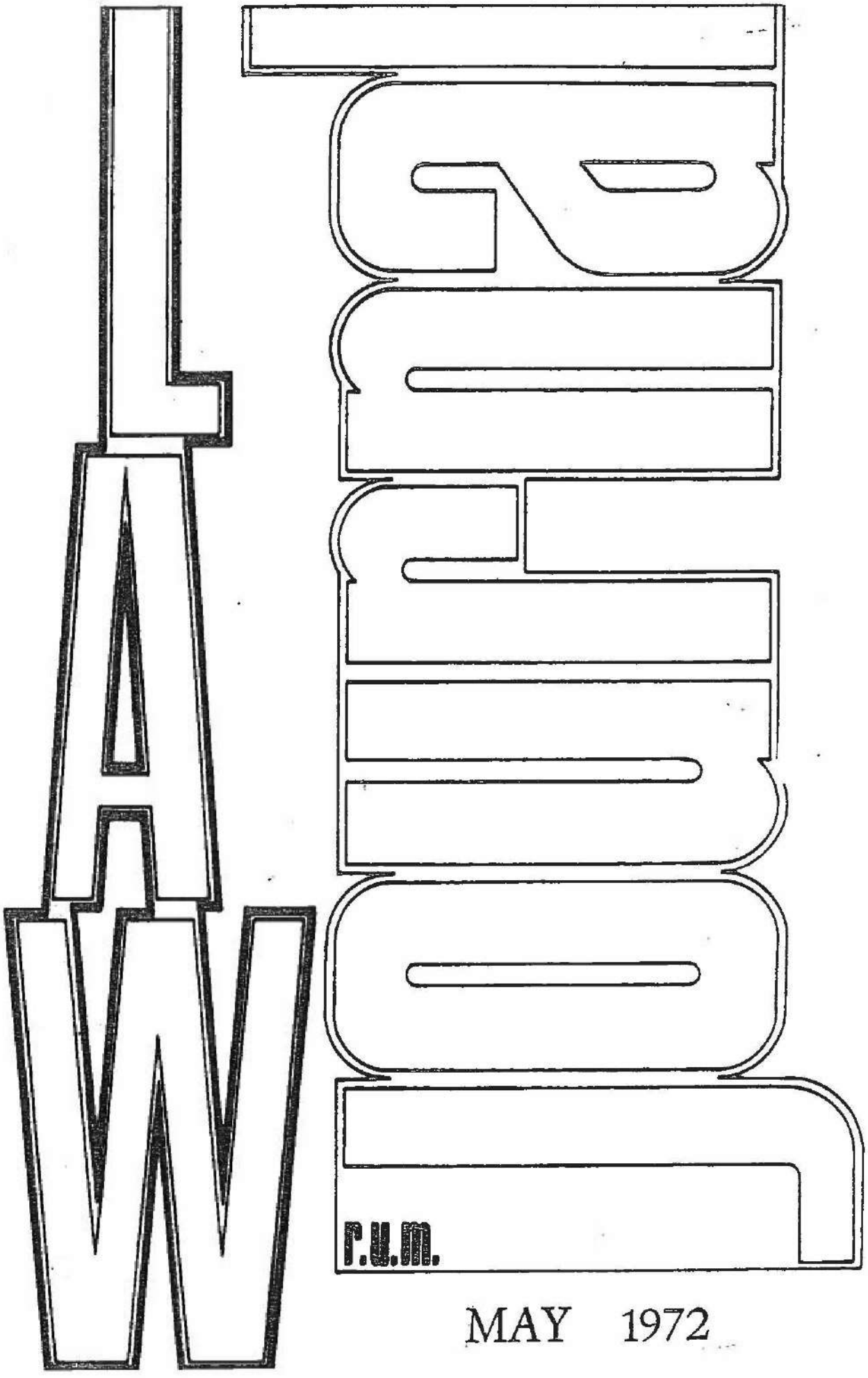

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EDITORIAL

Publishing a Law Journal is a much needed exercise. The absence of any other regular Maltese Literature on Maltese Law is enough in itself to emphasize the importance which such a publication should acquire.

I must state, however, that unfortunately, contrary to the enthusiastic views which I nursed before engaging myself in the publication of this Journal, co-operation from the members of the legal profession was more than wanting. Only a handful were ready to contribute their knowledge. It is hoped that in the future, the Law Journal will acquire the attention which I believe should be attributed to it.

However, one must note at the outset that the scope of a Law Journal is not merely to serve as an opportunity for the fully fledged lawyers to contribute their knowledge but also to serve as a medium for students reading Law. In this way the Law Journal too achieves most of the aims of the law Society, viz., "To act as liaison between its members and the Faculty of Law and legal professional organisations" and to "promote the study of Law in all its aspects."

In furtherance of its aims, the Law Society has worked incessantly and has proved itself to be not only a mere potential but also an actual strong contribution *to the promotion of the study of Law especially by organising regular forthnightly lectures on a wide range of topics which directly or indirectly are of extreme interest to Law Students and Lawyers alike.*

It is also the scope of this Law Journal to provide interesting material to persons who, though not being lawyers, are interested in the legal filed. Legal education must be within everyone's reach. Knowledge of the Law is not only a duty but is a right. *Unfortunately, however, this fundamental right is being seriously hampered by a disastrous halt in the publication of the Laws of Malta and the Judgements of the Maltese Courts. This is a serious and immediate problem which should be solved forthwith. The very saying that the Laws of one's own homeland are unavailable even to those who desire to know them or require to have them available for academical studies is repellable. It is hoped that this problem, though obviously known, be tackled.*

May I finally express my warm thanks to all those who have helped us in the publication of the Law Journal and also in the other activities of the Law Society. Special mention has to be given to Professor J. Cremona LL.D., who has once again supplied us very kindly with a handsome contribution and to Professor J. M. Ganado, B.A., Ph.D.(Lond.), LL.D., whose sincere interest and constant help has been greatly admired and appreciated.

The Editor
PHILIP FARRUGIA RANDON

PROCEDURAL ANOMALIES IN CONSTITUTIONAL CONTROVERSIES

— by PROF. J. M. GANADO, B.A., Ph.D.(Lond), LL.D. —

I. WIDENING SCOPE OF SUCH CONTROVERSIES

Since the creation of the Constitutional Court in 1964, the number of lawsuits concerning the Constitution and its Fundamental Rights sections has been very limited. This may reflect well on the drafting of the Constitution and also on the absence of violations of the guaranteed Fundamental Rights, but it may also be due to an insufficiency of awareness on the part of the population in general, as to the full implications of the standards imposed by the constitutional provisions and the types of remedies ensuing therefrom. It is incumbent upon everyone, and especially the members of the legal profession, to question even long accepted practices and to apply to them the tests resulting from the constitutional provisions. For example, according to long standing practice, an arrested person is not given a written statement of the charges for which he is placed under arrest. The charge is read out in Court and copies can be taken by the accused or his lawyer. However, the Constitution requires that the accused be supplied with a written chargesheet and, had it not been for the exclusion of the basic Codes from the purview of s.47 of the Constitution, the procedure that had normally been followed might well have been held to be unconstitutional(1).

Let us take another example. Being confronted with a claim for additional tax comes within the experience of probably the majority of taxpayers. As the Income Tax Act gives the Commissioner an administrative discretion in regard to the imposition of such additional tax, it has unfortunately been the practice of the Board of Special Commissioners not to interfere with the circumstances and reasons leading to its imposition(2). In 1964, up the enactment of the Constitution which guaranteed a fair hearing by an impartial body on all matters concerning the determination of civil rights(3), any form of discretion on the part of the Commissioner on a matter which is really of a judicial or quasi-judicial character became unconstitutional. The result is that either the Commissioner has lost his discretion or, alternatively, the Board will have to investigate the fairness or otherwise of the imposition of the additional tax(4).

Nothing contained in or done under the authority of the provisions of the Civil Code, Commercial Code, Criminal Code, Code of Police laws, Code of Civil Procedure(5) and the Land Expropriation Laws (as obtaining in 1964(6)) can be regarded as being in violation of the Human Rights provisions. The exclusion of these Codes or Laws from the application of the Fundamental Rights provisions may have been due to a fear that the task of modifying the basic codes would have been too much and too dangerous to complete within the period of three years imposed by the Constitution for the amendment of Laws for the purpose of making them conform to the Constitution. There was only one case(7) in which it was alleged that a provision of one of the basic Codes (namely the Criminal Code) was

in conflict with the Constitutional provisions. There are undoubtedly other cases of conflict, but there is no reason why one should harbour any special fear that the removal of the special treatment accorded to the basic Codes would lead to undue confusion and change. If an individual claims that the Human Rights sections of the Constitution are being violated by the provisions of these codes, he should be at liberty to raise the matter for the Court to apply the appropriate remedy. The position of the Land Acquisition Ordinances may present a different case, as it is known that the compensation awardable under those Ordinances is in most instances less than reasonable and adequate compensation and a Court would certainly hold them to be unconstitutional. It seems, therefore, that these Ordinances should be examined and discussed on their own particular merits and the necessary changes should be effected by legislation(8).

It has been officially stated that the individual petition to the Commission and Court of Human Rights of the Council of Europe is going to be recognized by the Government of Malta. This is a welcome step, but one must appreciate that such a right is naturally restricted within the margins of the European Convention of Human Rights. The same liberal tendency should have the effect of eliminating the basic Codes from the entrenched position which they possess at the present moment and also to liberalize the Constitution or correct the defects which have so far appeared(9).

The above suggestions may possibly increase the numbers of lawsuits involving constitutional issues. In the limited number of cases we have had so far, doubts have arisen on the extent of the Constitutional Court's jurisdiction in relation to that of the Court of Appeal and a greater incidence of such lawsuits will undoubtedly have the effect of highlighting the difficulties on jurisdiction and the inadequacy of the procedure when such difficulties arise. It is therefore necessary to rectify the position also from the purely procedural angle.

II. Jurisdiction of Constitutional Court

According to s.96(2) of the Constitution, the Constitutional Court has jurisdiction to hear and determine:—

(a) Such questions as are referred to in s.64 of the Constitution, namely any question whether—

(i) Any person has been validly elected as a member of the House of Representatives.

(ii) Any member of the House has vacated his seat therein or is required by the Constitution to cease to perform his functions as a member

(iii) Any person has been validly elected as Speaker from among persons who are not members of the House, or having been so elected, has vacated the office of Speaker.

(b) Appeals from decisions of the First Hall of Her Majesty's Civil Court under s.47 of the Constitution, which is the section granting an action for the enforcement of the provisions protectinng the Fundamental Rights and Freedoms of the Individual. It should here be noted that if an action had already been made under a previous Constitution in order to enforce some Human Rights section, an appeal from the relative judgment is to be made to the Court of Appeal and not to the Constitutional Court, (10) because the Constitution in this sub-section refers specifically to Fundamental Rights Actions based on the 1964 Constitution.

(c) Appeals from decisions of **any Court of original jurisdiction** in Malta

on questions as to the interpretation of the 1964 Constitution. It must be noted that the First Hall of the Civil Court is not the only Court of original jurisdiction. The provision certainly includes the Commercial Court and the Courts of Gozo in their superior jurisdiction. Would the Inferior Courts be included? They are Courts of original jurisdiction; it is true that they have a jurisdiction severely limited by value but a question of interpretation of the Constitution may arise as an incidental matter to a lawsuit within their jurisdiction.(10a)

(d) Appeals from decisions of **any Court or original jurisdiction** in Malta on question as to the validity of laws. The same comment made in respect of (c) applies here too.

In both sub-paras. (c) and (d) we find an exclusion as to those decisions which may fall under the Fundamental Rights sections of the Constitution. It seems that this exclusion is introduced merely for the purpose of avoiding duplication. In fact, all appeals from decisions on actions made under those sections will go to the Constitutional Court in accordance with sub-para (b).

III. Division and proliferation of actions

Even a cursory reading of s.96 shows that in regard to sub-para. (c) and (d), the Constitutional Court will be called upon to deal possibly only with one aspect of a particular lawsuit. For example, in the Broadcasting Authority Case, (11) the action was based on s.122 of the Constitution and on s.7 of the Broadcasting Ordinance. Questions on interpretation of the former would have to be decided upon by the Constitutional Court, while questions on the interpretation of the latter would have to be decided by the Court of Appeal. It often happens that in one action various legal grounds are put forward, with the result that if one of them happens to be a provision of the Constitution needing some form of interpretation for the purpose of applying it to the particular case, the Court of Appeal will find itself without jurisdiction to determine the issue.

With regard to actions based on the Fundamental Rights provisions of the Constitution, from a procedural point of view, it may appear that there is no dificulty. In fact all actions based on s.47 must be commenced by means of an application filed before the First Hall of the Civil Court (12) and appeal therefrom is to be made again by application to the Constitutional Court (13). However, even here it may happen that a plaintiff may wish to base his claim on various grounds, some based on the ordinary law and some based on the Fundamental Rights provisions. In such a case, it is necessary to make two separate actions: one by means of a Writ of summons and the other by means of an application. Although they are filed before the same Court, it is very often the case that they are heard by different Judges, unless a specific order is given by the Court to have the two cases dealt with together; (14) however, the existence of two separate actions invariably causes difficulties of precedence and delays in the hearings. Two separate cases lead to two separate appeals and, for the reasons mentioned later, two separate cases may easily proliferate into three or four separate appeals.

Actions based on the Fundamental Rights sections are normally intended to be made use of only in default of other rights of action based; if a person has a right of action under normal law, he is expected to avail himself of that right of action before resorting to the Fundamentnal Rights sections (15). The difference in the pro-

cedure may perhaps be intended to underline this difference between these two remedies. However, the rule that a plaintiff should not resort to the Fundamental Rights action, if he possesses other actions or until he has exhausted his other remedies, is not a binding rule in accordance with s.47 but only a rule of guidance to the Court which has a discretion not to grant the remedy under s.47 if it is satisfied that other remedies are available.

Certainly it would be quicker, less expensive and more practical for the same Court to hear all the evidence and submissions in one and the same case and then decide whether to make use of the discreteion which the law confers upon it. The effectiveness of these remedies very often lies in their being given quickly and it is imperative that procedural complexities be eliminated as much as possible.

IV Interpretation of the Constitution

With regard to the exclusive jurisdiction of the Constitutional Court to interpret the Constitution, from a theoretical point of view there may seem to be no difficulties but in practice we come across the problem as to what is really meant by 'interpretation of the Constitution'. Surely, a mere reference to a provision of the Constitution or a mere application of it is not 'interpretation'. Interpretation in the strictly technical sense of the term comes into play only when there is a matter of doubt as to the meaning of a particular provision or as to its extent or mode of application to a particular case. It is, however, obvious that the line of demarcation, where mere reading and understanding end and interpretation in the proper sense begins, is an extremely uncertain line and very often depends on the subjective criteria of the particular Judge. It is to be expected that, if a Judge feels that a provision of the Constitution is not clear and calls for interpretation, he should say so clearly, and, if he has jurisdiction, decide the point separately; alternatively, if he does not have jurisdiction to decide the issue, then one of the parties will be given a time-limit to make the appropriate proceedings. In either case, an appeal to the Constitutional Court is possible.

The Constitution refers to the case in which a point of interpretation of the Constitution arises 'for the first time before a Court of second instance'. What do the words, 'for the first time' really mean? The point may have been referred to, directly or indirectly before the Court of first instance, but neither the parties nor the Court may have considered that the question raised an issue of interpretation properly so called. More importance may be given to the issue when the matter is discused further after the judgment. Would the point have been raised for the 'first time' when it is discussed again before the Court of Appeal and the Court of Appeal feels that, strictly speaking, interpretation by the Constitutional Court is called for? The reply to the question may bring about effects of considerable practical importance. In fact, if there is some point of interpretation, then an appeal should be made not only to the Court of Appeal on the merits of the case but also to the Constitutionanl Court on the question of interpretation of the Constitution. Failure to make such a second appeal may mean that the question cannot be raised again as that part of the judgment would have amounted to an implied 'res judicata'. After all, the Court of Appeal would not be able to say that the question had arisen 'for the first time' before it and, therefore, it would not be in a position to give the

reference which is provided for in s.47 (3) of the Constitution. The position can produce serious hardship and unfairness and should not be allowed to stay as it is.

The three appeal judges are normally also three of the judges sitting in the Constitutional Court. It is often very dificult to take a point of interpretation in isolation from the merits of a case or at least some of the main facts of the case. In the judgment of the Constitutional Court there may be certain expressions of opinion reflecting on the merits of the case. Would the judges of the Court of appeal be able to continue the hearing before the Court of Appeal or would they find themselves debarred from continuing the hearing on the grounds of some expression of opinion in the Constitutional Court's judgment reflecting on the merits? This depends on the details of each case but if they have to abstain, there will be obvious practical difficulties by reason of the small number of judges on our bench.

V. Conflicts of Jurisdiction

With regard to the exclusive jurisdiction of the Constitutional Court to decide on questions of validity of laws, much the same difficulties that have been encountered in regard to the interpretation of the Constitution can arise. A problem has arisen in a case which wil probably remain unique(16). There is still pending before the Court of Appeal a Human Rights action instited on the basis of the 1961 Constitution. The Act impugned was Act I of 1963 enacted on the 15th February 1963. As the action was not a Fundamental Rights case based on s.47 of the Constitution, it obviously did not fall within s.96(b) of the 1964 Constitution but it did involve the question of the validity of Act I of 1963. Therefore, the dificulty arose as to whether it came within s.96(d) referring generically to questions of the validity of laws without any limitation. Two appeals were made and quite a long time had to elapse before the hearing of the case could actually commence, in order to discuss which of the hearings should take precedence. Ultimately it was decided that, although one of the points at issue was the validity of a law still that point arose as part of a Human Rights action based on the 1961 Constitution. The Constitutional Court declared itself to be incompetent and the case was held to fall within the sole jurisdiction of the Court of Appeal. Both parties to the case favcured the adoption of such a solution because at least it terminated the uncertainty that had prevailed and the necessity of dividing the actions into two parts with unavoidable confusions and delays.

VI. Conclusion

Most of the difficulties to which I have referred have already been encountered. There is no doubt that there are other latent ones. The main suggestions that arise from the observations made in the present paper are the following:

a. The basic Codes should be removed from their present entrenched position.
b. Any judgement of the Constitutional Court on the question of jurisdiction or extent thereof, should be binding on any other Court and, in case of conflict of judgements on such matters, the judgement of the Constitutional Court should prevail.
c. The procedure in constitutional matters should be more flexible. Particularly, the Court should have authority to give relief in cases in which time-limits for the making of appeals are deemed

to have lapsed on account of the procedural difficulties animadverted upon. This amounts to the "restitutio in integrum" which traditionally existed in our procedural system but which was recently held to have been tacitly abrogated(19).

d. In the cases in which the prescribed procedure before the Court of First Instance is by application, the procedure by writ of summons should be equally valid. In this way the incidence of duplication of actions will be diminished. In s. 164 of the Code of Civil Procedure there is a precedent for alternative modes of procedure and the Court is given a wide discretion.

e. Greater procedural flexibility for references to the Constitutional Court directly or to the Civil Court should be introduced.

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(1) Police-vs-Francesco Certo decided by the Constitutional Court on the 14th August 1968.

(2) Decisions Nos. 23/66; 31/66; 16/70 decided by the Board of Special Commissioners for Income Tax and Tax Cases Nos. 29, 42, 57, 84 delivered by H.M. Court of Appeal.

(3) S.40(2) of the Constitution.

(4) The point was raised in a 1971 income tax appeal. However, it was not decided by the Court, because the additional tax was cancelled by the Commissioner of Inland Revenue.

(5) Vide First Schedule to the Constitution and s.48(7) of the Constitution.

(6) S.48(9) of the Constitution.

(7) Police-vs-Certo supra.

(8) The hardship arising from the application of the provisions of the Land Acquisition Ordinances was the cause of an appeal to the Judicial Committee of the Privy Council in the case Depasquale noe. et vs Aquilina et disposed of by the Judicial Committee on the 11th March 1971. The Judicial Committee agreed with the Court of Appeal's rigid and literal interpretation of the provisions of the Ordinances in contrast with the liberal interpretation followed by the First Court.

(9) One example of a serious defect that has been encountered in practice relates to s.87(3) where by the Constitution the Prime Minister is required to perform any function in accordance with the recommendation of or, after consultation with, any person or authority, the question whether he has in any case received, or acted in accordance with such recommendation or whether he has consulted with such person or authority shall not be enquired into in any Court. This provision in reality stultifies the guarantees afforded by other provisions of the Constitution. During the pre-Independence talks, this provision was criticised by the Malta Labour Party which suggested that it should be restricted only to the cases in which the Prime Minister is required to consult with any person or authority, but should not apply to the cases in which he is required to act in accordance with the recommendation of any person or authority (Vide p. 99 of "Malta Independence Conference 1963 - M.M.S.O. Amend 2121)
Such a suggestion was fully justified and it is strange that it was not adopted in 1964.

(10) Ganado noe.-vs-Borg Olivier noe. and Ganado noe.-vs-Felice noe. decided by the Constitutional Court on the 10th March 1971.

(11) Mintoff noe.-vs-Montanaro Gauci noe, decided by the Court of Appeal on the 22nd May 1971.

(12) s.2 of the Fundamental Rights and Freedoms Rules of Court 1964 (L.N. 48 of 1964)

(13) s.2 of H.M.'s Constitutional Court Rues of Court 1964 (L.N.49 of 1964).

(14) Such an Order was given by the First Hall of the Civil Court in the case Mintoff noe. - vs - Montanaro Gauci noe. which was ultimately withdrawn before the Constitutional Court on the 24th June 1971.

(15) The proviso to s.47(2) of the Constitution.

(16) Ganado noe.-vs.-Borg Olivier noe. and Ganado noe.-vs.-Felice noe. which are pending before the Court of Appeal.

(17) s.776 et seq. of the Code of Civil Procedure.

(18) The possibility of both Courts declining jurisdiction arose in a Gozo appeal. With regard to the decision of a particular point of procedure both the Court of Appeal in Malta and the Gozo Court of Appeal held themselves not to have jurisdiction (vide Compagno noe vs. Bajada et. decided by the Malta Court of Appeal on the 23rd February 1962).

(19) Vide Judgment of H.M. Court of appeal (in its Inferior Jurisdiction) in case "Misrahi vs. Cassar" of 10th June 1965.

THE BENEFIT OF THE SEPARATION OF ESTATES

by **FRANCIS LANFRANCO**

In consequence of the 'confusion' which occurs between the personal estate of the heir and that of the inheritance (in succession), the creditors of the decujus become creditors of the heir, and those who were already his creditors can obtain satisfaction of their debts from the property inherited. This state of affairs can prove to be prejudicial to the creditors and legatees of the deceased, especially when confronted by an heir who is inundated with debts. In order to safeguard their interests these individuals may resort to the "Benefit of the Separation of Estates."

As in the Italian Civil Code of 1927, this Institute forms the subject-matter of a separate title under our Civil Code, coming directly after "Priveleges and Hypothecs". The new "Codice Civile Italiano" and the French Civil Code have perhaps more appropriately, placed the Institute under the Law of Succession; but our legislator preferred to keep the "causes of preference" side by side. In fact section 3 of Ord. XI of 1856, which brought this Law up to date, says that "Le cause legittime di **prelazione** sono i privileggi, le ipoteche, e il 'benificio della separazione del patrimonio' "

This Institute derives from the "Separatio Bonorum" of Roman Law; but whilst the latter brought about a 'complete separation' of estates, keeping the estate of the decujus exclusively for the satisfaction of his creditors and that of the heir for the satisfaction of his personal creditors, in modern law there is no such absolute seperation. In the words of S. 2201 of the Law "The benefit of seperation of estates is the right which the creditors of a deceased person and his legatees have, to demand that the property, both movable and immovable, of the inheritance be seperated from the particular property of the heir, and applied to the payment of their respective debts or legacies **with preference over all the heir's creditors**" i.e. this benefit ensures the "preferential treatment" of their heirs and legatees of the decujus, but it does **not** create two distinct masses and even the creditors of the heir can resort to the property of the inheritance for the satisfaction of their claims, after the creditors of the said decujus have been paid. Another characteristic of the said Institute, which again serves to distinguish it from the "separatio bonorum", is that since the benefit of separation is granted in the interest of the creditors of the decujus and not in that of the heir — there is nothing to stop the creditors and legatees, who have had recourse to this benefit, from further enforcing their claims on the personal property of the heir.

It has often been said that the "Benefit of the Separation of Estates" is diametrically opposed to the "Benefit of Inventory" in the Law of Succession — both produce a separation of the property of the inheritance from that of the heir; but the latter is granted to the heir in order to separate his property from the rights of the creditors of the inheritance of the legatees, whilst the "Benefit of Separation" is granted to the creditors of the deceased and to the legatees as against the particular creditors of the heir, who cannot demand this separation against the creditors of the inheritance. A judgement of the **Court**

of **Torino** (Moderni vs. Erba 25th July 1884) held that "L'accetazione della eredità col benefizio d'inventario esime i creditori del defunto dal chiedere la separazione dei patrimoni, giacche' quest'articolo è scritto unicamente nell'interesse dei creditori che vogliono premunirsi nel caso di decadenza dell' erede dal beneficio d'inventario'.

"The benefit is granted to all the creditors of the deceased indistinctly — priviledged,, hypothecary and simple, and to the legatees who become creditors as soon as the succession is opened". Although Maltese Jurisprudence on this Institute is very limited indeed, the question as to "whether there is also need for the hypothecary creditors of the deceased to resort to this benefit" appears to have been of some concern to our Courts, in the past. In **Mollia vs Ferriggi** (XVI.1. 10th June 1898) the Court of Appeal held that "I creditori ipotecarii del defunto **non hanno bisogno** di valersi del beneficio della separazione dei patrimonii per non essere pregiudicati dai creditori particolari dell'erede." In arriving at this decision the Court based itself on a previous judgement of the same Court — "come e' stato ritenuto da questo Corte nel'Concorso dei creditori dei fratelli **Zammit vs. Negte. Paolo Ellul'** " (3rd Feb. 1894). It is true that, in relation to the benefit of seperation, this Court said ". . . si verebbe a ritenere che quella separazione sia una misura che riguarda **solamente** i creditori chirografari o quei creditori rispetto ai quali o non sia iscritto la ipoteca contro il defunto, ovvero tale ipoteca abbia al tempo della morte perduto la sua efficacia; "but then the Court goes on to say **"cio' pero' non e' da ritenersi** poiche' la legge non fa una tale distinzione e quindi non e' neanche' a farsi dai tribunali" and in another part of the same judgement the Court quotes il "Trattato della separazione del patrimonio del defunto da quello dell'erede" by Prof. Melucci which says "Non osservando le formalita' prescritte per la conservazione della causa legittima di prelazione derivante della separazione dei patrimonii, il creditore del defunto **viene messo al pari** del creditore dell'erede e concorre con lui senza alcuna prelazione, e **sebbene il creditore** del defunto **sia un creditore ipotecario** . . ." In arriving at its decision, which is meant to be on this latter judgement, the Court in Mallia vs. Ferriggi appears to have missed out much that was relevant in the said judgement. The benefit is personal to the creditors and legatees who have made the "demand", and "shall not operate except in favour of the persons exercising it" **S. 2209(2)** This is also the accepted view in both France and Italy— "Questa preferenza non spetta a tutti i creditori del decuius e a tutti i legatori, ma soltanto **a coloro che** l-abbiamo esercitata." **Torrente Laurent** dismisses the idea that the creditors and legatee, who exercises this right, may be acting under a tacit mandate or as a negotiorum gestor of the others and he is in agreement with the French Courts "che' la separazione dei patrimonii non puo' giovare se non **a quelli che l'hanno domandato.**"

The Creditors and legatees cannot exercise the "benefit of Separation of Estates" if there has been novation, by acknowledging the heir as the debtor (2209(11)). Novation may also be implied from certain acts performed with the heir as representative of the decujus.

The benefit may be exercised "in respect of **all the property indiscriminately and for the seperation of one or more things specified** in the demand **(2209(3))** In Italy, in the words of **Torrente,** "la separazione ha carattere particolare e non universale: essa si

esercita non sull'intera massa del patrimonio ereditato, ma sui singoli beni che la costituiscono." As in France and Italy, in Malta this benefit can be exercised over both **movables and immovables**. It takes the form of a "judicial demand" in case of movables and in regard to immovables there is a "registration" of the benefit, in the manner prescribed for the registration of hypothecs. This is in keeping with Italian Law; but there seems to be a divergence of opinion in France, where according to **Demolombe** both doctrine and jurisprudence are "uncertain and obscure" with regard to the manner in which this benefit is to be exercised. This obscurity is to a great extent due to Demolombe himself, in the opinion of **Laurent** who is in agreement with **Pothier** that "a solution to the problem can be found in the text of the law itself." The relevant section of the law (S.878) speaks of "a demand" and this demand can be none other than **"a judicial demand."** In regard to immovables "oltre l'iscrzione occorre anche' una domanda" — **Laurent.** Thus in this case the author is of the opinion that registration is not sufficient; but that the demand prescribed in the Law should also be put forward. On the otherhand, our Law and its Italian counterpart state quite clearly that "the registration takes the place of such demand"

In Malta this right may only be exercised within the period of **one year** from the opening of the succession" **S. 2203.** Italian Law prescribes the rather short period of three months and Sec. 880 of the French Code says that this right may be exercised over immovables only "finche' esistono in potere dell'erede". In regard to movables the term of prescription of three years would apply. It is evident that separation becomes impossible after the lapse of a considerable period of time for it is a universal presumption that with the passage of time the confusion between the estates of the heir and the inheritance increases and a day arrives when it becomes impossible to distinguish the one from the other, especially in regard to movables.

Our Civil Code is in keeping with the Italian Code of 1927 in regard to the **"alienation of the hereditary property"**, though no mention of such sales is made in the present Italian Code and the French Civil Code. The Law distinguishes between alienations made prior to the exercise of the benefit and those made after the benefit is exercised:—

In the former case the benefit may still be exercised over the price "which is still due" **(S. 2204)** If the price has been paid, it becomes one with the property of the heir and thus escapes the hereditary creditors — this being a consequence of the right of ownership and a measure of the respect which is due to it. If the property is alienated after the exercise of the benefit, the rights of the creditors and legatees continue to subsist in relation to the immovable property; but any such alienation of movables (except with regard to litigious rights) shall remain unimpaired. In **"Buhagiar utrinque"** (12th Feb. 1897 Vol. XVI. 11) Judge Giovanni Pullicino said that "I creditori del defunto ed i legatori che esercitono l'azione di separazionen dei patrimonii **possono chiedere** in riguardo **ai mobili ereditarii le cautele ed i provedimenti conservatori** che la Corte credesse necessarii nel loro interessi." This view is upheld by the French Courts and by Demolombe. Prof. Melucci makes reference to it in his treatise on the Seperation of Estates.

Although the French Civil Code makes no direct reference to alienations of this sort, the French hypothecary low in relation of immovables

lays down that "the heir may not make any alienation prejudicial to the creditors within the period of six months from the opening of the succession." A contrariu sensu one could argue therefore that sales made after this period of six months would remain unimpaired and the price would be the property of the heir. Where the sale of movables is concerned, **Laurent** affirms that the creditors have no 'droit de suite' against the 3rd party in possession.

One of the effects of this Institute is the **right of suit** of the creditors and legatee against third parties in possession of hereditary immovables. As to the moment when the benefit becomes operative, one must refer to the date of registration. A registration effected within three months from the opening of the succession will be operative from such date, in regard to immovable alienated within that period **(S.2208)**; if the benefit is registered later, it will operate from the day if registration.

The chief aim of the benefit is to grant the creditors and legatees of the decujus **a right of preference over the particular creditors** of the heir, even though priveledged and hypothecary; and "Kontra wirt battal **ma' tistax tintalab** is-separazzjoni tal-patrimonju għaliex sakemm il-wirt jibqa' battal hemm partrimonju wieħed waħdu" — **Giuseppe Chetcuti vs. Valentino Malia,** Harding (22nd Nov. 1934-XXIX.11. P109). The only effect of the Seperation is that of **protecting** the said creditors and legatees from any prejudice they might sustain in consequence of the claims of the particular creditors of the heir. However, their internal relations remain unimpaired and they retain the same order of ranking" . . . . this benefit maintains in favour of all and each of them, in competition, such rights only as are competent to them respectively, according to the nature and the conditions of their debts and other rights over the property of the inheritance" (S.2202). The death of their debtor cannot in any manner alter the internal position of the creditors, making it more favourable and otherwise. It can only bring about a new class of creditors — the "legatees" who rank after the creditors.

"Tutti i caratteri che abbiamo delineato inducono a ritenere che per effetto della separazione viene a costituirsi un vero e proprio diritto reale di garanzia sui beni che ne formano l'oggetto, anologo al pegno e all'ipoteca" — Cicu.

LEGITIMATE DEFENCE

What is the 'raison d'etre' of legitimate defence? What justifies it? When and under what circumstances?

Self-defence is a right based on common sense because it comes as a natural instinct. It is an inherent right to protect onself from any personal aggressor and, since we live in a civilized world, we should feel ourselves constrained if not bound by human sympathy to defend others who are unjustly assaulted and in need of help.

This natural right of every individual is not a modern concept of law, but it has been the theme of great philosophers. Cicero the greatest philosopher of Rome, who also happens to be the first known legal writer, writes in 'Pro Milone' Chapter 10 et seq., that the repelling of aggression by force is a natural instinct:

'Est haec non scripta, sed nata lex, quam non didicimus accepimus, legimus, verum ex natura etc.'

HOBBES, a modern English philosopher from the positivist school, again states in his book 'LEVIATHAN' Chapter 27:

'for no human law can oblige a man to abandon his own preservation'.

Legal writers do not justify this defence with a mere philosophical statement, but they produce legal arguments. Carrara looks at it from the subjective point of view. He argues that if the state, because of any circumstance whatsoever, is incapable of protecting the rights of an individual, while that individual himself has that ability, then the right of protection of which the state possesses, passes automatically on to the individual himself. In fact Carrara says:

'Il fondamento della legittima difesa riposa sul principio che, cessi nella società la funzione del punire allorquando la difesa privata possa essere efficace ed invece si palesi impotente od insufficiente la difesa pubblica.'

ANTHONY RUTTER GIAPPONE

The positivist school bring a different argument to justify the legitimate defence. They say:

'che l'interesse dell'aggredito coincide coll'interesse sociale, nel senso che la società ha maggiore interesso alla conservazione dell'individuo aggredito, ch'è individuo onesto, in confronto della conservazione dell'aggressore, che'è individuo criminale ed antisociale'.

Other authors disagree with Carrara and the subjective point of view, and they justify the self defence objectively. These authors:

'posero la ragione della legittima difesa non piu nell' elemento soggettivo del reato ma nell'elemento oggettivo, affermando che l'atto con ciu si respinge l'altrui inguista violenza è conforme al diritto e manca, quindi, di quella antiguiridicità che e necessaria perche un'azione possa venire elevata a reato'.

Thus, in the act of self defence, there is lacking that element which is necessary to make the act a crime, viz, the 'actus reus'.

Florian together with Ferri does not agree with the above arguments and he insists:

'che la guistificazione sia nei motivi determinanti al reato'.

Professor Sir Anthony Mamo seems to agree with Carrara's theory, when he states that:

'Where the hand of the state on account of the time or place in which the agression takes place cannot intervene to protect him, every person is entitled to resist by force any wanton aggression.'

It would be better, now, before we proceed, to have a look at what the Criminal Code says on the subject of legitimate defence. This topic is first mentioned in section 237 which says that:

'No offence is committed when a homocide or a bodily harm 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.'

In the next section the code goes on to give three cases of 'actual necessity', which it must be said, are not exhaustive but exemplary. In fact the first thing that strikes us in this section is the vagueness of this phrase, for the code does not give any hard and fast rules where the self defence is applicable. However, we get a very good idea of what the limitations of this law are from the local jurisprudence.

In the case of Police vs. Joseph Attard — 11th November 1963, Judge Harding said:

'L-estremi tal-leġittima difesa ma jistgħux jiġu indikati aħjar milli bil-formula klassika tal-Carrara li l-perikolu hemm bżonn li jkun inġust, gravi u inevitabili. Skritturi oħra ma għamlux ħlief eleboraw dawn l-elementi.'

It is therefore best to consider the three elements arising from Carrara's 'classical formula'.

The first element mentioned is that the evil threatened must be unjust. It is obvious that if the evil threatened is legitimate, then one has to submit himself to it and cannot defend himself, because 'altrimenti' says Florian 'non si tratterebbe più di difesa, ma di offesa o di ribellione.' So a man sentenced to death cannot attack the executioner in trying to escape.

The second distinction Carrara makes is that the evil avoided must be grave. Our law, unlike that of other countries e.g. England and Germany, considers as grave only that which threatens the life, the body or the chastity of the individual. Mere intervention with property will not justify any bodily harm. Scetion 238 (a) justifies only the case:

'where the homicide or bodily harm is committed in the act of repelling during the nightime, the scaling or breaking of enclosures, walls, or the entrance doors or any house or inhabited appartment, or of the appurtenances thereof having a direct or indirect communication with such house or appartment'.

It is quite clear that unless an aggressor is attacked at one of these stages there is no legitimate defence. Once he is on one's property and he is merely tampering with it then one cannot use force to send him out. In fact in the case of Police vs. Joseph Micallef on the 25th June, 1955, Judge Harding gave this interpretation:

'Id-dispożizzjoni tal-liġi li tiskuża lil min jikkaġuna offiża lil persuna oħra in difeża tal-proprietà talferitur, tirrikiedi li l-azzjoni, biex tkun skużabbli, għandha tiżvolġi ruħha dak il-mument stess li tkun qiegħda tiġi invarja l-proprietà u in difeża attwali tagħha. Jekk meta l-feritur irrejeġġixxa, il-ferut ġa kien daħal fil-proprietà tal-feritur, ma hemmx kwistjoni ta' attwalità ta' reżistenza kontra l-vjolazzjoni waqt li qiegħda ssir il-vjolazzjoni.'

The English law does not agree with this principale of ours, but on the contrary it allows a person to force out

any trespasser on his property, provided he does not kill him. Archbold, in fact, tells us that the owner can pursue the aggressor until his property is completely out of danger. He also goes on to say that:

'In defence of a man's house, the owner or his family may kil a trespasser who would forcibly disposses him of his property, in the same manner, as he might by law kill in self defence a man who attacks his person.'

Florian agrees with our Code, that the defence of property is not legitimate. In fact he says:

'Quanto alla difesa dei beni, il legislatore ha dittato norme speciali per cui, l'attacco ai beni giustifica la reazione solo in quanto presenti pericolo alla persona.'

It is worth noting that if the attack mentioned above is done at night the legitimate defence falls under section 237 (a) and is justified. If however, the same attack is done in broad daylight, the same act of defence falls under section 241 (b) and is not justified but merely excusable.

Carrara's third disposition, that of the inevitability of the act, again branches out into three other requisites namely that the danger must be sudden, actual and absolute.

If the danger were not sudden, that is, if it had been anticipated then it is not right that a person ignores such a threat so that he is then forced to kill when he could have avoided all this before.

The danger threatened must be actual, because if the danger had already passed then the person assaulted cannot pursue the aggression. Indeed this would be cold blooded revenge. However, at the same time one is not expected to let the aggressor strike first. If the danger is imminent and certain one can anticipate. In Police vs. Grezio Mallia on th 22nd February, 1930, it was said by Judge Ganado that we may accept the rule.

'Nemo tenetur expectare donec percutiatur.'

The third disposition, is that the danger threatened must be absolute, that is, it could not be avoided by any other means. This brings us to a very controversial arguement. Should the person assaulted try to retreat before inflicting any bodily harm or even killing the aggressor? The superior courts of the United States and continental writers hold that one is not obliged to do so because one cannot, in those circumstances, reason out what is best for his assailant. Florian in fact argues:

'noi crediamo che codesta condizione non debba ammettersi, non potendo la legge imporre la fuga: d'altronde l'animo agitato dell'aggredito difficilimente potrebbe discernire i casi, in cui la fuga fosse possibile ed utile.'

Some English jurists do not agree with the above statements. Thus Archbold states:

'To show that it was homicide in self defence, it must appear that the party killing had retreated either as far as he could by reason of some wall, ditch or other impediment or as far as the fierceness of the assault would permit him.'

Our courts also had occasion to give its own interpretation on this point in the cases Police vs. Saver Agius, on the 7th November, 1953 and in the case Police vs. Carmelo Cassar on the 2nd April, 1927. Both these cases agree with the English point of view and oblige the person assaulted to retreat. In the case Police vs. Carmelo Cassar, Judge Camilleri said:

'Fu esclusa la legittima difesa..... fra altro sul motivo della mancanza della necessità attuale di respin-

gere la violenza, avendo potuto il citato schivare il pericolo da lui preteso ricoverandosi in una vicina bottega e chiamando la gente vicina a proteggerlo.'

Finally in order to obtain full justification, the means adopted to ward off an apprehended danger must be proportionate. That means if one is assaulted he cannot go beyond that which is necessary to resist the aggression and he cannot take it upon himself to punish his aggressor.

Our jurisprudence abounds in the above reasoning. The typical case of excess in self defence is when the person assaulted uses some weapon to defend himself. This excess is particularly stated in the case Police vs. Saver Aguis, 7th November, 1953. However we must take into consideration the actual state of mind the person who has suddenly been attacked would be in and one cannot but agree with the statement that:

'Detached reflection cannot be demanded in the presence of an uplifted knife'.

This theory is in fact applied by Judge Harding in the above case Police vs. Saver Aguis.

'Dan l-eċċess però mhux soġġett għal piena għax hu ovvju li l-imputat ġie meħud għall-għarrieda u nħasad u beża'.'

The last question which provokes an immediate answer is: Who can put forward such a plea of self defence? Our courts have left no doubt that this plea can only be put forward by the person assaulted and never by the aggressor himself.

'Il-provokatur mhux intitolat għall-iskriminanti tal-liġittima difesa'.

Police vs. Sidor Caruana 3rd Feb. 1955.

The International Status Of Bangladesh

(Article written on the 10th January 1972)

(Note from the Editor: As from the date of writing, various countries have granted recognition to Bangladesh. Though some factors in the Bangladesh problem have changed, this essay provides an interesting study of the birth of this state in the light of rules of Public International Law).

— by **EUGENE MONTANARO** —

The question of the international status of Bangladesh seems to be a problem which, besides embracing different aspects of international law, is also permeated with international politics, financial issues, and the racial and religious tensions of the Indian subcontinent. And while we are here concerned with the legal principles relevant to the problem it does not seem right to disregard the underlying realities — especially the political realities — of the Bangladesh question.

When Pakistan became independent its territory was geographically divided into two wings completely separated from each other by Indian territory. Yet now the forces of nationalism bolstered up by armed intervention on the part of India seem to have brought about the seccession of the East wing — Bangladesh — from the northern country of Pakistan. **De facto,** East Pakistan appears to have disappeared to become Bangladesh. Thus when Sheikh Mujibur Rahman returned to Dacca he was welcomed as the leader of the new state of Bangladesh. But is Bangladesh a state in the international law sense?

The requirements of statehood in international law appear to be the following: a permanent population; a defined territory; a government enjoying the habitual obedience of the bulk of the population; a capacity to enter into external relations with any other states.

As to the first requirement nobody in his right senses would say that Bangladesh lacks a population. Nor is there reason to believe that this population is any sense nomadic. The striking feature here is that this population is in any sense nomadic. The striking feature here is that the population of Bangladesh tends to swell in numbers day by day with the repatriation of those Bengalis who had previously taken refuge in neighbouring India. But otherwise the population is a fairly stable and is certainly not the equivalent of a wandering tribe. So that the first factual charecteristic of statehood — a permanent population — seems to be present in Bangladesh.

The second regular requirment of statehood is a defined territory. Territory is of course vital; its absence would not entitle us to speak of an active and stable government in Bangladesh. Now at the moment of writing Pakistan still insists on the unity of the country and still claims the territory of Bangladesh. But on the other hand there seems to be no reasonable prospect of Pakistan reasserting its authority over the Bangladesh territory. And this seems to bring us to the heart of the problem, namely, the requirement of a government which is in effective control over the territory of Bangladesh and which enjoys the habitual obedience of the majority of Bengalis.

We know that in Bangladesh there is at the present time an administration

formed by the Awami League and led by Sheikh Mujib as Prime Minister. It was this same political body which victoriously swept the board in last year's election in East Bengal at a time when East Bengal still formed an integral part of Pakistan. And with the outright majority such as the Awami League then gathered, Sheikh Mujib's administration might at first sight seem to offer Bangladesh a firm and stable government. But on closer examination the pattern which emerges from the Bangladesh situation does not appear to be all that smooth. At the moment of writing Indian troops are still present in Bangladesh; these troops have stayed on in Bangladesh following the most recent round in the series of Indo-Pakistani armed conflicts. There are also rival guerrilla forces present in Bangladesh. India had after all intervened to aid the Mukti Bahini, an independant guerrilla force fighting for a free Bangladesh. And in this connection, the presence of the Bihari Muslims in Bangladesh may also be the cause of some embarrassment and friction especially since the Bahiris appear to have strong Muslim ties with the concept of Pakistan. In such circumstances it is relevant to consider the extent to which Sheikh Mujib's administration is a government in Bangladesh. Does this administration have clear authority and has it established effective control over Bangladesh? Do law and order in Bangladesh depend on the continued presence of Indian troops? The answers to these questions really depend on the factual realities of the situation. But perhaps it is only a matter of some time before Sheikh Mujib's administration can remove all doubts and satisfy one and all that his administration is in fact the lawful government of Bangladesh.

Finally we come to the requirements of a capacity to enter into external relations with other states. Does Bangladesh have such a capacity? Here Bangladesh is as yet at a disadvantage. Whenever part of an existing state breaks away in an attempt to form another independent state, third states tend to be reluctant to enter into any relations with it before they have granted it recognition. Thus it would seem that it is only through recognition that Bangladesh will be able to acquire a capacity to enter into external relations with existing states. But here again there is a further obstacle for with the appearance of a new entity the granting of formal recognition tends to become a controversial issue. In such circumstances it is not unknown for such states to evaluate the factual situation in a manner which best suits their political and national interests.

Now before recognition may be granted to the government, as distinct from the state of Bangladesh, international law would appear to require that that government must enjoy the habitual obedience of the bulk of the population, that it must manifestly control the territory over which it claims sovereign rule, and that it must have a reasonable expectancy of permanency. And at the moment of writing it is not yet clear whether Sheikh Mujib's administration satisfies these requirements to the full. But this is not to equate the concept of recognition with the requirements of statehood. In respect to our problem the two concepts are closely related in that states are not likely to enter into relations with the Bangladesh before they have granted it recognition and hence probably Bangladesh will not fully satisfy the requirements of statehood before a certain number of states have granted it recognition. However, the legal significance of the recognition of Bangladesh is in itself a separate issue, an

issue about which there are two principal theories in international law, the declaratory theory and the constitutive theory. According to the constitutive theory it is the act of recognition alone which creates statehood. According to the declaratory theory, once the four conditions of statehood are satisfied, a state exists as such prior to, and independantly of, recognition. The better approach is perhaps to adopt the declaratory theory and also to say that recognition is a legal act; for if we embrace the constitutive theory and then go on to say that recognition is a political act we would really be making nonsense of the four charecteristics of statehood.

When we come to apply the appropriate legal principles to the Bangladesh situation we find in the first place that, as far as the four essential characteristics of statehood are concerned, it is still difficult to establish whether Bangladesh already possesses a fully stable government. In such circumstances recognition by the outside world may not be immediate and hence states are not likely to be hustled into relations with Bangladesh. In view of these difficulties we cannot really say that Bangladesh has already attained statehood in international law. But on the other hand it is clear that the two former wings of the old Pakistan cannot be reattached in any organic political form. Bangladesh, it appears, has come to stay. Presumably if the Indian troops were to be withdrawn from Bangladesh and if Sheikh Mujib's administration were then to show that it can still stand on its own the major obstacles would have to be removed. Perhaps the only other outstanding problem would be the normalizing of relationships between Bangladesh and its former mother country-Pakistan. But only time can provide a solution to these problems. In the meantime it appears that the exact legal status of Bangladesh is as yet undetermined. Perhaps the most we can say by way of a conclusion is that it is an entity which is on its way to becoming a state in the international law sense.

INCOME TAX DECISIONS

Board Of Special Commissioners 1953/54

Note from the Editor: It is intended that in the following issues of the Law Journal, decisions of subsequent years will be published.

Kawza Nru. 2/1953 deċiża fil-31 ta' Marzu, 1953.

Tiswija fi Proprjeta — Spejjeż — Deduzzjoni — Claim War Damage Commission.

L-artikolu (10(1)(d) ta' l-Income Tax Act jiddisponi li ebda tnaqqis ma għandu jsir għal kost ta' tiswija f'xi proprjeta li kienet is-suġġett ta' talba taħt l-Ordinanza 111 tal-1943 dwar il-Ħsarat tal-Gwerra.

Din id-dispozizzjoni tapplika wkoll fil-każ li l-War Damage Commission tirriġetta l-claim; anki f'dan il-każ l-ispejjez ma jistgħux jitnaqqsu.

Din id-deċizjoni ġiet revokata mill-Qorti ta' l-Appell fid-9 ta' Frar, 1954. Każ Nru. 8.

Kawza Nru. 3/1953 deċiża fil-25 ta' April, 1953.

Restaurant — Ulied impjegati ma' missierhom.

Il-profitti dikjarati mill-appellant kienu ferm żgħar u l-Bord deherlu li ma kienx ġustifikat inaqqas il-profitt magħmul mill-appellat.

L-appellant kellu restaurant u martu u erba wliedu li kienu impjegati hemm kienu jieklu hemm, u l-Kummissarju żied il-profitti b'£1 fil-ġimgħa għal ikel tal-familja tiegħu.

Kawza Nru. 4/1953 deċiża fil-19 ta' Mejju, 1953.

Importatur — car, spejjeż ta' — Deduzzjoni.

L-appellant kien importatur tal-ġlud u kellu ħanut u kien ibiegħ bl-ingrossa u bl-imnut.

Il-Bord iddeċieda li għan-negozju tiegħu l-appellant kellu bżonn ta' karozza; u billi l-car kienet tiġi wzata wkoll għall bzonnijiet tal-familja, l-Bord akkorda deduzzjoni ta' nofs l-ispejjez kollha, kompriza d-deprezzament.

Kawza Nru. 5/1953 deċiza fis-27 ta' Awissu, 1953.

Ex officio assessment —

Spejjez ta' natura kapitali.

Appell min ex officio assessment. L-appellant kellu stabbiliment fl-arja aperta u l-Bord iffissa l-profitti għassena 1949 fuq il-kotba ta' l-appellant.

F'dan il-kaz l-appellant u ħuħ kienu wirtu l-istabiliment bil-patt li jħallsu lil ħuthom £40 fis-sena. Inoltri ħuh kellu bżonn isiefer u ftehmu li l-qliegħ ikun ta' l-appellant, bil-patt li jagħti £1200 li ħuh. Il-Bord deherlu li l-appellant kellu dritt inaqqas dawn il-£160, għax ma kienux ta' natura kapitali.

Kawza Nru. 6/1953 deċiza fit-30 ta' April, 1953.

Appelli — fuori termine — null —

F'dan il-każ l-appell kien null għax il-Form A ġiet preżentata wara l-għeluq tat-terminu, liema terminu kien fatali.

Kawża Nru. 7/1953 deċiża fil-25 ta' April, 1953.

Iltiem — Orphan — Deduzzjoni għal neputi — Art. 22(1)(b)

L-appellant talab deduzzjoni għal manteniment ta' iben ibnu li hu kien qiegħed irabbi. Il-missier tat-tifel kien assenti minn Malta.

Il-Bord ċaħad l-appell għax it-tifel ma kienx iltiem mill-missier.

L-art. 22(1)(b) ġie emendat bl-Att.

Kawża Nru. 8/1953 deċiża fit-13 ta' Awissu, 1953.

Barriera

Il-Bord iffissa l-kwantita ta' ġebel mibjugħa mill-barriera ta' l-appellant ma' tul l-1949.

Kawza Nru. 9/1953 deċiża fit-3 ta' Novembru, 1953.

Manutenzjoni immobili — Deduzzjoni.

L-appellant talab deduzzjoni ta' £98 li ntefqu fit-tiswija tal-ħajt ta' għalqa.

Il-Bord ċaħad it-talba, għax dik l-għalqa kienet parti integrali tal-ġnien anness mad-dar, u għalhekk kwalunkwe spiza ta' manutenzjoni hija koperta mid-deduction kontemplata fil-G.N. 684 tal-1950. Jekk ma kienitx spiza ta' manutenzjoni kienet eskluza mill-art. 11(c)(d) ta' l-Income Tax Act.

Kawza Nru. 10/1953 deċiża fil-19 ta' Mejju, 1953.

Appell fuori termine — nullita

Il-Form "A" ġie prezentat ferm wara t-tletin ġurnata stabbiliti fl-art. 57(1) u għalhekk l-appell kien null. Dan it-terminu hu perentorju.

Kawza Nru. 11/1953 deċiża fit-28 ta' Mejju, 1953

Terminu—Appell fuori termine—Null

Jekk il-liġi ma tiddisponix espressament, il-ġranet ta' kwalunkwe terminu ma humiex utili u t-terminu għalhekk huwa korrenti.

It-terminu għal prezentata tal-Formm "A" bħal ta' kwalunkwe att ieħor jibda jgħaddi mill-għada tal-ġurnata tannotifika, biss għal prattiċita' billi n-notifika issir bil-posta reġistrata ġie fissat terminu ta' tliet ijiem wara l-impustar.

Kawza Nru. 12/1953 deċiża fid-9 ta' Lulju, 1953.

Spejjez deduċibbli — Spejjez ta' vjaġġ.

Biex spejjez ikunu deduċibbli mhux biżżejjed li l-ispejjez ikunu ġew inkorsi in konnessjoni mal-produzjoni tal-income, imma hemm bżonn li jkunu ġew inkorsi esklusivament għal dan il-fini.

Huwa prinċipju li għandhom jitnaqqsu l-ispejjeż li servew għall-profitti likwidati u mhux għall-profitti li għad iridu jiġu likwidati.

F'dan il-kaz il-Bord ċaħad talba għal deduzzjoni ta' £150 spejjez ta' vjaġġ Londra biex ikellem il-propjetarji ta' ditta rapprezentata minnu.

Kawza Nru. 13/1953 deċiża fis-16 ta' Ġunju, 1953.

Deduzzjoni — Ħlas lil iben.

Il-Bord ma ammettiex deduzzjoni ta' £22 għal kera ta' razzett għax ma setgħax jingħad li dik kienet spiza inerenti għan-negozju tiegħu; ma ammettiex deduzjoni ta' 5/6 kuljum biex iżomm żiemel, għax ma kien hemm ebda neċessita li jżomm dak iż-żiemel. Pero ammetta deduzjoni ta' £3 fix-

xahar imħallsa lil ibnu li kien jgħinu fuq ix-xogħol.

Kawza Nru. 14/1953 deċiza fil-31 ta' 1953.

Deduzjonijiet — perit. Dependents.

Il-Bord ammetta deduzzjoni 1) għal boili u spejjeż ta' stationery, 2) għal spejjeż ta' pjanti, prints, etc., 3) għal deprezzament, maintenance u spejjeż oħra dwar car f'każ ta' perit arkitett.

Fit-termini ta' l-art. 22(c) kull min iżomm lil oħt il-mara tiegħu għandu dritt għal deduzzjoni indipendentement minn kwalsjasi konsiderazzjoni oħra, purche' tavvera ruħha l-kondizzjoni l-oħra kontemplata mill-liġi, li "l-income tal-persuna mantenuta majkunx jeċċedi s-£60."

Kawża Nru. 15/1953 deċiza fit-30 ta' Settembru, 1953.

Commission — Spejjez ta' entertainment.

Spejjez f'bini, ordnati mill-Awtorita Sanitarja.

Commission bħala tali ma tista' qatt tiġi ezentata mil-income tax, għaliex hija qliegħ jew profitt minn impieg fis-sens tal-art 5(1)(b).

Biex spejjez jiġu mnaqqsa jeħtieġ li jkunu "wholly and exclusively incurred in the production of the income". F'dan il-kaz il-Bord irrifjuta t-talba għad-deduzzjoni ta' spejjez ta' entertainment.

M'humiex deduċibbli spejjez inkorsi f'xogħol fil-bini ordnat mill-awtorita sanitarja; jekk huma ta' natura ordinarja allura jieħu t-tnaqqis kontemplat fil-Govt. Not. 684/1950. jekk huma straordinarji allura huma esklużi mil-art. 11(c)(d) tal-Income Tax Act.

Kawza Nru. 16/1953 deċiza fid-9 ta' Lulju, 1953.

Obligu li jżomm notamenti propri dwar l-income — Art. 42 Income Tax Act.

Is-sanzjoni kontemplata fl-art. 42 ma hiex li t-taxpawer ma jistax jagħmel għalkemm a riskju tiegħu, il-prova dejjem jirnexxilu jipperswadi lill-Bord. dwar l-income b'mezzi oħra, purche Is-snazjoni fl-art. 42(3) hija purament penali u ma tirrigwardax il-Bord.

Kawza dwar qliegħ ta' D.M.O.; u dwar deduzzjoni għal spejjez ta' car.

Kawza Nru. 17/1953 deċiza fil-20 ta' Mejju, 1954.

Rati ta' profitti — grocer — Ex officio assessment.

Ex officio assessment ta' grocer.

Il-Bord iffissa dawn il-profitti fuq il-bejgħ:—

(a) għar-rations 9%;
(b) għall-groceries 9%;
(c) għall-ħelu 13% (profitt uffiċjali hu 15%);
(d) għas-sigaretti 11%;
(e) għal imbejjed 10%;
(f) għal spirti 15%.

Kawza Nru. 18/1953 deċiza fil-10 ta' Marzu, 1954.

Ex officio assessment — gjojellier. Art. 57(3) Income Tax Act.

Ex officio assessment għal negozjant ta' oġġetti tad-deheb.

It-taxpayer iddikjara gross profit ta' 30% fuq is-sales li ġie aċċettat.

Il-Bord iffissa l-ammont tas-sales.

L-artiklu 57(3) jitfa l-piz tal-prova fuq min jappella u kieku l-Kummissarju kellu jispjega kif wasal għal likwidazzjoni tat-taxxa l-iskop tal-liġi kien ikun eluz, la darba l-likwidazzjoni sakemm ma ssirx il-prova kontrarja, hija prezunta li hija ġusta.

Kawza Nru. 19/1953 deċiza fit-30 ta' Diċembru, 1953.
Ex officio assessment — Butcher.

Il-Bord iffissa dawn ir-rati ta' profitti għall-1948 u 1949:—

(A) laħam tal-porku, -/5d. ir-ratal.
(B) laħam taċ-ċanga, -/6½d. ir-ratal.
(C) laħam frozen, -/4d. ir-ratal.
(D) kirxa, -/2d. ir-ratal.

Imbagħad deduction għall-"wear and tear" fuq il-van u r-refriġerator.

Kawza Nru. 20/1953 deċiza fit-13 ta' Awissu, 1953.
Appell fuori termine — null —

Kienet x'kienet ir-raġuni l-għala l-appellanti ma pprezentatx il-Form "A" fiż-żmien kontemplat mill-liġi, hija ddekadiet mid-dritt tagħha li tappella quddiem dan il-Bord.

Kawza Nru. 21/1953 deċiza fis-16 ta' Diċembru, 1954.
Ex officio assessment — Wholesaler u retailer ta' żraben u lbies.

Ex officio assessment ta' importatur, wholesaler u retailer ta' żraben, drappijiet u lbies, għall-1948 u 1949.

Il-Bord qagħad fuq ir-rati ta' profitti akkordati mill-F.C.C.O. wara li naqqas ċertu perċentaġġ biex jagħmel tajjeb għal xi telf li jista' jkollu ineguzjant u anke għal fatt li mhux dejjem possibbli minħabba il-konkorrenza jew ċirkostanzi oħra li wieħed jirrealizza l-profitt kollu permess mill-liġi. L-appell minn din id-deċizjoni ġie dikjarat null.
Qorti ta' l-Appell — Appell Nru. 13

Kawza Nru. 22/1953 deċiza fit-28 ta' Novembru, 1953.
Donazzjoni lill-ulied
Art. 21(2) Income Tax Act

It-taxpayer b'att tal-1948 kien iddona ċerti immobili lill-uliedu li jgħixu miegħu. Il-Kummissarju applika l-art. 21(2) u kkunsidra l-income ta' dawk il-beni bħala tat-taxpayer u mhux ta' wliedu.

Id-dicitura tal-art. 21(2) hija tant ċara li ma tistax tfisser ħaġa oħra ħlief dak li jgħidu l-istess kliem. Hu importanti li fis-sena bazi t-tfal ma jkunux miżżewġa.
Din id-deċizjoni ġiet konfermata mill-Qorti ta' l-Appell. (Appell Nru. 10).

Kawza Nru. 23/1953 deċiza fil-10 ta' Novembru, 1953.

L-appellant kienet armla, u wara l-mewt ta' żewġha wliedha ħadu l-agenzija li kellu żewġha. Il-Kummissarju kkunsidra l-income minn dik l-agenzija bħala ta' l-armla.

Il-Bord irrevoka għax fil-fatt l-armla ma kellha l-ebda dritt fuq dik l-agenzija.

Kawza Nru. 24/1953 deċiza fit-2 ta' Lulju, 1954.
Ex officio assessment.

Ex officio assessment. Il-Bord iffissa l-profitt tal-Industrija in kwistjoni għas-sena 1948.

Kawza Nru. 25/1953 deċiza fis-16 ta' Marzu, 1953.
Ex officio assessment — Ironmonger

Ex officio assessment ta' ironmonger. Il-Bord accetta l-profitti dikjarati fil-kotba ta' l-appellant li kienu miżmumin sewwa, pero' mal-profitti żied il-valur ta' l-oġġett li ħa għall-użu tiegħu, li ma kienux ġew indikati fil-kotba.

Kawza Nru. 26/1953 deċiża fis-16 ta' Marzu, 1954.

Ex officio assesment — Architect.

Penalties għal kontravvenzjoni mhumiex deducibbli.

Ex officio assessment ta' perit arkitett. Il-Bord iffissa l-income u l-ispejjez deducibbli għas-sena 1949.

"Penalties paid to the Crown for the contravention of a statute are not deductible."

Kawza Nru. 27/1953 deċiża fit-13 ta' Jannar, 1954.

Deduzzjoni — Spejjez legali — spejjez kapitali.

L-ispejjez legali għal twaqqif ta' ħanut ġdid, ma jistgħu qatt ikunu deducibbli għaliex kienu jkunu dejjem spejjeż aċċessorji għal spiza ta' natura kapitali, u kwindi għandhom isegwu l-istess sorti in bazi għal magħruf prinċipju li "accessorium sequiteor principale".

Kawza Nru. 28/1953 deċiża fil-11 ta' Frar, 1954.

Professjonista — Deduzzjoni għal car — għall-vjaġġi.

L-appellant talab deduzzjoni tal-car li juza għal-professjoni tiegħu, u £500 spejjez għall-attendenza ta' kongressi tat-tobba.

Il-Bord ammetta l-ispejjeż kollha dwar car u ċaħad deduzzjoni għall-ispejjez tal-vjaġġi.

Biex spiza tkun konsiderata bħala magħmula "wholly and exclusively in the production of the income" għandha tkun tali li mingħajrha l-income ma setax jkun realizzat, jiġifieri għandha tkun kondizzjoni sine qua non għall-produzzjoni tal-income.

Bħala maintenance ta' knowledge l-ispejjeż ma jistgħu qatt ikunu deduċibbli.

Spejjeż għall-attendenza ta' kongressi ma jistgħux jiġu kunsidrati bħala magħmula għall-extension of knowledge u kwindi koperti mid-dispost tal-art. 10(1) (i) li jikkontempla spejjez għal scientific research.

Kawza Nru. 29/1953 deċiża fid-9 ta' Marzu, 1954.

Bad debts.

Il-Bord ma ammettiex d-deduzzjoni ta' bad debts, għax dawk il-krediti ma kienux jidħlu fil-business jew vocation ta' l-appellant kif irid l-art. 10(1)(2) tal-Income Tax Act.

Kawza Nru. 30/1953 deċiża fis-17 ta' Jannar, 1955.

Ex officio assessment — gojellier

Telf ta' kambju — meta deduccibbli.

Ex officio assessment ta' gjojellier għas-snin 1949 u 1950.

Il-Bord ma ammettiex deduzzjoni għal telf f'kambju ta' Franki franċizi, għax la t-taxpayer ma kienx jinnegozja fil-kambju, dak it-telf kien ta' natura kapitali, u ma kienx jirrigwarda n-begozju tiegħu fl-istess snin, imma se mai telf fuq assessments.

Kaz Nru. 1/1954

Deduzzjoni — Spejjez ta' vjaġġ ta' neguzjant.

Biex spiża tkun deducibbli hemm bżonn dejjem li tkun verament neċessarja, raġonevoli, u mhux ta' natura kapitali, oltre naturalment li tkun attinenti għal professjoni jew negozju tat-taxpayer.

F'dan il-kaz it-taxpayer talab deduzzjoni ta' £141 minn £361 li hu kien nefaq għall-vjaġġ ta' xahrejn, in parti

għan-negozju u in parti għal vaganza. Il-Bord ippermetta deduzzjoni ta' £115 għal għaxart ijiem l-Ingilterra u l-passaġġ bl-ajru.

Kaz Nru. 2/1954

Ma ppruvax li l-assessment ħażin — neguzjant.

It-taxpayer kellu negozju ta' drappijiet, zraben u oġġetti affini. Għas-sena bazi 1950 hu kien irrapporta profitt ta' £641, u billi wara nduna li kellu żball fil-balance sheet, ippretenda telf ta' £368. Il-Kummissarju llikwida l-profitt għal £939.

Il-Bord, billi l-kotba miżmuma mit-taxpayer kienu mizmuma b'mod irregolari, ddeċida li l-appellant ma wasalx biex jipprova li l-likwidazzjoni tal-profitti magħmula mill-appellat kienet inġusta u ċaħad l-appell bl-ispejjez.

Neguzjanti ta' dal-ġeneru ta' merkanzija għandhom dritt ta' profitt ta' 12½% bħala wholesalers, u ta' 22½% bħala retailers.

Kaz Nru. 4/1954

Amministrazzjoni tal-beni tal-familja

It-taxpayer kien jamministra l-beni tal-familja, u ma kienx jieħu ebda onorarju, pero' billi waħda minn neputijiet kienet residenti l-Italja, u għalhekk il-kustodju tal-Proprjeta ta' l-għadu u ħa f'idejh il-proprjeta, u ħalla l-amministrazzjoni lit-taxpayer, dan beda jiddeduċi huwa qassam dak id-depositu lill-eredi.

Il-Kummissarju ppretenda li dak il-pagament kien ta' natura volontarja, u għalhekk l-income relativ kien taxxabbli.

Il-Bord irritiena li ma kien hemm ebda rinunzja għal drittijiet likwidati favur l-appellant, għax dawk kienu "in suspense account" u li kien wisq naturali li amministratur ma jippretendi xejn minn għand ħutu jew in-neputijiet talli jamministra l-beni komuni.

Kaz Nru. 5/1954

Appell fuori termine — Null —

Il-Bord irritiena li dan l-appell kien irritu u null għax prezentat wara t-terminu.

L-għaxart ijiem kontemplati fl-art. 14 tal-GN 749/49 huma korrenti u mhux utili, għax il-liġi ma ssemmi xejn.

Kaz Nru. 6/1954

Ħlas lill-ulied t-taxpayer — meta deducibbli

L-appellant kellu żewġ uliedu ta' 20 u 22 sena rispettivament jaħdmu f'żewġ ħwienet tiegħu. Lil dawn kien itihom paga ta' Ġ6 fil-ġimgħa, u wara beda itihom kummissjoni tal-1%.

L-appellant appella għax il-Kummissarju ma akkordalux id-deduzzjoni tal-commission.

Il-Bord ċaħad l-appell, għax irritiena li s-salarju li kienu qegħdin jirċievu t-tfal kien adekwat u ma kienx hemm lok għal ebda kummissjoni. Pero' irriserva li ssir deduzzjoni għax-xogħol ta' korrispondenza u bookkeeping li huma kienu jagħmlu.

Il-Bord irritiena li m'hemm xejn kontra l-liġi li mpjegat oltre s-salarju jieħu wkoll xi kwota mill-profitti, pero' meta bħal kaz prezenti l-impjegat ikun t-tifel stess tal-prinċipal wieħed għandu jikkunsidra dawn l-ispejjez b'ċerta ċirkospezzjoni, għaliex anke jekk ikunu saru in buona fede, ħafna drabi ma jkunux saru għal motiv ta' negozju, imma għal skopijiet oħra, u jekk il-pagament ma jkunux proporzjonati għax-xogħol, ma jistgħux ikunu deduċibbli.

Kaz Nru. 7/1954
Deduzzjoni — Travelling expenses —

Biex travelling expenses ikunu deducibbli jeħtieġ li jkunu verament neċessarji u ragonevoli, attinenti għal professjoni jew negozju tat-taxpayer, u mhux ta' natura kapitali.

F'dan il-kaz l-appellant talab deduzzjoni ta' £296 18s. 0d. u l-Bord ippermetta biss deduzzjoni ta' £99 3s. 4d.

Kaz Nru. 8/1954
Bejgħ ta' immobili — negozju fi — kummerċjant, att ta'.

Meta jsir xiri minn xi neguzjant, il-prezunzjoni hija li x-xiri sar għal fini tal-kummerċ, u jinkombi lin-negozjant li jagħmel il-prova kontrarja.

F'dan il-kaz l-appellant ġie intaxxat fuq il-profitt li għamel fix-xiri u bejgħ ta' dar.

Din id-deċiżjoni ġiet konfermata mill-Qorti ta' l-Appell (appell Nru. 12)

Kaz Nru. 9/1954
Vitalizju — rendita —

Għalkemm il-ħlas tar-rendita jiġi stipulat in korrispettiv tal-kapital trasferit, jibqa' pero' li min jirċievi r-rendita huwa obbligat li jħallas it-taxxa tal-income fuqha in bazi għad-dispost tal-art. 5(1)(2) . . .
Jekk il-pagament in kwistjoni ma humiex magħmula a titolu ta' rendita, ma għandhomx ikunu taxxabbli għaliex jirrappresentaw pagamenti ta' natura kapitali.

F'dan il-kaz it-taxpayer kien biegħ lill-uliedu fabbrika bil-prezz ta' £20,000 0u bil-patt li għal tul il-ħajja tal-venditur, jew għal perijodu ta' ħames snin liema minnhom ikun iqsar, jitħallas £50 fix-xahar lill-venditur. Il-bord iddeċida li f'dan il-każ ma kienx hemm renedita, għax kienet tonqos l-alea, u għalhekk ma kienux taxxabbli.

Kaz Nru. 10/1954
Appell fuori termine — null

It-terminu ta' l-appell huwa fatali u jimporta in-nullita tal-attijiet li jsiru wara li jkun skada.

D'dan il-kaz il-Form A ġiet prezentata ġurnata tard. (Dies a quo non computatur in termine).

Kaz Nru. 11/1954
Deċizjoni preliminari:—

Notice of obligation — pont mhux imsemmi fil-

Dan il-Bord ma jistax jippermetti li jiżdiedu punti ta' appell li ma ssemmewx fin-notice of objection.
Deċizjoni finali:—
Rigal f'lokazzjoni — Spejjez biex jinfetaħ negozju — mhumiex deduċibbli.

Ir-rigal li jitħallas minn negizjant li jikri fond għan-negozju huwa ta' natura kapitali u kwindi mhux deduċibbli mill-income tiegħu.

Spiza biex jinfetaħ negozju mhix deducibbli, anki jekk magħmula f'fond ta' ħaddieħor.

L-appellant ippretenda wkoll deduzzjoni għal spejjez f'yachts li hu qal li kien iżomm għan-negozju. Il-Bord irritiena li dawk il-yeacths kienu wzati mit-taxpayer għal pjaċir u għalhekk l-ebda spiza ma kienet deducibbli.

Kaz Nru. 13/1954
Socjeta kummercjali — varjazzjoni ta' kwota ta' profitti.
Spejjez deducibbli — effettivament minfuqa.

Il-Bord dehrlu li ftehim tal-varjazzjoni tal-kwota tal-profitti ta' soċjeta kummerċjali kien reali għalkemm ma

sar b'ebda skrittura u ma kienx jidher bl-ebda mod li sar biex issir xi evazjoni tat-taxxa.

It-taxpayer għandu dritt li jnaqqas effettivament inforsi, u jekk għal xi raġuni jew oħrħa ma jkunx bagħtihom huwa ma għandux dritt li jitlob ebda deduzzjoni tagħhom.

Kaz Nru. 14/1954

Deduzzjoni — paying casjier — cash shortage

L-appellant kien paying cashier ta' Bank, u fil-kors tax-xogħol tiegħu kellu jħallas £93. 2. 0d. minħabba cash shortage, dovut għal xi żbal.

Il-Bord iddeċida li dak l-ammont kien deduċibbli mill-income.

Kaz Nru. 15/1954

Deduzzjoni — Manteniment ta' — "Relative" Art. 22(1)(c) Income Tax Act.

It-taxpayer talab deduzzjoni ta' £105 għal maneteniment ta' oħtu, żewġha (li kien apopletiku) u wliedha.

Il-Kummissarju akkorda deduzzjoni ta' £60 (il-massimu) għal oħt it-taxpayer.

Il-bord akkorda deduzzjoni ohra ta' £45 għal żewġ oħtu, billi irritiena li "relative" għal fini tal-artiklu 22 (1) (c) tal-Income Tax Act, għalkemm strettament tfisser parentela middemm tikkomprendi wkoll ir-relazzjoni miż-żwieġ.

Kwantu għal menteniment tan-neputijiet jeħtieġ li t-tfal ikunu orfni mill-missier u mhux sempliċement relative tat-taxpayer. Konfermata mill-Qorti ta' l-Appell (Appell Nru. II).

Kaz Nru. 16/1954

Kuntrattur — profitti ta'.

Il-Bord irritiena li l-appellant irnexxilu jispjeġa soddisfaċentement id-diskrepanza fir-rata ta' profitti bejn issnin 1948 u 1949.

L-appellant kellu ħanut u kien kuntrattur tax-xogħol ta' plumbing u elettriku. Fil-1048 kien irrapporta profitt ta' 9% fuq is-sales, u fil-1949 profitti ta' 19%. Il-Kunnissarju kien iffissa l-profitti għal 1948 f'19% fuq is-sales.

Il-kotba ta' l-appellant kienu ġew miżmuma regolarment.

Kaz Nru. 17/1954

Deduzzjoni — Spejjez ta' tobba etc. — Art. 22(3).

Interpretazzjoni ta' liġi.

Huwa magħruf illi disposizzjoni partikulari għandha tipprevali, skond il-principji tal-ermenewtika legali, għal disposizzjoni ġenerali.

Skond l-art. 22(3) ta' l-Income Tax Act l-ispiza ta' tobba u sptarijiet ma tistax taċċedi £20. L-eċċess ma jistax jitqies bħala tnaqqis.

Din id-disposizzjoni ġiet emendata bl-att VIII tal-1969.

Kaz Nru, 18/1954

Divizzjoni — spejjez ta'. Spejjez ta' manteniment ta' bini. Govt. Not. 684/1950.

L-ispejjeż tad-divizjoni tal-bini komuni ma għandhom x'jaqsmu xejn mal-produzzjoni ta' l-income, u għalhekk mhumiex deduċibbli.

Dwar l-ispejex ta' tiswijiet ta' fond urban dawn huma regolati bil-Govrt. Not. 684 tal-1950. La darba hemm disposizzjoni espressa tal-liġi li tikkontempla l-ammont preċiż li jiġu akkordati deduzzjonijiet superjuri għal dak l-ammont.

Jekk l-appellant irid jikkontesta l-validita' ta' Govt. Not. hu għandu jadixxi t-tribunal kompetenti in kontestazzjoni tal-persuna legittima.

Il-Govt. Not. 684/1950 ġie emenlat bil-L.N. 39/1969.

Kaz Nru. 19/1954

Grocer — Ex officio assessment

L-appellant (grocer) appella minn ex officio assessment Il-Bord iffissa dawn il-profitti bazati fuq is-sales:— dwar l-oġġetti razzjonati 9%, dwar il-ħobz 8%, dwar il-ħalib tal-bott 1/- il-kaxxa; dwar l-oġġetti l-oħra, komprizi imbejjed, spiriti u sigaretti, 10½%.

L-appellant kien iddikjara profitti ta' 6½%.

Kaz Nru. 20/1954

Ex officio assessment — Department's alowance — Notice of objection — Reifuzjoni ta' taxxa.

L-appellanti (teacher) appellat minn ex officio assessment. Il-Bord iddeċida li l-ammont ta' £1.475 li hi kienet iddepozitat f'Banek fis-snin in kwistjoni, kien ġie minnha infaddal qabel l-1948.

Il-Bord irritiena wkoll li l-appellant kellha wkoll tibbenefika mid-dependent's allowance, għalkemm din il-kwistjoni ma ssemmitx fin-notice of onjection.

It-talba għar-rifuzjoni ta' taxxa ma setgħetx tiġi milqugħha għax saret wara ż-żmien preskritt fl-art 67(1) ta' l-Income Tax Act.

Kaz Nru. 21/1954

Spejjez ta' natura domestika — Art. 11(a). Income Tax Act. Jaħdem fl-esteru.

L-appellant li kien mar jaħdem il-Libya talab deduzzjoni ta' ċerti spejjez li hu nefaq għal menteniment tiegħu fiż-żmien li kien jaħdem fl-esteru.

Il-Bord irriġetta t-talba għax dawk l-ispejjez kienu ta' natura purament domestika u privata u bħala tali eskluzi mill-art. 11(a) ta' l-Income Tax Act.

Kaz Nru. 22/1954

Spejjez ta' natura kapitali — Rendita vitalizja

L-appellant kien akkwista m'għand missieru negozju sħiħ kontra l-pagament ta' rendita vitalizja.

Il-Bord ma ppermettiex id-deduzzjoni tar-rendita mħallsa minnu fis-snin in kwistjoni, għax din kienet ta' natura kapitali, u għalhekk prekluz mid-dispost tal-art 11(c) ta' l-Income Tax Act. "If the expenditure is made with a view to bringing into existence an asset of an advantage to the enduring benefit of the trade, such expenditure is attributable not to revenue but to expenditure".

Kaz Nru. 23/1954

Kaz identiku għal dak Nru. 22/1954. L-appellanti fiż-żewġ kazi kienu aħwa.

Kaz Nru. 24/1954

Grossista ta' foodstuffs — ex officio assessment

L-appellant (neguzjant bl-ingrossa ta' foodstuffs) appella minn ex officio assessment.

Il-Bord iffissa l-income fuq l-average tad-diversi rati ta' profitti permessi mill-F.C.C.O.

Kaz Nru. 25/1954

L-appellant (grocer) appella minn ex officio assessment. Il-Bord iffissa dawn il-profitti bazati fuq is-sales:—

a) dwar l-oġġett razzjonati 9%; b) dwar il-ħobz 8%; c) dwar l-oġġetti l-oħra 10½%.

Kaz Nru. 26/1954
Tfaddil — Kapitali mhux income.

L-appellant fil-1949 kien iddeposita l-Bank £1,100, u l-Kummissarju kien ikkunsidra £950 minn dan id-depozitu bħala income.

Il-Bord iddeċida li dawk il-£950 ma kienux income, imma kienu kapitali li t-taxpayer kien faddal fil-kors tas-snin. It-taxpayer kien ġuvni, ħaddiem, jgħix ma' oħtu.

Kaz Nru. 27/1954
Kuntrattur —

Il-Bord iddeċida li l-appellant kien jaħdem bħala kuntrattur bi sħab ma' ħuh.

Inoltri l-Bord iffissa l-profitti ta' l-appellant għas-snin 1949 u 1950.

Kaz Nru. 28/1954
Spejjez — verifika ta'

L-appellanti kienu kuntratturi u talbu li inaqqsu mill-income ċerti spejjeż li għamlu fil-kors tal-eżukuzzjoni ta' diversi appalti.

Il-Bord ċaħad l-appell u iritiena li l-Kummissarju irrifjuta li iżied ma' l-ispejjez l-ammoni reklamati, mhux arbitarjament imma għaliex kien fl-impossibilita li jara jekk kienux diġa nklużi fil-lista, imposibilita kawżata mill-istess appellanti li qattgħu malajr wisq in-notamenti oriġinali tal-ispejjeż.

Kaz Nru. 29/1954
Spejjez ta' kapitali — mhux deduċibbli.

B'att pubbliku l-appellant akkwista l-avvjament ta' negozju fis-Sala Reali, u obbliga ruħu li bħala prezz ta' ċessjoni kellu jħallas l-5% fuq l-inkassi lorid saż-żmien ta' disa' snin jew salmewt taċ-ċedent, jekk din tkun qabel.

Il-Bord iddeċida li dak il-ħlas ma kienx deduċibbli għax kien tan-natura ta' kapital.

Kaz Nru. 30/1954
Vitalizju — taxxabbli — Art. 5(1)(2) Income Tax Act.

L-appellant kien ittrasferixxa lil uliedu 'sehmu 'tal-beni 'tal-komunjoni ta' l-akkwisti in korrispettiv ta' vitalizzju £551. 5s. 0d. fis-sena. Dan il-vitalizzju kien soġġett għat-taxxa għax kolpit bl-art 5(1)(2) ta' l-Income Tax Act.

Kaz Nru. 31/1954
Spejjez ta' Natura domestika

L-ispejjez dwar il-ħlas ta' reġistration fees biex iben l-appellant ikun jista' jeżerċita ta' tabib, u biex jemigra għall-U.S.A. huma ta' natura domestika u mhux deduċibbli.

L-appellant kien ibbenefika mil-allowance ta' £80 għal dan it-tifel.

Kaz Nru. 32/1954
Deduzzjoni — Ħlas lill-ulied.

L-appellant importatur u commission agent ta' textiles kellu lil ibnu impjegat miegħu bħala pjazzista bil-paga ta' £240 fis-sena u kommissjoni ta' ½% fuq it-turn over kollu.

Il-Kummisarju ma riedx jiddeduċi dan il-ħlas kollu.

Il-Bord dwar l-ewwel sena riduċa l-ammont mitlub, u dwar it-tieni sena ikkonferma l-intier.

Hu ċar li biex tiġi akkordata d-deduzzjoni ta' l-ispejjeż għall-fini tal-Income Tax, il-kompens li jitħallas għandu jkun proporzjonat għas - servizzi resi.

Kaz Nru. 33/1954

Bidwi — bejgħ ta' annimali.

Bidwi li jiddeċidi li ma jkomplix irabbi l-bhejjem u ibiegħ l-annimali kollha, mhux soġġett għall-income tax fuq il-prezz ta' dawk l-annimali, għax dak ikun kapital u mhux income.

F'dan il-kaz l-appellant il-prezz ta' l-annimali impjegaħ f'Defence Bonds.

Kaz Nru. 34/1954

Refund — Sec. 67(1) Income Tax Act.

In this case the claim for the refund of the tax was barred by the lapse of the time prescribed by section 67(1) of the Income Tax Act.

Sec. 67 was amended by Act XX of 1955.

Kaz Nru. 35/1954

Spejjez ta' natura kapitali — Deduzzjoni

Kwistjoni dwar l-interpretazzjoni ta' l-art. 9(1)(b) tal-G.N. 389/42 dwar il-proprjeta' amministrata mill-Kustodju tal-proprjeta' tal-għadu.

Spejjeż ta' natura kapitali jew aċċessorji għall-kapital mhumiex deduċibbli. Spejjeż li jirrikorru darba biss, u ma jkunux ta' natura rikorrenti, huma ta' natura kapitali.

Kaz Nru. 36/1954

Appell — fuori terminu — nullita' ta'.

It-terminu għal prezentata tal-Form "B" għall-appell hu terminu fatali u kwindi improrogabbli.

F'dan il-kaz l-appell kien null għax il-Form "B" ġiet prezentata ferm wara ż-żmien preskritt mill-liġi.

Kaz Nru. 37/1954

Ex officio asessment — Kuntrattur.

Appell dwar ex oficio assessment.

Il-Bord iffissa l-profitti għall-1948 u 1949 ta' l-appellant li kellu l-kuntratt tal-Conservancy mas-Services.

Kaz Nru. 38/1954

Barriera — exhaustion ta' — ebda deduzzjoni.

L-artikolu 11(c) ta' l-Income Tax Act espressament jipprojbixxi kwalunkwe deduzzjoni għall-exhaustion of capital.

I-Bord iddeċida li t-taxpayer ma kellux dritt għal ebda allowance għall-"exhaustion" tal-barieri minnu maħduma.

ADOPTION OF CHILDREN AND YOUNG PERSONS

— by WALLACE PH. GUILIA — LLD., BA., BSc., PhC., MA(Admin) (Manch), D.PA. (London.)

IN THIS PAPER IT IS INTENDED TO GIVE A QUICK BIRD'S EYE VIEW LOOK AT THE TRENDS RELATING TO ADOPTION. IN SUCH A QUICK SURVEY MOST OF THE DETAILS WILL ELUDE US, BUT THE BROAD CURRENTS WILL OBVIOUSLY COME TO THE FORE.

Adoption was recognised by Greek Law and possibly also by Assyrian law (1). Its details in those laws have completely eluded us. In Roman Law it was characterised by formal procedures — amounting almost to a ridiculous ritual (2) with which later Roman Law dispensed, making it possible for a **filiusfamilias** to pass out of his family into that of the adopter. Such formal procedures indicated that the consent of the parties (though hardly of the adopted) was vital, Court consent playing but a subordinate and in a sense minor role which aimed principally at seeing that the consent of the **paterfamilias** and the adopter had been given, and, in later Roman Law, that the prospective adopted did not object. Nor would it appear that Roman Law aimed at using adoption to devise an alternative home for the adopted, so much as the establishment of an heir for the adopter; although in practice it is very easy to surmise that the two —the alternative home and the institution of an heir — must have gone hand in hand, linked together as they have always been by psychological, social and economic factors, though it would not appear that as a rule, **potestas** passed from the original **paterfamilias** to the adopter.

It is likewise interesting to observe that Adoption was sometimes used in Roman Law to confer freedom on a slave (3). The Roman Law concept of Adoption, however, did not pass away with the passing of Rome; for it continued to prevail in general in the emerging countries of Europe so much so that adoption continued to be a well established institution of Continental law in the traditional pattern of later Roman Law and in 1555 it was given the following definition in the Vocabularium utriusque juris (published Venetiis): **"Adoptio est gratuita quedam electio qua aliquem sibi elegit in filium, et hoc faciunt plerumque hi qui filios habere non POSSUNT AD IPSARUM SOLATIUM. Et talisque sic recipitur in filium, dicitur adoptivus quasi a patre legittimo sic ei datur et illi qui sic eum adptat dicitur adoptivus pater."**

With the Code Napoleon adoption was given a fresh lease of life, and preserved the traditional characteristics it had enjoyed in Roman Law, but laid new emphasis on the duties (obligations) of the adopted person, vis-a-vis his natural family (4) of which he continued to form part and permitted adoption to take place in those cases where **"forti debiti di riconoscenza vincolassero l'adottante all' adottato (5) oppure nel caso in cui da almeno sei anni il primo avesse Sovvenzionato il secondo con sussidi e ne avesse avuta la cura non interrotta."** (6).

The Cole Napoleon was, of course, the basis of the Code of Civil Law of many of the countries of modern Eu-

rope. The Belgian, French, Italian and (until recently) Maltese Codes all retained the Napoleonic basic pattern of adoption. Without going into the basic and sometimes subtle differences of detail of these Codes, which for the purposes of a paper such as this would amount to no useful exercise, it can safely be asserted that the basic features of adoption in all these Codes are the following:-

(1) Adoption is not to compete with the basic family structure or to introduce any significant alterations in that structure. Thus, persons with legitimate children of their own may not adopt, and adopters have to be over an advanced minimum age (7) to lessen the likelihood or possibility of adopters having legitimate descendants of their own prior or past to adoption.

(2) Adoption of different persons, be they brothers and sisters, by the same adopter (s provided they are husband and wife) could take place only by means of one and the same act.

(3) The surviving natural parents must consent to the adoption as must the person to be adopted if he is over fourteen years af age.

(4) On adoption, the adopted assumes the surname of the adopter and adds it to his own; the adopter becomes responsible for the education and maintenance of the adopted person, and in the case of a female for dowry on the occasion of mariage, as if he were born in lawful wedlock to the adopter(s); whilst the adopted assumes liability for the maintenance of his adopter(s); but he remains in his natural family and preserves all his rights and duties within that circle too and does not pass into the family circle of the adopter (s).

(5) Consequently, detailed provision exists relating to the succession of adopters and adopted and provision is made for cases where legitimate issue exists as well as for the cases where no such issue exists (8)

Because of all these limitations, adoption does not appear to be a success in contemporary European Countries. This seems obvious from the alternative provisions which exist in some of these Codes, e.g., the Italian Civil Code (9) for the filiation of minors who have been entrusted to public or private institutions. The basic stumbling block seems to be the fact that the adopted continues to have two feet in two households. At the psychological plane, adoption cannot be a success except where the adopted is fully integrated in the family of the adopter (s) and burns his boats behind him with respect to the natural family. But this concept represents a major difficulty in Natural Law countries; for, how can such a concept uniform itself with the basic natural law assumption of parental rights and duties, except by means of a resort to fictions which are themselves unsatisfactory, raising as they do hornets nests of their own, such as the question whether at Natural Law there is, or could ever be, a forfeiture of parental rights and duties, and whether the sanctions to such forfeiture could be remedied by Positive Law instead of Natural Law itself.

To get out of this quandary, it is submitted that such is the one and only helpful approach to this serious problem; and that this, in fact, represents a much more subtle complex than is usually met with in the problem of the interrelationship between Natural and Positive Law. The problem one usually discusses in that context is that of which law is supreme; which is to give in to the other, and which will in particular circumsances prevail. In Natural Law countries which still abide by the concept of natural law as formulated by Aquinas (10), the answer immediately is: "Natural Law is

to prevail!" But in the approach to the problem posed, the question is not the simple one of which law is supreme; but the more basic, more urgent, intimate and thought provoking one, subtler and, I submit, more constructive approach of how far, in a sense, can positive law complement natural law — so that retaining that superstructure, one at the same time recognises the limitations thereof and tries to provide by means of positive law for filling in the details which the broader implications of natural law may themselves be unable to provide for adequately and satisfactorily.

Adoption was late in coming in the U.K. — until 1926 it was not even known at Common Law (11) — but when the Adoption of Children Act, 1926, was enacted (12) it came down heavily on the side of the contemporary psychological consideration that the adopted should be integrated as fully as possible into the family of the adopter (s). Thus "An adoption order" under that Act, "extinguished all rights, duties, obligations, and liabilities of the parents or guardians of the child in relation to his future custody, maintenance and education, including all rights to appoint a guardian or to consent or to give notice of dissent of mariage. All such rights, duties, obligations and liabilities become vested in, exercisable by, and enforceable against the adopter as though the adopted child were a child born to the adopter in lawful wedlock; in respect of these matters, and in respect of the liability of a child to maintain its parents, the adopted child stands to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. (13)

This solid basis of the new family of the adopted was preserved and carried forward in the Adoption of Children Act, 1958, (14) through the various intermediate and consolidating Acts relating to adoption in the U.K. Indeed this basis in this respect has been rendered more solid still by extending the concept completely to the realms of the transmission of, and succession to, property (other than entailed property) (15).

Furthermore, the English Adoption Law, whilst recognising the importance of the principle of the consent of the natural parents to the making of an adoption order, (the effect of which would, for all intents and purposes, be that of uprooting the adopted from his family and transfering him to the family of the adopter), made inroads into that principle by providing for dispensing with consent, in particular circumstances, such as where the natural parent has abandoned, neglected or persistently ill-treated the prospective adopted; or where he is withholding his consent unreasonably or where he "has persistently failed without reasonable cause to discharge the responsibilities of a parent". (16)

On the other hand, English Law wisely provided for the protection of the normal family unit, in the sense that where the application for adoption is being made by one of two spouses, the consent of the other spouse is a must for the making of the adoption order (17), except in special circumstances (18). Otherwise it would have been simplicity itself for the parent of an extra-marital child to introduce that child into his own family unit in spite of the protestations of his spouse; a factor which could easily lead to the breaekdown of the normal family unit.

Another highly significant provision of English Law is that relating to the care and possession of the infant to be adopted by the prospective adopters for a minimum period of three consecutive months, immediately preceding

the date of the order, not counting any time before the date on which the infant attained the age of six weeks.

Again the integration of the adopted in the adopter's family is also consolidated by the provision that the adopted following the adoption order, may be known by a name (s) of the choice of the adopters and not by any previous name. In making the adoption order the Court should naturally see that such provision is exercised as seems reasonable in all the circumstances of the case.

In England the aim obviously is to make adoption a relatively simple exercise; in this respect the minimum age for adoption was considerably reduced from the Napoleonic fifty to twenty-five and, in special circumstances, e.g., where the applicant is a parent or relative of the prospective adopted, even less. Furthermore, the disability against a number of adoptions by the same adopters does not feature in English law so that it is possible, and in practice it frequently happens, that adopters adopt more than one child at different periods, thus simulating the natural growth of a natural family.

These provisions of English Law have been recently followed in Eire and in Malta. As has been said the Malta Civil Code has at its basis the Code Napoleon, but the provisions relating to adoption have recently been substituted **in toto** by provisions which have been obviously culled from English Law. It can be asserted without hesitation that the law of adoption in Malta today is with but few and in a sense minor variations identical with the law of the U.K. by which it was inspired and on which it was obviously based. In the circumstances it appears more worth while to concentrate, in a paper such as this, on the points of difference between the two systems and to try to establish the reason for such variations.

The basic differences between Maltese and English Law on the subject may be reduced to three:-

a) The minimum age at which a person may adopt.

b) Dispensing with consent; and

c) the time limit starting with marriage and ending five years thereafter, within which persons may not adopt.

It has been seen that in the U.K., an applicant for adoption must be at least twenty-five years of age, except in special circumstances, such as where the applicant is a parent or a relative of the person to be adopted. Prior to 1961 that age in Maltese Law without any exception whatsoever was fifty, the justification traditionally given being that adoption is a very serious step indeed in the life of both the adopter and the adopted. Age twenty-five represents a slashing of that age by exactly one half. Although by contemplorary sentiment, age twenty-five may seem mature enough, after all infancy terminates completely at twenty-one and at that age a person becomes entitled to vote and thus exercise the most serious of civic rights, nonetheless in an adoption context, twentyfive may be too low, especially when we bear in mind that many people are not even married at that age.

Although in the meantime the position had been thoroughly reviewed in the U.K., and the Curtis Report had not commented in any way about that age being too low, the Eire Adoption Act, 1958, which followed the U.K. model pretty closely, had departed therefrom where the age was concerned, and provided that an applicant for adoption had to be of a minimum age of thirty five or forty. The Malta Ordinance provided for a minimum age of thirty — an age which plays safe, with-

out being too safe and provides the best ten years in a person's life (30-40) when the family, normally speaking, is being set up. Another justification for age thirty rather than thirty-five is that if the Malta view that during the first five years of marriage a couple should not adopt (**vide infra**) is correct then age thirty would appear to be just right, especially where young people tend to get married in the midtwenties instead of their late teens.

The second major departure from U.K. Law to be found in Maltese Law are the provisions relating to dispensing with consent. It has been seen that English Law allows the Court to dispense with consent where the parent has failed to discharge his parental responsibilities without just cause or fails to give his consent unreasonably. (19) In general it may be said that Maltese Law does not provide for dispensing with consent on these grounds of English Law. Semble, that at Natural Law the parent has a fundamental right and duty to look after the child which the father may not be forced to renounce; suffice it that the parent may, if he so chooses, and in any case with the Court's permission, in the greater interest of the child, pass on his responsibilities to a willing third party; but forfeit those responsibilities, even where he has not fulfilled the responsibilities of parenthood, he may not. In Maltese Law the provisions relating to dispensing with consent refer to the minor circumstances when the person concerned cannot be found or "is incapable of expressing his views'. (20)

The third major departure is the provision that "An adoption decree may be made on the application of two spouses, who have been married for a period of not less than five years and are living togeteher, authorising them jointly to adopt a person and may not be made on the application of one only of such spouses." (21) It is well known that newly married couples are usually anxious to have children of their own, an anxiety state that may itself impede conception. Such couples may rush into adoption as a means of allaying their anxieties and when children of their own turn up, they could easily regret the step they took and come to look on the adopted as an outsider within the family circle — a situation which is not desirable at all. It is understood that a similar provision exists in a recent Netherlands Law on Adoption which was anterior in date to the recent Maltese Law of Adoption.

So that the contemporary trend seems to be that adoption should be made easily possible, because in itself it is a very useful and salutary social measure against a number of social evils, such as the problem of the unmarried mother and that of the illegitimate child. It is well known that the Code Napoleon, probably as a reaction to the social evils of the time, had reacted vigorously against illegitimate children whether acknowledged or not, and placed them in a very unfavourable position vis a vis children born in lawful wedlock where rights against their parents were concerned. Natural parents can now, through adoption on this new basis, remedy the mistake and the blemish which is purely theirs and which should in no way be made to attach to the innocent child.

Indeed the United Nations Universal Declaration of Human Rights at Article 25(2) categorically affirms that "All Children' whether born in or out of wedlock, shall enjoy the same rights and protection".

This certainly seems to be the trend in contemporary adoption at the ideal plane: "There are no illegitimate children, there are only illegitimate parents!" Apart from the social benefits

accruing to the community from the adoption of children born out of wedlock by other people who have no children of their own; adoption is a singular system in terms of which illegitimate parents may confer a legitimate status on their children born out of wedlock. And, not that there is any direct correlation between slavery and illegitimacy, one cannot help reminescing here how adoption in Roman Law was sometimes used, as has been said, to confer freedom on a slave!

It seems that this is being increasingly appreciated, for although continental law in general does not seem to have moved in this direction so far, the Council of Europe has recently had occasion to look at adoption law and, from what one hears, seems to have come down heavily in favour of the Maltese experiment which is certainly more than a half way house between the English and the Continental pattern.

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(1) *Novissimo Digesto Italiano*, UTET, I¹, p. 287 (col. 1).
(2) The *paterfamilias* sold his son to the prospective adopter TWICE OVER: EACH time the prospective adopter manumitting the *filius familias* back to the *paterfamilias*. Thereafter a third sale to a third party was made by the *paterfamilias*, thus *DESTROYING THE POTESTAS*. Thereupon the adopter "brought a collusive action against the buyer claiming that the person to be adopted was his son, and judgment was given accordingly." *A Manual of Roman Private Law*, Buckland, p. 77. Vide also Novissimo Digesto Italiano, UTET, I¹, p. 287.
(3) *Novissimo Digesto Italiano*, ibid. col. ii).
(4) Code Napoleon (s. 348).
(5) *ibid.* s. 345.
(6) Ugo Gualazzini, *Adozione* (*Diritto Intermedio*), Nov. Dig. Ital. p. 290 (col. ii).
(7) Belgium, 35; Code Civil, s. 344. France, 40; Code Civil, s. 344; Italy, 50; Codice Civile, s. 291.
(8) Vide ss. 131-153 of the Malta Civil Code, now substituted (infra); ss. 343-370 French Civil Code; and ss. 291-310 Italian Civil Code.
(9) ss. 400-413, Italian Civil Code.
(10) In a nutshell: "That part of God's eternal law which is referable to man and which man discovers by means of his reason — the guide to reason being provided by the Church.
(11) Halsbury's Laws of England, 2nd Edition, Vol. 17, Part VI, para 1406.
(12) 16 & 17 Geo. 5, 29.
(13) Halsbury, *ibid.*, para 1416.
(14) 7, Eliz. 2, c. 5.
(15) U.K. Adoption Act, 1950, S. 13 and Adoption Act, 1958, s. 16.
(16) s. 5.
(17) s. 4 (1) (b).
(18) s. 5 (4).
(19) s. 5.
(20) s. (2) 134 Civil Code.
(21) s. 134 (3) (c) and s. 131 (2) Civil Code.

THE RETIREMENT OF PROF. F. CREMONA LL.D.

On September 30th, 1971, the Dean of the Faculty of Laws retired from service to the Royal University of Malta. He had reached the new age limit of 65 to which Council had already extended his services and had now completed the teaching of the students who were graduating in November, 1971. Our Alma Mater has many able men but it is now poorer without this dedicated and beloved teacher. Professor Cremona had occupied the Chair of Commercial Law for over 34 years, much longer, in fact, than any of his predecessors these last hundred years and was the 'master' of the present Chief Justice, Prfessor Dr John J. Cremona B.A., LL.D., D.Litt (Rome), B.A., Hons. (Lond), Ph.D. (Lond), F.R.Hist.S., of more than half of the members now serving on Her Majesty's Bench as well as of all the members of the present Board of Faculty of Laws.

Professor Felice Cremona graduated "cum laude" in 1928 and later attended the Universities of Rome and of London where he deepened his knowledge of Commercial Law under the guidance of Professor Vivante and Professor, later Lord, Chorley. He joined the staff of the university in 1935 as Professor of History of Legislation when for some time he also taught Civil and Canon Law. In 1937 he was appointed to the Chair of Commercial Law, and became Dean of the Law Faculty on the retirement of Professor Victor Caruana B.Litt., LL.L., O.B.E., in 1961.

As a teacher, law students had discovered in Professor Cremona two outstanding attributes: clarity of expression and deep erudition of the law. Throughout his long number of years dedicated to teaching the gentleness of his manner, the courtesy and restraint of his speech gave him peculiar power. It was all this that made him a great teacher of Commercial Law. Indeed, as Aristotle once remarked, "the one exclusive sign of a thorough knowledge is the power of teaching".

by DR J. A. MICALLEF LL.D.

At the Bar Professor Felice Cremona is one of its leading members where he has earned the love and respect of all his colleagues. He has been legal adviser to the Council of the Chamber of Comerce and to almost all the leading commercial banks. He has been one of the legal members of the War Damage Commission since 1945 and is also the Chairman of the Investment Bank of Malta Limited. In 1944 Professor Cremona was a member of the Commercial Code Commission and has served for a long number of years as umpire in National Insurance claims.

Like his father, the late Judge Giuseppe Cremona, who is the author of "Giurisprudenza sul Codice di Malta" in different volumes, Professor Cremona has also made a contribution to the small amount of legal literature published in Malta. His book on the principles of Maltese Company Law has already had three editions by the University Press. Before retirement he prepared a revised edition of his Com-

mercial Law Notes and has written a number of articles on Law.

Finally, Professor Cremona's outstanding contribution in his long and remarkable career will remain his contribution to the Draft Model of the Commercial Partnerships Ordinance which is eclectically in essence; adopting the English system for limited liability companies while retaining the continental system with regard to partnerships. The Draft bill was prepared by a Commission set by Dr. Giovanni Felice, then Minister of Justice, of which Professor Cremona was Chairman. Soon after his retirement from the university, Professor Cremona was appointed by the present Minister of Finance as Vice Chairman of a Commission to revise the Succession and Donation Duties Ordinance. While, therefore, the law Society wishes Professor Cremona a happy retirement may he still make further contributions towards the Maltese system of Law.

IN MEMORIAM

by Dr. W. Ph. Gulia LL.D., B.A., B.Sc., Ph.C., M.A. (Admin.) Manchester), D.P.A. (Lond.)

Recently Mr Justice Alberto Magri, B.Litt., LL.D., passed away at the age of seventy one.

Mr Justice Magri was a man of many parts — leading criminal and civil lawyer, man of letters, philantropist, member of the legislative assembly during the first spel of Malta's self-government.

His leading characteristic, whether in his pleadings or in his judgements was his extensive and intricate knowledge of the interpretation of the law given by our Courts from time to time. Not that he was unduly tied to precedent fon he did not hesitate to depart from the beaten track where he felt that it was necessary to do so. In this respect one cannot but animadvert to the development of the Maltese theory of the dual personality of the State in his hands. As he found the doctrine, the function of the Court was merely that of seeing whether, when an action was alleged to be iure imperii, it was actually iure imperii and whether it had been discharged by the competent organ in accordance with the formalities, procedures and conditions prescribed by the law. Having found that the Court's function was exhausted and it could not go into the merits to see whether, and if so what damages had been caused by the State to other parties.

In two judgements (Xuereb vs Micallef, XXXVII, ii, 753 and Apap Bologna vs Borg Olivier noe XLII, ii, 93), both of which did not reach H.M. Court of Appeal, obviously because Government had acquiesced in his findings, he established the principle that even in matters iure imperii the State must make good damages caused to the citizen out of homage to the Civil Law principle, which did not distinguish between personalities, that "Every person shall be liable for the damage which occurs through his fault." (s. 1074, Chr. 23). It is noteworthy that the Italian Courts are currently grappling with this notion of **neminem laedere** as manifested in the field of executive discretion where the control of technical advice is concerned.

However, one cannot just dismiss the late Mr Justice Alberto Magri on the basis of his practice of the law. For as long as one can remember he was an outstanding gentleman who manifested true christian qualities. Suffice it to remember that for a very long time indeed he was Chairman of the Valletta section of the St Vincent de Paule Society and that after his retirement from the Bench he voluntarily gave free legal advice to the poor who sought his advice.

JUDGE JOSEPH FLORES B.L. CAN LL.D.

Judge Joseph Flores retired as one of Her Majesty's judges on Saturday, January 15th 1972. His farewell ceremony which was held in the Criminal Hall at the Law Courts Valletta was attended by a large crowd which included H.M. Judges, the Minister of Justice, Magistrates, the acting Crown Advocate General, Lawyers and other members of the legal profession.

Judge Flores was born at Hamrun on the 17th January 1907. He was educated at Flores College which was founded by his grandfather. In 1924 he joined the law course at the Royal University of Malta. As a student he was very active and sat on the Permanent Committee (nowadays known as the Student's Representative Council) for seven consecutive years. He graduated Doctor of Laws in 1931 and 3 years after as Bachelor in Cannon Law in which subject he was appointed lecturer at the R.U.M.

As a lawyer, Dr Flores will always be remembered as a colossal figure who, during his career, defended in all, 26 capital trials. This set up a record which is still unbroken. One should note that in all these trials by jury none of Dr Flores's clients received capital punishment. Dr Carmelo Mariani defended at 20 such trials but six of his clients received capital punishment. Dr Flores was also a member of the Malta Arbitration Tribunal and Vice President of the chamber of advocates. He was the first lawyer to appeal sucessfully to the Privy Council against a judgement in which his client P.C. J. Connel was sentenced to death in connection with a murder which took place at Gold it-Tafal in 1944.

Dr Flores was nominated judge on the 9th December 1955 when it was found necessary to increase the number of judges to eight. He presided over both the Civil and Criminal Court. In August 1971 Judge Flores was appointed Vice President of the Constitutional Court.

by PAUL A. GAUCI MAISTRE

Judge Flores was also a one time politician. He joined the Malta Labour Party in 1950 and soon after became its deputy leader. He contested the elections and was sucessful on three occasions in both the 8th, and 9th districts. He was appointed Speaker to the Legislative Assembly till the 5th December 1955.

Recently I met Judge Flores and took the opportunity to get his opinion on some aspects of our law. He agreed that an overall revision of the Criminal Law is necessary because times had changed but our laws had not kept pace. In sentencing the guilty party, special attention should be given to the treatment of the young offender. From his own experience both as a lawyer and as a judge, Judge Flores considers that crime has increased in one way because of the increase in population, in another, because the individual who is by nature imitative craves for a higher standard of living, sometimes beyond his reach. Crime is committed

mostly by persons whose ages range from 16-40 years. Such people normally come from broken families and thus do not receive an appropriate education during the formative years of their childhood. Crime is not prevented by inflicting harsh penalties for this will only breed a subconscious vindictive attitude towards society: "Punishment should have for its object only the discouragement of crime but also the reformation of the offender". Judge Flores stressed. Loss of liberty and seclusion from society for a period are the hardest forms of punishment. With regard to probation, Judge Flores said that this has proved to be 85% successful, and it has rarely happened that offenders who have been conditionally released became relapsers.

Judge Flores concluded by saying that he will persist in increasing his knowledge of crime and the criminal.