Second Year Criminal Law

Prof A.J. Mamo

Revamped by Christopher Aquilina

GĦSL
Għaqda Studenti tal-Liġi

LL.B. II

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Finally, GħSL would like to thank Christopher Aquilina, who took the time to revamp and retype these notes for the benefit of law students.

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Revamped by Christopher Aquilina (2022)

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I. Crimes Against the Safety of the Government

The very first title of Part II of the Criminal Code which deals with Crimes and Punishments, is devoted to Crimes against the Safety of the Government. This is not unnatural, as these crimes strike at the very foundation, the very existence of the state.

The Crimes therein dealt with correspond substantially to what in English Law is known as Treason, the crime which the law ranks as the most heinous of all crimes. “The highest Civil crime which, as a member of the community, any man may commit”[1]. “The atrocious crime of endeavouring to subvert by violence those institutions which have been ordained in order to secure the peace and happiness of society”[2].

The word "Treason", derived from the French "trahir" and Latin "tradere" denotes an act of perfidious "betrayal". The offence might, at English Common Law, be committed either by a breach of the faith due to the King from his subjects (High Treason), or even by a breach of that due to one of those subjects from his own inferiors (Petit Treason). But a sufficiently grave breach of the latter form of allegiance could only be committed by the actual slaying of the superior; as when a feudal vassal murdered his Lord, a priest his Bishop, or a wife her husband. Since 1828[3], such homicides have ceased to differ from ordinary murders; so that High Treason is now the only kind of Treason known to English Law[4].

Treason being, as we have said, the most serious of all Crimes, it ought, therefore, to be the most precisely ascertained: and yet, at Common Law, there was great latitude left to the Judges in determining what was Treason, or not so; whereby the creatures of tyrannical princes had opportunity to create abundance of constructive Treasons; that is, to raise, by fraud and arbitrary constructions, offences into Treason, which were never suspected to be such. The inconveniences arising from this laxity were put an end to by the Statute of Treasons[5] which defines what offences should for the future

[1] Blackstone

[2] Chief Justice Marshall

[3] 9 Geo. 4 c 31, s. 2

[4] Kenny, “Outlines of Criminal Law” 15th Edition, pg. 306

[5] 25 Edw. 3, St. 5, c. 2

be held to be Treasons: comprehending all kinds of Treason then known, under several branches.

We shall see how the crimes specified in our Criminal Code correspond to the various forms of Treason under that Statute.

1. Taking away the life or liberty of the King or of the Heir Presumptive to the Crown or endangering their life by bodily harm

"The principle (upon which the criterion of this crime is founded) is too obvious to need much enlargement. The King is considered as the head of the body politic, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot be taken away by treasonable practices, in the ordinary course of things, without involving a whole nation in blood and confusion; consequently, every stroke levelled at his person is, in the ordinary course of things, levelled at the public tranquillity. The law, therefore, tenders the safety of the King with an anxious concern, and, if I may use the expression, with a concern bordering upon jealousy". Thus wrote Mr. Justice Foster.

Under the English Statute of Treasons above referred to, the first mode of committing the crime consists also in "compassing the death of the King, of his Queen, or their eldest son and heir". The word "compass" signifies the purpose and design of the mind or will and not, as in common speech, the carrying of such design into effect. But as the compassing is an act of the mind, it cannot fall under any judicial cognizance, unless it be demonstrated by some open or overt act. And, therefore, it is necessary that there appear an open or overt act upon which to convict the traitor. As to what might be a sufficient overt act for the purpose of the crime under English Law, confer Blackstone[6].

[6] Blackstone, "Commentaries" IV, 79; Kenny op. cit., pp. 308-309

Under our Law (Section 55) the crime can be committed by actually killing the King or the heir presumptive to the throne, or by depriving them of their liberty, or by endangering their life by bodily harm.

It is commonly held by text writers that the "intentional element" of this crime consists in the wilfulness of the act against the person of the sovereign or the heir apparent, and more precisely in the deliberate attack upon his person or his liberty. It is, therefore, not necessary that the offender should have acted for a political object. The law gives a special protection to the Head, of the State having regard, as we have said, to the effects which an attempt against him may have upon the public peace, and these effects do not change, at any rate substantially, by reason of the diversity of the object aimed at by the agent[7].

Now although mention is made of the King only, there is no doubt that a Queen Regnant such as Queen Elizabeth or Queen Victoria, being invested with Royal Power and entitled to the allegiance of her subjects, would be within that description. Indeed, this is expressly declared in the Interpretation Act, 1889, s. 30. But the husband of such a Queen would not[8]. And the King here intended is the King in possession without any respect to his title. In England it is held that a king "de facto" and not “de jure”, or, in other words, a usurper that has got possession of the throne is a king within the meaning of the Statute as there is a temporary allegiance due to him, for his administration of the Government, and temporary protection of the public. The most rightful heir of the Crown, or king “de jure” and not “de facto”, who has never had possession, is not a king within the Statute[9].

2. Subverting, or attempting, to subvert the Government of these Islands or of any other part of Her Majesty's dominions

Natives of Malta are natural born subjects of the British Crown, and they may be guilty of acts which violate their duty of allegiance to the general Government of which they

[7] Confer Maino, op. cit., pg. 43, art. 117, para 676; Tuozzi "Corso Completo di Diritto Penale, Vol. III, pg. 67

[8] Blackstone, op. Cit. 77

[9] ibid.

are a part. A Maltese subject might aid and abet a treason without being directly guilty of subverting or attempting to subvert the local Government[10]. That is why crimes under Section 56 arise also where the act of subversion is directed against the Government of Her Majesty established in any other of the possessions of the British Crown.

Under the English Statute already quoted it is Treason to "levy war against the King in his realm".

The meaning of the word "war" here is not limited to the true "war" of International Law[11], but will include any forcible disturbance that is produced by a considerable number of persons and is directed at some purpose which is not of a private but of a "general" character, e.g. to release the prisoners in all the goals. It is not intended that the offenders should, be in military array or be armed with military weapons. It is quite sufficient that there be assembled a large body of men who intend to debar the Government from the free exercise of its lawful powers and are ready to resist anyone, according as this object is of local, or a public and general character.

Another species of Treason under the English Law consists in "adhering to the King's enemies in his realm, by giving to them aid and comfort in the realm or elsewhere." "Enemies" here is to be taken in the strict sense which International Law puts upon the word; and accordingly includes none but true public belligerents[12].

Under our Code, the crime which we are now considering consists, as we have said, in subverting or attempting to subvert the Government of the King in these Islands or in any other of His Majesty's dominions by committing any of the acts hereunder mentioned. The word "subvert" implies the destruction or change of the Government. The acts whereby the crime may be committed are:

a) Taking up arms against the Government for the purpose of subverting it
b) Bearing arms in the service of any foreign Power against the Government
c) Aiding His Majesty's enemies in any other manner whatever against the Government

[10] Jameson Report pg. 94

[11] Opoenheim's International 5th Edition, P. II, 2, 1

[12] Kenny, op. cit., pp. 311-312

d) Usurping or unlawfully assuming any of the executive powers of the Government for the purpose of subverting it
e) Taking up arms for the purpose of compelling the Government to change its measures or counsels or of obstructing the exercise of its lawful authority.

The expression "bearing arms" in (b) above may give rise to a doubt whether a person who joins the armed forces of a foreign Power at war with His Majesty, but in a non-combatant capacity, will be guilty of the crime as having "borne arms" in the service of that Power, against the Government. Under the old German Code, where the expression used was "serving with enemy forces", it was held that, not only service with the enemy as a combatant but also service in any other capacity as, for instance, doctor R. chaplain, would constitute the crime. Under the Italian Code of 1889 where the same expression is used as in our Code, ("portar le armi") it was doubted whether the mere enlistment, or even service in other than a fighting capacity would fall within that expression. In Rex vs. B. P.[13], where the accused had joined an enemy regiment but performed duties only as an 'artist' (such as depicting and illustrating war incidents) and had taken no part in military operations, the Court gave the accused the benefit of the doubt and considered that, as he was in a non-combatant section, he had not "borne arms".

The point, however, is not one of great practical importance. In fact, in the judgment afore quoted, although the act of the accused '"as not considered as amounting to "bearing arms", nevertheless his enlistment in the army of the enemy followed by service in that army, even though not as a combatant, was considered as undoubtedly constituting an "aiding of His Majesty's enemies" within (c) above. In R v Casement[14], it was held that ''any act done by a British subject who strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King constitutes giving aid and comfort to the King's enemies".

With regard to (c) above we may repeat here what we have already said in regard to the corresponding expression in the English Statute, that the word "enemies" is in this context used in the strict sense of true belligerents[15]. Hence to give aid or assist mere

[13] 19th November 1942

[14] 1917 1 K. B. 98

[15] V. Falzon, "Annotazioni alle Leggi Criminali", pg. 42

rebels against the King does not constitute an offence under that sub-paragraph: though it may be sufficient to constitute the offence under sub-paragraphs (a) or (d) or (e).

It was held in England that the act of purporting to become naturalised in an enemy state in time of war constitutes, in itself, an act of treason, by giving aid or comfort to the King's enemies[16]. This doctrine was followed by our Court in R v, E. F. et.[17].

It has likewise been held that aid given to an enemy agent against an ally of His Majesty is sufficient to constitute the crime. (V. Archbold, p. 1030 quoted in "Rex vs. B. P already referred to).

How in respect of the crime we are discussing the law (Section 56) subjects to the same punishment the completed as the attempted crime. But we think we may usefully quote here with Maino the following passage from a famous speech by Areri:

"Il legislatore in vista appunto del pericolo che lo stato incontra nei vari attentati, parifica il tentativo al reato consumato, ma richiede pur sempre gli estremi del tentativo. Senza la serietà "del pericolo, vero attentato non vi ha [...] La legge mette bene il tentativo nelle, linea del delitto consumato in quest'ordine di crimini, appunto per la ragione che sempre in queste cause, udimmo ripetere, desunta da quanto in Senato disse Catone contro Catilina: 'Haec nisi provideris ne accident, ubi eveniant, frustra judicia implores'. Ma se parifica il tentativo al reato consumato, richiede però serrore che vi siano i caratteri veri del tentativo.

It is, however, provided that where the crime is not carried into effect in consequence of the voluntary desistance of the offender not to complete the crime, then the punishment must be diminished by one or two degrees.

Though, as we have said, to constitute the crime under Section 56 there must be at least an attempt as defined in Section 42, yet, as we shall see, in the supreme interest of preventing at the earliest stage possible, acts directed against the state, even preparatory acts, indeed even mere conspiracy to commit the crime, are made substantive, though minor, offences by the law.

[16] R v Lynch (1903) 1 K.B. 444

[17] 5th October 1946

3. Conspiracy against the Government

Section 57 lays down that: “Any person who shall take part in any conspiracy having for its object any of the crimes in Section 55 and 56 is liable to hard labour for a term from three (3) to six (6) years. Here besides the mere conspiracy, preparatory measures for carrying the crime into effect shall also have taken place, the punishment is hard labour "for a term from five (5) to nine (9) years".

In English Law conspiracy generally means the agreement of two or more persons to affect any unlawful purpose, whether as their ultimate purpose or only as a means to it. This definition presents three points for notice:

(i) the act of agreement

(ii) the persons agreeing

(iii) the purpose agreed upon

(I) Act of Agreement

It must not be supposed that conspiracy is a purely mental crime, consisting in the mere concurrence of the intentions of the parties. For even in the case of conspiracy the fundamental principle holds that bare intention is not enough. "Agreement", as Lord Chelmsford put it clearly, "is an act in advancement of the intention which each person has conceived in his mind". It is not mere intention, but the announcement and acceptance of intentions. Bodily movement, by word or gesture, is consequently indispensable to affect it. But the mere fact of the parties having come to such arrangement suffices to constitute a conspiracy (in the English sense as above defined). The offence is complete as soon as the parties have agreed as to their unlawful purpose, although nothing has yet been settled as to the means and devices to be employed for affecting it.

All the above refers to conspiracy under English Law. Under our Law the substantive crime of conspiracy against the state exists and is completed as soon as the means employed for carrying out the common purpose have been agreed upon or settled between two or more persons. From this, it is clear that bare intention is not enough,

nor even is the mere agreement in furtherance of the intention which each conspirator has conceived in his own mind sufficient. It is necessary that the persons taking part in the conspiracy should have devised and agreed upon the means whatever they are for acting although it is not required that they or any of them should have gone on to commit any further acts towards carrying out the common design. As conspiracy thus consists essentially in the agreement and no further act is necessary, all the conspirators are co-principals in the offence and there can be no question of complicity[18].

If beyond the arrangement as to the means to be employed, preparatory measures towards the execution of the projected crime have been taken, the punishment for the conspiracy is increased.

Of course, if instead of the mere preparatory measures there is a commencement of the execution of the crime intended or such crime has been accomplished, the original offence of conspiracy would become merged in the attempted or consummated crime and the conspirators would be guilty as co-principals or accomplices in such crime.

It will be thus noted that in the case of conspiracy we have a very notable departure from the ordinary doctrine of attempt; we saw last year that, in general, there is an attempted offence when the intention of committing such an offence has been manifested by an overt act followed by a commencement of the execution. Acts that are merely preparatory do not constitute an attempt, much less of course the mere manifestation of a criminal design or mere agreement without any further act whatever.

But in the case of offences against the safety of the state, the supreme interest of the security of the state itself requires that it should be protected from any possible attack even before the evil-minded have actually embarked upon the accomplishment of their criminal enterprise, for there is danger in delay. The aim of the law might reach out too late to safeguard the safety of the state if it had to wait until the criminal design is affected in order to punish it. As Roberti points out: "Trattandosi di misfatti che direttamente attaccano la società", il supremo interesse dello stato non permette di attendere e non considerare come rei se non quelli che di già hanno agito; ma esige

[18] Vide Arabia, Principi di Diritto Penale; 5 P. III, p. 22

invece che consimili misfatti si arrestino per via, onde non pervengano alla fatale meta[19].

On the other hand by requiring as our law does - on the lines of the Neapolitan Code[20], for the subsistence of conspiracy the devising and the settling of the means to be employed, the law has also provided the necessary safeguards against any vexation which the arbitrary discretion or misguided zeal of public authority might have led to if the law had satisfied itself with the mere abstract agreement to act. It is therefore necessary that the mode of acting should have been definitely concluded between the conspirators so that without need for any further deliberation they could proceed to action. "Vi occorre, per ultimo, che tutto sia definitivamente conchiuso tra i cospiratori, ed in modo che, riunite in una/deliberazioni, potesse all'istante medesimo passarsi ella stessa esecuzione, nulla per altro ostando che questa si differisce forse sol per cernire il momento creduto opportuno a realizzarla"[21].

/ sola le volontà di tutti, senza il bisogno di ulteriori /

(II) Persons Agreeing

The very name of the crime under examination indicates that it is essentially one of combination; a man cannot by himself con-spire. But though there must be a plurality of conspirators, it is not necessary that all should be brought to trial together. One person may be indicted alone for conspiracy with other persons who are not in custody or who are even unknown to the indictors. Indeed, some of the conspirators may be unknown even to the others, provided they all be acting under the direction of one common leader. There need not be communication between each conspirator and every other, provided that there be a design common to them all[22].

[19] Corso Completo - Vol. IV, pg. 156; para. 139

[20] Roberti, ibid., para. 142

[21] Roberti, para. 143

[22] Kenny, "Outline of Criminal Law", Ed. 1944, p. 336

(III) Purpose

The purpose of the conspirators under reference must be any one or more of the crimes against the safety of the government dealt with in Sections 55 and 56.

4. Instigation to commit a Crime against the Safety of the Government

The elements of this crime are:

i. Direct instigation to commit a crime against the safety of the Government

There must be a direct causal connection between the instigation and the commission of the crime. In other words, the instigation must have been intentional, that is deliberate, aimed at inciting the commission of that crime. "La provocazione deve essere diretta tale cioè che non possa punto dubitarsi nei dell'animo ostile del provocatore nef della qualità del misfatto in specie che ne formi lo scopo"[23].

ii. By means of speeches delivered in public places or at public meetings

The instigation must be by means of speeches (as to instigation by means of printed matter, confer the Press Ordinance, 1933) delivered in public places or at public meetings. With regard to this ingredient, it is commonly taught that in order to decide whether it exists or not, regard must be had not only to the character of the place, but also to the number of persons present and other circumstances which make possible the incitement of the feelings of the crowd and the violent manifestations of such feelings. Nor is it sufficient that the publicity of the utterances be merely potential; it is not enough that the speeches be delivered in a place open or accessible to the public. The publicity must be actual; that is to say the speeches must be delivered to a number of persons publicly assembled.

[23] Roberti, op. cit. para. 184

For the punishment of this offence it is not necessary that the instigation should have produced its effects: its failure to do so is merely a ground of diminution of the punishment[24].

Where the crime instigated is in fact committed or attempted the instigator is liable to the punishment for the crime so committed or attempted, reduced by one degree.

If the instigation shall have produced no effect, the punishment shall be decreased by one to three degrees. This latter provision constitutes a clear departure from the ordinary principles of complicity. We know that there cannot be complicity unless the offence sought to be instigated etc. has been in fact completed or at least attempted. There is no such a thing as attempted complicity. But here the law considers the instigation as a substantive offence, an offence “sui generis”, even though it has not in fact produced any effect.

Exemption from Punishment

In order to better prevent the grave mischief arising out of the crimes against the safety of the Government already mentioned, the law endeavours to frustrate and break up that concert and assistance among the delinquent without which those crimes would not, as a rule, be perpetrated.

It, therefore, holds out the prospect of impunity to any person concerned in the crime who, before the execution thereof and before any attempt at execution and before any proceeding thereupon, shall reveal the same to the Government or the authorities of the Government[25].

This provision has been the subject of strong criticism on the part of certain writers. By granting impunity to a co-offender - these writers say[26] the law sanctions betrayal which all laws should look upon with disfavour, and moreover the law confesses its weakness by invoking the assistance of the delinquent. Furthermore this promise of impunity far from preventing the crime encourages the delinquents to undertake it in

[24] Section 59 para. 2

[25] Section 60

[26] Vide Beccarie. 'Delitti e Pene', para. 37

the hope that each of them will be able to avoid the punishment by disclosing it when he finds that success is impossible and detection easy.

Against this criticism it is observed that in the interest of the community itself it is extremely useful to sow the seed of diffidence among the delinquents to make them constantly fear so many informers in their confederates. The promise of impunity does not encourage to cowardice except the delinquents themselves and all that which is calculated to dishearten them is useful. Human morality which is based on law and has for its object the maintenance of public good order cannot admit among its virtues the encouragement of loyalty among delinquents. If in open war it is proper to welcome deserters, it is even more prone to do so in a war which is secret and underhand and consists in conspiracies and betrayals.

Nor is it true that the prospect of impunity does not help to prevent these crimes. The offences against the safety of the Government are, as a rule, such that their commission cannot be undertaken by one person alone, and it is reasonable to hold that by instilling the fear that any amongst the delinquents might turn as an informer against the others the necessary concert amongst them may be prevented.

Finally, it would be contrary to the policy of the law inexorably to deny to the persons taking part, for example in a conspiracy, every possibility of escaping the punishment at a time when no actual harm has yet been done, thereby making it their interest to complete the crime for their own sake by at once increasing their chance of complete escape through the success of the crime.

Now in order to benefit by this impunity, the disclosure of the intended crime must be made before such crime is <u>executed</u> or <u>attempted</u>. As the object of the provision is the timely discovery of the project of these crimes and the prevention of their commission, it is clear that such object could no longer be attained if the crime has already been executed or attempted, because in the case of execution the event which it is desired to prevent has already happened, and, in the case of attempt, the overt acts of execution themselves reveal the intended crime and make the disclosure useless. While all this offers no difficulty in respect of crimes which do not become punishable except when the attempt satisfies the ingredients of Section 42 (e.g., under Sections 55, 56) difficulty arises in the case of crimes which are punishable even when the mere agreement as to the means and preparatory measures constitute a crime in

themselves (conspiracy). It might indeed appear that as this crime of conspiracy is complete so soon as the ingredients required by its definition exist, the disclosure cannot be calculated to prevent it as it can come only after its consummation. But Roberti thinks that in the case of conspiracy the words “execution or attempt” in the provision under discussion (Section 60) must be referred to the crime which the conspirators had in view and for the accomplishment of which the means to be employed have been agreed upon, and not to the execution (i.e., consummation of the crime of conspiracy itself). This interpretation has in its support the consideration that Section 60 applies to all the crimes dealt with the proceeding sections of the title among which is the crime of conspiracy. If a different interpretation were to be given there would be no case in which the provision of Section 60 could apply in the case of conspiracy.

Lastly it is essential that in order to obtain impunity the disclosure must be made before any proceedings. It is important to understand that by “proceedings” here is meant the very first steps which the Government or its authorities take for the discovery of the offenders; in other words, the expression “Proceedings” includes any act by which the search for and collection of evidence is taken in hand. Therefore, if the police have already succeeded in obtaining knowledge of the criminal project and initiated appropriate measures for its discovery and prevention and disclosure made by any of the co-offenders would be late and would not insure him impunity.

5. Omission to reveal Intended Crimes

For the same purpose for which the law grants impunity to any of the offenders who reveals the crime as aforesaid, the law also makes it an offence for any person being aware that a crime against the safety of the Government is to be committed, to fail to reveal to the Government or the public authorities within twenty-four hours all the circumstances which are to his knowledge. This crime is very similar to the English “misprision of treason”. In English law, even when no active assistance is given to a person who has committed a treason, anyone who knows of his guilt can give information that might lead to his arrest will commit an offence if he omits to communicate that information to some justice of the peace. This misprision (i.e., high misdemeanour) of thus concealing the treason is usually termed briefly “misprision of

treason". There is some authority says Kenny[27] for saying that a misprision may also be committed in the case of a treason that is merely being planned, if anyone who knows of the design refrains (however much he may disapprove of the project) from disclosing it to a justice of the peace in order to prevent its accomplishment. It is this last statement that makes "the misprision of treason" more closely akin to our provision under discussion, under which the duty of giving information refers to the case in which knowledge is had of an intended crime under the preceding sections of Title I. In other words, according to our law the failure to disclose knowledge obtained of a crime which has already been committed does not constitute the offence under Section 61. "Il fine del legislatore essendo principalmente quello di dare al governo i mezzi onde arrestare dei misfatti contro la sicurezza dello stato, come un tal scopo non pu' piu' conseguirsi per mezzo del rivelamento quando essi si sono già eseguiti, così non può applicarsi la pena nel caso in cui il non rivelatore ne avesse avuto - conoscenza dopo la cennata esecuzione." (Roberti - op. it, p. 204).

The duty of communicating the information does not by an express provision of the law (Section 62) extend to the spouse, the ascendants and the descendants, the brothers and sisters, the mother-in-law and the father-in-law, the son-in-law or daughter-in-law, the uncles and aunts, the nephews and nieces, and the brother-in-law and the sister-in-law of the principal or the accomplices in the crime not disclosed. In making this exception the law has paid a tribute to the principles of the dignity of man and of the sentiments of trust and concord which it is so necessary to maintain in the family.

In connection with this provision an interesting point is discussed by text-writers, that is whether in view of the restricted wording of this provision, the privilege extends also to the confessor who may have obtained knowledge of a conspiracy or of a projected crime against the safety of the government through a confession and to the legal practitioner who may have come to know of any such conspiracy or project through professional communications made to him. Roberti has no hesitation in solving the doubt in the affirmative in both cases. As regards the confessor he says that it could not have been the intention of the legislator to require the breach of the secrecy which the Catholic Religion uncompromisingly commands to be observed whatever may be

[27] Op. cit., pg. 320

the reasons which might in a particular case seem to advise to the contrary[28]. Regarding legal practitioners Roberti observes that the law itself makes it an offence for any legal practitioner to commit a breach of secrecy in respect of professional confidences made to him. It is true that Article 371 of the Neapolitan Code (similar to Section 270 of our Criminal Code) which creates this offence saves from its operation the cases in which the law requires the depository of a secret to disclose it to the public authority. But this saving, Roberti thinks, does not apply to the case in question chiefly because the law so far protects the professional communications between legal practitioners and clients that the former cannot be compelled to depose in respect of circumstances the knowledge whereof may have been obtained from the confidence which the parties themselves shall have placed in their professional assistance or advice.

It must however be clearly pointed out that according to English doctrine, when a legal practitioner is a party with his client to an illegal purpose no privilege attaches to the communications with him upon the subject. Likewise, a communication made to a legal practitioner in furtherance of any criminal purpose does not come within the scope of professional employment, and therefore, communication made to a legal practitioner by his client before the commission of a crime for the purpose of being guided or helped to the commission of it are not privileged and this whether the legal practitioner was or was not aware of his client's intention; if he was so aware, then the communication would not be in the course of any professional employment; if he was not aware then there is no professional confidence[29].

In view of this and bearing in mind that our Section 60 requires the disclosure of crimes which one knows it is intended to commit (i.e., not already committed). It is difficult to conceive how the necessity of the privilege which Roberti claims for legal practitioners can arise in practice. In fact, he himself says that it is natural to suppose that the persons responsible for a conspiracy or a criminal project against the state do not disclose the same to legal practitioners except after the public authorities have already got wind of what is on, and consequently proceedings (in the broad sense in which we have already defined the word) have already started. So that, rather than saying, apart

[28] See also Carnot "Commento del Codice Penale Francese", Art. 103, N. 4

[29] Vide Powell, "Law of Evidence" 9th Edition, pg. 238

from all other considerations, that the legal practitioner is in such cases exempt from disclosing the facts by reason of professional privilege, it seems more correct to say that he is so exempt because once the authorities are already aware of the facts there is no necessity for anybody to disclose.

Finally, it is to be noted that according to general principles the knowledge of an intended offence and the failure to disclose the same to the authorities is an offence “per se” and not complicity in that offence if committed. Dealing with complicity last year we saw that the mere concealment of an offence committed or the mere omission to reveal an offence which is known to be planned does not in itself constitute complicity; there cannot be “negative complicity”. In other words, there cannot be complicity without some active proceeding on the part of one person towards the commission of an offence by another. But the interest of public security makes it imperative to prevent the planning or perpetrating of treasonable activities by all means and this is the justification for the severity of the provision concerning the crimes against the safety of the Government.

II. Crimes Against Public Tranquility

After dealing with the crimes which directly attempt at the very life of the state, our law passes on to deal with the crimes against the public peace or tranquillity. It would be uttering a commonplace to say that the stability of public order is essential as a binding force of the body politic. Indeed, the maintenance of the public peace is the primary purpose of civil society and, in a sense, all Criminal Law is precisely intended to ensure the peace of the community. Every criminal offence generally speaking is a public wrong in that it causes a public mischief besides the private injury to one or more individuals which it may or may not also cause. This public mischief which in Continental doctrine is known as the "danno morale o mediato" of the offence consists if in nothing worse at least in causing alarm or diminishing in the subjects the sense of their own security. In this sense all criminal offences may be described as injuring the public peace or tranquillity because they all cause an apprehension in the minds of the citizens on account of their possible repetition. But there is a class of offences which produce as their immediate effect a disturbance of the public peace giving rise to a

widespread danger as a direct consequence of the act itself independently of the apprehension of their possible repetition. So that, the alarm and apprehension of violence produced in the minds of the subjects constitute a really immediate public injury irrespective of any ulterior injury to the individual which the agents may have intended to commit. Such violence or appearance of violence undermines those fundamental principles upon which the stability of ordered society of the state, and, therefore of civilization itself, depends.

Most of the provisions now contained in Title II were added in our Code at the suggestion of Andrew Jameson. In the draft which was submitted to him in 1842 the only species of seditious or riotous offences which were included in the Title purporting to deal with offences against the public tranquillity were, as he says in his report[30] those of an armed combination to commit any other offence, the carrying of regular weapons without a written licence, and the act of inciting an assembly of ten or more persons to commit an offence. But as he pointed out, there are many acts of a seditious and riotous character which are not necessarily accompanied with an intention to commit an offence or with an armed combination to do so and of which forcible resistance to public officers is by no means an invariable characteristic. It would be contrary to justice as well as to good policy, he goes on to say, to prosecute acts of this kind as subversions of or attempts to subvert the established government by which are meant offences of the nature of high treason; yet they are too injurious to the security of the Government and the public tranquillity to be left altogether unnoticed in a Criminal Code.

The subjects omitted are:

i. Seditious offences of which the injurious nature consists in endeavours to promote public disorder and to endanger the political constitution by engendering discontent in men's minds against the constitution and the laws or the manner of their administration. These include seditious assemblies, seditious conspiracies, seditious libels, the administering of unlawful oaths for seditious purposes to which may be added incitement to mutiny.

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[30] Pg. 78

ii. There is a second class of offences, Jameson goes on to say, of an inferior degree of criminality and less dangerous in their usual results which is left unprovided for. This includes tumultuous and unlawful assemblies which are only prohibited in the proposed Code, when they meet for the commission of some crime and with more than three persons regularly armed. But an assembly may be unlawful the express object of which is to affect not a criminal but a praiseworthy object, as the redress of some public grievance. The illegality consists in the circumstance of a number of persons assembling with such appearance of power and actual violence, or a plain tendency thereto, as leads to a well-founded apprehension of the consequences and a breach of the public peace.

So, Jameson proposed nine additional articles with a view to supplying these material omissions, and all his suggestions were, with slight variations, accepted and eventually incorporated in the Code of 1854 (Sections 72 to 82).

Let us now proceed to examine the various crimes comprised in the Title in some detail.

1. Public Violence

Violence when unjust is always inherently unlawful. Unjust violence may be private or public. The first represents an aggression against the person or the liberty of one or more determinate individuals; the second injures or threatens the liberty or security of an indeterminate number of persons either in themselves or in the authority which presides over their well-being.

Private violence constitutes in itself those offences belonging to the class of offences against the person or the liberty of individuals variously classified in the Codes of Positive Law; or it may constitute an ingredient (e.g., Sections 90, 95, 212) or an aggravation (e.g., Section 217 (l)(a)) of certain other offences.

Public violence is considered as a special crime against public tranquillity: it constitutes an offence in itself (Section 66) and it aggravates all other offences which it accompanies (Section 63).

According to Section 63 "an offence is said to be accompanied with public violence when it is committed by a number of not less than three individuals assembled together

with the purpose of committing an offence, and of whom two at least carry arms proper".

The elements of this aggravation are therefore:

(a) The assembling of three or more persons

(b) They should have assembled together with the purpose of committing an offence

This clearly implies that it would not be enough to show that, at the time of the actual commission of the offence, the offenders were three or more, but it is necessary to show that they had joined together precisely to commit an offence. And the commission of the offence must have formed the subject of the design common to not less than three of the persons so joined together. This means that if only two had the common purpose of committing an offence, although a third one also took part in the material execution of the offence but not in the design, this aggravation does not subsist. On the other hand, however, if the common design in at least three persons is proved it does not matter that the offence – if a crime – is actually committed by one or two only of the persons so assembled. Section 67 lays down that "for the purpose of punishment crimes committed by any of the individuals assembled as provided in Section 63 shall be considered as aggravated by public violence, when in committing such crimes, they have acted in pursuance of a common design".

(c) Two at least of the persons should be carrying arms proper

This circumstance taken together with the number of persons gives rise to the injury to the public peace. "Il numero dei delinquenti influisce sensibilmente ad accrescere le gravezza di un reato perchè non solamente ne facilità le esecuzione, ma contribuisce in modo singolare ad aumentare il danno sociale che dal reato medesimo risulta, quel danno cioè inerente alla diminuzione della fiducia di sicurezza che ciascuno nell'ordine sociale ripone. Allo stesso effetto tende altresì l'uso di quei mezzi, che destinati principalmente all'altrui offesa, nel mentre che assicurano ben anche la

funesta riuscita del reato spargono vieppiu' negli animi di tutti la costernazione e lo spavento"[31].

This third element makes it necessary to enquire what the law understands by "arms proper". The law itself (Section 64) gives the definition. "Arms proper are all fire-arms and all other instrument, implements and utensils principally designed for defensive or offensive purposes. All other instruments, implements, or utensils are not considered as arms except when they are actually used for a defensive or offensive purpose, and then they are called arms improper".

The reason is clear for which the law requires, for the purpose of this aggravation, that the weapons should be arms proper. It is only when such weapons are brought into play that the public in general is specially alarmed. There is no one who does not see the difference in this respect between the case in which three or more persons who combine, for instance, to commit a theft provide themselves merely with sticks to help carry out their purpose and the case in which such persons instead provide themselves with firearms or daggers.

It is to be noted that the aggravation subsists if at least two of the persons are carrying arms proper which seems to mean, according to some writers, that it is not invariably essential that the weapons should be visible. It is sufficient, such writers say if the weapons are about their persons at the time the offence is committed even though concealed from view[32]. Nor does it make any difference that the persons carrying the weapons are licensed (e.g., under the Weapons Ordinance) to carry weapons about them. Nor finally “a fortiori” is it necessary to prove that the weapons were actually used.

If these three elements concur the offence committed by three or more individuals or even by any of them as aforesaid is considered to be aggravated by public violence and the punishment for the offence committed is higher by one degree than the ordinary punishment provided for the offence but so that the punishment, applicable shall in no case be less than imprisonment from one to three months.

[31] Roberti, op. cit., no. 217, pg. 240

[32] Roberti pg. 249

So far, we have considered "Public Violence" as an aggravation of some other offences. We must now say a few words about it as constituting an offence in itself. Section 66 lays down:

"The individuals assembled together as provided in Section 63 (i.e., to the number of three or more with intent to commit an offence, two at least carrying weapons) shall, for the mere fact of so assembling, be liable to the punishment of imprisonment from one to three months."

From this it is clear that this offence is constituted and is completed by the mere act of the assembling of three or more persons under the said circumstances and it is not necessary that any attempt of the offence had in view should have been committed. The law considers the mere combination itself as an offence "sui generis" apart from any execution or inception of the further offence which the associates intended to commit; for the mere existence of such association as soon as it takes place by overt acts constitutes a menace and a danger to public order and requires so to say to be nipped in the bud. This sanction is not a measure only of repression but also a measure of prevention.

2. Seditious Offences

“Sedition” in English Law, whether by words spoken or written, or by conduct is a misdemeanour at Common Law, punishable by fine and imprisonment. It embraces all those practices, whether by word, deed or writing, which fall short of high treason, but directly tend or have for their object to excite discontent or dissatisfaction: to excite ill-will between different classes of the King's subjects: to create public disturbance, or to lead to Civil War: to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm and generally all endeavours to promote public disorder; or to incite people to unlawful associations or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law or to use any form of physical force in any public matter connected with the state"[33].

[33] Archbold, “Pleading, Evidence and Practice in Criminal Case”, 28th Edition, pg. 1139

The offences which we are now going to consider, and which are dealt with in Sections 68 to 82 of our Criminal Code all fall more or less within this definition.

(a) Incitement to Unlawful Assembly with Intent to Commit an Offence

Whosoever shall incite an assembly of persons who when so incited shall be ten or more, with the object of committing an offence shall, for the mere fact of the incitement be liable to imprisonment for a term of from one to three months or to a fine (multa) (Section 68 (i)).

The elements of this crime are:

i. Incitement to assemble

ii. The actual assembling of ten or more persons

iii. The purpose of committing a criminal offence

The offence is complete so soon as ten or more persons assemble together as the result of the incitement with the object of committing an offence, without requiring the execution or even the inception of the criminal purpose had in view. The punishment is provided for the mere incitement. If the projected offence is actually committed the punishment is increased as we shall see.

(b) Taking Active part in the Unlawful Assembly Formed with Intent to Commit an Offence

Subsection 2 of Section 68 lays down that whosoever takes an active part in an assembly formed of ten or more persons with the object of committing an offence, even though the assembly may not have been incited by anyone in particular shall be liable to imprisonment for a term of three days to three months or to a fine (multa).

The elements of this crime are:

i. The taking of an active part in an assembly

ii. formed of ten or more persons

iii. with the object of committing an offence.

For a conviction of this crime, it is essential that the defendant should be proved to have taken an active part in the assembly by word, deed or conduct. Merely to join for a while out of curiosity is not enough. But if an active part is taken, whether from the beginning or at any subsequent stage, so long as the gathering lasts, the crime is complete if the gathering is of ten or more persons and its purpose is the commission of an offence. ''Il delitto di cui al para due dell'articolo 71 (now 68) delle leggi criminali si consuma per solo fatto di formare parte dell'attruppamento allorché questo si revela come tale. Non si richiedono ne' convenzioni prestabilite, ne' consensi espressi, ne ordini di gerarchia o di disciplina fra gli attnippati. Come dimostrano le parole della legge - <u>ancorchè l'attruppamento non sia stato da alcuno in particolare suscitato</u> - una riunione anche fortuita di dieci persone almeno, collo scopo di commettere un reato, delitto o contravvenzione che sia, e' un attruppamento punibile"[34].

In the judgement last quoted Mr. Justice Harding laid down that if a person is physically forming part of any such unlawful assembly in suspicious circumstances, the "onus" weighs heavy upon him of giving a satisfactory explanation of why he was present in those circumstances.

The punishment aforesaid applies when the offence which the assembly intended has not in fact been committed.

Provision common to foregoing crimes

If the offence which the assembly had for its purpose is in fact committed then, when the punishment provided for such an offence is less than those provided for the mere incitement, or, as the case may be, the mere taking part in the assembly, such latter punishments shall be applied with an increase of one degree; but when the former

[34] Criminal Appeal, Police vs Carmelo Saliba et., 25/6/02, Law Reports, Volume XVIII, Part IV, pg. 39; Criminal Appeal, Police vs Rocco Zammit et., 24/4/11; Criminal Appeal Police vs Giovanni Debattista et., 20/9/12; Criminal Appeal Police vs. Bigeni, 17/3/1945

punishment is equal to or higher than the latter punishments, the former punishment shall be applied with an increase of one degree.

(c) Public instigation to commit an offence

Public instigation to commit an offence is a crime in itself even though the incitement has no effect. Prior to 1909, there was no such general provision in our Code. There was of course the special provision of Section 59, namely incitement to commit offences against the safety of the Government, and there was a provision in Ordinance XIV of 1889 when the incitement was made by means of printed matter. The general provision of Section 69 was added by Ordinance VIII of 1909 and it was drawn from the similar provisions of article 246 of the Italian Penal Code of 1889. It was considered very rightly that the incitement to commit an offence should be punishable not only when it is done by means of the Press but also when it is done publicly by other means. Any such incitement is a threat to public peace because this requires not only that actual injury to the rights of others should be repressed, but also so far as possible that such harm be prevented and obviated. And such prevention is secured by punishing even the mere solicitation or incitement independently from the effect thereof.

In dealing with the doctrine of complicity we saw that the instigation or incitement to commit an offence cannot constitute a form of complicity and be punished as such unless the offence instigated or incited is in fact committed or at least attempted: there cannot be complicity in an offence which has not been in fact committed or attempted. But we also saw that apart from any effect produced, such instigation or incitement is, in view of the special danger arising there from, made punishable as an offence "sui generis" in some cases.

We are now dealing precisely with one of such cases. The elements of this crime are:

i. Publicly instigating

ii. to commit an offence

Let us first examine what the law means by the word “publicly”. As this provision was modelled, as we have said, on the corresponding provision of the Italian Code, recourse may usefully be made to the commentatore of that Code. In proposing the

addition of this provision to our Code in the Council of Government, the Crown Advocate said: "By giving a literal reproduction of the article of the Italian Code, the provision which, if this amendment is passed, will be subject to the same interpretation which has been put on the corresponding provision of the Italian Code[35]. "Con la parola pubblicamente - so says the Relazione Ministeriale on the project of 1887[36], viene espressa come estremo essenziale comune a tali delitti, la circostanza della pubblicità da cui soltanto deriva un vero pericolo di disordine sociale. Sarebbe infatti contrario ad ogni principio di liberta stabilire sanzioni penali contro quelle manifestazioni che, avvenendo in privato, rimangono quasi nei limiti del pensiero". In deciding whether this requirement of publicity is fulfilled, regard must be had not only to the nature of the place where the incitement takes place but also to the number of persons attending at the time. To incite to the commission of an offence even in a public square but at a time when there is only one person or a very few persons present, does not, according to the more commonly quoted text writers, constitute the crime under discussion. Conversely, if the incitement takes place in a private place, though there is a substantial number of persons present, the requirement of publicity likewise fails. To the public character of the place there must therefore be added the presence of such a crowd of people as can give rise to the apprehension and danger which the legislator intended to prevent in creating this crime. "La provocazione commessa in luogo privato non e punibile […] quella commessa in luogo pubblico e punibile a condizione che con la pubblicità del luogo si accompagni tale moltitudine da corrispondere al timore e al pericolo a cui il legislatore intese di ovviare creando il resto di pubblica provocazione a delinquere"[37].

The law does not specify the means with which the instigation may be committed. Such means are therefore all those which are calculated to affect the intended purpose and are consistent with the notion of publicity, such as for example speeches delivered at public meetings etc. If the instigation is made by means of printed matter then the special provisions of the Press Ordinance, in the appropriate cases, apply.

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35 Debates Volume XXXIII, pg. 320

36 N.0X.W

37 Maino "Commento al Codice Penale Italiano", art. 135, para. 746

The second element of this crime is that the instigation should have for its object the commission of a criminal offence. That is to say it must be referable to a determinate offence and be made with the intention that this should be committed. The instigation, therefore, must consist not in the mere propaganda of ideas or in the rousing of mere feelings or passions, however blameworthy, as for instance of hatred or hostility, but in urging the commission of an action or a material fact which constitutes a criminal offence[38]. "It is not sufficient, in order to constitute the crime in question, for a person to publicly suggest to another to do something without saying what it is, or for a person to incite another to commit an offence he may choose to commit: in that case the offence provided for by this provision would not arise. The offence will not arise unless the incitement is to commit a determinate offence"[39].

The law speaks of instigation to commit an offence; therefore, the crime subsists whether the offence instigated is a crime or contravention, the difference being in the "quantum" of the punishment. According to law:

i. If the offence instigated is a crime liable to a punishment higher than three years' imprisonment or hard labour, the punishment for the instigation is hard labour from two to five years.

ii. If the offence instigated is a crime liable to imprisonment or hard labour for a term not exceeding three years, the punishment for the instigation is hard labour or imprisonment up to two years.

iii. In the case of any other offence the punishment for the instigation is a fine (multa) or detention.

If the offence instigated is in fact committed or attempted, the instigation will not be punishable under the provision we are now discussing; it would fall under the general provisions relating to complicity. The object of this provision is to punish the public instigation "per se" independently of the effect which it may have on the audience to which it is addressed. If the instigation is followed by the commission or attempt of the

[38] Maino, op. cit., art. 246, para. 1225; Pincherle "Manuale di Diritto Penale", pg. 320, No. 625

[39] Crown Advocate, Debated, loc. cit., pg. 322

offence instigated, the instigator would be an accomplice of the author of that offence[40].

(d) Public Incitement to Disobedience of the Law

“Whosoever shall publicly incite to the disobedience of the law, shall be punished with imprisonment for a term not exceeding three months or with a fine (ammenda)". (Section 70)

This provision was added by the said Ordinance VIII of 1909, and, like the preceding one, was modelled on art. 247 of the Italian Code of 1889, but those parts of that article which contemplated the offence known as "Apologia del delitto", that is glorifying or excusing the commission of a crime, and the offence of incitement to class hatred, were omitted because, as the Crown Advocate observed, the omitted provisions had been made the subject of strong censure by all the jurists in Italy on the ground that they constituted a danger to the liberty of the citizen and lent themselves as a means of stifling public discussion by preventing the expression of political opinions which might be obnoxious to the powers that be. These objections did not apply to the part of that article upon which our provision was framed. "Nothing in this provision," the Crown Advocate said, "lends itself to misconstruction. The offence consists in a public instigation to the disobedience of the law. You have only to find out what the law imposes and whether a public instigation has been made to its disobedience […] If the law is bad there are legal remedies but instigation to disobey the law because it is bad is certainly not a legal remedy and so long as the law is in force, no one can claim to be justified in inciting others to disobey it"[41].

In other words, this provision is not designed to prevent or make criminal candid, full and free discussion of any public matter which is the right of every citizen. The law may be criticized freely and liberally. The provision under reference does not seek to put any narrow construction on the expressions used but interferes only when plainly and deliberately the limits are passed of frank and candid and honest discussion or criticism and degenerates into a public incitement to the disobedience of the law.

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[40] Maino, op. cit., art. 246, para. 1227

[41] Debates, loc. cit., pg. 325

As to the requirement of "publicity" we have only to make reference to what we have already said in connection with the preceding crime of public incitement to commit an offence.

It is hardly necessary to point out that incitement to disobey the law is not the same thing as, and does not include, "incitement to abstain from exercising a right", as for instance to abstain from voting at a political election[42].

(e) Unlawful endeavour to compel the King or the Government to change their counsels or measures. (Section 71)

A person is guilty of this crime who, by unlawful means not amounting to the crime of insurrection or treason dealt with in Section 56, endeavours to compel His Majesty the King or the Government established in the Island of Malta and its Dependencies or in any other of the dominions of the British Crown to change their measures or counsels.

Here again it must be noted that lawful criticism or censure of the conduct, or of the servants of the Crown, or of the acts of the Government, does not constitute this crime or any crime. This crime arises where use is made of unlawful means designed to bring pressure to bear upon the King or the Government with a view to compelling them to alter their decisions or arrangements with regard to the government of the State or to intimidate them into doing what they would not otherwise have done, provided such unlawful means are not any of those (bearing arms, etc.) which constitute the crime under Section 56.

The punishment for this crime is imprisonment for a term from six months to two years.

(f) Contempt of the King

Section 72 lays down:

"Whosoever shall use any defamatory, insulting or disparaging words, acts, or gestures in contempt of the person of His Majesty the King or of His Royal Dignity, or shall censure or disrespectfully mention or represent His Majesty the King by words, signs or visible representations, or by any other means not provided for by the laws

[42] Maino, op. cit., para. 1232

relating to the Press, shall be liable to imprisonment from one to three months or to a fine (multa)."

The principle upon which this is founded is too obvious to need much enlargement. The King is considered as the head of the body politic and the members of that body are considered as united and kept by a political union with him which rests upon the love and esteem of the members towards him. Any contempt of his person or his dignity may tend to lessen him in the esteem of his subjects, may weaken the government or raise difference between him and his people and occasion public disorder.

The contempt may be by words, signs, gestures or other visible representations as by giving out or suggesting scandalous stories about him, or by cursing him or wishing him ill, or by saying that he lacks intelligence or integrity, or by falsely asserting that he suffers from a disorderly mental disease, or by ridiculing him or in general by doing or saying anything, which may diminish his esteem among his subjects.

If the contempt is committed by printed matter, then the provisions of the Press Law will apply.

In connection with this crime it is to be noted that the element of publicity as above defined is not required because this crime does not derive its criminality from the place where it is committed but from the act itself and the effect which it may produce and the scandal which it creates; “E' necessario per l’applicazione della pena, che il reato dì cui si parla sìa commesso in luogo pubblico o in adunasse pubblica? La risposta negativa ci sembra certa. La legge tra gli elementi del reato non richiede la pubblicità del luogo, come la vuole, a cagion d'esempio, nello art. 69 & 76 di queste leggi. Égli e’ vero che le offese segrete non appartengono al dominio della legge, imperocché non potrebbero essere provato; ma un reato non traecarattere dal luogo, bensì dai testimoni che avesse, dai suoi effetti, dallo scandalo causato e dall’intenzione dell'autore; e quindi potrebbe verificarsi tale reato anche privatamente ed in presenza dì un sol testimonio"[43].

(g) Seditious Assembly

[43] Falzon, Annotazioni alle Leggi Criminali

By Section 73 it is provided that: “If three or more persons shall unlawfully assemble, or being unlawfully assembled shall continue together with intent by public speeches, exhibition of flags, inscriptions or other means or devices whatever to excite hatred or contempt of the person of His Majesty the King or of His Majesty's Government established in the Island of Malta and Its Dependencies or in any other of the dominions of the British Crown or to excite other persons to attempt the alteration of any matter established by law, otherwise than by lawful means, every person so "offending shall be punished with hard labour or with imprisonment from six to eighteen months".

The elements of this crime are clear from the very definition of it which the law gives. The persons taking part in the assembly must be not less than three though it is not absolutely essential that all should be tried together. The cannon design must be manifested by any of the means which the law specifies and although the adjective "public" appears used only in connection with the word “speeches”, it is thought that the requirement of publicity applies also to all other means[44].

In connection with this crime the following dictum of Lord Holt is relevant:

“If men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as - crime, and no government can be safe unless it is punished”

(h) Seditious Conspiracy

If two or more persons shall conspire to excite hatred or contempt of the person of His Majesty the King or of His Majesty’s Government or to incite other persons to attempt the alteration of any matter established by law, otherwise than by lawful means, every person so offending shall be punished with hard labour or with imprisonment from six to eighteen months. (Section 74).

Here again the law punishes the mere act of conspiracy having for its object the acts above mentioned. This section does not give a definition of “conspiracy”. But there appears to be no reason why the definition given by Section 58 should not apply, that

[44] Falzon, op. cit., pg. 104

is that a conspiracy exists from the moment any measures whatsoever for acting have been devised or agreed upon between two or more persons.

(i) Raise Imputation of Malversation

Whosoever by speeches delivered in public places or at public meetings shall falsely impute misconduct in administering the Government of His Majesty to any person employed or concerned in administering the same shall be punished with imprisonment from one to three months or with a fine (multa). (Section 75).

The elements of this crime are:

i. Raise imputation of misconduct

ii. Made by speeches delivered in public places

or at public meetings

iii. Against a public officer or servant

iv. In the discharge of his public duties in connection with the public administration.

This crime is comprised in the class of offences against public tranquillity on account of the need of providing that the government shall not be unlawfully brought into disesteem, so that its moral influence and its hold upon the people which have so great an influence upon the maintenance of public order be weakened. While, as we have said, any citizen may criticize or censure the conduct of the servants of the Government freely and liberally, the criticism or censure must be without malignity, must not falsely impute corrupt or malicious motives and must avoid defamation calculated to cause a breach of the peace.

This offence arises where the imputation of misconduct if made by speeches delivered in public places or at public meetings. If it is made by means of printed matter then the provisions of the Press Law apply, and the imputation must be falsely made, that is with the knowledge that it is false. Finally, it is necessary for this offence that the imputation of misconduct should refer to the discharge of the duties or exercise of the rights of the public officer or servant in connection with the part he performs in administering the government, that is not in his private or domestic conduct.

Of course, it is immaterial whether the public speeches impute the misconduct to the public officer in a direct manner or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the persons to whom the speeches are addressed. Taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the judge to say whether, in his mind, they convoy the idea of imputed malversation.

(j) Administering unlawful Oaths

Whosoever shall administer or cause to be administered or token any oath or engagement intended to bind the persons taking the same to engage in any mutinous purpose or seditious purpose to disturb the public peace, or to be of any association, society or confederacy formed for any such purpose shall be punished with imprisonment from seven months to two years.

This punishment shall also apply when the oath or engagement is intended to bind the person taking the same in any of the modes following:

i. To obey the orders of any committee or body of men not lawfully constituted or of any leader or other person not having authority by law for such purpose

ii. Not to inform or give evidence against any associates or other person or not to reveal or discover any illegal act done, attempted or intended to be done by such person or any other. (Section 76)

This provision was framed on Section 1 of the Unlawful Oaths Act, 1797 of the United Kingdom[45]. The reason for the passing of this Act is thus set out in the preamble whereas diverse wicked and evil disposed persons have of late attempted to seduce persons serving in His Majesty's forces by sea and land, and others of His Majesty's subjects from their duty and allegiance to His Majesty and to incite them to acts of mutiny or sedition and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered; be it enacted etc".

[45] 37 Geo, 3 c. 123

It must be noted in the first place that the oath or engagement described by the above provision must purport or be intended to bind the party to whom it is administered to one or other of the things therein specified. On the other hand, the form of the oath or engagement is not essentially material so long as it is intended and considered to be binding. In Rex vs. Moors[46] it was held that if the oath or engagement was read from a paper at the time it was administered, still it is not necessary to produce such paper, but parole evidence of its purport will suffice. So, parole evidence of any declaration made by the defendant at the time he administered the oath will be received in proof of the nature of the oath if that does not sufficiently appear from the words of the oath itself[47]. (But see Section 558 of the Code of Organization and Civil Procedure as applied in Criminal matters by Section 513 of the Criminal Code).

It must also be noted that the punishment provided by the said Section 76 is incurred for the mere act of administering or causing to be administered or taken the oath or engagement for any of the purposes therein described. If such purpose is carried out or attempted the person administering or causing to be administered the oath or engagement may be liable as accomplice.

(k) Taking of Unlawful Oaths

Section 77 provides that the punishment applicable to the preceding crime of administering unlawful oaths or engagements for any of the purposes described in Section 76 applies also to any person who shall take any such oath or engagement provided he shall not have been compelled to take the same.

For the notion of “compulsion” we have to make reference to our studies of last year. Under Section 34 “no person is punishable for any act committed or omitted by him, if he was constrained thereto by an external force which he could not resist”. But in respect of this offence the law makes a qualification to this general rule. It lays down that compulsion shall not avail as a justification or an excuse to a person taking such oath or engagement unless within four days from the cessation of such compulsion, he discloses the fact to the competent authority.

[46] East 419n (b)

[47] Vide Archbold, pg. 1152

Observation Common to Sections 76 & 77

Where the crime had in view in administering or taking the oath or engagement is punishable with hard labour then the normal punishment of imprisonment prescribed in Sections 76 & 77 shall be applied in hard labour.

(l) Inciting to Mutiny or Sedition

By Section 78 anyone who endeavours to seduce any person serving in His Majesty's forces by land, sea or air from his duty and allegiance to His Majesty or to incite or stir up such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever is punished with hard labour from nine months to three years.

This provision was taken from Section 1 of the Incitement to Mutiny Act, 1797. It does not, of course, prevent the application of the rules of complicity in appropriate circumstances where the offence instigated has in fact been committed or attempted: nor does it prevent the person guilty of such acts as are contemplated in the provision in question from being prosecuted for treason where the act done contains the ingredients of such crime.

It may be noted that in Rex vs Bowman[48], it was held that when the incitement is in a publication addressed to British soldiers generally, it is not necessary to specify in the indictment any particular person who has been incited[49].

(m) Unlawful and Tumultuous Assemblies

Section 79 incorporates substantially the Common Law offences of unlawful assembly, rout, and riot.

An unlawful assembly at Common Law is an assembly of three or more persons (i) for purposes forbidden by law, or (ii) with intent to carry out any common purpose, in such

[48] 22 Cox. 729

[49] Harris - Principles and Practice of the Criminal Law'*, 15th Edition, pg. 63

a manner as to endanger the public peace or under such circumstances of alarm, either from the numbers or language or behaviour of the assembly as to give to persons of reasonable firmness and courage ground to apprehend a breach of peace[50]. Whenever therefore as many as three persons meet together to support one another, even against opposition, in carrying out a purpose which is likely to involve violence or to produce in the minds of their neighbours any reasonable apprehension of violence then, even though they ultimately depart without doing anything whatever towards carrying out their design, the mere fact of their having thus met will constitute the misdemeanour of unlawful assembly.

The offence is sometimes defined so widely as to include all cases where three or more persons are assembled for any unlawful purpose whatsoever, even though it be one that can cause no fear of violence. But this comprehensive definition, long ago called in question, has now been set aside by the case of Field v. The Receiver for the Metropolitan Police District[51]. Kenny goes on ‘In the offence of unlawful assembly as in all others, the law regards persons as responsible for the natural consequences of their conduct. Consequently, if people have assembled together under such circumstances as are in fact likely to cause alarm to bystanders of ordinary courage, the assembly will be an unlawful one, even though the original purpose for which it came together involved neither violence nor any other illegality’. 'You must look not only to the purpose for which they meet but also to the manner in which they come, and to the means which they are using’[52]. Accordingly, the idea of an unlawful assembly is not restricted to gatherings met together for the commission of some crime, or for arousing seditious feelings or for inciting to some breach of the law. For, however innocent may be the object for which a meeting is convened it will nevertheless become unlawful assembly if the persons who take part in it act in such a way as to give firm rational men a reasonable ground for fearing that some breach of the peace will be committed. But it is important to notice that, if persons meet together for a lawful purpose and quite peaceably in act and intent, the fact of their being aware that other people, less scrupulous, are likely to disturb them unlawfully and thereby to create a breach of the peace does not render their assembly an

[50] Harris ~ op. cit., pg. 115

[51] (1907) 2 7,3. 853; Kenny, op. cit. 327

[52] Bailey, J.

unlawful one. A man cannot be convicted for doing a lawful act, merely because his doing it may cause someone else to do an unlawful act. But to do this intrinsically lawful act, for example to wear a party badge, with the desire of thereby irritating others into a breach of peace would render it unlawful. Some authorities go further and hold that mere knowledge (without desire) of the irritation being probable will suffice to render the act unlawful if it be done without a reasonable occasion"[53].

This is the position in English Law. Our own law in the first paragraph of Section 79 lays down that:

"If three or more persons shall assemble or shall continue together for any purpose whatever, in such manner and under such circumstances of violence, threats, tumult, numbers, display of arms or otherwise, as are calculated to create terror and alarm among the King's subjects, every such assembly shall be deemed to be unlawful and every person forming part of such assembly shall be punished with imprisonment from four to twelve months."

It will be seen that according to our law that which makes the assembly of three or more persons unlawful is not necessarily the unlawfulness of their purpose in assembling together. Their purpose may have nothing unlawful about it, and yet the assembly will be unlawful if the manner of the persons coming together and the circumstances under which they meet are such as are calculated to cause alarm among the citizens. The numbers alone, it is true, will not suffice to make an assembly unlawful but they are a circumstance to be considered. And a marked absence of women and children from a crowd, an unusually late hour of meeting, a seditious tone in the speeches, any menacing cries of banners, any carrying of weapons, are similarly circumstances to be taken into account in determining whether a meeting might reasonably inspire terror in the neighbourhood[54].

'Closely akin to the offence of an unlawful assembly', Kenny says, 'are some other crimes of tumultuous disorder which are technically distinguished from it. Thus, an unlawful assembly develops into a rout so soon as the assembled persons do any act towards carrying out the illegal purpose which has made the assembly unlawful. And

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[53] Kenny, op. cit., pp. 329-330

[54] Kenny, ibid.

the rout will become a riot so soon as this illegal purpose is put into effect forcibly by men mutually intending to resist any opposition'.

Our law also increases the punishment provided for the offence of unlawful assembly (although it does not in such case call it by any different name) when the unlawful assembly proceeds, either wholly or in part, to execute their common design or shall attempt to do so. Here again it may be noted that for the purposes of these provisions of our law, it is immaterial whether the common purpose of the assembly is unlawful or lawful, if the manner of the meeting endangers the public peace and causes alarm.

There is in English Law another cognate offence to those of unlawful assembly, rout and riot, but more modern and more heinous, which has no recognised technical name but which, for distinction's sake Kenny terms a Riotous Assembly. It is the creation of the Riot Act 1715[55] which was passed in consequence of the riots in many towns that followed the accession of George I in 1714. Under its provisions, whenever an unlawful assembly of twelve or more persons do not disperse within an hour after a Justice of the Peace has read or has endeavoured to read to them a Proclamation (set out in the Act) calling upon them to disperse, they cease to be mere misdemeanants and become guilty of felony punishable with penal servitude for life.

On the same lines, our Section 80 lays down:

"If any persons of the number of twelve or more, being unlawfully assembled together to the disturbance of the public peace, and being formally warned or required by any competent authority, to disperse themselves and peaceably to depart to their habitations or to their lawful business, shall to the number of twelve or more unlawfully remain or continue together for the space of an hour after such public warning shall have been given, every such offender shall be punished with imprisonment from nine months to three years."

Of course, even while the hour is still unexpired the authorities have the right to disperse the crowd. This right and duty devolves firstly on the Executive Police who by Section 358 have the duty of maintaining the public order and tranquillity and of preventing offences. "But also private citizens have a duty to co-operate with the authorities in such circumstances, if called upon to do so" and Section 352(c) makes

[55] 4 Sc 5 Geo. I. c. 58. 3. 16

it an offence for any person, not being one of those mentioned in Section 62, to refuse without just cause to lend his services to a public officer in the discharge of his public duties on the occasion (inter alia) of a tumult or offences "in flagrante".

Lastly, we must notice that, although in discussing the nature of the offences of unlawful assembly we have stated that the lawfulness of the common purpose does not exclude the offence if the manner of the meeting endangers the public peace and causes alarm, yet the law makes an express exception to this rule. By Section 81, if the common purpose of the three or more persons assembled together be that of assisting in the defence of the possession of the dwelling house or other property of any one of them or in the defence of the person of any one of them, such assembly shall not be deemed unlawful, even though they may execute or endeavour to execute such purpose, or otherwise conduct themselves violently and tumultuously, or in such manner and under such circumstances as are calculated to create terror and alarm among His Majesty's subjects. Indeed, even a bodily harm or a homicide committed by any such person in the act of such defence may, in appropriate circumstances, be exempt from punishment. Section 238 considers as justifiable a homicide or a bodily harm taking place in the act of defence against persons engaged in theft accompanied with violence or plunder with violence even though the theft or plunder be only attempted.

(n) Spreading False News

This offence was added to the class of crimes against Public Tranquillity by Section 2 of Ordinance VI of 1933. Every person is guilty thereof who maliciously spreads false news which is likely to alarm public opinion or disturb the public good order or the public peace or to create a commotion among the public or among certain Classes of the public. The punishment is imprisonment from one month to three months.

The word <u>maliciously</u> in the context means "with the knowledge that the news is false".

Where the offence is committed by means of printed matter then Section 13 of the Press Ordinance (Ordinance V of 1933) applies. That section provides that "malice" is presumed, for the purpose of the offence hereunder, in default of evidence showing that the accused had taken adequate care to investigate the truth of the statement before publication.

Note. It would be useful to look up:

1. The Judicial Proceedings (Regulation or Reports) Act. (Chapter 97)

2. The Public Meetings Ordinance. (Chapter 108)

3. The Seditious Propaganda (Prohibition) Ordinance. (Chapter 111)

III. Crimes Against the Administration of Justice and other Public Administrations

Other Public Administrations

The crimes against the safety of the Government which we have already dealt with constitute direct attacks against the State, being directed to subvert the Government or forcibly to change its form. The crimes which we are now going to consider also attack the State but indirectly, inasmuch as, without being actuated by motives hostile to the Government, they proceed from other causes, often of a private character and affect those social institutions on and by which the machinery of the Government rests and moves; those institutions, that is to say which provide the means of guaranteeing to every member of the community the integrity of his rights and those benefits which derive from the state of civil society. Carmignani considers the former class of crimes (i.e., against the safety of the Government) as directed against the life of the state and the latter class as directed against its well-being.

These institutions must therefore be protected with effective safeguards both against the misconduct of their own functionaries who, by abusing their powers, might wield the same against the duties of their office, as well as against the malice of private individuals who by violence or deceit might obstruct or bring into obloquy the public authority.

The several acts which injure these institutions constitute the class of offences against the Public Administration and we will now proceed to consider them in some detail following the same order in which they are dealt with in our Code.

(a) Usurpation of Public Authority and of the Powers thereof

i. Usurpation of public functions

The first crime under this heading is that of the "Usurpation of Public Functions". Section 83 lays down that "whosoever shall assume any public function whether civil or military without being entitled thereto, and shall perform any act thereof, shall be punished with imprisonment from four months to one year".

It is, in the first place, essential to distinguish this offence from that covered by Section 56(1)(d) of the Criminal Code. Where the usurpation of the executive powers of the Government has for its purpose the subversion of the Government, it constitutes the crime of insurrection or treason. Where this is not the purpose of the offender the crime is that now under discussion.

It is clear that the machinery of social authority cannot function if every private individual were allowed to invade its sphere of operation and pose as its representative without being vested with such authority in due form. Hence this crime of abusive exercise of public functions, the notion of which is not restricted to the usurpation of a permanent office but extends to every manifestation properly belonging to the activities of the public authority whether permanent or temporary[56]. Moreover, this Section refers to any public function whether civil or military, whether paid or unpaid, and it says expressly that the offence may be committed by "whosoever". This means that the offender may be a private individual, a person not holding any public office whatever; but he may also be a police officer who is not, however, duly vested with the exercise of <u>those</u> public functions to which the act out of which the offence arises refers[57].

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[56] Pessina, "Elementi di Diritto Penale", Vol. II, pp. 115 - 120

[57] Puccioni "Codice Penale Toscano Illustrato" Vol. III, pg. 312; <u>contra</u> Carnot, art. 258, French Code; Roberti, op. cit., Vol. IV, para. 283

To constitute this offence there must be, according to the general rule, the criminal intent, that is to say in this case, the knowledge of exercising a function with which the agent is not legally vested and the consciousness of exercising without title powers attaching to a public authority; so that inadvertence or mistake would exclude his crime[58]. The material element of this offence consists in our law in actually performing the duties or assuming the powers of a public functionary unduly. Mere claims to such functions, mere words or boasts are not sufficient; nor is the assumption of the designation of office or the wearing of uniforms sufficient: what is required is the actual taking possession of the office to which the function in question belongs. The unauthorised wearing of uniforms may constitute an offence under Section 352(o).

Our section was framed on section 258 of the "Code Penal" of France and section 164 of the Neapolitan Code, but our legislator properly left out, as Jameson remarks, the provision as to the assumption of honorary badges and decorations, so anxiously included in the analogous provisions of those Codes: "J1 contravventore a questo regole merita piuttosto derisione e disprezzo che pene criminali"[59].

Finally, it is to be noted that the offence under discussion is not to be confused with that kindred offence constituting in reality a variety of the same offence dealt with in Section 132 which consists in the unlawful continuance in the exercise of functions after dismissal or suspension.

ii. Unlawful assumption by private persons of powers belonging to the public authority.

Under this heading our Code deals with three different offences, namely:

(a) Illegal pursuit of legal rights

(b) Wrongful arrest and detention by private persons

and (c) Sending or imprisoning a British subject abroad.

A. Illegal pursuit of legal rights

[58] Puccioni, loc. cit. pg. 312; Pessina Loc. Cit. Vol. III, pg. 121; Maino, art. 186, para. 982

[59] Falzon, loc. cit., pg. 121

Concerning Article 70 of the draft, Jameson wrote as follows: "The illegal pursuit of legal rights is as far as I can discover new in penal legislation, at least in this form. The provision is derived from the Neapolitan Code (Article 168). It prohibits the compulsory enforcement of any legal right without lawful authority or what is familiarly known in this country as taking the law into one's own hand. This would be punished (in England) as a trespass or theft or assault as the case might be but the absence of a felonious intention and the existence of a good or supposed legal right makes the offence clearly distinguishable from theft. Thus, it is said to have been decided in the French Courts that a creditor who unlawfully takes his debtor's goods, in good faith to pay himself, is not guilty of theft. The omission of some provision of this kind has been remarked as a defect in the French Criminal Code".

"It is doubtful", Jameson continues, "whether acts of this kind would not be better left to the operation of the ordinary civil remedies by way of interdict or claim of damages, but I have not thought it necessary to recommend the omission of the article, it having been approved of by the Code Commissioners, who are better Judges of the necessity of the provision"[60].

Jameson suggested certain verbal improvements which were accepted, and the provision now stands at Section 84 which reads as follows:

"Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall of his own authority compel another person to pay a debt or to fulfil any obligation whatsoever, or disturb the possession of anything enjoyed by another person, or demolish buildings or divert or take possession of watercourses, or in any other manner unlawfully interfere with the property of another person, shall be punished with imprisonment from one to three months. But the Court may, in its discretion, award a fine (multa) in lieu of such punishment".

It is clearly the duty of every citizen to apply to the competent authority for the reinstatement or recognition of a right which others may have violated or disputed. This much is evidently required to the necessity of maintaining the public peace and the rules of law. If a private individual takes the law into his hands, his act injures social justice and must be repressed.

[60] Report, pg. 99

The elements of the offence are[61]:

i. An external act depriving another person of a right of a thing which he enjoys and done in spite of the opposition express or implied of such other person

ii. The belief on the part of the agent of doing such an act in the exercise of a right

iii. The consciousness on the part of the agent of doing of his own authority that which should be done through the lawful authority

iv. The absence of a more serious offence.

Particular importance attaches to the second, the moral element of this offence, which gives it its specific character and distinguishes it from other offences the material element of which may be the same. According to the different purpose actuating the agent, the same fact may constitute this offence or another offence, e.g., <u>theft</u>, if the intent of the doer was that of making an unlawful gain, or <u>damage to property</u> if he acted from malice or revenge rather then, in both cases, from the honest belief of exercising a right.

The enquiry into the motive of the doer is therefore essential. But if it is established that the act was done in such honest belief and without any improper motive, it is not material that the claimed right is not, in fact, actually competent to the agent or not enforceable at law, e.g., being barred by prescription or arising out of an invalid document[62].

The material element consists, as we have said, in depriving another person of a right or thing he is enjoying. The offence, therefore, does not arise where the act consists merely in the retention of possession already enjoyed by the agent: “Qui continuat non attentat”. The deprivation of, including the interference with somebody else’s possession is essential: “L’atto esterno deve privare altri contro sua voglia di un bene che gode. Ohi e’ nell'attuale godimento di un bene e continua a goderne a dispetto di chi non voglia, non delinque perchè la legge protegge lo ‘statu quo’, il quale non può variarsi tranne per consenso degli interessati, o per decreto della autorità giudiziale”[63].

[61] Vide Criminal Appeal Pulie vs. Bonavia, 14/10/44, Harding J.

[62] Carrara, “Furto e Ragion Fattasi”, opus di diritto criminale, Vol. VI, p. 113

[63] Carrara - Prog. Parte Speciale, Vol. 5 para. 2850 note; Roberti - op. cit., Vol. 4, para 304

Another rule commonly accepted is that no offence is committed if the agent has done the act in consequence of the necessity of defending his own possession rather than with the purpose of disturbing the possession of others. The maxim "vim vi repellere licet" applies not only to the repelling of unjust aggression against the person. It extends also to the repelling of any unjust attack against the property when the defence is exercised within the proper limits, e.g., by forcibly retaking from the thief the thing which he has just stolen[64]. Roberti says: "Non converremmo giammai che meritasse pena la via di fatto del possessore legittimo la quale servirebbe di replica ad altre vie di fatto criminali"[65]. This rule must, of course, be understood subject to the express provision of our law concerning the legitimate defence of oneself or others. (Sections 337, 235 Criminal Code)

B. Wrongful arrest and detention by private persons.

The more serious and common species of usurpation of public authority is the offence of wrongful arrest or detention. Section 85 lays down: "Whosoever without a lawful order from the competent authorities, and saving the cases where the law authorises private individuals to apprehend offenders, arrests, detains, or confines any person against his will, or provides a place for carrying out such arrest, detention or confinement, shall be punished with hard labour or with imprisonment from seven months to two years. But the Court may, in minor cases, award the punishment of imprisonment from one to three months or a fine (multa)".

This section was framed on Article 169 of the Neapolitan Code.

It will be observed in the first place that the law does not, in contemplating the simple form of this crime, specify the purpose which may have actuated the offender in committing the illegal arrest, detention or imprisonment. The fact in itself is so odious that it calls for a punishment corresponding to the importance of the right violated, that is the liberty of the subject. Whatever may have been the motive of the offender, e.g., the enforcement of a claimed right or the taking of revenge, or whether any motive is made to appear at all, if the fact of the illegal arrest, detention or confinement is proved,

[64] Maino, op. cit., Art. 235, para. 1189

[65] Loc. cit., 314

the offence subsists, saving the right of the judge to avail himself of the latitude of punishment left to his discretion to proportion the same to the greater or lesser wrongfulness of the motive, where this is at all discovered.

In the second place it will be noticed that Section 85 saves from its own operation the cases in which the law authorises private individuals to arrest offenders. The question naturally arises: Which are these cases? Article 106 of the French Code of Procedure specified such cases in express terms by laying down that, not only the members of the public force, but also any and every other person was bound to arrest any offender caught in the act or followed by the hue and cry, in order to take him before the competent authority, without the necessity of any warrant, provided only the offence was liable to certain grave punishments. Our Laws of Procedure contain no such formal and express provision. This omission was animadverted upon by Andrew Jameson: "Article 71 (85)", he said “excepts from the operation of these provisions, the cases where the law authorises private individuals to arrest offenders. But neither in this branch of the subject, nor in that of penal procedure, to which the subject more properly belongs, are there any rules laid down to guide the public on this important subject which is thus left in a state of dangerous ambiguity. We may suppose the exception refers to the cases of self-defence or of assisting in the apprehension of offenders, or seizing them in the act. This omission should be rectified. “The omission has not, in fact, been rectified by any general provision. In the absence of any similar provision in the Neapolitan Code of Penal Procedure, Roberti is of the opinion that the cases excepted “si riducano per lo meno a quelli della sorpresa nella flagranza di un misfatto o delitto pertanto almeno a pena di prigionia”. Arabia thought that such cases were, in general, those in which, by reason of legitimate self-defence or other form of coercion, malice is excluded; those of crimes “in flagrante”, to which should be added the cases in which special laws authorise private persons to arrest individuals”[66].

In English Law, a private person without a warrant may arrest:

i. Any person who, in his presence commits a treason or felony or dangerous wounding. The law does not merely permit but requires the citizen to do his best to arrest such a criminal.

[66] Principii di Diritto Penale, Part III, art. 169, p. 48.

ii. Any person whom he reasonably suspects of having committed a treason or felony or dangerous wounding provided that this very crime has been actually committed by someone (whether by the arrested person or not). But in this case, as also in the statutory one to be referred to, the law, though permitting a mere private person to make an arrest, does not command him to do so.

iii. In addition to these two Common law powers, modern statutes permit any private person to arrest anyone whom he "finds" committing certain specified offences[67].

Our Official Secrets Ordinance empowers any private individual to arrest any person caught in the act of committing an offence thereunder or whom he reasonably suspects of having committed, or attempted to commit or being about to commit such an offence. And Section 352(c) makes it a contravention for any person (not being a relative of the offender as provided in Section 62) to refuse to give his assistance to the Police or any other person charged with a public duty in the case of offences detected "in flagrante".

Now the material element of the crime under discussion consists in arresting, detaining or confining any person against his will, without a lawful order from the competent authority; or in providing the place for such arrest, detention or confinement. It is, thus, not every order from the authorities that will exculpate a person accused of this offence. It must be a lawful order regular in itself in form and in substance as well as granted by a competent authority[68].

The words "arrest", "detention", and "confinement" are not synonymous: each indicates a special manner in which an attempt can be made on personal liberty: "reato preveduto nell Articolo 165 (our: Section 85) esiste sia quando alcuno si fermi nel mentre che agisce o cammina; sia quando si facci, rimanere suo malgrado in quel lougo ove si trova; sia quando finalmente si trasporti da un luogo ad un altro"[69]. It was held in trance that these three expressions denote three varieties of the crime which although closely analogous to one another may exist separately. In fact, the illegal arrest may subsist as an offence although it is not followed by detention or confinement. Thus, a person may be arrested without being incarcerated or confined

[67] Vide Kenny, op. cit., pp. 528-529

[68] Jameson, p. iv, Notes of Observations appended to Report

[69] Roberti – ibid., para. 323

in any place; or may be detained in his own house without having been previously arrested; or may be confined in a lonely place, or may, by a fresh act of violence, be confined in a place where he is[70].

Where the offence consists in providing the place for the illegal arrest, it must of course be proved that the defendant acted knowingly and wilfully. “Risulta manifesto che chi presta il luogo debbo essere stato sciente dell'ufo a cui questo luogo era destinato, quantunque la circostanza della scienza non sia richiesta espressamente dal nostro articolo”[71].

So far, we have considered the simple or substantive form of this offence for which the punishment is hard labour or imprisonment from seven months to two years, or in slight cases imprisonment from one to three months or a fine (multa).

But this punishment is increased to hard labour from thirteen months to three years in aggravated cases. The first aggravation specified arises where the detention or confinement shall have continued for more than twenty days. The reason for this aggravation is obvious. The injury to personal liberty increases in proportion to the length of time the restriction on it continues. The point was discussed whether in computing the time of twenty days the “dies a quo” and the “dies a quem” were to be reckoned. Carnot maintained that they should not, on the strength of the well-known legal maxim “dies termini non computantur in termino”. Roberti, however, was of a contrary opinion. “Libertas inestimabilie res est” and the rules prescribed for computing the times of the acts of Civil Procedure cannot be relied upon in this matter. Our law speaks of days and if a day is made up of twenty-four hours and not more. It is quite easy to decide when the confinement or detention has continued for more than twenty days. This time should be computed, Roberti goes on to say, from the moment of the arrest, from the hour it is effected (when this can be established with certainty) up to the day, up to the hour, in which it is discontinued, in order to decide whether the duration of it has or has not exceeded twenty days “cioe i venti spazi di ventiquattro ore che formano un giorno” .

[70] Cheveau et Helie, para. 2945

[71] Cheveau et Helie, para. 2953

The second aggravation arises when the arrest shall have been affected with the unauthorised use of a uniform (falsa divisa) or under an assumed name or under a warrant falsely purporting to proceed from a public authority. This deception used in penetrating the crime increases its heinousness. It clearly serves to facilitate its commission, to disarm the victim and also to outrage public authority, when the offender puts on a uniform which inspires respect, or assumes a name which imposes obedience, or displays an order which induces prompt compliance, the victim is undoubtedly intimidated into submitting to the arrest or confinement without offering any obstruction for fear, lest his resistance might be a resistance to the authority of the law. It is therefore just that the punishment should be increased in consideration of the malice of the offender and the gravity of the deception practised by him in carrying out the crime.

The crime is, in the third place, aggravated when the person arrested, detained or confined is subjected to any bodily harm or is threatened with death. Here, another crime is superadded to the crime of illegal arrest, confinement or detention. The victim is not only deprived of his personal liberty but is also made to suffer a bodily hurt or is terrorised by threats. It is not, however, any threat that will constitute this aggravation but only a threat of death. As regards bodily harm, on the contrary, any bodily harm, whether grievous or slight or even very slight will suffice. Furthermore, the law lays down that if the bodily harm so caused constitutes in itself an offence liable to a higher punishment than two years hard labour or imprisonment or is caused or accompanied by any kind of torture, the punishment shall be hard labour from four to six years.

There is a fourth aggravation where the detention or confinement is continued by the offender notwithstanding his knowledge that a writ or order has been issued by the competent authority for the release or delivery of the person detained or confined. The disregard of such an order for liberation is an additional offence against the authority of the law and quite as deserving of additional punishment as the use of a feigned order mentioned in the second aggravation.

This fourth aggravation as well as the other three that follow were inserted upon the suggestion of Andrew Jameson who thus wrote in his Report: "The intent or object for which the offence is committed as in other cases may greatly heighten the injury to the sufferer, and the atrocity of the offence. If the confinement is resorted to for the

purpose of extorting money, or consent to a deed, or still worse to compel the injured party to commit a crime, the character of the offence is as much aggravated in guilt and danger as by the mere extent of the duration or by the deception used in perpetrating it. If the offence is committed as the means of compelling a woman to submit to vicious desire or to treatment injurious to the modesty of her sex, it becomes to the sufferer a far more aggravated injury than simple confinement from caprice or malice. As women are not sufficiently protected from such atrocious attempts by the law of abduction, which refers to taking away and does not seem to apply to mere confinement, it is thought proper to include this aggravation". Four new paragraphs were therefore suggested by him to supply the defects. The first of these has already been given above. The other three are as follows:

"Section 86: ………………………………………………………………………………….

(e) "If the crime is committed with the object of extorting money or effects or of compelling another person to agree to any transfer of property belonging to him

(f) If the crime is committed for the purpose of forcing another to do or omit an act which, if voluntarily done or omitted, would be a crime

(g) If the crime is committed as the means of compelling a woman to do an act or to submit to treatment injurious to the modesty of her sex".

It need hardly be said that Section 86 must be construed without prejudice to the operation of Section 21 which lays down that: "Every punishment established for any offence shall be deemed to be so established without prejudice to any higher punishment prescribed for the offence in any other law whenever the circumstances mentioned in such other law concur in the offence". The words "other law" mean not only any law other than the Criminal Code but also any other provision of the Criminal Code itself. It would be manifestly absurd, for instance, to apply Section 86 combined with Section 87 and punish the offender with a punishment up to six years hard labour, when the bodily harm inflicted upon the victim of the illegal arrest or detention is grievous within the meaning of Section 232 or 234 and liable per se to imprisonment or hard labour up to nine years or twenty to twelve years respectively.

After dealing with the aggravations, the law (Section 88) contemplates a cause of extenuation of punishment for the illegal arrest, detention or confinement. It lays down

that "the punishment for the illegal arrest, detention or confinement of a person, without the concurrence of any of the circumstances indicated in paragraphs (b), (c), (d), (e), (f) and (g) of Section 86 and in Section 87, shall be imprisonment from seven months to one year, if the offender, before the commencement of any proceedings, shall have restored to liberty the person arrested, detained or confined, within twenty-four hours from the arrest, detention or confinement: provided during that time the offender shall not have attained the object for which that person was arrested, detained or confined".

The object of this reduction of punishment is to give to the offender a strong motive to release his prisoner within a short time. But four conditions require to be satisfied in order that this benefit may be available:

i. The arrest, detention or confinement must not be aggravated

ii. The release must follow within twenty-four hours

iii. Before the inception of any proceedings; and

iv. The offender must not have in the meantime achieved the purpose he had in view in perpetrating the arrest, detention or confinement.

If the release takes place after proceedings of any sort in connection with the crime have already been set afoot, the benefit is not available, for in such case the law presumes that the desistance from the further continuance of the crime is merely the effect of fear inspired by the action of justice and not of returning good feeling or other voluntary cause. Likewise, if the offender has already attained the object for which the arrest was affected, the crime is fully completed and the law presumes that the prisoner is released not out of any repentance on the part of the offender but only because the continuance of the arrest, detention or confinement is not any longer required for his own purpose.

C. Illegal arrest abroad

Section 89 lays down:

"Whosoever unlawfully and forcibly removes any subject of His Majesty to any other country or wrongfully detains, arrests or confines any such subject in any other country, shall suffer the punishment established in Section 86".

This section together with another one (relating to desertion of crews by Masters) which has since been repealed, was inserted at the suggestion of Andrew Jameson. Commenting on Article 71 of the project (Section 86) he wrote in his report (page iv): "There are two offences which are intimately connected with the illegal arrest and detention now under consideration, which do not seem to have been brought under the notice of the learned Commissioners. These are the sending or imprisoning subjects of His Majesty beyond the seas and Masters of ships forcing on shore or leaving behind any person belonging to the crew. These are plainly varieties of the offence of illegal arrest and imprisonment and of a highly criminal nature, as they are easily perpetrated and with difficulty redressed. It is the more necessary that they should not be omitted in a penal code. The first comes directly under the designation of the section and is a very aggravated usurpation of executive powers, besides an act of great and criminal oppression to the individual. The second is an illegal detention of the very worst kind. The provisions of the article might strike at the former, but the latter could not be brought under their operation by construction and analogy".

"It very advisable to extend by direct enactment these salutary provisions of the law of England, so anxious to entail over every species of violation of personal liberty, to the subjects of Her Majesty in Malta. Experience has shown the necessity of these provisions which form the subject of two statutes - the prevention of illegal imprisonment abroad having been secured by the Habeas Corpus Act, and that of the desertion of crews"[72].

The offence consisting in the carrying away any person from his own country into another is known by the name of "kidnapping".

(b) Outrages and Violence Against Public Officers

In this sub-title, our Code goes on to deal with other crimes against the public administration and makes provision against outrages upon or the use of illegal force against persons vested with public authority or exercising public powers. It is manifest that if threats, insults, forcible constraints or illegal violence are to be repressed by wise legislation whoever the person against whom they are directed, they assume

[72] by 9 Geo. iv, capo 31; and 5 & 6 William iv; cap. 19

special gravity against the depositaries of public authority: for in such cases the offence, besides the injury caused to a private individual, causes also in his person a direct and immediate injury to the public administration which he represents.

1. Coercion of a Public Officer

The first crime dealt with in this sub-Title is that of “Coercion of a Public Officer” which is committed by whosoever by violence or threats compels a public officer to do or omit any act appertaining to his office (Section 90). The words “Public Officer” are defined as including not only the constituted authorities, civil and military, but also all such persons as are lawfully appointed to administer any part of the executive power of the Government, or to perform any other public service imposed by law, whether judicial, administrative or mixed.

The ingredients of this crime are drawn from the means used by the offender and the purpose at which he aims.

As to the means:

The law speaks of violence or threats. These constitute the material element of this crime which cannot therefore be committed without the use of coercion. Such coercion subsists when the public officer subjected thereto is compelled by violence or threats to do against his will that which he otherwise would not do. There is violence, therefore, whenever the will of the public officer is forcibly constrained or impelled into doing or omitting the act by means of force calculated to overwhelm his repugnance or to overcome his resistance. As to the “threats”, the law does not make any distinction between “verbal or written threats” or threats arising from an act or a gesture. In other words, the law is satisfied with any act calculated to inspire fear and to produce that moral coercion on account of which the public officer does or leaves undone something which if left alone, he would not or would do, to avoid the apprehended and threatened evil to himself. This means that the threat must be relatively serious so that it creates a material apprehension in the mind of the public officer of a wrongful harm to himself. If this condition is satisfied the crime subsists, saving of course the discretion of the judge to proportion the punishment to the gravity of the threat within the latitude allowed by law.

As to the purpose

As to the purpose of the offender this is clearly defined by the law itself. The offender must have aimed at procuring or frustrating the doing by the public officer of an act appertaining to his office. Here lies the formal element of this crime. The law wants to guarantee the freedom of action of all public officers: but its special protection extends only to acts belonging to the public office entrusted to that officer. Consequently, if the act which the public officer was compelled to do or to omit does not fall within his powers or duties qua public officer, this crime does not arise.

The definition of "public officer" above quoted which the law itself gives for the purpose of this crime must be carefully noted. It limits the meaning of that expression to those persons who are truly depositaries of the public force or authority. In the Project of 1842, the words "public officer" in this context were defined as including not only the constituted authorities, civil and military, but also all such persons as exercise of any public office or function whatsoever under the authority of the Government. This definition appeared to Jameson "to admit a dangerous latitude of construction and to go considerably beyond the limits of this class of offences whether on grounds of principle or policy. The office of a professor in a Lyceum or University, he remarked, or of a schoolmaster, is a public office under the authority of the Government. Is a college row, or the insubordination of a few riotous youths to be punished with two or three years' imprisonment? As if it were the same as resistance to the officers of justice or violence against a judge? An appraiser or auctioneer, a notary public, a licensed surgeon may all be included under this sweeping denomination, and acts of the most venial kind, nay, it may be perfectly legal, might thus be tortured into crimes. This dangerous vagueness of the law must be corrected. It was obviously not intended by the learned Commissioners. Their model, the Neapolitan and French Codes, properly restrict the offence to the obstruction of officers of the public administrations, judicial or ministerial. It is so limited in the law of England". With a view to remedying the defect, Jameson suggested an amendment of the definition, and Section 91 now reads as reworded by him.

"De tale definizione", wrote the late lamented Prof. Randon, "si ricava che per pubblico ufficiale si hanno da intendere quelle persone che sono rivestite di pubbliche funzioni. Per bene intendere adunque il concetto di pubblico ufficiale giova formarsi il concetto

di pubblica funzione. Questa nel suo generico significato comprende l'esercizio di qualsiasi volontà attribuita dalla legge al fine di provvedere ai pubblici interessi. Quindi per poter decidere se una persona appartenga alla categoria di pubblico ufficiale, conviene esaminare colla scorta delle leggi speciali che ne istituiscono la carica e ne regolano le attribuzioni, se una data persona abbia direttamente il compito di dare provvedimenti per la esecuzione del mandato pubblico che la legge le affida. Pertanto colui che non per autorità propria ma per un incarico avuto da un pubblico uffiziale compie qualche atto proprio delle attribuzione di costui o lo aiuta nel disimpegno delle sue attribuzioni non per questo può essere considerato come pubblico ufficiale. Esso, come subalterno, cioè impiegato, formante classe di quelli che per legge non hanno alcuna autorità', rientra nella categoria che la legge designa di quelli individui incaricati di un pubblico servizio. I pubblici ufficiali sono rappresentanti dell'autorità e nella loro persona e' offesa l'autorità stessa, ma tali, non sono le persone legittimamente incaricati di un pubblico servizio il di cui incarico piuttosto che essere pubblica funzione ne e' una dipendenza".

This explanation will serve to distinguish this crime from that contemplated in Sections 94 and 95.

2. Reviling or Threatening Judicial Functionaries

The second crime dealt with under this sub-Title is that contemplated in Section 92 which lays down as follows:

"Whosoever reviles or threatens a Judge, or the Attorney General, or a Magistrate or a Juror in the execution or on account of the execution of his functions, or with intent to intimidate or unlawfully influence him in the execution of such functions, shall be punished with imprisonment from one to three months and with a fine (multa)".

The elements of this crime are:

i. A revilement or threat

ii. Against a Judge, or the Attorney-General[73] or a Magistrate or a Juror

[73] See the Attorney-General and Crown Counsel (Constitution of Office) Ordinance (Chapter 140)

iii. In the actual execution of his functions or on account of his having executed such functions; or with intent to intimidate or unlawfully influence him in the execution of such functions.

Let us consider each of the elements in some detail.

i. Revilement or threat: Any insult or threat is sufficient to constitute this first Ingredient of this crime. Insults generally are dealt with in Section 265 and Section 353(i)(e) of the Criminal Code; whence it appears that they may consist in words spoken or written, gestures, drawings, or other means calculated to destroy or lessen the reputation of the person against whom they are addressed or uttered or used, or to hurt the feelings of or give offence to such person. The insult may be specific or may consist in vague expressions or indeterminate reproaches or words or acts merely indecent or offensive. Likewise, threats are generally dealt with in Sections 262 and 263 and Section 353(i)(e) of the Criminal Code. But as we have already said, any insult or threat, whatever its gravity or form, and whatever the means used, is sufficient to constitute the material element of this crime in its simple form. The law however aggravates the punishment where the specific purpose of the offender in uttering the insult is to destroy or lessen the reputation of the functionary against whom it is directed. So, also the law increases the punishment where the threat is of a crime; and if the threat is made by means of a writing whether anonymous or signed in one's own or in a fictitious name, the ordinary punishment for such threat (Section 262) is increased by one degree. And in both cases the Court may require the offender to enter into a recognizance or give security with or without surety as provided in Sections 395, 396 and 397 of the Criminal Code.

   This crime is distinguishable from the simple contempt of Court dealt with in Sections 987 et. seq. of the Code of Organization and Civil Procedure, which are applied to the Courts of Criminal Jurisdiction by Section 681 of the Criminal Code. These contempt consist, broadly speaking, in words or gestures which show disrespect to the dignity or authority of the Bench or disturb the good order of the transaction of judicial business. They are not direct attacks against the person of the Judge or Magistrate or his honour or feelings. Even so the border-line between these contempt and the crime under discussion may not, in a particular case, be clearly marked. However, Section 987 of the said Code of Organization and Civil

Procedure lays down that where the act of contempt of Court amounts to an offence under the Criminal Code, the matter is dealt with under this Code.

In English Law slanderous words spoken to a Judge or Magistrate in the execution of his office, or a personal attack upon a Judge or a Magistrate with reference to something said or done by him in the course of a case tried before him may constitute that kind of contempt known as "scandalizing the Court itself"[74].

ii. The victim of this crime cannot be except one of the judicial functionaries expressly mentioned and not any other public officer. The purpose of the law in creating this special offence is to afford a special guarantee so that the administration of justice proceeds freely and undisturbed and without suffering any indignity.

iii. The crime under reference subsists where the insult or threat is directed against any of the said judicial functionaries either in the actual execution of their respective functions (fin officio) or on account of their having executed such functions (propter officium) or with intent to intimidate them or unlawfully influence them in the execution of such function. Where the insult or threat is uttered or made against the judicial functionary while in the actual exercise of his functions, it is taught that the outrage need not necessarily have any connection whatever with such functions. In this case, especially, the law aims at safeguarding the undisturbed and dignified exercise of the public function and consequently also to protect the person while discharging such function. If, therefore, an individual in order to take revenge for an offence received from a Judge or a Magistrate or other judicial functionary as a private citizen, insults him in the act of exercising his functions, that individual is guilty of the crime under discussion although his purpose was merely to insult the Judge or Magistrate or other judicial functionary in his private capacity[75].

"Quando l'oltraggio si verifica noi corso delle funzioni, il motivo che lo determina e' indifferente; la leggo vede soltanto il turbamento, l'inguria fatta all'esercizio delle funzioni, l'insulto che degrada la loro dignità; avesse pure guest'inguria una causa

[74] Archbold, op. cit., pg. 1250

[75] Roberti, op. cit., Vol. V, para. 375

determinante estranea alle funzioni, il turbamento all'esercizio di esse sussisterebbe sempre"[76].

On the contrary where the outrage is committed on account of the Judge or Magistrate or other judicial functionary having executed his judicial functions, the cause or occasion of the outrage must be an act done in the discharge of such functions. In other words, a nexus must be proved between the outrage and the execution of an act of the office, such a nexus as shows that the outrage was caused or occasioned by the execution of that act.

Our law, improving on the models on which these provisions were originally framed, does not restrict their application to the case of insults or threats on the Judges and Magistrates and other judicial functionaries in the actual exercise of their public duty or on account of such duty being exercised. On the suggestion of Andrew Jameson, the application of these provisions was extended to the case in which the insult or threat is used with intent to intimidate those public officers or unduly to influence them, irrespective of the time when used: "Such offences", wrote Jameson, "may be committed to intimidate a Judge or a Magistrate from performing a certain duty, as well as by way of revenge after it is performed. It is to be presumed that "threats" at least are more likely to be used before, than after the performance of a specific function which the offender wishes to obstruct or prevent. The due discharge of these important functions may be as effectually obstructed by means of such offences when committed before the functions are exercised as after that event. Should a malicious litigant threaten bodily harm to a Judge on his way to Court, this offence would not fall under the provision (as it stood in the Project) because it is neither committed in the exercise of the duty nor on account of it. The article ought to be worded so as to prevent any undue influencing of a public functionary by means of threats or violence, irrespective of the period when used, provided the intent is proved." The article was worded as suggested, that is as it now reads.

The question was long debated whether it is of the essence of this crime that the insult or threat should be uttered or made in the presence of the Judge, Magistrate or other judicial functionary. In the Italian Code of 1889, the matter was placed beyond doubt by making such presence an essential element of the crime, by express words in the

[76] Chaveau et Helie, Vol. II, p. I, para. 960

definition which the law itself gave (Art. 194). Indeed, according to Maino[77], even before the enactment of that Code, the Courts held that “le ingiurie o minaccio dirette a un funzionario assente, o fattegli pervenire per lettera, non assumono carattere di oltraggio”.

In the French and Neapolitan Code no express mention of such presence as an essential ingredient of the crime was made. Nor is any such express mention made in our Code.

Roberti, commenting on the Neapolitan Code, was of the view that “niente importa [...] che il funzionario sia o non sia presente all'oltraggio, che senta o non senta le parole ingiuriose, che vegga o no i gesti oltraggianti.” And he quotes in support Carnot and also judgments of the French Court of Cassation[78]. Chaveau et Helie, although conceding that the presence of the functionary is not invariably an essential element of the crime, require that the insult or threat (the outrage) he directly addressed to the victim so that it is necessary that the defendant shall have either addressed the words or writing directly to the functionary, that is to his face or, if he has made use of a third party, that he shall have the intention that the insult or threat shall reach the functionary and shall have done this in such circumstances as make it sure that the threat or insult shall in fact reach the functionary. These writers also require when the insult or threat is uttered or made against the functionary in the act of the execution of his duties, that such functionary shall have heard or noticed the threat or insult. "Delle parole sfuggite a bassa voce, un gesto scorto appena non possono costituire il reato, perchè non raggiungono direttamente il magistrato"[79].

Our Courts have followed this latter doctrine. In re "The Police vs. George Ellul"[80], Harding J. quoting Chaveau et Helie held that for the application of Section 92 the presence of the Judge or Magistrate or other judicial functionary is necessary so that the insult shall have been hurled to his face, and that he shall have heard the words or noticed the fact constituting the outrage. The same principle was also affirmed in re

[77] Vol. II, para. 1021

[78] Vol. V, para. 376

[79] Vol. II, cap. xxxiv, para. 967, 968, para 973

[80] Criminal Appeal, 30th September, 1944

"The Police vs. Arcicovich"[81] and in re "The Police vs. Leone"[82], although these two judgments were not concerned directly with the application of section 92 but with Section 94. Of course, though the crime under Section 92 does not arise, according to this doctrine, where the threat or insult is committed in the absence of the Judge, Magistrate or other judicial functionary, the offence of insult or threat under Sections 863, 265, 353(i)(e), as the case may be, will always remain and the offender may be punished under these provisions. In other words, where the threat or insult is committed in the absence of the functionary it is dealt with as a threat or insult against any other private individual, but of course the character of the offended may be taken into consideration in assessing an adequate punishment.

Finally, we must notice that the truth of the insulting words will not justify or excuse the offender. It is the general rule in the matter of slander that “veritas convicii non excusat a convicio”. To this rule our law makes an exception and admits, subject to certain conditions, evidence of the truth of the fact attributed to the person aggrieved, when (inter alia) such person is a public officer or employee and the fact refers to the exercise of his functions. But, by the express provision of Section 266 this exception does not apply in the case of crimes under Sections 92 and 94.

If the outrage committed against a Judge, the Attorney-General, a Magistrate or a Juror, in the execution or on account of the execution of his functions or with the purpose of intimidating him or unduly influencing him in the exercise of such functions, consists in bodily harm caused upon his person, the punishment is hard labour from two to five years. When the bodily harm is of such a nature that, independently of the quality of the victim, it renders the offender liable to a higher punishment, such higher punishment shall be applied with an increase of one degree.

3. Insults, Threats or Bodily Harm Against Persons Charged with a Public Duty

Section 94 lays down:

[81] Criminal Appeal, 17th November, 1909, Law Reports Vol. XX, P. IV, page 37

[82] Criminal Appeal, 23rd May, 1910, Law Reports, Vol. XXI, P. IV, page 27

"Whosoever in any other case not included in Sections 92 and 93 shall revile, threaten or cause bodily harm to a person lawfully charged with a public duty, in the act of executing such duty, or on account of the execution of such duty or with intent to intimidate or unlawfully influence him in the execution of such duty, shall be liable to the punishment prescribed for the vilification, threat or bodily harm when not accompanied with the circumstances mentioned in this section, increased by one degree.

Such increase, however, shall not be made when the punishment is that established for contraventions.

Nor shall it be made or it shall be made only by the addition of a fine (multa) when the punishment is that of imprisonment or hard labour for a term not exceeding three months".

This provision does not call for any special notice in addition to what we have already said in connection with the offence dealt with in Section 92. The material and the moral elements are the same. What is different is the person upon whom the outrage is committed. The victim in this offence can be any person lawfully charged with a public duty other than a Judge, the Attorney-General, a Magistrate or a Juror. In the old Italian text, the expression was "un individuo legittimamente incarigato di un pubblico servizio". The same expression in the Neapolitan Code was construed as including, among others, Court Marshals, Customs Guards etc. but not also persons who may be merely materially carrying out a public work, as for instance workmen, road-keepers etc.:

"La legge mira a garantire solamente quel servizio che si deve direttamente per volere della legge o dei regolamenti di pubblica amministrazione, anche perchè qualunque altro non influisce da vicino pel mantenimento dell'ordine pubblico, e capace in consequenza non può divenire perchè tali reati da privati quali sarebbero di propria indole, degenerassero in reati contro le pubbliche amministrazioni, che soli formano oggetto delle disposizioni di questo titolo"[83].

This offence arises even though the person charged with the public duty may not at the time of discharging such duty be wearing his uniform or badge etc. of office,

[83] Roberti, op. cit. para. 395. But cf. contra Maino, op. cit. art. 396, para. 1793

provided the offender was aware of his status as such person. It is true, as Dalloz observes, that the uniform is not merely an ornament but is intended to warn the citizen of the character of the person charged with a public duty; but his conclusion that, without such uniform, the public officer must be treated like any other private citizen, cannot be accepted without great qualification. For one thing, the uniform does not make the public officer; secondly there are public officers who do not wear any uniform or other distinguishing marks of office. Provided his capacity is not unknown to the person committing the insult, threat or bodily harm in the circumstances described in the definition of the offence, the punishment provided in the section applies. This principle was affirmed several times by our Courts; in the case "The Police vs. Giuseppe Borg"[84], Sir Vincent Prendo Azzopardi C.J. said:

“Nel reato di oltraggio ad ufficiale od impiegato pubblico, oltre il dolo specifico desunto dal fine dell’agente, er necessario ad integrare l'elemento morale od intenzionale del reato, la scienza della qualità ufficiale dell'oltraggiato, ma questa scienza può sussistere indipendentemente dalla questione se il pubblico ufficiale portasse o no la divisa della sua carica al tempo dell'oltraggio; di guisacchè il reato può avverarsi anche se l’ufficiale non indossasse tale divisa a patto, ben inteso, che risulti della scienza nell'oltraggiente della qualità ufficiale dell' oltraggiato"[85].

4. Attack or Resistance with Violence or Active Force against Persons Charged with a Public Duty.

This crime in its simple form consists in an attack or resistance by violence or active force (vie di fatto), not amounting to public violence, against a person lawfully charged with a public duty, while acting in execution of the law or of a lawful order of the competent authority.

This provision (Section 95) of our Code was derived from article 178 of the Neapolitan Code which was itself modelled on article 209 of the French Code where the crime was called by the name of "Rebellion".

[84] Criminal Appeal, 24/11/1917

[85] Law Reports, Vole XXXII, Part I, page 1086

The first element of this crime consists in an attack or resistance. Mere disobedience of the law or of the orders of the public authority does not constitute the crime in question. When a person fails or omits to do that which the law enjoins, he, no doubt, commits a wrong, but such wrong is not always liable to penal sanctions. The same with regard to orders given by a public authority. A person, for instance, who fails to appear before a Court when subpoenaed to give evidence undoubtedly disobeys an order of a competent authority; but he does not, by the mere omission, commit a criminal offence. It is only when the insubordination or defiance goes so far as to obstruct the execution of the law or of the lawful orders of the competent authorities that the crime of attack or resistance with which we are now dealing can arise. The purpose of the agent in this crime, therefore, must be precisely that of obstructing or frustrating the execution of the law or the lawful orders of the competent authority, by opposing the action of those who are charged therewith. If this purpose is absent, though there may have been acts of violence, or threats or insults, the crime in question cannot subsist; we could have the crime under Section 92 or Section 94.

Such attack or resistance must be made with violence or active force. The opposition we have mentioned does not, therefore, constitute the material element of this crime unless it is made with such means. In other words, the law requires the use of private force, which is alone calculated to offer a serious obstacle to the action of the officers concerned with executing the law or the orders thereunder and to impede such action. If, therefore, a man makes opposition to a Warrant of Seizure merely by refusing to open the door of his house, he does not commit this crime. The law would have exacted heroism had it expected anyone to submit cheerfully to an unpleasant execution of a Warrant against him. The same may be said where a person avoids the execution of a Warrant of Arrest by running away at the arrival of the police, or, by freeing himself from their hands without, however, using any violence whatever. The law respects the natural instincts of every man and does not pretend that he should renounce a way which appears open to him to maintain his liberty. Indeed, we shall see that the law does not even punish the simple escape from prison of a person under arrest or trial (as distinct from a person undergoing sentence: Section 149). Likewise, a mere passive resistance to arrest is not punishable. The old Italian text spoke of "violenza o vie di fatto". A like expression was used in the French Code and the Court of Cassation thus made out the difference between the two:

"La violenza suppone una resistenza, ciò che non suppone punto la via di fatto. Così ogni violenza e' via di fatto, ma non ogni via di fatto e' violenza. Via di fatto e in generale ogni atto col quale ai esercitino di autorità privata pretensioni o diritti contrari a quelli di un altro"[86].

With reference to the crime under discussion, however, it appears that both terms denote the use of private force the difference being one merely of degree: every "voie de fait" degenerates into violence when it encounters the resistance of the person against whom it is used. The slightest use of force, however, when accompanying the attack or resistance is sufficient to constitute the material element of this crime. It has been held that for a man to lay his hands in a hostile manner (upon a public officer) is enough to constitute a "voie de fait"[87].

On the contrary mere insults or threats without the actual use of force would not be sufficient. With regard to threats, however, it seems that this preposition holds good only where they are merely by words of mouth or in writing and not where the threats are accompanied with such circumstances of fact (e.g., show of weapons, aggressive attitude) as are calculated to impede the execution of the law or of a lawful order. This latter kind of threats can be considered as a "voie de fait" within the meaning of Section 95.

"In quell'atto di minaccia si contiene lo a e tantamente la forze fisica soggettivo di questo reato, perchè e' sufficiente a trattenere gli esecutori dall'ufficio loro per l'aspetto del proprio pericolo non appreso soltanto oome una previsione di possibile ma come reale e sovrastante"[88].

The second element of this crime refers to the condition or capacity of the person against whom the attack or resistance is directed. The law speaks of any person lawfully charged with a public duty. We have already had occasion to discuss which persons in the public service come under that category. Here again we must note that it is not necessary that the person concerned with the execution of the law, or a lawful order should at the time be wearing his uniform or any other badge or distinctive mark of office: but it is nevertheless necessary that his capacity should be known to the

[86] Vide Marlin, "Questions de Droit", article Voie de Fait"

[87] Criminal Appeal, The Police vs. Gius. Debono et., 3.11.45

[88] Carrara, op. cit., 1. c. para .2747: he calls this type of threat "minaccia reale"

agent: so that if on the evidence it appears that he was not aware of it he would not be guilty of this crime:

"Non occorre che il pubblico ufficiale vesta la divisa, ma la sua qualità deve essere nota a chi resiste"[89].

In the third place it is necessary that the attack or resistance against the said persons should take place in the act of the execution by them of the law or of a lawful order from a competent authority. We have already said that the formal element of this crime consists in the purpose of the offender of impeding or frustrating the execution of the law or of a lawful order. Therefore, any violence committed after the law or the order has already been executed, even though it may be on account of such execution, would not give rise to this crime. In Section 95 the law does not use the same expressions as in Section 92 and Section 94.

The question arises whether resistance would be punishable if the officer was at the time abusing his powers or exceeding his jurisdiction, or otherwise acting unlawfully or arbitrarily. In an attempt to give a reply to this question some old writers distinguished the case in which the act of the officer was manifestly unjust from the case in which such injustice was merely doubtful and took the view that only in the former case resistance should go unpunished. Other writers made a distinction between the case in which the execution of the act on the part of the officer might cause an irreparable injury and that in which the injury was reparable. Others, finally held that under a properly ordered system of government there could not be any injustice truly irreparable and that in any case it was unwise policy to authorize private individuals to resist the public officers: consequently ,resistance was, in their view, always punishable because the law itself sufficiently provides for the repression of any abuse on the part of any officer and, thus, offers an effective guarantee in favour of the subject against oppression. In our law the solution of this question is clear. So that the crime under Section 95 may arise it is essential that the officer to whom resistance is offered should be acting in the execution of the law or of a lawful order of the competent authority. “Donde segue che se questa esecuzione lungi dall'essere voluta dalla legge, vi si trovi in opposizione, viene a mancare quel dato essenziale che si richiede per la criminosità della incontrata resistenza”. This is clearly the best and most

[89] Maino, op. cit., para. 1007; Carrara, op. cit. 2757; Roberti, op. cit., Vol. III, page 406

equitable solution. The law gives its special protection to the officer not to the man, and, therefore, just as resistance to the representative of public authority while he is discharging his lawful duty is, and should be, severely repressed, so, conversely, the subject has, and should have, the right to resist any arbitrary or illegal act. It would be inequitable to require a passive obedience and submission in all circumstances from the subject who cannot be denied the right of expecting faithful observance of the law from the officers whose duty it is to cause it to be observed by others[90].

This is also, substantially, the English law[91]. Having thus defined the constituent elements of the crime, let us now see how it is punishable. If the attack or the resistance is committed by one or two persons, the punishment is imprisonment from four months to one year; but if it is committed by three or more persons the punishment is hard labour or imprisonment from seven months to two years (Section 95). If anyone of the offenders shall use any arm proper in the act of the attack or resistance or shall have previously provided himself with such weapon with the design of aiding such attack or resistance and shall on apprehension be found in possession of any such arm, he shall be punished with hard labour or imprisonment from nine months to three years (Section 96). It appears from the wording of this last Section 96 that the higher punishment therein provided applies only to the person using or providing himself with the weapon even though the other person or persons joining in the attack or resistance may have been aware of the use of the weapon at the time of the commission of the act and may have done nothing to prevent it, or may have been even previously aware that that person had provided himself with the weapon with the design of aiding the attach or resistance[92]. This is an anomalous departure from the general rule as to the communicability of material circumstances laid down in Section 46 of our Criminal Code.

It must be noted that in the case in which the offender is taken with the weapon (as distinct from the case in which he actually made use thereof) he is answerable for the aggravated form of the crime only if it is made to appear that he had previously provided himself with such weapon with the design of aiding the attack or resistance.

[90] Vide Carrara, Prog. Parte Speciale, Vol. V, para. 2760: Pessina, “Elementi di Diritto Penale”, Vol. 3, pg. 98

[91] Cf. Archbold, op. cit. Ed. 1931, pg. 989

[92] Vide Roberti, op. cit., Vol. V, pg. 94, n.(2)

In article 179 of the Neapolitan Code, on which the provision of our Code was framed, it was sufficient if the offender "nel luogo stesso dell'attacco o della resistenza fosse preso con un'arma propria anche nascoste." It appeared to Jameson that this phraseology might lend to injustice. The fact that the offender is taken on the spot and weapons found on him might in some instances be altogether accidental, as in the case of sudden encounters and affrays end if no bad use were made of the weapons being so accidentally in the possession of the offender, this would be a circumstance of extenuation rather than aggravation. Such a provision is both arbitrary in character and contrary to the just principles of a penal code, which ought to reject all arbitrary presumptions of guilt or aggravation and allow every circumstance of suspicion to be gifted at the trial according to the evidence. It ought to appear that the weapons were provided beforehand with the intent to aid such an attack or resistance[93]. Jameson therefore recommended that the article of the Draft should be amended, which it was. It is true that in the text of Section 96 of our Code there is an "or" instead of an "and". The section reads:

"If any of the offenders […] shall use any arm proper in the act of assault or resistance, or shall have previously provided himself with any such arm with the design of aiding such assault or resistance or shall, on apprehension, be found in possession of any such arm, he shall be punished ... etc."

But this "or" must, it is submitted, have crept in by mistake instead of an "and", if the idea was, as it was, to give effect to Jameson's recommendation. That "or" instead of removing the defect animadverted on by Jameson, adds another defect to the section, for it makes a separates case of aggravation of the condition which he suggested should be fulfilled in order that the mere possession of the weapon by the offender on the spot of the crime should constitute an aggravation. In other words if one were to accept that 'or' instead of an 'and', not only the mere accidental possession of the weapon at the time of the attack or resistance would be an aggravation in spite of the objection pointed out by Jameson - but there would also be the aggravation if the offender had <u>previously</u> to the attack or resistance provided himself with the weapon to aid the attack or resistance, although he may have subsequently thought better and dispossessed himself of such weapon <u>before</u> the actual attack or resistance. If the

[93] Report viii

crime under discussion is accompanied with "public violence" the punishment is hard labour from two to five years. So that this punishment may apply all the elements of public violence as defined by Section 63 must concur.

In conclusion "as it is always better to prevent than to punish offences and proper to give offenders a motive to desist from attempts so injurious to the public tranquillity, a provision is properly introduced declaring that no punishment shall be awarded to those offenders who, at the first warning, desist from the further commission of the offence"[94]. Section 98 lays down that:

"No punishment shall be awarded for the mere act of the assault or resistance mentioned in Sections 95 and 97 against any person who, although he shall have attempted to commerce or shall have actually commenced to act shall, at the first warning given by the person assaulted or to whom resistance is offered, or by any public authority, desist from the further commission of the offence."

(c) Calumnious Accusations, Perjury, and False Swearing

The crimes we are now about to consider, and which fall into the wide class of offences against the Public Administration, are those which more particularly impede or interfere with the proper administration of Justice.

1. Calumnious Accusations

Section 99 lays down:

"Whosoever, with intent to harm any person, shall accuse such person before a competent authority of an offence of which he knows such person to be innocent, shall, for the mere fact of having made such accusation be punished as follows:

(a) to hard labour for a term from thirteen to eighteen months, if the false accusation be in respect of a crime liable to a punishment higher than the punishment of hard labour or an imprisonment for a term of two years

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[94] Jameson p. viii

(b) To hard labour for a term from six to nine months, if the false accusation be in respect of a crime liable to a punishment not higher to a punishment of hard labour or imprisonment for a term of two years, but not liable to the punishments established for contraventions

(c) to imprisonment for a term of three days to three months, if the false accusation be in respect of an offence liable to the punishments established for contraventions.

Where the crime is committed with intent to extort money or other effects, the punishment shall be increased by one degree, and shall in all cases be that of hard labour".

The constituent elements of this crime are three:

(i) Accusation of an offence made to a competent authority

(ii) Intent to harm the person accused

(iii) Knowledge on the part of the accuser of the innocence of the person accused.

We will now briefly consider each of such elements separately.

(i) Accusation of an Offence Made to a Competent Authority

In our system of law, as we shall see more fully in our studies of Criminal Procedure, the criminal action is essentially public and is vested in the Government which, exercises it in the name of His Majesty through the Executive Police or the Attorney General as provided in each case by the law. Such action is exercised "ex officio" in all cases in which the complaint of the injured party is not requisite to set the action in motion or in which the law does not expressly leave the exercise thereof to the private party (Section 4). By Section 529 any person may give information to the police of any offence liable to prosecution "ex officio" of which he may have in any way become aware. And by Section 532 any person who considers himself aggrieved by any offence and who may wish proceedings to be taken for the punishment of the offender, if known, or if unknown, in case he be discovered, may make an instance or complaint to any officer of the police.

Such information and complaint are two of the ways in which notice of the commission of an offence is given to the police. Another form of "notizia criminis" is the "report",

that is to say, the notice which certain public officers are expressly bound by law to give of an offence of which they may have become aware in the execution of their duties.

Now when the law in the definition of the crime under discussion speaks of "accusation" it refers to all or any of the several ways in which notice of an offence is given to the competent authority. For indeed it is limited to those formal ways contemplated in the law of procedure above referred to. According to the authorities, for the crime of calumnious accusation it is not essential that the information or complaint or report or other notice given of the offence should satisfy all the requirements of form which the law of procedure prescribes[95]. Any act which is calculated to give rise to criminal proceedings against an innocent person is sufficient, for the law of procedure prescribes these requirements of form to ensure the authenticity of the writing and of the facts and circumstances which it describes, and not to afford impunity to calumnious accusations though informally made which may expose the victim to the same perils[96]. However, in the Criminal Appeal of Police vs. N. Brincat et.[97], Montanaro Gauci J. held that, to constitute this crime, the "accusation" (denunzia) of the offence must be spontaneous: it is not sufficient that it was merely voluntary. Consequently, if the accusation was made, for instance, in answer to questions put by the Police, a charge of calumnious accusation would not arise. The charge that would arise is, in appropriate cases, that of defamation.

The false accusation made to the competent authority must be of an offence: that is to say, it must refer to a fact which has the character of a criminal wrong be it even only a contravention. The reason for this is easy to find. It is only when a fact is attributed to a person which the law characterises as a criminal offence that the competent authority may be moved to institute proceedings against the person accused and it is only in such case that such person may be exposed to injury through the misdirected instrumentality of penal justice. If therefore the fact does not constitute a criminal offence, however morally reprehensible, mischievous, or injurious to character or reputation it may be, this first element of the crime of calumnious

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[95] Of. Criminal Appeal "Police vs. Carmelo Mifsud", 27.3.35 per Bartolo J.

[96] Vide Maino, op. Cit. art. 212, para. 1098, and the authorities he quotes

[97] 24/10/1951

accusation fails. The imputation of such fact may, in appropriate circumstances, constitute slander or defamation[98].

In the Criminal Appeal of Police vs. Giuseppe Attard[99], Mr. Justice Montanaro Gauci held that, in so far as the accusation made is not in respect of an offence which can give rise to the exercise of a criminal action before the Courts of Criminal jurisdiction, a charge of calumnious accusation fails, even though the fact falsely attributed to the victim may expose him to disciplinary action and the infliction of punishment by authorities other than the Criminal Courts (e. g. under Sections 9 and 13 of the Police Ordinance - Chapter 35).

(ii) Intent to Harm the Person Accused

The accuser who gives the information or makes the report or complaint to the competent authority against another person may have grounds for believing or at least suspecting him to be guilty of the offence charged. Notwithstanding that the evidence may subsequently disclose and establish the innocence of the accused, the law could not reasonably punish the accuser who would not have acted from malice and would have merely used and not abused a right which is competent to him. Even in Roman Law, which repressed calumny with the greatest severity, the acquittal of the accused was not reason enough for subjecting the accuser to the punishment for calumny. The Magistrates had the duty to inquire “de accusatoris consilio” and to see “qua mente ductus ad accusationem processit” and to excuse him entirely from the punishment for calumny whenever “justum ejus errorem repererint”. Indeed, such punishment could not even be applied in the case in which the accuser had acted rashly or with patent imprudence without pondering on the consequences of the accusation he was making. In our law which requires the intent to harm, the same principles apply. The “harm” to which reference is here made may consist merely in exposing the victim to the possibility of criminal proceedings being taken and punishment awarded against him. Indeed, in order that the crime of calumny may subsist, the possibility of such proceedings is essential. This does not mean that it is absolutely necessary that the

[98] Vide Rex vs Giuseppe Portelli, 8/5/1915, Law Reports Vol. XXII, Part IV, pg. 33; Police vs Attard, 7/11/1949, Law Reports Vol. XXXIII, Part IV, pg. 965

[99] 7/11/1950

accusation should indicate the person of the accused by name, it being sufficient if the information, report or complaint contain the particulars necessary to identify him. Nor is it necessary that the false accusation should contain minute details of facts or indications of articles of the law; provided it contains sufficient matter to give rise to proceedings[100].

As the contents of the false accusation must be such as to expose an innocent person to criminal proceedings, it follows that if the offence imputed to the victim is one which cannot be prosecuted except on the complaint of the injured party, then, according to Pessina, a mere "information" will not suffice to constitute calumny but a formal "complaint" of the party entitled to lodge it is requisite[101].

Also, in connection with the principle that the possibility of injury to the victim is an essential condition, it is generally held that the crime of calumnious accusation does not arise when the fact falsely imputed is no longer punishable on account of the action in respect thereof being extinguished through prescription or some other cause or barred by a final judgement that the fact does not constitute an offence. Calumny is made punishable because, through it, the administration of justice may be misled into sentencing an innocent person, and this legal possibility cannot arise if from the contents of the information, report or complaint itself, it is evinced that the criminal action is extinguished or barred[102].

Always in connection with this element of the "intent to harm" the question is also discussed whether a calumnious accusation committed by a person for the purpose of saving himself from a charge or a calumnious accusation "per retorsionem" or "per exceptionem" is liable to punishment. Pessina makes a distinction: he holds that no crime of calumny is committed by a person who stands already charged with an offence and who in order to exculpate himself of the charge tries to accuse and to shift the responsibility for the fact on to another person. In any such case, this writer says, the accuser does not so much intend to injure others as to save himself. If, however, a delinquent, well knowing that he has committed an offence, accuses another thereof

[100] Maino, loc. cit., para. 1100

[101] Op. cit., Vol. III, page 251; also Maino loc.cit.

[102] Carrara, Programma, Parte Speciale, Voi. V, para. 2618; Pessina, op. cit., Vol. III, pg. 255, quoted by Maino, loc. cit., contra Impallomeni, Cod. Pen. Ital. Illustrato, Vol. II, 248 - 249

in order to divert from himself the enquiries of the officers of justice, he is at the same time guilty of the offence with which he has not yet been charged and also of calumny in respect of the accusation he has made against the other well knowing him to be innocent[103].

Carrara also makes a distinction. He admits impunity for the calumny committed for the purpose of saving oneself from a capital charge but not in other minor cases.

The best solution, however, according to Maino is that given by Mortara, that "il diritto di difesa non si può spingere fino al punto di legittimare una lesione così grave della personalità altrui"[104], and that therefore the purpose of defending oneself does not exclude the crime of calumny.

(iii) Knowledge on the part of the Accuser of the Innocence of the Person Accused

This knowledge constitutes the specific formal element of the crime and puts in hold relief the design to injure the victim. Indeed, while our law, like its model the Neapolitan Code, requires as constituent intentional elements of this crime both the design to <u>injure</u> and the <u>knowledge of the innocence of the accused</u>, other Codes (e.g., art. 212 Italian Code of 1889) satisfy themselves with this latter ingredient only.

"Data la scienza, in essa sta tutto il dolo: il reato anche nel suo elemento morale è perfetto. Quindi e' che [...] non occorre aggiungere, come parve ad alcuni, l'avverbio dolosamente [...] nè come altri, che il calunniatore avesse il disegno di nuocere [...] L'incolpazione di un reato a perdona la quale si sa innocente, non può essere che dolosa: non può essere fatta che nel disegno di nuocerle, e nell'intento, che è caratteristico di questo delitto, di far deviare la pubblicà giustizia dal retto sentiero, rendendo i magistrati complici inconsapevoli dell'altrui iniquità ed esponendo a pericolo un innocente"[105].

The knowledge on the part of the informer or complainant of the innocence of the person to whose charge the information is laid or the complaint made, must be certain,

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[103] Op. cit., Vol. III, p. 255

[104] Op. cit. para. 1097

[105] Maino, loc. Cit., para 1096

so that it can be said that he deliberately and maliciously made the false imputation. The mere falsity in fact of the imputation without such knowledge is not sufficient, because as we have already said, such falsity may be involuntary and not therefore malicious, as in the case of an informer who imputes an offence to a person whom he, in truth, believes to be guilty.

"La calunnia criminalmente perseguibile - says Carrara[106] - e' oggi soltanto la manifestissima. Bisogna cioè che non solo l'accusato abbia chiarito l'innocenza propria, ma di più che sia dimostrata nell'offeso che lo denunziò come autore del delitto la cognizione di tale innocenza. Qualunque causa di giusta credulità sara' bastevole ad esonerare dal rimprovero di calunnia un offeso che erroneamente sebbene con troppa precipitazione si persuase che l'autore del delitto da lui patito fosse chi realmente non lo era".

Any information, report or complaint not in accordance with the true facts but which may have been laid or made not in bad faith, may only give rise to a responsibility for damages for the unjust accusation in so far as the agent may be guilty of negligence for civil purposes[107].

Furthermore, the knowledge on the part of the informer or complainant of the innocence of the accused must exist at the time of information is laid or the complaint made. This emerges clearly from the wording of Section 99 which considers the crime complete by the mere act of laying the information or making the complaint. All the ingredients required by the law must therefore concur in the fact constituting the crime, that is, at the moment the false accusation is made. Knowledge of such innocence subsequently acquired will not make the informer or complainant guilty of calumny. If notwithstanding such knowledge so acquired the informer or complainant persists in the prosecution or gives or produces false evidence to support his original information or complaint or suborns evidence etc., he will be guilty of other crimes but not of calumny[108].

[106] Programma, Parte Speciale, para. 2623

[107] Roberti, op. cit. Vol. V, para. 438

[108] Roberti, ibid., para. 449; Rex vs Catarina Debono, 12/11/1919, Law Reports, Vol. XXIV, part IV, pg. 886

The question falls here to be considered whether the crime of calumny subsists only in the case in which an accusation is made against an innocent person, or also in the case in which the responsibility of an offender is falsely aggravated. Many writers take the view that even in the latter case the crime of calumny subsists, observing that, in respect of the aggravations falsely imputed, the person accused is innocent, and, further, that the malice of the accuser in falsely affirming aggravating circumstances or attributing a graver character to the fact charged, should not go unpunished[109]. Other writers, on the contrary, remark that the law in the crime of calumnious accusation, punishes the false reformation or complaint and such is not that which in its substantial and main parts is recognised as genuine, nor that which to the fact essentially true attributes the character of a different or more serious crime. The injury caused to the administration of justice, the latter writers add, by the partial falsity, is set off by the advantage of the disclosure of an offence and the punishment of the offender[110].

Roberti says:

"Sia pure che nella sua querela o denunzia (il querelante o denunziante) abbia calunniosamente attribuito al fatto che ne formava l'oggetto, una circostanza aggravante rimasta nel guidizio smentita ed esclusa anche colla formoia constare che non sia concorsa, non crederemo che potess sol perciò dirsi calunniatore. Quando vero si riconosca il fatto principale, e quando rimanga punibile anche senza il concorso di quella circostanza, la insussistenza di essa e quindi la calunnia parziale, non può equipararsi alla calunniosa insussistenza della querela o della denunzia che solamente la legge vuol punita. La iattura della giustizia per tale parziale calunnia viene in certo modo compensata col vantaggio della scoperta di una reità. Quindi una pena non potrebbe imporsi per ciò al delatore o querelante, salvo se abbia osato complicare alla calunnia parziale anche la falsità di un testimonianza, mentre allora per questa sola sarebbe punibile"[111].

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[109] Puccioni "Cod. Pen. Ital. Illustrato", Vol. II, p. 182; Carrara, "Programma, Parte Speciale" Vol. V, paras. 2612-2617; Impallomeni "Cod. Pen. Ital. Illustrato" Vol. II, p. 249; Pincherle "Cod. Pen. Ital. Annotato", p. 322-323

[110] Vide Pessina, op. cit., Vol. III, p. 253-254; Maino, loc. cit., para. 1099

[111] Loc., cit., para. 442

2. Fabrication of False Evidence

Section 109 lays down:

“Whosoever shall fraudulently cause any fact or circumstance to exist, or to appear to exist, in order that such fact or circumstance may afterwards be proved in evidence against another person, with intent to procure such other person to be unjustly charged with, or convicted of, any offence, shall, on conviction, be liable to the punishment established for a false witness, in terms of the preceding sections of this Sub-title.” (i.e., Sections 102-103).

This provision was inserted in the Code on the suggestion of Andrew Jameson who thus wrote in his Report[112]:

“A criminal conviction may be either prevented or procured by the fabrication of false circumstantial evidence as well as by false swearing as to the circumstances or the fabrication of documentary evidence. These are all varieties of a similar offence, and equally tend to obstruct the due administration of justice. But it is only the two latter offences which are prohibited in the Code. It is plain that if a man artfully makes circumstances - for instance by placing some article of property in the chamber or trunk of another man in the case of theft, or by staining another’s clothes with blood or placing a bloody knife in his room in a case of homicide or bodily harm, he may as effectually mislead a judge or jury as by himself swearing to the facts.”

The crime created by this section is in some continental codes and textbooks dealt with as a form of calumnious accusation.

Whereas the false accusation we have already dealt with made orally or in writing by any information, report or complaint constitutes the calumnious accusation properly so called verbal or direct, this other form consisting in falsely fabricating factual evidence of an offence against an innocent person, constitutes the calumnious accusation known as real or Indirect:

[112] Pg. 85

"La calunnia reale consiste nel simulare a carico di persona che si sa innocente le tracce o gli indizi materiale di un reato [...] Tale sarebbe il porre sul luogo del reato un oggetto simile a quello portato dalla persona che si vuol colpire, ovvero il porre sulla persona o nell'abitazione altrui un pugnale insanguinato, oppore una cosa furtiva"[113].

The constituent elements of this crime emerge clear from its definition. The material element consists in fabricating, that is, as the law says, falsely causing any fact to exist or appear to exist which may be used as evidence of a criminal offence against an innocent person. The intentional element consists in the intent on the part of the agent to procure that that person be unjustly convicted of or charged with the offence. If these two elements concur the crime subsists, even though the person against whom the evidence was fabricated may not have been, in point of fact, convicted or even charged. Whereas, however, in the case of the calumnious accusation properly so called, i.e., the crime under section 99, such crime is completed by the mere presentation of the information, report or complaint to the competent authority, in the case of this indirect form of calumnious accusation the crime cannot be said to be completed until the fact or circumstance of fact falsely caused to exist or to appear to exist as aforesaid, becomes known to the competent authority:

"Nella calunnia verbale, il momento consumativo e' certo colla presentazione della denunzia o querela all 'autorità giudiziaria o al pubblico ufficiale avente obbligo di riferire. Nella calunnia reale, basterà che il calunniatore, allo scopo di esporre a pena un innocente, abbia depositato nell'abitazione di quello - per esempio oggetti di contrabando - perchè si possa dire consumato il delitto? In ciò vi sono certamente gli estremi del tentativo: ma conveniamo con Carrara che non vi sono quelli del delitto consumato, porchè l'obiettivo della calunnia, si verbale che reale, non si limita alla proprietà privata o altro diritto dell'individuo, ma e' precipuamente la pubblica giustizia: perciò il delitto di calunnia reale non si può dire perfetto finchè il fatto non sia venuto a contatto con gli agenti della giustizia e finchè questi non abbiano perquesito e ritrovato"[114].

[113] Maino, op., cit., para. 1102

[114] Maino, para. 1102; Carrara, Programma, Parte Speciale, Vol. V, para. 2655

3. Simulation of Offence

The second sub-section of Section 109 lays down that:-

"Whosoever shall lay before the Executive Police an information regarding an offence knowing that such offence has not been committed, or shall falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such an offence, shall, on conviction, be liable to imprisonment or hard labour for a term not exceeding one year".

This provision was added to our Code by Ordinance No. IX of 1911 and was modelled in its substantive part word for word on Section 211 of the Italian Code of 1889.

The simulation of an offence is considered as a crime for the injury which it does to the administration of justice by misleading it; for the alarm which the news of an offence causes in the public; for the inconvenience and expense to which the officers of justice may be put; for the danger of suspicions and molestations to which law-abiding citizens may be exposed in the attempt to ascertain an imaginary fact[115]. This crime differs from that of calumnious accusation in as much as in the simulation of offence there is no specific accusation against any determinate person and there is not, therefore, the intent to cause an innocent person to be unjustly convicted or charged. Moreover, the crime of calumnious accusation does not, like this crime, pre-suppose the inexistence of the material fact: the offence in respect of which the information or complaint is laid or made may have in fact been committed, but there is a calumny when a person is accused thereof who is known to be innocent[116].

The simulation, like calumny, may be either verbal or direct or real or indirect. The former must consist in a denunciation, that is in an information or report or complaint to the Executive Police: and the crime is completed by the presentation of such information, report or complaint, so that the subsequent confession of the untruth would not avail to exclude it:

[115] Carrara, Programma, Parte Speciale, Vol. V, para. 2566; Puccioni, Cod. Pen. Toscano Illustrato, Vol. IV, pg. 309

[116] Maino, para. 1094

"Il reato e' consumato colla presentazione della denunzia, altro non richiedono l'articolo 211; onde la successiva è anche pronta confessione del mendacio non varebbe ad eliminarlo"[117].

4. Perjury

Our law does not give a definition of the crime of perjury or false testimony or as it is called in some other systems of law legal or judicial perjury. But it is certain that the essential constituents of such crime are:

(i) A testimony given in a cause, whether criminal or civil

(ii) An oath lawfully administered by the competent authority

(iii) Falsity of such testimony in a material particular

(iv) Wilfulness of such falsity or criminal intent

(i) A testimony given in a cause

The crime now under discussion cannot arise unless the defendant has given his testimony in a cause. Falsity committed in any other case may constitute the crime of forgery, or if on oath the crime of extra-judicial perjury as we shall see, but not the crime of false testimony. By testimony of course is meant any statement or deposition or declaration made before a Court of justice in judicial proceedings according to law. Testimony or as it is otherwise termed <u>personal evidence</u> (as distinct from <u>real evidence</u>) thus includes all kinds of statements regarded as possessed of probative force in respect of the facts stated and is, by far, the most important form of evidence. There are few processes of proof that do not contain it - few facts that are capable of being proved in courts of justice otherwise than by the testimony of those who know them.

Here, as we have already said, we are dealing only with the crime of false testimony. The wilful production of false witnesses or false documents is made punishable as a separate crime. (Section 101).

[117] Maino, para. 1088

The crime of false testimony can be committed by any person appearing to give evidence as a witness before a judicial authority in a cause whether criminal or civil (as we shall see, the question whether the false testimony is given in a criminal or a civil cause affects the measure of punishment but the ingredients of the crime are in either case the same). It must be a cause, that is to say contentious proceedings which call for a decision. Therefore, false evidence given, for instance, in proceedings of a "reperto" or before the Court of Voluntary Jurisdiction will not constitute this crime. Likewise, it seems that false evidence given before the Court of Magistrates sitting as a Court of Preliminary Inquiry, does not constitute the crime of false testimony, because the proceedings before that court are not a cause (e.g., a formal trial where a final decision must be taken[118]). In all these cases the false evidence given on oath may constitute the crime under Section 106 (extra-judicial perjury or false swearing).

So far, we have spoken only of witnesses giving evidence in a cause in which they are not themselves involved. But in our law, the same crime may also be committed by the person charged or accused in a criminal cause[119] or by any of the parties in a civil cause. Up to 1909 there was no provision in our Code to enable the defendant in a criminal matter to give evidence on his own behalf. But by Ordinance VIII of that year such provision was made on the lines of Section 1 of the Criminal Evidence Act 1898 of the United Kingdom[120]. Every person charged or accused with or of an offence was made a "competent" though not a "compellable" witness, in the sense that he may, if he wishes, give evidence but may not be called as a witness except upon his own application. Section 630 of the Criminal Code which contains this provision lays down that:

"the provisions of the law relating to witnesses shall apply to the accused who gives evidence on oath."

In civil matters, the parties to the suit are both competent and compellable witnesses. Section 564 of the Code of Organization and Civil Procedure lays down that:

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[118] Falzon, op., cit., pg. 198

[119] Vide Criminal Appeal Police vs Wigi Attard, 25/4/1951 (Harding J.); Police vs Carmelo Bartolo", 12/5/1953 (Montanaro Gauci J.)

[120] 1862 Viet. C. 36

"Any of the parties to a suit, whatever his interest therein, shall be competent to give evidence, at his own request, or at the request of the other parties to the suit, or if called by the Court 'ex officio'. The provisions of this Code relating to witnesses shall apply to such party."

The question is discussed whether the complainant in the case of an offence which can be prosecuted only at private instance (Section 532) can become guilty of the crime of false testimony. In the past the view was taken that "witnesses" only, that is persons who were in no way directly interested in the event of the proceedings, could commit this crime. This was at a time when the accused himself and also the parties to a civil suit could not give evidence. The complainant, it was said, could only be required to make or confirm his complaint on oath: but such complaint is not testimony.

Thus Falzon wrote: "Sebbene nelle cause criminali in cui si nrocede sommariamente innanzi la Corte della Polizia Giudiziaria come corte di criminale giudicatura, la stessa possa esigere [...] che la querela della parte sia fatta o confermata con giuramento, pure propriamente parlando, tale querela, quantunque talvolta fatta o confermata con giuramento, non e' una testimonianza, perchè la causa in sifatto caso sara' propria del querelante e l'azione non viene esercitata che dalla parte stessa. Quindi in questo caso la parte facendo detta querela con giuramento non assume il carattere di falsa testimonianza, nel caso che si alteri la verità, ma di spergiuro ai termini dell'articolo 99 (106)[121].

But in Vella vs Camilleri[122], Mr Justice Harding held that in cases cognizable by the Court of Magistrates, instituted on the complaint of the injured party, the complainant is a Competent witness (Recent Criminal Cases Annotated, para. 63), and therefore, whatever the older doctrine was, if the Complainant gives false evidence on oath at the trial, he is guilty of the crime of false testimony like any other witness[123].

Finally, as to who in general can be a witness see Section 625 et seq. Criminal Code and Section 562 et seq. Code of Organization and Civil Procedure.

[121] Op. cit. pg. 197 - 198

[122] Criminal Appeal, 15/5/1937

[123] Vide also Maino, op. cit., art. 214, para. 1112

(ii) Oath

The second ingredient of this crime is that the false testimony shall have been given on oath lawfully administered by the competent authority. In some other systems of law this requirement is not essential. Thus, in article 214 of the Italian Code of 1889 the fact that the deposition is given on oath rather than without it affects only the "quantum" of punishment:

"L'ultima parte dell'articolo 214 dimostra non essere condizione necessaria del delitto in esame la prestazione del giuramento da parte di colui che falsamente depose. Ciò non e' più necessario - così la relazione ministeriale sul progetto del 1887 - dopo che, per il progresso della scienza e della civiltà, la falsa testimonianza ha cessato di essere un reato contro la religione, ed e' divenuta, secondo l'intrinseca sua natura, un delitto contro l'amministrazione della giustizia"[124].

The oath is not required either by the present Italian Code (Article 372). But in our law, as in the English law, if the testimony is not given on oath, no statement or affirmation however false will constitute this crime. By Section 15, sub-section 1 of the Perjury Act, 1911[125], for the purposes of that Act, the form and ceremonies used in administering the oath are immaterial if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without opposition or has declared to be binding on him. But Section 528 of our Criminal Code prescribes the form of the oath to be administered to witnesses, that is:

"You A.B. do swear that the evidence which you shall give shall be the truth, the whole truth and nothing but the truth. So help you God."

And in civil matters Section 109 of the Code of Organization and Civil Procedure lays down that:

[124] Maino, para. 1112

[125] 1 and 2 Geo. 5c 6

"witnesses or other persons required to take the oath shall swear to tell the truth, the whole truth and nothing but the truth."

By Section 111 of this Code (applied to Criminal matters by Section 513, Criminal Code), the oath must in all cases be taken personally by the person to be sworn in the hands of the registrar. (Vide Sections 576, 595, 672 of the Code of Organization and Civil Procedure). It is further provided by Section 108 of the said Code of Organization and Civil Procedure that:

"Persons professing the Roman Catholic Religion shall be sworn according to the form acknowledged by such Religion: and persons not professing that Religion shall be sworn in the manner which they consider to be most binding on their conscience".

The same thing is provided by Section 627 of the Criminal Code.

We have said that in order that this crime of false testimony may subsist it is essential that the false deposition shall have been given not only on oath but also that the oath shall have been lawfully administered by the competent authority. The forms and formalities above mentioned must therefore, where applicable, have been observed. The French Court of Cassation held several times, for instance, that this requirement had not been complied with, where, in the administering of the oath, the word "all" (the truth) had been omitted, as also where the words "nothing but the truth" had been omitted. As Carrara observes, the words "You swear" even without any addition may be sufficient, from a religious point of view, to direct the witness' attention to the sanctity of the oath: but the same cannot he said from a legal point of view: because the witness might think that his only duty under the law is not to falsify the truth on those circumstances about which he is interrogated but that he has no further duty to disclose everything that may be relevant to the proceedings and also the duty to be truthful in whatever he says without being interrogated. Hence the real importance of that form, which is not satisfied by the mere word "I swear" although this may be sufficient to make the deponent comprehend his religious obligation[126].

However, although, as we have said the "oath" is essential, Section 108 of the Criminal Code provides that:

[126] Op. cit., para. 2668, n. 1

"The solemn declaration or affirmation of any person authorised by law to make a declaration or affirmation instead of taking an oath, shall for the purposes of any punishment established in the preceding sections of this Sub-Title, have the same effect as if the person making such declaration or affirmation had been sworn according to law".

By Section 15 of the English Act above quoted, oath, similarly, includes affirmation and declaration. As to who are the persons authorised to make a declaration or affirmation in lieu of taking an oath, Section 127 of the Code of Organization and Civil Procedure lays down that in the case of Quakers, Moravians, Separatists or others of their conviction as regards the taking of oaths, a simple affirmation shall be equivalent to an oath.

The authorities that are competent to administer the oath are those expressly indicated by the law. Section 126 of the Code of Organization and Civil Procedure gives such power to every Court and every judge and magistrate.

Finally, it may not be amiss to mention that by Section 110 of the said Code of Organization and Civil Procedure:

"The Court before which an oath is to be taken, shall have power to warn the person about to take the oath as to the obligation of the oath and the consequence of perjury."

This provision is applied to the Criminal Courts by Section 513 of the Criminal Code (Vide also Section 625 of the Criminal Code).

(iii) Falsity

In English law, a person commits a perjury who, being lawfully sworn as a witness in a judicial proceeding, wilfully makes a statement material to that proceeding, which he knows to be false or does not believe to be true; the matter sworn must either be false in fact or, if true, the defendant must not have known it or not have believed it to be

so[127]. Section 124 of the Italian Code afore quoted makes guilty of the crime of false testimony any person who, before a judicial authority, affirms what is false or denies what is true or fails to disclose, in whole or in part, that which he knows about the facts of the case. Our law does not define in what the falsity of the testimony may consist, but it is obvious that the same rule laid down in the Italian Code applies. A person perverts the truth in the first place when he affirms what is false or denies what is true. There must be a statement made and therefore the mere refusal to give evidence or to answer any question cannot constitute this crime:

"Ed in vero, non può aversi falsa testimonianza se non quando siasi fatta una dichiarazione: ora il niego di fare la dichiarazione non può tenersi come la dichiarazione stessa, e poi, il testimone non inganna mica la giustizia, egli non fa che negarsi a darle quei lumi che potrebbe"[128].

Such refusal is made the subject of a special provision in the Code (Section 515) which gives power to the Court to order the arrest of any witness who shall refuse to be sworn or to depose and to detain him as long as may be necessary or the Court may think proper, having regard to the insubordination of the witness and the importance of the case. It may also constitute the crime under Section 130 where the witness for the purpose of withholding his service to the competent authority when so required alleges an excuse which is found to be false. But, as has been said, the mere refusal to make any statement cannot constitute the crime of false testimony.

Such refusal must not, however, be confused with the failure to disclose, in the course of the evidence, anything the witness knows about the facts of the case in which the evidence is given, even though he may not have been specially questioned on the point. The oath is taken to speak the whole truth and, as Rauter says, the duty of the witness is to say the truth as far as he knows it: he expressly promises on oath to fulfil this duty and the fulfilment of such duty is required of him in the interest of law and justice: therefore if he leaves out something he knows or says he knows nothing, he fails in this duty, and if he does it in bad faith or with criminal intent, he is guilty of the crime of false testimony. This would be, for instance, the case of a witness who, being called to give evidence concerning a fact wrongly imputed to a person other than the

[127] Archbold, op. cit., pg. 1222

[128] Chaveau et Helie, no. 3056

culprit, does not declare the innocence of that person which is known to him. It is clear that this silence gives to his evidence a meaning which is contrary to the truth, to the detriment of the defendant.

The same thing may be said with regard to negative statements, that is, those in which the witness denies having seen or heard the facts on which his evidence is required. It is true that in such cases the absence of good faith may be difficult to prove, because it may happen that this witness, although he was in a position to have seen or heard, may have in fact not noticed: but if it is proved that he had actually seen or heard and that his denial was intended to destroy such proof it is evident that he commits the crime of false testimony.

Indeed, a witness may have averred something which is in fact true and yet be guilty of this crime if he must not have known it or not have believed it to be so. So in England it was held that where a man swears to a particular fact without knowing at the time whether the fact is true or false, it is as much perjury as if he knew the fact to be false, and equally indictable[129] and that if a man swears that J. N. revoked his will in his presence, if he really had revoked it, but it was unknown to the prisoner that he had done so, it is perjury[130]. The same principle is affirmed in continental doctrine:

"Scientificamente si insegna che può essere falso testimonio anche chi attesti una cosa in se stessa vera, quando falsamente narra di averla veduta; il falso qui non consiste nel fatto, ma nel non essersi il fatto stesso veduto dal testimonio. Il criterio della falsità della testimonianza non dipende dal rapporto fra il detto e la realtà delle cose, ma dal rapporto fra il detto e la scienza del testimonio. Aliud est mentiri aliud dicere mendacium"[131].

But in all cases, in order that the crime of false testimony may subsist, it is necessary that the falsity be material to the cause: this is expressly required in the Perjury Act, 1914. But it applies equally to our law. The law aims at ensuring the integrity of judicial trials and it 1 s in the violation of such integrity that the injury caused by the crime subsists. If therefore the falsity falls upon circumstances which are entirely irrelevant to the cause and which, whether true or false, could in no way influence the result, the

[129] R. V. Mawby, C. T. P., pp. 619, 637

[130] Allen vs. Westley, Hetley 97

[131] Carrara, Programma, Parte Speciale, Vol. V, paras. 2678 & 2698

crime could not arise because no possibility of injury which alone justifies the punishment would exist.

Roberti says:

“Ben dunque diceva sul proposito, il profondo Raffaelli, che per indossare alla falsa testimonianza il carattere di criminosa non basta dire che sia falsa, ma dopo e' rinvenirla ancora influente a far pronunziare un falso giudizio. Perciocchè priva essa d'ogni influenza a tale scope, sarà reprensibile come mendacio, ma non punibile come falsità”[132].

And Maino says:

"Perchè sussista la falsa testimonianza - delitto funesto in vista dell’inganno nel quale per esso vien tratta o potrebbe essere tratta la giustizia – e’ necessario che le circostanze falsamente asserite o maliziosamente taciute siano pertinenti alla causa o influenti sulla decisione di questa"[133].

The law itself in Sections 557 and 559 of the Code of Organization and Civil Procedure applied in criminal matters by Section 513 of the Criminal Code requires that all evidence must be relevant to the matter in dispute, and enjoins the Court to refuse to admit any evidence which it considers irrelevant or superfluous.

What is or is not “material” in the particular case depends upon the circumstances of that case and no ‘a priori’ rules can be laid down. In England, it was held that even a man's testimony as to the credit of a witness is "material"; and every question in a cross-examination which goes to a witness’ credit as, whether before he was convicted of felony, is material for this purpose[134].

If the falsity is material, that is to say <u>could</u> have affected the decision one way or the other, it does not matter that it has not in fact influenced such decision. All the authorities are unanimous that a crime of false testimony is complete so soon as a false deposition is made which is calculated to mislead the Court. No actual injury resulting from an erroneous judgement pronounced in consequence of such false

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[132] Op. cit., para. 460, n. 13

[133] Loc. cit., para. 1113; Confer also Carrara, loc. cit., paras. 2620 - 2681; Chaveau et Helie, Vol. IV, No. 1781; Impallomeni "Codice Penale Italiano Illustrato", Vol. II, pg. 257

[134] Vide Archbold, pg. 1220

deposition is required[135]. It is the mere possibility of injury to the administration of justice that alone characterises this crime and the event is not considered except, in certain cases, for the purpose of the assessment of punishment.

"Compiuta dunque la falsa deposizione, compiuta e' del pari l'esecuzione del reato, ne' occorre punto attendere la sentenza sulla causa per far dipendere dall'esito di questa l'applicazione della pena"[136].

Finally, for a charge of this crime it is not absolutely essential that the evidence impeached as false shall have been taken down in writing. What the witness has said may also be proved by parole evidence[137].

(iv) Criminal Intent

The intentional element of this crime of false testimony is the consciousness of uttering a falsehood or of concealing the truth. Any error or forgetfulness excludes the criminal intent in this crime. In other words, the falsity must be deliberate and intentional, for, if incurred into from inadvertence or mistake, it cannot constitute this crime. Therefore, this crime is not committed by a witness who testifies a falsehood, honestly believing it to be the truth. A man who was an eye-witness of a fact may, by misapprehending the essential circumstances thereof, deceive himself in good faith, and often one is under the impression of having seen or heard things which in reality never took place; often also fear or fright or strong emotions as well as the mistaken perception of the senses play tricks on sight or hearing. Consequently, in order that the crime in question may subsist it is necessary to prove in addition to the actual falsity and the possible injury to the due administration of justice, the criminal intent, a strong presumption of which arises when some advantage accrues to the deponent from his false deposition or if he was corrupted[138].

On the other hand, however, this criminal intent need not consist in the wish to injure any particular person. Indeed, in the case of criminal proceedings, the crime subsists

[135] Vide in this sense Criminal Appeal Police vs Zammit, 14/3/1949, Law Reports, Vol. XXXIII, Part IV, pg. 840

[136] Roberti, para. 461

[137] Vide judgement by Montanaro Gauci J. in Criminal Appeal Police vs Galea, 29/3/1952

[138] Vide Chaveau et Helie, op. cit., No. 3072

whether the false testimony is given against or in favour of the accused, and, in the case of civil proceedings, whatever is against one of the contending parties is naturally in favour of the other. The motive of the offender is, as in most other crimes, immaterial:

"E' indifferente, per la natura del reato per qual motivo l'autore della falsa testimonianza abbia agito: basta che abbia agito in male fede o con intenzione criminosa. E vi ha intenzione criminosa quando anche il testimonio non avesse alcuna intenzione di nuocere al tale o al altra parte. Siccome l'oggetto o la materia del delitto sono la verità in quanto il testimonio la conosce, ed il diritto che ha la giustizia di saperla da lui, l'intenzione esiste appunto perchè contraviene scientemente a questa obbligazione che ha di dire il vero"[139].

The question whether there was this criminal intent is one of fact the solution of which depends on the particular circumstances of the case.

The point is not settled among the authorities whether a person is liable to the punishment for false testimony who makes a false deposition to save himself. The Italian Code of 1889 contained an express provision on the said subject. Article 215 thereof exempted from all punishment any person who, by manifesting the truth would inevitably expose himself or a close relative to a grave injury to his liberty or his reputation[140]: but granted only a reduction of punishment when the false testimony exposed another person to criminal proceedings or to a sentence of condemnation.

Among French writers the point is controverted. The Court of Colmar had declared a false witness to be excused from guilt on the ground that he could not be compelled to declare a fact which would have exposed him to criminal proceedings. This decision was annulled by the Court of Cassation for the reason that the law did not make any exception and the sanctity of the oath did not allow any to be made; therefore, the witness, simply on account of having invoked the Deity to confirm his statement, could not, by reason of any personal consideration, be excused from the obligation of discharging the sacred duties imposed on him by the oath. This decision was criticised by Chaveau et Helie as well as by Rauter and Carnot, but supported by Dalloz.

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[139] Rauter, para. 491

[140] A similar provision is made by Article 384 of the present Italian Code.

Under our law, the position would appear to be as follows: As regards the accused himself we have already seen that he is a competent though not a compellable witness. If he chooses to give evidence, he is liable to be cross-examined notwithstanding that such cross-examination may tend to criminate him of the offence with which he is charged. All the provisions relating to witnesses shall, in such case apply to the accused giving evidence on oath. Therefore, if he makes a false deposition, he becomes guilty of the crime of false testimony.

As regards all other witnesses, including the parties to a civil action, the general rule laid down both in the Code of Organization and Civil Procedure (Section 588) and in the Criminal Code (Section 639) is that no witness can be compelled to answer questions which might subject him to a criminal prosecution. Therefore, a witness to whom any such question is put has the right to claim the privilege; if, however, he does not claim and avail himself of this privilege and gives his reply on oath, he cannot alter or pervert the truth, and if he does, he is guilty of false testimony[141]. The same rule, it is submitted, applies also to the accused with regard to the replies which might incriminate him of an offence other than that with which he stands charged. But if "ex hypothesis" a witness has claimed the privilege but was wrongly compelled by the Court to give a reply, then if he gives a false answer, it does not seem that he could be held guilty of a crime.

What we have said applies only to depositions which might expose the witness himself to criminal proceedings. There is no doubt that if the witness gives a false testimony to save somebody else even if from criminal proceedings or to avoid, whether to himself or to others, any other injury (that is other than a criminal charge, for example an injury to property, reputation etc.) he would be guilty of the crime and no absolute privilege covers any such testimony. Only, Section 629 of the Criminal Code gives a discretion to the Court to excuse a witness from giving evidence against close relatives, and Section 640 likewise gives a discretion to the Court to exempt a witness from replying to a question if the reply might tend to manifest his own turpitude. But if the Court does not see fit to use its discretion in this sense, the witness is bound to

[141] Vide Criminal Appeal Police vs Vassallo, 8/3/1948, Law Reports, Vol. XXXIII, Part IV, pg 664

give evidence or make a reply and if he commits a falsity, and if all other ingredients concur, he will be guilty of false testimony[142].

Finally advocates, legal procurators, priests and other persons, bound to secrecy, may not be compelled to disclose certain matters which the law itself covers with privilege. (Vide Section 638 Criminal Code, Sections 587 and 689 (2) Code of Organization and Civil Procedure). If, however, any of them voluntarily gives evidence and makes a false statement, he would be guilty of the crime[143].

Retraction

Here again our Criminal Code does not contain any express provision, as is contained, for instance, in art. 216 of the Italian Code of 1899 and art. 376 of the present Code. But the principle as we shall say has been accepted in our case-law.

Pessina says:

“Il testimonio il quale facesse una testimonianza falsa, ancorchè ciò avvenga nel corso del giudizio, ritrattandosi prima che si chiudesse il dibattimento, non sarebbe soggetto ad azione penale per falsa testimonianza, siccome fino a tale momento si tratta di un conato, che vien esente da pena per il sopraggiunto pentimento del colpevole"[144].

The reasons for this principle are briefly that the several parts of a testimony form together one indivisible whole, such testimony cannot be considered complete and irrevocable except when the discussion of the cause in which it is given is definitely closed. A witness who retracts any untruthful deposition before it has caused to the community or to the individual an irreparable injury, thereby voluntarily negatives the effects thereof. The law creates the crime of false testimony only in as much as this may wrongfully influence the decision in the cause and when a person who has given the false testimony prevents its effects in time, one of the ingredients of the crime, that is, the possibility of misleading justice and causing an injury, ceases to exist.

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[142] Vide Falzon, op. cit., pg. 196, para. 512

[143] Falzon, ibid., para. 513

[144] Elem. di Diritto Penale, Vol. II, Cap. III, I para. 1

The principle, as we have said, has been accepted by our Courts. In Rex vs P. Borg[145], His Majesty's Criminal Court held that "retraction, if timely, negatives the offence"[146]. This principle, the Court said, may be inferred from Section 601 of the Code of Organization and Civil Procedure applied to the Criminal Courts by Section 641 of the Criminal Code, which lays down that if a witness, at any time before the hearing of the cause is closed, wishes to make any addition or correction, the Court shall allow such addition or correction, and shall evaluate the same according to the circumstances. From this provision it also clearly emerges that the time up to which a witness may retract is the closing of the hearing of the cause. Retraction made subsequently to that stage will not avail the false witness. There is only one exception to this rule: as we shall see, retraction made after sentence of death has been passed on the accused but in time to stay the execution of the sentence, ensures to the false witness a <u>substantial reduction</u> of punishment.

The retraction, in order that the witness may benefit thereby, need not, it appears, be absolutely <u>spontaneous</u> in the true and proper sense of the word: it is sufficient if it be voluntary. Under Section 515 of the Criminal Code the Court has the right in its discretion to lead back to the truth any witness who prevaricates in his deposition, by warning him, keeping him apart, or even ordering his arrest. Notwithstanding that the retraction may have been made after any such measures were applied, it would seem that it nonetheless avails the witness[147].

By Section 516 of the Criminal Code, when a reasonable suspicion arises of falsity of any evidence, the Court may order the arrest of the person suspected to be guilty thereof: if this happens before His Majesty's Criminal Court, such person shall by order of such Court be remitted to the Court of Judicial Police for the necessary enquiry: if it happens before the Court of Judicial Police such Court shall proceed "ex officio". The same power of ordering the arrest and remitting a suspected false witness to the Court of Judicial Police for the necessary proceedings is also vested in the Civil Courts by Section 600 of the Code of Civil Procedure. Now in connection with these provisions the question arises whether the witness against whom such order as aforesaid is made

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[145] 18/12/1942

[146] Vide Harding, op. cit., para. 36

[147] Cfr. Harding, op. cit., para. 36, n. 43

in the course of the proceedings can usefully retract, in view of the rule we have laid down that the witness can retract until the discussion is closed. Some writers hold that in view of this rule the order of the Judge or Magistrate cannot deprive the witness of the benefit which the law itself allows him, and that therefore, if notwithstanding that the order has been made and proceedings may have been initiated against the witness for false testimony such witness retracts before the hearing of the cause in which the false testimony is closed, he is exempt from punishment. If, however, the proceedings in that cause had to be suspended on account of such suspicion of false testimony (vide sub-section 2 of Section 600, Code of Civil Procedure), the order of the Court for proceedings to be instituted against the witness makes the continuation or resumption of the hearing of that cause impossible until the proceedings on the false testimony are terminated; in such case the decree of suspension is considered as closing the hearing of the cause in regard to the witness and he cannot, therefore, any longer usefully retract[148].

Punishment

The crime of false testimony is not of the same gravity when it is committed in a civil cause as when it is committed in a criminal cause. In both cases, it is true, there is an offence against the administration of justice; but the effects both in regard to society at large as well as in regard to the individual are not injurious in the same degree. In civil causes the interests involved are ordinarily merely pecuniary, and even where the false testimony has occasioned a wrongful judgement, the prejudice suffered by the party aggrieved is, if not always at least often, remediable. But in criminal causes the interests involved are much more sacred and more directly affect the maintenance of good order consisting in the repression of offences; and the false testimony is calculated to provoke a more grievous injury which is almost always not redressable, both when it favours the impunity of a guilty person as when it damages an innocent person. Hence the difference which the law makes in the punishment.

The punishment for false testimony in a civil cause is hard labour from seven months to two years (Section 103).

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[148] Maino, op. cit., art. 245, para. 1124

The punishment for false testimony in a criminal cause varies with the gravity of the offence in the trial of which the false testimony was given. If such offence was liable to a punishment not higher than two years hard labour or imprisonment, the punishment for the false testimony given against or in favour of the accused is hard labour from nine months to two years. If such offence was a crime liable to a punishment higher than two years hard labour or imprisonment, the punishment for the false testimony is hard labour from two to five years. But, if the accused was sentenced to a punishment higher than five years hard labour or imprisonment the false witness who gave evidence against him at the trial or of whose evidence use was made in such trial against the person sentenced, shall be liable to such higher punishment. Thus, in the case of condemnations involving a higher punishment than five years' imprisonment, with or without hard labour, the principle of "lex talionis" so common in antiquity, so much repudiated in modern times, is applied. The false witness is visited with the same punishment to which the injured party is condemned. This, Jameson wrote in 1844, is in accordance with the public feeling and the example of many codes. If, therefore, the prisoner against whom the false testimony was given or use made of the false testimony, is sentenced to death, the false witness is also, in respect of this crime, subject to what we shall presently say, liable to death.

"Soma celebrated writers on jurisprudence", it is again Jameson writing[149], "have doubted whether this atrocious way of depriving a fellow creature of life, ought to be held as murder, or in any case to be punished capitally. It is not denied by any that the guilt of this crime is equal to that of wilful murder. It implies a degree of deliberate malice and dark villainy which far surpasses most instances of murder. It was justly held by the Romans to be a species of assassination and was as such punished with death by the 'lex Cornelia do Sicariis'".

Jameson goes on to review the English authorities on this point according to the balance of which killing a man by perjury is not murder and he concludes by recommending that, notwithstanding the English practice, the provision of our Code which, without classifying this atrocious crime under the head of homicide, punishes it, nevertheless, as such, should be retained. "There seems to be no sound argument against the ordinary punishment of murder being awarded for this heinous and worst

[149] p. IX

form of it. It is against sound principles to visit the same crime with a more lenient punishment on account of the mode of perpetration merely, more especially if that mode is one which manifests more deliberate malice and aggravated guilt."

However, our law properly restricts the general provision in favour of the offender where the sentence of death awarded against the accused, in the trial in which the false evidence was given, is not executed. If the false witness retracts his evidence in time to stay the execution of the sentence of death passed on the accused, the punishment of the false witness is reduced to hard labour from four to six years. Thus, the law holds out a motive for the false witness to retract in time to save his victim. If, though the false witness does not retract, the execution is stayed for some other cause, the false witness will be liable to the ordinary punishment for attempted homicide.

In addition to the punishment above mentioned, any person sentenced for false testimony incurs also the punishment of general interdiction and is disqualified from serving as a witness, except in judicial proceedings, and as a referee in any case. Such interdiction is awarded for a term of from ten to twenty years.

5. False Reference and False Interpretation

By Section 105, the punishment of false testimony is extended to Referees or Experts and Interpreters. That section lays down:

"Any referee who, in any civil or criminal proceedings, shall knowingly certify false facts, or maliciously give a false opinion, shall, on conviction be liable to the punishment to which a false witness is liable under the preceding sections (i.e., 102,103,104) of this sub-title".

The same punishment applies to any person who when acting as an interpreter in any judicial proceeding and on path, shall have knowingly made a false interpretation.

As these persons have a great deal in their power and pay very easily pervert the course of justice it is just to subject them to the same checks against falsehood or fraud as other witnesses.

The moral element of this crime is clearly indicated by the words "knowingly", "maliciously":

"non si deve confondere un involontario errore della mente colla dolosa alterazione del vero che propriamente costituisce il reato di cui (in questo articolo)"[150].

It is no mistake or erroneous expression of opinion or inadvertence, nor even carelessness or unskillfulness that the law punishes here, but the deliberate and intentional perversion of the truth.

For the rest we can make reference to what we have said concerning the crime of false testimony which "mutatis mutandis" applies.

6. Subornation of False Testimony, False Reference or False Interpretation

Section 100 lays down:

"Whosoever, in any civil or criminal proceedings, suborns a witness, a referee, or an interpreter, to give false evidence or to make a false report or a false interpretation, shall, on conviction, be liable:

(a) where the false evidence, report or interpretation has been given or made, to the punishment to which a person giving false evidence would be liable

(b) where there has only been an attempt of subornation of a witness, a referee, or an interpreter, by means of threats, bribes or promises, to the same punishment decreased by one or two degrees."

Subornation is the instigation to commit any one of the crimes mentioned in this section. It is the procuring of a witness to make a false testimony or of a referee to make a false report, or of an interpreter to make a false interpretation, in each case in a civil or criminal cause. It has not been considered by our legislator as comprised in the general class of cases of “Concursus delinquentium”, that is, in other words, as a form of a criminal participation, as an accomplice or co-principal, in the crime of false testimony, false reference or false interpretation; but has been created as a distinct substantive offence. It is, nevertheless, intimately connected with those crimes and, like them, it constitutes an offence against the administration of justice.

Other systems of law and theoretical writers consider subornation as nothing more than a form of complicity; but for them the offence is punished only when the false

[150] Maino, para. 1128

witness, referee or interpreter has actually given false evidence or made a false reference or interpretation. It could not be otherwise: for no one can speak of complicity unless the principal offence has been committed.

As, however, our law punishes subornation even when it has been unsuccessful or merely attempted, inasmuch as a witness, referee or interpreter sought to be suborned has not, in fact, given false evidence or made a false reference or interpretation, so the necessity of making of subornation a crime "sui generis" distinct and independent from the crime of false testimony, false reference or false interpretation, is obvious.

For purpose of punishment the law distinguishes the case in which the crime of false testimony, false reference or false interpretation has actually taken place from the lease in which it has not. With regard to the former case, it is to be carefully noted that it is not necessary that the false witness, referee or interpreter should have been sentenced. Even if the witness, referee or interpreter has been acquitted of the charge by reason of some personal ground of defence, the person who had suborned him will not be exempt from responsibility for the subornation, if the falsity of the testimony, reference or interpretation is Subjectively established[151]. Also, when our law speaks of the false testimony, reference or interpretation having taken place, it does not mean that it is necessary to prove that it has objectively influenced the event of the proceedings: what is necessary is merely that the false testimony, reference or interpretation has been given in the cause to the possible prejudice of justice.

As we have already said, our law punishes also attempted subornation, but only where the attempt is made by means of threats, gifts or promises. When the subornation has achieved its object, and has actually been followed by the false evidence, reference or interpretation, it is immaterial how or by what means the witness, referee or interpreter was suborned; but when there has been only a fruitless attempt to suborn, this is not punishable unless the attempt was made by means of threats, gifts or promises:

"La subornazione seguita da effetto e' punita in qualunque forma sia avvenuta, semprecchè le istigazioni del subornatore siano state la causa determinante del reato

[151] Pessina, op. cit., Vol. II, pg. 243; Chaveau et Helie "Theorie ecc.", Vol. IV, n. 1823-1824

principale [...] quella non seguita da effetto e' punita solo se commessa mediante minaccie, doni o promesse"[152].

This is a special form of attempt which is committed so soon as, with intent to suborn a witness, referee or interpreter, threats are used, or gifts are offered, or promises made independently of the effect produced or of the acceptance or otherwise of the witness, referee or interpreter[153]. The said means used by the offender have been considered by the legislator sufficiently grave and so dangerous and scandalous as to constitute in themselves in the "iter criminis" a commencement of execution and to produce a danger to the proper administration of justice[154].

The point is discussed whether to constitute subornation it is essential that the person suborned should have already at the time of the subornation assumed the judicial character of witness, referee or interpreter. Under the Italian Code it is generally held that it is not so essential, it being sufficient that the offender knows that the person suborned will be later called or appointed. Maino agrees with this view for the fact does not change its nature by reason of the circumstance that the subpoena or citation of the person suborned has already been issued or is merely anticipated. However, this writer goes on, every ground of incrimination fails if the person suborned and who, it was thought, would be called or appointed is not, in fact, subsequently called or appointed at all:

"poichè in simile ipotesi il subornato non avrebbe rivestito mai la qualità di teste, interprete o parito, richiesta dell'articolo 218 (ours 180) e sarebbe di fatte mancata ogni potenzialità di danno"[155].

7. Fabrication or Production of False Evidence

Documentary evidence plays a very important part in most judicial trials. Therefore Section 101 lays down that:

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[152] Maino, op. cit., art. 218, para. 1131

[153] Vide Tuozzi, "Corso di Diritto Penale", Vol. III, pg. 334, 335; Crivellari, "Il Codice Penale", Vol. VI, n. 152, Tit. IV, p. 574

[154] Vide Rex vs Curmi, 21/3/1924, Law Reports, Vol. XXV, Part IV, p. 264

[155] Op. cit., para. 1123

"Whosoever, in a civil or a criminal proceedings, shall cause a false document to be prepared or shall knowingly produce a false document, shall be liable to the same punishment as the forger thereof."

The old Italian text spoke of:

"Istruire e produrre carte false":

"Istruire la carta talea in un causa qualunque non e' che raccorla, ordinarla, o addattarla alia causa per farla servire alla decisione della medesima, nella stessa guisa in cui nel raccorrei registrare ed ordinare le prove, consiste appunto l'istruzione della prova nel senso delle nostre leggi di procedura penale"[156].

Any person, therefore, who prepares, puts together or gets up any false document for the purposes of any civil or criminal proceedings and any person who knowingly produces any false document although he may not have himself prepared or got up such document, are dealt with by the law as if they had themselves originally forged the document.

What constitutes "forgery" and how it is punished will be seen later on. Section 107 imposing the application of interdiction applies also to a conviction of this crime.

[156] Roberti, op. cit., Vol. V, para. 529

8. Extra Judicial Perjury

Section 106 lays down:

"Whosoever, in any other case not referred to in the preceding sections of this Sub-title, shall make a false oath before a Magistrate or any other officer authorised by law to administer oaths, shall on conviction be liable:

(a) To hard labour for a term from four months to one year, if the oath required by law, or ordered by a judgement or decree of any court in the island of Malta and its Dependencies

(b) To hard labour for a term not exceeding three months if the oath be not so required or ordered."

This provision does not apply to promissory oaths. This section deals with false statements on oath made otherwise than by a witness or a party or the accused or a referee in a civil or criminal cause, or by an interpreter in judicial proceedings.

The elements of this crime are:

(i) A false statement

(ii) Wilfully made

(iii) On oath

(iv) Before a person authorised by law to administer oaths.

With regard to the second element which constitutes the intentional element of the crime it is necessary that the person making the statement should have the full consciousness of perverting the truth. If on account of ignorance, forgetfulness or other cause exclusive of malice a statement has been made which is objectively false, no criminal responsibility under this section is incurred[157].

The material element of the crime is the false statement on oath. The oath, being an appeal to the Deity to be witness of that which is asserted creates a religious bond which is effectual only for those who, having a religious persuasion, see in it a binding obligation on their conscience. Our law, as we have already seen, makes provision for the taking of an oath by persons who do not belong to the Roman Catholic Church.

[157] Puccioni, Codice Penale Toscano Illustrato, Vol. IV, pp. 203 - 225

And moreover, by section 109 of the Criminal Code the solemn declaration or affirmation of any person authorised by law to make a declaration or affirmation in lieu of taking an oath has the same effect so far as regards the punishment contemplated in sections 102-107 as if the person making the declaration or affirmation had been lawfully sworn.

The oath must be lawfully administered, that is in the form and with the ceremonies which the law itself prescribes and by a person who is authorised by law to administer oaths. By our Code of Procedure every Court and every Judge or Magistrate has the power to administer oaths: other officers have this power specially conferred on them by particular laws for certain specified purposes[158].

"Assertory" oaths not "promissory" ones are here concerned. An assertory oath is one on which a present or past fact is affirmed or denied: a promissory oath is that by virtue of which a person binds himself to a future positive or negative obligation e.g., oath of office. It is admitted by all and our law expressly lays it down that promissory oaths do not subject the party violating to the penalties of perjury. This exclusion from criminal sanction rests on the consideration that, generally speaking, one has not at the time of the taking of such oath the criminal intent of violating it. This intent may arise subsequently on the occasion of the doing of some act which is incompatible with the promise given. In such case either the act which breaks faith with that promise is in itself criminal and, then, it is punishable according to its nature and the character of the offence arising there from, or that act is not criminal and therefore, it constitutes merely an immorality.

For the purposes of punishment in respect of this crime (which must always include interdiction: sec. 107) a distinction is made between oaths which are required by law or ordered by a judgement or decree of any Court in these Islands, and other oaths not so required or ordered. The punishment is considerably higher in the former case. Instances of oaths required by law, are those made necessary to obtain the issue of precautionary warrants (Sec. 835 and Sec. 863, Code of Civil Procedure, or to be admitted to free legal aid (Sec. 915 ibid.)

[158] V. e.g., The Commissioners for Oaths Ordinance of 1934; The Attorney General Ordinance of 1936

In respect of this crime as also in respect of the crime of false accusation and false testimony, a time honoured precaution which the English Common Law of Evidence imposed in prosecutions for perjury and which the Perjury Act, 1911, perpetuated, is also contained in our Code. By Sec. 635 no person can be convicted of false accusation, false testimony or perjury on the bare testimony of a single witness contradicting the fact previously stated on oath by the accused. Otherwise, there would be but one man's oath against another's, the statement originally sworn to by the accused and, on the other hand, the contradiction of it now sworn to by the witness for the prosecution. But it is sufficient if the evidence of the single witness is confirmed in some fact material to establish the alleged crime by other evidence duly adduced.

9. Suppression of Evidence

Section 110 lays down:

"Whosoever shall hinder any person from giving the necessary information or evidence in any civil or criminal proceedings, or to or before any competent authority, shall, on conviction, be liable to imprisonment for a term from four months to one year or to a fine (multa).

(ii) Whosoever, in any case not otherwise provided for in this Code, shall knowingly suppress, or in any other manner destroy or alter the traces of, or any circumstantial evidence relating to an offence, shall, on conviction, be liable -

(a) if the offence is a crime liable to a punishment not less than that of hard labour or imprisonment for a term of one year, to the punishment laid down in subsection (i) of this section,

(b) in the case of any other offence, to imprisonment for a term not exceeding three months or to detention or to a fine (ammenda) of not less than one pound.

As Jameson pointed out[159]:

"The administration of justice may also be obstructed and the interests of individuals injured by the suppression of evidence as well as by its fabrication. The Criminal

[159] Report, pg. 86

Courts in some countries have been in use to punish this offence as contempt of judicial authority but it seems more proper to include the offence underneath the head of obstructions to the public administration, than leave it to the unknown and ambiguous class of contempt."

The first species of this offence consists in deterring a person from coming forward to give the necessary information or evidence in a civil or criminal cause or to the competent authority.

“Egli e’ evidente”, Falzon wrote concerning this offence, che tra i principali requisiti di questo reato sia la coazione fisica o morale di una persona a non dare la necessaria prova in una causa, dimodochà risultando non esservi stato un atto bastevole ad iraperdire la prova o non essendo neccessaria la prova che si volesse impedire per la giusta definizione della causa sia civile che criminale, non ci ‘sara’ luogo a procedimento per tale reato"[160].

The second species of the same offence consists in knowingly suppressing, destroying or altering the traces or the factual evidence of an offence. This offence is a variety of that known in Italian law under the name of "Favoreggiamento". The provision dealing with this offence in our Code as amended in 1909 literally corresponds to part of art. 225 of the Italian Code of 1889.

This offence arises when the fact does not constitute some other offence under other provisions of the Code. In fact, the suppression or destruction of the evidence of an offence may be, for instance, in pursuance of a promise given by the agent to the principal offender previous to the commission of the offence, in which case we would have an act of complicity in the principal offence, also, the suppression of the evidence may consist in the concealing of the body of a person whose death was caused by a crime: in which case the provision which would be applicable would be sec. 253 (Notice the anomaly in the punishment there prescribed as compared with the punishment prescribed in sec. 110).

The subject of this offence can, according to the said Sec. 110 of our Code, be "Whosoever", that is any person but according to the best accepted authorities this generalisation does not include the parties themselves to the principal offence. In other

[160] Op. cit., pg. 238

words, if a person who has himself committed an offence, suppresses or destroys the traces or evidence thereof he would not be guilty also of this further offence: his action in any such case would but be a continuation of his principal offence[161].

There need not be, to constitute this offence, any agreement with the principal offender.

"Può, infatti darsi aiuto ad alcuno senza intendersela con lui, per un impulso tutto subitaneo o per un concerto preso con parenti od amici del carcerato: anzi spessissimo accade che arrestato improvvisamente qualcuno, gli amici accorrono a visitare la sua camera per sottrarne carte o armi o altri oggetti compromettenti: e in questi atti vi sono gli elementi tutti del favoreggiamento"[162].

Indeed, in our law it does not seem even necessary that the agent shall have the idea or the desire to help the principal offender or other particular person. The mere suppression or destruction or alternation of the traces or material evidence of the offence is sufficient to constitute the offence.

But such suppression, etc. must be done knowingly that is to say the agent must have full consciousness that an offence has been committed, whether or not he knows who is the particular offender, and he does the act not by mistake or ignorance or through negligence but intentionally to obstruct or frustrate the action of Justice. And the offence is complete without requiring that the officer of justice should have been in fact deceived or put off. The mere possibility, of such injury to the administration of justice is sufficient.

But it does not follow, according to Carrara, that this offence is always a formal offence and does not therefore admit of an attempt. The ultimate result desired or hoped for by the agent will not be necessary: but the completion of the fact constituting the material element of the offence is necessary. Therefore, a person who, with the requisite intent, conceals the dagger with which the murder was committed, and which was left on the spot, is guilty of the complete offence of suppression of evidence, even though such dagger is soon afterwards discovered by the police Officers, who could apprehend the murderer in spite of the act of the said, person. But if that person is

[161] v. Carrara "Opuscoli di Diritto Penale" Vol. VII, pp. 48 & 49; Impallomeni op. cit., Vol. II pg. 283

[162] Carrara, Opuscoli, Vol. III, pg. 54

detected while he was trying to conceal the dagger and prevented from so doing, it cannot be said that he is guilty of the complete offence of suppression of evidence, as one would have to say if this offence were absolutely formal: he is only guilty of an attempt. The same thing should be said in the case of a person surprised in the act of washing the clothes stained with blood and constituting evidence of a crime[163].

(d) Of the Abuse of Public Authority

The next species of offences against the due exercise of the Executive Powers consists of acts of arbitrary and illegal oppression committed by Public Functionaries for the purpose of extortion and of their corruption by others by means of bribes.

1. Unlawful exaction

The first crime of this species is that of unlawful exaction, contemplated in sec. 111 which lays down that:

“Any officer or person employed in any public administration or any person employed by or under the Government, whether authorised or not to receive moneys or effects, either by way or salary for his own services, or on account of the Government, or of any public establishment, who shall, under colour of his office, exact that which is not allowed by law, or more than is allowed by law, or before it is due according to law shall, on conviction, be liable to hard labour or imprisonment for a term from three months to one year."

The elements of this crime are three, i.e.

a) The public character of the offender

b) The unlawful exaction, and

c) The colour of office.

It is, in the first place necessary that the offender be an officer or employee of a public administration, or a person employed by or under the Government. This wording, it will be observed, is very wide indeed and includes every person who is directly or indirectly

[163] Prog., Parte Speciale, Vol. V, para. 2823; Opuscoli, Vol. VII, pp, 62,63

in the employment of the Government. Any person who does not hold such employment cannot, therefore, become guilty of this crime, even though per chance he may have exacted money or valuable things by personating a public officer or falsely making use of marks or distinctions or uniforms of a public officer. In any such is the pretext of public authority of which a private person makes us to exact money or commit any other offence, is appropriately considered by the law as a constituent element of some other offence, (e.g. fraud, sec. 322) or simply as an aggravating circumstance increasing the punishment of some other offence (e.g. illegal arrest sec, 86 (b); theft, aggravated by means see. 276 (b)).

If, however, the person exacting money or other things not due according to law, in whole or in part, or before they are due, is in the employment of the Government as above defined, it is immaterial whether he has or has not by virtue of his employment the right to receive money or effects in remuneration of his services or on account of Government or of a public establishment. Originally art. 99 of the Draft submitted to Jameson made the existence of this right necessary. Any public functionary who was not entitled to levy anything from the public directly, or any person serving in a gratuitous office might therefore commit this offence without being liable to punishment. But, as Jameson observed, in principle, it is evident, that this circumstance is not at all material to the constitution of this offence, and the words of the article (of the draft) by making it material, greatly narrows the application of the law, impair the efficacy of the prohibition and make conviction depend upon a point entirely accidental and foreign to the question of criminality. The article ought to be general, for the offence is one which may be committed by all kinds of official servants, whether paid by the Government or by the public, by salary or by fees, or serving gratuitously. The article of the Draft was amended as suggested by Jameson.

The second element of this crime is the unlawful exaction. What the public employee or servant exacts must be something which the law does not allow or exceeding that which the law allows, or must be exacted before it is due according to law.

"The functionary who exacts any money or movable property before it is legally due, is as guilty of Illegal exaction as he who exacts what is not due or what is more than due"[164].

The public ought to be protected from all forms of this odious offence. The crime is completed and not merely attempted, according to the best accepted authorities, by the mere "exaction" even though the victim may not have in fact paid or even promised to pay what it was sought unlawfully to exact from him. The mere demand by the public officer or servant, provided it is serious and calculated potentially to achieve the intent, is sufficient to complete the crime. This is, in fact, a formal crime, because what the law aims at preventing is not so much the violation of the right of private ownership as the violation of that public right which the community as a whole has to the honesty and fair dealing of the State and its functionaries. And this right is violated by the mere claim of what is not, or not yet, due independently of its effects. This is the prevalent doctrine and it enables us to understand the meaning of the word "exact" used by our law, in the sense of demanding and not necessarily in the sense of actually receiving,

Nor is it necessary, according to our law, that the exaction should be made by the public functionary for his private gain. The purpose requiring the unlawful exaction to be for the functionary's private advantage is not at all essential, Jameson pointed out, to the commission of the offence. It may not be for his private advantage but for that of some other functionary or individual, an offender might pretend it was for the public service. It may be resorted to from motives of malice and oppression without the design of private emolument. Therefore, even though the public functionary might have passed what he has unlawfully exacted entirely to the public revenue, without making any private gain, he is nevertheless guilty of the offence. In the Italian Code of 1889, on the contrary, this purpose of private gain for one's self or another was essential:

"ciò dichiara espressamente la relazione Zanardelli sul progetto del 1887 aggiungendo che, appunto per dichiarare l'estremo del lucro per parte del concussore e togliere il dubbio che possa considerarsi concussore il pubblico ufficialo che abbia versato integramente nelle pubbliche casse l'indebitamente percetto, fu abbandonata la formola del progetto senatorio, secondo la qualo (art. 182) il reato di consussione

[164] Jameson, I, XV

consisteva nell'abuso dell'autorità per riscuotere ciò che non e' dovuto por tasse, diritti io altre contribuzioni. E ciò è conforme ai principii della dottrina e della giurisprudenza"[165].

In the third place it is necessary for the constitution of this crime that the unlawful exaction be made by the public functionary, under the colour of his office. "What is exacted must be exacted under the pretext that it is legally due." "Juris colore qauesito". The exaction thus creates in the private contributor a sense of grievance against the Government by making him believe that by order or the authority of the Government exorbitant fees or too heavy impositions are exacted.

In the old French Code, it was expressly required that the unlawful exaction should be made “knowingly”, the crime was committed by a public functionary who exacted what he knew not to be due according to law or to exceed what was due. Our law does not expressly require this condition. In most cases the fees, dues, taxes, or other payments due to the Government or Government employees are fixed by tariffs established by the law or by regulations or appear from the registers of the administration; and therefore, the defendant would, in the generality of cases, in vain plead ignorance. But in a particular case it may happen that a reasonable doubt arises as to the interpretation or application of the said tariffs or as to the amount due or as to the time when due; and, in any such case, notwithstanding that our law does not expressly use the word "knowingly" in the definition of the crime, we cannot conceive that the defendant would be guilty thereof if in good faith by a mere mistake he has exacted what was not due. A contrary view would ignore the fundamental principle of criminal liability. After all, the regulations or tariffs themselves often contain provision for reclaiming any excess paid, and this not for the purpose of subjecting the officer to the punishment of unlawful exaction if it is found that he demanded or received more than was due, but only of compelling him to make a refund of the excess to the claimant[166]. In England also it was held that the crime "must be accompanied by some

[165] V. Maino, op. cit., paras. 169 & 918; where he quoted also Carrara Prog. Parte Spec. Vol. V, para. 2568, and Pessina "Eleni. di Diritto Pen." Parte Spec., Vol III, pg. 73

[166] V. Roberti, op. cit., Vol, V, pg. 273 para., 559

‘mens rea’ so that an over charge by an innocent mistake without a criminal negligence or intention will not constitute a criminal offence"[167].

2. Extortion

If the unlawful exaction above mentioned is committed by means of threats or abuse of power, it is considered as extortion and the punishment is hard labour or imprisonment from thirteen months to three years.

The crime of "extortion" is therefore but only the same crime of unlawful exaction: only the means of perpetration are more aggravated. We have already seen that for the crime of unlawful exaction it is not necessary that the offender should have used any means of compulsion; the mere exaction is sufficient. As however the offender might have resorted to such means in order to attain his purpose, it was proper that the law should take account of these to aggravate the punishment.

Such aggravation arises where the defendant has used threats or abuse of power.

We have already had occasion to define the word “threats” in connection with other crimes. Any menace of an evil however conveyed to anyone and capable of intimidating him is a threat. And as in respect of this crime the object of the threat is to induce the person to give what he otherwise would not give, so any menace calculated to achieve this object is sufficient to constitute this element of the crime of extortion. The threat may be by words or by gestures and includes "not only threats of injury to persons or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property"[168].

As to the "abuse of power", the unlawful exaction is in itself an abuse: but it is not of such abuse that the law speaks and which makes the unlawful exaction degenerate into extortion. This crime (extortion) presupposes a further abuse of power intended to facilitate the unlawful exaction. When, therefore, the public functionary avails himself for this purpose of the means which derive to him from his office; when in other words he proceeds to use those same means which the law provided for compelling

[167] V. Harris "Principles and Practice of the Criminal Law", 115th Ed., pg. 74

[168] Archbold, op. cit., pp. 707, 712

a person to give a thing, as for instance, by issuing a warrant or causing a seizure to be made and so on, than in such cases "nequiter utitur permissa sibi potestate", he abuses of his power, because he turns to a wrongful use a means which the law provides to him for legal purposes.

"Questo abuso adunque o' precisamente quello che la legge comprende sotto il nome di abuso di potere e basta osso solo a carattorizzare l'estorsione".

With reference to the two crimes above dealt with, sec. 113 lays down that: "Where such crimes are accompanied with circumstances which render them liable also to other punishments, the higher punishment shall be applied with an increase of one degree"

3. Corruption of Public Servants[169]

Sections 114 and 118 deal with the crimes of bribery and corruption of public officers. The crime is committed by any public officer or person employed under the Government who in connection with his office or employment receives for himself or for any other person any regard in money or other consideration to which he is not entitled or accepts the promise or offer of such reward. The crime is completed by the mere acceptance of the reward or even of the promise or offer thereof. But the gravity of the crime and consequently the punishment varies.

(i) according to whether the purpose was to induce the public officer to, do his duty or to fail in such duty;

(ii) in the latter case, according to whether the public officer has or has not in fact failed in his duty;

(iii) in the case of failure of duty, according as to whether this consists in an unjust condemnation of a person accused or in an unjust discharge or acquittal.

It will be thus seen that this crime subsists, at any rate in its simple form, irrespective of the inherent justice or injustice of the act which the reward was intended to induce

[169] Confer also Sections 52 et seq of Chapter 163 (Corrupt practices at elections); Section 11 (i) (d) of Chapter 179 (Bribing officers or members of Legislative Assembly); and Act No. XXV of 1946 (Corruption in sport).

the public officer to do. The justice or injustice of what the public officer does or engages to do in view of the reward or promise or offer of reward, is not an essential ingredient of the crime but only serves as a criterion to distinguish one form of the crime from another for the purpose of punishment:

“Il concetto che in questa parte deve dominare la Regge” - it was said in the ministerial report on the corresponding provisions of the Italian Draft Code of 1887 - "è di colpire severamente la venalità del pubblico l'ufficiale che accetta, per atti del suo officio, retribuzioni non dovute. E la venalità è colpita indipendentemente dalla giustizia o ingiustizia degli atti stessi, imperocché è di universale interesse che non si faccia cadere in discredito od in sospetto a pubblica potesta" col rendere venali uffici i quali per la legge devonsi prestare gratuitamente."

This crime which may produce the most dangerous consequence to the public service itself as well as to the interest of the individual over which public servants have necessarily so great an influence, was at all times very severely punished especially when committed to Judicial functionaries. In fact, as Chevau et Holie remark, it constitutes one of the greatest perversions which a public officer could commit, by selling for money the exercise of authority entrusted to him, he betrays not only the special duties of his office but also the interests of the community entrusted to him probity and justice itself which does not admit any motive force for its acts except their own righteousness. The crime acquires a still graver character when a judicial officer trades on his judgements and barters away his sacred office and his conscience.

“Non flagitiosum tantum”, said Cicero, “sed omnium etiam turpissimum maxime quo nefarium mi hi videtur ob rem judicandam pocuniam accipere, praetio habere addictam fidam et religionem”[170].

Old legislations punished corrupt judicial officers with the greatest severity and the Law of the Twelve Tables implied in all cases the punishment of death:

“Si judex aud arbiter Jure datus ob rem judicandam pecuniam acceperit, capite”

Our law, as we have said, proportions the punishment to the gravity of the crime in the particular case: but in all cases the punishment is adequately severe for, as Jameson

[170] In Verrem, Book II, Cap. XXII

pointed out, such crime had better not be included in a Code at all, than be visited with a slight and inadequate penalty. The punishment attached to an offence so dangerous, so easily perpetrated, so hard to be discovered ought to be such as rigorously to exclude the temptation to sacrifice duty to gain.

Now the elements of this crime are: -

(a) The public character of the offender.

(b) The acceptance of a reward or promise or offer of a reward not due according to law.

(c) In connection with his office,

(d) The purpose to do or to fail in his duty.

The character of public officer or person employed under the Government is the first essential of this crime. The wording is very wide and embraces all officers or employees under the Government as we had already occasion to notice in connection with the crime of unlawful exaction. It includes all public officers or employees whether their duties are judicial, ministerial or executive or mixed. A private person who has not this character, cannot therefore become guilty of this crime: His act may, in appropriate circumstances, amount to fraud. It has been held by our Courts that persons belonging to, or employed with His Majesty's Forces are included in the expression "public officers or persons employed under the Government"[171].

The second ingredient of this crime is the acceptance for himself or for others of a remuneration or promise or offer of a remuneration which is not due to him. It is essential that the corruption should take the form of this acceptance of gifts or rewards or the promise or offer of gifts or rewards whatever their kind and whatever their value provided they represent some advantage to the grantee or promise. The law speaks of "remuneration in money or other advantage (old Italian test: "altra utilità)[172].

[171] V. Harding, op. cit., para. 104 and judgments therein quoted

[172] The present text in the Revised Edition which speaks of "money or other valuable consideration" might possibly restrict somewhat the proper application of the provision. Does it, for example, include an honour?

"Dicendo la legge denaro o altra utilità non v' e' bisogno che il privato interesse del pubblico ufficiale nella corruzione sia sempre pecuniario: basta l' appagamento di un desiderio qualunque, di un bisogno, sia diretto e personale, sia indiretto. Ne si può fare distinzione se la utilità data o promessa sia grande o piccola"[173].

But a promise, at least, of money or some other advantage there must be: if the public officer succumbs to mere solicitation or prayers, without any such promise, his act may be illegal or may amount to some other offence, but will not constitute the crime of corruption.

But it is not necessary that the reward or the promise or offer be made to the public officer personally or be by him personally accepted. The crime subsists just the same if the public officer has acted through an intermediary, and whether the advantage was to be enjoyed by himself or by others, provided the intermediary has acted with the consent of the public officer and provided that the reward or promise made to a third party inconsideration of or in connection with the functions of the public officer, was made with the knowledge and connivance of such public officer[174].

It may be mentioned that the Colonial Regulations prohibit any public officer from receiving any gifts whatever; and hold the officer responsible for any breach of the prohibition committed by members of his family.

In the third place it is essential that the acceptance of the remuneration or promise or offer be made by the public officer in connection with his office or employment. The old Italian text said: "in occasiono del suo officio od impiego". This means that the act in respect of which the reward etc. is accepted must fall within the functions of the public officer concerned. An act which is foreign to the functions of such public officer and which he would not have the right to do by virtue of his office, will indeed be an act of that officer but not an act of his office. It does not matter, however, whether the act falls directly within the officer's own competence or whether it falls within his delegated functions. What is indispensable is that the act be one which the officer could do in the exercise of his duties. A magistrate, says Carrara, who has not the cognisance of a case, does a very wrong thing if he accepts a reward to recommend

[173] Pessina, op. cit., Vol. III, p. 73; Maino, op. cit., 171 para. 924

[174] Op. Carrara op. cit., paras. 25 46; Chauveau-Helie op. cit., Vol. I, No. 1846

the matter to his colleague; in fact, he may be guilty of fraud, but he cannot be guilty of the crime of corruption unless he is the secret agent of his colleague[175]. Nor is it sufficient that the public officer accepting the reward etc. or the person making the reward may have thought that the act was one within the duties of the office of that officer: it is necessary that the act should be such in the reality of things[176].

It seems, however sufficient if the act be one in respect of which the officer concerned could by reason of his office give any directions or make any arrangements whatever or in any manner influence the decision thereon.

Lastly, the purpose of the reward or promise or offer must be to induce the public officer to do or to fail to do that which it is his duty to do. In the former hypothesis the law wants to protect the dignity of the public service and the prestige of the judiciary which are harmed in the esteem which they should enjoy by any improper reward received even though it is not intended to injure materially the interests of the individuals or the interests of justice. Public officers are bound to discharge their duties with the most impartiality and without taking any private interest or remuneration other than that which the law allows for their services.

In the second hypothesis, that is when the reward is given or promised to induce the officer to fail in his duty, there is in addition to the injury to the good name of the service, also the danger of actual injury to the rights of individuals or of justice, and the law takes account of this for the purpose of aggravating the punishment. Even in this second hypothesis the crime is completed by the mere acceptance of the reward or promise or offer. Only, if besides accepting the reward etc. the public officer or functionary actually fails in his duty the punishment is higher, proportionately to the gravity of the failure of duty concerned.

In the elaboration of the Italian Code of 1889 the point was discussed whether the doctrine of corruption should apply only when the gift or promise is made and accepted in respect of an act which has yet to be done by the public officer, or also in respect of an act which he may have already done. For the view that it should only apply where the act has yet to be done it was urged that the acceptance of rewards or promises for

[175] Prog. Parte Spec. Vol. V, para. 8533

[176] Pessina, op. cit., loc. cit.

acts already done, however improper, does not present the character of a crime and disciplinary action would be sufficient; corruption consists in subjecting the performance of official duties to the gifts of private persons and a public officer cannot be corrupted in this sense for an act already done. Against all this it was argued that there is a violation of official duties even where rewards are accepted after acts done, because the performance of such acts must always appear entirely free of any suggestion of venality. Ordinarily the reward is not expressly stipulated, but on account of it a sort of tacit understanding is formed between the public officer and the private person who is convinced that unless he gives that reward he will not, on further occasions, be able to obtain that which he has the right to obtain. This latter reasoning prevailed and article 171 of that Code was so worked as to apply in both cases[177].

It does not appear, however, that the same solution could be applied under our law. As sec. 114 (a) and (b) are worked it seems that there can be the crime of corruption only where the reward, promise or offer is made to the public officer and accepted by him in respect of an act he has yet to do and not also for an act he may have already done.

4. Bribing a Public Officer

So far, we have considered the case of a public officer or employee who allows himself or holds himself out to be corrupted. We will now examine the position of his corrupter.

As it is only a public officer or employee who can sell away an act of office, so it is only he that can be considered as the principal offender in the crime of corruption. The briber or corrupter is only an accomplice in as much as he instigates or strengthens the resolution of the public officer or employee by giving or offering rewards or promises. And as the crime is completed by the mere acceptance, on the part of the public servant, of the reward or offer, so also it must be considered in respect of the corrupter.

Our Code at sec. 118 expressly applies to the corrupter the rules of complicity. If the crime of corruption is, therefore, completed by the unholy compact of the public servant and the private person, the latter is liable to punishment whether the corruption

[177] Similar provisions are contained also in the present Italian Code, (Articles 318 to 321)

has as its object the performance by the public officer of his duty or his failure in such duty. And the punishment of the corrupter varies with that of the public servant. The consequences arising out of the personal circumstance of public servant in the principal offender are, in their entirety, imputable to the accomplice: for this circumstance is an essential ingredient of the principal crime and an indispensable condition for its commission.

Subsection (2) of the said sec. 118 deals with the case in which the crime of corruption has not been committed by the public servant, but there has been an attempt to corrupt him. It lays down:

"Where the public officer or servant does not commit the crime the person who attempts to induce such officer or servant to commit the crime shall, on conviction, be liable to hard labour or imprisonment for a term not exceeding three months: Provided that the Court may in serious cases, in addition to either of the said punishments, award a fine (multa)."

This provision settles a question which was variously solved by theoretical writers. Some held that the <u>mere</u> <u>offer</u> of a reward made to a public servant for the purpose of influencing his conduct and which is not accepted by such public servant, constituted <u>attempted corruption</u>. Others such as Carrara and Pessina held an opposite view. Corruption, these latter jurists said, is a bilateral crime resulting from the concurrence of the act of the corrupter and the officer corrupted, and this constituted by the acceptance of the reward or promise; it follows that the mere offer of money or other consideration is not an act of execution, it being the act of one party only which can never by itself give rise to the said crime and to it, therefore, the rules of attempt cannot apply.

On the other hand, these jurists went on to say, once the offer is not accepted by the public servant and the principal offence is not, therefore, committed, one cannot think of applying to the briber the rules of complicity: to do so would be to make punishable an attempted complicity, which as we know, is absurd.

Without a special provision creating the mere offer as an independent offence in itself the act would therefore escape punishment. This was also the view taken by our court in Rex vs. C. B, on the 3/9/1901[178].

Perhaps rising out of this decision and, in any case, to solve the difficulty and not allow such dangerous acts to go unpunished, the provision of subsection (2) was added to the said sec. 118 by Ordinance No. 1 of 1903.

"E' indubitato che il tentativo di corruzione raccoglie in se elementi bastevoli per essere reputato come un delitto sui generis mentre racchiude certamente un oltraggio al magistrato ed un'offesa all dignità delle pubbliche funzioni"[179].

This special crime is, therefore, committed whenever a bribe is offered to a public servant and such offer is not accepted. That is what the law means when it says: "the officer or public functionary has not committed the crime". It does not refer to the actual failure from his duty; but to the mere acceptance, for as we have seen, the crime of corruption is completed in all its essential constituents, by the mere acceptance, the additional failure from duty only aggravates the punishment. If the offer of bribery is not accepted the public servant is not guilty of any wrong but the person making the offer is guilty precisely of this special crime.

The law does not specify the forms in which the offer of bribery may be made: It was held that this crime can be committed without even uttering any word and simply by sending money to the public officer[180].

We have said that an unaccepted offer of bribery made by a private person to a public officer, does not restitute an attempted corruption, but only the substantive offence sui generis. The question is discussed whether an attempted corruption is possible on the part of the public officer. In other words: suppose a public officer has offered to sell out an act of his office: but his proposal is not accepted by the private person to whom it was made; would the public officer be guilty of attempted corruption? Maino replies affirmatively unhesitatingly:

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[178] Law Reports, Vol. XVIII, Part IV, pg. 2

[179] Roberti, op. cit., para. 610 cfr.; Also Criminal Appeal, Police vs P. Gatt, 27/9/1907; Police vs. C. Chetcuti, 15/12/1945

[180] Maino, op. cit., art. 173, para. 930

“la proposizione non accolta del pubblico ufficiale costituisce conato di corruzione, perchè egli ha indubbiamente la qualità di autore nel delitto di corruzione, e come tale egli incomincia colla propria proposta l’esecuzione del delitto stesso"[181].

The reference we have just now made to corruption the initiative of the public officer makes necessary a brief mention of the criteria for distinguishing the crime of corruption from that of illegal exaction.

In the latter crime the private person who unjustly pays, always pays "metu publicae potestatis". He figures in the crime merely as the victim and he is therefore immune from any criminal responsibility. In the case of corruption on the contrary, the private person is an associate in the crime and gives or promises to give of his own free will. This distinction which appears so simple in theory, may nevertheless in practice offer considerable difficulty. The public officer, as Carrara says, does not always address himself to the person face forward demanding money as the price of his acts of office: these methods are too clumsy and are therefore rare: the corrupt officer does not demand but leaves it to be understood that he would take: then the private person understands and is intimidated and offers money. Great care is here required to establish whether the private person (the corrupt) was not himself the originator of the criminal design, and who would have willingly spared himself that sacrifice, is a briber, or rather the victim of an illegal exaction. It is difficult, perhaps impossible., Maino concludes, to fix in this matter any hard and fast rules: it is a question of fact which depends on the particular circumstances of each case. But the observations of Carrara are useful and interesting: and where there is a doubt to the criminal fact, one should decide for illegal exaction and apply the punishment only against the public officer[182].

5. Corruption of Jurors

Sec. 119 of our Code applies all the provisions relating to the corruption of public officers or Government employees, to jurymen. All we have said concerning these

[181] Loc., cit., para. 932; Manzini, however, takes the view that, under the Italian Code, a proposal of corruption made by a public officer and rejected by the individual to whom it is made is not an attempted corruption, but a crime of exaction. (Op. cit., Vol. V, P. 181, § 1328).

[182] Op. cit., para. 933; Carrara. Prog. Parte Spec. Vol. V. Para. 2572 et. Seq.

provisions applies also in this case. The corruption of jurymen by money or promises is one form of the English Common Law misdemeanour known as "Embracery".

6. Abuses committed by Advocates and Legal Procurators

The institution of the college of Advocates and Legal Procurators has the purpose of assisting the administration of justice. For this reason, the law, on the one hand, affords them protection and confers rights and privileges on them, and, on the other hand, imposes upon them important duties. Advocates and Legal Procurators appear before the Courts of Law as functionaries of the same and the law makes it the duty of every Court to maintain to them, in the exercise of their duties the most ample liberty, consistently with the law, and to repress "ex officio" any insult which may be offered to them in its presence (sec. 995 Code of Organization and civil Procedure). But the dignity and importance of the Legal Profession and the rights and prerogatives which the law bestows on it are precisely an additional reason why its members should not deviate from the right path and why the law should repress in a special manner abuses which they may commit to the prejudice of justice and to the injury of individuals.

There are two such abuses of a sufficiently grave character as to call for penal sanction and be characterised as crimes. Other minor abuses or failures committed by legal practitioners in the exercise of their profession and in connection with professional matters, are dealt with by the special disciplinary procedure provided for in the said sec. 995 of the Code of Organization and Civil Procedure.

The two abuses above referred to constitute what in continental law and doctrine is known by the traditional, general name of “prevarication”. The first one is committed by any Advocate or Legal Procurator who, having already commenced to act on behalf of one party, shall, in the same cause or in any other involving the same matter and interest in opposition to the same party or to those claiming under him, go over to act on behalf of the opposite party, without the consent of the former (sec. 120).

The second is committed by any Advocate or Legal procurator who betrays his client so that, in consequence of his fraud or his fraudulent omission, the client loses his cause or any right whatever is barred to his prejudice (sec. 121).

The definitions of these two crimes are sufficiently detailed and clear and do not require any lengthy explanations. It may be useful, however, to make some short remarks concerning some of the expressions used.

Generally speaking a legal practitioner is free to accept or refuse to act on behalf of a person, like say "generally speaking" because there are cases in which it is not permissible for him to refuse his services without a reasonable cause, e.g., when he is specially assigned to a defendant by the Court (sec, 555 et seq. Criminal Code, sec. 926 Code of Organization and Civil Procedure). Moreover we state the rule above with some hesitation one of the most important rules of obligation governing the English Bar is that which compels its members to accept any brief in the Court in which they propose to practice, provided that a proper fee is paid, unless there are special circumstances justifying a refusal to accept the brief. Addressing a young barrister in his most interesting little book "Letters to a young Barrister"[183], F.I. Wrottosley thus writes:

"You have no right to refuse to appear for a client just because you think he is in the wrong nor because the conduct with which he is charged is peculiarly atrocious nor because he is identified with some cause of which you disapprove. Your profession places you upon the rank and you are as much at the services of the first comer as is a cabman" (pg. 8).

But, having in any way commenced to act on behalf of one party an Advocate or Legal Procurator is no longer free to abandon him and go over to the other side. So that this change-over may constitute the crime, under Section 120, it is necessary that:

(i) He shall have already / commenced to act on behalf of one party.

(ii) He goes over to the opposite side in the same cause or in any other involving the same matter and interest.

(iii)In opposition to the original client or those claiming under him; and

(iv) Without his or their consent.

[183] Sweet and Maxwell 1930

With regard to condition (i) the mere acceptance to be briefed without having as yet done any act in the capacity of counsel is not, according to Roberti, sufficient:

"La semplice accetazione di una difesa, senza essersi fatto alcun atto dall'avvocato o patricinatore in tale qualità non basterebbe punto per costituire il reato quando anche concorresse il secondo estremo, cioè il passaggio alla difesa della controparte"[184].

If an advocate or Legal Procurator makes the changeover in such circumstances, he will undoubtedly commit a grave indiscretion and perhaps an immoral act. But it is not this the said writer says that the law here visits with a penal sanction. But other writers opine that, once an Advocate or Legal Procurator has definitely accepted to act for a client, he is guilty of this crime if he goes over to the opposite party – assuming, of course, all other ingredients concur. What would not be sufficient according to these other writers is, for instance, a mere "opinion" given to a client.

"E' concorde", says Carrara, "appò tutti la opinione che limita la criminalità al caso di <u>difesa accettata</u>, cioè di mandato definitivamente conferito: finchè si tratta di semplice <u>consulto</u>, non vi e' luogo a repressione penale per quanto possa essere brutta cosa il dare oggi all'uno un consulto in senso, e dar poi domani all'altro un consiglio in senso contrario"[185].

And Maino observes that:

"Perchè la difesa si intende cominciata, non si deve materialmente richiedere che abbia avuto luogo qualche atto giudiziale; basta che da parte del cliente abbia- no avuto luogo confidenze o comunicazioni di documenti, o che siasi altrimenti fissato il sistema di difesa"[186].

In any case no Advocate or Legal Procurator can confide to third parties any professional communications received in confidence as long as he was acting in a professional capacity. He may never use such information to his client's detriment even after the relationship of counsel and client has ended, and should he become

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[184] Roberti, op. cit., Vol. V, pg. 333, para. 620

[185] Prog. Parte Spec., Vol. V., para. 2601, Note

[186] Op. cit., art. 223, para. 1149

the counsel opposed to his former client he may not use this information obtained in confidence to embarrass his former client[187].

To constitute the crime we are discussing, the changeover must be in the same cause or in another involving same matter and interest. It is hardly necessary to point out that the expression the same cause embraces all stages of the proceedings of the same judicial dispute.

Until upon such dispute there is a final and absolute judgement, it is all along the same cause.

The changeover must be without the consent of the former client or those claiming under him, still engaged in the proceedings. Roberti thinks that if such client himself abandons his Advocate or Legal Procurator, this is free to go over to the opposite party without incurring any liability for this crime, saving always his ligation to respect professional secrets.

With regard to the crime under sec. 121 two elements are required:

(i) the fraud or fraudulent omission on the part of the Advocate or Legal Procurator

(ii) the actual injury to the client, consisting in losing the case or in having any right barred to his prejudice.

The betrayal of the clients must be due to the fraud or fraudulent omission, that is to deceit or malice. Indeed, it is a general rule that provided a legal practitioner acts honesty, neither his skill nor his wisdom, nor his industry can be questioned by a disappointed client. On the other hand, however, our law does not require that this fraud or fraudulent omission should be the result of corruption as was required for instance, in art. 209 of the Neapolitan Code which expressly mentioned "gifts, rewards, offers or promises”. There can be collusion without “animus lucrandi" any at all on the part of the legal practitioner, as for instance, from hatred or hostility against the silent or even from a feeling of misdirected pity towards the other party. Even in such case, the essence of the crime consists in the betrayal of the loyalty which is owed the client,

[187] Wrottesley, op. cit., pg. 10; vide sec. 270, sec. 638 Criminal Code, sec. 587 Code of Organization and Civil Procedure

(this is its moral element) and its material element consists in the prejudice occasioned to cause, thus even in such case the essence of the crime is unchanged.

In conclusion when the law speaks of "cause" in secs. 120 and 121 it refers to both civil and commercial as well as to criminal causes. Moreover, when it speaks of Advocates or Legal Procurators, it makes no distinctions between these engaged directly by the parties or those assigned or appointed "ex officio": nor those serving fees and those serving gratuitously.

7. Of Malversation by Public Officers and Servants

In the old jurisprudence of France, any grave crime committed in the exercise of a public office or employment took the name of "Malversation". In later Codes and text books, this genus of offences was designated by the general description of "abuses of the public Authority", and the word "malversation" was reserved to indicate the species consisting of frauds which public officers commit in the administration or direction of public affairs, and one form of that crime which in Roman Law was known as "Peculatum". It is in this limited sense that the word "malversation" (the dictionary meaning of which is "evil conduct or misbehaviour in office") is used in this heading of our Code under which are comprised the crimes of:

(i) Taking private interest in official matters.

(ii) Embezzlement by public officer.

i Private interest in official matters

By sec. 122:

"Any public officer or servant who shall overtly or covertly or through another person take any private interest in any adjudication, contract, or administration, whether he holds wholly or in part the direction or superintendence thereof, or held such direction or superintendence at the time when such adjudication, contract, or administration

commenced, shall on conviction, be liable to imprisonment for a term from one to six months paid to perpetual interdiction from his public office or employment."

And section 123 lays down:

"Any public officer or servant who takes any private interest in any matter in respect of which he is entrusted with the issuing of orders, the winding up of accounts, the making of arrangements or payments of any sort, shall, on conviction, be liable to the punishments laid down in the last preceding section."

The special position of public officers and functionaries often makes it necessary that they should abstain from doing certain acts which in the case of others are perfectly permissible and legitimate. Being the depositaries of trust of the Government and consequently also of that of the public, they should discharge their fiduciary office so as to keep away from themselves even the suspicion or fear of any fraud to the detriment of the public or of private individuals whose affairs they are called upon to administer, manage or supervise. And as such suspicion or fear is bound to arise whenever there is a conflict between one’s own interests and those of others, so the law wisely prohibits public officers or functionaries from having any privato interests in matters appertaining to their office.

Upon an analysis of the definition of the crime as given above the elements thereof are clear.

In the first place this crime can only be committed by a <u>public</u> officer or <u>servant</u> precisely because, as we have said, the crime consists in the abuse of functions or office. We have already had the occasion to define the “public officer or functionary” and here we will only make reference to what we then said.

The material element of the crime consists in <u>taking a private interest in any adjudication, contract or administration etc</u>. The manner of taking such an interest is immaterial. The prohibition applies whether the public officer or functionary takes such an interest openly in his own name, or by simulated acts or through intermediaries (interposed persons). All deceits and machinations used to conceal the act or to give to it the colour of legality are therefore useless to evade the law. The civil law, in different places, creates for the purpose of certain acts, certain presumptions as to the persons that are to be deemed “intermediaries”. Thus, dealing with the nullity of a

donation made to a person incapable of receiving by donation, sec. 1844 of the Civil Code lays down that such donation is null even if made through an intermediary and by "intermediary", Sec 1845 means “the father, the mother, the children, and descendants and the husband or wife of the person who is incapable" (V. also sec. 649 relating to testamentary dispositions). But these presumptions of Civil Law do not extend to the crime under reference. It may well be, on the one hand, that the intermediary used by the public officer is not a relative of his at all and therefore not a person whom the Civil Law deems an "intermediary" for its own special purpose; or it may happen, on the other hand, that though a relative of the public officer is concerned in an adjudication, contract or administration, he is not at all an intermediary of the public officer. Legal presumptions are inadmissible in this matter which is purely one of fact and must be decided in accordance with the particular circumstances of the case[188].

If the public officer or servant has taken a private interest, the value of such interest is immaterial for the subsistence of the crime. The circumstance that such interest is small may only operate in mitigation of punishment.

But in order that such private interest may be set up against the public officer or servant, it is essential that he should have, wholly or in part, the direction or supervision of the adjudication, contract or administration in which the private interest is taken or that he should have had such direction or supervision at the time the adjudication or administration was commenced. It is because of this function of direction or supervision that the act becomes immoral and constitutes a breach of trust and an abuse. It is immaterial whether the public officer or servant was himself solely or jointly with others responsible for such direction or supervision. Nor is it material whether the adjudication, contract or administration concerns the Government or private individuals: our sec. 122 does not in this connection use the word "public": provided, of course, the public officer has the direction or supervision there of as aforesaid[189].

Nor finally is it necessary that the public administration should have suffered any actual injury.

[188] Chaveau-Helie op. cit., Vol. II, no. 826; Maino op. cit., art. 176, para. 944; Roberti, op. cit., Vol. V. p. 351, para. 639

[189] Roberti, loc. Cit., para. 637

“L’ingenerante del publico ufficialo e’ sempre perniciosa alle pubbliche amministrazioni e sempre indecorosa per publico ufficiale, anche quando lo stimolo del privato interesse non l’avesse spinto a recar danni determinati e valutabili all’ amministrazione cui l’affare appartiene”.

This comment made with reference to the corresponding section of the "Progetto Zanardelli" of 1887 fully applies to our law, which expressly at sec. 124, takes account of "any fraudulent loss caused to the administration to which the matter belonged" not as an essential constituent of the crime under sec. 122, but only for the purpose of aggravating the punishment therein prescribed.

By way of conclusion, we will make a brief mention of a nice question which is variously solved by the authorities. The question is whether the "person interposed", where the public officer takes a private interest through such person, becomes the accomplice of the public officer. Carnot has no hesitation in replying in the affirmative.

“As the private person interposes”, he says, “to facilitate the commission of an offence, by giving aid and assistance to the person who commits it, he necessarily becomes an accomplice"[190].

Roberti is of the same opinion provided the person interposed has acted knowingly[191]. Chaveau-Helie take an opposite view: for the public officer, they say, the crime consists entirely in the abuse of his functions:

the same fact, if done by any other person, would be perfectly lawful; therefore, the crime remains exclusively personal to the public officer[192]. The opinion of these writers is also propounded by Carrara[193].

In such conflict of opinion among the great masters we would submit that the former view is more acceptable and more consistent with our law. Under sec 4-5 of our Code circumstances which are solely personal to one offender and which, with regard to him, exclude or mitigate or aggravate the punishment, are not communicable to any other co-offender in the same offence. But the character of public officer in the crime

[190] Comm. Art. 175, n. 9

[191] Loc. Cit., para. 640

[192] Op. cit., Vol. II, n. 626

[193] Prog. Parte Spec. Vol. V. paras 2524 et. seq., para. 2531

under discussion is a constituent element of the crime itself and, as we saw last year, when this is the case, the personal circumstance is communicable to all associates in the offence. Moreover, as Maino concludes:

"Se vi e' motivo dì assicurare con sanzione penali la correttezza disinteressata delle pubbliche amministrazione non si vede perchè debba sfuggire alla pena il privato che si fa sciente co-operatore di chi vi manca"[194].

ii Embezzlement by Public Officers

Sec. 123 of the Criminal Code lays down:

"Any public officer or servant who for his own private gain misapplies or purloins any money whether belonging to the Government or to private parties, credit securities or documents, bonds, instruments, or movable property, entrusted to palm by virtue of his office or employment shall, on conviction, be liable to hard labour for a term from two to six years and to perpetual general interdiction."

This is a species of the crime laid down in Roman Law by the name of "Peculatum". This name was derived from "pecus" - cattle - which in olden times constituted the only wealth. In modern Italian law and doctrine "peculato" still designates the crime which consists in the misappropriation committed by public officers of any money or other valuable property of which they have the administration or custody or which they are responsible to collect. (Art. 168. Code of 1889; and art 514, 315 Code of 1950.). In English the more or less similar offence is called "Embezzlement" which in its modern concept, is the creation of the Larceny Act. 1915. Sec. 17 thereof makes it a felony for anyone employed in the public service or in the police to embezzle, or fraudulently apply, any chattel, money or valuable security that has been entrusted to, or received, or taken into possession by him in his employment. The derivation of the word "embezzle" is uncertain; but it has been in use since the fourteenth century as meaning "to make away with", usually connoting some degree of clandestinity. The legal use of the term is almost exclusively limited at the present day, to the statutory felony referred to above[195].

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[194] Loc. Cit., para. 947

[195] Kenny, op. cit., pg. 265

The elements of the crime under our law, as appears from the definition which the law itself gives, flow from:

(i) the character of the person committing it

(ii) the mode in which it can be committed

(iii) the things in regard to which it can be committed, and

(iv) the purpose of private gain

In the first place, the offender must be a "public officer" or "servant". The expression "public officer" is defined in sec. 91. The addition of the word "servant" emphasizes the generality of the expression which thus includes all persons who, in any way, are called upon to discharge any public service, whether in a permanent post or temporarily, whether on payment or otherwise. What is essential is that the offender should have the capacity of public officer or servant, in other words that he should have in his possession or at his disposal the things misapplied or purloined, by virtue of his office or employment, because that which especially characterises this crime of embezzlement is not the public ownership of the things misapplied or purloined, but the breach and abuse of a public trust. We shall see that this crime can be committed even though the things belong to private individuals.

The character of "public officer or servant" serves also to distinguish this crime from that of theft or purloining of documents from places of public deposit under sec. 142 and from that of aggravated misappropriation dealt with in sec. 308.

The things with regard to which this crime of embezzlement can be committed are, according to the said sec. 125, money, credit securities or documents, bonds, instruments or any other movable property. But in order that the public "officer may be guilty of this particular crime it is essential that those things should have been entrusted to him by virtue of his office or employment. If, therefore, they were in his hands as a private individual he would be guilty of theft or of fraud but not of this special crime. The words "by virtue of his office or employment" imply that it was part of the duties or functions of the officer to receive or hold or have the custody of such things, by express words of the competent authority or, even by long established usage not

disapproved by such authorities[196]. If the things had come into the possession of the public officer not lawfully by virtue of his office, that is to say, in virtue of a duty or function inherent in his office but, for instance, by an abuse of his powers of duties, this special crime would not arise[197].

But if this condition is satisfied, in other words if the things had been entrusted to the public officer or servant by virtue of his office or employment, the law does not require any more. It is not necessary that the money or other things misapplied or purloined by him should belong to the Government or the public administration or that these should have suffered any actual damage.

"Sia che si tratti di cose dello Stato e quindi affidati al publico ufficiale per andato diretto della leggo, ratione imperii, sìa che si tratti dì cose dei privati da lui ricevute, jure gestionis, uguale in entrambi le ipotesi e' la ragione di punire".

A private person who deposits a thing or a sum of money in the hands of a public officer by virtue of his office would justly feel aggrieved if the law did not afford him the same measure of protection as it affords to the Government in respect of its own things: in both cases the deposit is made on the strength of the public confidence which public officers should inspire: and any breach of such confidence is equally criminal in both case irrespective of the derivation of the money or things[198].

The material element of the crime consists in "misapplying" or "purloining" the money or things. The old Italian text spoke of "distrarre o sottrare". The first of these two words would connote the idea of misappropriation, the second the idea of theft.

Strictly speaking, the more appropriate word to denote this element of the crime under reference is the first, i.e., "misapply", inasmuch as the public officer already has the detention or general possession of the thing: he only betrays the trust reposed in him by diverting it from its destination, by using it unlawfully for his private advantage; in

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[196] Regina vs Police, C. C., 23/11/1901

[197] Rex vs Fava et., C. C 6/8/1943

[198] The present Italian Code, however, distinguishes the embezzlement of money etc. belonging to the Public Administration from the appropriation of money etc. belonging to private persons: in fact, it reserves the name "peculato" only to the former and calls the latter "malversazione" (vide articles 311 and 315))

brief by deriving therefrom an unlawful gain. (Negri: "Del Peculato" in Riv. Pen. 1905. 1487 The legislator - as Civoli points out (Manuale di Diretto Penale 1900, 784) uses both words, (sottrarre, distrarre) which etymologically connote, the first the intention of definitely appropriating the thing of which the agent has the custody by virtue of his office, the other the intention of arbitrarily making use of the things as by way of loan, in order precisely that no doubt should exist that the punishment which the law provided against the person who purloins or takes away moneys or things entrusted to him by virtue of his office, applies equally against the person who converts such money or things to his private use even in the hope of being able later to restore the same to their proper use:

“Noi riteniamo” says Ugo Gavezzi – “che per dar vita al malefizio in esame sia sufficiente anche una illeciti distrazione momentanea e dappoiché il legislatore nostro (like our own) niuna distinzione fa, fra distrazione momentanea e appropriazione definitiva: egli reprime come reato qualunque illecito uso che il funzionario faccia a beneficio proprio od altrui della cosa affidatagli per ragione d’ufficio”[199].

We may here quote what Mr. Justice Harding writes although not with reference to the crime under sec. 125.

"Embezzlement is a "crimen interversionis” - that is, is completed when the lawful "causa possidendi" is fraudulently substituted by the unlawful "causa dominii" As soon as the sum or thing is misapplied (i.e., applied in such a way as to change the original title to possession, which may have been "causa depositi”, “cause pignoris” etc.) there is fraudulent conversion. It is not necessary that the sum or thing be disposed of and lost to the owner”[200].

It is, nevertheless, essential that the intent of the agent should be that of making a private gain. This word must not, however, be understood only in the limited sense of "pecuniary profit": whatever the satisfaction or enjoyment the agent intended to obtain in wilfully abusing of the things entrusted to him by virtue of his office, the crime subsists.

[199] Trattato Diritto Penale, Vol. IV, p. 20

[200] Op. cit., para. 24, n. 31

We have said "wilfully" abusing because in every case it must be proved that the defendant has misapplied or purloined the money or things entrusted to him by virtue of his office. It is not sufficient to prove at the trial a general deficiency in account or a deficit, because such deficiency or deficit might be due to mistakes or negligence which are not sufficient to constitute the formal element of this crime.

8. Abuses Relating to Prisons

The crimes dealt with under this heading are also comprised in the class of crimes consisting in abuses by the public authorities. In some other codes the crimes herein contemplated are included in the group of crimes "against individual liberty”. (Vide articles 150 & 152, Italian Code of 1889).

i. Our Code provides

Section 126: “Any turnkey or gaoler who shall take any person in custody without a lawful order or warrant from a person authorised by law to issue such warrant or order shall, on conviction, be liable to imprisonment for a term from one to three months."

Section 127: "Any turnkey or gaoler who shall subject any person under his authority to any arbitrary act or restriction not allowed by the prison regulations shall, on conviction, be liable to the punishment established in the last preceding section.

Where the restriction or arbitrary act aforesaid of itself constitutes a crime liable to an equal or a higher punishment, such punishment shall be applied with an increase of one degree."

As we have already had occasion to note, the law lays down the cases in which persons who have committed or are suspected of having committed an offence, or in certain other circumstances, may be arrested. Upon committal to a prison, the officer in charge is not only entitled to require the warrant or order of committal but commits a crime if he receives or takes any prisoner in custody without a lawful order or warrant issued by the competent authority.

When duly incarcerated, a prisoner cannot be subjected to any wanton discipline: indeed, any arbitrary act or restriction not allowed by the appropriate prison regulations

which are committed by the prison officers to the prejudice of a prisoner would be an act of oppression and constitute a crime.

Though the law, in the definition of these crimes, does not make any express mention of malice or other particular state of the mind, it is generally taught that "dolus" is a necessary ingredient: but such "dolus" is present whenever the set reprobated by the law is done voluntarily and not, for instance, in consequence of mere inadvertence or excusable error of interpretation and execution of the duties inherent in the office of gaoler.

ii. Section 128 thus provides

“Any public officer or servant who, without authority or necessity, detains or causes to be detained any person under arrest, in any place other than a place appointed as a public prison shall, on conviction, be liable to imprisonment for a term from one to three months or to a fine (multa).”

This crime does not call for any special explanation. “Public prisons” are now the Corradino Prison and the prison of the Gran Castello in Gozo. But by section 11 of the Prisons Ordinance (Chapter 44), the Governor is empowered to declare any suitable place or places to be a prison or prisons to which the provisions of that Ordinance apply. Likewise, under sub-section (1) of section 12 of that Ordinance it is provided that any person performing quarantine who is liable to be kept in prison, may be so kept in any place which the Governor may appoint for the purpose.

9. The Refusal of a Service Lawfully Due

Two crimes are dealt with under this heading.

The first is committed by any public officer or servant who has under his orders the civil police force and who, on a lawful request made by any competent authority, fails to afford the assistance of such force.

The hierarchy of the Police Force is established by the Police Ordinance (Chapter 35). The general command, direction and superintendence of the Force are vested in the Commissioner who is assisted by a Deputy Commissioner and an Assistant Commissioner. There are then a number of Superintendents, Inspectors, etc.

Unlike article 179 of the Italian Code of 1889, which referred to any "agente della forza pubblica" refusing or delaying compliance with a request lawfully made to him by the competent authority, our Section 129 speaks of any public officer or servant who has the civil police under his orders. In view of this, it seems that the offence in question cannot be committed by the rank and file, but only by the officers in charge of the Force or a section of it. And indeed, it is to these and not to mere constables that the Judicial and other competent authorities address their requirements for the services of members of the Police Force.

The formal element of this crime consists in the consciousness on the part of the offender of violating the duties of his office.

The other crime, involving the refusal of a service lawfully due, can be committed by any juror, witness or referee who, with the object of not affording assistance to the competent authority lawfully requiring such assistance, or of explaining his non-appearance before such authority, alleges an excuse which is shorn to be false.

What the law is here creating as a criminal offence is not the mere failure of appearance or the refusal to give evidence or to be sworn, etc. of the person duly required or sub-paeaned to serve as a juror or a witness or referee. Such non-appearance or refusal is adequately provided for by the penalties for contempt of court, warrant of escort, and condemnation in costs of adjournment contemplated in the laws of procedure. (Vide, for instance, Sections 574, 658 and 659, Code of Organization and Civil Procedure; and Sections 455 (4) and (5), 519 (l) and 605, Criminal Code). Instead, Section 129 Criminal Code subjects to criminal sanction the act of a juror, witness or referee who alleges a false excuse for obtaining exemption from the service; required of him or for accounting for his non-appearance before the requisitioning authority.

It is to be noted that, in regard to witnesses and experts, Section 129 of our Criminal Code applies not only when their presence is required before the judicial authorities, but also before any other competent authority as for instance the Legislative Assembly under Chapter 179, or a Commission of Enquiry under Act No. IV of 1948.

10. Abuse of Authority end Breach of Duties Pertaining to a Public Officer

i. Disclosing Official Secrets

A public officer or servant is guilty of a crime under Section 131 if he communicates or publishes any document or fact entrusted or known to him by reason of his office and which is to be kept secret, or if he in any manner facilitates the knowledge of any such document or fact, unless the act constitutes a more serious offence. The punishment is imprisonment up to one year or a fine (multa).

Section 131 of the Criminal Code which creates this offence is identical with article 177 of the Italian Code of 1889, apart from the saving which our provision makes of any case where the act of the offender constitutes a more serious crime as, for instance, under the Official Secrets Ordinance (Chapter 82) or a crime of treason under Section 56 of the Criminal Code.

This crime can be committed only by a public officer or servant. Breach of secrecy by other persons, exercising a profession or calling involving confidence, is dealt with under Section 270 of the Criminal Code.

The said crime can be committed not only in relation to documents but also in relation to "facts" - "potendovi essere interesse a custodire il segreto di fatti conosciuti come di documenti posseduti: fatti conosciuti per ordini, per comunicazioni verbali, per dispacci ricevuti"[201].

The material act may consist alternatively in "communicating" or "publishing" or in any manner "facilitating the knowledge" of any document or fact held by or known to the agent by reason of his office. "Communicating" literally means giving information of the matter to a determinate person; "publishing" means a disclosure made, not so much repeatedly to different persons, as by means of indeterminate and extensive publicity.

It need hardly be said that to constitute the crime, the disclosure of the secret matter made by the public officer or servant must be wilful, that is, made with the consciousness of contravening the legal prohibition. Mere negligence or imprudence

[201] Report of the Chamber of Deputies on the project of 1887, n. cxlii

is not sufficient, saving, of course, any disciplinary action which such negligence or imprudence may entail.

Finally, where the disclosure of any secret document or fact is made by a public officer or servant as a result of corruption, the case would fall to be governed by the provisions applicable thereto and not by Section 131[202].

ii. Continuance in Office After Dismissal

Section 132 of the Criminal Code lays down:

"Any public officer or servant who, having been dismissed, interdicted or suspended, and having had due notice thereof, continues in the exercise of his office or employment shall, on conviction, be liable to imprisonment for a term from one to six months."

This is but a variety of the crime of unlawful exercise of public functions dealt with under Section 83. In fact, the two crimes are dealt with together by article 185 of the Italian Code of 1889. Indeed, it may appear that the provision of Section 132 is superfluous as it denotes nothing more than one of the ways in which the crime under Section 83 may be committed; that the public officer or servant is therein punished because he is no longer such when he performs the act of office; that consequently whether the public officer or servant has been dismissed or suspended, or whether the agent is a person who never was a public officer or servant, the substance of the matter does not change.

The answer to all this is that the legislature has considered the act under Section 131 as a special form of abuse and provided for it a special sanction. The expediency of it is evident also on account of the precise condition therein required to make the abusive continuance in office punishable - and that is that the public officer or servant has received due notice of the cessation of his office by dismissal, interdiction or suspension, if such notice has not been given the provision of this section cannot apply, but only such disciplinary action as may be appropriate.

[202] Confer Carrara, Programma Parte Speciale, Vol. V, para. 2557; Maino, op. cit., art. 177, para. 951

This crime also requires "dolus". Inadvertence or error will therefore constitute a defence[203]. The law here punishes the obstinate and arbitrary persistence after due notice of the cessation of office "sicché per mancanza di dolo, o anche dopo codesta legale notizia, non potrebbe essere punito colui che esercitasse qualche atto per la necessità di providere ad un urgente servizio"[204].

iii. Unlawful Domiciliary Entry

The crime under Section 134 is committed by any public officer or servant, who under colour of his office, shall, in cases other than those allowed by law, or without the formalities prescribed by law, enter any house or other building or enclosure belonging to any person.

The law protects the house and premises of every citizen from unwarranted trespass in various ways. Under Section 355(o) the Criminal Code every person is guilty of a contravention who, even though without the intent of committing another offence, enters into the dwelling-house of any other person against the express warning of such person or without his knowledge or under false pretences or by any other deceit. Where the entry into any house or other place or enclosure is affected by any of the means mentioned in Sections 277, 278, 279 (i.e., breaking, false keys, scaling) then the offender for the mere entry and notwithstanding that there is no evidence of any act constituting an attempt to commit another offence, is liable to punishment as provided in Section 344.

In Section 132 the law deals specifically with the case of a public officer or servant, who by abuse of his office or employment, enters into the house or other building or enclosure belonging to any other person. According to this section there is such abuse when the entry is not authorised by law or is affected without the formalities prescribed by law and, in either ease, the offender commits the act under the colour of his office.

The reference to entry "authorised or allowed" by law applies for instance to the cases contemplated in Section 362 et seq. of the Criminal Code which also prescribe the formalities to be observed. In general, members of the Police Force below the rank of

[203] Pessina, Elem. di Dir. Pen., Vol. III, p. 121; Puccioni, Cod. Pen. Tosc., Vol. III, p. 512

[204] Chaveau et Helie, Theorie du Code Penale, Vol. III, n. 904

Inspector cannot enter any house, building or enclosure for the purpose of affecting any search therein or arresting any person who has committed or is suspected of having committed an offence without an order in writing from a superior officer. Other officers are also authorised to enter premises by special laws. Thus, for instance, section 68 of the Customs Ordinance (Chapter 60) enables Customs officers to enter and search premises for prohibited or uncustomed goods provided they are authorised to do so by a warrant issued by the Attorney-General or by a Magistrate. (Confer also section 80 of the Spirits Ordinance (Chapter 64); section 12 of the Official Secrets Ordinance (Chapter 82), etc.)

Now the offence under discussion in its simple form is committed by the mere unwarranted entry under colour of office irrespective of any bad motive on the part of the offender. Only, where it is proved that the entry took place for an unlawful purpose or for a private advantage, the punishment is considerably aggravated. Of course, if there is not only an entire absence of improper purpose, but there is also want of "dolus", the crime would not arise. But what Maino says in commenting on article 148 of the Italian Code of 1889 applies: "Certo a costituire il reato in esame e' necessario il dolo: ma il dolo vi e' ogniqualvolta (l'entrata) ma stata fatta volontariamente, e non per pura colpa o per un errore scusabile nell'interpretazione e nell'esecuzione dei doveri inerenti al mondato che la società ha conferito ai pubblici ufficiali per la tutela dei cittadini"[205]. Excess of or misdirected zeal does not, therefore, necessarily exclude the offence.

iv. Failure of Magistrate to Attend to Complaint of Illegal Detention

Section 135 of the Criminal Code lays down that:

"Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours, shall, on conviction, be liable to imprisonment for a term from one to six months."

This provision was introduced as a safeguard of individual liberty. Yet one is bound to make in regard to it the same observation as was made by Chaveau et Helie in regard

[205] Op. cit., art. 147, para. 796

to article 119 of the French Code, that is, that it exposes certain deficiencies in our law. This provision requires a Magistrate - under threat of a punishment – "to attend to a lawful complaint touching an unlawful detention", but we search in vain either in the laws of procedure or elsewhere for a general provision which lays down expressly the powers which a Magistrate, or indeed any Court, could exercise about any such detention upon any such complaint.

In England a most efficacious remedy to obtain release from illegal detention is the writ known as the "Habeas Corpus". The writ - described as "the principal bulwark of English liberty" - is an order from the Court, usually the Queen's Bench Division, made upon affidavit of the prisoner or someone on his behalf, showing probable grounds for supposing that a case of false imprisonment exists. It directs the person in charge of the prisoner to produce his body before the court in order that he inquire into the reason for the detention; and if the reason given is inadequate the prisoner will be released or bailed. This writ does not generally run in Malta[206].

Our section makes it also an offence for any member of the Executive Police to fail to report to his superior officers within twenty-four hours any complaint made to him of an illegal detention. In this connection reference may be made to Section 365(l) of the Code which lays down that every officer of the Executive Police below the rank of Inspector must, on securing a person arrested, forthwith report the arrest to an officer not below the rank of Inspector who, if he finds sufficient grounds for the arrest, shall order the person arrested to be brought before the Court of Judicial Police; otherwise he shall release him.

It is also interesting to recall other provisions of special laws concerned with, providing remedies against illegal detention in particular circumstances. Thus, section 5 the White Slave Traffic (Suppression) Ordinance (Chapter 102) lays down that "it shall be lawful for the Commissioner of Police where, in his opinion, there is reasonable cause for him to suspect that a woman or girl is detained, against her will for immoral purposes by any person in any place, to issue a warrant to any police officer not below the rank of Inspector, authorising him to search for such woman or girl and to take her out of such place; and the Commissioner of Police may cause any such woman or

[206] Vide Cremona "The Writ of Habeus Corpus and Maltese Law". "Scientia", Vol. XIX, No. I, p. 21 et. seq.

girl to be delivered up to her parents or other relatives or otherwise dealt with as the circumstances may permit or require.” And section 2 of the Prisoners on Board Merchant Ships Ordinance (Chapter 34) provides that "where the Commissioner of Police has reason to believe that any person is being kept in custody on board any merchant ship in consequence of a sentence of a foreign tribunal, or in order to be tried in a foreign country, he shall forthwith give notice of the fact to a Magistrate of Judicial Police who shall, without delay, inquire into the circumstances of the case and make a report thereon to the Governor" for the purposes of the provisions of that Ordinance.

v. Acts of Oppression by Public Officer

Section 136 of the Criminal Code lays down:

"Any public officer or servant who shall maliciously in violation of his duty, do or omit to do any act not provided for in the preceding sections of this Title (dealing with Crimes against the Administration of Justice and other Public Administration) to the oppression or injury of any other person, shall, on conviction, be liable to imprisonment for a term not exceeding three months or to a fine (multa):

"Provided that the Court may, in minor cases, award any of the punishments established for contraventions."

General Provisions

1. In the case of any crime under Sections 131 to 137 inclusively, the Court may, in addition to the punishments therein laid down, award the punishment of temporary or perpetual interdiction. (Section 138).

Saving the cases where the law specifically prescribes the punishment to which offences committed by public officers or servants are subject, any public officer or servant shall be guilty of any other offence over which it was his duty to watch or which by virtue of his office he was bound to repress shall, on conviction, be liable to the punishment laid down for such offence increased by one degree. (Section 139).

This aggravation of punishment is perfectly justifiable, and its reason is evident. “Gravior enim poena constituenda est in hos qui nostri juris sunt at nostra debent custodire mandata.”

It is to be observed that this provision applies in cases where the law does not already specifically prescribe the punishment applicable to offences committed by public officers or servants. The public character of the person is sometimes a constituent element of the offence, or essential to it so that the act is not criminal if not committed by a public officer or servant. At other times that character serves only as an aggravating circumstance of the punishment of the offence. In all such cases the aggravation prescribed under the provision now under examination (Section 139) does not apply: the punishments applicable would be those prescribed by other specific provisions whether comprised under Sub-title IV of Title III of Part II of Book I of the Code or elsewhere. Notwithstanding that Section 139 is headed by the caption “General Provision Applicable to this Sub-title” it has been repeatedly held by our Courts that it is of general application. As Roberti points out, in prescribing the punishment in these cases, the law has already taken account of the public character of the offender, and it would be unjust to take account of it again for adding further aggravation of punishment under Section 139[207].

This latter aggravation applies in the appropriate circumstances against any public officer or servant “who shall be guilty of any offence....” These words show clearly that it is immaterial whether the public officer or servant is the sole offender or a co-principal or an accomplice.

Lastly, so that the aggravation may apply, it is necessary that the offence in which the public officer or servant is concerned be one “over which it was his duty to watch or which by virtue of his office, he was bound to repress”. It is only in such circumstances that the guilt of the public officer or servant is more serious in the eyes of the law “poichè questa e’ turpemente oppressa da coloro che dovrebbero difenderla e violata da coloro che sarebbero invece tenuti a vindicarne le infrazioni.” Thus, the members of the Police Force whose duty, by law, it is to prevent offences not to provide for their punishment, if they render themselves guilty of any offence, they cannot escape this aggravation of punishment. Similarly, other public officers' in respect of specific

[207] Op. cit., Vol. VI, pg. 101, para. 768

offences which they are appointed to prevent or repress, as for instance, Customs guards or officers in regard to Customs offences. Nor is it necessary to inquire whether the offence is committed by the public officer or servant “in the discharge of his duties". This is not required by the law:

"Sarebbe quindi un aggiungere arbitrariamente alia legge il pretenderlo quando esse non l’esige, e portare alla stesse una restrizione o una distinzione non compatibile colla generalità delle sue espressioni"[208].

(e) The Violation of Public Archives, Public Offices, Public Places of Confinement, and Public Monuments

1. Breaking of Seals

This is a crime against the Public Administration and in particular, against the Administration of Justice, because it frustrates or negatives the interest which they have in view in affixing public seals to prevent the concealment or misappropriation of the things or to ensure their identity.

The use of seals has been prevalent since ancient times. Thus, the Romans used soils both in private transactions to identify the thing or the goods forming the subject matter of the transactions, and in testaments to prevent the opening thereof until the appropriate time, as well as in other instruments to ensure in some way the authenticity of the signatures of the writers or the parties. The violation of the seals so affixed however, did not always constitute a distinct offence, but it was either punishable as a species of forgery, when it involved an alteration of the writing or instrument, or was subject to the punishment of theft when it served as the means of committing this crime, or, finally, it merely involved an action for damages.

Subsequent laws extend the use of seals, though maintaining more or less the same purposes. Whenever the seal is affixed by or by order of a Public Authority, it is, of course, necessary that the purpose in view shall not be frustrated. Consequently, apart from the legal provisions concerning forgery in cases where the alteration of

[208] Roberti, loc. cit., para. 770

counterfeiting of the seal serves as the means of a crime of forgery, another distinct and substantive crime arises according to the present laws from the mere breaking of the seals in question, which, as already stated, constitutes an offence against the Public Administration.

Sub-section (I) of section 140 of our Criminal Code lays down:

“Whosoever shall be guilty of breaking any seal affixed by order of public authority shall, on conviction, be liable to imprisonment for a term from one to three months.”

Three are the ingredients of this offence, namely:

(i) That the seals were affixed by order of a public authority;

(ii) that there is a breaking thereof;

and (iii) that each breaking is committed wilfully.

It is therefore clear that interference with seals affixed as a result of private conventions would not fall under this provision. If the circumstances so permit, the act could fall under the provisions dealing with theft if it serves as a means for stealing, or under the provisions dealing with fraud if the seals are broken to misappropriate the thing. In other cases, it can give rise to a civil action for damages.

Regarding the second ingredient of the crime under discussion, it is to be noted that the mere breaking of the seal is sufficient to constitute the crime without requiring evidence of any other damage. In theory, Carrara observed, the breaking of seals should not constitute a separate offence, but only an aggravating circumstance of other offences. The eminent jurist wrote:

“La rottura di sigilli non ha una particolare oggettività giuridica: inopportunamente si e’ voluto farne un titolo di reato principale: essa non e' che una circostanza aggravante, la quale può accompagnare un numero infinito di reati il furto, la frode, la truffa, il falso... E' difficile imaginaie un guasto di sigilli che sia fine a se stesso e che non accatti la criminosità prevalente da un altro reato principale: che se si suppone tali rottura fatta per il solo gusto di farla, e’ danno dato per ingiuria e niente di piu’’[209].

[209] Programma, Parte Speciale, Vol. VI, para. 2817, nota

Our law, however, like its models, does not make the criminality of the act depend on any other offence or on any actual linage, but on the injury, inherent in the act itself, to the public authority and on the danger of other possible damage which the law desires to prevent by the affixing of the seal. Any actual injury, therefore, is not considered except for the purpose of aggravating the punishment when such damage is the consequence of an asportation constituting a theft. Indeed, by the express provision of Section 141, every theft Committed by means of the breaking of any seal affixed by order of a public authority is deemed to be aggravated by breaking", that is, "by means" (Section 276 (a)).

The third ingredient is an obvious application of general principles and is implied in the words "be guilty". Mere negligence or inadvertence does not, therefore, attract the punishment prescribed by this section; not, much less, a fortuitous event or “casus”.

The position is, however, different in regard to the person in charge of the seal. Such person is double bound because in addition to the duty which he owes as an ordinary citizen respecting the law and the acts of the public authority, he has also a special duty as guardian and custodian of the seals. If, therefore, instead of honouring the trust placed in him, he renders himself guilty of the crime either as sole offender or as a co-principal or an accomplice, he deserves a more severe punishment than that provided against any other person.

But there is more. The person in charge of the custody of the seals, by accepting such charge, assumes the duty of taking care that the same shall not be violated, and he does such duty not so much to the private persons who may be interested in the inviolability of the seals as to the Public Administration by whose order they were affixed. He must therefore be answerable not only in respect of a violation which is imputable to his own malice, but also in respect of that which is imputable to his negligence. Consequently, sub-section (2) of Section 140 provides that where (in regard to the breaking of seals) there has been negligence on the part of the person in charge, such person is, for the mere negligence, liable to the same punishment as is provided against the breaker. But, Roberti asks, is such punishment applicable to the person in charge even when the seals have been broken without “dolus” on the part of anyone? And, with some hesitation, he answers such question in the negative:

"E' dunque... alla negligenza del custode che mai si verifichi nel caso di violazione da altri volontariamente commessa, che sembraci dovessi esclusivamente limitare l'applicazione della pena, per non sottoporsi qualunque altra negligenza che alle semplici indennizzazioni civili giuste le regole del diritto comune"[210].

In conclusion, Section 143 lays down that where the crime under Section 140 is committed with violence against the person, the punishment is hard labour from two to six years. This punishment, of course, applies where the violence against the person does not in itself constitute a more serious crime.

2. Purloining of Documents or Deposits from the Public Archives or other Public Offices

In cases of embezzlement, destruction, mutilation or purloining of documents, records or other papers, registers, acts or any effects whatsoever existing in the public archives, or in any other public offices, or delivered to any public depositary or functionary whatsoever in virtue of his office, the offender is liable to hard labour from thirteen months to three years (Section 142 (I)).

Here again, the law does not punish the act in so far as it is a violation of property, but in so far as it constitutes an offence against the Public Authority instituting the deposit. As was expressly explained by the official reporter in connection with the French Code:

"Un deposito pubblico e' un asilo sacro; e qualunque trafugamento commesso in quel luogo e' una violazione della garanzia sociale, un attentato alla pubblica fede"[211]. And the Court of Cassation said: "Le sottrazioni cui si riferiscono esclusivamente questi articoli sono quelle che si verificino nei depositi posti sotto la speciale protezione della pubblica autorità, o costituiscono, indipendentemente dal valore degli oggetti sottratti, un'offesa all'interesse di ordine, renerai e per cui queste, protezione si e' resa necessaria." This is why, this crime is included under the Title which deals with offences against the Administration of Justice and other Public Administrations.

The material objects in regard to which the crime may be committed are defined by the law as being "documents, records or other papers, registers, acts or any effects

[210] Op. cit., pg. 114, para. 784

[211] Cheveau et Helie, op. cit., Vol. II, pg. 149, para. 1050

whatsoever" and the places in relation to which the crime may arise are the "public archives or other public offices" to which the law has assimilated the hands of any public depositary or functionary who has received the things by virtue of his office. Typical of such places are the Notarial Archives, the Public Registry, the Archives and Registries of the Courts, the Registries of Government Departments, etc.

In the old jurisprudence of France, it was held that the theft of books from a public library constitutes an offence under this provision. Chaveau et Helie doubt the soundness of such decision. It is true, they say, that a public library is "a public place of deposit" in a very broad sense: but the objects which the law specifies as being the matter of this crime would tend to show that the intention of the legislature was to limit the application of the provision to the deposit of documents, records, acts and registers. The other words used by the law "or other effects whatsoever" are, indeed, very comprehensive and could include books; but, in the view of the said writers, those words ought to be construed as referring, by the rule "ejusdem generis", to things of the same kind as the documents, acts and registers specifically mentioned. At the same time, however, the learned commentators do not disguise the fact that public libraries contain also important manuscripts and documents of very great interest and that, consequently, the law may well have intended to cover them by this provision.

Where the document, register etc. taken, purloined or tampered with is not in a public archive or other public office, but is in the hands of a public depositary or functionary, it is necessary that such public depositary or functionary shall have received the custody of the thing 'by virtue of his office'. Such would be, for instance, a judicial referee to whom the record of the proceedings is delivered for the purpose of the reference, or a court martial or usher to whom acts are delivered for purposes of service or execution. Such, riso, undoubtedly, is every notary in regard to the notarial acts received or kept by him in his capacity as such, though not in regard to papers entrusted to him as a fiduciary depositary on account merely of personal trust.

Although section 142(1) does not make any express mention, this crime cannot be committed without criminal intent in the case of embezzlement or purloining. The dolus "inest re ipsa." But if it is evident that an involuntary or accidental destruction or mutilation of a document does not constitute this crime.

However, where such a crime has been committed, then, if there has been negligence on the part of the archivist, registrar, recording officer, notary or other functionary, he shall be liable to imprisonment from four to six months or to a fine (multa) for the mere negligence. (Section 142 (2)). Concerning this provision, we can repeat the observations we made in the similar provision of the law in regard to the crime of breaking of seals.

As in the case of the crime just mentioned, so in the case of this crime of embezzlement, destruction etc. of documents, it is provided by Section 143 that where the crime is committed with violence against the person, the punishment is increased to hard labour from two to six years.

Finally, the crime under discussion is completed by the embezzlement, destruction, mutilation or purloining of the document, etc. It is not necessary that the offender shall have achieved the aim he had in view, as, for instance, the deceit of the judicial authorities. Nor is it necessary, to prove that any private damage has been actually caused. Nor is the completion of the offence effected by the fact that the document, etc. purloined has been recovered. It is interesting to recall in connection with the last observation that Section 202 of the Italian Code made a wise provision: it provided a substantial reduction of punishment where the offender returned the act or document unaltered without having derived any profit therefrom and before the institution of proceedings.

3. Violation of Public Places of Confinement; the escape of persons in custody or Suspected or Sentenced and Harbouring of Offenders

Concerning these provisions of our Code (then Section II-of Chapter IV) Jameson wrote: The next Section provides against those offences which relate to the security of prisoners and the obstructions to public justice by those who harbour offenders or facilitate their escape. This is a necessary branch of the law which protects the due exercise of the different departments of the executive power. The provisions of the Chapter distinguish with sufficient precision and minuteness the153ifferrent varieties of these offences, and for the most part award appropriate punishments. These indeed lean to decide of lenity as they ought to do, considering how much these offences depend upon the state of administration of prisons and of the Police, and in the local

circumstances of Malta, with a small and compact territory surrounded by the ocean, severity of punishment is not necessary"[212].

The violation of places of confinement to which the heading refers consists in the escape of prisoners therefrom. For the sake of clarity of exposition we will discuss the whole subject:

(i) With regard to these who being in custody, under arrest or sentence, effect their own escape.

(ii) With regard to those who, being bound to prevent such escape, neglect or betray such duty.; and

(iii) With regard to those who, not being bound as above said aid or abet such escape.

i. Escape by prisoners

In connection with the first enquiry, it is essential to premise certain distinctions which are of fundamental importance in the matter. In the first place the escape is either simple or aggravated; there is the former when the escape is affected without the use of violence to the person or breach of prison: there is the second when the escape is effected by breach of prison or by means of violence to the person.

A second distinction is to be made between persons confined merely under custody as those charged with an offence and awaiting trial and those serving a punishment as under a sentence.

Now, most systems of positive law, following the more commonly accepted doctrine, do not consider as a criminal offence the simple escape from prison of persons detained therein only under custody. The law condones the prisoner who takes advantage of an opportunity offered to him to make his escape following a natural instinct urging him to re-acquire his lost liberty.

[212] Report 1, XXII

Troppa virtù si pretenderebbe dagli esseri umani, se si esigesse che continuassero a rimanere in un carcere, malgrado che aperto si presentasse loro la via per uscirne, e per sottrarsi così dagli affanni e dei pericoli di un giudizio che soprasta”[213].

and Carrara says:

La esimizione di persona o la evasione, quando si obiettano allo stesso arrestato o detenuto, non sono generalmente considerate come delitto, se l’elemento criminoso non si trova noi mezzi adoperati. Il reo che per pigliare il largo usa artifizi o profotti della negligenza dei Buoi custodi, obbedisce ad una legge dì natura, ed e’ scusato: la legge serba il suo rigore contro i custodi o negligenti o corrotti"[214].

Our law is fully in accordance with this doctrine. It does not visit with any punishment the simple escape from places of confinement of persons who are under arrest or in custody but not yet condemned by a sentence of a Competent court. This clearly emerges from sec. 149 Criminal Code which deals with the crime of simple escape and limits it only to "any person under sentence"[215]. In Rex vs Zammit[216], H.M’s Criminal Court held that the vehicle used for the removal of prisoners must be considered as a place of custody and an extension of the prison; and any simple escape therefrom by a person who has not yet been sentenced is not punishable. This is the interpretation to be given, the Court said, to sec. 13 of the prisons ordinance (Cap. 44)

But the escape though simple of a person under sentence is punishable. Although the natural impulse to re-acquire the lost liberty is always identical whether the person is merely in custody or under arrest or whether he is under sentence, other overriding reasons make it expedient to subject the latter to punishment. A person under a sentence who escapes from the place appointed for his punishment violates the obligation arising out of a solemn judgement given against him by the competent public authority.

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[213] Roberti, op. cit., Vol. VI, pg. 153

[214] Op. cit., para. 2813

[215] V. Rex vs Mercieca, 25/4/1924: "Law Reports Vol. XXV, Part IV, para. 8671, Criminal Appeal; "Police vs Sacco 28/12/1942

[216] 11/7/1907

He, as some writers put it, tries to evade a debt which he has contracted towards the community to suffer the punishment for the offence committed and of which he has been found guilty. Moreover, the alarm which the escape of a criminal, proved as such in the ordinary process of law, causes in the public is much greater than the alarm caused by the escape of a person who is still merely suspected of or charged with an offence but may yet prove to be innocent.

And when the said sec. 149 Criminal Code speaks of the escape of a person "under sentence", these words must be understood as referring only to persons sentenced to a punishment restrictive of personal liberty and not to a mere pecuniary punishment. A person sentenced to a fine who makes default in the payment thereof cannot be considered as a person "under sentence" for the purpose of the said sec. 149 until that punishment is converted into one restrictive of personal liberty[217].

Moreover, by person "under sentence" is meant a person against whom a final and absolute sentence has been given which can be carried into execution. A person who escapes while an appeal is pending from his sentence could not be punished under sec. 147[218].

Aggravated escape constitutes a crime whether it is effected by a person under arrest or by a person under sentence. Sec. 150 lays down:

Whosoever shall be guilty of escape from any place of confinement or punishment, shall, when the escape has been effected by violence on the person, or with breach of such place, be liable, on conviction, to imprisonment for a term from thirteen months to two years.

The law speaks of "violence" on " the person" without any specification. It is controverted whether the expression includes, besides the use of physical force, also moral coercion. Raniero Babboni thinks that the better answer is in the negative, because the Code generally makes express mention of threats when these are considered as a sufficient element or an aggravating circumstance of an offence[219]. Other writers, however, take the view which we submit is more acceptable - that "in

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[217] Cfr. Rex vs. Mercieca above quoted

[218] Maino, op. cit., art. 826, para. 1172; Roberti, Vol. VI., para. 028, pg. 155

[219] Dei Delitti contro l'amministrazione della Giustizia in "Tratto di Diretto Penale", Vol. V., pg. 283

quanto alla violenza per la medesima si comprende qualunque via di fatto, qualunque minaccia avente per oggetto di passalizzare o di influirenoralmente sulla guardia e la vigilanza dei custodi"[220].

By "breach of the place" of confinement or punishment, the law means the overthrowing down, breaking demolishing, burning, wrenching, twisting or forcing of any wall roof, bolt, padlock, door whether internal or external, or other contrivance, intended to secure the place. But the breaking must be of the place itself; it is therefore generally thought that the breaking of a chain, for instance, or manacles intended to secure the person of the prisoner does not constitute this form of aggravated escape. And, again, there must be actual breaking in above sense; merely getting over the wall or ceiling, or passing out through a door by false keys or the like and without violence on the person is a simple escape and not a breach of prison or aggravated escape[221]. Moreover, the breaking must be made by the fugitive himself or with his participation; in other words the provision relating to aggravated escape does not apply to a prisoner who merely avails himself of a breaking previously committed by others without his participation[222].

Finally, with regard to simple escape, the crime is completed when the fugitive actually regains his liberty. So long as the prisoner is still within the outer boundaries and the precincts of the prison and is followed by the gaolers and apprehended, he is not guilty of the completed offence of escape but may be guilty of an attempt[223]. In the case of breach prison, however, the crime is completed so soon as the prisoner breaks out of his place of custody, even though actual escape may have been detected and prevented in time[224]. Among continental writers the question is discussed whether the provisions relating to escape from prison apply to the escape of a person imprisoned for debt. The prevalent view is that they do not: for the escape of a debtor arrested for debt does not cause, like that of a delinquent or presumed delinquent, public alarm sufficient to require penal repression[225], and moreover Italian writers point out the

[220] Falzon, op. cit., pg. 348, para. 712

[221] Archbold, op. cit., para. 1212; Carrara, op. cit., Vol V, para. 2811 et. Seq.

[222] Chaveau et Helie op. cit., Vol. III, n. 1016; Maino, op. cit., art. 226, para. 1169

[223] Carrara, op. cit., para. 2815

[224] Carrara, ibid., para. 2619

[225] V. Chaveau et Helie Vol III, n. 1013 & 1024; Maino loc., cit., para. 1167

wording of article 226 of seq. of the Italian Code of 1889 referring as they do to: "arrestat" and "condannato" and prescribing the punishment for, the escape by reference to the gravity of the offence or the kind and duration of the punishment yet to be undergone, clearly have reference to persons arrested or sentenced for criminal offences[226].

Whatever may be the correct solution of the problem under other systems of law, it is not thought that any question can arise under our law. In fact, sec. 158 Criminal Code applies all the provisions relating to the escape of persons arrested or sentenced, to the escape of any person lawfully confined from any place appointed for his custody. It is submitted that the general expression "persons lawfully confined" comprises also a person imprisoned for debt.

ii. Where the escape is favoured by the negligence or corruption of the persons in charge of custody of prisoners

Section 151 deals with the case in which the escape of any person under arrest or sentence is affected in consequence of the negligence or imprudence of the person charged with his custody, care or conveyance. In such case the person charged with the custody or care or Conveyance of the fugitive, is liable to punishment as follows:

(a) If the person escaping is accused of or sentenced for any crime liable to a punishment not exceeding two years hard labour or imprisonment or if he was in lawful custody for any cause other than a crime, to imprisonment for a term from one month to three months.

(b) If the person escaping is accused of or sentenced for any crime liable to a punishment exceeding two years but not exceeding five years' hard labour or imprisonment, to imprisonment for a term from four to six months

(c) If the person escaping is accused of or sentenced for any crime liable to a punishment exceeding five years, hard labour or imprisonment but not liable to the punishment of death, to imprisonment for a form from seven months to one year

[226] Confer also Falzon, op. cit., pg. 357, para. 715. But it is to be remembered that Falzon wrote before Section 158 was added to the Criminal Code by Ordinance 1 of 1903

(d) If the person escaping is sentence to death or is accused of any crime liable to the punishment of death, to imprisonment for a term from thirteen months to two years.

Sec 152 deals with the case in which the escape of any person under arrest or sentence is affected with the connivances or corruption of the person charged with his custody, care or conveyance. The punishments prescribed for in the case of mere negligence or imprudence are here applied in hard labour and increased by one degree and the punishment of perpetual general interdiction is added.

Finally, sec. 155 provides that the punishments laid down in the two preceding sections shall be increased by one degree where the escape is affected by violence to the person or with breach of the place of confinement or punishment or by the conveyance into such place of any instrument or weapon to facilitate the escape.

From the foregoing provisions it will be seen that the law has in no case applied to the person charged with the custody, care or conveyance of the fugitive, the rules of complicity. In the case of mere negligence or imprudence the application of such rules was, of course, impossible because a negligent complicity is, as we saw last year, inconceivable, complicity always predicating a common design. But even in the case of connivance or corruption, to have applied the rules of complicity would not have met the case in all hypotheses. The law punishes the connivance or corruption of the person charged as aforesaid even when, as in the case of simple escape by a person under arrest, the fugitive himself is not liable to any punishment; in such case, as the principal act (the escape) is not criminal, it would have been impossible to punish the connivance or corruption as an act of complicity. Moreover, there may be acts of connivance e.g., letting the escape take place although being in a position to prevent it, which do not constitute acts of complicity proper.

The law, therefore, punishes the negligence or imprudence or the connivance or corruption of the officer in all cases as a substantive independent offence. And, in the case of connivance, the motive which may have induced it is irrelevant.

Laciarsi quindi sedurre o dalle preghiere del detenuto, dalla commiserazione per la di lui sorte o dalla ingiustizzia istessa della persecuzione cui forse il vegga soggiacere o da altra qualunque benché non turpe cagione; Bon circostanze tutte che, senze escludere la reità per connivenza possono tutt'al più influire perchè la pena si applichi con minor rigore nella latitudine del grado assegnatole dalla legge. "

iii. Where the escape is aided or abetted by persons not having the custody of prisoners

Having considered the matter of escape in regard to the fugitive himself and in regard to those in charge of the custody, care or conveyance of the prisoner, our third enquiry concerns all other persons, who, not being so in charge, aid or abet the escape.

In Roman law these other persons were punished in the same manner as those who were in charge and connived at the escape. But our law considers the offence of these latter more serious than that of the former because they commit, at the same time, also an abuse of their office and public trust and are moreover in a position of much more easily favouring the escape. Therefore sec, 154 lays down:

Whosoever, not being in charge of the custody, care or conveyance of any person under arrest or sentence shall facilitate or be an accomplice in the escape of such person shall, on conviction, be liable to the punishment established for the person so charged and conniving, decreased by one degree."

But this diminution of punishment does not apply where the escape has been affected by violence on the person or by breach of the place or by conveyance into such place of any instrument or weapon to facilitate escape. In these cases, the stranger who aids or abets the escape is liable to the same punishment prescribed for the person in charge of the custody, care or conveyance of the prisoner: this is fully justified in such cases by the gravity of the danger inherent in the means used and by the more effective concurrence constituting the aid or assistance in escape.

Only, the Court can in all cases substitute the punishment of imprisonment for the punishment of hard labour (see. 154 (2)).

Now it must be noted that whereas in the case of the persons in charge of the custody etc, of the prisoner, the law speaks of connivance and not of complicity for the reasons already stated, in the case of these other persons the law makes their offence consist in "facilitating or being accomplice in the escape". If therefore in the case of the former persons, mere tacit acquiescence in the escape or the mere non-prevention of the escape constitute connivance, are sufficient to give rise to their offence, in the case of the latter persons, a more direct and positive aiding or abetting, in fact such as

constitutes an act of complicity within the general definition of acts of complicity contained in sec. 43, is required; a mere negative concurrence or even a positive concurrence which does not amount to actual facilitating or to an act of complicity as there defined would not be sufficient.

But except for this, no other application of the rules of complicity has been made in the case of these persons just as the rules of complicity have not been applied in the case of the persons in charge of the custody, etc of the fugitive. In fact, the aiding or abetting, of the escape on the part of any person not in charge of the custody etc. is an offence per se and punishable even where the escape itself does not constitute an offence for the person escaping. Moreover, the punishment is fixed not by reference to the punishment which might have been incurred by the person escaping but, as we have seen, by reference to the punishments prescribed for the persons in charge of the custody etc. and conniving at the escape.

"La reità dei terzi nella fuga dei detenuti e' una reità! Principale, che può star da se independentamenta da quella dei detenuti stessi che evadono e se vien denotata sotto il nome di complicità, cio, deriva unicamenta dal bisogno di esprimerla nei caratteri che la costituiscono o la rendono punibile agli occhi delle leggi., Trae -illegible word- dunque seco uno pena a parte, che nella sua qualità e nel suo grado viene indi a fissarsi alla base di quella che si ora già prescritto contro i custodi conniventi, diminuendosi bensì di un grado (except where the escape is aggravated, in which case no reduction applies, as we have said)[227].

iv. Assisting a criminal to escape from these Islands

Sec. 155 makes it an offence for any person knowingly to provide the means for effecting an escape from the Island of Malta and its Dependencies whether of a person under arrest or sentence for a crime, or of a person under warrant of arrest for a crime, of a person who has committed a crime although not yet sentenced nor under arrest or warrant of arrest. The punishment for this offence gradually increases according to the gravity of the crime for which the fugitive is punishable as measured by the

[227] Roberti, loc. cit., 858

punishment to which such crime is liable. The word "crime" has been underlined in order to show that this provision does not apply in the case of mere contraventions.

Otherwise, the definition of the offence is clear and does not require any explanation. We will only note that by sec. 157 where the person providing the means for affecting the escape is any one of the near relative of the fugitive mentioned in that section, no punishment is applied.

v. Harbouring of Offenders

In English law the harbouring of offenders constitutes, generally speaking, a form of accession after the fact. An "Accessory after the fact" is one who, knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man accessory after the fact, as, for instance, that he concealed him in his home, or shut the door against his pursuers, until he should have an opportunity of escaping, or supplied him with money, a horse or other necessaries, in order to enable him to escape[228]

We saw last year that our law knows no complicity after the fact. Certain acts which would in English law constitute such complicity are created by our law as substantive independent offences. The harbouring of offenders is precisely one such case. It is an offence against the administration of justice, because it tends to obstruct its course and frustrate the advantages which accrue to the community from the effective prosecution and speedy punishment of offenders.

Section 156 lays down:

Whosoever shall harbour or cause to be harboured any person condemned to death, knowing that such a person was so condemned shall be punished with hard labour or with imprisonment from seven months to one year. Whosoever shall knowingly harbour or shall cause to be harboured any person against whom there exists an order of arrest for any offence liable to the punishment of imprisonment for more than three months or of hard labour for any period of time, or to any more severe punishment, or

[228] V. Archbold, op. cit., paras. 1461 - 1462

in cases where the Executive Police is seeking such individual for the purpose of arresting him for any such offence, or who has escaped from arrest for such offence, shall on conviction be punished with imprisonment form three days to three months."

In the first sub-section concerning the harbouring of a person sentenced to death, the law obviously requires that there should have been a legal conviction and sentence against the harboured offender and that the person harbouring him or causing him to be harboured is aware of such sentence.

In the second sub-section, concerning the harbouring of other persons, there need not have been already a conviction formally pronounced against them, nor indeed need they be at all actually guilty of any offence: it is sufficient if it is known that a warrant of arrest has been issued against them or that they are "wanted" by the Executive police or that they have escaped from arrest, in each case, for an offence liable to hard labour for any time or to imprisonment for a term exceeding three months or to any higher punishment. If these circumstances are known to the person harbouring the fugitive from justice or causing him to be harboured, he will not be exempted from punishment, even though the fugitive may have subsequently proved to be innocent of any offence.

Un danno produce all'ammistrazione della giustizia l'occultare un individuo qualunque che essa' ricerchi, o reo o innoconto che fosse del reato imputatogli".

The fact of such innocence may operate in mitigation of the punishment.

In order that the punishment provided in the second sub-section may apply against the person harbouring or causing to be harboured the fugitive, it is necessary that the offence in respect of which a warrant of arrest was issued against him or for which he was already arrested or is searched for by the Executive Police, be of a certain gravity, i.e., liable at least to hard labour for any time or to imprisonment for more than three months. It is true, as Jameson, pointed out, that the obstruction to public justice and the injury to the public services does not depend entirely upon the gravity of the charge; but, on the other hand, when the offence for which the fugitive is "wanted" is of a trivial nature, and the injury to the community is consequently very small, the law can well afford to forbear from imposing a punishment which would be unjust once it cannot be justified by an indespicable necessity.

Finally, our legislator, out of deference to the laws nature which prescribe above all the duty of solidarity among members of the same family, has introduced a humane exception in favour of near relatives whereby the wife or the husband, the ascendant or descendant, the brother or sister, the father-in-law or the mother-in-law, the son-in-law or daughter-in-law, the uncle or aunt, the nephew or niece, and the brother-in-law or sister-in-law of the fugitive or the person harboured as aforesaid, are exempt from punishment. “This”, Jameson remarked, “is a manifest superiority to the English law on the subject.” In fact in English law the general rule is that except for the wife who on a charge for any offence other than treason or murder, may prove as a good defence that the offence was committed in the presence of, and, under the coercion of the husband, no other relation of persons can excuse the wilful receipt or assistance of felon; A father cannot assist his child, a child his parent, a husband his wife, a brother his brother[229].

General provision

Sec. 150 applies all the provisions of secs 149 - 157 inclusively to the escape of any person lawfully confined from any place appointed for his custody. Cfr. also secs. 12 & 13 of the prison' s ordinance (Cap. 44).

IV. CRIMES AGAINST THE RELIGIOUS SENTIMENT

The provisions contained in this Title (Sections 161-163) were inserted in our Criminal Code by Act No. XXVIII of 1933. Certain provisions to deal with “crimes against Religion” included in the projects of the Criminal Code had, in the form in which they were proposed, been criticised by Andrew Jameson and disapproved by the British Government. As no agreement for revision could be reached with the then Council of Government, the Code was eventually promulgated by an Order-in-Council, with the omission of the provisions in question.

The matter of including provisions of this kind in a Criminal Code is one of some difficulty. On the one hand, there is no doubt that Religion, which is the pillar of all

[229] Cf Archbold, op. cit., para. 1462

human society, ought to be respected and Religious Worship ought to be protected. On the other hand, it is necessary to ensure to all persons have full liberty of conscience and the enjoyment of the free exercise of their respective modes of religious worship.

It is thought that the provisions now contained in the said sections succeed in reconciling these two interests. Naturally, a Criminal Code cannot concern itself with all irreligious acts. Not every sin can be the matter of penal sanction. The state takes account of irreligious or immoral conduct only when it constitutes the infringement of a right (lesione di diritto). It consequently cannot prohibit free and frank discussion or propagation of ideas, doctrines and beliefs, so long as the decencies of controversy are observed. But it must intervene when Religion is publicly reviled or there is interference with the profession and practice of religious faith and worship[230].

Every man has the right to claim respect for all that which constitutes the object of his affection, his care and his hope: and Religion is precisely such an object. An offence made to the religious sentiment of a people or of an individual by an aggressive act must be repressed by the Criminal Law. The legislator is not, thereby, appointing himself a moralist or theologian, nor arrogating to himself any function of vindicating the rights of the Almighty. His sufficient justification is that an offence to the religious sentiment is, in certain circumstances, a violation of a social or individual right sufficiently important as to deserve the protection of that law. As Storkie wrote: To attempt to redress or avenge insults to a supreme and omnipotent Creator would be absurd; but when it is considered that such impieties not only tend to weaken and undermine the very foundation on which the human laws must rest and to dissolve those moral and religious obligations, without the aid of which mere positive laws and penal restraints would be inefficacious but also immediately tend to acts of outrage and violence, being for the most part gross insults to those who believe in the doctrines which are held up to scorn and contempt, they necessarily become an important subject of municipal coercion and restraint". The gravity of the violation and of the offence may vary and consequently have an influence on the degree of punishment: but the basis and justification of the punishment resides alone in the violation of a

[230] Cfr. Crim. App., Police vs Farrugia, 28/10/1946 (Actually this case was concerned with an offence under the Post Office Act); Police vs Bridle and Smedley, 29/1/1949

protected interest. Religion which gives rise to religious sentiment is a legitimate and natural need of humanity and this creates two legal precepts: first; the liberty of conscience of every individual; and second, the right everyone has not to be offended in his religious sentiments or interfered with in the enjoyment of the exercise of his mode of religious worship.

Resting the matter on the said basis, it is not difficult to determine the conditions subject to which an act may be made punishable by the State as violating the religious sentiment (independently of any violation of other interests) without abusing its powers and encroaching on civil liberties.

Such conditions are:

1. The direct intention to vilify the religious sentiment

2. An external act offending such sentiment; and

3. publicity of the act.

1. The intention of the agent must be directed to offend the religious sentiment and consequently Religion whether as faith or as worship. This is the formal element of these crimes, on account of which the act becomes the material of the offence. The public mischief which arises out of the irreligious act postulates the consciousness on the part of the agent of contemning the religious sentiment.

2. If an act against the religious sentiment cannot be punished as an offence except in so far as it injures the right which man has to the respect of the faith professed by him and to his mode of worship, it is clear that only external acts can be the object of punishment: internal acts cannot cause any injury to the rights of others. Freedom of thought and opinions cannot be denied to man by man without incurring into the most intolerable of tyrannies.

3. What has been said regarding internal acts as being incapable of injuring the rights of others, may be repeated in regard to external acts committed in private. Without publicity of the act, there is no public mischief: the public, being unaware of the irreligious act committed in private without having any continuing trace of itself, cannot feel any sense of apprehension or alarm. To drag such acts into the limelight of judicial proceedings would do more harm than good. Moreover, this severe search into

domestic privacy would disturb public tranquillity and open the door to calumny and vexation.

Modern view: Generally, limits the acts of which penal law may properly take cognizance to the following:

1. Publicly vilifying religion

2. Hindering or obstructing religious ceremonies

5. Destroying or mutilating objects devoted to religious worship

4. Molesting or insulting Ministers of Religion

5. Violating monuments or things in place of worship.

Having premised these general and introductory observations we can now deal with the specific provisions of our law.

1. Vilification of Religion

Section 161 lays down:

Whosoever by words, gestures, written matter, whether printed or not, or pictures or by some other visible means, publicly vilifies the Roman Catholic Apostolic Religion which is the Religion of Malta and its Dependencies, or gives offence to the Roman Catholic Apostolic Religion by vilifying those who profess such religion or its ministers, or anything which forms the object of, or is consecrated to, or is necessarily destined for Roman Catholic worship, shall, on conviction, be liable to imprisonment for a term from one to six months".

By Section 162 it is provided that where any of the said acts is committed against any cult tolerated by law, the punishment is imprisonment from one to three months.

The material element of this crime consists in the public vilification, by any of the means mentioned, of Religion directly or by vilifying those who profess it, or the ministers of religion, or anything which forms the object of or is created to or is necessarily destined for worship. The intention of the law here is to protect the religious sentiment in itself, considering it: “come fattore morale per l'individuo e la collettività, e quindi lo tutela non soltanto nelle sue estrinsecazioni esteriori, come esercizio di un

culto o come manifestazione individuale o collettiva dolio fede religiosa, ma anche in ciò che e' l'origino, il fondamento della fede, ossia nella religione in se' e per se'. La religione, invero, ha un contenuto che trascende il patrimonio morale individuale, per assurgere ad intereeoe generale; e', insomma, non tanto un fenomeno attinente alla coscienza individuale, quanto un fenomeno sociale della piu' alta importanza, anche per il raggiungimento dei fini etici dello stato. L'idea religiosa e' una delle idee-forze, dei valori morali e sociali che reggono il mondo". Thus was written in the Ministerial Report on the project of the Italian Code with reference to article 402 corresponding more or less to our Section 161.

The mental element consists in the consciousness and the will to commit the act as an act of vilification; "Basta al dolo la volont di vilipendere […], con la "coscienza della capacità offensiva per la religione "del fatto"[231].

Under the provisions in question the offence is always directed against Religion, i.e., the total of all those principles and beliefs constituting the faith taught by the Religious Authorities. The act may be committed against Religion either directly or by vilifying those who profess it, or its ministers, or the things essentially connected with the cult. But “l'offesa non vuole la presenza del soggetto passive”. Nor where the object of the offence is a minister of religion is it necessary that he shall be at the time in the actual performance of his sacerdotal functions. But it must be emphasised that in every case the law, in these provisions, is concerned not with giving any special or privileged protection to persons or any class of persons, but through such persons, with protecting Religion and the religious sentiment. The 'dolus' of the agent must be to vilify religion not merely the individual against whom the contumely or abuse is directed.

In every case the act is punishable under these provisions only if committed publicly, "perchè il diritto che ha l'uomo a vedere rispectata la propria religione non può essere offeso da atti commessi in privato; per poter dire aggredito il mio culto vi e' bisogno di un fatto esteriore che, manifestandosi ai sensi di molti, porti il culto stesso ad un discredito"[232].

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[231] Sofo Borghese, "Il Cod. Pen. Ital.", 1955, pg. 515, art. 402-403

[232] Carrara, Prog., Parte Speciale Vol VI., para. 8359

Now it will be noticed that, for purposes of punishment, our law distinguishes the case in which the offence is committed against the Catholic Religion from the case in which it is committed against any other cult tolerated by law.

In Malta liberty of conscience and freedom of religious worship is ensured by the Constitution (Sect. 53 of the "Malta (Constitution) Letters Patent, 1947"). But the Religion of Malta is the Catholic Religion. The very first legislative business transacted by our Parliament under the Constitution of 1921 was to pass an Act (Act No. I of 1922, Cap. 79) whereby it was declared that "The Roman Catholic Apostolic Religion is, as it has always been in the past, the Religion of Malta and its Dependencies".

There are those who consider that any such discrimination between the established religion and other faiths is unjustified. "Oggi lo stato non presta "il braccio secolare ad una speciale professione religiosa, "ma tutte le protegge egualmente come naturale espressione della coscienza dei cittadini"[233]. And in fact, in the Italian Code of 1889 the distinction made in previous codes between the Catholic Religion and other cults was abolished. Such distinction was, however, re-introduced in the Italian Code of 1930, also in implementation of the Lateran Treaty Of the 11th February, 1929, between Italy and the Holy See which, in Article 1 declares the Roman Catholic Apostolic Religion to be the only Religion of the State and that "come tale, "e perchè professata dalla stragrande maggioranza degli Italiani, ha diritto a piu' valida tutela giuridica"[234].

As was stated in the course of the debate on the said Act No. XXVIII of 1933, by which Sections 161 to 163 were added to our Criminal Code, these provisions were modelled on articles 402-406 of the present Italian Code, with certain modifications. But apart from precedent, there is a juridical basis for the provision of a more severe punishment where the crime is committed against the religion of the country, in our case the Catholic Religion which is the Religion of Malta.

This particular question was, in his usual masterly fashion, dealt with by Carrara who distinguished three kinds of government which he described as "intolerant", "indifferent", and "tolerant". An intolerant government affords its protection only to the

[233] Maino, op. cit., art. 140, p. 476, 762

[234] V. Borghese, op. cit., p. 515

state religion, which it considers as exclusively dominant. Who could have asked Mohammed - Carrara asks - to protect the religion of the Christians or of the Jews? It may be that, in such a state acts of aggression against other cults are punished as common offences when the circumstances give rise to such offences, as for instance, homicide, arson, theft, etc. But direct protection of the right of worship of the followers of such other cults is inconceivable, indeed inconsistent with the political institutions of such governments.

On the contrary, where the State is ’indifferent’, a difference in the degree of punishment of the offence against religious sentiment conditioned to the diversity of the religion in question is impossible, inasmuch as such a State does not protect any religion as such, but protects all religions merely as expressions of the liberty of conscience of the respective followers, and, consequently, it protects them all equally.

It is only in the penal codes of ’tolerant' governments that a distinction as aforesaid can be found. Such a government recognises one religion only as true, and as a civil institution designates it as the religion of the State: other cults are tolerated only in deference to the liberty of conscience which is also a political principle admitted by it. It can, therefore, consistently, give to the state religion a greater degree of protection: This difference, Carrara goes on to explain, "può coordinarsi anche a un principio meramente e strettamente giuridico: dicendo che nelle società siffattamente costituite l'aggressione contro "il culto dominante e’ complessa mentre quella diretta contro gli altri culti e' semplice nel rapporto della sua giuridica oggettività. E' semplica questa, perchè aggredisce soltanto la libertà dei cultori della religione offesa nella di lei estrinsecazione del sentimento religioso. E' complessa quella, perchè oltre allo aggredire ugualmente nei cittadini che professano il culto dominante la estrinsecazione della propria liberta’ di coscienza, offende eziandio una istituzione dello Stato. Ecco come e quando per quali ragioni possa nel reato di oltraggio al culto tenersi come criterio misuratore nel rapporto del suo danno immediato la diversità del culto aggredito"[235]. Thus, the public interest of protecting the religion of the country is evidently greater than that of protecting other religions merely tolerated by the State.

[235] Carrara, Parte Speciale. Vol. VI, 3312-3320

2. Obstruction of Religious Services

"Whosoever impedes or disturbs the performance of any function, ceremony or religious service of the Roman Catholic Apostolic Religion or of any other religion tolerated by law, which is carried, out with the assistance of a minister of religion or in any place of worship or in any other public place or place open to the public shall, on conviction, be liable to imprisonment for a term not exceeding "one year" (Section 163 (I)).

The punishment is imprisonment from six months to two years if the crime is aggravated by any act amounting to threat or violence against the person.

It must, in the first place, be observed that the distinction between the Catholic Religion and tolerated religions made, for purposes of punishment, in respect of the previous crime of vilification of religion, is not repeated in respect of this crime. On this point our legislator has not followed the Italian model, though otherwise our provision is substantially identical with article 405 of the Italian Code. The reason seems clear. Here it is no longer a question of protecting Religion as a faith and consequently of affording more energetic protection to the Religion of the country which gives life and character to the religious sentiment of the people, but of preventing direct and forcible interference with the right of worship of any person or group, which may also lead to serious breaches of the public peace.

The crime is committed when the performance of the external practice of worship is prevented or hindered from beginning or is interfered with or disturbed in the course of it, as well as when, on account of the fact, the said performance proceeds irregularly. It was held by the Italian Court of Cassation that a disturbance of short duration is sufficient to constitute the crime and even though it has not caused grave commotion or disorder (Riv. pen., II, 599).

The crime is wilful (doloso) inasmuch as the fact must be voluntary: but it is not necessary to prove a specific intent to vilify religion, "perchè l'offesa alla religione inest

rei ipsae, e chi impedisce o turba intenzionalmente funzioni, cerimonie o pratiche religiose non può ignorare di offendere, in tal modo, la religione"[236].

By the express terms of the text, the function, ceremony or service impeded or disturbed must be performed either:

(1) with the assistance of a minister of religion in a place of worship; or

(2) in a place of worship; or

(3) in a public place or in place open to the public

In the first hypothesis, the act is punishable even though it is committed in a private place in regard to functions, ceremonies or services to which intervenes, necessarily or facultatively, a minister of religion, as, e.g., the confession of a sick person, the administration of extreme unction, the blessing of a house, etc. The law requires "the assistance" of a minister of religion and nothing more: so, such assistance may consist in an active participation in the act of worship as well as in mere passive presence, provided the minister of religion intervenes in such capacity and not simply as one of the faithful or spectator. As was explained in the Ministerial Report on the Italian Code (on which, as already mentioned, our provision was modelled), the word "with the assistance" was adopted because that word "mentre esprime il concetto che non basta la semplice presenza del ministro del culto come credente o spettatore, denota così la vera e propria partecipazione attiva, come la semplice direzione, sorveglianza, ecc., esplicate nell'esercizio della qualità di ministro del culto" (II, p. 196).

When the criminal act is committed, wholly or in part, "in a place of worship", i.e., in any place, though private, destined, whether permanently or temporarily, to worship, it constitutes the material element of this crime, notwithstanding that the function, ceremony or service is not performed with the assistance of a minister of religion.

Again, in the third hypothesis, i.e., when the act of the offender is committed in a public place or in a place open to the public, the assistance to the function, ceremony or service of a minister of religion is not necessary. The condition relating to the public place or place open to the public subsists independently of the character and

[236] Manzini, op. cit., Vol VI, p. 54, § 1854. Vide also Ann. di dir. e proc. pen., 904; Giust. pen. 1940, II, 174

destination of such place. For instance, the ward of a civil hospital was held to be a place open to the public for the purposes of this crime: likewise a public office or institution.

V. Crimes Affecting Public Trust

Under this heading our Code comprises

1. Coinage Offences

2. Forgery of Government Debentures, Securities, Acts of the Authorities, Public Seals and Stamps; 3. Forgery of other Public or Private Writings.

1. Coinage Offences

It may not be out of place to mention how the falsification of money was in times past considered a species of the "Crimen Laesae Majestatis". By a law of the Emperor Constantine, false coiners were declared guilty of high treason and were condemned to be burnt alive: so also by the laws of Athens all counterfeiters, debasers of the current coin, were subjected to capital punishment. In England, by the Statute 25 Edw, III, the counterfeiting of the gold and silver coins of the Kingdom and importing such counterfeit money with intent to utter, knowing it to be false, were made treason, and as this was not found sufficient to restrain the evil practice of coiners and false moneyers, so other statutes were made for the purpose.

"The crime itself", says Blackstone, "was made a species of high treason as being a breach of allegiance, infringing the King's prerogatives, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the State by contributing to render that public faith suspected. However, it must be owned", Blackstone goes on to say, "that this method of reasoning is a little overstrained, counterfeiting or debasing the coin being usually practised, rather for the sake of private and unlawful lucre, than out of any dissatisfaction to the sovereign. And there- fore both this and its kindred species of treason, that is of

counterfeiting the Seals of the Crown or other Royal Signatories, seem better denominated by the latter Civilians a branch of the "crimen falsi" or forgery".

The present English law on the subject of coinage offences is contained in the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99).

In our law, as in the host modern continental Codes, coinage offences are classed among the crimes affecting Public Trust;

Siccome quello che gettando il discredito sulla sincerità delle monete, genera diffidenza nel pubblico mercato ed impedisco o perturba le operazioni commerciali" (Relazione Ministeriale on the Italian Project of 1887, et CXVIII).

The following are the offences dealt with in our Code:

A - Counterfeiting of coin

This crime exists in each of the following three cases: -

1. When gold or silver coins legally current in these Islands are counterfeited or lightened or impaired (Section 164)

2. When copper coins similarly current are counterfeited (Section 166)

3. When gold or silver coins not legally current in these Islands are counterfeited or lightened or impaired for the purpose of circulating the same in these Islands or elsewhere (Section 169 (1)).

The falsification of coins can, therefore, be committed in two ways, i.e., by <u>counterfeiting</u> or by <u>altering</u>. The counterfeiting of coin consists in the fabrication of one of these pieces of metal to which the Public Authority has given the privilege of representing an established value and which are receivable in payment. The natural characteristic of counterfeiting is the <u>imitation</u> of the genuine coin. In other words, the false money must be of the type and be made to resemble the genuine coin, by bearing those figures and those indications which distinguish such coins as money end make them as such receivable or capable of being received by the public. On the other hand,

however, it is not to be supposed that the imitation must be exact, complete and indistinguishable: it is sufficient if it be such as to be capable of deceiving. Roberti, commenting on a provision of the Neapolitan Code, from which the provision of our Code was drawn, says:

"Trattandosi di contraffacimento la legge non distingue punto la maggiore dalla minoro somiglianza tra le monete false e le monete vere, ma si contenta inveoe di vedere contrafatta una moneta qualunque, di vederla, cioè, fornata ad una qualunque somiglianza colla vera, per punire l'autore quando anche non sia riuscito ad imitarla perfettamente. Esistendo sempre la possibilità dell'inganno nel contraffacimento in disamo vi esiste parimenti il soggetto della pena a senso della legge"[237].

In the English Coinage Offences Act it is expressly laid down that the offence of counterfeiting is to he deemed complete although the counterfeiting of the coin is not finished or perfected. Indeed, in that Act, the offence is deemed complete even if the coin made or counterfeited is not in a fit state to be uttered. This is in contrast with the continental doctrine according to which, although, as we have said, it is not necessary that the resemblance of the genuine coins should be perfect, yet in order to constitute the complete crime of counterfeiting it is essential that the coins should be in a fit state to be uttered ('spendibile'):

"Perchè sorga il reato di falso nummario, la moneta contraffatta o alterata deve essere spendibile"[238].

The interest which the law seeks to protect in creating this crime is, as we have seen, the public faith, inasmuch as counterfeit or altered coins engender mistrust in the public market and hinder or disturb commercial transactions. It is, therefore, necessary, as Carrara says, that the public faith can be exposed to suffer injury by this fact; in other words, it is necessary that the money may be put into circulation: if this possibility is absent, there will only remain a perverse intention manifested by insufficient acts and the public aspect of the crime fails (Prog., Parte Spec., VII, para. 3548). So that, if the counterfeiting is so imperfect or so clumsy and evident that the money cannot possibly be uttered, the crime cannot arise:

[237] Vol. VI, pg. 220, para. 897

[238] Maino, op. cit., para. 1268

"E però può ritenersi come regola inalterabile e costante che se, in generale, l'imperfezione della imitazione non e' una causa legale di scusa [...] nondimeno, quando essa giunge a tal grado di grossolanità e di evidenza che il commercio della circolazione non possa sentire alcun danno, allora il reato svanisce: i pezzi fabbricati non possono essere piu' considerati come noneté false, perchè' non hanno ne' l'apparenza ne' i tipi delle monete imitate: il principale elemento del reato non sussiste"[239].

Some writers hold that even the fact that the money may have been actually uttered is not necessarily in itself a conclusive proof that it satisfies the requirements of "spendibilità"'. The interest protected by the law in repressing this crime - they insist - is public faith and not the pecuniary interest of any particular individual. The fact that a false coin which could not have deceived and cheated the most elementary care may have been received as good money, may be sufficient for constituting a fraud to the detriment of the foolish or careless person who received it: but that fact cannot supply the deficiency of the material element, which is necessary to constitute the crime against public trust[240].

It is not certain how far our Courts would be prepared to accept the view that though the false coin has in fact been uttered, this is not conclusive evidence of its potentiality of circulation. In fact, we shall see in dealing with the crime of forgery of documents - which are also crimes against the public trust - that, according to our case law, although there cannot be the crime of forgery unless there is a potentiality of the document deceiving (not even this is necessary when the document forged is a public document) still where the forgery has, in point of fact effected the deceit intended by the forger it is no longer material to enquire whether the manner of executing forgery was such as to create the possibility of prejudice[241].

The altering may consist in "lightening or impairing the coins". The old Italian text said, like its model the Neapolitan Code, "alterare il peso o la bontà". In England also, under Section 4 of the Act aforequoted, it is a felony to "impair, diminish or lighten any of the

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[239] Chauveau-Helie, op. cit., Vol. I, P. II, p. 167, n. 582

[240] V. Maino, loc. cit., where he quotes also Carrara op. cit., para. 5546 et seq.; Pessina 'Cod. pen. tose, ill.', TV, p. 32

[241] Cfr. Harding, op. cit., paras. 50, 26, 19

King’s gold or silver coin with intent that the coin so impaired, diminished or lightened may pass for the King? s current gold or silver coin". The impairing or lightening may be by clipping, filing or other process intended to take away part of the metal or reduce the weight or degree of purity or standard of metal.

Among continental writers the question is discussed whether the altering of genuine coins so as to give, them the appearance of coins of a blether denomination constitutes an "altering" of the coins of lower denominations or a "counterfeiting” of the coins of a higher denomination which it was sought to imitate.

Carrara says:

"Dove l’alterazione consiste nel dare alla moneta di valore inferiore apparenza di altra moneta di valore superiore/si avrà la contraffazione e non l’alterazione perchè il delitto non consiste qui nel diminuire il valore intrineico della moneta inferiore ma nel simulare il valore ebtrinsico della moneta superiore. Non e' reato in quanto siasi alterato il modo dì essere di una moneta sincera ma in quanto si e' cercato/col darle apparenza di un modo diverso dal vero di creare, e porre in circolo una moneta falsa"[242].

The same writer goes on: "Tanto fabbrica un Napoleone falso chi lo costruisce con una lamina greggia, quanto chi lo costruisce servendosi di un franco d’argento ...E quando daluno si - illegible - non dirà gia di aver patito danno perchè gli e' stato imposto un franco alterato, ma di aver patito danno perchè gli e' stato imposto un Napoleone falso"[243].

The same solution applies, other writers say, where the alteration consists in the colouring, gilding, silvering, etc., of coins to make them resemble and pass for other coins of a higher denomination: as, e.g., silvering copper coin to make it pass for silver coin[244].

In English law, the matter is put beyond doubt by the said Coinage Offences Act under which the expression “false or counterfeit" coin resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, includes any of the current coin which shall have been gilt, silvered, washed, coloured or cased over, or

[242] Op. cit., para. 3523

[243] Ibid.

[244] Cfr. Roberti, op. cit., Vol. VI, p. 218, n. 14; Chauveau-Helie, Vol. II, p. 582

in any manner altered so as to resemble or be apparently intended to resemble or pass for, any of the King's current coin of a higher denomination.

Now, these two species of falsification, i.e., the counterfeiting and the altering (lightening or impairing are not common to every kind of coin. Our law speaks of them both with regard to gold or silver coins (Sections 164, 169 (l)) but speaks only of counterfeiting copper coins. The reason for this difference was that while the lightening or impairing, as by filing or clipping, gold or silver coins might yield some profit to the forger, because even a small quantity of such metal had always some value in itself, to do the same thing with copper coins was not considered to offer inducement to the forger, because the small portions of such metal that could be taken away from the coins would have no appreciable value and would not even pay the forger for his trouble and work. Such alteration, therefore, did not deserve to be provided for by the legislator as a species of forgery not likely to happen: “Quod perraro accidit praetereunt legislatores".

Also, for the purposes of punishment, the law makes a distinction between the counterfeiting or altering of gold or silver coins lawfully current in these Islands and the counterfeiting of copper coins so current. These latter are not used except for transactions of small amounts and the injury that can therefore arise is not of the same gravity as that which can be feared from the falsity of the other coin. Moreover, as the gain which the forger can hope for in counterfeiting copper coins is by far less substantial than that which he expects in falsifying a gold or silver coin, a higher punishment is required to restrain the latter than the former.

Another distinction which our law raises for the purpose of punishment is whether the crime of counterfeiting or altering gold or silver coins, or counterfeiting copper coins, in either case, lawfully current in these Islands, is committed by a private person or "by any public officer or servant who by virtue of his office is charged with the receipt or issue of coins. In the latter case, the ordinary punishment is increased by one degree”. The abuse of office and the special breach of trust clearly aggravate the criminality of the act.

A third distinction is made between the case in which the falsification of gold and silver coin refers to money lawfully current in these Islands and the case in which the money is not so lawfully current. Other codes do not make any such distinction but give the

same treatment to foreign money as they give to the money of the State. Thus, with reference to the Italian Code of 1889 it is stated:

"Il codice non fa distinguere tra monete nazionali e le monete straniere, perchè come ebbe ad osservare la commissione della Camera Elettiva sul progetto del 1887 il mondo e' un sol mercato: le monete servono agli scambi, i quali non sono soltanto interni, ma esterni e questi non hanno minore importanza dei primi, perchè' servono a svilupparli e mantenerli"[245].

Our Code, however, makes the following distinction:

(i) It provides no punishment at all for the counterfeiting or altering of foreign cooper coins

(ii) It punishes the counterfeiting or altering of foreign gold or silver coins with a much smaller punishment than the counterfeiting or altering of gold or silver coins lawfully current in these Islands.

Another distinction would seem to emerge from the different wording of Section 169 (l) as compared with that of Sections 164 and 165. With regard to the counterfeiting or altering of coins not lawfully current in these Islands, the said Section 169 (l) expressly requires, in order that the crime may subsist, that the purpose of the offender be that of circulating the same in these Islands or elsewhere. No express mention of any such purpose is made in the said Sections 164 and 165 in regard to the counterfeiting or altering of gold or silver coins or the counterfeiting of copper coins lawfully current in these Islands.

The very important question, therefore, arises as to whether the said purpose is an essential element of the crime even in the case of falsification of coin being legal tender in these Islands. Chaveau-Helie say:

"The criminal intent is an essential element of every crime. If a person has counterfeited a coin, without any intention of uttering it, but only for a purely artistic purpose, he will not be guilty of any offence".

[245] Vide Maino, op. cit., art. 256, para. 1263

"In materia di falsa moneta la reità si rivela dalla emissione del prezzo falso e dalla prova che questa emissione e' stata lo scopo del contrafattore"[246].

In Italian doctrine this mental element is considered necessary in all cases. In the Messina project of 1883, the intent of putting the counterfeit or altered coins into circulation was expressly required.

"La scienza" - it was said in the Ministerial Report on that project - ''non dubita di porre questo fine come condizione per aversi il falso nummario[247], mettendo in luce le conseguenze esorbitanti a cui e potrebbe venire con un concetto diverso come, per esempio, di punire colui che tosasse o limasse una moneta senza nessuna intenzione di spenderla, ma per usare di parte del metallo di cui e' composta, o che per uno scopo affatto diverso dallo spendere, come, per completare una collezione, imitasse una moneta d'altro "valore".

But the addition proposed by Pessina was not accepted in the Italian Code. It was considered dangerous as implying that the falsification was not sufficient to incriminate the fact, that it was necessary to prove on the part of the agent the intention of putting the coin into circulation.

"Such intention" - it was said in the report on the project of 1887 - "is inherent in the fact of the falsification of the money, as in general, in all crimes of forgery in respect of which the maxim applies ‘res ipse in se dolum habet'. In order that the forger "may remove from himself criminal responsibility the circumstances must show in the clearest manner proof of the fact, very rare to be sure, that the counterfeiting of the money was done for mere artistic pleasure or for the satisfaction of some other legitimate purpose".

In view explanation Maino words proposed by Code, the Italian of the last part of this official argues that, although the express Pessina were not incorporated in the legislator did not intend to depart from the doctrinal principle that the intentional element was requisite to constitute this crime:

[246] Chaveau et Helie, Vol. I, P. II, p. 166, n. 581

[247] Carrara, Programma, Parte Speciale, Vol. VII., para. 3529

"Il legislatore non fece altro che constatare 'una presunzione di fatto, la quale e' nel corso ordinnario delle cose: ma lascio' libera la dimostrazione "del contrario"[248].

If we accept this reasoning with regard to our law as, it is submitted, we might, the conclusion would be that the difference in the wording of Section 169 (l) as contrasted with that of Sections 164 and 165, merely alters the burden of proof: its effect being in the case of the counterfeiting or altering of foreign coins, to throw on the Prosecution the obligation of proving the requisite specific intention by further evidence that the mere inference from the criminal act itself, which in the case of counterfeiting or altering of coins being lawfully current in these Islands is ordinarily sufficient to prove it.

In conclusion, coins 'lawfully current' in these Islands means coins which are legal tender herein, that is, the currency of which is imposed by the law so that none can refuse to receive them in payment (within the amount prescribed in certain cases by the law) according to their established value. Section 352 (k) of the Criminal Code makes it a contravention "to refuse to "receive at the established value any money lawfully "current". As to which money is lawfully current, cfr. Order in Council of 13.11.1850 (Govt. Gazette, No. 1707 of 1851); Order in Council of 24.9.1886.

B - Introducing or Uttering False

The act of introducing or importing false coins into these Islands or of uttering or of putting off such coins, thus constituted an offence which is separate and distinct from the offence of falsifying coins. It may be that the importer or utterer is the forger himself: in which case, according to the principle laid down by H.M.'s Criminal Court in "Rex vs Simler et." (11.3.1921), which has since been followed in several other judgments, he would be guilty of two distinct offences, although for purposes of punishment section 19 (b) or (h) may, according to the circumstances, apply. The prevalent Italian doctrine and jurisprudence is in the sense that the forger of money is answerable for one offence even when he is at the same time the utterer of the false money[249]. Where the person importing or putting off the coin is other than the forger, certain codes (e.g., the

[248] Op. cit., art. 256, para 1267

[249] Maino, op. cit., art. 256, para 1269; vide also Rex vs Riccardo Bonnici, 20/11/1912 and Rex vs Giuseppe Grech, 11/5/1912

French Code) consider him in all cases as an "accomplice" of the forger and deal with him accordingly[250]. Other Codes (e.g., the Italian Code of 1889) distinguished between the case in which the person importing or uttering or putting off the false coin acted in concert with the forger (art. 256 (2) of that Code) and the case in which he acted without such concert (art. 258); in the former case he was liable to the same punishment as the forger; in the latter, to a lesser punishment.

Our law does not either consider the importer or utterer as an accomplice of the forger, for it may well happen that there was no concert at all between them: or make any such express distinction as the Italian Code. It considers in all cases the person introducing or uttering or putting off the false coin as guilty of an independent offence and, generally, makes him liable to the same punishment as is prescribed against the forger. In fact, by Sections 167 and 168, any person who maliciously introduces or utters any counterfeit or debased gold or silver coin, or any counterfeit copper coins lawfully current in these Islands, is liable to the same punishment as is established against the person counterfeiting or debasing such gold or silver coins (Section 164), or counterfeiting such copper coins (Sect. 165) respectively; and by Section 169 (2), any person who maliciously puts off or introduces for the purpose of putting off any counterfeit or debased gold or silver coin not lawfully current in these Islands is liable to the punishment as is established in subsection (1) of that Section against the person who counterfeits or debases such coin for the purpose of putting them off in these Islands or elsewhere.

By these provisions the law intends to protect the public from the ultimate consummation of that criminal design towards which the falsification was the first step. Although the fact of the importation like the fact of the falsification is but a preparatory act towards another offence, i.e., that of uttering, it is right that the legislator should constitute it as a complete offence in itself:

"Giacchè essa equivale a trasportare nello stato la fabbricazione della moneta falsa. In verità la contraffazione o l'alterazione hanno bisogno di ulteriori azioni delittuose che si concretano nelle importazione, spendita o diffusione di monete falsificate, perchè sia conseguito lo scopo dei falsificatori e sia il fatto delittuoso della

[250] Vide Chaveau-Helie, loc. cit., p. 172. para. 589

falsificazione portato alle ultime sue conseguenze col danno sicuro della pubblica e privata economia"[251].

The act, therefore, which constitutes the material element of the offence we are discussing is the introduction or the uttering or the putting off. There is "introduction" so soon as the false money is brought or imported into these Islands. To "put off" is to put into circulation in any number whatever and by whatever title, onerous or gratuitous. The word "utter" in the English text of our law stands for the word "spendere" in the old Italian text: in the Maltese text it is "jonfoq". In Italian jurisprudence it is not well settled what constitutes an actual "spendita", in other words, whether the offence is complete by the mere "tender" of the false coin or whether it is necessary that the coin so tendered should be "accepted" as good. Maino prefers the latter alternative; So does Lombardi who says: "La seconda ipotesi e' costituita dalla spendere le monete per qualsiasi corrispetto e con qualsiasi modo facendole accettare per genuine da colui che viene ingannato. Il delitto e' quindi consumato anche se "poco dopo l'ingannato si accorga dell'inganno e restituisce le false monete avendo in cambio le buone. Se, viceversa, manca l'inganno può aversi solo un delitto "tentato"[252].

In England, however, it was held that:

"It is an 'uttering and putting off' as well as a 'tendering' if the counterfeit coin is offered in payment, though it is refused by the person to whom it is offered"[253].

The formal element of the crime consists in the "malice" of the agent, i.e., in his knowledge of the falsity of the coin. Where the 'actus reus' consists in the "importation" of false coins, Sections 167 and 168, which concern coin being legal tender in these Islands, do not expressly require, as does Section 169 (2) which concerns foreign coin, "the purpose of uttering or putting off". This notwithstanding, we repeat here what we have already submitted with reference to the offence of counterfeiting or altering where in Sections 164 and 165 and Section 169 (I) there is the same difference of wording: that the specific purpose is requisite in both cases[254]; only, with regard to coins lawfully

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[251] Lombardi, Dei delitti contro la Fede Pubblica, pg. 42

[252] Op. cit., in Trattato di Diritto Penale, Vol. VII, pg. 44

[253] Cfr. Archbold, op. cit., p. 1126

[254] Vide Pincherle "Manuale di Diritto Penale", pg. 248

current in these Islands, the law infers this specific purpose from the act Itself subject to the accused negativing that presumption whereas with regard to coins not so lawfully current, the Prosecution must prove this specific purpose by further evidence than the mere inference from the criminal act itself.

Where the 'actus reus' consist in uttering or putting off the false coin, Section 170 makes an important distinction. We have said that our law subjects the person maliciously uttering or putting off the false coin to the same punishments as are prescribed against the counterfeiter. But in order that these punishments may apply against such person it is necessary to prove that he received the coin which he uttered or put off knowing the same to be false. Where it is not proved that such person received the counterfeit or debased coins knowing them to be false but it is proved that he knew the coins to be counterfeit or debased at the time of putting them again into circulation, he is only liable to imprisonment for a term from one to three months or to a fine (multa) and, in a minor case, the Court may apply any of the punishments established for contraventions. There is no doubt that the act of a man who, having originally received a false coin in good faith without detecting the falsity, puts it off again is blameworthy and illegal; but it is clearly very much less blameworthy than the act of a man who originally received the coin knowing it to be false, - "e la legge deve compatire la sua condizione e non vedere in lui che un disgraziato, il quale cerca di far cadere su la generalità la perdita onde era esso stesso minacciato"[255]. As Roberti puts it, in such case the delinquent is not moved by any desire of unlawful gain: "egli non e' mosso che dal fine di rifondere su gli altri quel danno del quale egli e' stato già vittima innocente"[256].

C - Possession of Counterfeit or Debased Coins

Neither the French nor the Neapolitan Code contemplated the offence of "possession" of counterfeit coins as an offence in itself independently of any connection with the offence of counterfeiting or of any actual or attempted uttering.

[255] Chaveau-Helie, op. cit., Vol. I, p. II, p. 173, n. 591

[256] Op. cit., Vol. VI, p. 228, n. 905

In the elaboration of the Italian Code of 1889 the necessity or otherwise of making special provision concerning the offence of possession was considered.

"Mi era proposto il dubbio", it is stated in the Ministerial Report on the final draft, "se per completare la serie di quoti delitti (i. e., delitti di falso nummario) si dovesse prevedere il fatto di chi e' trovato in possesso di monete […] contraffatte o alterate, sebbene non tia colto, come non e' facile accada, nell'atto di spenderla".

He came to the conclusion that such special provision was not necessary, as the case could be covered by the general provision relating to the offence of "receiving". This, however, does not apply in our law under which the receiving is punishable as an offence 'per se' where the thing received derives from any of the crimes mentioned in (a), (b) or (c) of Sect. 348 only[257].

A special provision was, instead, contained in the English Coinage Offences Act, 1861, Section 11 whereof made it a misdemeanour in England for anyone having in his possession or custody three or more pieces of false or counterfeit coins resembling or apparently intended to resemble or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit and with intent to utter or put off the same or any of them. Section 15 made a similar provision with regard to British Copper coin and Section 23 with regard to foreign coin.

The analogous provision of our Code was introduced in 1909 (Section 8 of Ordinance VIII of 1909). In introducing the Bill in the then Council of Government, the Crown Advocate (Sir v. Frendo Azzopardi) said:

"There is one case not provided for in our law with regard to which I now propose to make some addition. I refer to the case of persons who are found in possession of counterfeit or debased coin under circumstances evidencing their intent to utter such coins .... It is the only provision that is wanting in our Criminal Laws in the matter of Coinage Offences. If any of the members of this Council will compare our law with either the Italian Code or the English Statute of 1861 or with other laws on Coinage offences, he will readily see that our laws are not in any way inferior to these laws, and

[257] L. Rep., XXXV, P. IV, p. 1016

when the new clause will be included in our Code, the law will be as complete as any other law of the kind"[258].

The added provision is now Section 171 which lays down as follows:

"The punishment mentioned in sub-section (1) or sub-section (2) as the case may be, of the last preceding section diminished by one degree shall be applied to <u>any person who is "found in possession of five or more counterfeit or debased coins in the case of silver coins or of three or more in the case of gold coins, if it is proved that the offender was in possession thereof with intent to utter or put off the name</u>".

It will be observed in the first place that this provision does not mention "copper" coins: which means that the possession of false copper coins, whatever the number or the intent of the possessor, does not in itself constitute the offence.

In the second place, the provision implies a distinction between the case in which the false coins possessed were originally acquired by the possessor in bad faith, i.e., with the knowledge that they were false and the case in which they were originally acquired in good faith, i.e., without such knowledge. In either case, the punishments prescribed respectively against the person uttering or putting off counterfeit or debased coins according as to whether he knew them to be false when he acquired them or became aware of such falsity only afterwards, are diminished by one degree. Obviously, there is less criminality in the mere fact of "possession" than there is in the actual uttering or putting off false coins.

The material element of the crime consists in the <u>actual</u> possession of, at least, five counterfeit or debased silver coins or three counterfeit or debased gold coins. It makes no difference, except for purposes of punishment, whether the coins resembled or were intended to resemble or pass for coins being legal tender in these Islands or foreign coins. Under the Coinage Offences Act, the coin is deemed to be in the "custody or possession" of the offender if he has them in his personal custody or possession, or knowingly or wilfully has them in the actual custody or possession of any other person, or knowingly or wilfully has them in any dwelling-house or other building, lodging, apartment, field or other place, open or enclosed, whether belonging

[258] Debates, Vol. XXXIII, c. 146-147

to or occupied by himself or not and whether they be had for his own use or benefit, of for that of another (Section I).

The formal element of the crime consists in the defendant's knowledge, at the time he is found in possession, that the coin was counterfeit or debased and his intent to utter it or put it off. These, of course, can only be proved by circumstances: as, for instance, by evidence of former utterings[259]; or by the fact of the defendant's having in his possession a large quantity of counterfeit coin of like date, and made in the same mould, wrapped up in separate papers, and distributed in different pockets of his dress[260].

Finally, in Rex vs Simler et. already quoted, the point was discussed whether the "possession" and the "uttering" constituted one single offence or two separate offences. The Court made a distinction:

"Il possesso e lo spendimento simultaneo di false monete offrono un altro esempio di concorso di delitti materialmente inseparabili nel senso che non si può spendere false monete senza possederle, e quindi il colpevole ujl spaccio non può allo stesso tempo essere accusato di aver posseduto la moneta spesa. Ma quando il delinquente ha già consumato il delitto di spaccio e si trova in possesso di false monete preordinate a futuri spacci non si può ritenere che tra lo spaccio già consumato ed il possesso inteso a futuri spendimenti vi sia un nesso di mezzo a fine: e in tal caso non solo il possesso di false monete e lo spaccio già consumato non costituiscono due reati inseparabili, ira so n nel fatto separati e indipendenti l'uno dell'altro, perchè si avrebbe da una parte uno spendimento già consumato e dell' altra un possesso di false monete preordinate

[259] Although in criminal proceedings evidence tending to prove the bad character of the accused is not as a rule admissible, the rule is relaxed when the evidence is intended to prove the 'animus' or guilty knowledge of the prisoner[259]; "Evidence as to 'animus' or "intent is frequently admissible in criminal proceedings, even though it tends to show that the "accused has become guilty of criminal acts other "than those with which he is charged" (Taylor, 'On Evidence', Vol. I, p. 278).

[260] Cfr. Archbold, op. cit., p. 1131

ad un futuro spendimento che il delinquente non ebbe tempo di commettere a causa di sua cattura"[261].[262]

D - Making or Keening Coinage Tools

We saw last year that thoughts which merely prepare the way for the commission of an offence do not constitute an "attempt" when they are not followed by a commencement of the execution of the offence: such acts may be created as an offence in themselves and be therefore subjected to a special punishment.

Now, on the one hand, the just preoccupation of the law of preventing a grave offence and, on the other hand, the necessity of repressing those acts which independently of any future execution of it, present in themselves a certain completed injury of the rights of the State and the public and show a clear intention on the part of the agent of perpetrating another even greater injury, have given rise to the necessity of creating as a special offence the unlawful making or possessing of dies or instruments or machines exclusively intended for coining. Section 172(1) lays down:

"Whosoever, without the special permission of the Government, makes or knowingly keeps in his possession any die or other instrument or machine exclusively intended for coining shall, on conviction, be liable to hard labour for a term from thirteen months to two years".

The important thing to notice in connection with this provision in that, in order that the crime racy subsist, the dies or other instruments or machine made or knowingly kept by the defendant, must be exclusively intended for coining. If such tools can also, at the same time, be put to some other use, "mancherebbe ongi soggetto di punizione, poiché non si avrebbe un doto oho volesse e palesare, senza lascia dubbio alcuno, la determinazione precisa del celinquente di commettere quel falso che la legge unicamente mira a prevenire, ne' si avrebbe d'altronde quelle offesa che mira a reprimere la usurpazione del diritto annesso alla sovranità, quale' quella di coniare le pubbliche monete"[263]. The adverb “exclusively" removes every doubt as to the use for

[261] Law Reports, Vol. XXIV, Po IV, p. 917

[262] But vide Rex vs Giuseppe Grech, 11/6/1912; and Rex vs Riccardi Bonnici, 22.11.1912, which appear to conflict with this doctrine.

[263] Roberti, op. cit., Vol. VI, p. 233, n. 911

which the tools must serve and makes clear, precise and certain the notion of the offence here contemplated[264]. The Italian Court of Cassation held several times that if the instruments are not exclusively adapted for the falsification of coin, but are adapted for other uses also, the corresponding provision of the Italian Code does not apply, even though the possessor kept the same for the purpose of counterfeiting coin[265].

But the fact that the dies, instruments or machines are not entirely fit for making coins or things which might easily be passed for coins does not necessarily mean that the person making or knowingly possessing such tools will be exempt from all punishment. If they are fit for making impressions similar to those of coins or pieces of metal of the dimensions corresponding to those of coin, whether on both sides or on one side only, the offender is liable to imprisonment for a term not exceeding three months or to a fine (multa) (Section 172 (2)).

It is finally to be noted that in these provisions the law speaks generally of "coining" and "coins". It makes no distinction between gold or silver or copper coins, nor between coins legally current in the Islands and other coins.

General Provisions

Any person guilty of the coinage offences above described is exempted from punishment if, before the completion of the offence and previously to any proceedings, he gives the first information thereof and reveals the offender to the competent authorities (Section 173).

We have already met with similar provisions in dealing with crimes against the safety of the Government, and for the justification thereof and its general interpretation we will make reference to what we then said. But there is one point in connection with this provision which requires careful consideration. The impunity is granted in respect of any of the coinage offences contemplated in our Code, provided the disclosure of the offence and the offender is made before the completion of the offence. It is essential, therefore, to enquire when each of such offences can be said to be completed. The

[264] Maino, art. 260, para. 1276

[265] Maino, ibid.

answer is given by Roberti in his comments on article 271 of the Neapolitan Code which is identical with our section as follows:

"On the one hand, there is no doubt that the falsification of coin constitutes in the eye of the law a completed crime so soon as the counterfeiting or altering of the coin is completed; likewise there is a completed crime in the introduction in the kingdom of counterfeit or altered coin, although in neither case the false money has yet been uttered or put off: finally, there is a completed crime in the making of dies or other instruments exclusively intended for counterfeiting coin, independently of the counterfeiting or the uttering thereof. But, on the other hand, it is no less undoubted that, as regards the purpose of the offender in all the said crimes, they cannot be considered as complete except when he has obtained that gain which he expected, that is, when he has actually uttered or put off the false money.

Now, it is of the latter completion, we think, that the law intends to speak in article 271. And, indeed, the object of the legislator could not certainly have been other than that of preventing the false money from being put into circulation: and as this can be achieved by the disclosure which perchance is made by any of the principals or accomplices in the falsification, so by the promise of impunity the law invites the offenders to make such disclosure, making it profitable for them to repent after may be the completion of the offence, but before any real mis- chief has been done to the community and, therefore, in time to prevent such mischief. If it were otherwise, the provision of the article which we comment would be utterly idle and also useless. Idle because if the impunity which the law promises were to be restricted to the case in which the disclosure is made before the falsification is done, there would be no need to resort to article 271, inasmuch as the same impunity would accrue by virtue of the rules of attempts remaining without effect owing to the voluntary desistance of the offender; useless, because if the disclosure made after the execution of the falsification, although prior to the uttering, did not avail to exempt the offender from the punishment for the falsification, there would be no case in which the law would attain its object which is that of presenting the false coin from being put into circulation, for there would be no one among the offenders who would come forward to disclose, thereby offering evidence of his own crime and subjecting himself, at the same time, to its punishment.

"Safe, therefore, remaining the principle that, as far as regards the application of punishment, the crimes in question must be considered complete as soon as all the ingredients concur which are required by their definition, it must be agreed that the provision of article 271 makes an exception to this principle so far as regards the impunity of the offender who voluntarily comes forward to disclose them; and that, in consequence, such disclosure avails him provided always he makes it before each of the said crimes is fully completed by the achievement of the purpose at which the offender aimed in committing them. It will, therefore, avail the forger if he discloses before uttering any of the coins counterfeited or altered. It will avail the importer of false coin, if he discloses before putting any of them into circulation. It will, in fine, avail the person making the dies or other instruments exclusively intended for coining, if he discloses before falsifying the coin, and even after he has made such falsification but before putting it off in which precisely consists of the stage at which he will have reached his intent. It may appear, one must admit, that this interpretation hardly fits the letter of the law: but it undoubtedly corresponds to its spirit, and it is the only interpretation calculated to make that the prevision of the law will not be useless. Moreover, this is not a case of restrictive provision in which no arguments for extending its purport would avail: it is a case of an indulgence or benefit which the law gives and this consideration contributes still more to make our interpretation acceptable in all its extent, or at least, to make us hope that in any amendment of the laws in force the opportunity will be taken of so rewording the said article 271 as to leave no room for doubt or ambiguity as to its meaning in the sense we have given to it"[266].

The corresponding provision of the Italian Code of 1889 (article 332) was clear in the sense of the view propounded by Roberti: it exempted from punishment the person guilty of falsifying coin before the completion of the crime, or even only before any uttering of false coin was made, gave information to the authorities. Article 262 of the Italian Code of 1889 gives impunity to the person guilty of any coinage offences if he succeeds, before the authorities have notice of the offence, in preventing the counterfeiting, the altering, or the putting off of the counterfeit or altered coin.

Paper Currency

[266] Op. cit., Vol. VI, pp. 242-244, para. 927-928

The provisions of the Criminal Code we have above considered deal only with metal coins; paper currency is covered by three Ordinances now in force.

The Treasury Notes Ordinance (Ord. V of 1915, Cap. 66 of the Revised Edition)

The Bank of England Notes Ordinance (Ord. I of 1929, Cap. 100)

The Currency Notes Ordinance (Ord. I of 1949).

The first two Ordinances concern paper currency issued in the United Kingdom and made current in these Islands, the third Ordinance concerns paper currency issued locally. The Treasury Notes Ordinance and the Paper Currency Ordinance provide that the notes mentioned or issued under those Ordinances respectively shall for the purpose of the Criminal Code, be deemed to be gold coins legally current in the Islands. The Bank of England Notes Ordinance likewise provides that the notes therein mentioned shall to all intents and purposes of the Criminal Code be deemed to be coins within the meaning of Section 164 and to be gold coins within the meaning of the offence under Section 171, and both Ordinances lay down that the punishments prescribed in the said Code in respect of coinage offences shall be applied with an increase of from two to three degrees to those offences when committed in respect of the notes mentioned in those Ordinances respectively: Provided that such increase shall be of one degree only where the forgery is easily perceptible.

The proviso requires some explanation. A similar provision existed in the Italian Code of 1889. Article 259 laid down:

"Le pene stabilite negli articoli precedenti sono diminuite da un sesto ad un terzo, se la falsità sia facilmenate riconoscibile".

It may appear that this provision Contradicts the statement we have made in dealing with the coinage offences under the Criminal Code, that in order that the complete offence of counterfeiting or altering may subsist, it is necessary (at any rate, according to continental doctrine) that the false money be fit to be uttered ('spendibile') or, in other words, that it be likely to deceive by passing for or being accepted as genuine. It may appear that in respect of paper currency, in view of this provision Of the said Ordinances, the said ingredient is not necessary so much so that a punishment is imposed even if the falsity be easily perceptible.

But, according to the commentators of the Italian Code, such a provision, rather than showing that the said requirement is not necessary, confirms that necessity. The said provision was clearly inserted to reduce the cases of impunity. Without it, magistrates and juries would feel inclined to acquit whenever the falsity was easily observable. By reason of it the cases of impunity are reduced to those only in which the falsification is so gross and clumsy that it is evident to any one at first sight, and Courts are enabled to award a punishment, even if reduced, in those cases in which the falsification is not so perfect or cleverly done as to require an extraordinary attention to detect but such as to be detected by average and ordinary observation[267]. Professor Lombardi says:

"In sostanza, fermo restando il criterio essenziale della spendibilità come estremo necessario del falso nummario, in modo che debba escludeisi il delitto se la falsità sia riconoscibile a prima vista e al un semplice sguardo; quando vi sia un minimum di e' all'inganno del pubblico e la falsità sia tale da apparire anche all'usuale e ordinaria osservazione si ha l'attenuante ò ell'articolo 259"[268].

The Bank of England Notes Ordinance above mentioned provided that in any proceedings for forgery of the notes referred to in the Ordinance, the sworn statement of the Treasurer or other person or persons authorised by the Government in that behalf, that a note is counterfeit shall be sufficient evidence of the forgery thereof. And the said Treasury Notes Ordinance likewise provides that in any proceedings for an offence thereunder the sworn statement of the Treasurer or other person or persons authorised by the Government in that behalf that a note is false shall be 'prima facie' evidence of the forgery: provided that the provisions of the Criminal Code relating to cross-examination of witnesses shall apply to the evidence of the Treasurer or OTHER person or persons making any such sworn statement.

The Currency Notes Ordinance, 1949, requires a somewhat more detailed treatment. This Ordinance provides for currency notes of Malta upon a permanent basis. Currency notes issued thereunder are legal tender for the payment of any amount, except, that currency notes of a denomination less than ten shillings are not legal tender for the payment of an amount exceeding forty shillings (Section 5). Paper currency or notes issued under the Paper Currency Ordinance, 1939 (Ordinance

[267] Cfr. Maino, op, cit., art. 259, para. 1275

[268] Op. cit., p. 35

XLVIII of 1939 which was repealed by the 1949 Ordinance) are deemed for the purposes of the latter Ordinance to be currency notes issued under such Ordinance.

Now, this Ordinance, unlike the Treasury Notes Ordinance and the Bank of England Notes Ordinance Above mentioned, which deal with offences thereunder by reference to the provisions of the Criminal Code, makes itself, more rationally and exhaustively, a number of provisions in respect of offences which can be committed in regard to currency notes issued or deemed to be issued under the Ordinance. These provisions were modelled on English legislation.

Briefly they are as follows:

1. Forgery

Section 10 lays downs

"Whosoever with intent to defraud shall forge or counterfeit any currency not issued or deemed to be issued under the Ordinance or any word, figure, mark, signature or facsimile upon or attached to any such currency note, or shall offer, utter, dispose of, or put off any such currency note, knowing the same to be forged or counterfeited or altered shall be guilty of an offence and shall on conviction be liable to imprisonment for a period of not less than two years and not exceeding ten years".

The first limb of this provision requires "the intent to defraud". We shall have later on occasion to see what interpretation English courts have put upon this expression. In general "to defraud" is to deprive by deceit: it is by deceit to induce a man to act to his injury. It is sufficient to prove generally an intent to defraud without proving intent to defraud a particular person. Much less is it necessary to prove that any person was actually defrauded[269].

The second limb requires "knowledge" of the forgery, counterfeiting or alteration. As Archbold says, this is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it. In R. vs Millard and other judgments it was held in England that upon an indictment for uttering a forged banknote, knowing it to be forged, the prosecution may give evidence of other forged

[269] V. Archbold, 33rd Ed., p. 821

notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is indicted, [...] or that he had in his possession other forged notes, in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. And if, in addition to this, it is proved that the prisoner when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge[270].

2. Imitation of Notes

Section 11 prescribes the punishment of imprisonment from seven months to five years against any person who, with intent to defraud, makes or causes to be made, or uses for any purpose whatsoever, or utters any document purporting to be, or in any way resembling or so nearly resembling as to be likely, in the opinion of the Court, to deceive, any currency note or any part thereof. Upon conviction the Court may order the document in respect of which the offence was committed and any copies of that document and any plates, blocks, dies or other instruments used for, or capable of being used for printing or reproducing any such document which are in the possession of or belong to the offender to be destroyed.

For the purposes of this provision, the expression "currency note" means a currency note issued or deemed to be issued under the Ordinance and includes also any note of a similar character by whatever name called, issued by and on behalf of the Government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection or by the Government of any Foreign State.

The expression "utter" is not defined. In Section 6 of the English Forgery Act, 1913, which deals with the offence of "uttering a forged document, etc.", it is laid down that a person utters a forged document, etc., who, knowing the same to be forged and with intent to defraud or deceive uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence or puts off the said forged document, etc.

3. Possession of Counterfeit or Incomplete Notes

[270] Op. cit., p. 366, 822

This offence is committed by any person who, without lawful authority or lawful or reasonable excuse (the proof whereof lies on the person accused) has in his possession, knowing the same to be forged, counterfeited or altered, any forged, counterfeited or altered currency note issued or deemed to be issued under the Ordinance or any unfinished or incomplete note purporting to be so issued. The punishment is imprisonment from thirteen months to five years.

By Section 15 of the Forgery Act, 1913, of the United Kingdom, it is provided that where the having any document, etc., in the custody or possession of any person is in the Act expressed to be an offence, a person is deemed to have a document, etc., in his custody or possession if he (a) has it in his personal custody or possession; or (b) knowingly and wilfully has it in the actual custody or possession of any other person, or in any building, lodging, apartment, field, or other place, whether open or enclosed, and whether occupied by himself or not. It is immaterial whether the document, etc., is had in such custody, possession, or place for the use of such person or for the use or benefit of another person.

As to the meaning of "lawful authority or excuse" see Dickins v. Gill (1896), 2 Q.B. 310; R. v. Mervey, L. R. 1, C.C.R. 284.

The presumption of guilt is placed on the person found in possession and it is for him to prove, if he can, a lawful authority or excuse. But where, in any case, some matter is presumed against an accused person "unless the contrary is proved", the burden of proof required is less than that required at the hands of the prosecution in proving the case so as to satisfy the jury of the prisoner's guilt, and is analogous to that laid on a party in a civil action. The burden, therefore, may be discharged by evidence satisfying the jury of the probability of that which the accused is called to establish[271].

4. Possession of Paper for Currency Notes

This offence is committed by any person who, without lawful authority or lawful or reasonable excuse (the proof whereof lies on the person accused) makes use of or knowingly has in his possession any paper with any word, figure, device or distinction peculiar to and appearing in the substance of the paper used for currency notes issued

[271] R. vs Carr-Briant (1943), K.B. 607; 29 Cr. App. R. 71

or deemed to be issued under the Ordinance, or any material upon which the whole or any part of any note purporting to resemble a currency note issued or deemed to be issued under the Ordinance has been engraved or made or any facsimile of the signature of the Commissioners of Currency or of any person who has held office as a Commissioner of Currency and whose signature appears on such notes still in circulation. The punishment is imprisonment from thirteen months to five years.

5. Mutilating or Defrauding Currency Notes

Finally, Section 14 of the Ordinance lays down:- "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the person accused) mutilates, cuts, tears, or perforates with holes any currency note issued or deemed to be issued under the Ordinance, or in any way defaces any such currency note whether by writing, printing, drawing or stamping thereon, or by attaching or affixing thereto anything in the nature or form of an advertisement, shall on conviction before a Court of Magistrates of Judicial Police be liable to a fine (multa) not exceeding ten pounds".

2. Forgery

In England, forgery at common law was defined by Blackstone (4 Com. 247) as the fraudulent making or alteration of a writing to the prejudice of another man's right. By the Forgery Act, 1913 (3 & 4 Geo. 5. c. 27), which consolidated the statute law relating to forgery and kindred offences, forgery, for the purposes of the Act, is defined as the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in the Act, counterfeiting of a seal or die. A document is false within the meaning of the Act if the whole or any material part of it purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.

Forging of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law. In respect of various specified documents the Act requires an intent to defraud. In the case of documents not so specified, being public documents, it is sufficient if there is an intent to deceive. The distinction between defraud and deceive was thus expressed by Buckley, J., in "Re London and Globe Finance Corporation" (1903):

"To deceive is to induce a man to believe that "a thing is true which is false, and which the person "practising the deceit knows or believes to be false. "To defraud is to deprive by deceit; it is by deceit "to induce a man to act to his injury. More tersely "it may be put, that to deceive is by falsehood to "induce a state of mind; to defraud is by deceit to "induce a course of action"[272].

And Kenny wrote:

"At common law it was necessary that the forger should intend not merely to deceive (i.e., to induce a man to believe that a thing is true which is false) but also to defraud thereby, to prejudice someone by inducing him to alter (or abstain from altering) his rights, though not necessarily to his actual pecuniary loss. But the statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving without any intention of defrauding. This, for instance, is the case with every public document […] and the documents or registers of any Court of Justice"[273]. Though in most forgeries an intention to defraud is necessary, still, Kenny goes on to say, it is not necessary that the forger should have intended the

[272] Cfr. Arch., op. cit., p. 852

[273] Op. cit., p. 302

defrauded person to incur an actual pecuniary detriment [...] The mere existence in the prisoner's mind of this intent to defraud will suffice, though (a) no one was in fact defrauded; and though (b) no particular individual was –illegible word- in the prisoner's scheme, and even though (c) there did not in fact exist any whom the scheme could have defrauded [...] But the fraudulent intent necessary will not exist unless the offender had reasonable grounds for supposing (however wrongly) that someone or other might possible be defrauded".

Our Criminal Code, like the models on which it was originally framed, does not give a general definition of forgery: only, in respect of certain crimes of forgery of public and private writings, it specifies the special ways in which the particular crimes may be committed. It, therefore, is necessary to enquire what, for the purposes of the Code, may, in general, constitute forgery.

"The Counterfeiting or the Altering of a document", says Roberti[274], "constitutes in general that 'forgery' with which we are now dealing: and the nature of such crime consists not so much in the illicit gain which might have moved the delinquent to commit the criminal act, as in the assault upon Public Trust and on those social institutions which are designed precisely to create and guarantee it".

And Pessina wrote[275]:

"I mezzi onde al vero si può sostituire ciò che non e' tale si riducono sempre a due, come il formare ex integro una imitazione o il modificare qualche obbietto, qualche atto, qualche scrittura vera di guisa che per effetto della trasformazione indichi tutt'altro che il vero. Il primo modo piglia nome di contraffacimento dove che l'altro dealterazione".

In two ways, therefore, may in general a forgery be committed: either by poking in whole or in part a false document counterfeiting, or by altering a genuine document. We have already seen that also in the definition of Blackstone, the forgery (apart from other ingredients to which we shall refer later) consists "in the making or alteration of a writing".

[274] Delia Falsità, p. 5

[275] Trattato di Penalità Speciale, p. 141

Now, before we deal in some detail with the various crimes contemplated in the Code we must consider certain general questions which arise in connection with the whole matter of the forgery of documents.

I. The first question is whether it is necessary for the crime of forgery in general that the forger should have had any specific form of ’mens rea’.

There is no doubt, of course, that a criminal intent is indispensable for this and of crime as it is, generally, for all wilful crimes. The Romans said: non sine dolo male falsem. It is, therefore, clear that mere negligence is not sufficient. A notary, for instance, who in writing down the last will of a testator uses different words from those dictated to him, in the belief that such words made the sense clearer hut the use of which, in point of fact, obscures the meaning and invalidates the deed, may be liable to an action for damages or to disciplinary action: but he is not guilty of criminal forgery. All definitions of the " crimen falsi” given by old writers postulated this ingredient: they spoke of "dolosa” or "fraudolosa imitatio veri". Blackstone’s definition also referred to the "fraudulent making or alteration of a writing". More modern continental authorities also insist on this element: "a costituire il falso e' sempre necessario il <u>dolo</u>". There is one case in our Code in which mere negligence is sufficient to induce criminal liability. Under Section 190 (2) where a legal and authentic copy is given out by a public officer or servant contrary to or different from the original, then if this happens through the mere negligence of the public officer or servant, he is liable to a fine. But this exception confirms the general rule aforestated that in general dolus is requisite to constitute the crime of forgery.

Our Criminal Code in the definition of the various crimes of forgery (as distinct from the crimes of <u>use</u> of forged documents) makes no express reference to the requirement of this criminal intent. It is only in respect of one of such crimes that the word "fraudulently" is used. That, however, does not mean that in all those cases in which no such word is used, "dolus" is not essential. It is only because in such cases the very act proclaims the guilty mind: "dolus inest re ipsa"; "res ipsa in se dolum habet", so that the criminal intent can he presumed from the act itself. In the one case in which the word "fraudulently" is used (Section 188), conversely, "e' possibile che l'atto si disnaturi non per dolo, ma anche in buona fede, anche "per negligenza, per

inavvertenza, per colpa insomma "dell'uffiziale pubblico"[276]. In this case, the prosecution cannot rely on the inference drawn from the act itself but must prove the 'dolus' by satisfactory additional evidence.

Now, the question is whether this dolus, which is thus always essential, must represent any particular intent or direction of the will - apart from the consciousness of committing an act which is contrary to law. In England, as we have already seen, according to the common law, an intent to defraud was always required. Statute law also requires generally such an intent, but in some cases, and in particular in regard to public documents, is satisfied with an intent merely to deceive.

In continental law and doctrine this particular question is very controversial. Some systems of positive law and various text-writers require in all cases of forgery an "animus nocendi", "animus laedendi jus alienum": the forger must intend the "preiudicium alterius". Against this it is pointed out by other writers that this interpretation of 'dolus' is much too restricted: the intention in fact may be either to injure others or to procure for oneself or for others an illicit gain or advantage without prejudicing any one or more particular individuals. But above all, in systems of law similar to our own, crimes of forgery are considered not as offences against property or other individual rights but offences against Public Trust generally. Under such systems the generally accepted doctrine is that a specific intention to defraud or cause injury is not essential. An intention merely to deceive, i.e., to represent as genuine a document which is known to be false, is sufficient. Or, perhaps, more correctly it can be said that the intention to defraud or injure the rights of others does not require to be proved, because such intention is presumed by the law from the very fact of the forgery of the document in any one of the manners specified in the law: Arabia thus wrote:

"Certo il falso e' per lo piu' un reato verso la proprietà altrui; o meglio un mezzo come offenderla, ed il falso essendo un reato, deve essere parto della volontà libera: ma da ciò' non segue che faccia bisogno di una prova speciale della intenzione fraudolosa del colpevole. Una volta che si provi la volontarietà nell'alterazione del vero

[276] Arabia, 'Principii', Vol. III, p. 165

l'intenzione fraudolosa e| presunta, e non accade provarla, comunque possa essere permesso di allegare in contrario fatti che la distruggono"[277].

This was also the doctrine of Impallomeni according to whom[278] “l'unico elemento morale necessario all'esistenza del falso documentale e' l'intenzione di ingannare sulla verità dell'atto, e' questa intenzione e' insita nel "fatto stesso, poiclo falsificare e' imitare il vero, e imitare non si può' senza saper d'imitare”.

II. The second question is whether, apart from the state of mind or intention of the forger, a possibility of prejudice to the rights of others is a necessary constituent element of these crimes. Here again there is great divergence of opinion among the authorities. All agree that actual injury is not essential: it is not necessary to prove that any person was actually defrauded. But the point is controverted whether the possibility of prejudice is requisite. The old Romans said: "Non punitur falsitas in scriptura qua e non solum non nocuit, sed nec erat apta nocere".

This possibility of injury is also much insisted upon by various writers. But the more generally accepted commentators of systems of positive law similar to our own, propound the view that a distinction has to be made between public documents and private writings. In regard to the former the possibility of prejudice to the rights of others is not an essential condition of the crime: such an element is, on the contrary necessary in the case of forgery of private writings.

This solution appears to be the one consistent with the provisions of our Criminal Code which, in the definition of the various crimes of forgery created thereby makes no reference at all to the possibility of prejudice to the rights of others or of any illicit gain except only in regard to the forgery of private writings in respect of which Section 195 requires that the forgery shall "tend to cause injury to any person or to procure "gain". Referring to the Neapolitan Code which, in this respect, was identical with our law, Roberti says:

I dottori di molte leggi […] avevan dedotto che quando lo scritto o falso, o falsificato fosse intrinsicamente non atto a recar danno e lucro, non potesse andar soggetto alla pena ordinaria del falso [...] Le leggi nostre di quel pregiudizio, o di quel lucro, e della

[277] Op. cit., p. 154

[278] As quoted in Maino, op. cit., para. 300

possibilità di produrli col mezzo del falso, non ha parlato espressamente che quando contemplano la falsità nelle scritture private. In fatto nell'art. 295 esigono come elemento sostanziale di essa che la scrittura sia atta a nuoere altrui, o a produrre alcun lucro laddove nel falso in pubbliche scritture, preoccupate, e meritamente, dalla premura di garantire la fede pubblica a quelle attribuita, non pare che guardano gran fatto al danno o al lucro per farne elemento essenziale del reato"[279].

Elsewhere the same writer says: "Ma da banda e per sempre le sottigliezze e le cavillazioni alle quali da' campo l'errore di ammettere nel falso un elemento che la legge non richiede; quello cioè del danno secondario, o anche della semplice possibilità' di esso. Ripetiamolo per l'ultima volta; la legge nel falso in pubblica scrittura non guarda che alla violazione della pubblica fede, e quando questa abbia luogo nella mira di "una fraude nel piu ampio significato della parola, il reato esiste sia che tal fraude raggiunga, sia che non raggiunga il suo scopo"[280].

Arabia is equally emphatic in the same sense "Given the voluntary alteration of the truth this writer says, in any of the ways and in the writings specified by the law, the prejudice to others whether actual, or merely possible, or even though impossible, is not an ingredient of the crime. In fact, the legislator could not have failed to say it, as he expressly required it in regard to private writings; one must, therefore, conclude, to explain this silence, that precisely on account of the public character of the forged writings, of the person of the forger and the means used in the forgery, the legislator presumes and justifiably presumes, both the intention to pre- judice others as well as the possibility of such prejudice.

"Sicché' le lunghe disquisizioni dei iure consulti per dimostrare che l'intenzione di nuocere ed il pregiudizio arrecato agli altri debbano costituire uno degli elementi di questi reati sono, in una legislazione positiva come la nostra, inutili e vane, poiché, torniamo a ripeterlo, l'intenzione di nuocere, cerne la possibilità delif altrui dann, e lucro illecito del falsario, seno presunte, o, a dir meglio, legalmente dimostrate dal solo fatto di essersi volontariarente falsificate, una pubblica scrittura, e falsificata in uno dei modi voluti dalla legge"[281].

[279] Op. cit., pp. 21-22

[280] p. 65

[281] Op. cit., p. 154 - 155

Public writings are, by their nature, calculated to create and pass rights and, therefore, they must be, and are, by the legislature, by a presumption founded on fact, deemed to tend always to cause prejudice whenever they are forged.

Our case-law regarding this question has not always been consistent. Certain judgments[282] had held that the potentiality of prejudice was indispensable in all cases. But a number of later judgments have since accepted and applied the doctrine above-stated, which, as already indicated, appears to be much more consistent without positive law that, where the forged instrument is a public document, the possibility of prejudice is not necessary[283].

Precisely because such potentiality of causing injury is not of the essence of the crime in respect of the said documents (the prejudice consisting inherently in the violation of the trust which the public attaches to the documents of a public nature) it is no defence to plead that the offender was lawfully entitled to what he sought to obtain by the forgery[284]. Roberti wrote: "Formar un - illegible word - falso per un credito vero, ed anche in sostegno di una -illegible word- legittimo, contiene la grande"[285].

For the same reason, according to the writer last quoted, the crime may subsist though the document forged is null owing to some defect of form or to the non-observance of some formality relating to the office held by the public officer by whom the act is or in whose name it purports to be drawn up. The only exception to this arises where the defect derives from the absolute want of jurisdiction of such public officer or from some gross and patent breach of essential formalities so that it can be said that the act is not, on the very face of it, a public writing. "La falsità pubblica vien dalle leggi di quasi tutte le nazioni civili, riguardata come un maleficio il quale, attacca la pubblica fede, il quale attacca la confidenza negli atti che portano l'impronta della fede pubblica; il quale offende le istituzioni sociali ordinate per ispirare quella confidenza, dalla quale tanti vantaggi emergono alla civile comunanza. Se in questa offesa appunto sta il reato, e subito che l'atto pubblico si e' contraffatto o alterato, il reato e^ perfetto nella

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[282] E.g., C.C., Rex vs L. Cassar, 18/11/1941; Rex vs Farrugia, 2/6/1942

[283] V. C.C., Rex vs Agius, 1/3/1943; Rex vs Rizzo, 1/4/1943; Rex vs Buttigieg, 25/5/1943; Rex vs K. Justice, 30/9/1943

[284] C.C, Rex vs M. Gauci, 19/11/1943, Judge Harding, op. cit., p. 33

[285] Op. cit., p. 64

sua indole, quando pure altro danno non sia giunto a produrre. Se quindi l'atto si trovi affetto da vizi di forma, sara' certamente il danno secondario che non potrà derivare, ma il danno primario continuerà senza dubbio a ravvisarvisi e tutto intero quando l'atto avrà i caratteri esteriori o la forma esteriore di una pubblica scrittura- dalle quale una efficacia qualunque si attribuisce dalla legge fino che' non ne venga riconosciuta ed anche decisa la nullità. Fermo quindi il principio che le disposizioni penali sul falso pubblico non possono aver luogo quando la falsità sia caduta in un atto, il quale per la sua forma esteriore non possa ravvisarsi come pubblica scrittura, negli altri atti i quali si trovassero affetti da vizi sia per dift,iuo accidentale di capacità nel redattore, sia per difetto di forma, la falsità e' punibile come se fossero validi, niente influendo che per tali vizi potessero essere anche annullati"[286].

The same opinion is expressed by Arabia: "Is it this jurist writes - a crime of forgery to falsify a void document? To resolve the doubt, certain writers seek to enquire whether it can or cannot cause an injury. But everyone sees that it is much simpler to enquire whether, in spite of the defects there may be, the public document, whether or not void, is at least in regard to the more essential formalities, a public instrument : if it is found to be so, the crime is complete, because the possibility of injury is established by the very –illegible word-[287].

Another point that arises in connection with the general question we are considering is whether it is necessary for the crime of forgery to he committed, that the forged document should have the <u>capacity to deceive</u>. Certain judgments of our Court seem to have treated this expression as if it meant the same thing as <u>possibility to defraud or cause prejudice</u>. But we have already noticed the distinction that is made in English law between "defraud" and "deceive", and continental writers likewise distinguish between "attitudine ad ingannare" and "possibilità del danno o di un pregiudizio". It is true that the latter always requires the former: but the converse is not true. The possibility of causing injury refers both to the judicial nature of the forged document and the manner of execution of the forgery: the possibility of deceiving refers <u>only</u> to the latter.

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[286] Op. cit., pp. 33-34

[287] Op. cit., p. 155

Whereas possibility of causing injury or defrauding is not, as we have seen, a constituent of the crime in regard to the forgery of public documents, the possibility of deceiving is commonly considered to be an essential element in regard to all forgeries. A perfect imitation is not, of course, necessary. But if the manner of executing the forgery is so clumsy that the forgery itself is obvious almost ‘ictu oculi’, then the crime of forgery is negatived, although there may be another kind of offense (fraud)[288].

"La falsità per essere incriminabile, deve avere attitudine ad ingannare: non sarà necessaria l'imitazione perfetta: ma quando il falso sia così grossolano e tale da dover essere facilmente riconosciuto, non potrà, per mancanza di vera e propria lesione della fede pubblica, applicarsi il titolo di falso, ma soltanto (nei congrui casi) quello di truffa, se per l'ignoranza o l'incuria della persona presso la quale fu adoperata la scrittura goffamente falsificata l'uso di questo abbia prodotto un danno"[289]. The instrument must appear upon the face of it to have been made to resemble the true instrument: not necessarily an exact resemblance, but such as to be capable of deceiving persons using ordinary observation, according to their means of knowledge.

If, however, the forgery has in fact deceived, the question of the manner of execution of the falsity cannot be raised[290]. In "Rex vs. P. Borg", the Court said:

“Se il documento, anche male e grossolanamente imitato, e' giunto ad ingannare, esso, come osserva Carrara, para. 3679 nota 2, ha raggiunto il suo obbiettivo giuridico e sarebbe vano desiderarvi una ulteriore potenzialità”[291].

III. In all crimes of forgery of documents, the material element consists, as we have already said, in the counterfeiting or altering of the document. It is a fundamental rule in this matter that the object of the falsification must be the very writing itself.

“Accordingly”, says Kenny[292], “an instrument is not a forgery when it merely contains statements which are false, but only when it falsely purports to be itself that which it is

[288] cfr. Rex vs L. Cassar, C.C., 18/11/1941

[289] Maino, op. cit., p. 1302; and the authorities there quoted

[290] Cfr. C.C., Rex vs P. Borg, 7/5/1915; Rex vs V. Muscat, 22/9/1942; Rex vs Azzopardi, 2/2/1942

[291] See also Rex vs Buttigieg, C.C., 25/5/1943

[292] Op. cit., p. 298

not [...] Thus, a forgery is a document which not only tells a lie, but tells a lie about itself".

Italian writers express the same idea by saying that the forgery must be in the "materialità della scrittura", i.e., the public or private writing in its external conditions as a document. The untrue contents of a document do not always create a crime of forgery. It is one thing to say that an instrument is false and another thing to say that it contains falsehoods. A true act may contain false statements: a false act may contain very true statements. The external conditions which give to a deed or a will or another public act legal existence and its essence as such a deed or will or public act are all those formalities which by the nature of things are inseparable from its very being or which the law has prescribed as an essential element of its Juridical existence.

The falsity of the contents may, in appropriate cases, give rise to fraud.

"E la ragione di questa soluzione sta nel principio fondamentale che l'obbietto del falso deve essere la scrittura o pubblica o privata nelle sue condizioni esteriori di documento".

There is forgery when a writing is counterfeited in whole or in part to make it appear, for instance, against the truth that such and such persons have stipulated such and such a contract or that they have stipulated it in such rather than in other terms: and this because the writing is destined to be evidence for the contracting parties and for third parties, that a contract was stipulated and was stipulated in these terms. But there is no forgery, but simulation and fraud, if a person on selling a tenement to others declares against the truth in the deed of sale that he is the owner or declares untruthfully that he has already received the price, because the writing is, indeed, evidence that those declarations were made, but it is not evidence and is not per se destined to prove that those declarations were true[293].

We shall say more about this later when we discuss the various hypotheses of forgery contemplated by the Code in respect of the several crimes.

IV. The wilful use of a forged document is not a constituent element of the crime of forgery. It is considered as a separate substantive crime, and this is so according to

[293] Maino, op. cit., para. 1301

the doctrine accepted by our Courts, even where the person who uses the false document is the forger himself[294].

V. Lastly, it is, of course, clear that the provisions of the Criminal Code do not apply to other forgeries specially dealt with in other particular laws.

We can now proceed to consider in some detail the more important crimes of forgery specified in the Code.

A. Forgery of Government Debentures, Securities, Acts of the Authorities, Public Seals and Stamps

1. Forgery of Government Debentures

Section 174(1) lays down:

"Whosoever shall forge any Government debentures for sums advanced on loan to the Government shall, on conviction, be liable to hard labour for " a term from three to five years, with or without solitary confinement".

In regard to this crime, it is sufficient to notice that the law does not specify the particular means by which the forgery may be committed. What we already said, therefore, applies, i.e., that the material act may consist either in counterfeiting the debenture, that is to say, fabricating it 'ex integro' by imitating its form, the signatures, the sum and other particulars necessary to pass it off as genuine; or altering the originally genuine document as by changing the sum, or fraudulently affixing thereto a stamp which is necessary to make it valid.

The crime is complete so soon as the document has been forged with the requisite criminal intent. It is not necessary for the completion of the crime that the forged debenture be passed off.

When the forgery consists in the endorsement of a genuine Government debenture, the punishment is hard labour for a term from thirteen months to four years, with or without solitary confinement (Section 174(3)). To make a false endorsement is the

[294] Cfr. C.C., Rex vs V. Caruana, 27/1/1942 reported in Harding, op. cit., p. 23; and the other cases there quoted

same as counterfeiting the signature of the person in whose name the debenture was issued, or to whom it was transferred by a previous endorsement from the person entitled thereto. By such means it is sought to defraud the owner of the sum of the debenture, and, at the same time, to deceive third parties who, unaware of the forgery, may accept the debenpunishment in this case is the forgery of the debenture case the forgery does not substance of the document or the Government to confer authenture for payment. But the less than that provided for itself, inasmuch as in this tamper directly with the with those marks used by ticity upon it.

The same punishment prescribed in the case of forgery of a Government debenture applies also when the forgery consists in opening a credit relating to loans made to the Government in the books of the Government Treasury (Section 174(2)).

2. Forgery of Documents entitling to payment, etc.

Section 175 says: -

"Whosoever shall forge any schedule, ticket, order or other document whatsoever, upon the presentation of which any payment may be obtained, or any delivery of goods effected, or a deposit or pledge withdrawn from any public office or from any bank or other public institution established by the Government, or recognised by any public act of the Government shall, on conviction, be liable to hard labour for a term from thirteen months to four years, with or without solitary confinement".

The same punishment shall apply where the crime consists in the forgery of any entry in the books of any such office, bank, or other institution, relating to any such payment, goods, deposit or pledge,

"When the forgery consists only in the endorsement of a genuine schedule, ticket, order or document, the offender shall be liable to hard labour for a term from nine months to three years, with or without solitary confinement".

This section does not call for any special comment. Except for the description of the special document which can be the object of the forgery, the elements of this crime are the same as those of the preceding one.

This crime refers to “any schedule, ticket, order or other document whatsoever on the presentation of which a payment may be obtained, or a deposit or pledge withdrawn or any delivery of goods effected from any public office or from any bank or other institution established by the Government, or recognised by any public act of the Government”. Such are, for instance, the “cedole” of the “Massa Frumentaria” Government Lotto tickets[295], delivery orders used in the Customs Department, Pass Books of the Government Savings Bank, the pawn tickets of the I Fonte di Pietà, etc. In every case, it must be such a document as, by the express provision of the law or regulation, or by the practice regulating the matter it is normally necessary to produce in order to obtain payment, or delivery.

Provision Common to the Crimes Aforesaid

Where any of the crimes aforesaid is committed by a public officer or servant by abuse of his office or employment, the ordinary punishment for the crime is increased by one degree. The reason for the aggravation is obvious:

"La qualità di uffiziale funzionario [...] fa crescere la pena della falsificazione, si' perchè la maggior facilità di commetterla spande maggior sgomento, si perchè vi è più danno morale ad abusare del proprio uffizio”[296].

The same aggravated punishment is applied to any public officer or servant who knowingly re-issues any order for payment or any of the documents mentioned in Section 175, after the payment or delivery of the goods obtainable upon the presentation of such order or document has been affected (Section 176). We have already seen, why, in certain cases only and not in others, the law makes use of such words as "knowingly", "fraudulently", etc., in defining the crime. The re-issue of the order or document may be due to an error or to mere negligence on the part of the public officer: in which case, there would be no crime, but only, in appropriate cases, a liability for damages. So that criminal liability for the crime may arise, the Prosecution

[295] Cfr. Rex vs. Psaila, C.C., 13.4.1950; Rex vs Carabott, C.C., 13/12/1932

[296] Arabia, op. cit., p. 138

must prove that the public officer acted knowingly, that is, with the knowledge that the payment of the money or delivery of the effects had already been affected.

3. Use of the False Documents Above-mentioned

We have already pointed out that the malicious use of false instruments is considered by the law as a special crime independent of the forgery. Section 177 lays down:

"Whosoever shall knowingly make use of any of the instruments specified in Sections 174, 175 and 176 shall, on conviction, be liable to the same punishments as the principal offender".

The crime of forgery, as we have said, is complete, even though the purpose had in view by the forger has not yet been accomplished. The injury to public trust is that which characterises the public nature of these crimes, and as this injury is affected by the forgery, so, sufficient grounds arise for applying to it the punishments prescribed by the law, independently of the use which may be made of the false instruments to attain the ultimate purpose aimed at by the offender. It may well happen that a person who did not in any way participate in the forgery, knowingly makes use of the forged document. As such use cannot be considered as an act of complicity in the forgery - there cannot be complicity after the fact - it is punished as a substantive independent crime.

The knowledge of the falsity of the instrument is required at the time use is made thereof whether or not it also existed at the time the instrument came into the hands of the person who uses it; Other systems of law, for purposes of punishment, make a distinction between the case in which the user had received the instrument in good faith, being unaware of the forgery, and the case in which knowledge of the falsity existed from the very beginning. Our law does not make any such distinction, as is made in respect of the crime of uttering false coins in Section 170.

We have already stated that the use of a false document is considered as a separate offence even where the utterer is the forger himself. This, however, does not prevent in appropriate cases the application of Section 19(h) according to which where one offence serves as the means for another offence, only the punishment applicable to the greater offence shall be applied.

4. Forgery of Government, Judicial and Official Acts

Section 178 (l) prescribes the punishment of hard labour for a term from two to four years, with or without solitary confinement, against any person who forges any act containing an order or resolution of Her Majesty's Government, whether general or local, or any judgment, decree or order of any Court, Judge, Magistrate or public officer whereby any obligation is imposed or terminated or any claim allowed or disallowed, or whereby any person is acquitted or convicted on any criminal charge.

The provision is clear. Suffice it to notice only the particular instruments in respect of which the crime may be committed. The object of the forgery must be either:

a) An act, i.e., the act itself, containing any order or resolution of Her Majesty's Government in the United Kingdom or the Government of Malta. Examples of such acts are an Act, an Ordinance, a Regulation, a Resolution in Parliament, an Order of the Governor for the remission of a sentence, a Ministerial Order, etc., OR

b) A judgment, decree or order of any Court, Judge, Magistrate or other public officer whereby any obligation is imposed or terminated or any claim allowed or disallowed or whereby any person is convicted or acquitted on a criminal charge

Unless the instrument falls precisely within the one or the other of these two descriptions, the special crime here dealt with will not arise - though the act may constitute another crime of forgery according to the true nature of the particular instrument.

Where the crime under reference is committed by a public officer or servant specially charged with the drawing up, registration or custody of any such act, judgment, decree or order, the punishment is increased by one degree.

Finally, the punishment provided against the principal offender is applied also to any person who knowingly makes use of the forged act, judgment, decree or order (Section 178 (2)).

5. Counterfeiting Public Seals or Stamps and the Use Thereof

By Section 179, any person counterfeiting the Great Seal of the Realm, Her Majesty's Privy Seal, or the Public Seal of Malta, or knowingly making use of any such counterfeited seal, is liable to hard labour for a term from three to five years with or without solitary confinement.

In the case of the counterfeiting of any other seal, stamp, or other mark used for sealing, stamping or marking in the name of the Government or –illegible word- of the authorities thereof, documents or effects which are public property or are under the public guarantee, the punishment is hard labour from thirteen months to three years with or without solitary confinement. The same punishment applies also to any person who knowingly makes use of any such stamp seal or mark (Section 180).

For the purpose of these crimes Section 184 provides that there shall be forgery not only if the false instrument is made or affixed but also if the genuine instrument is fraudulently affixed.

Where any of the above crimes is committed by a public officer or servant charged with the direction, custody or proper application of the seals, stamps or other instruments, the punishment is increased by one degree.

These crimes correspond to those dealt with in Section 5 of the Forgery Act, 1913, of the United Kingdom. Section 18 of that Act defines the meaning of "seal" as including any stamp or impression of a seal or any stamp or impression made or apparently intended to resemble the stamp or impression of a seal, as well as the seal itself. The expression "stamp" is defined as including a stamp impressed by means of a die, as well as an adhesive stamp; and the expression "die" as including any plate, type, tool or implement whatsoever, and also any part of any die, plate, tool, type or implement, and any stamp or impression thereof or any part of such stamp or impression. In regard to these crimes it is to be noted that - apart from the case of the affixing of the genuine instrument fraudulently obtained, the forgery can be committed only by <u>counterfeiting</u>. We have already defined the meaning of this word. Tue hypothesis of <u>altering</u> is not contemplated, and the reason is clear. A seal, stamp or mark which is materially altered, and which thus ceases to be what it originally was, cannot deceive and serve for any use likely to be prejudicial to the interests of the State or the public authorities, or the public. It would, therefore, be but a useless instrument in the hands of the would-be forgers.

"Siccome quindi e non può essere mosso al falso che o dalla mira di recar pregiudizio agli interessi suddetti, o dal fine di commettere quelle frodi che la legge voleva allontanare appunto col- l'applicazione dei bolli, marchi o punzoni in dis- corso; e siccome d'altronde questo scopo non può altrimenti conseguire che formando i bolli falsi ad imitazione dei veri, nel che consiste appunto il contraffacimento così di questo mezzo doveva unicamente parlarsi"[297].

But, as already stated, the affixing of the genuine instrument fraudulently obtained, is also considered forgery for the purposes of these sections. "Fraudulently" here signifies, by means of theft, fraud or some other artifice or device[298].

Now, in Section 180 above-quoted, the law speaks of "any seal, stamp or mark used for sealing, stamping or marking in the name of the Government, ate." In Rex vs A. Caruana et. (4/5/1914), H.M.'s Criminal Court held that "government" in the context means not only the local government tut also H. M. 's Government in the United Kingdom:

"La voce 'governo', senz'altro limitazione che ne restringe il significato comprende il Governo di Sua Maestà, tanto generale quanto locale, amenocchè la disposizione in cui e' usata, avuto riguardo all'Oggetto della disposizione medesima, non indica chiaramente essere questa solo riferibile all'una o all'alta specie di Governo, e la terminologia della legge accema chiaramente alla inclusione del Governo Imperiale e del Locale nella espressione genaerica di Govero" (Cfr. Cremona, op. cit., art. 174, p. 131).

6. Counterfeiting and Use of Counterfeited Postage Stamps, etc

Whosoever counterfeits postage stamps, or knowingly makes use of counterfeited postage stamps, shall on conviction be liable to hard labour for a term not exceeding two years with or without solitary confinement.

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[297] Arabia, op. cit., p. 145

[298] Arabia, op. cit., p. 145

The same punishment applies to any person who, without the special permission of the Government, knowingly keeps in his possession counterfeited postage stamps, die machines or instruments intended for the manufacture of postage stamps.

The above provisions apply also in regard to any stamp denoting a rate of postage of the United Kingdom of any of H.M. 's colonies, or of any foreign country.

The same punishment abovementioned applies also to any person who, without lawful authority or excuse (the proof whereof shall lie on the person accused) knowingly purchases or receives, or takes or has in his custody or possession any paper exclusively manufactured by or under the authority of the Government of Malta, for use as envelopes, wrappers or postage stamps and for receiving the impression of stamp dies, plates or other instruments provided, made or used by or under the authority of the Government for postal purposes, before such paper has received such impression and has been issued for public use.

By Section 15 of the Forgery Act of the United Kingdom already quoted, it is laid down that: -

"Where the having any document, seal or die in the custody or possession of any person is in the Act expressed to be an offence, a person shall be deemed to have a document, seal or die in his custody or possession, if he: (a) has it in his personal custody or possession; or (h) knowingly and wilfully has it in the actual custody or possession of any other person, or in any building, lodging, apartment, field or other place, whether open or enclosed, and whether occupied by himself or not. It is immaterial whether the document, matter or thing is had in such custody, possession, or place for the use of such person, or for the use or benefit of another person".

General Provision

In respect of all crimes of forgery so far considered, Section 186 applies the provision of Section 173, according to which the person guilty of the crime shall be exempted from punishment, if before the completion of the crime and previously to any proceedings, he shall have given the first information thereof and revealed the offenders to the competent authorities.

B. Forgery of Other Public or Private Writings

1. Forgery of Acts by Public Officers

Saving the cases mentioned above, any public officer, or servant who shall, in the exercise of his functions, commit forgery by any false signature, or by the alteration of any act, writing, or signature, or by inserting the name of any supposititious person, or by any writing made or entered in any register or other public act, when already formed or completed, shall, on conviction, be liable to hard labour for a term from two to four years, with or without solitary confinement (Section 187).

The three essential elements of this crime are:

(a) The status of the agent and the abuse which he makes of his functions

(b) The manner of falsification

(c) The nature of the document falsified.

The subject of this crime can be only a public officer or servant. We have already had occasion to examine the meaning of this expression. It comprises every person who is lawfully entrusted with the carrying out of any act appertaining to the public administration. But the quality of public officer or servant in the agent is not sufficient: it is further necessary that the forgery shall have been committed in the exercise of his functions. Such abuse makes the act more heinous because his position as a public officer or servant makes the perpetration of the offence easier and the injury which is thereby caused to public faith is graver. The requirement that the forgery shall have been committed by the public officer or servant in the exercise of his functions implies that the document must be one failing within the official competence or jurisdiction of the public officer or servant concerned.

The manner of falsification may be:

i) by false signatures; or

ii) by the alteration of any act, writing or signature; or

iii) by inserting the name of any fictitious person; or

iv) by any writing made or entered in any register or other public act when already formed and completed. Any one of these modes will be sufficient to constitute the crime.

False signature is that generally which is not of the person whose name it represents. The signature is falsified either by counterfeiting the true signature by a more or less good imitation, or by falsifying the genuine signature in order to attribute it to another, although the latter case would fall more correctly under forgery "by the alteration of signatures".

It is generally taught that if the false signature is of a deceased or inexistent person then the case would properly fall within the hypothesis of forgery “by the insertion of the name of a supposititious person”.

“Vi e' falsa sottoscrizione quando le vera e' almeno potenzialmente possibile, e la falsa ne piglia il luogo. Ma quando ciò non sia, vi sara’ reato di falso, ma non per questo capo, si bene per l’altro, cioè per supposizione di persona, poiché non solo la firma, ma tutta la persona si suppone dal falsario, e si fa apparire come esistente e vera”[299].

Where the falsification is by the alteration of the act or writing or by the making or entering in the document of any writing after it is formed or completed, the crime, according to the authorities, arises only where the alteration, or the imitation is material, i.e., such as to affect the truth or value of the document. This is not due to any requirement that there should be any prejudice actually caused or even possible, which requirement is not, as we have seen, of the essence of the crime of forgery of public documents, but it is due to the fact that, if the meaning or purport or value or validity of the document is not in some way affected, it cannot be said that the document has been “falsified”.

“La falsità per dirsi tale deve attaccare l'atto o la scrittura, in modo che denoti o comprovi una cosa diversa da quella che s'intendeva. Deve quindi aver per iscopo d'ingenerare tuia falsa idea della cosa che ha format'oggetto dello scritto, o delle qualità di essa. In consequenza se si aggiungono in una scrittura parole che non mutino il senso della stessa, non può' esservi contraffacimento costituente falsità' in

[299] Arabia, op. cit., p. 158

generale, come non può esservi falsità per alterazione quando, malgrqdo questa, la scrittura continua a presentare 'quod actum est'"[300].

Arabia[301] likewise says: "So that there can be the crime of forgery it is necessary that the writing made or inserted in the act or register alters the truth contained in it. If the writing nothing adds or takes away, there would be no crime; this not because there would not be the 'alterius praeiudicium' according to the mistaken theory of French jurists, which prejudice, in the forgery of public documents, is presumed; but because there cannot be criminal forgery where there is no alteration of the truth".

2. Fraudulent Alteration of Act by Public Officer

Section 188 deals with the crime of any public officer or servant who, in drawing up any act within the scope of his duties, shall fraudulently alter the substance or the circumstances thereof, whether by inserting any stipulation different from that dictated or drawn up by the parties, or by declaring as true what is false or as an acknowledged fact a fact which is not acknowledged as such.

The ingredients of this crime are:

(a) the status of public officer or servant in the agent

(b) the falsification must concern an act falling within his official duties

(c) the falsification must be in the manner specified in the section, so as fraudulently to alter the substance or the circumstances of the act.

There is alteration of the substance of an act when this as a whole expresses, on account of the forgery, something different from the truth, e.g., the parties wanted to contract a sale, but the notary writes down a donation; the parties intended to have a power of attorney to receive an annuity, but the notary draws up a power to assign the same.

There is alteration of the circumstances when the falsification refers to some particular or part only of the act: e.g., the notary draws up the will which is dictated to him by the

[300] Roberti, op. cit., p. 110

[301] Op. cit., p. 159

testator, hut adds or omits a legacy. Here the essence, the nature of the act is true, but there is falsification of a particular or part of it. Important 'circumstances' of an act may also be the date on which and the place where it was received.

It is, of course, to be noted that in respect of the 'circumstances' to which the falsification refers, there is a complete alteration of the truth and that, therefore, though the forgery relates only to one or more particulars, the intention of the testator or the will of the parties is, to that extent, betrayed. From this it must he concluded that such particulars must in fact be falsified /*/ but when they are of such negligible importance that they do not affect the true intention or purpose of the parties, the crime under this section would not arise. /*for the subsistence of this crime. The alteration must be done fraudulently. We have already had occasion to point out that this word does not imply the requirement of a 'praeiudicium alterius ' nor that the public officer shall have committed the act for private gain.

“Anche che l'opera sua giovi alle parti private, e nulla non profitti all'ufficiale pubblico, vi e' il reato di falso se egli alterò la sostanza o i particolari importanti dell'atto, perchè' il legislatore presume e con una sapiente e provvida presunzione juris et de jure, che vi sia questo pregiudizio altrui nel danno della fede pubblica manomessa da chi aveva debito di difenderla”[302].

Fraudulently here means maliciously, deliberately, wilfully, and it has been added because in the cases contemplated in this section it is possible that the substances or the circumstances of the act be altered in good faith, by inadvertence, by misapprehension, by mere negligence.

The alteration of the substance or the circumstances of the act, to constitute this crime, must be made:

(a) by inserting any stipulation different from that dictated or drawn up by the parties; or

(b) by declaring as true what is false or by declaring as an acknowledged fact a fact which is not so acknowledged.

[302] Arabia, op. cit., p. 165

A public officer (e.g., a notary) in drawing up an act in the course of his duties is not necessarily bound to adopt precisely the same words and expressions used by the parties. The use of different words and expressions may not often be imposed by the necessity of making clear the sense of the disposition, covenant or declaration of a testator, a party, or declarant. It is only when the matter stated in the act misrepresents or dissembles the true position so as fraudulently to alter the substances or the circumstances of the act, that the crime will arise.

Regarding the other manner of committing this forgery, a public officer in drawing up an act discharges generally a two-fold function. In respect of certain facts, he renders himself a direct witness in declaring their truth, as for instance, the day or the place when or where the act is executed, the person at whose request the act is made, the presence or intervention of those taking part in it, his personal knowledge of the parties, etc. In respect of other facts, he is merely a sort of interpreter or draftsman, registering them in the act not as observed or verified by himself, but as declared or dictated to him by the parties. Now, as to the first group of facts, the untruth may constitute forgery if it involves an alteration of the substance or the circumstances of the act; but as to the second group of facts, if the untruth is in the statements of the parties, even though it may affect the substance of the act it cannot constitute forgery, because the act being precisely destined to represent that which was declared or stated by the parties, in fact corresponds to the truth in so far as it reproduces what was said or stated by such parties. This distinction refers to that which the writers make between "forgery" and simulation". Both may be inspired by the same fraudulent motives: but they are distinct “avvegnacchè per l'una” (simulation) "non si oltraggia la fede pubblice come, per "l' altra" (forgery), "e possono essere sufficienti a prevenirla o a riporarta gli effetti misure diverse che le leggi civili ha dettate, senza il bisogno di ricorrere alle pene le quali di regola non possono giustificarsi se non per imperiosa necessita”[303]. In appropriate circumstances the untruthful assertions of the parties may give rise to a crime of fraud:

La simulazione, ìa falsità interiore potrà nei congrui casi, far sorgere il titolo di frode o truffa: mai quello di falso"[304].

[303] Roberti, op. cit., p. 136

[304] Maino, op. cit., para. 1301

3. Forgery of copies of Public Acts by Public Officer or servant

The punishment of hard labour for a term from thirteen months to two years, with or without solitary confinement, is provided against any public officer or servant who:

(a) gives out any writing in a legal form representing it to "be a copy of a public act when such act does not exist; or

(b) gives out a legal and authentic copy in virtue of his office, in a manner contrary to or different from the original, without this being altered or suppressed.

In the latter case where the copy is so given out by the mere negligence of the public officer or servant, the punishment is a fine (multa) (Sections 189, 190).

These provisions do not require any special explanation. The ingredients of the crime are clear from the provisions themselves.

A copy is “legal” or “in legal and authentic form" when it is accompanied by such formalities and declarations as are prescribed by law, when it is given and accepted as the work of the public officer, and when, therefore, it is received as such in judicial proceedings and administrative uses. Section 636 of the Code of Organisation and Civil Procedure (applied to criminal proceedings by Section 513(i)(c) of the Criminal Code) lays down that "authentic copies are admissible as evidence to the same extent as the originals. Copies are deemed to be authentic, when they are made in the form prescribed by law by the officer by whom the original was received or is preserved, or by the person lawfully authorised for the purpose”.

Where the offence consists in giving out the copy in a manner different from the original, it is necessary, according to the authorities, that the difference shall be in some material particular. Canofari, commenting on the corresponding provision of the Neapolitan Code on which the above provisions of our Code were formed, wrote:

“Una diversità interamente oziosa, nulla, incapace a produrre alcun effetto, non e' il soggetto di questo articolo” (art. 289).

But it must be again made clear that this is so not because of any assumed impossibility of causing actual injury to the prejudice of others but because there

cannot be any alteration, punishable as forgery, unless it affects the substance or the essential circumstances of the document[305].

4. Forgery of Public, Commercial or Private Bank Documents by person not being a Public Officer or Servant

According to Section 191 “any other person (i.e., other than a public officer or servant acting in the exercise of his-functions) who shall commit forgery of any authentic and public instrument or of any commercial document or private bank document, by counterfeiting or altering the writing or signature, by feigning any fictitious agreement, disposition, obligation or discharge, or by the insertion of any such agreement, disposition or discharge in any of the said instruments or documents after the formation thereof, or by any addition to or alteration of any clause, declaration or fact which such instruments or documents were intended to contain or prove, shall, on conviction, be liable to hard labour or imprisonment from thirteen months to four years, with or without solitary confinement”.

The object of this crime can be:

(a) any authentic and public instrument; or

(b) any commercial document; or

(c) any private bank document.

Section 1276 (2) of the Civil Code defines “a public deeds” (‘atto pubblico in the original Italian text) as "an instrument drawn up or received with the requisite formalities by a notary public or other public officer lawfully authorised to attribute public faith thereto". This definition corresponds, in the models to that given of an “authentic” act rather than of a public act. Thus art. 1271 of the Civil Laws of the Neapolitan Kingdom defined an authentic act "Quello che e’ stato ricevuto da pubblici uffiziali autorizzati ad attribuirgli la pubblica fede nel luogo in cui l'atto si e' steso, e con le solennità richieste". As Maino puts it, "Gli atti pubblici del codice civile sono gli atti autentici". The "public" instruments to which the Criminal Gode is referring are all the acts of office, that is to say, all the acts drawn up by a public officer in the discharge of his duties.

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[305] Roberti, op. cit., p. 212

The definition of the crime we are now considering requires that the instrument, the object of the forgery, shall be not merely public but also authentic. In other words, it is not every act drawn up or received by a public officer in the discharge of his functions that can be the object of this crime; but only such of these acts as are drawn up or received by him and to which he is legally authorised to attribute public faith. A public officer does not render an instrument 'public' and 'authentic' merely because the instrument originates from him; he so renders it when he draws it up or receives it with the requisite formalities and lawfully attributes public faith to it.

Commercial and private bank documents are treated in the same manner as public and authentic instruments in respect of their forgery under this section. This severe treatment is necessary in view of the speed with which these documents are destined to circulate for the uses of trade and the good faith which is, therefore, an essential condition thereof. As was stated in the report concerning the draft of the French Penal Code of 1810, quoted by Chauveau et Helie[306]:

"La sicurezza e la confidenza sono le basi del commercio, e gli atti che lo ringuardano presentano per la loro importanza e pei loro risultamenti punti di rassomiglianza con gli atti pubblici: la sicurezza della loro circolazione, che deve essere necessariamente rapida, richiede una protezione particolare da parte della legge. Questi motivi e la facilità di commettere falsità sopra gli effetti di commercio hanno suggerito la gravezza della pena per tali falsità!

Now, what is to be understood by "commercial documents" (Scritture di commercio)? According to the commentators of the Neapolitan Code, they are those writings which have for their object an act of trade as defined in the Commercial Law[307]. Sections 5 and 6 of our Commercial Code give a definition of "acts of trade". Any writing which is destined to be evidence of any such act or which relates thereto would, therefore, be a 'commercial document' for the purposes of this crime. To these must also, however, be added the trade books which, according to the commercial law, traders are bound to or may keep for the purposes of their trade.

[306] Vol. III, p. 204

[307] V. Arabia, op. cit., p. 170; Roberti, op. cit., p. 293 et. seq.

From this it is clear that a document is not a "commercial document" for the purposes of this crime merely because it emanates from a trader, unless it refers to an "act of trade". A trader, like a public officer, is not different from any other individual when he performs acts which do not depend on his special personal capacity.

On the other hand, if the document is a "commercial document" as above defined, it does not matter that the forgery has been committed by a person who is not himself a "trader" as defined in the Commercial Code:

"La protezione della legge parte dalla mira di favorire il commercio dalle insidie che possono venire agli atti e alle scritture che lo riguardano; e se queste insidie sono ugualmente dannose sia che provvengano da un 'negoziante', sia che derivino da persone estranee alla mercatura, non vi sarebbe ragione alcuna per distinguere l'uno dalle altre"[308].

In respect of this crime also, the "praeiudioium alterius" is not an essential element. But where the forgery relates to a commercial or private bank document (as distinct from an authentic and public document) then, according to certain writers, the crime does not subsist unless the forger has in fact uttered the forged document. If, as Arabia says, use has not been made of the document by uttering it, there cannot be any criminal proceedings, because it remains a mere preparatory act which could be destroyed by the repentance of the offender, which repentance must be presumed until the contrary is proved[309]. It is not thought that this solution would be accepted by our Courts. As has already been pointed out, our Code deals with the crime of "use" distinctly from the crime of "forgery" and even where the "user" is the forger himself, our Courts have repeatedly held that, there are two distinct and separate offences.

The various modes in which this crime can be committed are clearly stated in the section. It must only be again noted that in regard to this crime also the forgery must be in respect of some material particular; otherwise, it would not alter the nature or the purpose of the document.

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[308] Roberti, op. cit., p. 310

[309] Op. cit., p. 172; vide also Nicolini P. P. p. II, n. 896

5. Forgery of Private Documents

This crime differs essentially from all the other crimes of forgery we have so far examined in respect of its object, that is to say, in respect of the private character of the document.

As to the means of perpetrating the crime, these are those specified in Section 187. Therefore, the forgery may be committed by false signatures, by the alteration of the writing or signature, by the insertion of the name of any supposititious person or by any writing made or entered in the document when already formed or completed.

Now, the Criminal Code does not give a definition of a private writing; nor is there a precise definition in the civil laws, although these often refer to such writings (e.g., Sections 1276 and 1277, Civil Code). But Section 633 of the Code of Organization and Civil Procedure lays down that:

"Any act which by reason of the incompetence or incapacity of the officer by whom it was drawn up, compiled or published, or which, owing to the absence of some formality prescribed by law, has not the force of a public act, shall be admissible as evidence as a private writing between the parties, if the parties have signed or marked the same or if it is proved that such act has been drawn up or signed by some other person acting on their instructions".

From this it is perhaps possible to infer that a “private writing” is one which is formed or received without the intervention of any appropriate public officer and to which the law attributes the force of evidencing a transaction in the widest sense of the word.

In order that this crime may arise, it is necessary that the private writing - the object of the forgery - shall tend to cause injury to any person or to procure gain (in the old Italian text: “atto a nuocere o a produrre alcun lucro” This element is not, as we have seen required in the case of forgery of public documents, because, as Roberti points out:

"La falsità nelle pubbliche scritture trascina seco l'onta alla fede dovuta alla im- pronta della pubblica autorità che ne garantisce, o a di cui nome ne vien garantita l'autenticità, quale onta non si verifica punto nella falsità delle scritture private"[310].

The "injury" or "gain" which the private writing must tend to produce or procure are not specified by the law: they are indicated in the most general and comprehensive way, and no distinction is, therefore, permissible to induce exceptions or restrict the meaning. But the injury or gain must be capable of deriving from the legal probative force of the writing: the writing must by itself be capable of causing injury or procuring gain.

A private writing is ordinarily evidence of a right or an obligation: when it may serve for the purposes of such evidence, it is capable of causing injury or procuring gain. Conversely, when a writing does not tend to prove 'quod actum est' or at least to open a way for that proof in accordance with the rules of civil law, it cannot be considered as a "private writing" within the meaning of that law: and its falsification cannot fall within the purview of the section we are now discussing, which deals precisely with the forgery of private writings as contemplated by the civil law.

General Provisions

1. "Any other kind of forgery not provided for in the preceding sections of this Title (Title V), when committed by any public officer or servant acting with abuse of his office or employment, shall be punishable with hard labour for a term from seven months to one year, and when committed by any private person, shall be punishable with hard labour for a term not exceeding six months" (sect. 196).

These other forgeries are known in the practice of our Courts as "innominati". According to Arabia, following Nicolini, the law here in speaking of "other kinds of forgery" is referring to the object of the forgery and not to the manner of executing the offence. In other words, the means of the forgery must, according to these authorities - be the same as those contemplated in respect of the other forgeries: only the instrument must be different, i.e., other than any of those expressly dealt with in the preceding sections of the Title.

[310] Ibid., p. 248

2. In all crimes of forgery when committed by public officers or servants, the punishment of perpetual general interdiction shall always be added to the punishment laid down for the crime.

VI. Crimes Affecting the Good Order of Families

Under this general heading our Code deals with three separate, though kindred, groups of offences, namely:

A. Crimes relating to the reciprocal duties of the members of a family

B. Crimes against the peace and honour of families and against morals

C. Crimes tending to prevent or destroy the proof of the status of a child.

In these notes we shall only consider those of such crimes comprised in the said three groups which appear to be of greater importance.

1. Bigamy

This is the crime committed by a husband or wife who, during the subsistence of a lawful marriage, contracts a second marriage. (Section 203)

Bigamy, as Blackstone tells us, properly signifies being married twice; but in law it is used as synonymous with polygamy, or having a plurality of wives at once, and polyandry, or having more than one husband at the same time.

The elements of the offence are three:

i. The existence of a previous valid marriage

ii. The celebration of another "marriage" with another person

and iii. The knowledge of the subsistence of the previous marriage.

Let us now consider each of these elements in some detail.

(i) Previous Marriage

To sustain a charge of bigamy the previous marriage, must have been valid. If that marriage was void the man who proceeds to marry some other woman will only apparently commit bigamy, but in reality, he does not commit the crime at all. And it does not matter that the previous marriage was not yet set aside at the time of the second marriage. That is null is inexistent even though the nullity has not yet been pronounced[311].

If upon a charge of bigamy, the plea is set up of the nullity of the previous marriage, the proceedings are usually suspended until the point is decided by the competent Civil Court.

(ii) Second Marriage

The second element of the crime of bigamy is the solemnisation of another marriage while the previous marriage still subsists. This second marriage must have been solemnised in the form and must satisfy all the requirements of a valid marriage so that it would have been valid were it not only for the impediment arising out of the subsistence of the previous marriage. This is, at any rate, the continental doctrine. In England, however, it was held that, though the subsistence of the second marriage would have been void as for consanguinity or the like, the defendant was guilty of bigamy[312]. In Archbold[313] it was thus stated:

"Where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage the case is not the less within the Statute (Offences against the Person Act, 1861, s. 57), by reason of any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case[314] […] And therefore where A having a wife living, married another woman, to whom he stood within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void under 5 & 6 Will. 4c 54 322, he was held to be guilty of bigamy".

[311] Vide Carrara "Pensieri", p. 230 et. Seq.

[312] Rex vs Brown, 1 C & K 144

[313] Op. cit., p. 1337

[314] Rex vs Allen

The proposition laid down by the Irish Court of Crown Cases Reserved in Rex vs. Panning[315] that to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, was fully considered in Rex vs. Allen above quoted, and disapproved.

The solemnisation of the second marriage is sufficient to constitute the material element of the crime of bigamy without it being necessary that such second marriage was “consummated” by sexual intercourse: for, according to modern ideas, bigamy is not considered as a sexual offence but an offence against the good order of families and the ground upon which it is punished is the broad one of its involving an outrage upon public decency by the profanation of a solemn ceremony.

(iii) Criminal Intent

The specific intentional element of the crime of bigamy lies in the wilful celebration of a second marriage in the awareness of the subsistence of the previous marriage[316]. This criminal intent is negatived by good faith consisting in the honest belief on reasonable grounds on the part of the defendant that the previous marriage no longer subsisted as, for example, owing to the death of the other spouse[317]. It is true that the provision of our Code (Section 203) which defines this crime does not require expressly any particular state of mind; "but as the Court for Crown Cases Reserved decided in 1889, by nine judges to five.

“The general principle of Criminal Law that a person cannot be guilty of a crime unless he has a guilty mind, is so fundamental that it must here override the omission of the statute in not expressly including a mental element as an essential requisite in the offence of bigamy”[318].

[315] 17 Tr C. L. R. 289; 10 Cox 411

[316] Carrara, Prog. Parte Speciale, Vol III, para. 1937

[317] Carrara, ibid., para. 1942, n. i.

[318] Vide Kenny, op. cit., pg 363; Confer also Chaveau et Helie, Vol. II, Part II, pg 235, n. 1676

The honest belief that the previous marriage was dissolved operates as a mistake of fact. But in England it was held that such “bona fide” belief is not sufficient unless proper and reasonable enquiries have in fact been made by the prisoner[319].

The requisite criminal intent must be present at the time of the celebration of the second marriage. If it is excluded by good faith at that time as we have already said, the discovery afterwards of the subsistence of the previous marriage will not suffice to constitute bigamy: the continued cohabitation of the parties thereafter as husband and wife may, in appropriate cases, only give rise to the crime of adultery.

In the definition of the crime under discussion the law refers only to a “husband or wife” who, being still bound by a valid marriage, remarries. What of the other party to the bigamous marriage not being himself, or herself, married? There is no doubt that if such other party is aware, at that time, of the criminal character of the fact, he is guilty as co-offender. His responsibility flows from the general rules of complicity. Bigamy is a crime the commission of which requires indispensably the concurrence of two persons one of whom must be a person bound by a previous marriage. This personal condition of one of the two parties to the crime is, as has been said, an essential constituent of the crime itself, and the consequences arising therefrom therefore extend to the other party. But it is necessary that such other party should have been aware of the criminal character of the fact. In this connection, as Pessina observes[320] a distinction is to be made, with regard to the existence or otherwise of the requisite intentional element, between the party who, being married, proceeds to another marriage, and the party who, not being married, contracts marriage with a married person. Concerning the former, the knowledge which he must have had of the previous marriage is enough to warrant the inference of the criminal intent, and it, therefore, lies on him to rebut this inference and prove his good faith; concerning the latter, on the contrary, it lies on the prosecution to prove that he was aware of the married state of the other party to the marriage.

Punishment

[319] Confer Archbold, op. cit., pg. 1339

[320] Op. cit., Vol. II, para. 164

The punishment for the crime of bigamy is hard labour or imprisonment for a term of from thirteen months to four years. Bigamy, Kenny points out[321], is a peculiarly elastic crime: the degree of guilt varying according to the degree of deceit practised and the sex of the wronged - from an offence closely approximating in heinousness to a rape, down to cases in which the parties' only guilt consists in their having misused a legal ceremonial for the purpose of giving a decent appearance to intercourse which they know to be illicit. Indeed, there may even be cases of an undoubtedly criminal bigamy where there is no moral guilt at all. For both parties may have been misled by some very natural misapprehension of law. The great, and unhappily increasing, dissimilarity between the matrimonial laws of civilised nations has made it but too easy for a man and a woman to be husband and wife in one country and yet not so in another.

Jameson also had written:

“This offence (bigamy) is susceptible of many degrees of criminality. The act of entering into a second marriage, during the subsistence of a previous lawful marriage, may in all cases be the same breach of public order, considered as depending on the due maintenance of the institution of marriage. But to the public offence may be added the grossest fraud and injury to an individual, or the act may be extenuated in various degrees by the long absence of a previous consort, as well as by other circumstances, as for example, that of concubine inducing a man to give her the apparent status of a wife at her own risk”.

In the Italian Code of 1889 the punishment for the crime» in ordinary cases, was alternatively that of “reclusione o detenzione” precisely - as the Ministerial Report said:

"Per corrispondere alle varie contigenze del delitto, che può essere macchinato nel modo piu' triste, e può essere al contrario la conseguenza, sebbene colpevole, di circostanze disgraziate e quindi scusabili."

But an increase in the ordinary punishment was provided in case the offender had misled or induced in error the party with whom he contracted the marriage “sulla liberta' dello stato proprio o dì essa”, “here there had been deceit - the Ministerial Report

[321] Op. cit., p. 364

observed - obviously greater is the inherent wrongfulness of the act, greater the injury, and greater, therefore, the responsibility:

"Perchè alla violazione del diritto del coniuge abbandonato si aggiunge […] la frode compiuta verso le persona con la quale si contrasse l'illecita unione, il perfido inganno della persona che si induce ad un connubio legalmente nullo"[322].

Attempt

There has been controversy among text-writers as to whether the crime of bigamy admits of an attempt. Most authoritative writers[323] hold that it does. But the great difficulty arises in determining which acts may constitute such attempts. We have already said that the crime of bigamy is completed by the celebration of the second marriage during the subsistence of the previous marriage: the consummation or otherwise of the second marriage is irrelevant: 'consensus facit nuptias non concubitus'. Therefore, if the possibility of a criminal attempt is to be admitted, it must be sought in the acts preceding the actual celebration of the second marriage and which constitute a commencement of execution. Sometimes it was held that the publication of the banns, the appointment of the day for the celebration of marriage, the execution of the nuptial deed or marriage settlement, the receipt of the dowry, were a sufficient commencement of execution to constitute a punishable attempt. At other times it was considered that the said acts were merely acts of preparation and, as such, not sufficient to amount to a criminal attempt[324]. We will not attempt to lay down any hard and fast rule concerning this question: we would only say that, as the essential act of the whole ceremony of marriage is the manifestation of the mutual consent of the parties, it may be perhaps safely said that there would be a punishable attempt in the case in which one of the parties has already pledged his consent by the ritual formula "I will" and the ceremony is frustrated before the act is completed by the

[322] Confer Maino, op. cit., art. 360, para. 1555

[323] E.g., Carrara, op. cit., para. 1745; Puglia, op. cit., p. 219

[324] Confer Maino, op. cit., para. 1554

other party's expression of consent. (Confer Chaveau et Helie, Vol. II, Part III, p. 239, n. 1670).

Controversy also exists among the writers as to whether bigamy is an instantaneous or rather a continuing crime. This question is of practical importance for purposes of prescription. As the crime consists in, and is completed by, in the wording of the law itself, the contracting of the second marriage, the better opinion seems to be that which considers bigamy as an instantaneous offence:

“La convivenza posteriore a modo coniugale fra i colpevoli di bigamia non e' continuazione del reato di bigamia; ma uno stato permanente di adulterio, e la prescrizione incomincia’ a decorre dalla celebrazione del secondo matrimonio nonostante quella convivenza”[325].

The Italian Code of 1889 expressly adopted a different solution. Article 360 thereof made prescription of the criminal action for bigamy to begin to run from the day on which one of the two marriages is dissolved or, the second marriage is declared null on account of bigamy. This provision is criticised by Maino[326] who quotes several writers to show that from a scientific point of view, that is according to general principles, bigamy cannot be considered as a continuing offence.

Jurisdiction

Bigamy is one of the exceptional crimes in respect of which our Courts are vested with extra-territorial jurisdiction. It can be tried in Malta according to our laws if the offender is a natural born or naturalised Maltese even though the crime was committed in any other / country, unless the offender shall have already been tried for it out of these Islands. (Section 5, Criminal Code).

2. Clandestine Marriage

Section 204 lays down:

[325] Pincherle, Manuale di Diritto Penale, p. 330

[326] Op. cit., art. 92, para. 533

"Where marriage is contracted before a parish priest or other competent minister of the Roman Catholic Church, without being preceded and accompanied by all the solemnities and forms prescribed in respect thereto by the laws of the said Church in force in the Island of Malta and its Dependencies, the party contracting such marriage shall, on conviction, be liable to imprisonment for a term from four to six months".

Our law "quoad formam" and "quoad vinculum" of marriage contracted by members of the Catholic Church is the Canon Law which has been adopted as the civil law of these Islands in the matter. The form of Catholic marriage is that prescribed by the decree of the Council of Trent.

Any person subject to such law who celebrates marriage before a parish priest or other competent minister of the Catholic Church is bound to observe all the formalities which that law prescribes and if he unlawfully contracts such marriage without observing such formalities, he will be guilty of the crime under reference, unless, of course, the observance of such formalities has been dispensed with by the competent ecclesiastical authorities.

3. Adultery

Sections 206 and 207 of our Criminal Code contemplate separately adultery committed by the wife and adultery committed by the husband. Adultery by the husband requires, as we shall see, special conditions for its incrimination. But there are certain conditions which apply to the crime either committed by the wife or by the husband, and it is expedient to cover this common ground before dealing with the special features of the crime when committed by the husband.

Our law, like all other codes which make provisions concerning this crime, does not give a definition of adultery. But this word, Chaveau and Helie point out, bears in itself its own meaning and its etymology is sufficient to explain itself "Adulterium alterum thorum vel uterum accessio". Adultery is the violation of the marriage bed, the breach of matrimonial faith consummated by sexual intercourse.

Three elements are indispensable to constitute the crime of adultery generally, namely:

(i) The married condition of, at least, one of the parties

(ii) A carnal connection

(iii) The criminal intent or dolus.

We will examine these elements in some detail.

I. Valid Marriage of Party

It is in the first place necessary that, at the time in which the sexual intercourse constituting the alleged crime took place, one at least of the guilty parties was bound by a valid marriage. A well-founded plea of the nullity of the marriage would exclude the crime[327]. If any such plea is raised in the course of the proceedings upon a charge of this crime, such proceedings are usually suspended until the Question of the validity or otherwise of the marriage is determined by the competent Civil Court.

The first condition of the crime of adultery, the existence of a valid marriage is not negatived by the separation of the spouse "a mensa et thoro". In fact, separation does not dissolve the marriage. Only, we shall see that the right of making a complaint for adultery is denied to the spouse who gave cause for the separation. (Section 208 (3).

II. Carnal Connection

The material element of the crime of adultery consists in sexual intercourse. In ethics an impure desire would constitute a sin: "Thou shall not covet thy neighbour's wife". But criminal law is not concerned with mere internal feelings. Nor indeed will the legal crime arise where the immoral wish has manifested itself in external conduct, but only by means of licentious acts or intimacies such as kisses or embraces. What is required is a complete sexual union between a man and a woman, for it is then that the marriage bed is truly violated, and serious consequences may be apprehended:

"In tema di adulterio e' requisito di essenza la consumazione del congiungimento corporale tra persone di sesso diverso, di cui la incolpata fosse unita con altri in matrimonio; come delitto, perseguibile criminalmente, nemmeno ammette attentato[328].

[327] Carrara, op. cit., Vol. III, paras 1879 & 1930

[328] Local Law Reports, Vol. IX, p. 456

The point is discussed by some writers whether an unnatural carnal connection would satisfy this requirement. Carrara, whose opinion is approved by Maino, replies in the negative, because, as Maino says:

“Non può ravvisarsi il reato la violazione di un diritto in un fatto al quale lo stesso coniuge offeso non avrebbe diritto”[329].

But although a carnal connection is thus necessary, it must not be thought that this must in every case be proved by direct positive evidence. To have so required would have been tantamount to making a prosecution for the crime impossible. For one thing Section 221 lays down that in all crimes under Title VII to constitute which there must be a carnal connection, the crime is deemed complete by the commencement of the connection, and it is not necessary to prove any further act. In English law also section 63 of the Offence Against the Person Act, 1861, provides that:

"Whereupon the trial for any offence punishable under the Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

But apart from this, all authorities are unanimous that, in respect of the crime of adultery, the proof of the requisite carnal connection may be drawn by way of an inference from the surrounding circumstances of the case. It is not necessary to detect the crime "in flagrante", while the offenders are "in ipsis rebus venereis" nor is it necessary that the offenders be caught "solus et sola, nudus et nuda, in eodem lecto". The proof is sufficiently established by circumstantial evidence, provided it is strong and consistent so that it can found that logical inference and moral certainty that are required[330].

III. Criminal Intent

The third essential condition of the crime of adultery generally is the criminal intention: “sine dolo malo adulterium non committitur”. This element is negatived in the case of violence: a married woman who is compelled by violence to yield her body to the

[329] Contra Pessina, op. cit., Vol. II, P. 310; Imnallomeni, Cod. Pen. Italo Illus. Vol. III, p. 110

[330] Confer Criminal Appeal, Police vs. Borg Testaferrata, 22/1/45

aggressor is clearly not guilty of any crime; she is rather the victim of rape. The mental element is also negatived where one of the parties to the act is induced in error as to the married condition of the partner, or believes in good faith and upon reasonable grounds that he or she is himself or herself free from the bond of marriage:

"non risponderà di adulterio la persona coniugata che all'atto dell'illecita relazione avesse giusta ragione di credere sciolto per morte dell'altro coniuge il matrimonio, e neppure colui che abbia relazione con donna maritata della quale ignori la condizione"[331].

Adultery by Husband

To constitute the crime of adultery by the wife the fact of one single carnal connection is sufficient. It is enough that she has yielded her body to another man, in any place whatever and even if only once. But for the incrimination of adultery by the husband the law requires certain special conditions. The mere sexual intercourse with another woman is not punishable unless the relation formed has acquired the character of being habitual and more or less stable so as to constitute "concubinage". In fact, Section 207 imposes a punishment on the unfaithful husband if he "keeps a concubine in the conjugal house or notoriously elsewhere". The reason usually given to explain the differentiation is that the act of adultery of the husband occasions less serious consequences than that of the wife, which renders uncertain the status and legitimacy of the issue and may saddle the husband with children that are not his. It is only when the husband not only forgets his pledged troth to his lawful wife but also inflicts on her the indignity and humiliation of having a rival in the conjugal house or witnessing the setting up by the husband of a sort of a second family elsewhere, that the aberration of the husband acquires sufficient gravity to call for a penal sanction.

Therefore, for the punishment of adultery of the husband, occasional facts of illicit sexual intercourse are not sufficient; nor is any illicit relation whatever sufficient. It is necessary that he keep a concubine living with him as his 'wife', in the conjugal house or notoriously elsewhere, forgoing a stable and continuous relation.

[331] Pessina, op. cit., Vol. II, p. 312; Maino, op., art. 353, para. 1535

Now, what must be understood by “conjugal house”? Chaveau et Helie give the following answer: It is the house which forms the common dwelling (ea domus in qua cum sua coniuge commaret), that, at least, where he can compel his wife to live and where she has a right to reside[332].

And what is to be understood by the words “keep a concubine”? According to the writers last quoted it is not necessary that the husband should bring a stranger into the conjugal house. Continued sexual intercourse such as constitutes concubinage with any woman other than the wife, even if she is a relative also living in the same house (as for example, a mother or sister-in-law) would constitute the crime. Nor does it make any difference that the concubine kept in the conjugal house or notoriously elsewhere, is not maintained at the expense of the delinquent husband[333].

Conditions for Persecution of Adultery

Adultery, whether of the husband or of the wife, is one of those exceptional offences in respect of which proceedings cannot be instituted except on the complaint of the aggrieved spouse. In this crime the mediate or indirect mischief is relatively so small and, on the other hand, the moral and material damage resulting to the aggrieved spouse and the family from the publicity of a criminal trial may be so great, that the law has thought it proper to make the institution of proceedings depend on the discretion of the said spouse.

The complaint, when made, extends ‘ipso Jure’ to the adulterer or, as the case may be, to the concubine of the husband. This principle of the indivisibility of the complaint has been laid down because an opposite principle would be unjust and dangerous: unjust because it might lead to the punishment of only one of the two offenders who necessarily concurred in the same crime: dangerous, because it might screen dishonest speculations and criminal collusions[334].

[332] Op. cit., Vol. II, Part II, n. 1470

[333] Op. cit., n. 1639; Vide also Maino, op. cit., art. 364, para. 154, n. 6.

[334] Maino, op. cit., para. 1544

In re The Police vs Borg Testaferrata et.[335], Harding J. held that the wife does not require the authority of the Second Hall to make a complaint for this crime against her husband.

But where the husband and the wife are judicially separated, the spouse who gave cause for such separation forfeits his or her right to make the complaint. It cannot be denied that when one of the spouses has rendered himself or herself guilty towards the other to the extent of giving cause for the pronouncement of separation, that spouse cannot invoke against the other the rigour of the law.

Punishment for Adultery

A wife convicted of adultery is liable to imprisonment for a term not exceeding one year. The same punishment applies to the adulterer. It might seem that as the nuptial bond binds only the adulterous wife, her punishment should be more severe than that of the adulterer. Our law, however, like other codes, has imposed an equal punishment because the adulteress and her partner are both co-principals in the crime and her personal condition of married woman, which is of the essence of the crime, necessarily extends to her co-principal: on the other hand it is not infrequent that the woman is instigated or seduced by the adulterer himself.

Imprisonment for a term up to one year is also imposed against the husband who keeps a concubine in the conjugal house or notoriously elsewhere, but the concubine is only liable to imprisonment for a term not exceeding nine months. Here the law has not made the punishment equal for both offenders "riflesso" as Maino says with reference to the corresponding provision of the Italian Code

"che a favore della concubina concorrono due ragioni per mitigare la pena: la mancanza del legarne infranto e la presunzione di essere stata provocata e sedotta"[336].

[335] Criminal Appeal, 27/1/45

[336] Ibid., art. 355, para. 1541

Exemptions from Punishment No punishment is awarded to the wife and the adulterer or, as the case may be, to the husband and his concubine, in any of the following cases:-

(a) If there has been at any time before conviction, the condonation, express or implied, of the offended party.

It is a general rule applicable in all cases in which the proceedings are instituted on the complaint of the party aggrieved that the complainant may, at any stage of the proceedings before final judgment is given, waive his complaint, (Section 55S). In case of adultery, the complainant may not only waive the complaint under this general rule, but may also, at any time before conviction, condone the offending spouse. Just as the law has left it in the hands of the aggrieved husband or wife to provoke by his or her complaint the initiation of the proceedings, so also it makes the continuance of such proceedings depend upon his or her continuing will. The community has greater interest that the spouses be reconciled than that a punishment should be imposed on an offence which, as we have seen, primarily, not to say exclusively, concerns the spouses themselves. Indeed the law is so anxious that the proceedings shall not, if possible, go on and publicise the family scandal and widen the breach between the spouses, that it presumes condonation if the offended party continues to co-habit with his or her wife or husband, as the case may be, or fails to lodge his or her complaint within six weeks from the day on which he or she became cognizant of the offence. But it must be clearly understood that in order that this presumption of tacit condonation may arise, it is necessary that it should appear that the offended spouse who continued to co-habit with the other spouse or failed to make the complaint, was aware of the offence suffered. Mere suspicion is not enough: certainty is required:

“sarebbe immorale e antigiuridico porre il coniuge che sospetti di essere offeso nella necessita’ di dar querela anche senza aver raccolto una prova sufficiente del fatto, per il timore di perdere l’azione”[337].

Condonation may also take place even after the conviction, in which case it has the effect of staying the execution of the sentence and of terminating the penal

[337] Maino, op. cit., art. 356, para. 1545; confer also Criminal Appeal The Police vs Borg Testaferrata et, 27/1/45

consequences thereof, (Section 210). Ordinarily, as has already been said, the right of stopping proceedings commenced at the instance of a private party is exercisable only until final judgement is given. But here the law gives to the injured spouse the right to condone even after the proceedings have been completed by a final judgement. It is a sort of right of pardon allowed to the aggrieved husband or wife in consideration of the fact that in this matter his will and his interests are supreme, when such condonation takes place the execution of the sentence is stayed and the effects thereof cancelled: so that the judgement cannot thereafter, inter alia, serve as a basis for a declaration of relapse[338].

Finally, the death of the complaining party produces the same effects as condonation, whether in the course of the proceedings or after sentence. By the death of such party the main reason for keeping alive the proceedings or of the sentence ceases. The law here speaks of the death of the complaining spouse. It appears that the death of the offending spouse would not affect or extinguish the proceedings of the sentence against the adulterer or, as the case may be, the concubine[339].

(b) The wife and the adulterer, or as the case may be, the husband and his concubine, are also exempt from punishment if:

(i) it is proved that the complaining husband has, within the last preceding five years, kept a concubine in the conjugal house or notoriously elsewhere

or (ii) if the complainant has been convicted of any of the crimes referred to in Sections 203, 205, 212, 213, 217, 220 of the Criminal Code

or (iii) if it is proved that the complaining wife has herself committed adultery within the last preceding five years

or (iv) if the complaining husband has for upwards-of- one year and without cause deserted his wife, leaving her in want

or (v) if it is proved that the complaining husband has previously acted as procurer for his wife, or that he has tolerated, encouraged, instigated, or facilitated her prostitution.

[338] Maino, loc., cit., para. 1550

[339] Maino, loc., cit., para. 1551

These are all cases in which the complaining spouse has rendered himself or herself unworthy of complaining:

"Se la legge rimette al beneplacito del coniuge tradito di vindicare l'onta e l'offesa ricevuta dal coniuge colpevole, non gli permette però ne' potrebbe permettergli di esercitare questa facolta quando se ne sia reso indegno"[340].

4. Rape or Carnal Knowledge with Violence

In English law, according to Harris (Principles and Practice of Criminal Law), rape is the offence of having carnal knowledge of a woman without her consent, either:

(i) by force or fear of bodily harm

or (ii) by fraud, as, for example, where, though there is no real consent, there is submission due to the belief that a medical operation is taking place

or (iii) by personation of her husband

or (iv) when she is asleep or unconscious, or so imbecile as to be -unable to understand the nature of the act.

In our law, the offence called “rape or carnal knowledge with violence” is that which is committed by any person who, by violence, has carnal knowledge of smother person of either sex.

Thus, there are two essential elements in this crime under our law, and these are:

and

(i) the carnal knowledge

(ii) the violence

I. The Carnal knowledge

The carnal knowledge, that is the sexual connection, distinguishes this crime from that of ‘indecent assault’ with which we shall deal later on. But the connection need not be

[340] Maino, op. cit., para. 1549

complete or consummated. Here also the rule laid down by Section 221 applies, namely, that the crime is deemed to be complete by “commencement of the connection without the necessity of proving any further acts. Also in English law, whenever it may be necessary to prove carnal knowledge for the purpose of any offence punishable under the Offences Against the Persons Act, 1861, it is not necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge is deemed complete upon proof of penetration only: and the slightest penetration is sufficient to prove the rupture of or injury to the hymen is unnecessary.

The carnal knowledge may consist in an unnatural connection.

II. The Violence

This is the characteristic decent of the crime of rape and serves to distinguish it from other crimes such as the one under Section 220. It is an element which is of the essence of the crime and not merely an aggravation of it. And such violence it is taught must be exercised on the very person of the patient: “oportet quod viclentia sit facta personae”. A man therefore, who forces the door of a house or of a room to gain access to a woman will not be guilty of this crime of rape if the woman voluntarily yields herself to him: “si quis frangaret ostium demus vel thalami, et violenter ingrediretur et non violenter orgnesecret non diceretur ccmnississe in coitu violcntiam, sed violenter tantum ingressum fuisse”[341].

The law does not specify what the violence must consist in. Nor could it. The whole point is to determine in each particular case whether the carnal knowledge took place against the will of the victim and notwithstanding such resistance as he or she could, having regard to his or her physical strength and energy, offer: All the rest boils down to an appreciation of the circumstances of fact according to the common experience of life. any attempt to determine “a priori” the intensity, the character and the degree of violence required would have been in vain and dangerous, they depending so much on the character and personal circumstances of the victim of the crime:

[341] Confer Chaveau et Helie, op. cit., Vol. II, p. 183. n. 1380

“Seconde l'età, le stato della salute e delle forze ed il temperamento della vittima, può avvenire che raggiungono l'intento dei mazzi che considerati in se stessi, nella generalità di casi, dovrebbe ritenersi inefficaci, e che riescano frustranei mezzi ed apparati per se stessi, nella generalità dei casi, idonei”[342]. But cur law, like other laws, has created certain presumptions with regard to this element of violence. Section 215 lays down that unlawful carnal knowledge shall be presumed to be accompanied with violence:

(a) when it is committed on any person under twelve years of age

(b) when the person abused was unable to offer resistance owing to physical or mental infirmity or for any other cause independent of the act of the offender, or in consequence of any fraudulent device used by the Offender.

Constructive violence is thus inferred in the first place from the young age of the victim. Children so young and necessarily so inexperienced are conclusively presumed incapable of consenting to the act or of fully understanding the nature of the act or of offering any resistance. Violence is then presumed in all cases in which the victim was, from infirmity of the body or mind or from any other cause independent of the act of the offender, unable to offer resistance to submit in consequence of any fraudulent device practiced by the offender.

As regards incapacity to resist from mental infirmity, it was held that it is not necessary to prove that the victim was totally insane: it is sufficient if, owing to mental infirmity the victim was in the impossibility of understanding the material and moral gravity of the act[343]. With regard to incapacity arising from ether causes independent of the act of the offender, this includes the case in which the victim was in a state of insensibility from liquor, having been made drunk by the prisoner (though the liquor was given only for the purpose of exciting her); or the case in which the victim was asleep[344]. Instances of fraudulent devices used by the offender to commit the crime would be by personating the husband, or by ether false pretences. Thus, in England, where the prosecutrix a girl of nineteen years, consulted the prisoner, a quack doctor, with respect to illness from which she suffered and he advised a surgical operation, and

[342] Maino, op. cit., art. 331, para. 1463

[343] Confer. Maino, loc. cit., para. 1467

[344] Archbold, op. cit., p. 1043; Maino, ibid

under pretence of performing it, had connection with her, she submitted to what was d* ne net with any intention that he should have connection with her, but under the belief that he was merely performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner, it was held that the prisoner was guilty of rape[345].

New, according to cur law, the victim of the crime of rape can be <u>any person</u>, whether a female or a male. It has already been said that the carnal knowledge may consist in an unnatural carnal connection: provided in all cases that the carnal knowledge is had with <u>violence</u>.

Several questions are discussed by text-writers in this connection. For instance, what if the victim was a common prostitute, or of a notoriously bad character for want of chastity or common decency. It was held in England that it is no excuse that the woman ravished was a common strumpet, or a concubine of the ravisher. Continental doctrine is also similar:

“Noi opiniamo”, thus say Chaveau et Helie, “che la debcscia anche abituale della donna non é un ostacelo all'esistenza del crimine perchè la sua vita dissoluta non basterebbe a legittimare alcun attentato sulla sua persona; essa non ha alient alienata la libertà di disporre di se stessa, e la legge che punisce le violenze estende la sua prctenzi.ne su tutti”[346].

The circumstances, however, that the woman was a prostitute or the mistress of the defendant or of bad moral character, should operate strongly with the jury as to the probability of the fact that connection was had with the woman against her consent[347].

Again, can the crime be committed by a husband on his wife. In -English law it is a general propositi n that a husband cannot be guilty of rape upon his wife; but, Archbold says, it would seem that the proposition does not necessarily extend to every possible case. In Regina vs N.N.[348], our Criminal Court (Sir Arthur Micallef) held that the crime of rape can subsist where a husband has unnatural carnal Connection with his wife, with violence:

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[345] Confer Archbold, p. cit., p. 1045

[346] Op. cit., para. 1581

[347] Archbold, p. 1046; Harris, cp. cit., p. 209

[348] 26/8/1854

“Se la legge non comprendesse sotto le disposizioni del detto articolo 195 (212) il reato di cui e' parola, nascerebbe il notabile e rimarchevole assurde, che una moglie, per la sola considerazione di moglie, dovrebbe considerarsi soggetta a qualunque atto violente della specie di cui e' parola, a cui piacesse assoggettarla il lui marito”.

Another question which is discussed in connection with the crime of rape is whether it admits of attempt. The better doctrine is that it does. We have already seen that if there is as much as a commencement of the carnal connection, the crime is completed and not merely attempted. But if there are other acts committed with violence and which do not amount to a commencement of the connection itself but constitute a commencement of the execution of the crime, and are clearly directed to the carnal connection, then there will be an attempted rape. It may be difficult in practice to distinguish between an attempted carnal knowledge with violence on the one hand, and violent indecent assault, defilement of niners, etc. c-n the other, since the material element of these crimes, may not offer any difference. To make the distinction regard must be had to the intentional element in order to ascertain whether the agent intended, for instance, to indulge his lust independently from carnal connection.

Aggravations of the Crime

The ordinary punishment for the crime is increased, by one degree in each of the following cases:

(a) when the offender has availed himself of his capacity of public officer, or when the offender is a servant of the injured party, with salary or other remuneration

(b) when the crime is committed by any ascendant, tutor, or institutor on any person under eighteen years of age

(c) when the crime is committed on any prisoner by the person charged with the custody or conveyance of such prisoner

(d) when the offender has, in the commission of the crime, been aided by one or more persons

(e) when the offender has, in the commission of the crime, made use of any arms proper

(f) when the person on whom the crime is committed, or any other person who has come to the assistance of that person, has sustained any bodily harm

(g) when the person carnally known has not completed the age of nine years.

The justifications of these aggravations are obvious. In the first three cases the crime becomes heinous by reason of the abuse of authority or breach of trust or special duties of the agent. The next three cases take account of circumstances which aggravate the violence used against the victim and cause greater intimidation and injury. The last case has regard to the extreme youth of the victim.

Prosecution of the Crime

In conclusion it is to be noted that proceedings in respect of rape cannot be taken except on the complaint of the private party, unless the offence consists in an unnatural carnal connection. If, however, the crime is accompanied with public violence or with any ether offence affecting public order, criminal action can be taken independently of the complaint of the private party. (Section 538, Criminal Code).

5. Abduction

Our law distinguishes two forms of the crime of abduction. The first is committed by any person who by violence abducts any person with the intent to abuse or marry such person. The second is committed by any person who, by fraud or seduction, abducts any person under the age of eighteen years who is under the authority of a parent or under the care of any other person or in an educational establishment.

For the existence of the crime it is, therefore, necessary that the victim has been abducted, that is to say, taken or removed from one place to another. The element is common to both forms of the crime. But the other elements differ, and we will therefore consider them separately.

I. Abduction by Violence

This variety of the crime can be committed against any person, whether male or female, whether of age or a minor, whether married or unmarried, provided the intent

of the agent was that of abusing the victim, or of marrying him or her. If the intent of the victim was that of abusing the victim the punishment is hard labour for a term from eighteen months to three years, with or without solitary confinement; if the intent was that of marrying the victim, the punishment is imprisonment for a term from nine to eighteen months.

The offence is completed the moment the person is taken away with the said purpose. The completion of such purpose is not necessary to constitute this offence.

II. Adduction by Fraud or Seduction

Where the means used to take away the victim are not “violence” but “fraud or seduction”, the crime arises only if the victim is a person under eighteen years of age, whether male or female, who is under the authority of a parent or tutor or under the care of another person or in an educational establishment. The fraud may consist in any device which places the victim into the hands of the offender, against, or at any rate without, the concurrence of the victim’s will. Therefore, it includes any means whereby the victim is induced in error and is decoyed to a place where he or she would not have consented to go without such fraud. It also includes any other fraudulent means, such as sleep, drunkenness, insensibility induced upon the victim so as to place him or her in the impossibility of opposing the taking away[349].

“La frode consiste”, say Chaveau et Helie, “nelle macchinazioni colpevoli, nelle fallaci promesse, nelle insidie tese all'inesperienza della gioventù tale sarebbe l'uso fatto fraudolentementè dall'agente del nome e dell'autorità' della famiglia del minore, per farlo uscire dal luogo in cui era posto; la corruzione praticata su coloro ai quali veniva affidato per farselo consegnare; tali sarebbero ancora le manovre impiegate per strappare ai parenti un consenso fondato su fatti falsi”[350].

Seduction consists in any persuasion, inducement or blandishment held out by the agent unlawfully to induce the victim to go away with him or her.

Extenuations

[349] Maino, op. cit., art. 340, para. 1504

[350] Op. cit., Vol. II, Part II, p. 285, n. 1744

If the person who shall have abducted another person as aforesaid shall within twenty-four hours voluntarily release the person abducted without having abused such person and shall restore such person to the family or to his or her place of custody or shall convey such person to any other place of safety, the punishment shall be imprisonment for a term from one to three months, (Section 214 (i)). Jameson thought that this limitation carries the reduction of punishment much too far. A young woman may be carried off by a villain and detained from her family and home, her reputation irreparably injured, her delicacy outraged, and every indignity committed short of actual violation of her person. It would be scandalous lenity, he said, to visit such an atrocious wrong with the punishment of one to three months imprisonment. And, indeed, the punishment for any illegal arrest, detention or confinement of a person, where the offender restores such person to liberty within twenty-four hours, is imprisonment for a term from seven months to one year.

But on the other hand, it must be pointed out that it is in the interest of the person abducted that the law seeks to induce the offender to release him or her at the earliest possible time and to refrain in the meantime from abusing such person. This inducement to be effective must represent a substantial reduction off the punishment.

If the offender, after abducting a girl, shall marry her, he shall not be liable to prosecution except on the complaint of the private party, whose consent, according to the civil law, would be required for the marriage. If the marriage takes place after the conviction, the penal consequences thereof shall cease, and the party convicted shall, upon his application, be forthwith released by order of the Court (Section 314 (3)).

This exception was also censured by Jameson who wrote:

The provision is liable to another serious object- ion - that the successful offender is exempted from all punishment just on account of the entire success of his crime. It is well known that this offence is generally committed from motives of base cupidity. It is a singular mode of preventing it, to declare. In substance that if the offender succeeds in compelling his victim into marriage, and if after thus obtaining right to her fortune which was the object of his crime, he can contrive to intimidate or bribe the relations into silence, he shall be freed from all punishment.

“The framers of the Code Napoleon”, Jameson went on, “are the original authors of this anomalous exemption which is thus rhetorically defended by M. Pause: 'Si l'interet

de la Società est qu'aucun crime ne reste pas impuni, son plus grand intcret, en cette occasion est de se montrer indulgente, et de ne pas sacrifier et une vengeance tardive l'honneur d'ime famille entière'. It is surely carrying indulgence beyond its fair limits, when the prohibition of nefarious attempts and the protection of the interests of persons so exposed to them are sacrificed to the considerations of a spurious delicacy".

But in defence of a similar exemption in the Italian Code of 1889 the Ministerial Report stated as follows:

"E' giusto ed equo non tener separate, per effetto del procedimento penale, due persone fra le quali si frapponeva dapprima il delitto, ma che poi si sono congiunte con uno dei vincoli piu' sacri; ed e' d'altronde prudente agevolare, con la concessione dell'impunità, la piu' grande riparazione che l'uomo possa dure alla donna da lui disonorata".

On the other hand, as Maino observes, the subsequent consent to the marriage may veil, in regard to the victim, be considered as a form of implied condonation[351].

Our law, as we have seen, in case of marriage between the offender and the girl abducted by him, makes the taking of proceedings contingent on the complaint of the party whose consent would, according to civil law, be required for the marriage.

6. Defilement of Minors

"Whosoever by lewd acts defiles a minor of either sex, shall, on conviction, be liable to hard labour for a term not exceeding two years, with or without solitary confinement"[352].

The substantive part of this provision is identical with the first part of art. 335 of the Italian Code of 1889, from which it was obviously derived. It deals with those lustful acts not consisting in carnal knowledge or attempted carnal knowledge with violence, whether actual or constructive, committed on the person or in the presence of an individual, whether male or female, and capable of defiling such individual.

[351] Op. cit. art. 352, para. 1530

[352] Section 217(l)

The first ingredient of the crime imprecisely, the age of the victim who must be below eighteen (18) years.

The second ingredient, which represents the material element of the crime, consists in the lewd acts. From the official and authentic explanations given in the elaboration of the model, it is evident that the expression “lewd acts” (atti di libidine) in the model was designedly used to make it clear that mere words, or any picture, book or representation, though obscene, or other indecent facts which affect only the moral sense, do not constitute the crime in question. It is required that the defilement be by lewd acts[353].

The lewd act constituting this crime must be committed either on the person of the minor, or even simply in his presence. To take a different view would be to ignore the obvious spirit of the law in creating the crime, that is the desire to protect youth from the pernicious effects of moral defilement and, therefore, also from all those acts which, though they take place without physical contacts, are nevertheless inherently intended to defile. Apart from this, the letter itself of the law speaks of lewd acts, without any distinction. Finally, the construction which we have given is explicitly supported by the observations made in the official reports on the draft of the model above quoted.

A carnal connection, even if natural, had with a minor, without violence actual or constructive, would undoubtedly constitute this crime. Some writers propounded the contrary view on the ground that such a connection is a perfectly physiological act and, therefore, not a lewd act as required by the law. But apart from the fact that one may doubt how far in cases of persons up to say sixteen years a carnal connection can be said to be a physiological act, it is arbitrary to add any qualification to the expression ‘lewd acts’ used by the law, in the sense of restricting it to morbid or pathological processes: whereas its natural meaning is inclusive of all acts directed to the indulgence of the sexual appetite. Moreover, it cannot be conceived that the legislature, which intended to safeguard the ingenuity of young persons from falling victim to the libidinous desires of others, could possibly have intended to withdraw its protection against that act which precisely represents the most frequent and most

[353] Vide Relazione Ministeriale sul progetto 1887, n. CXXVIII; Relazione della Comm. della Camera dei Deputati sul progetto 1887, n. CXOIX

complete expression of such desires. The law assumes generally that persons under eighteen years are, in any case, incapable of validly consenting to a carnal connection which, in adults, would not, if normal and voluntary (saving the case of adultery), constitute any offence.

Besides carnal connection, other lewd acts also of lesser gravity perpetrated on the person or in the presence of a minor would constitute the crime, provided they are calculated to defile the minor by exciting sexual passion or desire.

It need hardly be said that although the law speaks of lewd acts (plural), it must not be imagined that one single act, if calculated to defile, will not be sufficient. The plural is used by the law merely to denote the species and not the number of acts. It would be absurd to hold that the defilement should be unpunished only because it has been caused by one single act (presumably grave) rather than by more acts. It may, at most, be a question of degree for purposes of punishment[354].

The third ingredient of the crime is the defilement. In the reports above quoted on the draft Italian Code, it was made clear that there must be effectual defilement of the minor.

Hence the question arises whether the crime can take place where the lewd acts are committed on a person or in the presence of a person being, of course, in either case, under-age who is already defiled. Concerning this question there has been considerable controversy amongst text-writers and divergence in judicial practice. It was more than once held by Continental Courts that, if the minor is already defiled, he cannot be the object of the crime under reference. But as against this view, other judgements and authorities point out that there can be degrees of defilement and that it would be but an improvident law that which left unpunished the act of a person “che si adoperasse a sospingere sulla via della corruzione, fino al piu' sconfinato libertinaggio, un impubere che già vi fosse iniziato”[355].

Between the two extreme doctrines, the one that excludes the crime whenever the minor is already defiled, and the other that admits such crime irrespective of the previous defilement, Maino himself suggests a middle course. “It is an inquiry”, he

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[354] Confer Law Reports, Vol. XXI, Part IV, p. 3

[355] Confer Maino, op. cit., art. 335, p. 189, para. 1476

says, “which has to be made in each case by those who have to judge; and, notwithstanding the difficulties and uncertainties inseparable from such an inquiry, we hold that this is the most correct solution, having regard to the spirit and the letter of the law, thereby avoiding the two extreme views, the one which makes the crime subsist whatever the previous defilement of the minor, and the other which excludes the crime whenever the victim is not new to sexual practices, without caring to ascertain whether his defilement is yet capable of being aggravated by fresh acts, thus leaving exposed easy prey to the lust of others mere children fallen, often without fault of their own, on the road of vice, but who might yet be reclaimed if others did not take the advantage of their inexperience or foolishness to complete their ruin”[356].

This reasoning is, no doubt, appealing. But our Courts, probably considering the extreme difficulty, if not absolute impossibility, of deciding in any case that a minor is so utterly lost as to be beyond hope, have consistently inclined to the doctrine that previous defilement, whatever its degree, does not exclude the crime[357].

For the subsistence of the crime, it is not necessary that the defilement shall be <u>immediate</u>. The very young age of the person with whom the lewd acts have been committed does not rule out the crime, if the remembrance of such acts is calculated to cause the defilement. Indeed, according to our law, if the victim is under twelve years of age, that is a reason for aggravating the crime.

As to the intentional clement of the crime, no specific intent to defile is necessary. The defilement, whether intended or not, must be considered as a necessary consequence of the lewd acts themselves, leaving it in every case to those who are to judge to determine whether they were calculated to defile. If the acts are inherently capable of this effect, it is impossible to maintain that the agent who willed the acts did not also will and intend the consequences inherent in their nature.

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[356] Op. cit., ibid.

[357] Vide e.g., Criminal Appeal, The Police vs Schembri, 11/10/48

Aggravations

The offence is punishable with hard labour from two to six years, with or without solitary confinement, in each of the following cases:

(a) if the offence is committed on a person who has not completed the age of twelve years or with violence

(b) if the offence is committed by means of threats or deceit

(c) if the offence is committed by any ascendant by consanguinity or affinity, or by the adoptive father or mother, or by the tutor of the minor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the minor.

Moreover, when the offence is committed by an ascendant or tutor, he shall incur the forfeiture of rights and the disqualifications mentioned in sub-section (5) of Section 205.

Now as regards the aggravations at (b) above, the word “deceit" includes all devices or contrivances calculated to induce the minor into error in order to make him submit to the lewd acts of another. It would appear that a false promise of marriage would constitute such deceit[358].

With regard to the aggravations at (c), Maino is of the view that the words “any other person charged ... with the care or control of the minor" include a master vis-a-vis his servant. The word “charged" (in the Italian text “affidata”) must not be construed in a <u>formal</u> sense but rather in the sense implied in the natural order of the relationship existing between master and servant or employer and employee. It would be inconsistent to exclude the aggravation in the permanent relationship which derives from a “locatio operis” and admit it - as there is no doubt it must be admitted, in the case of a person who has, even casually, the temporary custody of a minor.

Proceedings

[358] Vide Maino, op. cit., para. 1478; Impallomeni, “Cod. Pen. Ital., Vol. III, pg. 88

Proceedings in respect of this crime cannot be instituted except on the complaint of the injured party. And, where the crime is not accompanied by any of the aggravations we have mentioned, the complaint is not admissible after the lapse of one year from the day on which the act was committed or the knowledge thereof was obtained by the person entitled to lodge the complaint in lieu of the injured party. (Sections 217 & 536), Wien the crime is accompanied by any of the said aggravations, then the period for lodging the complaint is the ordinary period for the limitation of the action[359]. If however:

(a) the lewd act consists in an unnatural carnal connection:

or (b) the crime is accompanied with public violence, or with any other offence effecting public order (as when the lewd acts are committed in a public place or in a place open to the public)

or (c) the act is committed with abuse of paternal authority or tutorship,

then in every such case, proceedings shall be instituted “ex officio”.

The reason why in respect of this crime as of other sex offences the legislature has deemed it proper to make prosecution generally conditional upon private complaint will be discussed in our studies of criminal procedure. Suffice it to quote the following extract from Maino[360]:

“Il legislatore considerò non essere un bene ne' per la morale pubblica ne’ per la pace e l’onore del facolare domestico attirare troppo facilmente la luce della giustizia sopra i traviamenti della vita intima, in quanto che dall'esercizio dell’azione pubblica potrebbe sovente derivare più danno che vantaggio alle stesse persone e alle famiglie che la legge intende proteggere; ed essere perciò più cauto e prudente lasciare agli oltraggiati la libertà di scelta nella tutela del proprio decoro”.

Now, as regards the time of one year within which the complaint must be lodged in the cases aforesaid, such time is not a special and abbreviated time of limitation or prescription. The lodgement of the complaint within one par is a condition for keeping

[359] Vide Debates of the council of Government, Vol. XXXIX, pg. 718

[360] Op. cit., art. 336, para. 1480

such criminal action alive and promote its exercise. But such action, once so maintained, is not prescribed except after the time applicable according to Section 683.

Conversely, if knowledge of the commission of the crime is obtained by the persons enabled to complain in line of the minor after the lapse of the time of prescription, they will not be able to lodge the complaint[361].

7. Lenocinium

(1) Inducing, etc., persons underage to prostitution

This crime is described by Section 218 as consisting in the act of any person who, in order to gratify the lust of another person, induces a person underage to practice prostitution or instigates the defilement of such person, for encourages or facilitates the prostitution or defilement of such person.

From this definition it is clear that the victim (soggetto passivo) of this crime can only be a minor, whether male or female, that is a person of either sex who is under age according to the Civil Code[362]. While it is true that such bad influences can in respect of females be easier and the injury greater, no reason exists for excluding young males from that protection which, in like conditions, is provided for young girls.

Now the characteristic of the crime under Section 218 (and, as we shall see, the crime under Section 219) is that the purpose of the agent is the gratification of the lust of others: whereas in the crime of defilement of minors, which has already been considered, the purpose of the agent is the gratification of his own passion.

As regards the material element of the crime, this may consist, alternatively, in either:

(a) inducing the minor to practice prostitution

or (b) instigating the defilement of a minor

or (c) encouraging or facilitating the prostitution or defilement of a minor.

[361] Confer Maino, cit.; also Debates of the Council of Government, loc. cit. pp. 268 - 270

[362] Vide Debates of the Council of Government, Vol. XXXIX, p. 245

The first two modes of commission represent the more serious variety of lenocinium, inasmuch as the procurer by Counsel and instigation, creates in the inexperienced and, perhaps, innocent mind of the minor, the idea or the desire to make himself or herself the means of gratifying the sexual appetite of others. The third mode of commission is less serious: here the offender does not induce or instigate the institution or defilement, but only encourages or facilitates same: “non può disconoscersi come ben diversa sia l'intrinseca immoralità del fatto di chi induce alla prostituzione o alle corruzione in confronto di quella della quale deve rispondere colui che, la prostituzione o corruzione avvenuta, la agevola, o la favorisce, e ben diverso il danno che da tale fatto deriva”[363].

From these considerations it would seem to follow that the first two species of the crime apply in the case of minors who are not yet defiled and the third applies in the case of minors already inured to vice[364].

Now “prostitution” means the yielding or offering of the body for promiscuous sexual intercourse or commonly for acts of lewdness, usually for payment. But as the crime under discussion may consist also in the instigation or encouragement or facilitating of defilement, such crime may subsist even where the acts are committed for the indulgence of the lust of a single person. But it is to be noted that /one/ according to Carrara[365], the word “defilement” in this connection refers to physical defilement. The purpose of the agent must be that of inducing the minor to the actual loss of his or her chastity or, in other words, to part with his or her virtue.

A grave question which arises also in connection with other crimes against morals is whether knowledge on the part of the accused of the age of the victim of the offence is necessary for the subsistence of the offence, or in other words whether reasonable cause to believe that the victim was above the prescribed age is a defence to the charge. Maino, following Stoppato[366] propounds the following solution: It does not lie on the prosecution to prove the knowledge of the accused of such age; but the accused must be admitted to furnish proof rebutting the presumption of knowledge;

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[363] Relazione above quoted, art. 329

[364] Vide authorities and precedents quoted in Maino, op. cit., art. 345 & 346, para. 1520

[365] Programma, Parte Speciale, Vol. VI, para. 8978

[366] La prova della scienza dell'età etc. in “Temi ven.”, 1907, 533

and such proof must be given in a positive manner so as, conclusively and reliably, to establish his good faith as to such age. A mere assertion by the accused that he was deceived by the look or complexion of the victim, or a mere statement of the latter would not be sufficient[367].

Our Courts would not be likely to adopt this doctrine even as circumscribed by Maino. The age of the victim is an objective fact and cannot be controverted by any evidence of opinion. The accused must be assumed to have acted at own risk and peril.

Aggravations

The offence is considered aggravated in each of the following cases:

(a) if it is committed to the prejudice of a person who has not completed the age of twelve years

(b) if it is committed by deceit

(c) if it is committed by an ascendant by consanguinity or affinity, or by the adoptive father or mother, by the husband or tutor of the minor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the minor

(d) if it is committed habitually or for gain.

When the offence is committed by the husband, by an ascendant or by the tutor, the provisions of sub-sections (4) and (5) of Section 205 apply.

(2) Compelling or inducing women of age to prostitution

Section 219 lays down that whosoever in order to gratify the lust of any other person, by the use of violence compels or, by deceit induces a woman of age to practice prostitution shall, where the act committed does not constitute a more serious offence, be liable, on conviction, to hard labour for a term not exceeding two years, with or without solitary confinement.

[367] Loc. cit., para. 1523

The punishment is from one to four years hard labour if the offence is committed

(a) with abuse of authority, of trust or of domestic relations

or (b) habitually for gain.

The requirement of the purpose of the offender to gratify the lust of others is common to this crime as to the preceding one. But in respect of this crime the victim can be only a woman and of age. Moreover, this crime requires always the use of violence or deceit.

Apart from this, having regard to the observations we have already made, this crime does not call for any special explanation.

But, in conclusion, concerning the crime of lenocinium generally, attention must be drawn to the provisions of the White Slave Traffic (Suppression) Ordinance (Chapter 102) which specially deals with the offences of inducing women of 21 years or more, or girls under 21 years, to leave these Islands for purposes of prostitution (secs. 2 & 3); of forcibly detaining women or girls in a brothel or in or upon any premises used for purposes of habitual prostitution (sec. 5); of knowingly living, wholly or in part, on the earning of prostitution (trading on prostitution); or, in any street or public place, importuning any person for the purposes of prostitution (sec. 7); of keeping or being concerned in the management of a brothel or premises used for prostitution or other immoral purposes, or knowingly letting for hire or permitting the use or sharing in the profits of the use of any vehicle for such Purposes (sec. 8); of keeping any premises used as a place of assignation for prostitution or other immoral purposes. (sec. 9).

8. Unnatural Carnal Connection

Blackstone called this “the infamous crime against nature, committed either with man or with beast”, a crime not fit to be named: ‘peccatim illud horribile, inter christianos non nominandum’”[368]. in the English ''Offences against the Persons Act, 1861", the crime is referred to as the "abominable crime of buggery» committed with mankind, or with any animal". Old legislations considered the crime as capital and punished it with death, and the rule was that if both parties had reached the age of discretion "agentes

[368] Comm. IV, 215-216

et consentientes pari poena plicantur". Also, the English rule now is that "it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated"; and that "both agent and patient (if consenting) are equally guilty"[369].

Our Section 220 punishes acts of lewdness against nature, that is to say those acts consisting in the unnatural carnal connection of two persons of the same sex or of different sexes, but committed without violence actual or constructive, or in the connection of a human being with an animal. "La disposizione dell'articolo 201 (now 220) abbraccia ogni congiungimento carnale contro le natura, senza distinzione fra congiungimento di un uomo con un altro maschio o femmina, chiamato nell'antica giurisprudenza "sodomia", e congiungimento di un uomo dell'uno e dell'altro sesso con una bestia, in quella stessa giurisprudenza chiamato "bestialità", e non presentando esse alcuna ambiguità non permette una interpretazione tendente a darle un significato diverso da quello che naturalmente portano le sue parole"[370].

Section 221 lays down that the crime shall be deemed to be complete by the commencement of the connection and it shall not be necessary to prove further acts. This rule applies to all crimes under the Title of Crimes Affecting the Good Order of Families to constitute which there must be a carnal connection.

9. Offences against Decency or Morals Committed in Public

Section 223 punishes any offence against decency or morals by any act committed in a public place or in a place exposed to the public, in cases where the fact does not constitute a greater offence under Sections 217 to 222 or some other provision of the law.

The object of the protection of the law under this section is public decency or morality. Publicity is therefore the essential basis of this offence. From this it follows that the

[369] Archbold, Op. cit., p. 1071

[370] Criminal Court, Three Judges, 16/5/1892, R vs C. Sciberras; and 18/11/1907, R vs Edw. Laughlin, Cremona, op. cit., p. 162

offending act may even be one which, if done in private, would be perfectly legitimate (e. g. normal sexual intercourse between husband and wife)[371].

The material element of the crime must consist in acts. Mere words might constitute some other offence (e.g., Sections 161 & 352(z)), but not this offence[372]. But, under a provision identically worded as ours (art. 338 of the Italian Code of 1889), it was held that the acts need not be "acts of lewdness," nor necessarily consist in exhibition of the private parts; embraces or other acts accompanied by such circumstances or words as offend the sense of decency were held to be sufficient[373].

The offending act may be committed on the person of another, or on one's own person, as for instance by the agent exposing his naked body or masturbating himself.

As we have already said, the characteristic element of this offence is that the offending acts shall have been committed in a public place or in a place exposed to the public. A place can be public either in a permanent manner, as a street or a square, or at certain times, as a theatre or a church. If the act is done in a place of the former category, it shall be deemed to have been committed in public whatever the time of the day or the night it is done; if, on the other hand, the act is done in a place of the second category, it will be considered as constituting this offence only if it is committed at a time when the place is open or accessible to the public. But; precisely because the law punishes these acts even if committed in a place "merely exposed to the public", it will be sufficient if the acts are done in a private place but in such a manner that they were visible to, or could have been seen by the public: "in luogo esposto al pubblico, e cioè' in condizioni tali da lasciar scorgere a chiunque non per singolare e fortuita eventualità, ma nell'ordinario dei casi, quanto vi si complet"[374]. It is not necessary, however, that any person should have actually viewed the act or that there has "been actual scandal"[375]. If the place is public, then "ratione legis" the possibility of public scandal is presumed.

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[371] Vide Arabia, Principii del Diritto Penale, Part III, art. 345, p. 246; Maino, op. cit., art. 338 - 339, para. 1494; Pincherle, op. cit., p. 304, para. 595

[372] Contra -- Pincherle, op. cit., p. 596

[373] Maino, ibid.; Vide Police vs. Grima, 7/11/49, Law Reports Vol. XXXIII, Part IV, p. 965

[374] Op. cit., para. 1495

[375] Confer Carrara, Programma Parte Speciale, Vol.VI, paras. 2941, 2950

The question is discussed whether to constitute this offence a specific intent to outrage public decency or morals is essential, According to Pincherle this specific intent is requisite: an obscene act if committed by way of a joke or caprice or for some similar motive would not constitute this offence. Impallomeni is of the contrary opinion: if the act is voluntary, it is not necessary to prove that the intent of the doer was to injure or outrage public decency: “offende il pudore e il buon costume colui che volontariamente agisce il modo da offenderlo, e non e’ necessario che si voglia offenderlo”[376]. Maino makes a distinction having regard to the nature of the act itself. Acts of lewdness and other acts which, though not committed for a lewd purpose, are intrinsically obscene, always outrage decency and good morals and, if committed in public, constitute this offence: the agent must be held to have intended the effects which are natural to them. But there are other acts, such as the exposure of the naked body, which, having regard to the intention with which they were committed, may constitute a mere contravention (e.g. the contravention under Section 352 (q) of our Criminal Code) or this crime according as to whether they were done with the deliberate purpose of outraging the moral sense of others, or to procure sexual satisfaction or to offend others and so on. In all these cases the specific intention directed to the commission of an obscene act in public excludes the element of negligence which is a marked characteristic of contraventions[377].

In Criminal Appeal The Police vs Fenech[378] our Court seems by implication to have held that the crime under discussion subsists, as has already been said, notwithstanding that the purpose of the agent may not have been that of indulging his passion but, for instance, that of giving offence to or insulting another[379].

If the outrage on public decency is committed by printed matter, then the provisions of the Press Ordinance apply.

10. Kidnapping or Concealing an Infant, etc.

[376] Cod. Pen. It. al. 111., Vol. III, p. 44

[377] Loc. cit., para. 1496

[378] 4/11/1902

[379] Vide also Maino, loc. cit.

Section 224 deals with the offence of kidnapping or concealing an infant, or of suppressing its birth or substituting one infant for another, or of supposititiously representing an infant to have been born of a woman who had not been delivered of a child.

As the heading under which this provision is contained expressly shows, the purpose of the legislator in creating this offence is to ward off acts tending to, prevent or destroy the proof of the status of a child. Such acts are usually committed from motives of lucre, the desire to appropriate property devolving on the child or, by making a birth appear, to enjoy the property which in j the name of the child is thereby secured. As Jameson pointed out the offences tending to prevent or destroy the proof of the civil status of an infant were derived from the Neapolitan and French Criminal Codes, in which they had been found necessary to enforce the law of registration of "births and prohibit society from the consequence of the fraudulent concealment or supposition of infants[380].

Every man has the right to the establishment of his true status, and the State also has the right of not being deceived as to the genuineness thereof, civil status being the basis of the family. All those facts whereby such status is maliciously altered are consequently considered as offences affecting the good order of families; not only that of families founded on the legitimate bond of matrimony, but also that of illegitimate children, because even the status of an illegitimate child involves rights which ought to be respected and protected[381].

The provision above quoted determines the modes in which the offences may be committed; these are:

(a) kidnapping or concealing an infant

(b) suppressing the birth of an infant

(c) substituting an infant for another

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[380] Report, p. 113

[381] Pessina, op. cit., p. 334; Carrara, op. cit., Parte Speciale, Vol. II, para. 1955; Maino, op. cit., art. 361, para. 1559

(d) supposititiously representing an infant as having been born of a woman who had not given birth to a child.

The law here speaks of "infant" and not, as for instance in Section 261 of "newly born child" or, in Section 258A "a child under the age of twelve months". It is commonly held that for the purpose of the crime under discussion the word "infant" does not necessarily mean newly born or recently born child[382]. Puccione thus wrote: "La parola infante qui si prende NON come nell'infanticidio, ma nel suo lato senso, e comprende cosi ogni bambino che non ubbia compito il settenio". And Arabia writes: "Pino & che dunque non si esce di fanciullezza, cioè, non si arriva per lo meno all' età di sette anni, quando incomincia la coscienza che un Uomo può avere di se', vi può essere sempre il reato"[383]. This, of course, does not refer to the modes of perpetration of the offence at (d) above: "poiché dalla natura del reato e' chiaro che questo può' avere luogo qualunque sia l'età del fanciullo supposto"[384].

The first three modes of perpetration regard the suppression or alteration of civil status; suppression, where the infant is deprived of his true state without giving him any other, so that it is not known to which family he belongs; alteration where the infant is given a different status from that which belongs to him. The concealment or suppression occurs when the birth of the infant is kept concealed from those who would have to register it, so that every proof of his true state is suppressed[385]; alteration takes place when an infant is substituted for another so that the one for which the other is substituted loses his status and the other takes his place in the family. The case of suppression or concealment presupposes that an infant is alive at the time of the commission of the offence and who, therefore, by having a life independent of that of his mother, would have enjoyed a civil status[386]: "Se un fanciullo nascesse morto, non vi sarebbe reato a sopprimerlo ed occultarne la nascita, perchè ne vi può essere questione di stato civile, ne può ricevere o transmettere diritti. Vi sarebbe reato a sostituirgline uno vivo perchè' sarebbe lo stesso come sopporre un

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[382] Impallomeni, Cod. Pen. Ital. 111. Vol. III, p. 121; Puccioni, Cod. Pen. part 111, Vol. IV, p. 159; Arabia, op. cit., Part III, art. 346, p. 248; contra Pessina, op. cit., p. 353

[383] Dell'art. 326, Codice delle Due Sicilie

[384] Arabia, ibid.

[385] Marchetti, Compendio di Diritto Penale, p. 252

[386] Carrara, op. cit., para. 1953

parto, che non e' avvenuto, ed alterare lo stato civile"[387]. In the case of a still-born child there might be the offence under Section 254.

It may be noted in conclusion that the Civil Code at Section 298 makes it an offence liable to imprisonment up to three months for any person requested by a competent officer to give information concerning the particulars required for the drawing up of, inter alia, an act of birth, refusing to answer any questions put to him by such officer relating to such particulars, or falsely stating that he does not know such particulars. The same punishment according to Section 299 applies against any person who makes any false declaration concerning such particulars. By Section 200 any person who, in a case not specially provided for in the Title, offends against the provisions thereof is made liable to detention for one month.

Nothing in the provisions of the Civil Code affects the application of the provisions of the Criminal Code which we have here discussed if the fact falls under these provisions rather than under the provisions of the Civil Code. This is expressly stated in Section 302(l) which also lays down that any forgery of any of the acts or registers mentioned in the Title or of any certificate or other document which may be delivered, in lieu of the act, in connection with the registration of any birth, (marriage or death) shall be liable to the punishment provided by the Criminal Code in respect of forgery of public writings.

VII. Crimes Against the Person

Life, personal safety, and reputation are inherent rights of man, interests inseparable from and fundamental to his personality. They are enjoyed by him as a man, considered by himself, independently of his social position as a citizen of the State. (Carrara). Injuries committed to such rights form the subject matter of this class of offences which, under our Code, comprises:

(a) Homicide

(b) Bodily Harms

[387] Arabia, ibid.

(c) Abortion and Administering of Poisons or Injurious Substances

(d) Abandonment and Exposure of Children

(e) Threats and Private Violence; and

(f) Defamation and the Disclosure of Secrets.

Our examination of this list of crimes will naturally begin with those which affect the security of man's person, employing here that word in the sense of the living body of a human being. Of all such crimes that of HOMICIDE is necessarily the most important; and, to every student of Criminal Law, homicide is a crime particularly instructive inasmuch as in it, from the gravity of the fact that a life has been taken, a minuter arguing than is usual in other criminal cases is made into all the circumstances, especially into the wrong doer's state of mind.

Homicide in general is the killing of a man by another man: "caedis hominis ab homine". But it may happen that the same effect (the death of a person) may be produced with the deliberate intention of causing death, or with the intention of causing merely a bodily harm, or without any intention but merely through negligence. In the first place you have wilful homicide; in the second case, homicide "praeter intentionem"; in the third case, involuntary or negligent homicide. All these are kinds of homicide which entail criminal liability, though of different degrees, and it is the formal or mental element, which distinguishes the one from the other.

And then there are other homicides which are not criminal at all, i.e., the species of justifiable homicides, and other homicides which though criminal are, for special reasons, less so, i.e., the species of excusable homicides. Be it noted that the meaning of excusable in our law does not strictly tally with that attributed to it, in the same connection by English lawyers)[388].

We must consider all these various species of homicide separately, beginning with the gravest, "the highest crime", as Blackstone called it, "against the law of Nature that man is capable of committing[389].

[388] Cfr. Kenny. op. cit., p. 116 et. seq.

[389] Comm. IV, 177

1. Wilful Homicide

Our law thus defines wilful homicide “A person shall be guilty of wilful homicide if, maliciously, with intent to kill another per- son or to put the life of such other person in manifest jeopardy, he causes the death of such other person” (Section 225 (2)).

From this definition it appears clear that the following elements are all necessary to constitute the crime:

(A) A human life that is taken away

This condition implies that the crime cannot be committed except upon a person in being, whatever his age, the condition of his mind or body, whether sane or insane, wounded, about to die from other causes (e.g., sickness or a death sentence), etc.: provided he was still in a living state at the time of the killing.

Wounds inflicted upon a body when life is already extinct, in spite of the perverse homicidal intention disclosed by the act, constitute nothing but an impossible attempt. On the other hand, the killing of the foetus in the mother’s womb is not yet homicide. To constitute homicide the child must have “come into the world” or, in other words, have been born and born alive.

In English law it is said “the birth must precede the death, but it need not also precede the injury”. Therefore, if the child is born alive and dies by reason of the potion of bruises it received in the womb, it may be murder in the person who administered or who gave them. Likewise, if a mortal wound is given to a child whilst in the act of being born, for instance upon the bed as soon as the head appears and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. But it must be proved that the entire child has actually been born into the world in a living state. There must be an independent circulation in the child before it can be accounted alive. A child is born alive when it exists as a live child, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power

of living by or through any connection with its mother. But the fact of a child's being still connected with the mother by the umbilical cord will not prevent the killing from being a murder[390]. If the child is born alive, it does not seem, according to the more authoritative doctrine, that it is necessary to prove that the child was capable of continued life (vitale)[391].

With the special crime of infanticide, we shall deal later on.

"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accuses has made no confession of any participation in the crime. Before he can be convicted of the crime, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for". The statement in the judgment of the New Zealand Court of Appeal in the case Rex v. Horry (1952) was quoted with approval in the recent case in England of "Rex v. Onofrejczyk"[392].

(B) An act of man destroying life

The second condition of the crime of wilful homicide is that life has been taken away by an act of man. "The killing may be by poisoning, striking, starving, drowning, and of a thousand other forms of death by which human life can be overcome"[393].

The act which destroys life may be an act of commission or an act of omission. Of certain acts of omission it is hardly necessary to speak. Count Ugolino who, in the Tower of Pisa, died because the person who had imprisoned him therein deliberately failed to take food to him, clearly died at the hands of that person. But another man, witness of the fact, **who had no duty**, to take food to the prisoner, if, though he could, he did not come to his assistance, would he be guilty of homicide? Most undoubtedly any right-thinking man would, in such circumstances, feel bound by the laws of

[390] Cfr. authorities quoted in Archbold, op. cit., pp. 898 - 893

[391] Cfr. Maino, op. cit., art. 254 "nato vivo e vitale", para. 1573

[392] Cfr. L.T., 11/02/1955

[393] Blackstone, op. cit., Vol. IV, para. 196

morality and humanity to help his fellow-man. But by the positive law, such man could not be punished for the death because his act was not the **cause** of death. Nor would a man who by the law has the direct duty to prevent crime, e.g., a policeman, and who, though he could, does not prevent the killing, would be guilty of homicide - unless, of course, he was an accomplice. In fact, the killing in such case is not the direct result of any act on his part (Arabia, op. cit., p. 255). But if a person has the duty to provide food, e.g., a gaoler, to a prisoner, then if with the requisite intent he omits to do so and death ensues, he would be guilty of the homicide. In England "premeditated neglect .... **by** persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them with necessary food, etc., if attended with fatal results, may be murder". (Archbold, op. cit., p. 914).

We shall see later on how our law deals with the abandonment and exposure of children.

According to some, the act causing death must ne a material act, that is, an act operating physically on the body of the deceased; "un atto che agisce sul morale, per esempio il cagionare un dolore, uno spavento, che producessero la morte, non sarebbero sufficienti alla nozione dell'omicidio"[394]. This is not in accordance with the more commonly accepted doctrine. "Il mezzo non e' certo necessario che sia materiale, perchè' se le torture morali, che vengono o dal dolore, o della privazione della volontà, o dallo spavento possono uccidere, quando ciò' sia provato, il giudice ben può condannare per omicidio"

Altavilla says:

"Il mezzo può essere fisico o morale; un trauma fisico ed un trauma psichico. E' noto che si può unccidere con uno spavento, un dolore"[395].

The law in England is now also to the same effect: "It used formerly to be thought", says Kenny[396], "that killing by a mental shock would not be murder; but, in the clearer

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[394] Pincherle, op. cit., p. 344

[395] Trattato di Diritto penale, Vol. X, pp. 13 - 14

[396] Op. cit., p. 149

light of modern criminal science, such a cause of death is no longer considered too remote for the law to trace".

This is thus not a question of principle but a question of evidence. The difficulty of proof may often disappear before the nature of the fact.

In England, to constitute murder, death must follow within a year and a day. But in our law, when the intention was homicidal (contrast the section referring to bodily harm followed by death) no time limit is fixed after the injury within which death must ensue in order to sustain a charge of wilful homicide. This is in accordance with the laws of the continent and also in accordance with Scottish law and other Criminal Codes in other countries. Kenny considers that the limiting of the period was a wise precaution in view of the defectiveness of medical science in mediaeval times, hut now no longer justifiable having regard to the present advance of forensic medicine.

What is known as "killing by perjury", i.e., causing an innocent man to be sentenced to death by false evidence, is not, in English law, murder. Yet, in "foro conscientiae", it is as much so as killing with a sword. Indeed it is, perhaps, the worst and most heinous form of wilful homicide, which manifests more deliberate malice and aggravated guilt; and our law, as we saw in dealing with the crime of perjury, without classifying this atrocious offence under the head of wilful homicide, punishes it, nevertheless, as such, making an exception only where the sentence of death is not actually executed (Section 102).

(C) The killing must be malicious

The taking of human life to constitute wilful homicide, according to the definition of our law, must be "malicious" (doloso). This word here means no more than that the killing must be unlawful. It is not, in the context, employed in its original (and popular) meaning of 'ill-will' or 'enmity', 'spite' and maliciousness to the person. In .... a man may be guilty of wilful homicide though, by mistake or accident, he may have killed a person whom he had no desire to harm at all: indeed, he may have been his own best friend. The word "maliciously" in the definition merely means an evil design in general, the consciousness of doing a wrong thing, and serves to mark off wilful homicide from other forms of homicide, which, though the intention be the same, i.e., to kill, are yet

not criminal, being ordered or permitted by the law or by lawful authority or otherwise justifiable.

(D) The killing must be committed with the specific intent to kill or to put life in manifest jeopardy

This is the grand criterion which distinguishes wilful homicide from all other species of unlawful killings. The word "maliciously" describes the generic criminal intent, i.e., the consciousness of doing something against the law: these other words connote the specific criminal intent of wilful homicide which must be precisely that of killing or at least exposing the life of another to manifest peril. It is the distinctive attribute of the crime. Without the specific intent there cannot be this crime, nor any attempt of it. It is the intent that distinguishes bodily harms which constitute an attempted wilful homicide from those which do not constitute it and are punished as the complete offence of bodily harm. So if the person injured dies, following the infliction of the bodily harm, but it is established that the intention of the offender was not that of killing or of putting the life of the victim in manifest danger, the crime of wilful homicide does not arise, precisely on account of the absence of that specific intention. We would have the less serious crime known on the continent as homicide "praeter intentionem" (omicidio preterintenzionale) or, in our law, "bodily harm followed by death" (Section 239). It is, likewise, the said specific intent that distinguishes wilful homicide from homicide by misadventure or accident and homicide by negligence or involuntary homicide. In these two species of homicide there is an absence also of any intention to harm (animus nocendi). In the case of homicide by misadventure, the killing is the effect of pure accident (casus) and, therefore, not imputable to anybody; in the case of involuntary homicide, the killing is the consequence of an act of negligence, which excludes criminal intent, and is punished as an independent minor offence.

But it must be noted that, according to our law, the intent in wilful homicide need not be positively that of "killing" (animus necandi). It is sufficient if the intent is to "put the life of another person in manifest jeopardy". Where the intent is "to kill", the intention is direct. Where the intent is "to put the life of another in manifest jeopardy", the intention is positive indirect. The law has considered that from the point of view of wickedness, having regard to the consequences ensuing, there is nothing to distinguish between a man who with the positive clear intent of killing proceeds to do

an act which in fact causes death, and the man who, although without positively desiring to kill, yet does an act which inherently and obviously is likely to kill and in fact causes death. The knowledge that the act is likely to kill, or the recklessness whether death, clearly foreseen as probable, shall ensue or not, is properly treated by the law on the same footing as the positive intention to kill. Every man must be presumed to intend the obvious and natural consequences of his voluntary acts: “dolus indeterminatus determinatur ab exitu”. In English law also, intention only to hurt - and not to kill - but to hurt by means of an act which is intrinsically likely to kill is considered sufficiently wicked to constitute murderous malice. “In the old case of Rex v. Holloway (1628) a park keeper, on finding a mischievous boy engaged in cutting some boughs from a tree in the park, tied him to his horse’s tail, and began to beat him on the back; but the blows so frightened the horse that it started off and dragged the boy along with it, and thus injured him so much that he died. The park keeper was held to be guilty of murder”[397].

But the specific intent we have Been discussing as essential to constitute wilful homicide, must not be construed as recurring <u>premeditation</u>, that is, the settled deliberate mind and design for some time before the commission of the act. If there is evidence of premeditation (concerted schemes, lying in wait), it makes it easier to prove the specific intent requisite. But even without any evidence of premeditation, such specific intent may well subsist. In other systems of law (e.g., Italian Code of 1889, Art. 366; Old Code of the Two Sicilies, Art. 348, etc.) which distinguished between wilful homicide of different degrees of gravity, premeditation was recognised as an <u>aggravation</u> but not as an essential notional element of the crime. A man who forms the intent to kill or to put the life of another in manifest peril and actually kills upon a sudden quarrel, although there may be no evidence of any previous cold-blooded calculation, commits wilful homicide, even if, it may be, in certain cases, excusable. With regard to the requirement of "malice aforethought" in the English definition of murder, Kenny thus points out:

(The malice) “need never really be <u>aforethought</u>. except in the sense that every desire must necessarily come before, though perhaps only an instant before - the act which

[397] Kenny, p. 155

is desired. The word 'aforethought' in the definition, has thus become either false or superfluous"[398].

Now the specific intent - and, indeed, responsibility for wilful homicide - is not negated by the fact that the person who was actually killed is different from the one whom it was intended to kill, or that the offender did not intend to kill any particular person. Section 226 of our Criminal Code expressly applies the provisions of Section 225 (definition and punishment of wilful homicide) "even though the offender did not intend to cause the death of any particular person or, by mistake or accident, shall have killed some person other than the person whom he intended to kill". The position is the same in English law. Among the several forms of 'mens rea' which have been held-to be sufficiently wicked to constitute murderous malice, Kenny mentions:

(i) "Intention to kill a particular person, but not the one who actually was killed.If a man shoots at 'A' with the intent and desire (or, as Bentham would express it, the 'direct intention') of killing 'A' but accidentally hits and kills 'B' instead, this killing of 'B' is treated by the law not as an accident but as a murder. In the old legal phrase, 'malitia egreditur personam', the 'mens rea' is transferred from the injury contemplated to the injury actually committed.

(ii) Intention to kill, but without selecting any particular individual as the victim. This has been conveniently called 'universal malice'. It is exemplified by the case put by Blackstone, of a man who resolves to kill the next man he meets and does kill him[399] and by the more frequent and more intelligible case of Malays who madden themselves with hemp into a homicidal frenzy and then run 'amok'; and by that of the miscreant who, about 1890, placed an explosive machine on board an Atlantic liner about to sail from Bremerhaven, in order to get the money for which he had insured part of the cargo"[400].

The same principles were applied and apply in the Italian Code and other Continental Codes:

[398] Op. cit., p. 153

[399] Comm., XV, para. 200

[400] Op. cit., 153 - 154

“Quando si abbia la morte d’un uomo volontariamente prodotta dal fatto d’un altro, l’errore sulla persona uccisa non toglie la volontarietà dell’omicidio: vi fu nel delinquente il proposito di uccidere: in fatto, si ebbe una uccisione: quindi il concorso si tutti gli estremi del reato”[401].

Even in Roman Law, the "Lex Cornelia de Sicariis" declared, that it was not enacted for the protection of the life of this or that particular individual, but for the protection of all men "ipsam humanitatem tuetur"[402].

But, as we shall see more fully later on, when by mistake or accident, the person killed is other than the person intended, the agent shall nevertheless benefit of any excuse which would have decreased the punishment for the crime if it had been committed on the person against whom the act was intended (Section 248, Criminal Code). Similarly in English law, “if a man fires at ‘A’ in such circumstances as would make the killing of ‘A’ manslaughter, and by accident hits and kills ’B’ whom he never intended to kill at all, he is guilty of manslaughter”[403]. Likewise, under the Italian Code of 1889. Indeed, art. 52 of that Code made a general provision applicable to all crimes and not only to the crime of wilful homicide (and bodily harms) to the effect that, where by mistake or through any other accident a crime is committed to the prejudice of the person different from that against whom the agent had directed his action, all circumstances which would have diminished his punishment for the crime if he had committed it to the prejudice of the person against whom his act was directed shall avail him.

Although this provision of the Italian Code, like Section 248 of our Code above-quoted, mentions only circumstances or excuses which would have diminished the punishment, there is no doubt that the same applies also in respect of circumstances which would exclude punishment altogether[404].

Punishment

The punishment for wilful homicide is death. But if the person convicted of such a crime is a woman who at the time of conviction is pregnant, the sentence to be passed

[401] Maino, op. cit., art. 254, para 1575

[402] Cfr. Arabia, op. cit., p. 256

[403] Archbold, op. cit., p. 908; Kenny, op. cit., p. 154 note

[404] V. Maino, op. cit., Art. 52, para 243; Arabia op. cit., P. III, Art. 348 - 356, p. 257

on her, or, if the sentence of death shall have already been passed, the sentence to be substituted for it, shall be imprisonment with hard labour for life (Sections 614-615, Criminal Code). In any case, if the jury had not been unanimous, the Court may award a sentence of hard labour for life or for a term of not less than twelve years in lieu, of the punishment of death (Sect. 504).

Unlike our law and English law, certain other codes distinguish between simple wilful homicide, which they do not visit, of course, with capital punishment, and certain other forms of aggravated wilful homicide. These aggravations are based on various considerations:

(a) The person of the victim

(b) The means- of perpetration

(c) The mode of execution

(d) The character and motive of the delinquent.

To the first species of aggravated homicides, belong those committed on the father, mother or other close relative or on certain public officers in the execution of their duties.

To the second belong homicides by poison ("of all species of death", Blackstone wrote, "the most detestable is that of poison: because it can of all others be least prevented either by manhood or forethought"), by arson, inundation, or great public damage.

To the third belongs homicide by premeditation or accompanied with great cruelty.

To the fourth belongs homicide committed for sheer brutal wickedness, or to prepare or facilitate the commission of another crime, or to cover up or to suppress the traces of another crime.

Bodily Harm

"Whosoever, without the intent to kill or put the life of any person in manifest jeopardy, shall cause harm to the body or health of another person or shall cause to such other

person a mental derangement shall be guilty of bodily harm" (Section 220, Criminal Code).

If, where an actual bodily harm is occasioned, the intent of the perpetrator was that of causing death, then, provided the means used or the mode of perpetration might have caused death, the offence chargeable will not be that of the bodily harm, having regard to the injury actually inflicted, but that of attempted wilful homicide, having regard to the more serious effect (death) which was intended.

The fact that the law in defining this crime merely excludes the specific intent of wilful homicide, and does not mention, positively, any other criminal intent, does not mean that an intent is not necessary. Bodily harm caused unintentionally may be either purely accidental and, therefore, not criminally punishable at all or merely negligent and, therefore, punishable as involuntary. To constitute the crime of wilful bodily harm, the injury must have been caused intentionally. But the intention required is merely the 'animus nocendi', the generic intent to cause harm, without requiring necessarily an actual intention to do the particular kind of bodily harm which, in fact, ensues. In other words, it is not essential that the intention was to produce the full degree of harm that has actually been inflicted. As we saw last year, the word "intention" in law has a much wider meaning than in philosophy, or indeed in ordinary use. It 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[405].

Therefore, in the case of bodily harm, if the intent of the doer is to injure, he will answer for the harm actually caused, in application of the principle "dolus indeterminatus determinatur ab exitu".

Now, the bodily harm may, as the law says, consist in harm to the body or health or in mental derangement. We may, therefore, here repeat what we have already said in connection with wilful homicide, that is, that provided the effect can be traced to the act of the prisoner, it makes no difference that the act operated on the mind or psyche

[405] Kenny, op. cit., p. 177

of the victim causing, e.g., a shock or some other mental unsettlement rather than on the physique causing, e.g., a wound or cut or stab[406].

It likewise makes no difference that no physical violence was directly exerted on the body of the victim, for even without this (e.g., by keeping for a long time an infant in a damp and cold place, or by giving him only scent and unwholesome food) it is possible to cause the effects contemplated by the law. In all such cases the effect is always a hurt or an injury calculated to interfere with the health or comfort of the victim. The difficulties that might arise, where direct physical violence has not been used, are simply a matter of evidence which, in particular cases, may give way before the circumstances which speak for themselves[407].

It is, moreover, commonly held that it is not necessary that the injury shall have been directly caused at the hand of the offender. Thus, a man will be guilty of the offence of bodily harm if he assaults another with a weapon and the latter gets hurt in trying to snatch the weapon from the aggressor's hand to ward off the assault and defend himself. The same applies to a man who pursues another with a weapon, if the latter in running away, grasps at something which injures him. A principle which seems to be more or less to the same effect was applied in the English case of Rex v. Martin. The facts were as follows:

Shortly before the conclusion of a performance at a theatre, the prisoner with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslight on a staircase which a large number of such persons had to descend in order to leave the theatre and he also, with the intention and with the result of obstructing the exit, placed an iron bar across" the doorway through which they had to pass in leaving. Upon the lights being thus extinguished a panic seized a large portion of the audience and they rushed in a fright down the staircase, forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus crushed on the staircase, several of the audience were severely injured, and amongst them ‘A’ and ‘B’.

[406] Cfr. Carrara, Prog., Parte Speciale, Vol. II, para. 1396

[407] V. Maino, op. cit., Art. 372, para. 1631

It was held that upon these facts, the prisoner was rightly convicted of unlawfully end maliciously inflicting grievous bodily harm upon 'A' and 'B'.

This case leads us to refer to what we have already said in dealing with wilful homicide and which applies also here, i.e., that the prisoner may be convicted notwithstanding he may not have intended to injure any one person in particular or by mistake or accident he injured some person other than that whom he intended to injure. But here again the provisions of Sect. 248 apply.

Attempted Bodily Harm

The principle that in the crime of bodily harm a generic intention to injure is sufficient, the offender being answerable for the harm which has actually ensued, gives rise to the doubt whether a charge of attempt is legally possible. As is well known, on a charge of an attempted offence, an intention to commit that particular offence is requisite. Basing themselves mainly on this, several Italian writers (be it noted that the definition of the offence of bodily harm in section 372 of the Italian Code of 1889 is, in substance, identical with that of Section 228 of our Code) maintained that, in respect of bodily harm, a charge of an attempt is impossible: the responsibility of the agent may only be assessed by relation to the effect actually produced.

But this doctrine was not, generally speaking, accepted by Italian tribunals[408] which admitted the possibility of a charge of an attempted bodily harm more serious than that in fact caused. The contrary opinion raises to the status of a general rule what is merely in particular cases (may be numerous) simply a difficulty in evidence. Looking at the classification of offences as made by the Law it is not difficult to imagine certain circumstances in which, having regard to the means used by the offender and his mode of action, one may be certain of his intention to produce one rather than another of the effects therein mentioned. Should there still remain a doubt as to the gravity of the result aimed at by the offender, the principle will naturally apply: "in dubio pro reo". Of course, if the result actually produced is punishable with a higher punishment than

[408] V. Altavilla, op. cit., p. 44

the attempt of the result intended, nothing will prevent the prosecution from preferring the charge liable to the higher punishment[409].

So far as is known, whenever the doubt was raised before Her Majesty's Criminal Court, the Court invariably adopted the latter doctrine in directing the jury.

Classification of Bodily Harm

Our Code (Section 229) distinguishes bodily harms into grievous and slight. But, as we shall see, grievous bodily harms are of various degrees of gravity, though not called by any different name; and there is one kind of slight bodily harm which is likewise not specifically designated by any special name but which in the practice of our Courts is described as slight and of small consequence (Section 335 (3)).

Certain other codes classify "bodily injuries having regard to all these various degrees, into very grievous (gravissime), grievous (gravi), slight (lievi) and very slight (lievissime).

A - Grievous Bodily Harm

A "bodily harm is grievous (Section 230):

(a) If it can give rise to danger of:

(i) loss of life; or

(ii) any permanent debility of the health or permanent functional debility of any organ of the body; or

(iii) any permanent defect in any part of the physical structure of the "body; or

(iv) any permanent mental infirmity.

Where the person injured shall have recovered without ever having "been, during his illness, in actual danger of life or of any of the said effects, it shall be deemed that the

[409] V. Maino, art. 372, para. 1633

harm could have given rise to such danger only when the danger was probable in view of the nature or the natural consequences of the harm.

If, instead of the mere possibility of the danger above described, the bodily harm actually causes any permanent functional debility of the health or any permanent functional debility of any organ of the body, or any permanent defect in any part of the physical structure of the body, or any permanent mental infirmity - then the grievous bodily harm is considered as aggravated and punished much more severely. Such debility, defect or mental infirmity shall be deemed to be permanent even when it is only probably so (Section 232).

(b) If it causes any deformity or disfigurement in the face, neck or either of the hands of the person injured.
The word 'deformity' stands for the word “deformita” in the old Italian text of our law, and the word ‘disfigurement’ stands for the word “sfregio” therein.

Now, to ‘deform’ implies something more serious than to ‘disfigure’. Any external injury which detracts from the appearance of the face, or of the neck or of either of the hands - the most conspicuous parts of the human body, provided it is not too trivial, will be a sufficient ‘disfigurement’ to make the bodily harm grievous. The word "sfregio" used with reference to the face in Art. 372 of the Italian Code of 1889, on which our provision was identically modelled, was officially interpreted as including “qualunque nocumento che può recarsi alla “regolarità” del viso, all'armonia dei suoi lineamenti od anche alla sua bellezza”[410]. If the injury is more marked so as to give to any of these parts of the body affected an unpleasant appearance, as by causing a considerable alteration of the tissues, then the disfigurement becomes deformity.

But it must be clearly noted that, in our law, in order that the bodily harm may be considered grievous, it is not necessary that the deformity or disfigurement of the face, or of the neck or of either of the hands be serious and permanent. If it is serious and permanent then this is a reason for a further aggravation of the offence and for increasing the punishment. The injury would be serious and permanent for instance when it consists in mutilation of the nose or of the fingers.

[410] Relazione Ministeriale sul progetto del 1837, n. CXLVTII

Responsibility for the offence will not abate merely because the deformity or the disfigurement might have been eliminated or reduced by some special treatment, e. g., plastic surgery, or in some other way, e.g., artificial denture or a glass eye. Nor does responsibility abate because the deformity or the disfigurement may be concealed by the hair, or the beard, or by a veil or in some other manner. In all these cases, the fact of the deformity or disfigurement is left and the nexus of the causality with the act of the offender remains unaffected.

(c) If it is caused by a wound which penetrates into one of the cavities of the body without producing any of the effects mentioned in Section 232.

The cavities of the body to which reference is here made are the abdominal, the thoracic and the cranial. The mere fact of penetration of the wound, without requiring that the wound shall have actually produced serious permanent harm, shall be sufficient. The mere possibility of such more serious effects arising from any such wound, affecting vital parts of the body, has been considered sufficient by the law to make the injury in itself grievous.

(d) If it causes any mental or physical infirmity lasting for a period of thirty days or more; or if the party injured is incapacitated, for a like period, from attending his occupation.

The system of making the gravity of the injury depend on the duration of the infirmity was criticized by noted jurists. The main objection taken is that such criterion makes the matter of a day or a few hours of difference decisive and productive of an enormous difference in punishment. Moreover, the duration of the infirmity is not a true criterion to judge the seriousness of an injury which varies in gravity rather according to the part of the body where it is produced. It would have been better, according to these jurists, if each case were left to be assessed by experts, than to fix a hard and fast rule which, in the last resort, is founded only on a presumption.

While these theoretical objections cannot undoubtedly be brushed aside, it has appeared to the legislatures which have included such provision in their codes, that the said criterion is a practical and convenient one. It provides an easily ascertainable standard which is better than mere conjectures or hypotheses. Moreover, having

regard to the financial loss which may be occasioned to the victim (though such loss is not an essential consideration) owing to the duration of the infirmity or incapacity for the stated period, the injury well deserves to be classified as grievous.

It is to be noted that according to our law the infirmity and the incapacity to attend to one's occupation are contemplated alternatively, not cumulatively. Either is sufficient.

Although our law does not say it expressly, "occupation" means the victim's ordinary occupation. The injury will be grievous if it produces the incapacity of the victim to attend to his ordinary calling or work for thirty days or more, even though during the whole or some part of such time the victim was not totally or absolutely disabled from all kinds of work: the law speaks of "his (the victim's) occupation".

(e) If, being committed on a woman with child, it hastens delivery.

If, instead of merely hastening delivery, the injury causes miscarriage, then the punishment is considerably increased (Section 232 (l) (c)).

"Il criterio differenziale e' semplice: nel primo caso si e' anticipata l'espulsione di un pardo maturo, e quindi si e. prodotto un danno relativamente lieve alla madre e al figlio; nel secondo il danno e. la vita del figlio"[411].

In other words, in the first case, there is merely the acceleration of delivery or premature delivery consisting in the extrusion of a child in such an advanced stage as to be capable of living: whereas in the second case, there is the extrusion of a foetus at a stage when it is incapable of an independent life.

In connection with this particular kind of grievous bodily harm, Italian text writers and commentators discuss the question whether knowledge of the pregnancy of the woman on the part of the offender is a requirement of the offence. Among the welter of contradicting theories propounded by the various writers based mostly on subtleties of distinctions and on provisions of positive law which have no counterpart in our own Code, we submit that in our law such knowledge is not an ingredient of the offence. We have already seen that in respect of the offence of bodily harm generally a specific intent to cause the particular degree of harm actually ensuing is not necessary: a

[411] Altavilla, op. cit., p. 40

generic intent to cause harm, the mere “animus nocendi” is sufficient, the offender being answerable in proportion to the harm which eventually, in fact, ensues. In our law, pre-existing causes which may contribute to make the injury serious, though unknown to the offender, will not diminish his responsibility. It is only supervening accidental causes that induce a reduction of punishment (Section 233).

If all this applies to all grievous bodily harms generally, there is no reason, nor is any one provided by the Code, to make an exception in respect of this particular kind of grievous bodily harm.

Supervening Accidental Causes

(La Dottrina delle Con-Cause)

Section 233 lays down that if a supervening accidental cause has contributed to make the injury grievous or aggravated as aforesaid, then the punishment is decreased by one or two degrees.

Although, where a grievous bodily harm has in fact been caused, it is not necessary to prove that the doer had the specific intent to cause that particular degree of harm, it is nevertheless considered that it would be contrary to the dictates of justice to hold the doer responsible for effects which, perhaps, he did not intend and which, in any case, his act would not have produced but for the supervening accidental causes which contributed to make the effects of his act serious. There is not in such case a direct and complete causal connection between the act of the offender and the effects ensuing.

But so that the offender may have this reduction of punishment, it is essential that the contributory causes shall be both supervening, that is to say, arising after the infliction of the harm by the offender, and accidental, that is to say, altogether independent of the act of the offender. Any antecedent disease which may have contributed to make grievous any injury which in a healthy person would not have produced such serious result, will not, therefore, avail the offender. Nor will any circumstance which, though supervening, is connected to the act of the defendant as a consequence thereof.

Cases of supervening accidental contributory causes would he, for instance, the negligence of the doctor attending the patient, or the improper applications to the wound, or the non-observance by the patient of the doctor’s prescriptions. In all such

cases we have a new fact, a positive fact, independent of the act of the offender, which is super-added to the injury and produces effects which the injury, by itself, would not have produced. But the case would be otherwise if, for instance, the wound turns to gangrene, or septic poisoning or becomes grievous by its natural consequences, or from an operation rendered advisable by the act of the accused. The rationale of this is that a person who brought the victim into some new hazard of serious personal injury may fairly be held responsible if any extraneous circumstances, that were not intrinsically impossible, should convert that hazard into a certainty[412].

Grievous Bodily Harm by Firearms, etc.

A grievous bodily harm is punishable more severely if it is committed with arms proper, or with a cutting or pointed instrument, or by means of any explosive, or by any burning or corrosive fluid or substance (Sect. 231).

This does not require any elaborate comment. The means used to cause the harm are sufficiently serious in themselves to require more energetic repression. Apart from the fact that these means are calculated and likely to cause extensive harm, the use of them discloses a greater degree of malice, greater determination and a more dangerous character on the part of the offender.

Arms proper are those defined in Section 64, namely, all fire-arms, all other weapons, instruments and utensils mainly intended for defensive or offensive purposes.

It is, of course, clear that the punishment prescribed by Section 321 applies where the bodily harm caused

[412] It is to be clearly noted that the doctrine of supervening accidental causes applies only in regard to bodily harm. It does not apply in regard to the crime of wilful homicide. In other words, if the intention of the agent was specifically that of killing or of exposing the life of the victim to manifest jeopardy and death in fact ensues, the agent is guilty of wilful homicide without any legal extenuation even if death had ensued partly as a result of supervening accidental causes.

by the means mentioned therein is simply grievous without producing the more serious effects described in Section 232 If these more serious effects in fact ensue, then the punishments prescribed by Section 232 apply irrespective of the means whereby the harm has been caused.

Grievous Bodily Harm Ending in Death

A person guilty of grievous "bodily harm from which death ensues solely as a result of the nature or the natural consequences of the harm and not of any supervening accidental cause is punished:

(a) With hard labour from six to twenty years if death ensues within forty days from the midnight immediately preceding the crime

(b) With hard labour or imprisonment from four to twelve years if death ensues after the said forty days but within one year reckoned as above.

The punishment is hard labour or imprisonment from three to nine years if death ensues as a result of a supervening accidental cause and not solely as a result of the nature or the natural consequences of the harm.

This is a form of homicide “praeter intentionem”. If the intention of the doer, wrongfully causing a bodily harm, was that of killing and death ensues, he is guilty of <u>wilful</u> homicide and not of this special crime. So also if his intention was to put the life of the victim in manifest danger. Death being easily foreseeable as a probable consequence of the act, the grave result which ensues is treated by the law as if it were intentional.

But where the intention of the offender was merely to cause a bodily harm, even though serious, but not such as to expose the victim to manifest danger of life, and death ensues, then this result goes beyond this intention and the law cannot justly punish the act as one of wilful homicide. The death, which was neither desired nor actually foreseen nor patently foreseeable as a likely consequence of the act, cannot fairly be charged against the offender as wilful. But in so far as his intention was directed to the wrongful injury of another, he must, though to a lesser extent than if he had intended, directly or indirectly, to kill 1 answer for the death which his act has in fact caused. And for this it is not necessary to enquire whether the death was more or less foreseeable. The following dictum said with reference to the Italian Code of 1889, applies to our law:

“Il Codice Italiano [...] non pone il fondamento della diminuente dell'eceesso del fine, nella piu o meno facile prevedebilità da parte dell'agente, delle conseguenze, che col fatto proprio poteva produrre, bensì nella intenzione di lui, nell'atto di ledere l'altrui integrità personale, di voler produrre lesione di entità minore a quella che effettivamente abbia prodotto”.

Indeed, if the death was obviously foreseeable from the fact that the intention of the agent was to cause a bodily harm of such a grievous nature as to expose the life of the victim to manifest jeopardy then, if death ensues, the agent is guilty of wilful homicide.

So that, therefore, this form of criminality may arise, it is essential that the intention of the agent was not that of killing or of exposing the life of another person to manifest danger, but only that of causing a bodily harm, whatever the degree, but not such as makes the contemplation of death manifest. If there was not even such an intention, in fact no intention at all to cause a hurt or injury, then if death ensues, it can either be purely accidental or, if due to negligence, involuntary, or, if ensuing from the commission of another crime, e.g., the crimes under sections 326, 330, 331, and 335 of the Criminal Code, imputable under those provisions.

That is so far as regards the mental element.

The material element consists in any grievous bodily harm of those already described, from which death ensues. But for the purpose of punishment, the law distinguishes between the case in which death follows solely as a result of the nature or the natural consequences of the injury and the case in which supervening accidental causes have contributed to bring about the fatal result. And in respect of the former case, the law further distinguishes "between the case in which death happens within forty days and the case in which death occurs later than forty days hut within a year.

We have already seen in dealing with the crime of wilful homicide that the law does not fix any time within which death must happen. In view of the sound criticism of Mr. Jameson of a provision fixing such a time in the original project[413], that provision was omitted when our Code was enacted. But where the intention of the agent was merely that of causing a “bodily harm, the law thought it proper to prescribe a time “beyond

[413] P. 114 and Note “C” of his report

which, if death occurs, it will not hold him especially liable for it. In principle, of course, the interval which may elapse between the commission of the criminal act whereby the injury is inflicted and the death of the sufferer in consequence of that injury, might have no effect in our estimate of the offender's guilt (Jameson). But, for practical reasons and, having regard, we repeat, to the fact that the fatal result was not intended, it is fair not to impose any aggravation of the punishment prescribed for the grievous harm caused, when death results after a reasonably long time.

The punishment varies, as already pointed out, according as to whether the death ensues solely as a result of the nature of natural consequences of the harm or also as a result of the supervening accidental causes. For the meaning of the latter expression, we may refer to what we have already said.

In English law, an act may amount to an unlawful killing either as murder or as manslaughter, even though it be so remote in the chain of causes that it would not have produced death hut for the consequent acts or omissions of third parties, unless the subsequent acts or omissions of the third parties were either wilful or, at least, unreasonably negligent. The rule extends even to similar intervening conduct on the part of the deceased victim himself: e.g., his refusal to submit to amputation[414].

B - Slight Bodily Harm

Any bodily harm which does not produce any of the effects mentioned in sections 230, 232 and 234 is deemed to be slight (Section 235 (l)). In effect, a bodily harm which is not grievous is slight. But, of course, the definition which section 228 gives of bodily harms generally, applies also to slight bodily harms. In other words, a slight bodily harm:

(a) consists in a harm to the body or health or in a mental derangement which is not grievous within the meaning of the said Sections 230, 232 and 234

and which:

(b) is caused by a person acting without any intention to kill or to put the life of any person in manifest jeopardy but with the intention of causing a personal hurt.

[414] Vide Kenny, op. cit., pp. 148 - 149

A stab or a cut or any contused or lacerated wound or mental shock or any other hurt or injury calculated to interfere with the health or comfort of a person, caused in the foresaid circumstances, would be sufficient to constitute slight bodily harm. The nature of the instrument or means with which it is caused, or the manner how it is caused is, generally, immaterial. But if the offence is committed by an am proper or any other of the means specified in section 231 the ordinary punishment is substantially increased. Conversely, where the effect, considered both physically and morally, is of small consequence to the injured party, the ordinary punishment for slight bodily harm is reduced.

Common Aggravations

The punishments prescribed for bodily harms under sections 230, 231, 232, 234 and 235 (1) and (2) (in effect, for all bodily harms except those which are slight and of small consequence) are increased by one degree when the harms is committed:

(a) on the person of the father, mother or any other legitimate and natural ascendant, or on the person of a legitimate and natural brother or sister, or on the person of the husband or wife, or on the person of the natural father or mother; or

(b) on the person of any witness or referee who shall have given evidence or an opinion in any suit, and on account of such evidence or opinion.

The reasons for these aggravations are obvious. In the cases at (a) the offender not only injures the right of personal safety and the integrity which belongs to every individual, but also offends against that special duty of love and good-feeling arising out of the bonds of close family relationships. In the cases at (b), a greater than the ordinary degree of protection is due to the persons giving evidence or an expert opinion in legal proceedings, thereby to ensure the freedom of such evidence or opinion in legal proceedings so essential to the proper administration of justice.

By the law, quite reasonably, provides (Sect. 236 (2)) that the increase of punishment shall not take place when the offender, without intent to cause harm to any particular person or with intent to cause harm to some other person, shall, by mistake or accident, cause harm to any of the persons mentioned above. In such case, the reasons for aggravation do not apply.

Proceedings upon Complaint

In the case of slight bodily harm not committed by any arm proper or other means mentioned in section 231, and of slight bodily harm of small consequence proceedings may not be taken except on the complaint of the injured party unless the offence is committed on a witness or referee in the circumstances contemplated in section 236 (1) (b).

2. Justifiable Homicide or Bodily Harm

As we have already said, it is not every homicide or bodily harm that is criminal, and it is <u>not</u> criminal, in the first place, where it is ordered or permitted by law or a lawful authority. In any such case the homicide or bodily harm is said to be <u>justifiable</u> and involves no legal penalty whatever. A typical illustration of this class of cases is that of the hangman who carries out the sentence of a competent court.

(N.B. This ground of exemption from liability was dealt with in the <u>General Part</u>).

3. Excusable Homicide or Bodily Harm.

A <u>justifiable</u> homicide or bodily harm is one that is not criminal at all and does not involve any legal penalty whatever. An <u>excusable</u> homicide or bodily harm, on the other hand, is one which is, criminal and involves legal penalties, but is less blameworthy than wilful homicide or bodily harm in ordinary cases, and, therefore, less severely punished. How less severely depends on the nature of the excuse and, of course, the kind of bodily harm caused.

(I) Excusable Homicide

Now, the cases in which, according to our law, a wilful homicide is excusable are the following:

(a) Where it is committed in repelling, during the day-time, the scaling or breaching of enclosures, walls, or the entrance of any house or inhabited apartment, or the

appurtenances thereof having direct or indirect communication with such house or apartment (sect. 241 (b)).

If the homicide is committed in the same circumstances but during the night-time, then according to section 233 (a), it is included amongst the cases of lawful defence and is, therefore, not merely excusable but justifiable.

The reason for the distinction is clear. The fright and alarm and especially the immediate apprehension of personal danger due also to the greater difficulty of obtaining assistance, caused by an assault on one's house at night-time are greater than during the day-time.

(b) When it is committed by any person who, acting under the circumstances mentioned in section 237, shall have exceeded the limits imposed by law, by the authority, or by necessity (Section 241 (d)).

Under section 237, a homicide is justifiable if it is ordered or permitted by law or by a lawful authority or is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person. But so that the justification which excludes entirely any criminality in the act, may apply, it is necessary that the limits imposed by law or by the authority or by the necessity of the defence are not exceeded. If there is an excess beyond such limits, then complete justification cannot be claimed, but only an excuse: in other words, the act will constitute an offence and will be liable to punishment, though reduced, unless the excess is due to the person concerned being taken unawares, or to fear or fright.

This provision was introduced into our Code by section 21 of Ordinance No. VIII of 1909 and was modelled on article 50 of the Italian Code of 1889, Introducing the Bill in the Council of Government at the sitting of December 23, 1908, the then Crown Advocate thus explained:

"A person, while engaged in self-defence or in carrying out an act which the law enjoins or permits, may exceed the bounds of moderation and an injury to life or limb may ensue. This, according to the general principles of the law, is an offence. It constituted what in Italian law is styled "Un eccesso di difesa" or "Un eccesso nell'esercizio dei propri doveri". As a rule, when any similar excess is committed, the persons convicted of such an excess are dealt with as a person who commits an excusable homicide or

an excusable bodily harm [...]. To give an instance, if a person can defend himself and avoid danger by wounding his assailant or maiming him, he would not be justified in killing him, even though he is the victim of an assault"[415].

Further in the course of the discussion, at the sitting of May 5th, 1909, the Crown Advocate said:

"Self-defence is certainly legitimate, and no one can be punished for acting in such a predicament: but when the limits of self-defence are exceeded, that excess becomes punishable like any other act contrary to law".

But on the proposal of Dr (now Sir) Arturo Mercieca, it was expressly laid down that such excess of defence shall not/punishable if it was occasioned by the person concerned being taken by surprise or through fright or fear. It was obvious that when in a given case there was such a degree of surprise or fright or fear that the person assaulted would not calculate the limits within which his action would be legitimate, the excess, if any, should not be deemed unreasonable and the person should be acquitted of all blame. Dr Mercieca thus said:

"In general, all admit that the right of self-defence is sacred. And such right, at first sight, would appear to be unlimited, inasmuch as it is difficult to know up to when the exercise of it may be necessary in consequence of an unjust and violent aggression on the part of another who has only himself to blame if any injury is caused to him by the person lawfully defending himself. The right of self-defence is inherent in the individual; it is derived from the law of nature which imposes the duty of self-preservation. Therefore, it is only in exceptional cases, and only where there is culpa, indeed where, more than culpa, there is a certain degree of dolus, that a departure can be made from the said principle. Now if the person exercising the right of self-defence was in such a state of mind as to be incapable of calmly judging up to where his resistance should go and of fixing the precise point beyond which his defence would cease to be permissible, in any such case there is clearly neither 'dolus' nor 'culpa': and where there is neither one nor the other, there cannot be any, "criminal

[415] Debates, Vol. XXXIII, cl. 148

responsibility and liability to punishment"[416]. In respect of article 50 of the Italian Code, Maino thus writes:

"Article 50 requires that the limits imposed by the law, by the authority or by necessity, shall have been exceeded. But not every time that there is disproportion between the act committed and that which has given occasion to it, the justification disappears to make way for the mere excuse of excess. Everything depends on the state of mind of the agent. If this was such, in spite of the peril, as to permit to him the free movement of his body and the free exercise of his mental powers, then it will be a case of mere excuse or extenuation: otherwise, the material disproportion of the act does not exclude the justification. And let it be repeated: those who have to judge must not let themselves be guided by the calm wisdom after the event, based on a too minute assessment of the record of evidence - but should judge according to the psychological condition of the agent at the time of the fact and according to what the impression caused on him by the imminent danger permitted him to discern and to do. Otherwise, by requiring an exact and mathematical proportion between the causative fact of the psychological condition and the material consequence of the defensive reaction, a crime is artificially created where a criminal does not exist, and a punishment is applied where there is no reason, either juridical or moral, which shows it to be necessary"[417].

"(c) Where it is provoked by a grievous bodily harm or by any crime whatsoever against the person punishable with more than one year's hard labour or imprisonment" (Section 241(a)).

As we shall see presently, such provocation does not benefit the accused unless it has "taken place at the time of the act in excuse of which it is pleaded" (section 249).

(d) Where it is committed by any person acting under the first transport of sudden passion or mental excitement in consequence of which he is, in the act of committing the crime, incapable of reflecting.

[416] Debates, ibid., ch. 1133

[417] op. cit., art. 51, p. 140, para. 251

The inclusion of this ground of excuse in the project of our Code was severely censured by Andrew Jameson: "The excuse of instantaneous passion", he wrote[418], "seems to be so dangerous among a Southern race and so contrary to the sound principles of criminal responsibility, that I cannot recommend it to be retained in the proposed Code, without great modification".

In fact, Mr Jameson suggested various alterations and additions with the view of limiting its dangerous latitude in the hope, as he put it, of reconciling due regard to human infirmity with the protection of life and the due administration of justice. Jameson concluded that jurists of all countries have admitted the plain distinction which exists between homicide committed under the immediate influence of a sudden violence of resentment excited by some injuries, and homicide committed in cold blood and deliberately. But all cases of ungovernable passion are not to be excused. Policy as well as reason demand that some checks be placed against the outbreaks of brutal violence of temper[419].

Practically all the additions and modifications suggested by Jameson were accepted and eventually incorporated in the Code. (Vide: Interesting study on the provision of section 241 by A. Ganado (now Dr A. Ganado) in The Law Journal" Vol. I, No. 3, Oct. 1945).

Now, so that a person may be deemed to be incapable of reflecting and benefit of this excuse it is necessary, in cases of provocation, that the homicide be in fact attributable to the heat of blood and not to a deliberate intention to kill or to cause a serious injury to the person and that the cause be such as would, on persons of ordinary temperament, commonly produce the effect of rendering them incapable of reflecting on the consequences of the crime. Be it noted, in regard to the latter condition, that the test to be applied is whether the provocation was sufficient to deprive a reasonable man, a man of ordinary temperament, of his self-control, not whether it was sufficient to deprive of his self-control the particular person charged; e.g., a person of defective self-control, easily irascible, etc.

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[418] Report, pg. 120

[419] Ibid., Appendix, Note D, p. IXXVI

In the case of the excuse dealt with at (c) i above, the law itself specifies what the provocation must consist in, i.e., in a grievous bodily harm or in any other offence against the person punishable with more than a year's hard labour or imprisonment. Here, on the contrary, the law leaves it to those who have to judge to exercise their independent judgment. It does not limit or specify the causes of provocation. Any fact, whatever it may be, which has induced a sudden passion or mental excitement in consequence of which the agent is, in the act of killing, incapable of reflecting, will be sufficient, provided the conditions stated in the last preceding paragraph are satisfied.

But there are some obvious qualifications to this generalization which the law defines (section 243). The excuse of instantaneous passion cannot be admitted:

(i) where the passion is provoked by the lawful correction of the person accused

(ii) where the passion is provoked by the lawful performance of duty by a public officer

(iii) where the offender has either sought provocation as a pretext to kill or to cause a serious injury to the person, or endeavoured to kill or to cause such injury before any provocation shall have taken place.

Furthermore, there are certain other limitations which in the practice of our Courts are also usually applied. As a general rule, no words or gestures, however opprobrious or provoking, will be considered to be provocation sufficient to excuse homicide by reason of instantaneous passion, if the killing is affected with a deadly weapon. But if words of provocation are coupled, for instance, with such an act as spitting upon the defendant or with a blow, they might have the effect of excusing the homicide. Also, the excuse of provocation is generally excluded if it was the defendant who first gave provocation. In the Criminal Appeal The 'Police vs. S. Lia[420], the Court said:

"The excuse of provocation is excluded by the fact that it was the defendant who, together with his brother first went up to N. N. and in this way began the fight; it is thus the case which English Jurists indicate by the words provocation provoked by the provoker. Provocation to be admitted as an excuse requires also that the reaction shall be proportionate, whereas the defendant used a weapon".

And also under the Italian Code of 1889, it was decided:

[420] 3/3.1948

"non poter invocane questa scusa (della provocazione) chi sia stato primo a offendere o a percuotere"[421].

Now in regard to all cases of provocation above dealt with, it is expressly laid down that they shall not avail the offender unless they shall have taken place at the time of the act in excuse whereof they are pleaded. In other words, it is essential that the wounding, etc., should have been inflicted immediately upon the provocation being given: for if there is a sufficient cooling time for the passion to subside and reason to interpose and gain dominion over the mind, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood. The principal question was - as Tindal C.J. told the Jury in the case Rex v. Hayward[422], whether the wounds were given by the prisoner whilst smarting under a provocation SO recent as showing that he might be considered at the moment not master of his understanding .... or whether, after the provocation, there had been time for the blood to cool and reason to resume its sway before the wound was inflicted.

(II) Excusable Bodily Harm

All the grounds of excuse which we have considered in relation to wilful homicide are applied also to bodily harm. In addition, a bodily harm is excusable if it is provoked by <u>any crime</u> whatsoever against the person (Section 244). Saving this addition, all that we have said concerning the excuses of homicide applies "mutatis mutandis" to bodily harm.

Adultery Case

A special case of excuse of homicide or bodily harm is provided for in section 250 of the Criminal Code which lays down as follows:

1. A husband who, on surprising in the act of adultery his wife and the adulterer, shall kill or cause a bodily harm on both or either of them 'flagrante delicto', shall, on conviction, be liable:

[421] V. Maino, op. cit., 144, art. 51, para. 238

[422] 6 C & P, 157

(a) in the case of homicide, to imprisonment for a term from one to six months

(b) in the case of grievous bodily harm, to imprisonment for a term from three to twenty days.

2. No proceedings shall be taken where the bodily harm is slight.

3. The provisions of this section shall not apply where the husband has acted as the pander of his wife, or has encouraged, instigated, facilitated or connived at her prostitution.

This special excuse or extenuation might well have been comprised in the general excuse of instantaneous passion or provocation. But the law deals with it specially in order to give a still greater reduction of punishment having regard to the particularly painful cause of excitement and legitimate resentment.

The law requires for the application of this special excuse that the husband shall have surprised the wife and the adulterer in the act of adultery and shall have killed or caused bodily harm on both or either of them 'flagrante delicto'. This is only, after all, an application of the general rule we have already considered, i.e., that the reaction to the provocation must be immediate or that the agent shall have acted in the first transport of a sudden passion or mental excitement. The word "surprised" clearly conveys that this special excuse will not apply where the husband had been aware of the illicit liaison of his wife. The words "in the act of adultery" mean that it shall not be sufficient that the husband shall have, for instance, heard from his wife or from others that she had committed adultery or that she was about to commit adultery. It is required that the death or bodily harm shall have been caused 'flagrante delicto'. Yet, in respect of provisions substantially identical with our own, it is generally opined by Italian commentators and text-writers, that in spite of the apparent strictness of the language used, one must not require that the husband shall have found the wife and her paramour and killed or wounded the same 'in ipsis rebus venere is'. "E' dottrina pacifica"[423], Pincherle writes, "che per aversi questa scusa non e' necessario che la sorpresa avvenga proprio 'in ipsis rebus venereis', ma basta che i colpevoli siano in un fatto che non lascia alcun dubbio sulla loro illecita relazione. E' in questo fatto e nella certezza che ne deriva e che suscita il giusto dolore del marito [...] il quale ne sia

[423] Op. cit., p. 360

spettatore, che consiste il motivo della scusa". And Maino writes: "Riteniamo, coll'autorità del Carrara, che si debba stare piuttosto allo spirito della regola che alla corteccia delle parole; basterà che non vi sia stato fra il momento della scoperta e quello della strage un intervallo sufficiente per dar luogo alla calma: basterà che non siasi agito per meri dubbi o sospetto, ma per una fatale certezza, come sarebbe nel caso di sorpresa dell'adultero mentre esce sul mattino dal quartiere della donna o quando entra nella camera di questa"[424].

Finally, Arabia commenting on Article 388 of the Neapolitan Code identical, word for word, with our section, writes:

"Non si deve con rigorose interpretazioni restringere o annientare un beneficio di legge. Qualunque sia la situazione de' due complici, purché sia tale che non lasci verun dubbio che l'adulterio ossia avvenuto, o sia per commettersi, la scusa non si può negare senza dichiarare assurda la legge. Non per ottenersi la certezza dell'oltraggio avvenuto, ma la legge vuole la sorpresa in flagranza perchè suppone nella visita dell'atto una forza particolare di constringimento, che non saprebbe trovare nella semplice notizia che il marito [...] ne possa avere: ma però. l'atto non deve essere veduto intero per forza"[425].

Infanticide

The crime of Infanticide is now treated by our law as a substantive crime separate from the crime of wilful homicide generally. Old Codes on the continent considered the killing of their children by mothers as an <u>aggravated</u> form of homicide. The doctrine then current was that the killing of so young an infant, in its first coming into the world and when it is absolutely incapable of offering any resistance, was particularly heinous: such killing was the effect of premeditation and its perpetration was difficult to discover: therefore, it was necessary to visit it with a sterner punishment than ordinary murder.

As time went on, that doctrine ceased to find any favour. In Italy, by the time the Code of 1889 came to be enacted, it had become the unanimous opinion of criminal writers that under certain circumstances the destruction of the life of a newly-born child was

[424] Op. cit., art. 376, 377, p. 324, para. 1675

[425] Op. cit., Vol. II, p. 154, para. 293

in some degree excusable. So section 369 of the said Code laid down that "when a wilful homicide was committed upon an infant not yet entered in the Registers of Civil Status and within the first five days after its birth, with a view to saving the reputation of one's self or of one's wife, mother, descendant, adoptive daughter, or sister, the punishment was detention from three to sixteen years".

In England also, more or less round the same time, “the widespread dislike of the application of the law of murder in all its severity to cases of infanticide by mothers led to such divorce between the law and public opinion that prisoners, witnesses, counsel, juries and even many of H.M. 's judges, conspired to defeat the law [..]. It was practically impossible to secure convictions for murder by mothers of young infants, largely because lay and professional opinions were out of sympathy with the law which drew no distinction between these and other types of murder. A ready method of avoiding it was discovered by taking advantage of the difficulties of proving live-birth for the purposes of the law of homicide”[426].

To appreciate the impulse for reform, it is relevant to mention some of the considerations which drove public opinion so strongly against the law on the subject.

There was a general feeling that child-murder is not so heinous as other forms of murder because of the nature of the victim. A child could not be regarded quite in the same light as a grown-up person; the loss to the child itself could not be estimated; “it was as if the child never came into the world rather than that, having come into it, it was murdered”[427].

It was contended that the killing of a child by its mother did not create the same feeling of alarm in society as other forms of murder did, and public opinion consequently did not insist on the death sentence as a deterrent. Generally, there was not that malignity in these cases which characterises other forms of murder. As the statistics showed, this crime was mostly committed by illegitimate mothers to hide their shame. The general opinion was that the motive of hiding a shame lessened the heinousness of the crime and that the execution of the law in its full severity would be barbarous. As Shee J. put it, “the severity of the social and family shame which attaches in this

[426] D. Seaborne Davies, Child Killing in English Law in the Modern Approach to Criminal Law (1945), pg. 301

[427] B.P.P., 1866, 21, pp. 5, 291

country to a girl's unchastity was a ground of exempting this form of murder from the operation of capital punishment".

The malice was generally less in this class of murder because also of the general state of health and mind of the perpetrators of them. As we shall presently see this consideration played a decisive part in the subsequent reforms.

Proposals for reform differed widely at first, in the exact details. Most would limit the exemptive effects of the reform to mothers: a minority would extend it to other persons. Opinion was fairly divided on the question whether it should cover legitimate as rail as illegitimate mothers. On the time-limit of the exemption from the law of murder the suggestions ranged mainly, from a week to three months. Stephen enunciated very clearly the dominant consideration which should determine this particular feature: "The operation of the Criminal Law", he said, "presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman just after childbirth is so upset, and is in such a hysterical state altogether, that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health […] Besides that, there is a strong sympathy, which it is never safe to neglect and which will always exist, with the miserable condition of the woman; and there is a sort of feeling (I do not say it is reasonable, and I don't know how to connect it exactly with the fact) as a general rule against the father of the child, who goes unpunished, which makes its way with juries and with the public. It seems to me that that being so, and as you have to legislate for human nature you find it, it would be a very desirable thing to pass a special statute [...] enacting that any woman who killed her new-born child with the intent to conceal the birth, should be liable to the severest secondary punishment in the discretion of the judge [...] I do not know that I should wish to limit the time very nicely because the effect of child-birth upon a woman's nerves lasts for a considerable time in some cases. I would rather have a little indefiniteness in the law than run the risk of an encounter between the law and public sentiment"[428].

[428] Cfr. D. Seaborne Davies, loc. cit., pp. 324 - 385

A series of attempts over a long number of years to have the offence of infanticide dealt with differently from ordinary murder culminated at last in the Infanticide Act of 1922 which provided as follows:-

"Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that but for this Act the offence would have amounted to murder, be guilty of felony, to wit of infanticide and may for such offence be dealt with and punished as if she had been guilty of manslaughter of such child".

The Act provided also an alternative verdict of infanticide on an indictment for murder.

The Act of 1922 was in 1933 repealed and re-enacted with modifications by the Infanticide Act, 1938[429]. The main modifications consisted in this, that

(a) Whereas the Act of 1922 used the vague expression "newly-born child", the Act of 1938 speaks of a "child <u>under the age of twelve months</u>". The expression "newly-born" was not defined in the 1922 Act. Accouchers limited it to infants less than sixteen days old[430]. In R. v. O'Donoghere[431], the Court of Appeal said: "We do not propose to undertake the task of defining the expression 'newly-born child'. It is enough for the purposes of the present appeal to say that Mr. Justice Talbot made no error in law in holding, with reference to a child of more than a calendar month of age, that there was no evidence upon which he could invite or permit a jury to find that the child was newly-born within the meaning of the Statute". In R v. Hale, a case tried at the Old Bailey in 1936 which concerned the killing of a baby three weeks old, Lord Dawson of Penn who gave evidence for the defence that the mother was suffering from puerperal insanity was questioned as to the length of time it takes a mother to recover from the conditions of "birth and he replied;- "I should say not less than three weeks, <u>in many cases longer</u>".

Under these circumstances, the necessity was felt that Parliament should amend the law by defining a "newly-born child". It was felt that the time-limit should not be the

[429] I & II, Geo VI, ch. 36

[430] Glaister, A Text Book of Medical Jurisprudence and Toxicology, 1932, p. 486

[431] 1927, 20 Cr. App. R. 132

determining factor in deciding whether a case comes within the scope of the Act; the vitally important matter was the mother's mental derangement post and propter the birth. Hence in the 1938 Act the words "newly-born" were removed and a defined limit of one year was put, such limit being considered sufficiently wide to cover the majority of cases of puerperal insanity.

(b) The 1922 Act applied where the balance of the mind of the mother was, at the time of the wilful act or omission causing the death of the child, disturbed by reason of her not having fully recovered from the effect of giving birth to the child. To this the 1938 Act added the effect of lactation consequent upon the birth of the child.

Section 9 of Ordinance VI of 1947 which made special provision in respect of the crime of infanticide in our Criminal Code closely follows the English Act of 1938.

Before then opinions in Malta differed as to whether any such special provision was necessary. It was not questioned that the killing by a mother of her child at a time when her mind was deranged following and on account of parturition, deserved to be treated less severely than ordinary wilful homicide. But one school of thought had it that sufficient provision for the purpose existed already in section 241 (c) of the Criminal Code which excused wilful homicide committed by any person under the stress of instantaneous passion owing to which the agent was at the time incapable of reflecting. In substance, this theory put the effects of child-birth on the same footing as other violent excitements like anger or fear: women were entitled to that indulgence to human weakness generally shown by the law relating to provocation. And it appears that in some cases even our Criminal Court had adopted that view. Dr Albert Ganado in his paper on "Excusable Homicide" already quoted, thus writes; "The excuse of instantaneous passion or mental agitation was adopted in a case of infanticide in re R vs Giuseppa Sultana in 1861; the Court, composed of three judges (Sir Antonio Micallef, presiding), directed the jury to ACCEPT the excuse, the existence of mental agitation having been actually proved. In another case, R vs Maddalena Camilleri & Marianna Bartolo in 1890, the jury declared "essere l'accusata Marianna Bartolo rea del delitto imputatole nell'atto di accusa, colla circostanza, però, che Marianna Bartolo nel commettere il delitto, agiva sotto l'immediata influenza di una instantanea agitazione di mente per cui era incapace di riflettere". It is undoubted that the same view was taken by the Law Officers of the Crown in Malta between 1922 and 1939.

But in 1944, in the case R vs. Vittoria Micallef[432], H.M.'s Criminal Court consisting of three Judges took a different view. It directed the Jury that, as a matter of law, the excuse set out in section 241 (c) applies only when the passion or mental agitation pleaded by the accused has "been induced by provocation, i.e., by a cause from without and does not apply when it is merely the effect of the physiological fact of having given birth to a child. If the jury considered as a fact that the accused had acted under the stress of excitement they could, if they should find her guilty of the charge, recommend her for clemency. The jury returned a unanimous verdict of guilty but with a strong recommendation for clemency. The Court, thereupon, sentenced the woman to death, it having no option to inflict a lesser punishment but in their report to His Excellency the Officer Administering the Government, the Judges endorsed the recommendation for mercy made by the Jury. A reprieve was granted and the sentence of death was commuted.

Thereupon it became clearly necessary to introduce appropriate legislation concerning infanticide, if only to avoid the "solemn mockery" of passing sentences of death which, everybody knew, would, and felt should, be commuted by the Executive.

As already stated, legislative action was taken in 1947 and the model adopted was the English law which, from the ethical point of view and upon general principles of criminal responsibility, is obviously by far more defensible that the corresponding continental law. The ground of extenuation is not the often spurious motive to hide shame or to save a reputation which often is beyond saving from other causes, but the deranged state of mind of the mother arising from the parturition which necessarily reduces the moral responsibility for the act.

Our section 258A lays down:

"When a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth to the child or by reason of the effects of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for

[432] 25/7/1944

this section the offence would have amounted to wilful homicide, she shall be guilty of infanticide and shall be liable to imprisonment for a term not exceeding twenty years".

This section makes reference to wilful acts or omissions. Infanticide by omission means the neglecting to do such things connected with the continuance of the life of the child as may cause its death; as, for example, neglecting to tie the umbilical cord after severance, since by omitting to do this, the infant may bleed to death; or by omitting to remove such obstacles as would prevent it from breathing; or by omitting to feed it. Infanticide by commission is the performance of any act against a live-born child which prevents it from living or which destroys its life.

In order that the conditions of the said section may be fulfilled, there must be at least three co-existing circumstances: first-the child must be the child of that mother; secondly - the child must be a child under the age of twelve months; and thirdly - at the time of the act or omission she must not have fully recovered from the effects of giving birth to that child and by reason thereof, the balance of her mind must have been disturbed or the balance of her mind must have been disturbed by reason of the effects of lactation consequent upon the birth of the child.

Of course, if the woman, at the time of the act or omission was definitely <u>insane</u> within the strict legal meaning of the word, then the provisions regarding insanity will apply: but if her state of mind is disturbed through what is called "puerperal insanity" or other physical effects of child-birth or exhaustion from breast-feeding consequent, then subject to the concurrence of the other requisite conditions, this section will apply.

The basis of the extenuation of homicide being the disturbed state of mind of the mother, i.e., a purely personal circumstance, it does not seem that it can extend to any co-offender, co-principal or accomplice.

Also, it will "be noted that, in our law, like its model the English law, there is no distinction between legitimate and illegitimate children. It is true that, generally speaking, there is more cause for disturbing psychic factors for the mother where the child is illegitimate. As a matter of statistics, the mortality from infanticide among illegitimate children is very much greater than those born in wedlock. But, in the first place, a child born of a married woman would, front the <u>legal</u> point of view, as a rule, be deemed legitimate on the strength of the maxim "pater is est quern justae nuptiae demonstrant": yet if, in point of fact, it is illegitimate, the mother is likely to be quite as

much, if not more, mentally disturbed as the unmarried woman. But, above all, it would have been scandalous to have given the benefit arising from the effect of parturition or lactation, quite independently of the legitimacy or other wise of the birth, to the illegitimate mother and to have refused it to the legitimate one. Indeed, as our law is based, we repeat, on the reaction of parturition or lactation itself on the mind of the mother, and not on any motive of saving the honour, the question of any distinction between legitimate and illegitimate mothers does not even rise, for consideration.

Finally, it may be observed that the law prescribed a maximum punishment tut no minimum: precisely in order to enable the Court to assess the appropriate punishment within that maximum, having regard to the particular circumstances of the case. It may well be that, in the particular case, the disturbance of the balance of mind of the mother was but very slightly removed from insanity.

Instigation to Commit Suicide

"Whosoever shall prevail on any person to commit suicide or shall give any assistance, shall, if the suicide takes place, be liable, on conviction, to hard labour or imprisonment for a term not exceeding twelve years" (Sect. 227).

In England, the intentional suicide of a sane person (Felonia de se) is still regarded by the law as an act of crime, and any attempt to commit suicide is an indictable misdemeanour[433]. Blackstone thus wrote about this crime

"Self-murder, the pretended heroism but real cowardice of the stoic philosophers, who destroy themselves to avoid those ills which they have not the fortitude to endure, though the attempting it seems to be countenanced by the Civil Law, yet was punished by the Athenian Law with cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence: one spiritual, in evading the prerogative of the Almighty, and rushing into His immediate presence uncalled for: the other temporal, against the King, who hath an interest in the preservation of all his subjects: the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony

[433] Kenny, op. cit., p. 129

committed on oneself [...] a 'felo de se', in that he deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or shooting at another the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime"[434].

Kenny writes[435]:

"The common law endeavoured to deter men from this crime by the threat of degradations to be inflicted upon the suicide's corpse, which by a natural unreasoning association of ideas, were often deterrent; and also by threatening the forfeiture of his goods, a vicarious punishment which, though falling wholly upon his surviving family, was likely often to appeal strongly to his sense of affection: thus the man who feloniously took his own life was at one time buried on the highway, with a stake through his body: and his goods were forfeited. The burial of suicides lost its gruesome aspect in 1824, when the original mode was replaced by the practice of the burial between the hours of nine and twelve at night, without any service. In 1870, the confiscation of the goods of suicides was put an end to in the general abolition of forfeiture for felony. And in 1882, the Statute 45 and 46 Vict. c. 19 removed every penalty, except the purely ecclesiastical one that the internment must hot be solemnised by a burial service in the full ordinary Anglican form. Even before the Common Law penalties of 'felonia de se' were legally abolished, the popular disapprobation of them, which ultimately secured their abolition, had gone very far in reducing the number of cases in which they were actually inflicted. For it rendered Coroners' Juries eager to avail themselves of the slightest grounds for pronouncing an act of suicide to have been committed during a fit of insanity, and consequently to have involved no felonious guilt. So if the evidence disclosed any source of anxiety which might have given the deceased a motive for his fatal act, anxiety was declared to have unsettled his mind; if, on the other hand, no motive could be found, then the very causelessness of his act was declared to be itself proof of his insanity. It is to be regretted that this practice of 'pious perjury' - to borrow an indulgent phrase of Blackstone's - became so inveterate that it has survived the abolition of those penalties

[434] Comm., IV, 189

[435] Op. cit., p. 127

which were its cause and excuse .[..] Juries who, in cases of suicide, pronounce on utterly inadequate grounds a verdict of insanity, forget that such a verdict, while no longer removes an appreciable penalty, may, on the other hand, throw on the family of the deceased an undeserved stigma, gravely affecting their social or matrimonial or commercial prospects".

Modern legislators do not make criminal the destruction of self nor attempted self-destruction. A person who attempts, but unsuccessfully, to take away his life is, in a great number of cases, the proper subject of medical or psychiatric attention and not a fit subject for criminal sanctions: and where the attempt is successful the infliction of any criminal penalties "in memoriam" or against the family is repugnant in modern notions.

But the motives which thus justify the impunity of the suicide or would-be suicide himself do not apply in regard to any person who, out of wickedness of heart or interest or mistaken pity induces another to commit suicide or knowingly aids or assists the perpetration of the act.

Up to 1900, no special provision, as that now made by section 227 above quoted, was contained in our Code just as no such provision existed in the models, the Neapolitan and French Codes. Under the latter Code, In the absence of an express provision, incitement or assistance to suicide went unpunished. The argument was that as the principal act (the suicide) was not an offence, so the instigation or assistance to it could not be considered as an act of complicity.

This argument did not appeal to Pessina who, in the Draft Italian Code proposed by himself, deliberately left out any special provision to deal with the instigation or assistance in suicide, on the grounds that in his view, such participation should be considered as participation in a wilful homicide. "Se anche il legislatore", he wrote, "non punisce il tentativo di suicidio in colui che vuole spezzare la propria esistenza, ciò non toglie che l'estraneo, aiutandolo in codesto fatto, commetta una lesione del diritto alla esistenza individuale, non potendosi applicare ai diritti inalienabili la massima 'violenti et consentienti non fit iniuria', Per questo motivo la sua azione antigiuridica non muta di natura, quantunque il soggetto passivo del fatto abbia consentito alla propria uccisione, dal momento che di fronte alla legge il consenso non ha, ne' può' avere valore alcuno. In poche parole, la posizione del compartecipante

non e' dissimile da quella di colui che uccide il conseniente, e come per questo fatto il progetto (Savelli) non creò un titolo speciale di reato, ma lo considerò quale un omicidio comune, cosi' non deve creare uno per il partecipe al fatto del suicida"[436].

This reasoning, however, did not prevail. It was retorted that assistance given to a suicide must not be treated on the same footing as the killing of a consenting victim. In this the main act (that of killing) is done by another who should answer entirely for such act. In the case of the suicide, on the contrary, the other merely incites or gives assistance. Moreover, the instigator or abettor who does not participate in the principal act of killing, cannot be held liable for complicity, once that the principal act of self-killing is not an offence. In the case of a person himself killing a consenting victim, that person is the author of a wilful homicide, which is a crime independently of the consent of the deceased.

For these reasons, propounded in the Official Report on the "Progetto Zanardelli", the special provision of art. 370 was inserted in the Italian Code of 1889.

Section 223 of our Code, added by Ordinance No. XI of 1900, was obviously modelled on that provision.

Now the first condition in order that this section may apply is that there shall, in fact, have been a suicide. Unless death, self-inflicted, has actually taken place, the instigation or assistance, whether or not there has been an unsuccessful attempt, will not be punishable.

The material element of the crime consists in:

(a) prevailing upon another to commit suicide; or

(b) giving assistance to the suicide.

The words "prevail upon" stand for the word "determina" in the original Italian text. This was chosen, the Official Report explained in order to made it clear that a mere passing suggestion, or mere indirect words of encouragement would not constitute the crime. What was required was the fostering and ramming in the original idea in the suicide's

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[436] Vide in Maino, op. cit., art. 370, p. 281

mind so as to impel him - almost against his wish, to take the fatal step. That was why the word ‘determina’ was preferred to the word ‘induce’.

“La parola ‘determina’ circoscrive meglio il concetto della legge; al suicidio induce anche colui che in altri rafforza l’idea del suicidio: mentre al suicidio determina colui che ne fa nascere il proposito”[437].

The giving of assistance may take various forms; but the crime will not arise except where the assistance given is recognised to have been really effectual. It must have the same characters as are required in order that the assistance given in the other crimes may, according to general principles, amount to complicity. The facts constituting the assistance given in other crimes must, therefore, consist in knowingly providing the means or giving other material aid - but provided, of course, such facts do not amount to participation in the direct execution of the act of killing, in which case the aider would himself be guilty of wilful homicide[438].

The Italian Courts held that there was the crime under Art. 370 of the Italian Code in a case in which a man had by persistent persecution and vexation induced a woman to kill herself and had furnished her with a weapon; likewise in a case in which a husband, knowing that his wife contemplated suicide, continued to maltreat her for the purpose of impelling her to make up her mind to take away her life.

In English Law, a consequence of criminality of suicide is that if two persons agree to die together, hut only one succeeds in putting an end to his life, the survivor is guilty of murder, as a principal if present, or, if absent, as an accessory before the fact (yet, says Kenny, in these “death-pacts”, the sentence is always commuted now).

4. Abortion and the Administering of Poisonous or Injurious Substances

1. Abortion

Our law comprises the crime of abortion in the class of crimes "against the person". Such a classification formed the subject of controversy among theoretical writers and

[437] V. Maino, loc. cit., para. 1617

[438] Impallomeni, Cod. Pen. Italiano, Vol. III, p. 172

is not universal in the systems of positive law. In fact, there are those who maintain that the proper place for this crime is among those affecting the "good order of families". In favour, however, of the arrangement adopted by our law (as by its models and most other laws, including the English) it can be said that the right alleged to have been violated by an offence cannot be considered, as it were, in the air, merely as a conceptual entity: it must be related to some person or body to whom the right appertains. Now such right, in the crime of abortion, must be attributed to the foetus and it is the right it has to a "spes vitae". Moreover, the intention of the offender is directed to the destruction, if not of a new life, at least, of an expectation of life: and the right violated is consequently that of life[439].

As to the grounds of the incrimination of this offence we can repeat the words used in the ministerial report on the "progetto Zanardelli" of 1887:

"La legge deve spiegare la sua protezione anche per il feto tuttora racchiuso nell'alvo matemo, difendendo la vita dell'uomo fin del momento della fecondazione e rigettando, come inumana, l'antica dottrina, secondo la quale la donna, procurandosi l'aborto, non fa che un atto di libera disposizione del propria corpo, e l'estraneo, facendola abortire, senza o contro il consenso di lei, di altro non deve rispandere che di un'offesa verso di essa"[440].

Our Code does not define the word "abortion" or, rather (because this is the word it uses) "miscarriage" In general this word, in the context of this crime means any malicious interruption of the process of pregnancy fry the expulsion of the foetus.

The crime, in general, requires these elements:

(I) A pregnancy, the normal period of which goes from conception to the natural ejection of the foetus. Our law does not recognise any difference between abortion or miscarriage and premature labour in relation to this crime. Such a difference is recognised by our law in relation to the crime of bodily harm in the sense that where a bodily harm inflicted on a pregnant woman causes abortion or miscarriage it is considered to be more serious and consequently is subjected to a much higher

[439] In the Italian Code of 1930, abortion is comprised in the class of crimes "contro la integrità e la sanità della Stirpe" (art. 545 et. seq.)

[440] N. CLIII

punishment than when it merely hastens delivery (sections 230 (l) (e), 232 (l) (c)). The crime of abortion may be committed at any stage of pregnancy, whether the criminal expulsion of the product of conception is produced before or after the period of quickening.

And the pregnancy must exist in fact. If it does not exist in fact, whatever may be the belief or the intention of the agent, nothing he can do can constitute the crime of abortion or any attempt of it. The act may constitute some other offence but not this one. As Carrara remarks: "mancando la gravidanza, non sara'-l neppur possibile l'accusa di tentativo di aborto per la inesistenza del soggetto passivo del "reato"[441]. Under the English "Offences Against the Person Act, 1861" (sections 58 and 59), any person (other than the woman herself) is guilty of felony and liable to the same punishment as for criminal miscarriage, if, with intent to procure the miscarriage of a woman, he "unlawfully administers to her or causes to be taken by her any poison or other noxious thing or unlawfully uses any instrument or other means whatsoever with the like intent, whether she be or be not with child: and any person is guilty of a misdemeanour who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever knowing that the same is intended to be unlawfully used or employed, with intent to procure the miscarriage of any woman whether she be with child or not"

In most other systems of law, the crime of abortion can arise only if there is a criminal interruption of actual pregnancy. Consequently, there cannot be any question of abortion if the uterus contains not the live products of conception but a pathological product or even a dead foetus. "Perchè si possa parlare di procurato aborto, e' necessaria la prova della destruzione di un prodotto fisiologico: non basta la dispersione di un prodotto Patologico"[442]. This, however, does not appear to be the position in English law. As Taylor says:

"The law uses the term miscarriage, a popular word, and it intends thereby to mean the discharge of the contents of a [...] uterus, whether such contents be well obviously

[441] Prog., Parte Speciale, Vol. I, para. 1254

[442] Carrara, Prog., Parte Spec., Vol. I, para. 1254

formed, living or dead, moles, or any other result of conception; the thing is the intent with which an operation was done or a drug given"[443].

(2) The accused, whether the woman herself or a third party, must know of the existence of pregnancy. Without this knowledge there cannot be the specific malice of this crime. Such malice consists in the intention to cause the expulsion of the foetus. Most writers take the view that the intention of the offender need not be specifically directed to the death of the foetus, in as much as such death being the almost necessary consequence of the expulsion, such consequence even if not positively desired must nevertheless have been fore seen as probable. In any event, the intention of the agent must not have gone beyond the death of the foetus. As we shall see later on, where the means used by the abortionist cause the death of the woman, he is liable to the punishment of homicide diminished by one to three degrees, But, this provision applies where the 'dolus' of the agent was directed to the mere abortion. For, if his intention was specifically that of causing, by the abortionist practice, the death of the woman or of exposing her life to manifest jeopardy, he would be guilty I if the woman dies - not of the crime of abortion but of wilful homicide[444]. In England, if a woman dies as the result of criminal abortion, the responsible person is chargeable with the crime of murder[445].

The question is sometimes discussed by theoretical writers whether there can be a "negligent" or "involuntary" crime of abortion and the answer generally given is in the negative. The sane is undoubtedly the position under our law. Only, of Course, if the miscarriage has caused the death of the woman or a bodily harm on her, there may be a charge of involuntary homicide or bodily harm, if the necessary requirement of "culpa" is satisfied.

(3) And now the material element. In the notion of abortion most continental writers do not make any distinction between the destruction of the foetus in the womb and the expulsion from the womb of an immature foetus which dies in consequence of the artificial means used to procure the miscarriage.

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[443] Principles and Practice of Medical Jurisprudence, 10th Ed., Vol. II, p. 130

[444] Cfr. Altavilla in 'Tratto di dir. pen., Vol. X, p. 201, para. 232

[445] Glaister, Medical Jurisprudence and Toxicology, 9th Ed., p. 382

Such a distinction, they say, is out of place because criminal abortion implies always the destruction of the foetus whether within or out of the mother's body. The essence of the crime, in fact, consists in interrupting the normal process or gestation which cannot be said to be completed except when normal labour occurs[446]. If this is the correct view, it appears clear that there is criminal abortion every time there is the destruction of the products of conception, whatever the stage of pregnancy, whether the foetus dies in the womb or after extrusion: there is the crime even if the foetus is born alive but not viable[447], or even if the foetus is viable but dies as a result of the trauma caused by the abortion. It must be observed, however, that though this is the view generally taken by continental jurists and commentators, in English law if the child is born alive but afterwards dies by reason of the potions or bruises received in the womb, those who administered the potion or caused the bruises are guilty of murder or manslaughter according as the appropriate 'mens rea' can be established against them[448].

It must further be noted that in England, the Infant life Preservation Act, 1929[449] created the special felony of child destruction, which is committed by any person who, with intent to destroy the life of a child capable of feeing born alive, by any wilful act causes a child to die before it has an existence independent of its mother. This felony is punishable by imprisonment for life. Evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more is 'prima facie' proof that she was at that time pregnant of a child capable of being born alive[450].

As to the node of producing the abortion, this is indifferent, as we 'shall see more fully later on.

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[446] Cfr. in Maino, op. cit., art. 381, Vol. II, p. 372, para. 1699

[447] Carrara, Prog., para. 1252

[448] V. Russel on Crime, 10th Ed., Vol. II, P. W

[449] This Act supplied a lacuna between the crime of abortion and the crimes of infanticide and murder. A somewhat similar remedy was provided in the present Italian Code by art. 578 which deals with the crime of 'feticidio'.

[450] The Infant Life Preservation Act, 1929, was amended by section 1 of the Criminal Justice Act, 1948, in the sense that no person shall be found guilty of the crime of child destruction unless it is proved that the act which caused the death of the child was not dene in good faith for the purpose only of preserving the life of the mother.

Now, let us examine the provisions of our Code. These contemplate diverse hypotheses:

(I) Subsection (I) of section 255 lays down:

“Whosoever by any food, drink, medicine, or by violence, or by any other means whatsoever shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a terra from eighteen months to three years”.

In this hypothesis the crime can be committed by <u>any</u> person, other than the woman herself. The consent of the woman to the criminal practice on herself is, for our law, immaterial. Other systems of law take account of the eventual consent of the woman to provide a more lenient punishment. The argument is that, although abortion is a crime directly against the foetus, it is also indirectly a crime against the woman inasmuch as it not only deprives her, if unwilling, of the expectation of the joys of motherhood but also exposes her to serious physical hazards: consequently, the punishment should be greater where the operation is performed against or without her consent. Our law has taken what appears to be the more acceptable view that the life of the foetus is not something which is disposable by the woman and that, therefore, her consent to the abortion should not carry with it any mitigating effect.

The crime can be committed by <u>any</u> means. In fact, the law after specifying certain more frequent modes of perpetration (food, drink, medicines, violence) then uses the comprehensive words "any other means whatsoever" to embrace every other possible wilful cause.

Here is not the place to discuss in detail the several possible methods of inducing criminal abortion, a subject belonging more properly to Medical Jurisprudence or Forensic Medicine. Suffice it to mention ’en passant’ that from the medico-legal point of view, the principal methods may be divided into two main classes:

Employment of drugs, and

Employment of instruments.

“All drugs having an abortifacient effect operate in one or other of three following ways, namely: by acting on the body generally as a poison; by acting locally and indirectly

upon the uterus through the gastro-intestinal or genitourinary tract; by acting locally and directly upon the muscular structure of the uterus". It must however, be emphasized that it is impossible to assert that any given drug in any given dose will produce abortion. "There is no drug" - says Taylor – "and no combination of drugs which will, when taken by the mouth, cause a healthy uterus to empty itself without endangering the life of the woman who takes it"[451].

Instrumental interference is brought about by the employment of a wide variety of instruments. These may be used in the first instance or be resorted to when drugs have failed to procure abortion.

But apart from instruments other 'mechanical' means may be used to induce miscarriage. Blows or violent pressure on the abdomen are sometimes resorted to. Also, severe exercise at certain kinds of physical exertion causing violent agitation of the body.

It has already been remarked that our law, besides food, drink, medicines, and violence, mentions also "any other means whatsoever". Do these include psychological means?

It is established medical experience that "any physical shock sustained by the body may operate indirectly on the uterus"[452]. Italian writers hold that the means of procuring abortion may be 'fisici o morali', such as, as regards the latter, the causing of fear or other violent emotions[453]. Crivellari also says: "I piu' chiari scrittori di medicina legale dichiarano questo mezzo atto a produrre l'aborto"[454].

As to the formal element of the crime, commentators of codes similarly worded as ours, require that the intention of the agent should be directed to causing the miscarriage[455]. If there is no such intention, the means used against the woman which should cause abortion, would constitute the crime of grievous bodily harm contemplated in section 232(l)(c). This solution, though probably theoretically unassailable, may yet involve in practice a curious anomaly: in fact, on the basis of it,

[451] Op. cit., Vol. II, p. 114

[452] Taylor, op. cit., p. 108

[453] Cfr. Altavilla, op. cit., p. 203; Maino, op. cit., Vol. II, p. 373, para. 1700; Carrara, op. cit., para. 1261

[454] Op. cit., art. 381-385, Vol. VII, p. 1012, I 117

[455] Cfr. Chaveau et Helie, op. cit., Vol. II, P. II, p. 40, I 1368; Arabia, op. cit., art. 395, p. 292

if the agent deliberately intended to cause abortion and actually causes it, his punishment would be up to a maximum of three years (section 255 (l)), whereas if he did not intend such consequence but acted merely out of hostility to the woman and caused the same effect, the maximum punishment would be nine years (section 232 (1)).

The material clement of the crime consists in causing the miscarriage of a woman with child. There must, therefore, be an actual emptying of the uterus of the product of conception, and it appears that such product must be a live foetus at whatever stage of development.

According to the commentators of the French and the Neapolitan Codes on which those provisions of our Code were modelled, the crime requires for its completion the death of the foetus: consequently the crime is not committed if, at the material time, the foetus was already dead: "Ammesso che non vi e' aborto senza uccisione del feto, e' chiaro che se tale uccisione non e' possibile perchè il foto e' gia' morto, non potra' parlarsi del reato ch'esaminiamo"[456].

According to this view, if the foetus, after extrusion, survives, there would be merely an attempt of the crime. It must, however, be pointed out that other writers opine that even in such case there would be the completed crime inasmuch as the law makes the crime consist in the miscarriage of a pregnant woman and the term miscarriage in the context means the discharge of a gravid uterus of the result of conception unlawfully caused by any means, independently of the ultimate effect on the life of the foetus.

(2) Subsection (2) of section 255 deals with the case of a woman who procures her own miscarriage or who has consented to the use of the means by which, her miscarriage is procured by others. The punishment is the same as under subsection (1).

We have already said that almost all civilised laws reject the inhuman doctrine which considers that a pregnant woman can dispose of the foetus within her womb as of a part of her own body: "può la madre straziare come crede le suo membra, ma non

[456] V, Arabia, loc. Cit.; Chaveau et Helie, loc. cit.

può' colpire l'embrione che si natura nel suo ventre"[457]. A new existence, from the very first moment of germination is considered by the law as the subject of rights, first among which is the right to full physiological development and no one, not even the mother, can deprive it of it.

Our law has likewise rejected the doctrine that the woman who consents to or herself procures her own abortion should be treated more leniently than any other offender. That doctrine is based on the specious assumption that the woman in such circumstances always acts under the stress of strong dictions which extenuate her guilt. But this is a gratuitous generalization: and in any event the Court can always give effect to any genuine grounds of mitigation in a particular case within the latitude of punishment which tie law provides.

In regard to the woman, the material element of the crime may consist alternatively either:

(a) in consenting to the use by others of the means by which the miscarriage is procured

or

(b) in herself procuring her own miscarriage.

It needs hardly to be said that the consent by the woman to induce her guilt must be free and voluntary and given in the awareness of the criminal purpose for which the means are used. Apart from this, having regard to what we have already explained in reference to the previous variety of the crime, no further cements are necessary.

(3) It is provided by section 256 that if the means used to procure miscarriage cause the death of the woman or a serious injury to her person, whether the miscarriage has taken place or not, the offender is liable to the punishment applicable to homicide or bodily harm diminished by one to three degrees.

This is not a mere aggravation of the crime of abortion but a distinct form of criminality in so far as liability is contracted, in the appropriate circumstances, whether the miscarriage has taken place <u>or not</u>. It is not uncommon that means used to procure miscarriage occasion the death of the woman or serious injury to her health without

[457] Altavilla, loc. cit.

succeeding in the principal intent. Such death or serious injury may occur without the onset of miscarriage. It must not be forgotten that abortionists possess varying degrees of skill, from the black sheep of the medical profession (who may perform the operation 'secundum artem'), through the midwife (who has some acquaintance with the anatomy of the parts), down to the totally ignorant layman (who is interested in a particular case, but makes no practice of the act)"[458].

When death or serious injury happens to the woman in consequence of the action of the abortionist or would-be abortionist, it is clear that the punishment must be more severe. But, on the other hand, our law does not make such punishment equal to that provided for wilful homicide or wilful bodily harm because in such cases the more serious consequence was not intended; it was caused, 'ex hypothesi', merely through want of skill or negligence: in other words, it was 'involuntary'. It is in these circumstances that this provision applies. For if the actual purpose of the offender was the death of the woman or her injury, the charge that would arise would be that of wilful homicide or bodily harm.

However, for the application of the provision in question, it must be established that the death of the woman or her serious injury arose in consequence of the means used[459]: in other words, there must be some nexus of causation between them. It is not, nevertheless, material to inquire whether or how far those consequences were foreseeable. If they happen as the effect of the means used, they are always imputable because the agent was, in any event, in the pursuit of a criminal transaction and the possibility of such consequences is such common occurrence that the prosecution ought not to be required to prove that the offender could have foreseen them.

(4) Finally, section 257 lays down that any physician, surgeon, obstetrician, or apothecary who has knowingly prescribed or administered the means whereby the miscarriage is procured, is liable to hard labour for a term from eighteen months to four years and to perpetual general interdiction from the practice of his profession.

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[458] Taylor, loc. cit.

[459] The Italian Code is more complete and accurate in applying the aggravation both where the death is caused by the means used as well as by the fact of the abortion itself independently of the means used, e.g., haemorrhage, or infection.

“Non sono molte, fortunatamente”, says Crivellari, “le persone che per le cognizioni della loro professione potendo facilitare il corapimento di questo reato, prestino il loro aiuto, ma pur essendovene che operano contro il loro dovere e la loro coscienza, era necessaria una disposizione che li colpisce con piu' grave sanzione degli altri, in vista appunto della violazione dei loro doveri che si aggiunge al delitto della facilitazione che col loro concorso trovano i colpevoli”[460].

It is not clear why our law has limited the application of this provision to certain sanitary practitioners only, expressly designated. The corresponding article 397 of the Neapolitan Code - which was obviously the source of our section - not only mentions, in addition, midwives but also “qualunque altro uffiziale di sanità”. Likewise, the Italian Code of 1889 applied the aggravation of its article 384 to any person “che esercita una professione sanitaria od un'altra professione od arte soggetta a vigilanza per ragione di sanità pubblica”. Similar provision is made in article 555 of the present Italian Code.

Now, so that this provision may apply, it is in the first place necessary that a miscarriage has actually taken place. In the second place it is necessary that it shall have taken place by the means indicated or supplied by the physician, surgeon, etc. Thirdly, the law requires that the physician, surgeon, etc., shall have prescribed or supplied such means knowingly, i.e., knowing they were intended to be used for that purpose. Clearly no guilt would attach to a medical practitioner, etc., who prescribes or supplies a drug or instrument for a proper or innocent purpose, hut of which, unknown to himself, use is made by the woman or others to procure the miscarriage. As Chaveau et Helie point out: “in mille circostanze le cure date ad una malata possono procurare l’aborto; può avvenire che la donna celando la sua gravidanza abbia finta una malattia allo scopo di parocurarsi l'aborto: ilmedico, se l’ha ignorato, o se ignorandola, non ha avuto intenzione di concorrere a questo suo proposito, non e' responsabile”[461]. But a strong presumption of guilty knowledge would no doubt arise if the drugs or instruments prescribed or sup- plied are commonly indicated or used as abortifacients.

[460] Op. cit., art. 384, p. 1040, § 136

[461] Op. cit., Vol. II, P. II, p. 46, i 1377

In connection with this provision, brief reference falls to be made to an important question of the utmost delicacy. Would a doctor be guilty of a crime if he induces miscarriage and destroys the foetus to save the life of the mother?

This question has long formed the subject of discussion among jurists. One school of thought, relying on the maxim "non sunt facienda mala ut eveniant bona", holds the doctor criminally liable even in such cases. The opposite view is that in such cases no criminality would attach, on general principles, for want of 'dolus'.

In English law, it appears that the doctor is excused from any criminal guilt if the act was done in good faith for the purpose only of preserving the life of the mother[462]. In Scotland also, to induce abortion as a necessary medical operation is not an offence. Writers, however, advise the greatest caution. Thus, Glaister says:

"In order to protect himself, the medical practitioner, when he deems such an operation urgently required, should ask and obtain, after consultation, the concurrence of another medical man, preferably an obstetrician, and, if possible, the consent also of the husband, after explaining the situation to him" (op. cit., p. 382).

The same view appears to be usually accepted in Italian legal doctrine. In the elaboration of the Draft Code of 1887 it was sought to insert a provision to state in terms that medical practitioners: "non sono impuatabili del delitto di procurato aborto quando abbiano operato per la necessità constatata di sottrarre in tal maniera le donna del pericolo di perdere la vita". But such an express provision was eventually omitted not, however, because it was desired to deny the principle involved, but because it was considered superfluous in view of the fact that the general principles of law necessarily presuppose the concurrence of malice in every crime and, onsequently, when this is wanting, as in the case contemplated, all grounds of incrimination fail. In such cases the doctor would be justified by the general defence of "Necessity"[463]. The same opinion seems to obtain under the present Italian Code. Manzini says:

"Il carattere dell' illegittimità viene escluso della necessità di interrompere la gestazione e di estrarre il feto immaturo per salvare la donna dal pericolo attuale di un

[462] V. Infant Life Preservation Act, 1929, and R v. Bourne (1938)

[463] Vide Altavilla, op. cit., p. 217

danno grave alla persona, non altrimenti evitabile, determinato dalla gravidanza o dal parto"[464].

In spite of all juristic authority for the view thus briefly outlined, our Courts would not be likely to countenance any defence based on such grounds. As was mentioned last year, the plea of "jus necessitatis" was rejected by our Courts whenever it was sought to be put up in justification of a serious criminal act. Moreover, it is remembered that in a case of abortion some twenty years ago where one of the accused was a doctor (who was in the event acquitted of any charge), the suggestion of such defence by counsel for the accused was vehemently deprecated by the presiding judge. It is well known that "sanitary" or "therapeutic" abortion, as it is called, is not justified by the Catholic Church. The Encyclical "Casti Connubii" of the 3rd December, 1930 lays down in categorical terms that the direct killing of the unborn child is always against the command of God and the very voice of nature itself, and that the so-called right of "extreme necessity" which conduces to the destruction of an innocent creature cannot in any way be admitted. "Pertanto", the Encyclical goes on to say, "si manifesterebbero indegnissimi del nobile titolo e vanto di medici coloro che, sotto pretesto di applicare l'arte medica, o per malintesa pietà, mettessero la madre o la prole in Pericolo di morte". As Ttr. Bonnar says: "Therapeutic abortion is explicitly and clearly condemned by the decree of the Holy Office of July 24/1/1395"[465]. "All this", he goes on to say, "holds of direct abortion. If, however, it is a question of indirect abortion, the matter presents a different complexion".

Indirect abortion is that which follows as a secondary result of an action the purpose and primary effect of which is other than abortion. In such a case, if there is a justifiable reason sufficiently grave for the course action proposed (whether it is a question of medical treatment or something else), then the abortion which follows may be permitted once it is neither intended nor directly caused. Pope Pius XII was clear and emphatic on the Catholic doctrine on this problem in his address to the congress of the "Unione Cattolica Italiana Ostetriche" held in Rome on the 29th of October, 1953. His Holiness said: "Ogni essere umano, anche il bambino nel materno, ha il diritto alla vita immediatamente da Dio, non dai genitori, ne' da qual siasi società o autorità

[464] Op. cit., Vol. VII, p. 499, para. 2572

[465] The Catholic Doctor, 1948, p. 82

umana. Quindi non vi e' nessun uomo, nessuna autorità' umana, nessuna scienza, nessuna 'indicazione' medica engenica, sociale, economica, morale, che possa esibire o dare un valido titolo giuridico per una diretta deliberata disposizione sopra una vita umana innocente, vale a dire una disposizione, che miri alla sua distinzione, sia come a scopo, sia come a mezzo per un altro scope, per si' torse in nessun modo illicito. Cosi', peresmpio, salvare la vita della madre e' un nobilissimo fine: ma l'uccisione iiretta del bambino come mezzo a tal fine, non e' lecita".

General Observations

1. The question is often asked by text-writers and commentators whether the crime of abortion admits of a punishable attempt. Naturally the question arises where the endeavour is made by adequate and sufficient means, for if the means used were absolutely inadequate or insufficient for the purpose, the hypothesis of a criminal attempt would be excluded on the grounds of impossibility. The law may punish the use of the means as such, if certain consequences, independently of the onset of miscarriage, ensue (as our law in Section 256, where the woman dies or suffers severe injury), but not as an attempt.

But suppose the means used or supplied or administered could have induced abortion?

The more commonly accepted jurists recognise the possibility of attempt where the act is done by any person other than the woman herself. The general rules of criminal attempt find no difficulty of application in such cases. Doubt is entertained by certain writers in the case of attempt committed by the woman on herself, Carrara, who examined this question, arrived at the conclusion "di dover ammettere in astratto la possibilità del teniato aborto, quantunque in concreto eia arduo sostenero l'accusa, per la facilità di declinarla con allegere la inettitudine dei mezzi; o dedurre che l'aborto Non segui perchè donna, o pentita o timida, sospese di Adoperarli"[466]. Moreover, Carrara doubted the expediency of preferring such charges which are calculated to cause family trouble and public scandals proceedings which, generally. must end in acquittal. Those are the reasons. the eminent jurist concludes, which induce a

[466] Op. Cit., para. 1266

multitude of criminal writers to deny the political immutability of abortion vainly attempted by a joiner upon herself[467].

Whatever may be the validity of these objections "in jure costituendo" - and there are many who strongly dispute them, "de jure condito", if the law itself does not by an express provision exclude the attempt in this crime, it is not seen why there should be impunity when unambiguous acts of execution leave no doubt as to the determined intent of the woman to attempt miscarriage. As Crivellari says: The difficulty of proof in the concrete case is not an obstacle, because such difficulty does not exclude the possibility:

"Ed ove sia possibile la prova e la ragion giuridica non escluda il conato, deve essere represso anche nel procurato aborto, come in qualsiasi altro misfatto"[468].[469]

2. Our Criminal Code has not, quite rightly, adopted the continental practice of granting a considerable reduction of punishment where the crime is committed by the woman herself or by certain close relatives "to save the honour or reputation" of the woman herself or of her family: spurious honour and reputation in most cases.

2. Administering of Poisonous or Injurious Substances.

This is the crime dealt with in Section 258 which lays down that:

"Whosoever shall, in any manner, maliciously administer to, or cause to be taken by another person any poisonous or noxious substance capable of causing any harm or injury to health, shall, on conviction, be liable to hard labour or imprisonment for a term from thirteen months to two years, provided the offence does not in itself constitute the offence of homicide, completed or attempted, or a serious injury to the person".

The formal element of this crime is indicated by the word "maliciously" which in the context seems to mean "intention to harm". The mere wilfulness of the act of administering the substance or causing it to be taken is not enough without the

[467] Ibid, para. 1269

[468] Op. cit., Vol. VII, p. 1016, para. 118.

[469] Vide contra Chaveau et Helie who exclude the possibIlity of attempt in every case. (Op. cit., Vol. II, p. 42 – 43, para. 1369 – 1373.)

knowledge of its poisonous or noxious character and of its capacity to cause harm, and without a wrongful intent. As Chaveau et Helie say with regard to the more or less similar provision of article 317 of the old French Code:

“La volontà non e. sufficiente per determinare la colpabilità: e’ mestieri che questa volontà sia caratterizzata dalla intenzione di nuocere”[470].

The substances to which the provision relates are poisonous or noxious substances capable of causing harm or injury to health. Taylor has described a poison as a substance which, when taken into the mouth or stomach, or when absorbed into the blood, is capable of affecting seriously the health or of destroying life by its action on the tissues with which it immediately, or after absorption, comes into contact. For the purpose of this provision of the law, however, it is not necessary that the words "poisonous substance" be defined further than as a substance which, when administered or caused to be taken, is capable of being harmful or injurious to health.

It seems that, though the substance be in itself poisonous or noxious, the crime will not arise if the quantity administered or caused to be taken is in fact innocuous.

The crime under discussion is completed notwithstanding that the victim has not, in fact, suffered any harm, if the substance maliciously administered or caused to be taken was capable of causing harm or injury to health.

In England, in regard to the corresponding offence now contemplated by the Offences Against the Person Act of 1861, it was held that it is unnecessary for proving administering to show that the thing was taken into the stomach, and that it is not necessary that there should be actual delivery by the hand of the defendant. Thus, where a servant, in preparing breakfast for her mistress, put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and the mistress drank the coffee. Park J. held that it was an administering within the meaning of the statute. So also where the defendant knowingly gave poison to A to administer as a medicine to B, but A neglecting to do so, it was accidentally given to B by a child, this was held to be an administering by the defendant, as much as if the defendant had given the poison to B by her own hands[471].

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[470] Op. cit., Vol. II, Part II, p. 48, para. 1381

[471] Vide cases cited in Archbold, op. cit., p. 928

By the express terms of Section 258, the punishment therein prescribed applies, unless the offence committed constitutes in itself the crime of homicide, whether completed or attempted, or a grievous bodily harm - in which cases the punishments applicable would be those appropriate thereto.

Finally, it may be mentioned that the sale and supply of poisons and dangerous drugs are regulated by the Sanitary Laws and by the Dangerous Drugs Ordinance. The Food, Drugs and Drinking Water Ordinance also makes it an offence thereunder to sell or keep for sale or supply any food or drink which is unwholesome or injurious to health.

VIII. Crimes Against Property and Public Safety

Our Criminal Code does not give a definition of theft. This is unfortunate because, although the notion of theft may at first sight appear to be easy and, in fact, does not offer great difficulties in practice in the generality of cases, yet certain aspects of this crime have given occasion to very great discussion among jurists and sometimes raise questions of difficult solution.

In the.....of a statutory definition our Courts have, generally speaking, adopted the definition of the crime given by Carrara[472] i.e., "La contrectatio dolosa della cosa altrui, fatta invite domino, con animo di farne lucro"[473].

An analysis of this definition discloses that no less than five ingredients are necessary to constitute the crime of theft namely: (i) The contra of a thing (contrectatio); (ii)belonging to others; (iii) made fraudulently; (iv) without the consent of the owner; (v) anime lucrandi.

[472] Prog. Parte Speciale Vol. IV, para. 2017

[473] Vide Criminal Appeal Police vs Mario Tanti et., 9/12/44; Criminal Appeal Police vs Carmelo Felice, 10/1/42

(i) Contrectatio

This is the act of taking possession of a thing Divesting the actual owner of the possession thereof. "Contrectatio" therefore represents the act of completion of the theft and all acts which precede it may, if all other conditions are satisfied, constitute an attempt. But the precise notion of contrectatio is a matter of serious controversy among jurists. Three main theories have been propounded, i.e.

(a) According the first, contrectatio consists in removing the thing from the place in which it was; therefore as soon as there has been such removal, the theft is couplet It is consequently not necessary that the thing be also carried away from the room or from the house of the owner, because although he is in possession of the room or of the house, he is no longer in possession of the thing.

(b) According to the second theory, contrectatio is made up of "apprehensio" and "amotio de loco ad locum". So that contrectatio may be said to be complete and that the theft may be said to be consummated, it is not enough that the thing be taken away from the portion of space which it occupied, but it is also necessary that it be removed from the sphere of possession or actual control of its lawful possessor. Before this happens, that is to say in the interval between the "apprehensio" and the "amotio de loco ad locum" there may be an attempt; but the theft cannot be said to be consummated or completed if therefore the thief is surprised before he has gone out of the room or of the house »he will be guilty of an attempt and not of the completed theft,

(c) According to the third theory, the theft is not consummated before the thing has been safely carried away, that is carried away to the place where the thief intended to take it (ao loco quo destina ver at) ; consequently the theft is not completed, not only where the thief is surprised while he is still in the house, but also where, having gone out of the house, the thief is caught while carrying the thing to the place he had appointed.

This third theory is propounded by a small minority and may be discarded. The second theory was strongly advocated by Pessina and v/as, in fact, enshrined in the Italian Penal Code of 1889. "This theory", Pessina wrote, "less strict (then the theory of

"amotio"), as well as answering to the true motion of the crime, finds an echo in popular judgement, because where, for instance, it happens that a thief is apprehended with the booty in the house where he went to steal, and is so apprehended while he was making for the door to escape, popular judgement always says that the man attempted to steal, and not that he stole"[474]. Elsewhere the seme jurist wrote: "Theft is completed by the thief taking possession of the thing; but this change of possession cannot be said to have taken place so long as the thing is still in the place which constitutes the sphere of possession of the owner [...] The first phase of the crime of theft is the "apprehensio rei", and the last phase consists in the change of place which integrates the "ablation". But by the 'place' one must not always understand the same J place in the physical sense, that is the room or the house. The place is determined by the sphere o' activity of the lawful holder of the thing. If one enters the house of another to commit a theft, the exit or going out of the thief from the house is a necessary condition so that the theft may be said to be consummated if two people live in the same house but in different rooms, one of them does not truly complete the theft, except when he carries away the thing out of the room where it lay. if two individuals share the same room, as for example two prisoners in a prison cell, or two pupils in a room in a college, the theft can be considered as completed when the thing is removed from the limited nook where all the property of the owner of the thing is contained and is carried away and concealed either out of the room or among the things of the taker. So the terminus ad quern' is represented by any displacement which takes away the thing from the sphere of activity of its lawful holder"[475].

This theory, attractive though it may be, was admitted by its own advocates to be necessarily somewhat fluid and flexible. It requires for the completion of the theft that the thief shall have become possessed (impossessato) of the thing or in other words that possession of the thing shall have passed from the lawful holder in the hands of the thief: how this passage of possession "non può essere raffigurato da una formola precisa, assoluta; ma deve essere rappresentato da circostanze, che difficilmente potrebbero essere prestabilite, od esemplificate"[476].

[474] Relazione sul progetto 29 Gennaio, 1885, p. XLVII - XLVIII

[475] Elem. di Dir. Pen. Vol. III p. 212

[476] Relaz. della Comm. della Ca. dei Dop. sul prog. 1887, art. 381., n. 1

The first theory, i.e., Carrara's theory which, as we have said, is generally adopted by our Courts, more severe and strict though it undoubtedly is, has the merit of providing a fixed and invariable criterion. It was the theory which, in the absence of a legal definition, was followed under the Tuscan Code. It was also the theory which, in the like absence, was generally followed under the Neapolitan Code, on which our Code was mainly modelled. It is as we shall see, identical with the theory which the English Common Law adopted and to which the English Larceny Act has given statutory recognition.

According to it, the theft is completed so soon as the thief has laid hands on the thing which he intended to steal and has removed it with such intent from the place T/here the owner had put it.

From a scientific point of view Carrara defends this theory by various reasons. in the first place, theft is a violation of the possession of others: hence at the first moment at which a thief takes possession of a thing which was possessed by others, the violation of possession takes place without waiting that the possession taken by the thief shall be protracted to any length of time, or much less that the thief shall convert the thing into his dominion. If we abandon this first moment of "amotio", which already in itself constitutes a violation of possession, we will never know where to find a criterion for defining the moment at which the crime is consummated. As a matter of fact, among the opponents of this doctrine of “amotio” there is very great uncertainty. Some say that the theft is completed when the thing stolen is removed from the room where it was: others hold that it is completed when the thing is carried away from the apartment; others mention the house, yet others speak of the appurtenance of the house, maintaining that the violation of possession is not completed so long as the thing, being still within the residence of the owner or within its appurtenances, remains in his possession. But this mode of reasoning confuses the possession of the house with the possession of the thing. Not all things that are in my house are posseted by .me. The things which another person has about him when he comes into my house are possessed by him and not by me: this is evident: and when the thief, having entered my house, takes my things, he makes himself possessor thereof, notwithstanding that he is still within my house[477].

[477] Carrara op. cit., loc. cit., para. 2019

According to Carrara's doctrine a theft is completed and not merely attempted although the thing removed from the place where the owner left it, is put by the thief in some other place in the same room.

In this respect, English Law accords with this doctrine. By the definition given by the Larceny Act (6 and 7 Geo. 5. c. 50) stealing requires a “taking” and a “carrying away”: “a person steals who, without the consent of the owner, fraudulently and without claim of right made in good--faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof [...]”. But the expression “carry away” is expressly defined as including removal of any thing from the place which it occupies but in the case of a thing attached, only if it has been completely detached. While therefore there must be a change of possession, at least constructively, to constitute larceny, inasmuch as if there is no infringement of possession, i.e. no trespass, there could be no larceny, yet the asportation or carrying away, which together with the taking is essential, is satisfied by the slightest removal of the thing from the place which it occupies: and this, even though the thief at once abandon the thing. Thus, there is a sufficient aspiration in taking plate out of a chest and leaving it on the floor; or in shifting a bale from the back of a cart to the front, or in pulling a lady’s earing from her car, even though the earing be caught in her hair and remain in it. Only in the case of a thing attached, there cannot be a sufficient removal unless it has been completely detached: e. g. not unless the string which ties the scissors to the counter has been cut through[478].

Now, the subject matter of the crime of theft can only be a movable thing. Immovables, it was said “non concretantur sod invaduntur”. Some of the very early Roman Lawyers had thought there might be “furtum fundi locive” i.e., that land was legally capable of being stolon. But even before the time of Gaius, all the jurists came to abandon this view. The expression “movable thing” must be construed in its widest sense. It includes also those things which are considered by the Civil Law as immovables so long as they are attached to the land, tenement or trees but which become movable as soon as they are severed therefrom; e.g., fixtures, growing fruit, etc.

With regard to the things attached to realty the Common Law rule in England was that they could not be the subject matter of larceny. The movableness of the thing must

[478] Kenny op. cit. p. 214

have existed before the theft, A thing therefore was not lacerable if it first became movable by the very act of the taking. Thus, it was no theft at all to take mould from I \ garden or send from a pit: or to pull down a wall and carry away the bricks. So it was no larceny to strip woodwork or other fixtures from a house or to cut down a tree. But these acts have now been made specific statutory offences. The Larceny Act, 1916, preserves the rule that (with a some except ions as to fixtures, growing plants and mineral orbs) “anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless, after severance he has abandoned possession thereof’. For even at Common Law, there would be a larceny if, after the severance heel once been fully completed, the thing were abandoned by the thief but he afterwards changed his mind and returned and carried it away.

The movable thing, to be stealable, must be physical or corporeal. Piracy of copyright may give rise to other remedies under specific laws, but not to a charge of theft. Likewise debts or rights of action cannot be the subject-matter of theft: but the papers or instruments evidencing such claims or right, may.

It is, however, not doubted by anyone and our law makes express provision - that gas or electric current are movable things capable of being stolen.

The thing to be the subject of stealing must have a value. But the exact measure of this value is not fixed in England the principle is now distinctly laid down that although, to be the subject of a stealing, a thing must be of value to its owner, if not to other people, yet this need not amount to the value of the smallest coin known to the law, or ever the hundredth part of a farthing”. In R vs Clarence (1889), Mr. Justice Hawkins went so far as to say, though only incidentally, that stealing a single pin would be larceny.

In Italian doctrine it is likewise held that, provided the thing has some value, even though very small, it can be the subject-matter of theft. Carrara says: “purché un qualche valore vi sia, per quanto minimo, e’ sempre furto”[479]. But some value is necessary. So that in the case of 'a theft of “a forged bank note” Carrara opined that there was no theft either complete or attempted.

[479] loc. ext. para. 2073

The extreme smallness of the value may cut out the crime by excluding the elemental criminal intent. Moreover, it is to be noted that in our law any person who in any field belonging to any other person, plucks or eats the fruit or other produce of such field is guilty only of a contravention. (sec. 354 (b)).

If the value of the thing stolen is considerable, it will, as we shall see, constitute an aggravation of theft.

(ii) Ownership

The thing, the subject-matter of theft, must be a “res aliena”, that is a thing which belongs to some other possessor at the time of the taking. It is however not necessary that the owner be known or discoverable , as in the case of brass plates being stolen from very old coffins in a vault. "La cesa di ignoto padrone e', relativamente a ciascuno, res aliena salva la dimonstrazione che non appartenga a nessuno o che il proprietario l'abbia abbandonata”[480]. As Carrara says, the thief cannot defend himself by challenging the right of ownership of the prosecutor in respect of the thing stolen. It is sufficient for the crime that the person taking it away had no right thereto. “Pur de dominio quaestionem movere nequit”. In fact, it is not necessary that the person from whom the thing has been taken shall have been the owner thereof in the full sense of the Civil Law. A theft may be committed from a person who holds the thing, not in full ownership, but for instance, on tenancy, under "commodaturn", or on deposit[481]. “The rule that the thing must be in possession of others implies, in the first place, that there cannot be a theft of a “res nullius” or of a “res derelicta”. Animals (ferae naturae) straying at large, from important class of things which have no owner. The general principle of the-law is that all true ownership of living things depends upon actual control over the Domestic animals (such as horses, oxen, sheep) or domestic such as hens, ducks, geese usually have a settled home and so come under the control of their occupier: and consequently are stealable. If they are so, their eggs and other produce will equally be stealable: and this even when the produce is stolen directly from the living animals themselves (as by milking cows, or plucking wool from the

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[480] Pessina, op, cit., p. 130

[481] Op. cit., para. 2030

backs of sheep) before the true owner has ever had possession of it as a separate thing. But over animals ‘ferae naturae’ there is usually no control, and therefore no ownership. But a power of control may, of course, be created either ‘per industriam’ or ‘propter impotentiam’ by their being too young to be able to get away. The degree of physical control which is necessary to establish ownership will vary with the habits of the particular species concerned. creatures may be subjects of ownership although they are not closely confined but are allowed to "wander away from home, provided they have a settled habit of returning thither: and this will be so although they are not shut up even at night. Peacocks, ducks, geese, readily acquire this habit of returning”[482].

This is so far as concerns “res nullius”.

But an article that has an owner may come to be intentionally abandoned by him and of such “derelict” articles there can be no theft. Thus wrecks which have “been abandoned without any intention of salvage or recovery are incapable of being stolen”. A sound rule seems to be that laid down by an English Court in R vs White to the following effect; “If there is any ground for supposing that the accused may have believed the articles found to have been abandoned by its owner , the jury must be carefully directed with regard to the matter, since, if the jury find that belief as a fact, the accused is not guilty”[483]. Confer Section 599 of the Civil Code which deals with the case of bees and domestic animals which have strayed away from the owner s control and are not pursued or claimed within certain prescribed times.

As we have already said, though there may be a theft only where the thing, at the time of being stolen, belonged to some other person, yet it is not necessary that this person should be a full owner. He may be a person having possession or control of the thing. Consequently, paradoxical as it seems, a man may commit a theft by stealing his own property. For when an owner of goods has delivered them to any one on such terms as (such as those of pawn) entitle the holder to exclude him from possession, then the owner may be guilty of larceny if he carries them off from the possessor with the requisite criminal intent. The question of theft of one’s own things (furto di cosa propria)

[482] Kenny op. cit. p. 221 - 222

[483] Archbold, op. cit., p. 54-55

is variously solved amongst jurists. But in R vs. Degiorgio[484], H. M.s Criminal Court composed of three judges adopted the doctrine of those who maintain that, under certain circumstances, (it was a case of pawn) a man can commit theft of his own goods. The Court said;- “After considering the various doctrines the Court inclines to accept the theory, maintained amongst others by Pessina, Lucchini, Arabia, and Marciano, and consequently holds that “a res Propria” may, in certain cases, on account of certain juridical relationship, be considered as a res aliena when the owner by reason of such juridical relationships, has not got the free disposition of the thing, as is precisely the case whore the thing has been delivered to the possess by way of pledge or pawn or where it has otherwise or’ been taken away from the free disposition of the owner. It may be added that this also was the doctrine of the Old Roman Law […]. It may also be added that the same is the tendency of English Law”

Another question which is variously solved is whether a person can be guilty of stealing a thing of which he is a joint-owner. At English Common Law, as every co-owner was equally entitled to the possession of the whole thing, he could not commit larceny by taking it. But now, by the Larceny Act, 1916 (Sec. 1(1)), a part-owner may be guilty of stealing a thing "notwithstanding that he has lawful possession thereof" if he fraudulently converts the same to his own use or the use of any person other than the owner.

According to Carrara the condition that the thing, to be capable of being stolen, must belong to others (altrui) excludes the theft of a thing owned in common (cosa comune). Such a thing cannot be a subject of theft unless it is possessed by one of the co-owners, and another steals it to deprive the other co-owner of his share[485].

Pincherle[486] writes: “Theft is not excluded by the fact that the accused was a part-owner of the thing, and therefore a co-owner, a partner or a co-heir who appropriates the thing of the community, of which he has not got the possession, commits a theft in respect of the portion exceeding his share”[487].

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[484] Indictment No. 8274, February 1945

[485] Loc. cit., para. 2033

[486] Manuale di Dir. Penale, p. 390

[487] Vide also Arabia Principii del Dir. Pen., p. 308

In the Italian Code of 1889, it was expressly laid down: "il delitto si commette anche sopra le cose di una eredità. non ancora accettata, e del comproprietario socio o co-erede sopra le cose comuni o dell'eredità. indivisa, da lui non detenuta. La quantità del tolto si misura distraendo la parte spettante al colpevole"[488]. As Maino points out[489], in order that a charge of theft may arise against a co-owner, a partner or co-heir, it is necessary that all the conditions required by the definition of the crime be satisfied, particularly that the thing of the community or the inheritance be not already in the possession of such co-owner or co-heir, arid that his ascertained intention be that of making an unlawful gain to the prejudice of the others. If the thing was already exclusively in his possession, he will not be answerable except for misappropriation. And if the taking of the thing took place in the belief and for the purpose of enforcing a right, there would be, in appropriate cases, only the offence of illegal pursuit of legai rights (ragion fattasi).

Our Code makes no express provision concerning the matter. But there should be no doubt that the doctrine of the Italian law would not be repugnant to the principles of our law.

In connection with the requirements of "res aliena" it may be convenient to deal with the special case of "Theft by finding".

Under section 601 of our Civil Code "Any person, who finds a movable thing, not being a treasure trove, (sec. 600), is bound to restore it to the previous possessor if known; otherwise he is bound to deliver it without delay to the Police".

Section 354(c) of the Criminal Code makes it a contravention for any person, finding any property mislaid or lost by any other person, to fail, within three days, to give information thereof to the Executive Police.

Now, this contravention applies when the failure to give information to the Police within the prescribed time, is a mere omission due, for instance, to negligence. But when the finder appropriates the thing, even though within that time, he becomes guilty not of that contravention but of theft. The position, as was stated in R vs Gius. Scicluna[490],

[488] Art. 402 c. v.

[489] Op. cit., Vol. IV. p. 17. art 40. para. 1846

[490] Criminal Court, 11/3/43

is as follows: “It is a settled principle of Maltese jurisprudence that a person who appropriates a thing which he has found in any place under such circumstances as show that it has an owner. commits theft”. This judgement cites R vs Bartolo[491], Rex vs Leatham[492], and Rex vs Williams[493]. Cfr. also cases cited in Cremona, op. cit. p. 206, and Criminal Appeal in re Police vs. Vassallo[494]. The fact that the finder conceals the thing or untruly denies having found it is evidence of the intention to appropriate - it.

According to Kenny, the law in England is as follows:

“if the owner has intentionally abandoned all right to them (lost articles), of course, the finder may appropriate them, and thereby become true owner. But even where there has been no such abandonment, and consequently the finder does not become owner of the thing which he has found, he will not commit any crime by appropriating it, unless, at the very time of finding, he both

(i) believes

(a) That the owner can be discovered by taking reasonable steps" (Larceny Act, 1916, s. 1(2), (i)), and:

(b) that the owner had not intentionally abandoned the thing;

And yet also:

(ii) forthwith resolves to appropriate it.

In determining whether or not a finder has had reasonable grounds to believe that the owner could be discovered, it will be important to take into account the place where the thing was found, and also its own nature, and, again, the value of any identificatory marks upon it. Thus, in the case of cheques, bills of exchange, promissory notes arid other securities that carry the owner's name upon them, a finder could scarcely think it impossible to trace out the owner, even though it were in a crowded thoroughfare that he picked out the papers. Similarly in the case of articles left in a cab, the driver

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491 11/7/1855

492 1/7/41

493 4/11/41

494 1/9/47

will generally have a clue to the owner from knowing where he picked up, or set down, his passengers. And where property has been accidentally left by a passenger in a railway train, it has always been held to be larceny for a servant of the rail ay company to appropriate it instead of taking the thing to the lost-property office"[495].

Thus, in English Law the main thing, apart from the appropriation, is that the finder believes that the owner can be discovered by taking reasonable steps. In the doctrine of our Courts what is required is that the finder believes that the thing found has an owner and, of course, that it has not been abandoned. The nature of the thing is therefore necessarily an important factor. Whether or not the finder believes that he can discover the owner is immaterial, because under our law the finder unless he knows the owner is bound to deliver the thing to, or at least inform, the Police.

(iii) "Contrectatio" must be Fraudulent

In other words, the abstraction or taking must be with the consciousness of abstracting or taking the property of others. Any honest mistake will negative this ingredient, as where the taker believes the thing to have been abandoned or that it is his own. It would appear that any such mistake excludes theft even if it is incurred into through negligence. As Carrara says, "non può concepirsi la figura giuridica di un furto colposo"[496]. If subsequently to discovering the mistake, the taker converts the thing to his own use then he may, indeed, become guilty; the subsequent intent to appropriate the thing taken will relate back and make the taking fraudulent. This is also the position in English law: Thus, where the prisoner drove off amongst His own lambs by honest mistake a lamb belonging to the prosecutor, but, after he has discovered the error, proceeded to sell the lamb, he was convicted of larceny[497].

The best evidence that there was no fraudulent intent is that the goods were taken quite openly. A surreptitious taking, or a subsequent denial of the taking, or a concealment of the goods, suggests a fraudulent intent.

[495] Op. cit., p. 24-4-245

[496] Loc. cit., para. 2023

[497] C. Kenny, op. cit., p. 244

(iv) Absence of Owner's Consent

Ownership of property being an alienable right, it is manifest that the consent of the owner to the taking of the thing by another, provided it is freely and spontaneously given, excludes the crime of theft. If the consent of the owner is obtained by intimidation it can afford no defence. In such case his will is overborne by compulsion. The consent need not be explicit or express. It may be tacit. Can it be "presumed"? According to Carrara, in exceptional circumstances a presumed consent may undoubtedly exclude malice when the good faith of the taker proceeds from an honest and reasonable belief (giusta credilità), especially if it is founded on relationship of particular friendship and is unaccompanied by any clandestinity or violence, and followed by restitution[498]. In Criminal Appeal Police vs Tanti et.[499], already cited, the Court apparently, did not admit the possibility of a "presumed" consent excluding the "invito domino". If, in point of fact, the owner was dissenting, then whatever the taker "presumed" will not avail him. It is, however, respectfully submitted that part of the judgement was based on a misreading of a passage in Carrara lo. Cit. Para. 2034 note (i). The reference to the "subjective" and "objective" doctrine of certain Roman Jurists is concerned with the case in which the owner was assenting but the thief did not know it and thought that he was dissenting. The subjective doctrine held that in such case the requirement of "invito domino" was satisfied: the crime existed "in opinione agentis" though not also "in veritate rei". On the contrary the majority of Roman Jurists embraced the "objective doctrine". The dissent of the owner is such an essential ingredient of theft that if, in point of fact, "there was not such dissent, the crime does not arise, in spite of what the taker thought to the contrary". "o' iniquo punire dove risulta che del delitto mancono gli estremi, e la pena fondare sopra un sospetto o sopra la sola intenzione".

Upon this point of the owner's consent a question of practical importance sometimes arises in consequence of the plans laid by the police for the detection of a suspected thief. If, for mere purposes of detection, the owner of the goods acquiesces in a thief's carrying them off, does such consent suffice to prevent the thief's act from being a

[498] Loc. cit., para. 2034; Vide also Maino, op. cit., art. 402, para. 1841

[499] 9/12/44

theft? In the case R vs Valentino Provi[500], His Majesty's Criminal Court composed of three judges held as follows:

Non giova agli accusati la circostanza che il proprietario a danno dol quale furono prosi gli oggetti rubati, era sciente della intenzione degli accusati, o, che, potendo impedire il furto, non lo ha impodito [...] dappoichè non si può scambiare l'animo di abbandonare il possesso ed il consenso alla distrazione del possesso stesso o del dominio, colla volontà' di portare il ladro alla pena, e, nulla sapendo il ladro della intenzione di colui al qualo la cosa appartiene, non si può ammettere che egli intenda di agire di accordo col padrone".

This view is supported by the authority of Carrara[501].

In English law a distinction appears to be made. According to Kenny:

"If the owner desired that the thief should actually remove his goods, or, still more, if he had employed someone to suggest to the thief the perpetration of the theft, his action would constitute a sufficient consent to render the taking no larceny, although his sole object was to secure the detection of the offender; yet if he went no further than merely to facilitate the commission of the theft (e.g., by allowing one of his servants to assist the thief), such conduct would no more amount to a consent than if a man, knowing of the intention of burglars to break into his house, were to leave one of the bolts on the front door unfastened."

We have mentioned the case in which the consent of the owner is obtained by intimidation, and we said that consent so obtained is no consent at all.

What is the position if the consent to the taking of possession has been obtained by fraud i.e., by some trick or false artifice? According to the doctrine of our Courts where possession is parted with by the owner voluntarily even though as a result of falso representation or a trick on the part of the taker, the element of 'invito domino' essential to the crime of theft, is excluded. the taking and appropriation of the thing in such circumstances may constitute the crime of 'fraud' (generally "truffa" (escroquerie) or "frode innominata"), but not theft[502]. In English law, fraud may equally with intimidation

[500] 1/3/1911

[501] Loc. cit., para. 2034 note

[502] vide Decree in R vs Karmnu Zammit, April 1949

remove all effect from an apparent permission, consent obtained by fraud may be no consent at all. Hence whenever an owner's consent to the taking of his goods is obtained "animo furandi", and the deception vitiates the consent, the taker is accordingly guilty of "larceny by a trick"[503].

We have said that, apart from the case of intimidation, where possession has been voluntarily delivered by the owner, the crime of theft cannot arise. In "Rex vs. Pisani" 2/12/1941) His Majesty's Criminal Court held that as theft is a violation of not only property, e. g., right of ownership, but also of possession, where there is only a violation of property without a violation of possession (because the owner has already parted with such possession for some reason or other), than there cannot be theft but some species of fraud. By possession here is meant the "natural" possession and not necessarily the "juridical" possession. "Natural possession" exist whenever the thing is under the physical control of the possessor, "Juridical possession" exist where a person is, by construction of law, considered to be in possession of a thing over which he has no actual physical control.

As Mr. Justice Harding, reporting the judgement, says, "Our Courts, have not accepted this distinction in "deciding whether an offence constituted theft or fraud. "In fact the distinction between theft and fraud consists in the violation, is the former case, not of juridical (i.e. constructive) possession, but of physical (i.e. actual) possession, so much so that, in certain case, the person, who has the constructive possession (civil possessor) may become guilty of theft, if he takes away the thing from the person having the actual possession (natural possessor).

There are, however, cases in which exceptionally the fact that the owner parted with the possession of the thing does not negative theft. These are:- (i) when the delivery of possession is general and not special, or limited to particular things. Thus if a servant has the charge of all the chattels existing in the place where he is employed, he would be guilty of theft if he were to take away any of them, (ii) when the delivery is made under such "circumstances as to show that the owner did not intend parting with his possession — thus if one person shows a watch to another and hands it over to him to examine, and the other person runs away with the watch; (ill) when although the owner has entrusted the thing to another to make delivery thereof elsewhere, a

[503] For further details cfr. Kenny op. cit., p. 234; Archbold, op. cit., pp. 553 et. seq.

third, party, however, is sent by the actual owner to watch over the person having the factual possession of the thing.” (Recent Criminal Cases Annotated, para. 20).

(v) The intent to Animo Lucrandi

The intent to Animo Lucrandi, make a gain is, as Carrara says[504], the special malice requisite to constitute theft. The intentional element in this crime is not constituted, by the mere intent to take, but also by the intent to make a gain. The special malice of theft consists in the intent to procure a benefit or satisfaction whatever from the thing belonging to others (lucri causa). Thus, “lucrum” in this connection does not mean an actual gain or profit in terms of money but any advantage or satisfaction procured to one's self. Therefore, even a person who steals intending to make a gift to others of the thing stolen will be guilty of theft, his gain consisting in the pleasure of making the gift. Similarly, a person who deals a work of art to complete a collection and for the pleasure of possessing it. Indeed, the crime could subsist even if the thief leaves in the place of the thing stolen another thing of equal value or its worth in money[505].

And it suffices that the purpose of deriving a gain in the above sense existed in the intention of the agent; it is not required for the completion of the crime that such gain shall have in fact boon realised. This is after all but an application of the general rule common to all cases in which a particular intent is an ingredient of a given offence. Indeed, even where the gain has failed to be realised by reason of a voluntary act of the thief himself (e.g., because he restores the thing), “quod factum infectum fieri nequit”. The crime of theft juridically continues to subsist, inasmuch as the “animus lucrandi” was present at the time of appropriating the thing. Restitution of the thing or compensation operates only in mitigation of punishment in certain cases (vide section 351 Criminal Code).

The “animus lucrandi” Is negatived by any intent of sheer spite or revenge if the thing is immediately destroyed by the thief. In such a case you may have the offence of wilful damage to property:

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[504] Loc. cit., para. 2035

[505] Cfr. Carrara, loc. cit., para. 2075; Pessina, op. cit., Vol. 11, p. 214; Maino, op. cit., art. 402 para. 1843

Chi toglie una cosa al proprietario non per trarne profitto, ma per gettarla via e distruggerla, e' colpevole di danno e non di furto"[506].

But this applies where the intent to destroy the thing existed at the very time of the taking: it does not apply, for instance, where the thief throws away or destroys the thing because he is surprised in the act of stealing by the owner. Nor, of course, does the said principle apply where the destruction of the thing represents merely the mode of making use thereof to satisfy the purpose had in view by the thief e.g., eating the thing stolen, or burning as fuel the wood taken. The "animus lucrandi" is also negatived if the thing is taken and carried away in the exercise of a pretended right: in which case you may have, in appropriate circumstances, the offence under section 84 of the Criminal Code

"Se la sottrazione della cosa altrui e' commessa o per pagarsi di un credito, o per compensarsi di un danno, o por esercitare sulla cosa un diritto ancorché. controverso, esula dal fatto, per comune consenso degli scrittori e pel concetto dell'articolo in esame, l'imputabilità a titolo di furto"[507].

Furtum Usus

The gain intended by the thief may consist merely in the temporary use of the thing stolen without any intention on his part of appropriating the thing permanently: e.g., the maid who takes her mistress's jewellery to adorn herself on a special occasion intending to restore the same immediately thereafter, or the man who takes a car from a carpark to go for a drive intending subsequently to take it back to the same place.

The Roman Law definition of theft expressly included "furtum usus". Carrara also admits this kind of theft although he makes no express reference to it in his definition of the crime. Such theft was also admitted under the old Neapolitan Code which, like our own, gave no general definition of the crime.

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[506] Maino, loc. cit., para. 1843

[507] Maino, ibid., para. 1844; N.B. Concerning this element of the crime of Theft, the "lucri causa" vide Criminal Appeal Police vs Tanti 9/12/1944

According to Maino[508] "L'articolo 402 [of the Italian Code of 1089] non contenando alcuna limitazione circa i modi e lo forme con cui si può trarre profitto della cosa rubata, ammette la possibilità del furto d'uso. "As to our law there is no doubt whatever that the same is the case. Only, in respect of simple thefts, when as section 301 says "the gain contemplated by the offender, is the mere use of the thing, with intent to restore same immediately", the ordinary punishment is considerably reduced.

In English law, on the contrary, "furtum usus" as such is not recognised. The Larceny Act, 1916, requires "intent, at the time of the taking, permanently to deprive the owner" of his chattel. There is no larceny where the intention is to take away the owner's possession from him only temporarily. Thus, Kenny says (p. 741), a boy may steal a ride without stealing the donkey. He will only be guilty of a trespass: but not of larceny. By the Road Traffic Act. 1930, the taking away of a motor vehicle for temporary use without the consent of the owner or other lawful authority has been made a special offence: it is however a defence to show a reasonable belief in the existence of lawful authority or that the owner would have given his consent if asked (20 and 51 Geo, 5, c. 43 s, 58).

According to Carrara, in order to determine the value in the case of "furtum usus", regard must not be had to the value of the thing in full ownership but an assessment "boni viri" should be made of the value of the particular use made thereof (para. 2038).

Classification of Thefts

Our law recognises Simple thefts and Aggravated thefts. It specifies the various aggravations and then proceeds to say that "theft, when it is not accompanied with any of the aggravating circumstances specified, is simple theft".

Having now given the general notion of must proceed to consider the various aggra circumstances contemplated in our Code.

Aggravating Circumstances

Section 274 lays down that the crime of theft may be aggravated:-

[508] Loc. cit., para, 1845

(a) by “violence”

(b) by “means”

(c) by “amount”

(d) by “person”

(e) by “place”

(f) by “time”

(g) by “the nature of the thing stolen”

Broadly speaking the main reason for all these aggravations, except the aggravation of 'amount' due to the greater amount of damage caused, is the greater facility which, under those circumstances, the offender has of perpetrating the crime and the greater difficulty in which the victim is of preventing it. Other special reasons will be mentioned in dealing specially with each individual aggravation.

A. Violence

The first and most serious aggravation of theft is that of violence. According to Section 275 of the Criminal Code the theft is so aggravated

(i) where it is accompanied with homicide, bodily harm, or confinement of the person, or with a written or verbal threat to kill, or to inflict a bodily harm, or to cause damage to property

(ii) where the thief presents himself armed, or where the thieves, though unarmed, present themselves in a number of more than two

(iii) where any person scouring the country-side and carrying arms proper, or forming part of an assembly m terms of Section 63, shall, by a written or verbal request, made either directly or through another person, cause to be delivered to him the property of another, although the request be not accompanied with any threat.

In order that an act of violence may he deemed to aggravate the theft, it is sufficient that such act he committed previously to, at the time of, or immediately after the crime with the object of facilitating the completion thereof, or of screening the offender from punishment or from arrest or from the hue and cry raised by the injured party or by

others, or of preventing the recovery of the stolen property, or by way of revenge because of impediment placed or attempted to he placed in the way of the theft, or because of the recovery of the stolen property or of the discovery of the thief.

The provision that the act of violence aggravates the theft even if it is committed immediately after the crime, may appear to be a departure from principle. As has been said, the crime of theft is completed by the asportation, even though the thief may not have succeeded in converting the thing to his own benefit. All that follows that moment of the completion of the crime strictly speaking cannot form part of it. However, it appeared to our legislator that when the act of violence occurs immediately after the technical, legal consummation of the theft, in the circumstances and for the purposes above mentioned, it so intimately links up with it that the transaction may rightly be considered as one. In any event, the express provision of our Code, framed on the identical provision of the Neapolitan Code, removed all the doubts to which the absence of sin express direction in the law had given rise.

By Section 343 the punishment applicable to the crime of theft (as to other crimes against property) accompanied with homicide, bodily harm or confinement of the person shall always he applied if the act of violence has been completed, even though the offence against property was merely attempted.

B. Means

Theft is aggravated by means

(i) when it is committed with internal or external breaking, with false keys or by scaling;

(ii) when the thief makes use of any painting, mask or other covering of the face, or any other disguise of garment or appearance, or when in order to commit the theft, he takes the designation or puts on the dress of any civil or military officer, or alleges a fictitious order purporting to be issued by any public authority, even though such devises shall not have ultimately contributed to facilitate the theft, or to conceal the perpetrator thereof.

The words “breaking”, “false keys” and “scaling” are defined in great detail in the Code (Vide Sections 277, 278 and 279.) Suffice it to point out that "breaking” includes all

manners of forcing any wall, other than a rubble wall enclosing a field, any bolt, door or contrivance intended to prevent entrance into any dwellinghouse or other place or enclosure or to lock up or secure things in any receptacle, and the breaking of any receptacle, even though such breaking may not have taken place on the spot where the theft is committed. “Breaking” includes also any breaking or twisting etc. of the pipes of the public water service or of the gas service, or of the wires or cables of the electricity service, or of the meters thereof, made for the purpose of effecting an unlawful communication with such pipes, wires or cables. In these cases, according to Section 291, the theft aggravated by means is deemed to be completed so soon as the unlawful communication is affected.

Sub-section (l) of Section 277 lays down that in the case of breaking of pipes of the public water service or of the gas service, or of the wires or cables of the electricity service, the existence of artificial means capable of effecting the unlawful use or consumption of water, gas or electric current, or capable of preventing or altering the measurement or registration on the meter of the quantity used or consumed shall, until the contrary is proved, be taken as evidence of the knowledge on the part of the person occupying or having the control of the tenement in which such artificial means are found of the said use or consumption of water, gas; or electric current.

“False keys” includes generally any instrument adapted for opening or removing fastenings of any kind and includes also any genuine key when procured by means of theft, fraud or any other kind of artifice.

“Scaling” comprises generally any entry into any dwelling-house, place or enclosure (not being a field surrounded by a rubble wall) by any way other than by the doors ordinarily intended for the purpose, howsoever the entry is affected. For purposes of punishment there is “scaling” even when, the entry having been affected by the way ordinarily destined for the purpose, the exit is improperly made.

C. Amount

Theft is aggravated by amount when the value of the thing stolen exceeds the sum of Ten Pounds. It must be noted, however, that for purposes of punishment our Code makes a distinction when the case in which the value of the thing stolen merely exceeds £10 but does not exceed £100, and the case in which such value not only

exceeds £10, but also exceeds £100. It is also to be noted that, according to Section 349, in any offence the punishment thereof varies according to the amount of the damage caused, as in the case of theft, such amount is not estimated by the gain made by the offender, nor does it include any interest .accessory thereon, but it is only represented by the actual damage suffered by the injured party at the time of the offence.

It was sometimes questioned whether in theory the greater or lesser amount of the loss caused by the theft should affect the punishment. To Filangieri, for instance, it appeared that the moral injury was the same in all cases and that the punishment should not vary. In some sense the law itself recognises this opinion. In fact, the greater value of the thing stolen operates to aggravate the punishment up to a limit only and not beyond. In our law, as we have said, the uppermost limit of destruction is £100. By whatever amount the value exceeds £100, account is not taken of the excess, except of course within the latitude of punishment fixed by the law. Moreover, if the gravity of the damage is to be made a true criterion of the gravity of the offence for purposes of punishment, one should take account of the means of the victim of the theft.

For practical purposes, however, it cannot be doubted that the arrangement made by the law is convenient, and, Just as the law has regard to the damage, when considerable, to aggravate the theft and increase the punishment, so also it has regard to it, when comparatively very small, to reduce the ordinary punishment. (Vide, for instance. Sections 291 (4), 295, 296; also Section 301). Moreover, according to Section 351, in cases of simple theft, or of theft aggravated by value alone, or in cases of fraud, the prescribed punishment is diminished by one or two degrees if, previously to the commencement of any criminal Proceedings against the offender, the damage caused by the offence has been fully made good.

D. Person

Theft is aggravated by person

(i) when committed, <u>in any place</u>, by a servant to the prejudice of his master, or to the prejudice of a third party, if his capacity as servant, whether real or fictitious, afforded him facility in the commission of the theft.

“Servant” includes every person employed at a salary or other remuneration in the service of another, whether such person lives with his master or not.

The specifications that when the theft is committed by the servant taking advantage for the purpose of such capacity, the aggravation subsists whether the crime is committed in his master’s house or elsewhere, whether he lives with his master or not, and whether the theft is committed to the detriment of the master or of others, have removed so many doubts that had arisen under the French Code.

(ii) when committed by any guest or by any member of his family in the house where he is receiving hospitality, or, under similar circumstances, by the host or by any person of his family, to the prejudice of the guest or his family.

It will be noted that where the theft is committed by the guest or any member of his family, provided it is committed in the house where he is receiving hospitality, it does not matter whether the theft is to the prejudice of the host or his family or of other guests or outsiders. In R vs G. Castellazzo[509], H.M. Criminal Court composed of three judges held that: “per l’ospitalità s’intende l’atto di accogliere e ricoverare nella propria casa una persona anche per brevissimo tempo, e dei fini d’aggravamenti e’ indifferente che la causa dell’ospitalità sia onesta e lecita ovvero immorale od illecita, per la ragione che il frenamento dell’aggravamento consiste nell’ abuso di fiducia e nella facilitazione che l’ospitalità presta alla perpetrazione del delitto”.

Bearing this in mind, the Court went on to say, it must be held that "hospitality" has been used by the legislature in a wide sense so as to include not only gratuitous hospitality, but also that given on the occasion of the rendering of a service for payment as, for instance, in a brothel for purposes of prostitution.

(iii) when committed by any hotel-keeper, innkeeper, driver of a vehicle, boatman, or by any of their agents, servants or employees, in the hotel, inn, vehicle or boat wherein such hotel-keeper, inn-keeper, driver or boatman carries on or causes to be carried on any such trade or calling, or performs or causes to be performed any such service; and also when committed in any of the said places by any individual who has taken lodgings or a place, or has entrusted his property therein.

[509] 19/5/1915

It may be recalled that by the Civil Law inn-keepers as well as carriers by land or water have special obligations in respect of the custody and preservation of the things entrusted to them by reason of their trade or calling. (Vide, for instance sections 1082, 1772 et seq., 2023 of the Civil Code.)

According to the authorities, among hotel-keepers and inn-keepers must also be included lodging-house and boarding-house keepers, but not tavern or coffee shop restaurant keepers[510].

(iv) when it is committed by any apprentice, fellow-workman, joinery-man, professor, artist, soldier, seaman or any other employee in the house, shop, workshop, quarters, ship, or any other place to which the offender has access by reason of his trade, profession or employment.

E. Place

Theft is aggravated by place when it is committed

(i) in any place destined for divine worship;

(ii) in the hall where the Court sits, during the sitting of the Court;

(iii) in any public road in the countryside outside inhabited areas;

(iv) in any store or arsenal of the Government, or in any other place for the deposit of goods or pledges destined for the convenience of the public;

(v) on any ship or vessel lying at anchor;

(vi) in any prison, or other place of custody or punishment;

(vii) in any dwelling house of apartment thereof.

In regard to (iv) above it was held in Criminal Appeal The Police vs G. Seychell[511] that the word “Government” therein refers only to the local Government. The Court said that when in the Code reference is made to “Government”, the intention always is to refer to the Malta Government and, in support of this, the Court quoted Sections 4, the proviso to Section 5, Sections 60, 61, 71, 619(2) and 635(2). It is respectfully submitted

[510] Vide Arabia, op. cit., p. 313

[511] 12/4/48

that the provisions quoted by the Court do not, in fact, lend support to the view it took. In some of them the analogy does not hold at all; in others the limitation of the reference to the Malta Government only is imposed by the context. The said view is against previous decisions according to which, whenever reference is made to Government, without any specifications or limitation, that reference must be construed as a reference both to the general Government of Her Majesty in the United Kingdom as well as to the Malta Government, unless there is something in the contexts to limit such application[512]. In the provision under reference not only is there nothing on the context to require the limitation of the reference to the Malta Government but, on the contrary, the fact that mention is made of "arsenals" of which there never were, not are, any belonging to the Malta Government, seems to make it clear that expression "Government" includes also H.M.'s Government in the United Kingdom.

F. Time

Theft is aggravated by time when it is committed in the night, that is to say, between sunset and sunrise. The time of night aggravates the theft because it facilitates its commission or the escape of the thief. In Roman Law also it was said: "Fur diurnus minus punetur quam nocturnus". The definition which our law has given of night, as being the time between sunset and sunrise, has removed all doubts that arose under the French and Neapolitan Codes. The purpose of the law being that already mentioned, namely that the quiet and darkness of the night offers facilities for the thief induced writers to hold that the aggravation did not arise in respect of all places at the same time and that therefore the night, in the sense of the law, denoted the time at which the inhabitant of the particular place generally went home to sleep. This solution was clearly open to the objection that it gave occasion for too wide discretion and arbitrary applications. Our law gave a definition of the time intended, which, it is true, may not perhaps correspond in every case to the realities of things, but, at least, removes the said doubts.

To decide whether there is this aggravation regard must, of course, be had to the time when the theft is completed.

[512] Criminal Court Rex vs Caruana, 4/5/1914

G. Nature of the Thing Stolen

The theft is so aggravated

(i) when it is committed upon things exposed to danger, whether by their being castaway or removed for safety, or by their being abandoned on account of urgent personal danger arising from fire, the falling of a building, or from any shipwreck, flood, invasion by an enemy, or any other grave calamity

(ii) when it is committed on beehives

(iii) when it is committed on any herd of cattle, large or small, on any pasture- ground, farm-house or stable, provided the value be not less than one pound

(iv) when it is committed on any cordage, or other things essentially required for the navigation or for the safety of ships or vessels

(v) when it is committed on any net or other tackle cast in the sea for the purpose of fishing.

(vi) when it is committed on any article of ornament or clothing which is at the time on the person of any child under 9 years of age.

In the Neapolitan Code, the hypothesis at (i) above was included amongst those which constituted the aggravation of means. In other Codes (e.g., that of Sardinia) it was the comprised among the aggravations by time.

What is important to note is that the aggravation arises where the thing has been exposed to the danger under the stress of circumstances which impelled the will of the owner: "perchè la ragione della legge e' di punire piu' gravamente questo furto per rispetto alla difficoltà maggiore del derubato di guardarsene, la quale cessa quando egli non spinto da necessità alcuna lascia o espone al furto le cose proprie". And when the reason which compelled the owner to leave his things ceases so that he can again, if he wishes, take care of them, the aggravation ceases. This rule was applied many times by our Courts in respect of the crime of looting, as the theft was called in those circumstances in respect of things left by their owners on account of evacuation or enemy air-raids during the last war.

The case at (iii) above was, in certain other Codes, included among those which were considered to be aggravated by “place”: the reason given being that in pasture grounds, farmhouses and stables, generally in the country, "gli animali sono posti so'bto la pubblica fede, piu difficile o minore e’ la sorveglianza degli agricoltori e maggiore l’improbità del colpevole”[513]. By the express provision of the law there is the aggravation when the theft is of cattle, whether large such as horses, bulls, cows, or small such as sheep, goats, pigs. It does not apply in respect of other animals which are not cattle within the ordinary meaning of the word, e.g., fowls.

In Continental doctrine the theft of animals is often called “abigeato” which in Roman Law consisted in the theft of ten heads of cattle, if small, or one head, if large.

Regarding (iv) above, it must be noted that the act of the offender may, in appropriate circumstances, apart from the aggravation of theft, constitute the crimes referred to in Sections 336 and 337.

[513] Luigi, Dir. Pen., p. 445