an evil doer the state renders to him has deserts, is the only one that seems to have a solid foundation. It is fit and right that evil or physical or mental, suffer or shame should be incurred by the wrongdoer.

Consistently with their view, such writers derive the measure of punishment not from any elaborate considerations as to the amount needed for the repression of crime, but from the simple principle 'lex talicnis'. "Thine eyes shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot. (Deuteronomy XIX, 21). Subject to metaphorical and symbolical applications this principle is in these writers' view the guiding rule of the ideal scheme of criminal justice.

Now it is scarcely needful to observe that such a conception of, retributive punishment is inadmissible. Punishment is in itself an evil and can be justified only as the means of attaining a greater good. Retribution is in itself not a remedy for the mischief of the offender, but an aggravation of it. The retribution of an evil with an ether evil, in respective of any social necessity or utility resolves itself into an unnecessary repetition of the evil: in other words, into a vengeance: vengeance by the state instead of the individual. The doctrine claims, it is true to be based upon a lofty plane of ethics, and to explain and justify legal punishment because it is the means by which society shows its adherence to what is right and dissociates itself from what is wrong but automatic and uniform punishment is entirely contrary to modern practice: it is the abdication of the judge, whose merciful function today it is to regard the whole

[391] I.P. 334

circumstances of the case in absolute contradistinction to the earlier practice of concentrating attention upon the wickedness of the criminal act. Furthermore, it is impossible to suggest by what means the due amount of pain can be measured out to each offender so that the resentment of society can be nicely discharged. Retchy tells us that the theory is the substitution of passion for reason. In this crime a right has been violated. No punishment can undo what has been done or make good the wrong to the doing of similar wrongs in other cases. Its object, therefore, is not to cause pain to the criminal for the sake of causing it. Hence as are driven inevitable to the conclusion that "the old notation of simple retribution, like extinct flora and fauna, has to place in our modern world"[392].

Another form of the idea of purely retributive punishment is that of expiation. In this view crime is done away with, cancelled, blotted out, or expiated, by the suffering of its appointed penalty. To suffer punishment is to pay a debt to the law that has been violated. Guilt plus punishment is equal to innocence. The theory which founds the right of punishment that the state should see that every breach of the criminal law is 'expiated' by the offender may be thus summarized: "the law of a state should be based upon divine law and human punishments therefore can have no higher or different aim than that of upholding the sanctity of divine law and of seeing to it that when this has been violated by crime and sin the violation shall be expiated by the suffering of the guilty. 'Punishment' says such[393] is in the notorious breach'. According to the exponents of this theory God required that sin shall be expiated by the chastisement of the sinner and it is, therefore, right that the state should recognise that crime is sinful and should show such recognition by imposing a punishment which will cause the law-breaker to expiate his offence by suffering. The dictua of Regel that strong negation right, by punishment negative the negation reflects this expiatory theory of punishment. This theory is clearly based upon a confusion between law and morality. The divergence of the criminal from the moral law is shown not only by the fact that there are many sins which are not legal offenses but by the fact that there are many legal offenses which are sins.

Moreover, this theory rests upon the false –illegible word- that it is the duty of the state to punish sin.

[392] Du Quires, "new theories of punishments", Modern Criminal Science series. 1911.
[393] 'Ethicle principles' p.317

If this were true it would be the business of the state to punish the many offenses against the divine law with which the criminal law is not concerned at all: it would have to punish mere guilty thought or intention. Now as Kenny points out “in ethics, of course, a vicious will would of itself suffice to constitute guilt. But there is no such searching severity in the rule of law. They never inflict penalties upon mere internal feeling when it has produced no result in external conduct.” Another obstacle to the acceptance of the theory of expiation is this: to require a judge to determine the degree of pain precisely adequate to expiate moral guilt is to demand what is potently impossible. No human judge but God alone can read the secrets of the heart and no –illegible word- to resist temptation, the –illegible word- of character, the degree of understanding and all the palliative circumstances upon which the amount of guilt depends.

Finally, this doctrine which bases the legitimacy of criminal punishment upon the necessity of making the offender expiate the guilt by suffering is disproved by the modern practice. A very large number of cases are nowadays dealt by putting the offender on probation despite the proof of guilt: Now surely there can be no ‘expiation’ if there in so ‘punishment’ inflicted at all.

4. The last theory which we shall consider is an eclectic one combing elements of some of the theories which we have already examined. It funds the right of punishment upon the natural function of the state as the guardian of law and order.

   According to this doctrine every right must have necessarily as one of its elements the power of self-assertion: otherwise it is not a right at all but a pious wish and a vain world. Now, every man is vested by nature with certain rights which are essential to him in the performance of his duties and in the fulfilment of his destiny: and he is the referee likewise vested by nature with the power of defending such rights. But a direct and ‘a priori’ defence of such rights by means of physical conclusion constantly exercised upon the offender, is by the nature of things impossible; so such defence must needs take the form of a psychological or moral coercion induced by means of the tract of an evil to be inflicted upon the wrong-doer in order that fear of such an evil may prevent the wrong-doer himself from repeating the injury and deter all others from imitating him: this is precisely the ‘jus punitionis’ competent to every individual independently of any social organisation or authority. But as such right is the hand of an individual would tend to (??) into the indulgence of private passion, and, on the other hand it would not in the limited strength and resources of the individual have sufficient guarantee of

protection, so the maintenance of law requires the organisation of civil society whose supreme authority shall have the necessary powers for self-guarding law and order: thus the right of punishment is exercised by the social authority as the means of protecting the individual, and this is the only justification of the exercise of such right which would otherwise be nothing better than sheer violence unless it was founded upon the necessity of protecting the rule of right.

Thus the 'Jus punitionis' derives to society from the law of nature for society has its source not in the consent or choice of the individual but in a natural compelling necessity. The social authority designed and preordained by Nature as the only means of protection the rights of men, must have at its disposal all the necessary powers required for the attainment of this end: and such powers are attributed to it not by the consent of the individual, not by political convenience but by the law of nature which has willed it for such purpose: such powers clearly include that of punishing the transgressor of the rules of right in order to protect the rights of the individual directly injured by the offences and its own rights in as much as its very existence depends upon the maintenance of such rule of right.

In this manner the right of punishment is made to repose in the three principles of utility, justice and the moral sense of the community: utility because this requires that suffering should be the reward of iniquity; the moral sense of the community, because the mental attitude which best becomes all men, when injustice is committed, should be one of the righteous indignation which feels a legitimate satisfaction when fitting justice is done upon the evil-doer. In other words the necessity of protecting and defending the rights of mean is the basis and first source of the right of punishment: justice should mark the limit within which it can rightly be exercised and the public conscience would decide the form in which it can best be exercised within those limits.

This is the theory (della 'tutela juridicia') propounded by Carrara[394]. Against it, it is pointed out that it does not explain the whole problem. It proves that the state has the right to inflict criminal punishments in respect of those offences – being breaches of the law of nature or in other words, of the absolute, eternal and immutable moral law – which constitute infractions of individual rights (i.e. murder, theft), but it affords no explanation of the undoubted right of the state to punish also those offences in which there is no such actual infraction (e.g. attempt) or those other offences which constantly increase in number as civilisation progresses and

[394] Programan, Parte generale, S 598-612.

become more complex, and which contains no inherent moral wrongfulness but are created for social expediency or convenience.

Modern criminal doctrine tends to reaffirm the materialistic and utilitarian view that the punitive agency of the states in relation to every system of positive law, rests upon the principles of social utility and the protection of society. Civil society came into existence in order to make life possible and continues to exist in order to make life good: the state, therefore, has the right and duty to check every practice which it considers inconsistent with the general welfare. Of course, the exercise of such right must be limited in degree to what is necessary for the fulfilment of that purpose, but then general utility is so intimately connected with justice that they are inseparable in criminal juris prudence'(Livingstone).

In any event, whatever be the reason and the purposes invoked by thinkers society has always exercised the penal or repressive function: and that clearly shows that it is an essential condition of the existence of society.

The Purpose of Criminal Punishment.

This inquiry is distinct from that which we have just made in the preceding chapter. There we were concerned with the fundamental principle on which the right of the state to inflict punishment is founded and the object of that inquiry was to determine under what circumstances it is just and wise to issue criminal prohibitions. Here we are concerned with the ultimate object which criminal sanctions are intended to achieve and the purpose of such inquiry is to determine which punishments it is best to provide against the branch of such criminal prohibitions. Here again there is by no means unanimity among jurists. There are advocates of many schools. But it is possibly correct to say that according to the generally accepted writers the hope of preventing the repetition of the offence is the main, if not the sole permissible, object of inflicting criminal punishment. This may affect the prevention of crimes in at least three different ways.

a. It may act on the body of the offender so as to deprive him either temporarily or permanently, of the power to repeat the offence, as by death. 'We hung murderers' says Salmond[395], not merely that we may put into the hearts of others like them the fear of a life fate, but for the same reason for which we kill snakes, namely , because it is better for us that they should be cut of the world than in it. A similar purpose (i.e. to prevent a repetition of wrong-doing by the disablement of the offender) exists in such penalties as imprisonment and forfeiture of office.' But 'prevention' is evidently not attempted in every case, as for example, when the punishment is that of a fine. Moreover, the crime is prevented in fact by any actions and activities with which the criminal law has nothing to do. For instance, it is generally thought that more will be done to prevent juvenile crime by the provision of opportunities for wholesome recreation, such as playing fields, then by all the law courts in the world.

b. It may not on the offender's mind counteracting his criminal habits by the terrors it inspire, or even a rededicating them by training him to habits of industry and a sense of duty – awakening a 'serve me right feeling' (Lord Haliene). The reforms in prison management which have been carried out during the past century and a half have been largely directed towards the development of the educational influences that can be thus attempted during imprisonment. There are, indeed, some criminologists who hold this reformation of the individual punished to be the only legitimate object of punishment, criminal law is destined to increasing prominence.

[395] op.cit., p.122.

In fact, if once we realize that the reformation of a criminal benefits not him only but the whole community then we shall begin to see that the theory of reformation comes near to satisfying the requirements of a complete theory of punishment. The offender remains, after the law has dealt with him, a member of the community (there is of course a case in which this is not so but the infliction of the death penalty is of such negligible numerical importance in relation to the numbers of all offenders that the general argument is not affected). He is still a unit of the whole. He may be better or worse than he was before, he may be living freely with his fellows or he may be confined in prison, but he exists, either an asset or a liability. Clearly, it is to the advantage of society that he should be an asset. If his punishment can make him better than he was before, than every law-abiding citizen gains in common with himself. The community may therefore reasonably expend, upon the treatment of a criminal effort and material commencing with the possibilities for the common good.

But the theory of reformation face to satisfy one crucial test: it is by no means universally applicable. The smallest practical knowledge of criminals should convince the advocate of reformation as the sole aim of legal sanctions, that his design in visionary. It is established beyond argument that, under any system of punishment with the most severe or the most indulgent methods, there are always certain types of criminals, representing large numbers of individuals, in regard to whom amendment is simply impossible. There are those so inexorably rooted in wrongdoing that no reasonable prospect exists of inducing in them an honest way of life. In such cases there is a clash between the interests of the individual and those of the community. Whenever that irreconcilable divergence arises, the latter must prevail. Society cannot be asked to submit indefinitely to the depredations of particular members, or to allow for ever activities which, by the force of evil example are doubly vicious. The conclusion is that in the administration of the law the desirability of the reformation of the offender should never be lost sight of: the reformative element must not be overlooked but neither must be allowed to assume undue prominence. To what extent it should in particular cases prevail is a question of time, place and circumstance: thus in the case of youthful criminals the changes of affective reformation are greater than in that of adults and the rightful importance of the reformative principle is therefore greater also: in orderly law-abiding communities, concessions may be safely made in the interests of reformation, which is more turbulent societies would be fatal to the public welfare.

c. But the chief aim of punishment inflicted on the offender has been and continues to be to deter others from wrongdoing by the fear of a like punishment: ‘Ut poena (says Tully) ad paucos, matus ad omnes, perveniat’. Punishment is before all things deterrent and the chief aim of the law of crime is to make the evil doer an example and a warning to all that are like minded with him. Offences are committed by reason of a conflict between the interests, real or apparent, of the wrong-doer and those of society at large. Punishment prevents offences by destroying this conflict of interest to which they owe their origin –by making all deeds which are injurious to others injurious also to the doers of them – by making every offence in the words of Locke an ill- bargain to the offender. We have said that deterrence is the main object of punishment, but it should not clearly be its sole aim. In the past men thought and maintained despite all experience that if the penalties for an infraction of the law were made sufficiently terrifying the dread of them would be enough to prevent even the most desperate of men from committing crime. The motives of society for the punishment of each and every type of offence was merged in the single savage attempt at deterrence – the effort to ensure that men should be honest by the provision of the most brutal penalties the horrid savagery of the time can be illustrated by the large number of petty offences subject to the punishment of death, by the ferocious legal punishments for all sorts of offences and the horrors of the prisoners. But experience has shown that uniformly frightful penalties have the effect of hardening and brutalizing those who feel their incidence but not of deterring them from crime; and moreover, that excessive harshness of punishment tends to defeat its own ends by arousing the sympathy of the public towards those who come before the criminal court. For these reasons the attitude of society towards crimes and the criminal has undergone a profound change. A greater humanity, both in law and practice, has been introduced with regard to those who offend against social order: there is a common desire that there shall be no unnecessary suffering or degradation in the execution of the law, and that the law itself, while fully and adequately protecting society, should yet not strike blindly at the offender but should be inspired with the spirit of mercy so far as justified by the circumstances. The modern principle is that punishment should have as its concurrent objects deterrence and reformation.

But beyond the paramount and universally admitted object of punishment, the prevention of crime, it may be questioned- says Kenny– whether there are not two further purposes which the legislator may legitimately desire to attain as results though not only minor results of punishments.

One of these distasteful as is the suggestion to the great majority of modern writers- is the gratification of the feelings of the person injured. In early law this was an object, often indeed the paramount object, of punishment. Even in imperial Rome, hanging in chains was regarded as a satisfaction to the kindred of the injured, “ut sit solati cognatis”, and even in England as recently as 1741 a royal order was made for hanging in chains “on petition of the relations of the deceased.” The current morality of modern days generally views these feelings of resentment with disapproval. Yet some eminent utilitarians, like Beathen have considered them not unworthy of having formal legal provision made for their gratification. Hence no less recent and no less eminent a jurist than Sir James Stephen maintains that criminal procedure may justly be regarded as being to resentment what marriage is to affection – the legal provision for an inevitable impulse of human nature. And a very general, if unconscious, recognition of this view may be found in the common judicial practice, in minor offences, of giving a lighter sentence whenever the prosecutor ‘’ does not press the case.’’

As we have said, the encouragement of any feelings of revenge is reprobated by modern public conscience. And yet does not our own law make a considerable concession to such feelings in all these cases in which criminal action cannot be taken, and, therefore, punishment cannot be awarded except on the complaint of the injured party? “There is a second subsidiary purpose of punishment, which, although not distasteful as the fore-going one is almost equally ignored by modern jurists. This consists in the effect of punishment in elevating the moral feelings of the community at large. For men’s knowledge that a wrong-doer has been detected and punished, gratifies- and thereby strengthens- their disinterested feelings of moral indignation. They feel, as Hegel has it, that “wrong contradicts right, but punishment contradicts the contradiction.” Medieval law made prominent this effect of punishment. For more than a century passed, the tendency of jurists has been too disregarded, but it occupies a large place in the judgment of ordinary man. It has full recognition from practical lawyers as eminent as Sir Edward Fry[396], Mr. Justice Wright[397], and Lord Justice Kennedy[398]. Professor Sidgwick testifies[399]: “We have long outgrown the stage at which the normal preparations given to the injured consisted in retribution inflicted on the wrong-doer. It was once thought as clearly right to requite injuries as to repay benefits: but Socrates and Plato repudiated this and said that it could never be right to harm anyone however he may have harmed us. Yet, thought we expect

[396] “Studies by the way”, pp. 40-71.
[397] Draft Jamaica Criminal Code, p. 129
[398] Law magazine”, no. 1899
[399] Methods of Ethics”, p. 280

this view of individual resentment, we seem to keep the older view when the resentment is universalized, i.e. in Criminal Justice. For the principle that punishment should be merely deterrent and reformatory is, I think, too purely utilitarian for current opinion. The opinion seems still to incline to the view that a man who has done wrong ought to suffer pain in return, even if no benefit results to him or to others from the pain; and that justice requires this; although the individual wronged ought not to seek or desire to inflict pain."

Sir John Salmond writes as follows: "Although the system of private revenge has been suppressed, the emotions and instincts that lay at the root of it, are still extinct in human nature, and it is a distinct though subordinate function of criminal justice to afford them legitimate satisfaction. For although in their lawless law and unregulated exercise and expression they are full of evil, there is in them nonetheless an element of good… Did we punish criminal merely from an intellectual appreciation of the expediency of so doing, and not because their crimes arouse in us the emotion of anger and the instinct of retribution, the criminal law would be but a feeble instrument. Indignation against injustice, is moreover, one of the chief constituents of the moral sense of the community and positive morality is no less dependent on it than is the law itself. It is good therefore, that such instincts and emotions should be encouraged and strengthened by their satisfaction: and in civilized societies this satisfaction is possible in any adequate degree only through the criminal justice of the State. There can be little question that at the present day the sentiment of retributive indignation is deficient rather than excessive and requires stimulation rather than restraint. Unquestionable as have been the benefits of that growth of altruistic sentiment which characterizes modern society, it cannot be denied that in some respects it has taken a perverted course and has interfered unduly with the sterner virtues. We have too much forgotten that the mental attitude which best becomes us, when fitting justice, is done upon the evil-doer, is not pity, but solemn exultation."

But Salmond himself confesses that this explanation of retributive punishment does not receive universal acceptance. Indeed, as has already been stated, modern jurists disregard this supposed effect of punishment: as Professor William McDougall points out "The fuller our insights into the springs of human conduct, the more impossible does it become to maintain the antiquated doctrine of retribution"[400].

[400] "Social Psychology" p.14.

We may conclude with Professor Kenny, that the current theories of criminal punishment has not been assumed, even at the present day either a coherence or a stable form. Sir Henry Haines said in 1864[401] "All theories on the subject of punishment have more or less broken down and we are at sea as to first principles." Citing these words in 1924, Mr Justice McCardy added "Again and again I have heard men of juristic distinction express the same opinion";; and in 1925 Lord Oxford citing then, added: "Nothing has since been said or written that has brought us any nearer to those principles." Continental Jurists express an at least equal distrust as to the systems pursued in their countries "But to Englishmen" (Kenny goes on to say) "the importance of arriving at definite principles on this subject is peculiarly great: for our abolition of minimum punishments has given our judges a range of discretion and, therefore, a range of responsibility: not unusually entrusted to continental tribunal". This last remark now applies to us largely in view especially of the recent amendment to our criminal code (V. Section 23A) whereby our courts have been empowered for special reasons to award punishments below the minimum prescribed by the law.

[401] "Speeches", p.123.

Measure of Punishment

From what we have said in the preceding lectures it is clear that the quantity of punishments cannot be absolutely determined by any fixed and invariable rule but it must be left to the discretion of the legislature to impose such penalties as are warranted by the dictates of justice and laws of society and as appear to be best calculated to answer the end of precaution against future offences and the other legitimate purposes of criminal punishment. But though there cannot be any general or determinate method of rating the quantity of punishment for offences uniform rule, yet there are some general principles drawn from the nature and circumstance of the offence that are of great help in fixing the appropriate punishment. The experience of centuries rendered familiar long-ago various lending considerations which habitually affect the minds of legislators in determining the maximum penalty for any given class of offences and the minds of judges in determining the penalty to be given in any given instance.

Thus the ancient Roman Lawyers[402] enumerated 7 points to be taken into account of:

(1) CAUSA e.g. Wanton aggression – parental chastisement
(2) PERSONA e.g. both of offender and victim.
(3) LOCUS e.g. sacrilege or not.
(4) TEIUS e.g. night or day
(5) QUALITAS e.g. open theft or secret
(6) QUANTITAS e.g. theft of one cow or a herd
(7) EVENTUS E.G. where attempt or consummated crime

Thus, practically speaking the offence itself and the offender.

For these last three, as “disquilibric” the only appropriate treatment in segregation (i.e. non-punitive detention, in what is rather an asylum than a prison) and this must continue for an indeterminate period, measured not by the guilt of the act but by the character of the offender, that is to say, permanently, except where the treatment proves so successful as to bring a particular offender to such a condition of mental health as makes it safe to release. Meanwhile the detention is not only to have a curative but also a compensative purpose, being co-regulated

[402] Dig. 43, 1916

as to try to obtain from the labour of the criminal a sum of money which will make amends to the victim of the crime. In the case of offenders of the first two classes, the raising of this compensation money, is indeed, to be practically the sole object of their detention.

In these theories it is obvious that Criminal Law, properly so called disappears from view and is replaced by Civil Law in some cases, and by the art of medicine, in others. The writers of this school have certainly rendered great services by drawing attention to the necessity of distinguishing between different types of criminals. They have thus warned legislators against the old error of trusting uniformly to the deterrent of efficacy of punishment, and still more, have warned judges of the necessity of an “individualization” of punishment based on such enquiry into the career and characteristic of each offender as will make it possible to adapt this particular penalty to his particular needs. The pathological peculiarities upon which so much stress has been laid by them are now shown to occur in so many persons who are free from all taint of criminality…… nor is the instinct to crime at all so frequent as these writers assume; experience shows that most criminals are much like other men and that it is only by gradual steps that they have failed……

Dr Goring in an invaluable treatise “The English Convict” tabulated elaborate medical statistics concerning 3000 grave offenders. The result challenged the Italian ‘Lombrosian’ theories at almost every point and led to the inevitable conclusion that “there is no such thing as an anthropological type”, the prison commissioners in 1914 endorsed the conclusion of Goring’s book, being convinced that “there are no physical or mental or moral characteristic peculiar to the inmates of the prisons, the man is not predestined to a criminal career by a destiny which he cannot control.”

From studies such as these, the present school of criminologists have discovered that there is no single formula that accounts for all violations of the criminal code. Indeed, the note of the day is research – research into the factors individual and social which determine criminal activities and research into the resources of the community for making such disposition of the offender as will effectually protect the former without destroying the latter.

Classification of punishment according to our criminal code

The forms of punishment permitted by our Criminal Code are:

i. Death
ii. Hard Labour
iii. Imprisonment
iv. Solitary Confinement
v. Interdiction
vi. Fine (Multa)
vii. Detention
viii. Fine (Ammenda)
ix. Reprimand or admonition.

The first six are the punishments which, as a rule, are applicable to crimes. The last three are the punishments which, again as a rule, are applicable to contraventions.

Death

It cannot be questioned that this punishment ought to be confined to the highest order of crimes. By our criminal code it is restricted to cases of wilful homicide (s. 225. 285), high treason (s. 55,56), arson of the most aggravated kind, being of danger to human life or the wilful destruction of arsenals, docks, etc. (S. 329,330,331), and a very few other offences causing loss of life. (Sects. 326, 335).

Commenting on the retention of this punishment in the project of our criminal code, Jameson wrote as follows: - “In conformity with the instructions of the government, the punishment of death has been preserved. No one can doubt that in the existing state of society this punishment must be retained. The reason given by the learned Commissioners in their first report for retaining capital punishment as being in conformity with the principles and rules of other continental codes is unsatisfactory. The true reason is the necessity of this punishment. Perpetual imprisonment offers too many chances of escape or mitigation of its terrors. It is too remote. Its real severity cannot be apprehended by passion. It is indispensable to save a punishment the nature of which

may be at once understood and felt by the most reckless without affording any place for illusory hopes for mitigation and escape. Those who from a mistaken and false humanity argue for its abolition overlook the numerous cases of atrocious crimes which are prevented by the dread of it."

Since then, the question of abolishing this punishment in Malta has been formally raised on at least two occasions, by Sir Adrian Dingli in 1850, and by Sir Arturo Mercieca in 1909. And indeed, there is a strong body of opinion, today perhaps even stronger, which with passion and conviction holds the view that the retention of capital punishment is not only mistaken but wholly unjustifiable. It is well that we should very briefly examine the grounds upon which this view is founded.

In the first place, it is claimed by the opponents of capital punishment that the penalty of death has been abolished for many years in various countries and that abolition has been in all of them a success. They add that in view of the other grave objections to capital punishment it would be most desirable to abolish it. Such other objections to which they point out are the irrevocability of the death sentence and the consequent danger of the execution of innocent persons, the risk that persons of such unstable mentality that they should not be held responsible for their action may be unjustly hanged, the depressing and indeed demoralizing effect of executions upon both the officers of prison staff and other prisoners, the false glamour which the existence of the death penalty throws over murder trials in such a way as to rise an unwholesome and morbid interest in crime; the danger that juries may be led to return verdicts against the weight of evidence for fear lest the prisoners may be hanged; and finally, the fact that the infliction of the death penalty outrages the feelings and the moral sense of large numbers of the best types of citizens.

It cannot be doubted that theoretically, the above arguments for the abolition of capital punishment are very strong indeed. But persons with practical experience with the criminal classes, maintain that they are not conclusive. Law exists for the protection of a community. It is not necessary to show that capital punishment is an absolute preventive of murder, nor even that it is only deterrent. If it can be shown that it is more effective as a deterrent than any other punishment, then it should be retained. To hold otherwise is surely to forget the innocent.

Victims of the crime in the interest of the offenders and there is little doubt that the fear of the gallows is the most powerful deterrent that has been or can be known. Two centuries ago, there were in most countries innumerable offences punishable with death, and this destroyed the terror

of the death penalty. Today, there is, we can practically say, the single crime of murder. Nothing could mark more clearly the sanctity with which the law regards human life.

The proposed alternative for capital punishment is imprisonment for life. It is possible that the savage alternatives to capital punishment enforced in some countries which have abolished the death penalty are an effective deterrent. It does not follow, however, that the mild treatment of long-term prisoners in the most civilized countries would prove to be the same. Sir Henry Bolands says[403] "I have found that the fear of penal servitude is nothing like such a deterrent, as the fear of being hanged." But for the death penalty, a prisoner already under imprisonment for life, would have but little fear if he killed his warder. "That little rope" said a convict once in England, "is a great check on a man's temper".

Finally the most searching examination of records for the past, say, 50 years in countries which have adopted a mode of trial surrounded with adequate cell guards for the defence of the accused, and thus affording the amplest practicable security against the unjust condemnation of any innocent person, fails to bring to light a single case, in which it can be suggested that an innocent person has been hanged and the merciful examination of the circumstances in every case by the head of the executive (the Home Secretary in England, the Governor in Malta) in pursuance of which a reprave is granted in a good proportion of cases as a further means of tempering in appropriate cases the rigour of the law. In a few words, the real justification of capital punishment appears to be still that mentioned by Jameson in 1843, mainly its necessity. Society has the right, for special reasons deeply affecting the common welfare, to make exceptions to the general principles, and the rules of punishments – "Salus rei pubblicae suprema lex".

The death penalty in Malta is executed by hanging. No person under eighteen years of age can be sentenced to death. All disabilities arising out of a death sentence (or any other punishment) e.g. forfeiture of all property, incapacity to receive or to dispose of property or to enter into a contract or to make a will have been abolished. As to the mode of carrying out execution and other incidental matters, see sections 8,504,614,615,661 of the criminal code, the Prisoner Regulations, and section 24 of the royal instructions to the governor 1947.

[403] 72 years at the Bar, p. 321

Punishments Restrictive of Personal Liberty

These are Hard Labour, Imprisonment, Solitary confinement, and Detention.

a. Solitary Confinement This is not an independent punishment but is an aggravation of hard labour or imprisonment. It is carried out by keeping the person sentenced to hard labour, or Imprisonment, during one or more periods in the course of such sentence, continuously shut up in the appointed place within the prison, without permitting any person to have access to him otherwise than on duty or specially authorized by the Government. Section 11 of the Criminal Code lays down the other rules governing the award of this accessory punishment.

   Solitary confinement was introduced into out Code in pursuance of instructions addressed to the Code Commissioners on 8th May 1840 and was to be regulated in terms of the Statute 1. Vic, c. 90para. 5. But it was mitigated as to the use to be made of it below the periods fixed by the said statute as it appeared to the Commissioners that the climate of Malta and the constitution of the people required some diminution[404].

   But in England the power of Courts of Justice to impose the punishment of Solitary Confinement has been taken away by the repeal of the enactments conferring it[405].

b. Persons sentenced to hard labour are confined in the prison in that part of prison appointed for the purpose end are compelled to work in accordance with the regulation lawfully made, and subject to restrictions as the regulations proscribe.

c. Imprisonment consists in confining the person sentenced to such punishment in the prison or in that port of the prison appointed for the purpose and subjecting him to such restrictions as are prescribed by the regulations. The duration of the punishment of Hard Labour of Imprisonment is fixed by the law in each particular case.

d. Detention consists in detaining in **accordance** with regulations the person sentenced to such Imprisonment, at his own expense in the prison or in that part of the prison appointed for the purpose without subjecting him to any hard tour. But if the person so sentenced has no means

[404] Jameson's report, Page 17
[405] V. Archbold, Page 255

of maintaining himself at his own expense, he is maintained by the Governor in which case he may be compelled to work like other persons liable to work.

The term of detention cannot, as o rule exceed one month (but see Section 53 of the Criminal Code.)

Those are the only forms of punishments restrictive of personal liberty. (As to detention in a reformatory (now Approved School), House of Correction or Industrial School we shall say hereafter.)

Interdiction

This is another accessory punishment. It is either general or special; and in either case perpetual or for a stated time only. Where the law does not otherwise provide, temporary interdiction shall be for a time not exceeding five years. Interdiction involves incapacity; of holding any public office or employment when general, and of holding a particular office or employment or exorcising a particular office or employment, or exercising a particular profession, art, business or right, when special.

Interdiction whether for life or for a stated time may, upon the application of the person sentenced to such punishment and on good grounds being shown to the satisfaction of the Court by which the sentence was awarded, be discontinued at any time by order of the said Court. The Court is bound to order a sentence awarding general or special interdiction or a decree ordering the discontinuance thereof to be published in the Government Gazette. In the case of a decree ordering the discontinuance of interdiction the expense of publication is charged to the person concerned (sec Section 12 of the Criminal Code as amended by Section 3 of Ordinance IV of 1947).

Finally, it is provided that any person sentenced to interdiction who disregards any of the obligations out of such sentence shall be liable to imprisonment for a term not exceeding three months and to a fine (multa).

Pecuniary Penalties

These include fines (multa) and (ammenda). In the absence of a special provision in any particular case in the maximum of multa is €20 and the minimum 25 but the Court may unless a particular minimum in otherwise prescribed in any particular case reduce in trivial cases to any sum not less than ten shillings. The maximum of ammenda in the absence of a special provision to the contrary in any particular case is of €5, minimum two shillings and six pence.

Sections 13, 15, 16 and 30 of the Criminal Code contain provisions as to the mode of payment of these fines and as to the conversion of the sum into imprisonment or detention in default of payment.

Reprimand and Admonition

Reprimand is a rebuke for the offence committed, the admonition is an exhortation act to commit another offence. They are administered in open Court by the Judge or Magistrate who was tried the case and any person who receives the sum in a manner of evidencing contempt or want of respect may be sentenced to detention or ammenda.

Non-Punitive Treatment

Our review of the form of punishment, all of them intended mainly for deterrence, must be completed by consideration of other methods of dealing with convicted offenders which aim mainly at reformation.

Young offenders, as we have already seen, and children under nine years of age are exempt from all criminal punishment. So also are children acting without mischievous discretion; but the Court may bind over the parents or any other persons bound to provide for the education of such children, to watch over their conduct under a penalty; in the event of non-compliance of a sum of not less than *€2* but net more than €100 regard being had to the means of the persons to be bound over and to the seriousness of the case.

THE END