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EDITORIAL

FERVET OPUS

DURING the interval between the first appearance of the Law Journal and this second issue, the life of the Law Society has been marked by constant activity. Various lecturers have kindly given us the privilege of hearing their views on matters of social interest ; and we are here reproducing one of these lecturers. Debates have also been held , and the motion "That the rights of the individual are above the rights of the State" evoked a very heated discussion in which many of the members took part. The motion was defeated by one vote.

But of course of all the activities of our Society, moots are the most lively. In our moot having as subject matter the question of foreign marriages — a most crucial question — we had the honour of listening to Professor W. Buhagiar, LL.D., B.A., B.C.L., in his role of judge. In dealing with the case he affirmed the principle that it was against our public policy to consider as invalid a Catholic marriage contracted abroad by a Maltese contrary to the formalities required by the *lex loci.*

THE RETURN OF THE LAW COURTS TO VALLETTA

This is a goal to which we all look forward with impatient anxiety: and which we consider another return of the Ark of the Covenant.

It is true that to find premises apt enough to be the local Palace of Justice with all the impressive pomp its dignity deserves, is not an easy matter. For the last year, all trials by jury have been conducted in a Hall of the Auberge which housed the Museum, and there seems to be some difficulty in deciding whether the rest of our Courts of Justice ought to be brought over there thus depriving the Museum Department of a proper seat. Admitted that relics of antiquity call forth the deepest veneration, it will nevertheless be easily realized that, whereas the re-housing of the Museum can wait, the return of our Law Courts to their pre-war state is an impellent want. Relies of the past are a precious ornament to our civil organization; Court of Justice are an absolute necessity.

THE RENT REGULATION ORDINANCE,1944.

An anomatous state of things has been given rise to by the promulgation of the Rent Restriction Ordinance of 1944. It has added to the conflicts and inconveniences caused by the several amendments to the Act of 1931 ; conflicts and inconveniences which render more difficult the proper application of the Law.

We deem it our duty to recommend the consolidation and co-ordination of all the enactments on letting and re-letting and on rent restriction.

THE RE-INTRODUCTION OF ITALIAN IN THE CURRICULUM OF THE PREPARATORY COURSE OF LAW

This is indeed a punctum pruriens. For some people it may seem an attempt at reviving a question of a political characters — the language question. And just as the Freudians will attribute every manifestation of life to some atavistic sexual motive, so these good people may in their excessive zeal imagine they smell a rat in our attitude.

It is a fact that at present there is no Professor of Italian and modern Languages in our University, so that even those Law students who intend going in for an Arts degree are de facto deprived of the option to choose Italian or another Romance language. Yet a glance at the syllabi of the Faculty of Law will show that a good percentage of the reference books recommended are either Italian or French. Add to this the fact that so far the volumes containing the decisions of our Tribunals have been published in Italian, while for the last five or six centuries up to decide ago all acts of civil life were drawn up in Italian. It would be absurd to consider such sources as our Notarial Archives and our Case Law as anything but indispensable for lawyers and law students. Any English or Continental lawyer would simply smile at the idea of a barrister being unable to understand his country's Case Law as anything but indispensable for lawyers and law students. As the position stands, this is exactly the situation our future barristers are heading to, unless that Body which has the wheels of Government takes steps in order that an alteration be made in the University statute.

In the Editorial of the first number of this Journal, the Law Society declared to have, among other aims, that of protecting and advancing the interest of its members. And it is solely with this end in view that we strongly advocate the re-introduction of Italian as a compulsory subject in the Preparatory Course of Law and in the Matriculation Examination for candidates intending to join such a Course.

THE PROBLEM OF THE UNMARRID MOTHER

Much has been said lately about infanticide and the plausibility or otherwise of enacting special laws dealing with this ever growing social scourge. We do not intend to tackle this problem for the present ; but we wish to call the attention of our readers to the fact that, while the unmarried mother has all facilities of saving her honour, the innocent child is torn away from its mother if the latter decides to enter our local Good Shepherd Convent. In other countries there are Catholic Institutions where the unmarried mother may go through a period of repentance and moral reconstruction, keeping at the same time her child, and tending to herself. Very often this practice developes in the unfortunate girl a bond of maternal affection task of readjusting herself physically and morally to her changed world. Many such Catholic Institution exist in England and Scotland, run either by nuns or by such societies as the Catholic Women's League. By way of example we mention : St. Pelagia's Home, in the Archdiocese of Westminster ; St Margaret's Home ,in the Diocese of Leeds ; St. Joseph's Home, in the Diocese of Southwark ; and St. Gerard's Home, in the Archdiocese of Glasgow.

As things stand in Malta, the unmarried mother has to choose between keeping her child, thus becoming the village scapegoat, and giving it away, often to people whom she does not know, in order to hide her shame. The institution so a "Mother and Baby" section in our Good Shepherd Convent would have the advantage of saving the honour of the mother, without depriving an innocent creature of its right to a mother's love.

DISTINGUISISHED BENEFECTORS

We cannot help expressing our deepest gratitude to H.H. Capt. Sir M. A. Maxwell Anderson, Kt., C.B.E., K.C., for his generous offer to the Law Society, among which Halsbury's Laws of England and Bassett Moore's International Law Digest; and to Major Adrian Dingle, M.A., LL.D., O.B.E., of London, for the notes kindly tendered to our President in his preparation of the short biography of Sir Adrian Dingli, which we are reproducing in this issue. Many of his notes are inserted verbatim.

Our thanks also go to the British Counsil for their generous offer to forward to the Society copies of several British Law Journals and to Major cathcart Bruce, the representative of the British counsil in Malta, for his invaluable help in this respect. The British Council's gesture has been very much appreciated by all members of the Society.

THE FUTURE

We law students belong to a very old academical body which is of its very nature conservative. Law, unlike Medicine and Engineering, is a science which it would be dangerous and harmful to Society, to subject to constant change. But we are ready to hail the new, when it does not clash with the good of the profession and of the community in general.

We are not concerned with police, and ll our suggestions are of a purely academical character. We do not deny the inevitable evolution of human thought and social exigencies, nor the disappointments that attend on human affairs. We do not wish to romanticize the robust myth of the law. But we are ready, when convinced that it is to the common good, to suggest and advocate alterations in the law machine of our country and to say with the Poet :
"Tomorrow to fresh fields and pasture new."

ACKNOWLEDGEMENTS

We acknowledge with thanks the following publications:
"Il-Parrocca ta San Pawl Nawfragju tal-Belt Valletta", by J.Galea (1944).
"Zwieg il-Mewt", Dramm f'Att wiehed; by A. M. Cassola (1945)

SIR ADRIAN DINGLI

(By J.M. Ganado, B.A., and J. A. Micallef — with reproductions from notes kindly forwarded by Major Adrian Dingli, M.A., LL.D.,O.B.E.)

"...there is real life in a nation, when the people are proud of their fatherland; there is life in a profession when the members are proud of it and what can better instill that sense of love, not unmingled with pride, than the knowledge of the annals of one's land, the knowledge of the greatness of one's forefaters or predecessors? And doubtless, how can one feel proud of them without knowing them?"

(Excerpt from Presidential Report,1944)

A GREAT jurist and a great statesman — that is what the name of Sir Adrian Dingli denotes and, in fact, a close examination of his life will most certainly unfold the mystery of real greatness. It is true that he is one of the most "well-known" luminaries of Malta's past; but the knowledge of most of us — of the Maltese gentleman at large, of the sons of that Malta which he loved with an ardent devotion, it is sad to say, does not amount to much, perhaps not more than the vague notion that he was the author of the bulk of our civil laws. And, therefore it is to be hoped that this short biography will appeal to the hearts of the real Maltese, since it tends to record at least some of the effects wrought by Time's destructive might. His life sheds strong light on an entire period of our island's history. At one time he was the motive power of his country's destinies, the wielding force which joined together the interests of Malta and those of the Empire and, when perhaps the oceans swelled (since Nature ordains that at times it must be so), he led the ship — it may be called *his* ship — safely into harbour. His acts, actuated by profound love of country and by unbounded loyalty to his King proclaim a really life-long devotion; his was a life of such disinterested service to his land, that we can proudly stand up before all the world and say : "this was a Man".

Born in Gozo in 1817 he had completed the elementary part of his education by taking his degree in law by the time he was 19. "After that", as he used to tell his son, " I began to study in earnest with a full realization of my deficiencies". He spent six years in Europe, during which time he attended at most of the great Italian seats of learning (particularly Rome and Bologna). Bonn, and Heidelberg, the Sorbonne and finally Oxford for the purpose in this case of historical research. He had a seat in the Chambers of an eminent Chancery lawyer. His diary of life in England is of much interest. As he was a fine horseman, his chief our-door amusement was in the hunting field; and apart from his horsemanship, he was a skilful fencer.

He was a really accomplished linguist. Italian was naturally his best, but there was little to choose between that and his English (very pure and Johnsonian) and his French. He was fluent and accurate in German and could hold his own in Spanish. His Latin was first class with a wonderful range of the classical and early post-classical writers; his Greek was sufficient at any rate for philosophical works. His knowledge of Hebrew and Arabic was not negligible. The immense stress which he laid upon languages was exemplified by the home weekly routine which he rigourously enforced. On two days a week everyone had to speak English only, on two others Italian. One day was French, one German and the seventh unallocated was usually English or Italian.

The knowledge of many foreign languages was obviously of great help to him in his prolonged and extensive studies in the best Universities of Europe. In 1842 he returned to Malta and started practising at the Bar and after a few years of intense work he succeeded in acquiring a substantial practice. In 1849 he was elected a member of the first Council of Government functioning under the 1849 Constitution. He, together with Mr.Lushington the then Secretary to Government drafted the Permanent Rules for the conduct of the Council's activities and his opinion was in many instances acted upon, since, as a lawyer, he was furnished with the necessary legal training which renders golden service to one who wishes to discuss or to amend a law. In fact, he figured very actively in the discussions relating to the enactment of the Criminal Code of 1854 and of the Laws of Organisation and Civil Procedure of the same year — laws which in the main still subsist.

On the 1st of January, 1854, on the elevation to the Bench of Dr. Antonio Micallef, the then Crown Advocate (now styled Attorney-General). Dr. Adrian Dingli was appointed Crown Advocate. In a letter to the Secretary of State, Sir William Reid, the then Governor of Malta, who was personally acquainted with Dr. Adrian Dingli, stated:" The ability he has shown in the Council as well as his character as a lawyer makes me think him the fittest person to recommend as Crown Advocate ". On the same date Dr. Dingli's Father, Sir Paolo Dingli, was appointed President of the Court of Appeal. This was indeed a family triumph, but apart from that, it was a triumph for Malta, because Dr. Dingli's appointment as Crown Advocate marked the beginning of a grand official career and made possible the things that were to be i.e. the reorganization of our entire civil law system, forged on Roman Law and the Code Napoleon but at at the same time reproducing our ancient laws and customs, thus respecting our national sentiments—a legal system which is entirely and essentially our own and of which everyone must needs be proud. " For that important office be possessed all the needful qualification to a remarkable extent. His legal erudition, his stringent dialectic skill and his remarkable tact and prudence all contributed to make him worthy of his illustrious predecessor (Sir Antonio Micallef)" (1)

On his appointment as Crown Advocate he immediately braced himself to carry the modernization of the Maltese laws, which then consisted mainly of the Municipal Code promulgated in 1784. In 1856 formed a complete Civil code. In its general structure it closely followed its prototype the Code Napoleon; but even a cursory examination reveals that there is constantly an original mind at work. Apart from the several titles and innumerable articles which have no counterpart in the French Code, the law presents a solution to many of the heated controverseries which arose after the promulgation of the French code thus eliminating many doubts. In 1856 , when he was about to start the colossal task he had voluntarily and freely set himself to perform, he was created Companion of the Most Distinguished Order of St.Michael and St.George.

His view was that Roman Law broadly taken was the most secure foundation. He was a profound student of that system. He had early absorbed the techniques of Savigny in the original German and during his long attendances at the Universities of Bologna and Rome he acquired a critical research method, which led him all through to work up to the original Roman source principles apparently grafted from "barbarian" sources on the mediaeval common law. Essentially a Romanist and a civilian he had little sympathy with the arbitrary distinctions within the body of laws introduced by the common law of Middle Ages, of which

(1) "Daily Malta Chronicle". 26th November. 1900

perhaps the most notable and persistent was the separate of the Laws for Merchants—in other words, Commercial Law. This was not the popular view in days when Codes of Commerce were springing up everywhere throughout Europe. Now for the first time a Code of Commerce has recently been abolished in Europe i.e. the 1942 suppression in Italy of the Codice di Commercio and the re-allocation of such provisions as were worth retaining to the new Codice Civile. The laws attributable to maritime matters which are clearly of specific and circumscribed application have, however been concentrated in a separate Code called Codice di Navigazione.

His views on Maltese law are well-known. There could be no question of any break with tradition in our case in the sphere of civil law. We have constantly followed the development of Continental Europe and as Judge DeBono says the study of the history of our legislation is important "perche se non in ogni altro ramo dello scibile, in legislazione e` pernicioso rigettare le tradizioni".(2) - The exception possible has been in regard to criminal law which in its Anglo-Saxon originality of treatment has no boundaries and sets up a new order for the world at large.

During Rejd`s Governorship a Judgeship was offered to him, but he declined to accept it because notwithstanding that the position of a Judge was essentially higher than that of a Crown Advocate, he considered that there was no post in the whole public service more influential than that of Crown Advocate; in fact during his long tenure of the office of Crown Advocate he was the "de facto" Governor of Malta. "Per molti anni, come Avvocato della Corona, fu un governatore di fatto di queste isole e l'arbitro onnipotente degli affari civili politici di questa poplazione" (3).

He was naturally not exempt from a factor which unavoidably attends man's course in life under the shape of insistent criticism kindled by those who were adverse to his policy. The presence of this element of criticism can be easily perceived in the following extract from "La Gazzetta di Malta:: "Certamente la sua politica lasscio molto da desiderare, certamente le sue idée non sempre incontrarono la generale approvazione; spesso ancora la sua amministrazione fu causa di agitazioni, di conflitti e di lotte, ne senza dubbio ando scevro dei difetti di tutti quelli che concentrano in se tutta la soma dei poteri, poiche dove sta l'arbitro, non possono evitarsi sempre le ingiustizie" (4). But as a set-oft to this decided attack on his policy—an attack charged, at least it appears, with unjustified severity—a note of encomium immediately follows : "Questo pero si puo dire in suo onore e in giusificazione della sua politica che in 30 anni che governo queste isole, egli seppe con mano ferma contenere entro I giusti limiti le pretensioni del Militarismo e dell'Imperialismo, non permettando mai che eccedessero tanto da urtare I sentimenti nazionali del popolo.." (5).

During the administration of Sir Gaspard le Merchant he was entrusted to take charge of the negotiations then under way with the Imperial Government for the extension of the Grand Harbour and was asked by the Admiralty to effect in its name the purchase of the property in French Creek. During this period in 1859 the Companionage in the Most Honourable Order of

(2) De Bono—"Storia della legislazione in Malta"
(3) "La Gazzetta di Malta", 27th November, 1900
(4) Ibid.
(5) Ibid

the Bath was conferred upon him and, later, before hardly a year had elapsed, he was created Knight commander of the Most had elapsed, he was created Knight commander of the Most Distinguished Order of St. Michael and St. George. This profusion of honours decidedly reveals the confidence reposed in Sir Adrian by the "Fountain of Honour", naturally, not unaccompanied by the friendship of the "fountain" of honours; but it also shows that everyone who came in touch with him was impressed by the magnitude of his energy and of his intellectual attainments.

An anecdote typifying his quiet insistence on his views is based on all occurrence during Sir Adrian's tenure of the post of Crown Advocate. Some Governor, freshly appointed , a gentleman rather of the "Colonel Blimp" type, had lost patience over some local development and had announced to Sir Adrian his intention of recommending the reorganization of the Police. "I suppose that will mean that I will have to keep my eye on this head of the Police", Sir Adrian said, "Not a bit of it", retorted the Governor, "I'll do that myself"." that will make it most awkward for me", Sir Adrian commented, as I shall have to keep an eye on you", at which both burst out laughing. The proposal was never heard of again.

As Malta's Crown Advocate he did not only thoroughly perform the ordinary duties of the Legal Adviser to the Government, but he also directed his attention to the general administration of the Island. He was the leading figure in the Council of Government— demonstrating a titanic energy and ability, especially when the opposing team happened to be formidable, led, as it was, by men like Dr. Sciortino, Dr. Pullicino and Dr. Torreggiani. Besides all this, he showed himself equally prepared to put his energies to fruition far away from his island's shores. For instance in 1862 the Secretary of State directed that an Ordinance on Extradition be enacted in Malta. "Dingli drew up the draft on which the Counsil of Government expressed a favourable opinion, and, proceeding to England, where he discussed the Ordinance in great detail with both the Colonial and the Foreign Offices, won the golden opinion of Her Majesty's Ministers who asked him to go to Turin and get in touch with the Italian Government. Even there Dingli was at his best and the draft Ordinance was approved by King Victor Emmanuel's Ministers who even consulted him about their own difficulties." [6] The Commenda dei Santi Maurizio e Lazzaro was offered to him but his acceptance of it was disallowed by the British Government, since it was thought that an exception could not be made to certain long-established regulations. In 1868 his K.C.M.G. was turned in a G.C.M.G

The favourable opinion which Sir Adrian had created at the Foreign and Colonial Offices gave another proof of its reality and extent in June, 1878,when on the British occupation of Cyprus Sir Adrian was appointed legal adviser to the new Commissioner, Sir Garned (later Viscount)Wolsely. His duties, however, were far more important and onerous than those of an ordinary legal adviser, because he had to lay the foundations to a new legal and judicial system. In July, 1880, he was invited by the imperial government to form part of a Board of Arbitration composed of the representatives of the British, Italian and French Governments and of the Bey of Tunis, In order to adjudge upon a question which had arisen between the Bey of Tunis and a Tunisian subject on the other. The President of the Municipality of Tunis and the President of the Commercial Court represented the Bey; Judge comm..V. della chiesa, the Italian Government ; Judge M. Comze, the French Government ; and Sir Adrian, the

(6) Laferla — "British Malta"

British Government. It seems that Sir Adrian's reputation had preceded him, because he was appointed President of the Court on the suggestion of the Italian and French representatives. Four years later he was again asked by the Imperial Government to represent Great Britain in the Board of Arbitration constituted in order to decide two questions between France, Great Britain and the Bey of Tunis. In both cases judgment was drafted by Sir Justice and President of the Court of Appeal. The title of Chief Justice was given to him as a special privilege because all his Maltese predecessors had been only styled as President of the Court of Appeal. His new title naturally affected his place in the scale of precedence, because as Chief Justice he had precedence over the members of the Executive Council. A special salary was also given to him in view of his outstanding merits.

On his elevation to the Bench new opportunities were afforded to Sir Adrian to make use of his profound legal knowledge; he had to interpret and apply that law which was the product of long years of hard work : in fact a new career was opened to him. As is well-known, during his term of office he enriched our Jurisprudence with many elaborate decisions and actually many of his judgements are still of the greatest importance today. There are hdimberiess decisions, some of which are the cardinal points of our case law, which demonstrate his intellectual faculties and his vast legal erudition; besides a meticulous care as to their form, they manifest extreme intellectual penetration both in the doctrinal field and in that other wide held of practical thought i.e. in the repression of the deceitful and the unjust. It is true that since he was in appellate court, some of the judgments which are often quoted nowadays might well have been written by his brother Judges; in fact some of his colleagues in the Court of Appeal likewise bear a name worthy of the greatest veneration; but, no doubt, his opinion, if not his pen, must certainly have influenced all the pronouncements of the Court.

In spite of his manifold duties as a member of the Bench, he accepted the post of Vice-President of the Council of government and, as the Marquis of Ripon noted, Sir Adrian was definitely the best person to choose for a Vice-President of the Council. For over 30 years he had been a member of the Council of Government, at first as the representative of Gozo and later on in his official capacity of Crown Advocate. In fact as Vice-President of the Council he earned universal applause for the sureness and wisdom demonstrated in resolving questions of procedure which at times arose.

Excepting for his legal activities his greatest intellectual interests were undoubtedly history and philosophy. His historical knowledge was immense. Within the framework of a general knowledge the periods he seemed to prefer were that between the years 750 and 1150, the most obscure and yet the most rewarding in the analytical research for caused; the period of the Rinascimento, with its parallerism between classical, scientific and artistic culture, and more narrowly that part of European history found him at a loss; in fact he was once heard contributing ex tempore in a discussion on the influence of Troubadour poetry on Dante, Petrarca and Chaucer; and on one notable occasion six months before his death on the influence of early Christian teaching and of the Gospel on the framing of the Koran. His memory was really fantastic.

His attitude to art is also worth the mention. His taste in pictures gravitated to the late sixteenth and seventeenth century; he liked authors like Reni. Solimene. Caracci. He disliked

Holbe'n and was indifferent to Rembrandt and Rubens. He was an admirer of the 18th century English portrait painters, particularly Romney. In music , to which he was devoted, his taste was static in Donizetti and the earlier Verdi up to "Aida". In poetry he was more Catholic in his selections. He knew much of Dante by heart and could quote from memory extensively from Shakespeare and Milton, while at the same time he kept quite well abreast with widely different authors like Browning and Swinburne.

To understand his philosophic appreciation of a cardinal event such as the great French Revolution it is necessary to know the boundaries of his mental make-up. His philosophy was Aristotelian with such concessions to the Platonic as had enabled him to reach conviction in the correctness of the foundation for the scholastic system inaugurated by St. Thomas often through the guidance of those remarkable converted Jewish philosophers and eventually influenced by the Saracen Averroes, and his school, whose contribution to the philosophic transition from pure Aristotelian paganism to its Christian adaptation was so notable. With regard to the three great expressions which precede the French revolution his views may be summarized thus : he disliked the cynical and barren anti-clericalism if Voltaire, despised the platonic and valueless abstractions of Roussean: he was, however, by temperament and his own intellectual industry favourably disposed and, in fact, influences by the Enevelopedist methods of Diderot and'Alembert, while completely rejecting the avowedely atheistical doctrine of the school.

When added to all this his devoted Catholicism, with his essentially realistic mind which rejected such misleading and specious formulaea as "Liberty, Equality, Fraternity", and his views on the Revolution, became defined. He, a monarchist, aristocratic by conviction, fundamentally just and detesting oppression in any form intransigent in his religion regarded the movement as inescapably necessary, while abhorring and condemning its course. These were not popular views in the early part of his life, at any rate for a man "of the right" to use modern jargon (itself derived from the worst developments of that self-same revolution). None the less, contemporary historical analysis has justified their theoretical correctness. He possessed, perhaps to excess, the rate trait of a complete superiority "complex", which meant that he was at ease and natural in the company of anyone from the highest to the lowest; he was slow to take umbrage, willing to condone, incapable of rancor, quit in manner, decisive but not over-assertive in expressing opinion. He treated the smallest people with precisely the same courtesy and consideration as the greatest. His intellectual make-up was that of a man of the Right in the best sense of that description. Conservative, traditionalist, religious, anti-socialist yet a realist and quick to defend the weak.

For a strong monarchist and traditionalist he had one queer characteristic: he disliked hereditary titles, in which connection an anecdote is worth repeateding. A royal Personage (probably the Duke of Cambridge). Who had for years an affection for hi, took steps to recommend him for the grant of a baronetcy, which as is well-known , is a hereditary title. After doing this he informed Sir Adrian, who it seems was indignant that this should have been done without consulting him, and was so determined in his opposition that the recommendation was withdrawn . his real reason was his dislike of the hereditary title principle, although he pressed as a reason that he could not afford the £800 or so which was the fee payable to the Herald's College in present of the Grant. Lady Dingli was extremely disappointed, but he made a joke of the whole matter to one of his most confidential friends: "Di baroni ne abbiamo parecchi I baroncini non ci mancano; aggiungerci I baronetti!—via, Malta non so lo merita."

The year 1894 marked the close of his career; old age had already for some time been nibbling at his forcible energy and he therefore asked for leave to retire. After over 50 years of hard work—as a barrister, as Crown Advocate and finally as Chief Justice—he had rendered much more than the land of his birth had the right to demand. As is clearly evidenced by facts, he did not limit his attention merely to the duties of his office, but he likewise directed his dynamic energy to other problems which affected his island's welfare. Emigrant was one of the questions which constantly attracted his notice and he went abroad on several occasions in order to arrange some emigration schemes. Even after his retirement he did not permit himself an untainted ease, but he strove to find a logical and a fair solution to the foreign marriages questions, which have been debated over and over again, adjudged upon in a dozen different senses and still remain unsolved up to the present day. His supervening death cut short all his attempts to arrive at a conclusion or, at any rate, as far as is known, to make any suggestion. In the small hours of the morning of the 25th November, 1900 the flame which had sparkled so much was peacefully spent away . The funeral took place on the 27th November at 3.30 p.m. at the Addolorata Cemetery. His Honour Sir Joseph Carbone, Sir Gerald (later Lord) Strickland, Dr. Alfredo Naudi, Judge Luigi Ganado, Judge Baron Alessandro Chapelle and Mr. Fredrick Mamo acted as Pall Bearers.

Some time after the death of the great patriot, whose life has been briefly recorded, a bronze statue was erected in the Maglio Gardens at Floriana. The statue was unveiled by King Edward VII on the 15th April, 1907. it is a lasting tribute offered by the sons of that nation which had admiringly witnessed him from his early days passing through the various stages of life always with one sole generous object in view. "Some of us live for pleasure, some for work. Some for mere sentiment. But those who succeeded in making some mark on the history of their country are those who have lived to do their duty. And that is what Sir Adrian Dingli lived for." (7)

(7) Speech delivered by Sir Gerald Strickland in the Council of Government in Sitting No. 6. on the 28th November, 1900.

CHURCH AND STATE

(A lecture delivered by the Very Revd. Professor Seraphim M. Zarb, O.P., S.TH.M., S.Scr.D. [Vat.])

Although man is known to be the most perfect creature, because he gathers in himself nearly all the perfections of the other beings and so to say unites in himself heaven and earth, being a spiritual and a material creature; at the same time he is not complete and does not suffice for himself, but he is in need of the help both of the other human beings and of the other inferior creatures which serve him to attain the purpose for which he was created. For this reason man cannot live on his own, separated from all contact with other human beings. Left by himself man cannot attain the purpose of his life, he becomes the most lonely and miserable of all creatures: in one world, man must live together with the other human beings in order to help the others and to be helped by them, so that he may attain the purpose for which he is created. Hence Leo XIII in His Encyclical Letter *Diuturnum illud* , of the 29th June 1881, states: "It is man`s nature to live in society. God is the author of society."

Moreover, man`s needs are so many and so varied, that a single society is not sufficient. This is why we find so many associations, guilds and unions, each one of which has a particular aim and some in order to help man in this or the other sphere of his activity: thus we find professional unions, literary societies, industrial and commercial cooperatives associations, trade unions and the like. Besides and beyond these particular societies there are two which easily surpass all the others and as they claim to the both perfect and in a certain sense universal at first sight they seem to clash against each other, whereas in fact they can and I should say they must , coexist in the most perfect harmony, because, though both perfect in their own sphere, they are both necessary for the well being and the welfare of mankind: I mean the Church and the State.

The great problem concerning these two societies is not exactly about their perfection, but rather about their sphere of action. In fact if the State pervades the sphere of Ecclesiastical matters, of the Church unduly interferes in purely state affairs, the clash is inevitable. But if each one of the two societies keeps to its own sphere of action, then no conflict is possible, because the scope and aim of the Church is entirely different from that of the State. Church and State, therefore, can peacefully live together; nay they should live harmoniously together; because as a people without a State is nothing but an anarchy so a State without religion or Church is a godless society, "an impiety", as Leo XIII puts it, "unknown even to the very Pagans" (Encyclical Letter : *Quod Apostolici muneris*). I think therefore, that it will not be out of place, in a lecture to the Members of the "University Students Law Society", to say a few words about the nature of Society in general, and to deal more particularly with the nature of Society in the Church and in the State.

I must confess that the subject is very vast and cannot be completely treated in one lecture. I feel, therefore, that I must limit myself to a small section of the immensely vast subject which lies before us. The section I would like to choose is to show that the Church of Christ has all the conditions of a perfect, complete and independent society vis-à-vis of the other societies,

even of the State; and that this perfection , completeness and independence of the Church by no means derogates to the perfection, completeness and independence of that other society, which is the State. Having thus limited my subject to this important problem, I hope to prove my thesis without difficulty.

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Let us in the first place determine carefully the meaning **of society**. **The word "society"** has the same meaning of association, gathering, collection: but this etymological meaning does not convey the real meaning of society. Not every collection, gathering or association is in fact a society. A collection of material things, even if arranged in such a form as to constitute a certain unity, such as a quantity of stones in the construction of a house, is not a society: nor is a society a number of sheep united in one herd; but society is said only of men, a gathering of men. Moreover, not every gathering of men is a society. A number of men traveling on the same boat or in the same train does not form a society nor is a number of prisoners living in the same jail a peculiar society; but society is a gathering of men: in as much as they are human beings, that is to stay in as much as they are endowed with intelligence and will that they might know and will the attainment of a particular aim and scope by the combined efforts of the members. This particular aim and scope is obviously the common good of the members. According to the various aims and scopes which a society endeavours to realize we have various societies.

Though the scope specifies the nature of society, it does not constitute it. In philosophical terminology one would say that the scope is the *final*, but not the *formal* cause of society, in so far as they are only members, are equal, and among equals no one has any authority over the other. There must be one, endowed with the power or the authority of a leader, in order to give a head to this body; and the authority of this head is necessarily limited to the scope of that society. Without such a head no society is possible: hence we read in the Book of Proverbs, XI 14: **Where there is no governor, the people shall fall,** and St.Thomas Aquinas in his celebrated book *De regime principum,* also compares society with a living body and says that society would dissolve without a certain common ruling force... which guides unto the common good of all the members: *Deflueret nisl esset aliqua vis regitiva comuni... quae ad bonium commune membrorum intenderet* (Chap. I.). thus society is constituted by the head as its *formal* element to which corresponds the *material* element namely the members.

Before going any further, I would like to mention one or two divisions or classifications of the various societies, because such a classification may turn useful in the course of this lecture. We have seen already that the scope or aim of a society gives it a special nature and distinguishes it from other societies, and, as there are various scopes and different aims in the various societies, consequently there are many societies of different nature and importance. Hence they can be classified in groups according to their degree of perfection, to their need etc.

In the first place we have to discern *perfect* and *complete* societies from the *imperfect* and *incomplete* ones. A society is said to be perfect either because it is perfect in its own constitution, or because, though imperfect and incomplete in itself, it is perfect in its management and activity, or, thirdly because its members are perfect or finally, because it is a perfect and complete having all the necessary conditions of a perfect and complete society.

A society may be perfectly constituted, having fit rules for the attainments of the scope, but it cannot exist of itself as perfect and complete society, because the perfection and completeness must not be only in its constitution, but in its scope and purpose ; and if this purpose is mnited and subordinate to other more important attainments, that society, though perfect in its own constitution, is necessarily subordinate to other societies which aim at a higher and more important scope in man's life and activity. Similarly, a society, the management and activity of which are simply excellent, may well be called perfect, but its perfection is again limited by its aim and purpose. And, finally, the same is to be said of that society which is called perfect, because its members are perfect, but which in itself is subordinate to other societies. A perfect and complete society, therefore, is that the purpose and scope of which is not subordinate to any other higher scope or purpose in life, but which is really supreme at least in its own order. It is in this sense that we speak of a perfect and complete society, and I deem it necessary to explain a little longer the nature of a complete and perfect society.

I prefer to explain the nature of a perfect and complete society by comparing it with a living organism. There are organisms which are complete in themselves and possess all the necessary means to attain the scope of their own existence; thus, each man is perfect and complete, because he is an independent being, and consequently it depends on the organism of which it is only a part. There are even perfect and complete organisms, but they are not in a state to live independently of another organism, such as the foetus in the womb of the mother. Thus among the various societies there are some which, though they may seem perfect and complete, in fact are only parts or other societies and consequently the are not completely independent of the others : a province or country in a Kingdom or a commonwealth in the British Empire, may be called perfect and complete in a certain sense, but they are only a part of the kingdom or of the Empire, and, therefore, not absolutely independent.

Consequently, for a perfect and complete society it is necessary that the society be perfect and complete in itself and absolutely independent of an other societies. I say *independent*, not materially, but in a very formal sense, that is in the sense of society. Man, as we have said, is a perfect organism, in as much as organism, so he is formally independent or other men in his own existence as man, but he may be materially dependent on them as well as on other creatures. He may be a servant and need air and food to live; but this material dependence does not annul that man has in himself a perfect organism, and that, as such, he is a perfect being. So also a society may be perfect and complete formally, though it may materially depend on other societies. Thus a state is a perfect society, but it may depend materially on other societies, and this dependence does not annul its perfection and completeness as an independent and perfect state. This classification of societies is most important in order to put each society in its own place according to its own nature and its own importance and its own importance.

This first classification of societies leads us to another classification no less important : that of *necessary* and *voluntary* associations. There are in fact some associations the purpose of which is not necessary to every man, and consequently do not appeal to him : a farmer would never dream of becoming a member of a medical association. But there are societies to which one must belong. Thus we cannot live without a State, and therefore, the State is a necessary

or compulsory society. But besides the State, there are many other societies, which are not absolutely necessary or compulsory, although them may be very useful, and these are called voluntary associations.

Quite recently, Mr. A. D. Lindsay, Master of Balliol, gave a lecture in the Debating Hall of the Oxford Union Society, which he also published in pamphlet-form, upon *Toleration* and *Democracy*. In it he classifies the State as a necessary or compulsory society — let us say the only compulsory society — whereas the church is called a voluntary society. In fact he says: "The sphere of compulsory organization — the State — is to be sharply distinguished from that of the voluntary association — the Church. The State cannot do the work of the church, nor the Church that of the State. One of the strongest arguments brought forward in this early discussion about toleration is that compulsion in the religious sphere defeats itself. It can compel outward observance. It can destroy ways of thinking by killing or banishing those who profess certain opinions. But it cannot produce right belief. And again it is equally clear that if the church — the organ of grace — attempts to enforce the law, it perverts its own nature."(1)

Nothing more erroneous could be said with regard to the nature of the Church as a perfect and complete society. To start with the Lecturer confuses the idea of the Church, with that of a seat. One fan be Catholic, Protestant or Schismatic; but whatever is his denomination he belongs to the church, and he feels that to belong to a Church is not a free choice, but a necessity. It is God's right and no man can refuse to obey God's will since God has been so good as to institute for man's voluntary but a necessary society: the various denominatios would not exist, if one could be sure of the one true Church. This is why we say, that when one knows which is the one true Church, he is bound in conscience to embrace it, and he cannot belong to another Church.

The grouping of societies in *necessary* and *voluntary* leads to another classification of the same, in societies which are a matter of individual and so to say private concern, and societies which are, *public* and to which every man must belong. This classification may coincide with the previous one; but it is not entirely the same. In fact, it aims at stressing the obligation to join a society not only as an individual and private person, but also as a community or a state. To join a religious society, that is the Church, and possibly the only one true church, is a duty which binds not only individual persons , but also the states or nations; because religion is not only an individual and private duty, but it is also a public and social one. Consequently there are two necessary societies, namely the church and the State : every man or women must be a member of the State, and the entire State and each one of its members must belong to the Church. Besides those two societies there are no others which by nature are necessary, and they must all be classified as voluntary societies. They may be very opportune and useful for the well-being of their members, but nevertheless they are not necessary or compulsory.

We have mentioned the final cause of society, that is the special aim or scope for which a particular society may be founded; we mentioned also its formal cause, namely the power and authority by which a society is led and ruled, and finally we have also mentioned its material cause, namely the members. In order to be complete we have to mention the fourth and last causality, namely the efficient causality, or the author of society.

Any voluntary society, founded for a peculiar scope and purpose, may have for its founder any person: but the same cannot be said of necessary societies, that is of the State and of the Church. The author of the State is God, in as much as He is the author of nature, and from Whom the State derives its authority. But the author of the Church, in the present order

established by God, is Jesus Christ, who instituted the Church, from Whom the Church derives its authority. Consequently, the authority in the Church is of a supernatural origin, whereas

(1) A. D.LINDSAY, Toleration and Democracy (The Lucien Wolf Memorial Lecture, 1941) Oxford 1942, p7

that of the State is of a natural origin; beside, though the authority in the State is derived from God, its form is not determined by God, but entirely entrusted to man who may choose that form of government was determined by Our Lord Jesus Christ Who instituted the Church in a form of a perfect monarchy which no human power can ever change.

Here, therefore, we have a neat distinction between a natural and a supernatural society; and though among the natural societies there may be necessary and voluntary societies, as we have seen above, a supernatural society, founded by God Himself, for the salvation of mankind cannot be but a necessary society. Consequently, man must belong to a State by natural law, but he must belong to the Church by a positive order of God.

In fact, in the Old Testiment, God elected for Himself the Hebrews, and entrusted to them His revelation. In this revelation was clearly contained the promise of a future Redemeer. When this promise was fulfilled not only the Synagogue had no right to oppose it but by the fact that the Redemeer had come, the Synagogue ceased to exist and was bound to obey God and follow the Messias by entering into the new Church instituted by Him.

Similarly the Gentiles had a natural duty to receive God's message and God's legates, and no human society or state could oppose the Church which was divinely instituted for men of all times and of all places. Consequently, the Church has a supernatural right of existence which no state can oppose; on the contrary each State's bound to help the church in its foundation and propagation, render by all means its existence possible to live according to its rules. Otherwise the State and its members would become opposers of God or of His Son Jesus Christ Who founded the Church and ordered to His Apostles to establish it in all parts of the world, giving to them the promise that He will be with them until the end of times. Indeed after His resurrection and before His ascension into Heaven Jesus appearing to the apostles said to them : All power is given to me in heaven and in earth : going, therefore, teach the all nations baptizing them in the name of the Father and of the Son and of the Holy Ghost, teaching them to observe all things whatsoever I have commanded you : and behold I am with you all days, even to the consummation of the world (Mt. 28. 18-20). By these words Christ gave to the Apostles and their successors the divine and supernatural right to establish the Church in all countries and at all times and whoever opposes the divine mission of the Church will oppose God, Whose orders he will thus try to evade and render vain.

Notwithstanding this divine will, opposition to the Church was not wanting in the first years of its foundation. Both Jews and Gentiles declared themselves against Christ and His followers, but the Church amidst all kinds of difficulties and bloody persecutions emerged victorious and gradually many a state accepted the Christian Faith. This state of things never failed in the history of the Christian Church and difficulties and persecutions are not wanting even in the present days in various countries. In many countries the State is not only Christian, but also Catholic : it acknowledges the Church as a perfect and complete monarchical society, the head of which is the successor of St. Peter, the Sovereign Pontiff or the Bishop of Rome.

This state of affairs crates a new problem. Although there were times in the history of the Hebrews in which the head of the theocratic government was at the same time the king and the High Priest was the head of the Synagogue . Things were different with the Gentiles who often

acknowledged in the head of the State, the characterists of the Supreme Pointiff. In such a state, where one and the same person was the head of the State, the head of religion, no conflict was possible between the religious and the civil societies. But in the Christian State the two societies are separated. Christ did not send His Apostles to conquer the Roman Empire or any other earthly kingdom : but He ordered them to preach the Gospel and found the Church in the various countries, and to live in those countries perfectly obedient to the constituted civil authorities. Hence Christ clearly distinguished the Church from the State and allows that the two perfect and complete societies, so different form each other because of their different origin, different scope, different form of government, and different heads could live side by side, not as two opposed societies, but harmoniously helping man to attain the scope of his earthly existence. Hence Christ Himself said to the Pharisees and to the Herodians who consulted among themselves how to ensnare Him in his speech and laid before Him the question : Master is it lawful to give tribute to Caesar or not? "Render to Caesar the thins that are Caesar's and to God the things that are God's" (Mt.xxi 15-21) . This doctrine of Christ was preached to mankind by the Apostles : it suffice here to quote the classic tract of the Epistle of St. Paul to the Romans, in which he says: "Let every soul be subject to higher power: for there is no power but from God: and those that are, are ordained of God. Therefore, he that resisted the power, resisted the ordinance of God. And they that resist, purchase to themselves damnation. For princes are not a terror to the good work but to the evil. Wilt thou then not be afraid of the power? Do that which is good: and thou salt have praise from the same; for he is God's minister to thee, for good. But, if thou do that which is evil, fear : for he beareth not the sword in vain. For he is God's minister ; an avenger to execute wrath upon him that doth evil. Wherefore be subject of necessity, not only for wrath, but also for conscience-sake..." (Rome. Xii, 1-5).

This same doctrine was in all ages taught by the Church to its faithful: but never before has the Church felt it so imperative to lay stress on this doctrine than in recent years. Since the days of the French Revolution new doctrines were forged and propagated about the constitution of civil society which in due time brought forth the idea of the so called "modern state". This new expression is used to distinguish the new from the old stated, especially in Europe, where all the states, though perhaps not all Catholics, followed Christian principles and respected in various degrees the Ecclesiastical institutions. "Modern State" means a system of government and view of its functions and of social institutions which were first realized in the French Revolution new doctrines were forged and propagated about the constitution of civil society which in due time brought forth the idea of the so called "modern state". This new expression is used to distinguish the new from the old states, especially in Europe, where all the states, though perhaps not all Catholics followed Christian principles and respected in various degrees the Ecclesiastical institutions . "Modern State" means a system of government and view of its functions and of social institutions which were first realised in the French revolution ,and which may be summed up in the following way. The idea of "Modern state" is based on the "Principles of 1789" and requires that the country be ruled chiefly by some kind of elected parliament, that it is indifferent to religious questions and professes neither to support nor to suppress any particular creed or cult; public education is the business of the state and at its charge, and it is non-religious : the state recognizes as valid only those marriages which are contracted according to its own regulations; it provides means for divorce and the remarriage of those divorced; there is a right of free speech; books and newspapers are uncensored. During the 19th century the doctrine of " Modern State" spread pretty well all over

Western Europe had colonized. The "Principles of 1789" found their classic expression in the famous Declaration of the Rights of Man and of the citizen, voted by the National Assembly of France. 28th August 1789, and prefixed to the French Constitution of1791.

In all the countries, where the old absolutist monarchies were replaced by new systems based on this practical judgment about the wisdom of the new regimes, and also about their lawfulness. The question was, in fact, not only "would they work," but "were they right?" Could a good Catholic help to work them? Or was he not rather bound to work for their overthrow? (2)

(2) PH. HUGHES, The Popes' New order, London 1943,p.59-61

The answer was expected from the head of the Catholic Church and many a Pointiff, such as Clement XII, Benedict XIV,Leo XII, and more particularly the recent Popes Leo XIII and Pius XI, gave their instructions about the nature, the aims, and rules of Christian States.

Of the Pontifical documents the most important is the so called trilogy of Pope Leo XIII, namely the Encyclical Lettere *Immortale Dei, Liberias praestantissimun and Sapientiae Christianea.*

We cannot enter into details and refute each particular point in this new system of government. We have dealt some time ago in this same hall with the problem of education. Today we are only concerned with the relations which exist between the Church and the State.

We have already proved that there is a very neat distinction between the civil and the ecclesiastical societies, between societies, between the State and the Church. But it is exactly this distinction that constituted the knot of the difficulties which in the course of centuries arose between the Church and the States. Already the first Christian Emperors, beginning with Constantine himself, though acknowledging that the State had no right to interfere in ecclesiastical affairs, led themselves, under the excuse of protecting the Church, to ascribe to themselves many rights with regard to its internal administration. These interventions of the lay states in the ecclesiastical affairs assumed various forms and proportions in various times and various places. If only we recall today the state of the Church in protestant and in Schismatic countries, we can easily see that the church can hardly be falled a perfect and complete society, because to a great extent it depends on the State, and can do nothing without the formal approval of the State. This state of affairs does not exist in the Catholic Church, but this does not mean that the Catholic Church did not experience this same difficulty in its own bosom. We have already mentioned the Byzantine Emperors, among whom Constantine II and Justinian pretended that the Church should be subject to their imperial authority. In the middle ages some of the Emperors, thou perhaps not theoretically, but in practice, affirmed that the State was the supreme authority, and that the church was subject to the Emperor. Even theologians like Ludwig of Bavaria and Marsiands of Paoda maintained that the Emperor had higher and superior authority than the Pope. With the outbreak of the pseddo-Reformation this doctrine emerged victorious, and all Protestants professed that the highest authority in the Church must be subject to the authority of the State. This doctrine had also its echo in Catholic countries : Gailicanism in France, principally under the lead of Richard; Febronianism in Germany, called after the name of Febronius, which corresponds to that of John Nicholas von Honchelm ,and Josephism in Austria and Italy, especially after Eybel, the canonist, which systems admit under various pretexts that the civil power has the right to intervene in many and various ecclesiastical matters. More recently in France the same doctrine was again maintained by the Jansists and in the last century Liberallism went so far as to deny to the

Church nearly every right of independence. In our own days many Jurists, following the Hegalian philosophy, do not admit rights independent of the State, and proclaim as indisputable the saying. *Omnis jurisdiction in nomine Caesaris exercetur* : There is no jurisdiction, except in the name of Caesar! Needless to say that all rationalists together with all sorts of anticlericalists reject the doctrine about the independence of the church from all lay and external power.

I need not insist on the Catholic doctrine about the nature of the Church as a perfect and complete society, and consequently independent of all earthy power. The words of Christ, already quoted above, by which He gives to the Apostles and their successors full authority in the foundation and administration of the Church should suffice to all those who admit the divine nature and mission of Jesus Christ. If God willed this state of affairs, no philosopher, jurist or theologian, can destroy or change what Our Lord Himself ordained.

I would like to bring forth in support of the arguments already quoted above and taken from the authority of Jesus Christ, some reasons which perhaps may appear to unbelievers much stronger than the arguments based on authority.

The first reason may be taken from the scope for which the Church was instituted. In fact, Jesus Christ instituted the church for the eternal salvation of mankind: this scope is at the same time universal and supernatural, and, as such it exceeds the Limits of every state, which is forcibly limited to a nation, and has no right on supernatural life. Therefore, the church because of its universal and supernatural scope exceeds the power of any earthly state, and consequently cannot be subject to it.

Another reason may be taken from the constitution of the Church. We have already seen that the Church has a supernatural origin; it derives its authority from its author Jesus Christ, Who founded His Church on Peter, on whom He conferred the supreme authority and subjected to him the other Apostles. The form of the church i.e. monarchical, and each particular bishop receives his power from the head of the Church. But if the authority in the Church is divine and supernatural, it cannot be derived or conferred by any state on earth; and consequently , the Church cannot be dependent on any State.

Finally, another argument can easily be formed, considering the divine institution of the Church. If one admits that the church was instituted immediately by Jesus Christ, -- to which He assigned a supernatural and universal scope, to which He delegated His own authority, which he endowed with the necessary means a salvation—then , it is utterly impossible that such a society could be subject to any earthly and human state.

But let us expound some of the arguments by which the Jurists endeavour to prove that the Church must be subject to the State.

Their first argument states that every perfect and complete society must have a territory, on which it exerts its jurisdiction. But the Church has no territory. Therefore it cannot be said to be a perfect and complete society.

The answer to this argument is not very difficult: in fact, we can say that the church not only has a territory, but the whole world is its territory. Indeed, the supreme owner of the universe, God Himself, in the person of Jesus Christ, said to the Apostles: " All power is given to me in heaven and on Earth" going, therefore, teach ye all nations" (Mt. XXVIII, 18-19). And again: "Go ye into the whole world and preach the Gospel to every creature" (MK.XVI, 15). Jesus, therefore, gave to the Apostles full jurisdiction in the whole world, and the jurisdiction is absolutely necessary, because the Church of Christ unlike the Synagogue, is not

limited to privileged nation, but it is universal and supernatural: the Church embraces all nations in a supreme effort to bring the whole world to Christ.

But our Jurists insist and say " One and the same territory cannot be possessed by two perfect, complete and independent societies. But in the assumption that the Church is a perfect, complete and independent society, the same territory would be subject both to the State and to the Church. Therefore the Church in front of the State is not independent, but subject to it.

To this we answer that one and the same territory cannot be subject to two perfect and independent societies having the same scope and purpose. But if the purpose of the Church is different from that of the State and not opposed to it, (but on the contrary Church and State can well work together for the welfare of man), then the same territory can well be subject to two perfect and independent societies. In fact, the State occupies the territory as a civil lay power an has full authority on temporal things belonging to the state; but the Church occupies the territory on things belonging to the internal and spiritual life of the citizens, in order to lead them in the right path of eternal salvation.

Our answer to the arguments brought forth by those whose interest it is to defend the integrity of the State and its superiority on the Church seem quite convincing; but we do not ignore, that if in theory two perfect and independent societies can coexist in the same territory, in practice they often meet and it is not always easy to avoid conflict.

In fact we can easily distinguish in the Church a twofold power: first the power of the Sacred Order given by the sacrament of Holy Orders, is limited to the cult of God and is purely and strictly instrumental. The power of Jurisdiction is conferred by the superior, by whom it can be limited or even entirely retired, and is consequently, extra-sacramental . it is exercised by the persons who passes it, not as mere instrumental, but as principal agents, though its origin remains divine and supernatural. The power of Jurisdiction is again twofold : it includes first the power of **teaching**, and secondly, the power of **administration.** We are not concerned here with the power of teaching , which can more easily be recognized to the Church: our difficulty lies rather in the power of administration. In fact, the power of administration or government of the Church includes: firstly, the power of legislation; secondly, the judiciary power, and thirdly the coercive or coactive power. In fact, there is no jurisdiction in the full sense of the word, as applied and exercised by the Church, as a perfect and independent society, without the legislative, the judicial and the coercive powers.

The legislative power implies that the Church has the right of issuing laws for the common welfare of the community which bind the subjects in conscience.

The judicial power means that the Church has the right and the duty to judge and determine of its own authority the genuine sense of laws, the conformity or otherwise of the actions of its subjects, according to the law, which obviously implies that the subjects have a strict obligation to submit themselves to the judgment of the Church.

Finally, the coercive or coactive power means the right of the Church to condemn and punish the subjects for their transgressions against its laws.

Needles to say that all those who deny that the Church is a perfect, complete and independent society, deny to the Church the threefold power and jurisdiction.

We need not lose our time in proving that the Church received of its divine Founder the threefold power of jurisdiction : it suffice to quote here one or two texts which prove with great evidence that Jesus Christ conferred on His Church: first, the power of issuing laws. Indeed, Christ said to the Apostles: "He that heareth you, heareth me: and he that despiseth you

despiseth me. And he that despiseth me, despiseth Him that sent me" (LK. X, 16). And in order to guarantee that the words and deeds of the Apostles were sanctioned by Himself, He repeatedly promised to them the Holy Ghost : "And I will ask the Father and he shall give you another Paraclate, that, may abide with you forever. The spirit of truth, whom the world cannot receive, because it seeth him not, nor knoweth him ; but you shall know him : because he shall abide with you, and shall be in you... The Paraclete, the Holy Ghost, whom the Father will send in my name, He will teach you all the things and bring all the things to your mind, whatsoever I shall have said to you (John, XIV, 16, 17, 26). THE Apostles were fully aware of the legislative power they head received of Jesus Christ and, when doctrinal difficulties arose among the first Christians, they gathered together and gave definite rules and laws to the first Christians. A famous example of this is the Council of Jerusalem held by the Apostles in order to determine whether the law of Moses was still binding or abrogated. The decision of the Apostles is well expressed in the following words "For it hath seemed good to the Holy Ghost and to us, to lay no further burden upon you than these necessary things..." (Acts, XV, 28).

Other examples of the legislative power exercised by the Apostles can easily be found in their writings, in the Epistles of St. Paul and in the seven Catholic Epistles in which there are many laws which are not found in the Gospels. Similarly the Church, the Oecumenic Councils, and the Roman Pontiffs issued laws binding the whole Church, whereas regional Councils and Bishops gave laws to their own particular congregations.

Secondly, Christ conferred on His Church the judicial power: Christ after His resurrection ; appearing to the Apostles said to them : "Peace be to you. As the Father hath sent me, I also send you. When He had said this, He breathed on them and He said to them : Receive ye the Holy Ghost : whose sins you shall forgive, they are forgiven them: and whose sins you shall retain, they are retained" (John, XX, 21-23). This faculty of forgiving and retaining sins necessarily implies a judgment; since forgiveness or retention of sins was not to be left to the will of the minister, but had to be used according to judgment. The faculty here conferred by Christ on His Apostles had been previously promised to them, and most particularly to Peter (Mt. XVIII, 18; 18) . more explicitly Jesus dealt with the judicial power of the Church, when He said: "If thy brother shall offend against thee, go and rebuke him between thee and him alone. If he shall hear thee, thou shall gain thy brother. And if he will not hear thee, take with thee one or two more: that in the mouth of two or three witnesses every word may stand. And if he will not hear them: tell the Church. And if he will not hear the Church, let him to be thee as the heathen and publican" (Mt. XVIII, 15-17). The Apostles were conscious of their judicial power and exercised it with the first Christians: thus Peter condemned Ananias and Saphira for they had lied and committed a fraud (Acts V, 1-10). Also Paul condemned the incestuous brother (1 Cor. IV, 18ss), and he gave instructyions to Timothy about judgment, when he wrote to him : Against a priest receive not an accusation, but under two or three witnesses" (1 Tim.V, 19).

Of old days each Bishop exerted the judicial power, and if this power, for obvious reasons, it is today limited to purely ecclesiastical things, such as matrimonial cases, ecclesiastical benefices and canonical offences, in olden days it extended also to purely temporal affairs. Scholars of the History of Malta are quite aware of the disputes between the Grand Masters and the Bishops of Malta about jurisdiction. The judicial power is intimately connected with the legislative power, because a legislative power without a judicial power is simply vain.

Finally, Christ conferred on His Church the coercive power. In fact, legislative power as well as judicial power is vain without a coercive power: consequently coercive power is necessarily included as an integral part in the administrative authority. Hence the Angelic Doctor ascribes to the prince the duty of inducing his subjects by punishment and rewards in the observance of his laws and percepts: *ut suis legibus et praeceptis poenis et praemiis hominess sibi subiectos ab iniquitate coerceat et ad opera virtuosa inducat (De regime principum, 1, 15).* We have already seen that Jesus Christ granted to the Apostles not only the faculthy of forgiving sins, but also that of retaining them, which obviously is a great punishment; He also taught the faithful to consider as a heathen and a publican the man who did not obey the Church, that is to consider as excommunicated him who did not submit himself to the correction of the Church. The same did the Apostles by words and deeds. Thus St. Paul to the Corinthians writes: "What will you? Shall I come to you with a rodor in charithy and in the spirit of meekness?" (1 Cor. IV,21); and again : "I have told before and fortell, as present and now absent, to them that sinned before and to all the rest that, if I come again. I will not spare" (2 Cor. XIII, 2).

Moreover, the Church has not only the power of inflicting spiritual punishments, but also temporal and corporal. Spiritual punishment by which man is deprived of spiritual and supernatural goods, though they may be less sensitive than the corporal, are in themselves much heavier and inflict a more serious penalty than the payment of a fee or any other corporal punishment. If, therefore, the Church has the power of inflicting spiritual punishments, which are considered heavier than the temporal and corporal , it is unreasonable to deny that it has also the lesser power, namely to inflict temporal or corporal punishments. Indeed, the Church, both in old days and at present, though with great prudence, does not abstain from inflicting temporal and corporal punishments for the correction of men.

Many jurists who deny that the Church is a complete and perfect society are inclined to grant to the Church the legislative power, but they reject the judicial and coercive power. Let us examine some of their arguments.

The Church, they say, is a spiritual society, and as such it can only use spiritual are outside the jurisdiction of the Church and consequently, it has no authority nor force of inflicting temporal and corporal punishments. Besides, such punishments are against the spirit of the Church which prefers love and meekness to vengeance and chastisement.

To all these reasons it is easy to answer that, though the Church is a spiritual society in as much as its purpose is spiritual, its members are not angels, but men; and as such it has a material and temporal organization, and must use material and temporal means to help men to attain their supernatural salvation. Consequently corporal and temporal things, in As much as they are necessary to attain its principal scope, are not outside the jurisdiction of the Church: and. If necessary the Church can resort to temporal or corporal punishment: in fact, it prefers to have recourse to the state, whenever corporal violence is required. The easily recalls to the mind of scholars of Church History the Sacred Inquisition: but time does not permit me to deal with this important point very badly known by those, who most strongly disapprove of it.

* * * *

I am afraid I have embraced a very wide subject, and treated very imperfectly of the relations between the two greatest societies on earth, namely the Church and the State. I insisted more on the perfect and complete nature of the Church as a society, and said very little

of that of the State. This I have done because I am perfectly sure, that you all know quite enough about the nature of the State. If, therefore, in my lecture I could only show you that the Church is not an intruder in the State, but that has received from its Author of the State, that full authority which it requires in order to attain its spiritual and supernatural purpose, namely the eternal salvation of mankind. I fell that I have fully accomplished my task. It will be easy for you to see that as man is made of a body and a soul, and both work harmoniously in the unity of the human being, so also the State and the Church each one in its own sphere, may and should work together for the welfare of man, that is to render to him possible the attainment of the purposes for which he is created by God.

CORRIGENDA

("*Foreseen and Unforeseen Damages*" by Paul Mallia, B.A., Vol.1, No 1, Page 24)

According to the distinction we referred to above the seller is bound only for the intrinsic damages, i.e. those damages which are closely connected with the immovable sold. Thus A is to reimburse B for the necessary and useful repairs carried out for the rents paid, for the costs of contract and also for the accidental increase of value of the house due to the opening of the new street; but he is not bound to make good the loss of the good-will acquired by B in his business, since such good-will is not intrinsically connected with the immovable itself. Here, however lies the difficulty : all damages suffered are either closely or remotely connected with the thing itself. The only help that is offered us in this case is to distinguish between common and peculiar damage. The good-will acquired by B in his business has nothing to do with the immovable itself but is peculiar to the particular use made of the house by B. it needless to say however that A would also be liable for the loss of such good-will if the establishment of the business was a clause in the contract of sale.

SOME CONSIDERATIONS ON CASE LAW.

(By Hugh W. Harding, L.P.)

In order to deal adequately with the subject matter of this title it is necessary to preface the fundamental distinction between the two great system of law, i.e. the system of code law and the system of case law. The reason for this distinction is obvious. In countries where the law in the main, is not codified, as in England, but is, so to say judge-made, case law is, in point of fact, the law itself. As occasion arises, the particular case before the Court is tried on the authority of precedent. Any law student who is accustomed to the system of code law shudders on reading that in England there are about three quarters of a million decided cases to go by. Nor is his mind set at rest on reading that in the case of Bottomley v. Bannister (1932). 1 K. B. 458, precedents decided in 1409 and 1425 were cited to assist the judge in determining who was liable for the leakage of a gas burner installed in 1929.

The functions of case law where the laws are codified are of an ancillary, although not less important, nature. What are these functions?

It would appear at firs sight that once the law is clearly set down in so many articles in the appropriate codes, case law loses much of its signifance. However—although we should certainly not look upon the law as cynically as Bernard Shaw did when he termed it "an imperfect, rough-and-ready device of mankind to keep people from sending each other to the devil"—we must admit that the law-giver can ever be so far-sighted as to anticipate all the contingencies of human life. It is exactly in this process of applying and adapting abstract law to the concrete cases of the moment, in all their diversity of circumstances. That the functions of case law, even under the system of code law, come into play.

First and foremost, case law applies and interprets the law in particular cases. In this sense the jurist Portalis said that case law is necessary supplement to legislation. With regard to interpretation, it is important to stress that the function of the judge is, in the words of Bacon, that of *jus dicere* and not *just dare.* Two maxims are to be borne in mind on this fundamental point, viz. *statutorum verba quando sunt clara non egent observantia interpretative* and *ubi statuentes nihil distinxerunt nec judices distinguere debent.* The point was further stressed by the French jurist D`Argentre when he said *Stulta sapientia quae vult lege sapientior esse.*

The exercise of this function of interpretation produces a collection of case law which has the authority of precedent. French text-writers call it *Jurisprudence* des Arrêtes.

With regard to the word *Jurisprudence* it is interesting to note that the meaning given to this word on the Continent is different from that in which it is understood in England. In the latter place it is generally taken to be the science of law i.e. the science which has for its function to ascertain the principle son which legal rules are based. As such it is mainly based, as W. G. Byrne points out in his "Dictionary of English Law", on comparative law i.e. on the

comparative study of the legal institutions of various countries because such a study from its historical accidents. Byrne goes on to say that Jurisprudence is also used, incorrectly, as synonymous with law, and, he says. "We hear of the jurisprudence of France or Russia when nothing else is meant than the law which is in force in those countries respectively". The latter statement, in my humble opinion is not perhaps, exact because what is really meant when one speaks of French jurisprudence, Italian jurisprudence or Maltese jurisprudence is the collection of judgments or precedents interpretiung the law i.e. the authority of precedent *rerum perpetuo similiter judicatarum auctoritas* (Fr. 38, Dig Leg.)

There may be cases in which judgments are conflicting but in any such case it would be just as well to say what a distinguished Scottish, judge, gifted with a vein of irony, remarked *a pronos* of the House of Lords as a tribunal that if sometimes two of its decisions are inconsistent such inconsistency was due "to the frail vision of the observer".

Another important function of case law is that of providing for what is called a *casus omissus*. This, of course, is not possible in Criminal Law where the maxim nullum crimen sine lege is paramount and inflexible. But in Civil law very well happen that a case ,not expressly envisaged in the written rule of law, can be decided by analogy to a similar case for which express provision is made . This is an application of the rule Ubi eaaem esc legis ratio, ibi eadem est legis dispositio.

But, even supposing that provision for a casus omissus cannot be made under the eiusdem generis rule without violating the maxim that the judge can only interpret but not make the law, then a third important function of case law comes into view. By pointing out in its judgment the fact that no provision is or can be made for the particular case before the court, the judge stresses the necessity or a legislative

Enactment, in jure condendo. It was again the jurist Portains who said, in his preliminary speech on the draft of the French civil cod, "to foresee everything is impossible. How can one chain time? How can one stop the course of things? How can one foresee that which only experience discloses? How can foresight be extended to things which the mind cannot as yet have in view?"

This takes us to the next important function of case law, viz., that of helping to adapt laws to the changing needs of the age. It was in recent address to the Edinburgh University Law Faculty Society that Lord Blackburn, of the Scots Bench, took as his subject the development of the law, meaning thereby not the development of legal principles in the course of the centuries but the enact of rapid changes in social conditions upon the application of the law to particular cases. In this connection one might be pardoned to quote at length from Professor Laski's book "Studies in Law and Politics", page 295, "Law like life has its periods of change and its periods of conservation; it is not a closed system of eternal rules elevated above time and place. The respect it can win is measured by the justice it embodies and its power to embody ideals of justice depends upon its conscious effort to respond in an equal way to the widest demands it encounters. I do not deny the difficulty of the task and I am anxious to recognize its nobility. I know how tremendous is the pressure of past tradition, how urgent especially in a critical time the need for stability. The lawyer's regard for precedent has been one of the greatest preservative forces of history; I do not for a moment deny the importance of the contribution it has made;" and later on: "It is the lawyer's function to make his doctrines

keep step with the spirit of the times." The same concepts are summarized in the saying of Mr. Justice Holmes: "The life of the law is not logic but experience,"— although, of course, this sociological interpretation of law must not be stressed unduly.

Some remarks on the binding force of judicial decisions in Malta would not be out of place. It has always been well settled that our Courts of Justice cannot, without grave reasons to the contrary, discharged decisions given in previous cases, especially if a given principle has behind it the weight of align series of decisions. With regard to an Inferior court vis-à-vis a Superior land vs. Hunter, 15th December, 1939,that it is the practice in the Maltese legal system, even though there is no precise obligation, for an Inferior Court to follow the principles laid down in recent judgments of a Superior court on points of law even though the Inferior Court may not share that opinion.

This rapid survey of the functions of case law tends to stress the absolute necessity of an early resumption of the publication of our Law Reports. It is necessary that law students and practitioners should be in a position to keep themselves au courant with the most important decision given by our courts. It is perhaps interesting to note that in England, in 1936, the proprietors of the Law Journal felt that there march of legal events justified the publication of anew series of High court Reports, and in that year they started the weekly issue, as a supplement to the Law Journal, of an new series of reports "The All England law Reports— Annotated". In presenting these reports to the public the proprietors of the Law Journal, who have the experience of a hundred years behind them, stressed the demand for *full* reports of *recent* decisions *at the earliest possible opportunity*. It is, therefore, highly desirable that, consistently with the circumstances of the emergency; steps be taken to resume without delay the publication of the local Law Reports in order to help legal practitioners to unravel the problems which beset them and keep abreast of legal progress. *Hoc est in votis*.

EXCEPTIO REI VENDITAE ET TRADITEA

(By Joe M. Ganado, B.A.)

ONE of the main objects of society at large is peace in the community and this can only be attained through constant conformity with principles of law; hence the enunciation of rules of action is almost indispensable. The Roman mind, endowed with a deep sense of law, responded brilliantly to this necessity and from very early times, it is recorded, rules, remarkable for their expediency, reach on thought and elegant simplicity, were made public in various ways. A student of roman Law cannot help noting the stiff laws relating to the *Dominum Quintariuim* : an absolute and perpetual right of ownership liable to be present only in the sphere of rights of a Roman citizen and from early days also of the Latini *vereres* and *colonaru*.

These strict rules led to the conclusion summarized by Gaius in the words: *ade enim ex jure Quincium unusquisque aominus erat, aut non invenigebatur dominus*. Leaving apart all attacks which are leavened against this sentence, let us now see what is necessary for the creation of the *Dominium Quiritarium* and what circumstances made the introduction of the *exceptio,* which forms the subject of this note, expedient. It is undenied that no other save a Roman or a Latinus could be the subject of Domnium; the object must be a Roman thing and there must have been some *juxta causa* i.e. some act or fact in law creating the right. The *exceptio* now under review comes in when there is flaw in the transfer and the seller claims back the thing for which he has already received the price from the purchaser.

Arbitrary principles are rarely of any utility and this general principle had its direct application with the old Roman Laws on Ownership. Since malicious people have never failed men, the Roman legislators became fully alive to the need of nipping in the bud any abuses consequent upon the stringency of the law; and an abuse which at one time became dangerously frequent was the transfer by simple traditio (which was inadequate *iure civili*} followed by the exercise of the *actio rei vindicatoria* after the price had been paid. In some cases the *rei vindicatoria* achieved its aims and the unfortunate deceived purchaser had no means of defence. A remedy was therefore given and W.W. Buckland describes the operation of this plea in the following terms: "If the vendor, or one claiming under him, brought a *vindication* assert no his *dominium* which would still exist till the time of *usucaplo* had expired, the Edict gave the bonitary owner the defence that the *res* had been sold and delivered to him or to a predecessor in title by the plaintiff or one from whom he derived title (*exceptio rei venditae et traditae*), a defence extended with necessary modifications of form to cases of alienation other than those on sale."

Above all the *exceptio rei venditae et traditae* is an *exceptio*, naturally partaking of the nature of the other Roman *exceptiones*, so that it would be of interest to see what the *exceptio* meant in the Roman Law.

From a rational point of view it is of the essence of an *exception* to be a means of defence granted by the law to the defendant to rebut the plaintiff s claims. It is very natural that the possible methods of defence should be given great importance, because obviously without them Justice cannot be well administered. However, perhaps rather surprisingly, in the days of the *legis actiones* , when the formulary system prevailed, there were no special formulas

playing the part of *exceptiones*. In reality this does not mean that pleas were completely alien to the system; it is true that nothing can be stated with absolute certainty but it seems that it is highly probable that the facts which later became the subject matter of the *exceptiones* were dealt with in *iure,* the *lagis* action being simply granted or dismissed according to the proofs adduced to either contention. If it appeared that the plea was intrinsically connected with the action the magistrate had the power to order a *sponsio* between the parties, thus giving rise to a *condictio* which played the part of a preliminary *actio* .

The old doctrine regarding the nature of the *exceptiones* is than they are a praetorian remedy intended to create a negative factor which, at least potentially, may be of service to the defendant. Savigny offers very strong arguments against this opinion; especially that of the existence of *exceptiones jure civili* like the exception *dominii*, exception *Senatus Consulti Macedoniani* and also *Gaius`* sentence: *exceptiones vel ex legibus vel ex his quae legis vicem optinent substantiam capiunt vel ex jurisdictione praetoris proditae sunt.* Savigny opines that an exception takes shape when the defendant wishes to affirm a right paralyzing the plaintiff's claims. Windscheid takes a view, and to his mind the *exception* is any circumstance of group of circumstances which, without denying the truth of the *intentio,* establishes an impediment to its actual operation.

The question relating to the person who may make use of this *exceptio* and against whom it may be employed is open to doubt. In this matter we may subscribe to Voet`s opinion and say that it may be availed of by:

1. The purchaser to whom the thing has been
   a. sold and delivered,

or b. sold but not delivered, provided he has had possession of the thing without any *vitium.*

2. All those qui *causam habent* from the purchaser, for instance his heirs and also his successors by particular title: so that a second purchaser may avail himself of it to rebut the claim of the first seller, although he is withheld from exercising an action directly against the first seller, before the right of instituting the action is transferred to him by the first purchaser, the reason being that the *exceptio* and actual retention of the thing are given preference to the *actio.* The plea may be put in motion not only against the original seller but also against all those who derive their title from him. However it is bound to succumb when a just motive is shown in claiming the thing back : e.g. if the plaintiff gives orders to his representative to the effect that consignment be made only if the price is paid and the representative deliberately disobeys his orders.

The main difficulties which have to be overcome refer to the praetorian or non-praetorian origin of the plea. It is of interest to note that the *exceptio doli (generalis)* is distinct from the *exceptio doli :* it has nothing to do with the specific malice but it tends to paralyse a suit which, though based strictly speaking on the law, is opposed to equity, *ne cui dolus per occasionem iuris civilis contra naturalem aequitatem prosit and qui aequitate fefensionis infrinaere actionem potest doli exceptione tutus est.* in dealing with these questions we are presented with a dense cloud of uncertainty: indeed a feature very common in the study of Roman Law. In fact in this regard the great Italian jurist Ferrini specifically states that the true theory has not as yet been fully proved and therefore there is no other safe way but to subscribe to the opinion with a less tender basis.

Dr. Krueger has offered a theory diverging from the course generally adopted in relation to its origin but in full agreement with the universal opinion that the *exceptio rei venditae et traditae* is a particular aspect, a mere configuration, of the *exceptio doli.* In short this is his theory: the exception *rei venditae et traditae* is not, as is generally held, praetorian. Originally its functions were carried out by the *exceptio doli* but for some reason or other an *exceptio in factum,* in all probability bearing no relation with the edict, began to be employed. It appears that this *exceptio in factum* kept steadily

Gaining ground because it established a permanent evasion of the difficulties in proving the subjective malice of the plaintiff, although, it is true, in the late Classical Period the exceptio doli could well be based on the plaintiff's demeanor objectively appearing malicious—which however, was no constant practice, later the *exentio in factum*, while gradually gaining more importance received the special appellation of exception *rei venditae et traditae* and this is why mention of it is only made in the works of relatively late jurists: Paulus, Ulpianus and Hermogenianus.

The great jurist Ferrini disagrees and suggest a theory, which in general concurs with the one upheld by the majority of writes. The *exceptio re venditae et traditae* was brought to light in republican days, by a praetorian ed'ct probably before the *exceptio doli* itself, in order to protect the *dominus bonitarius* against the *vindicatio* exercised by the *dominus quiritarius*. It could also be availed of by those purchasers, who for various reasons did not become immediately *domini* after *traditio*, for instance when there was a suspensive clause, but as a general rule not by those who purchased from the non-owner. In this case *the exceptio doli* was exercisable, but it was not applicable to certain cases e.g. when the defendant wished to reply to the plaintiff's answer. It is an established fact that in a *condemnatio* the plea of dolus had to appear last of all: so that, when in the middle of a case a contradiction had to be proved, a congruous formulation in *factum* had to be employed—exactly corresponding with the content of the *exceptio rei venditae et traditae.* Although its functions were denoted by its specific mention in the index of the edicts, the jurists of the age after that of Julianns diverted its application to other cases, and later it became only exercisable in those instances. Thus a phenomenon, not uncommon in Roman Law took place: namely that an institution loses its connection with the cases for which it was originally created and in due course becomes applicable only to the cases which have gradually encroached upon it and subsequently enveloped within its sphere of action.

No mention of its original functions is made in Justinian's codification; its new role is outlined only in comparatively recent writers. However, it may be said that clear and direct references to it may be detected in the works of former writers. In D.19, 1, 50 taken from Labeo we read the words : *utpote cum petenti eam rem petitor ei neque vendidisset neque tradidisset.* The meaning of this sentence has been subjected to severe discussion but it appears that it is referring to the plea under review, even if we merely look at its diction. It is dealt with in a way denoting that it has established formulas and procedure and not as an *exceptio camparanda in factum.* In Julianus' writings themselves we can likewise trace a reference. Finally Pomponius mentions an *exceptio quidem opponitur ei de re empta et tradita*; the fact that there is a slight alteration in the terminology is not an absolute proof to the contrary at all, because we can find many instances in which the Roman jurists adopted a different nomenclature from that of the edict.

A case mentioned by Ulpianus apparently militates against this construction. If a slave buys a thing *peculiariter* and he is manumitted by will with a legacy of the *peculium* before the

thing the has bought passes into the ownership of his master, Ulpianus says : *exceptio in factum loco habebit.* It may be said with comparative certainty that this was the original application of the *exceptio.* Consequently it appears puzzling why Ulpianus says: *exceptio in factum,* an expression seemingly referring to a plea liable to vary and not *exceptio rei venditae et traditae,* of which he is certainly aware. The freeman is now an *alius homo,* so that the *exceptio* in its real form does not apply, since he, as defendant, is unable to allege that the thing has been sold and transferred to *him.* Hence an altered formulation of the *exceptio*—A sort of *exceptio utilis*—is necessary; and as can be ascertained from the Vatican fragments these slightly altered pleas are known as *exceptiones in factum.* This shows that we must not be led astray by the use of the words *exceptio in factum* because the do not denote an *exceptio* distinct from the one under review.

Another case worthy of note is that mentioned by Julianus: *a Titiu fundum emeris, qui Semoronii erat* and later Titius, inherits Sepronius' property. In this instance if Titius, as Sempronius' heir claims the thing back, *exceptione in factum comparata vel doli mali summoveretur.* The difficulty lies in determining whether the *exceptio in factum comparata* is the *exceptio rei venditae et traditae* or not. If we turn our gaze to the early days of the latter *exceptio,* we find that it is intended to protect the purchaser who by *tradito* has received *a res mancipi* from the owner. Even in the writings of jurists, when mention is made of the plea, delivery is considered as having been made by the owner himself or by his agent with a special mandate — never by a *non- dominus* . However, the abovementioned case possesses special features of its own namely that Titius i.e. the actual vendor is now the heir of Sempronius, *who was and remained* the owner, on account of the insufficiency of *traditio* according to civil law. In this regard a sentence written by Ulpianus is of great bearing : *alienatum non proprie dicitur quod adhuc in dominio venditoris manet ; venditum tamen rectedicetur.* Hence the term *venditum* could be used even in this case, although the ownership *stricto jure* remained with the original owner and this is in full agreement with the general law of Sale.

Admittedly there are very powerful arguments militating against the assertion that this case comes within the sphere of operation of our *exceptio.* First of all the *exceptio in factum comparata* is evidently of an uncertain character without any clear formulation, which decidedly makes it appear distinct from the *exceptio rei venditae et traditae.* Secondly, there is not any clear reference in any of the jurists' writings to a case of a transfer a *non domino.* In spite of these arguments Ferrini subscribes to the opposite opinion i.e. that the case under review is no other than an extension and a particular application of the same plea. On the authority of Marcellus, Ulpianus says: *arcellus scribit, si alienum fundum vendideres et tuum postea factum petas, hac exceptione recte repellendum* and while commenting the edictal index he clearly states what may be rightly called *venditum.* In this manner the case of transfer *a non domino* is included within the orbit of *hac ezceptione* and thus Ferrini accepts this opinion and says that it is impossible to forego the conclusion that the case mentioned by Ulpianus indicates an extension of the *exceptio rei venditae et traditae.*

If we look at this *exceptio* from a wide point of view, we cannot but perceive that it functions in the Roman legal System in a way which gives it the character of a particular application of the principle: *malitiis hominum non est indulaendum :* and bence it is bound to be in constant relation with the general plea, consequent upon the acceptance of the abovementioned undeniable maxim: the *exceptio doli (generalis).* The praetor took upon himself the task of putting a halt to the injustices and the very ingenious devices to defraud unsuspicious people which came in the wake of arbitrary principles of law. This plea is one of

the weapons adopted to beat down these fraudulent devices and in some cases, especially when there is an explicit or implicit declaration on the part of the plaintiff, with which his actual conduct can be put in contrast, the two *exceptiones* are concurrent. However it is interesting to note that no concurrence has ever been recorded when the *exceptio rei venditae et traditae* safeguards any person who has purchased from the owner himself or from his authorized agent.

The *exceptio rei venditae et traditae* is interesting not only in its nature, but also in its significance from a wide point of view, because it can throw much light on matters beyond itself and on the circumstances which brought it to existence. In the Republican era, in which it probably arose, there was a substantial decadence in Roman manners. The effects of this decadence are easily discernible in all branches of Roman Law, especially in Family Law. Divorce became a common resort of irate husbands and wives, perhaps due to the *lex maenia* itself; this law greatly diminished the ancient authority of the family council and fixed specific cases in which divorce was admissible, thus rendering the people familiar with these cases and tacitly encouraged them to ask for a divorce at the first occasion. In other branches of law the *Querela Inofficiosi Testamenti* became an institution frequently availed of, because members of the family became somewhat estranged, on account of the laxity in customs which pervaded the whole population. In the patrimonial relations between men the old, renowed *fides Romana* absolutely lost its vigour, and everybody helped in the search for *cautiones* and the Gentleman's promise was held in universal contumely. The dispositions of Rutilius regarding bankruptcy and the *action Pauliana,* in defence of creditors—all tend to show the far reaching decadence in the economic relations; everything went from bad to worse and the decadence grew more accentuated with the increase of commerce. These were the circumstances giving rise the *exception rei venditae et traditae* and even at first sight the simple observer can perceive that it was a national necessity, in order to check malicious people from taking advantage of the rigour of the law and perhaps bringing ruin upon innocent, unsuspicious people. Villains have always played their part in life and the Roman legislators with their world-wide fame in legal affairs stood up for Justice's sake by presenting to their citizens wise provisions of law, among which the *exceptio et vendite et traditae,* at a time when the *graeca fides* had largely smothered the ancient Roman probity.

INTERNATIONAL LAW— ITS FOUNDATION & DEVELOPMENT

(BY George Zammit, B.A.(lond), L.P.)

MOST writers of International Law think it fit to put, in the introductory part of their work, the eternal question: "Has International Law a positive character? Is it a law in the real sense of the word?"

The question may seem an idle one; yet it is worthy of examination and discussion. The fact that a State has rights as against other Stated, has seldom, if ever, been utterly denied. Even savages recognize the obligations of good faith and the wickedness of breaking a covenant. On the other hand, the right of the stronger to impose what terms he pleases, and if necessary to push his demands to the point of the utter annihilation of his enemy as an independent power, has been almost as generally admitted. Besides, covenants have, both in ancient times and in our own days, been treated as mere "scraps of paper"; and these two open and reckless instances of how the rules of good neighbourhood between States are in fact discarded, would be enough to convince one that there is no such thing as a law of nations and that International Law is a fond dream of either interested speculators or benevolent Utopians.

And such a view would indeed be justified when based on certain pages of past and contemporary history. The very fact that so much stress is laid on certain elementary principles which ought to serve as laid on certain elementary principles which ought to serve as the basis of all relations between State and State is a proof that such principles have as yet not attained, on the minds of men, that hold which they ought to have attained. *La frequence de la proclamation d'une doctrine ne prouve que fort peu en faveur de sa bont; elle temoigne mime contre elle, si la proclamation n'est pas suivie d'acceptation:* and the failure of the League of Nations is a witness to the truth of this assertion of J.Lorimer. laws are promulgated and enforced within the boundaries of a State, because all the forces of the State are united against all actual and possible offenders; but nothing short of a world conflagration can prevent a powerful Stated from discarding those rules which nations have unanimously accepted as Law.

And yet, the very outbreak of a state of hostilities between nations, far from being a denial of those universal rules of conduct which are supposed to regulate the relation of States, is a confirmation of such rules—if not of their efficacy, at least of their existence and acceptability. For it is the fable of the wolf and the lamb, that, mututis mutandis, repeats itself over and over again: Strong people are never content to destroy their enemies without first proving them to be wholly in the wrong and utterly unworthy to live. An aggressor has never spoken of himself as an aggressor, but as a defender of the rights and liberties of his nation, a champion of truth, honour and justice: and thus, throughout the centuries—and our own century forms no exception—Have the grossest and meanest injustices been committed in the name of Justice.

The development of International Law is to be traced back to the most primitive stages of human society; and just as medical science, which aims at ensuring physical health, is an outcome of the fact that the life of man is beset on all sides by an infinity of diseases, so the rules of International Laws, that have as object the peaceful setting of differences between nations, sprung form the innate pugnaciousness of man. It was, as a matter of fact, war, that gave rise to such feelings of chivalry and respect for an antagonist which are a ray of light

amidst a world of cruelty and barbarity. These is a well known story, for example, of the Arkansas of North America who gave a share of their powder to the Chickasaw to fight them with; and the Algonquin are reported to have refrained from pressing an attack on the Iroquois on its being pointed out that might had fallen. Apart from this, the welfare of savage and primitive societies is not without its rules and limitations. Often an open and honourable declaration of War is insisted on; the persons of envoys areas a rule respected; agreements are maintained, bad faithe is condemned, and often, permanent injury to enemy property is forbidden. Among the problems, however, that outbreak of hostilities invariably brought with it, there was that of finding a way of dealing with captive enemies, and often enough with their families. Hence the different methods of killing or enslaving the captive warriors or their families. In ancient Egypt, the bulk of the males for sacrifice or for special vengeance. This is how an inscription of the XIX dynasty speaks of the King of the day : "He is a lion who strikes with the claw... he has a heart closed to pity; when he sees the multitude he lets nothing remain behind him." And further on, a general, narrating a single combat with a foe, says: "...and my arrow struck in his neck . he cried out and fell upon his nose I brought down upon him his own battle axe. Then I took his goods, I seized his cattle; I spoiled his dwelling; I grew great thereby" And yet, amidst all this ferocity, we find Rameses II making a treaty with Cheta, providing for the return of deserters from either country to their original home, and promising that neither the deserter himself nor his wives or children shall be destroyed, nor his mother be slain. But this is an exception ; and a very strange exception in an age when the Asyrians were committing unheard of atrocities on the conquered foes. "To the city of Kinabu," says Assur-natsir-pal 9883-858 B.C.), "I approached, I captured it. Three thousand of their captives I burned with fire. "I captured many of the soldiers alive with hand. I cut off the hands and feet of some, I cut off the noses, the ears and the fingers of others; the eyes of the numerous soldiers I put out...Their young men and their maidens I burned as a holocaust." (Sayce, Records of the Past.ii)

Even among the Hebrews, the chosen people of the Lord, is similar ferocity to be found. When Joab took Rabbah (I. Chron.XX,3), "he brought forth the people that were therin, and put them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brick-kiln, and thus did he unto all the cities of the children of Ammon. " But the Book of Deuteronomy lays down that a female captive must have her time for mourning, and, if married by her captor, not be sold nor dealt with as a slave. Besides, the Hebrews generally showed themselves to be great respecters of a promise given on oath, to strangers. Joshua, for example, kept his word with the harlot who had introduced his men into Jericho, and spared both her and the general massacre. And we must not forget that there are sound theological arguments in explanation of the seeming inhumanity with which the chosen seed treated from time to time the enemies of Israel. Such arguments, however, would be out of place in an essay on International Law. In India an China, chivalry in battle is recognized, honourable methods of warfare are praised, and atrocity is condemned. "We have not laid fire to burn our enemies," says Bhima, in the Mahabharata [V. Duncker, History of Antiquity, Vol. IV, P. 93; "nor cheated them in the game, nor outraged their wives; by the strength of our arms alone we destroy our enemies." And Manu has a complete, though brief, legal code of warfare: "Let not [the soldier] strike with weapons concealed, nor barbed, nor poisoned... Let him not strike an eunuch, nor one who joins the palms of his hands [in supplication] , nor one who flees, nor one who says 'I am thine' Nor one who sleeps, nor one who has lost his coat of mail, Nor one

who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed...nor one whose weapons are broken, nor one who has been grievously wounded." (Manu, vii, Sec. 90). Passing further East, we find similar ideas among the Chinese; and chivalry in war. but strenuously oppose war and militarism. Mencius teaches that a victorious king should not annex the conquered territory except by the will of the conquered people. When King Senen had conquered Yen, he asked Mencius if he should take possession of it. Mencius replied that, if the people of Yen would be pleased with his doing so let him do it; otherwise not. (Mencius, Book I, pt.ii,Ch.10). "If it were merely taking the place from the one State to give to the other, a benevolent man would not do it; how much less will he do so when the end is to be sough by the slaughter of men?" And this voice calling to us across the darkness of past ages is enough to put to shame our enlightened and highly humanitarian generation!

But the first people to develop something like a regular international law were perhaps the Greeks; it was they who first worked out a regular system of arbitration. Periander of Corinth arbitrated between Athens and Mythilene as to the possession of Sigeum. In the sixth century Spartha arbitrated between Athens and Megara, and appeals to Delphi were not uncommon. (Thucydides, I, 28). Sometimes States were pledged by oath or by the deposit of a sum of money to abide by arbitration. Of course, the history of Greed warfare is not devoid of its aspects of cruelty and atrocity. The merest acquaintance with Homer's Iliad would be enough to prove this. But the stripping of the slain, the erection of trophies in temples, the ravaging of the land and the burning of houses are all condemned by Plato. Aristotle points out that the enslavement of captured enemies is unjust, at least in theory, for "no one would say that he is slave who does not deserve to be a slave, for if so, those who are held noblest might be slaves and sons of slaves if they happened to be captured and sold." (Arist. Politics, I,vi).

At Rome a defeated enemy was in principle rightless. The very type and exemplar of property is that which is captured from an enemy. Stranger and enemy are identical terms—*hostes*; and no stranger is acknowledged to have any rights unless he is under the protection of Rome either as a member of an allied State, or as a protégé of a Roman citizen. Yet, there is no reason to doubt that the general feeling of the Roman world condemned excess of barbarity. Camillus says that his soldiers direct their arms not against that age which is spared even in the capture of a town, but against armed men, (Livius, V. 27). The slaughter of non-combatants, old men, women and children is frequently spoken of in terms of condemnation, even of horror and Livv's words *"jure belli in armatos renuanatesque caedes."* Imply the full limitation of the right of killing to active combatants. The generals Marcellus and Scipio condemned the violation of women and took measures to prevent it; (Grotus, Book iii,Ch.iv) and on the whole we may consider Virgil to be quite justified in his boast about the method of Roman warfare : *Parcere subjectis et debellare superbos.*

In the teaching of the Koran, Moslems can never be turned into slaves by Muslem captors. But the attitude towards non-Moslems was very different : " and when we meet those who misbelieve, then strike off heads until we have massacred them, and bind fast the bonds." Within the Moslem world the Koran looks forward to universal peace and forbids the enslavement, but even the refusal of quarter.

And now we came to the character and effects of Christian doctrine and its influence on the nations as a universal creed.

The Gospels pronounce definitely against violence in any shape or form and though the soldier's profession is not condemned the Church endeavours to lay down the conditions upon which war is justified. "To wage war," says Saint Angustine, "is not a crime but to wage war for the sake of booty." (Sermo xix). War is therefore just if it is waged in resistance to an aggressor. Ambrose declares that he who does not defend a friend is as bad as the aggressor; while on the other hand Augustine strongly condemns malice, cruelty and vengeance, the implacable spirit, savagery in insurrection *(feritas rebellandi)* and the lust of dominion; (Contra Manichaeos, Corpus Juris,892); and it was also Augustine who laid down the principle : *Hostem pugnantem necessitas deprimat, non voluntas.* (Epist. 207). Franciscus a Victoria goes a bit further and asserts *quad etiam in bello contra Turcos non licet interficere infants. Imo nec feminas inter infidels.* Nay, the very idea of medieval chivalry—the cult of the *parfait gentil* knight, sworn to succour the oppressed, to defend women and children, is true product of the influence of the Church side by side with the barbarities of the period. In time of peace and in time of war the mediaeval world found guidance and power in the spiritual supremacy of the Pope, which accustomed men to the reconciliation of national independence with a spiritual authority to whom all alike could appeal. As a matter of fact, the modern idea of the codification of rules that would govern the relations between communities emerged when the so called Reformation broke up this unity. Men had lost a father and they wanted to bind themselves reciprocally and guarantee brotherly behaviour among themselves. Grotius himself though affirming that the duties of men are not circumscribed by on certain universal attributes of humanity, is in reality building his theoretical edifice on that very Gospel which he is discarding, for what philosophy, more that that of the Gospel, teaches men how to enjoy the blessings of earth without incurring into mutual bloodshed? The beneficial influence of the supremacy of the Head of the Church is admitted also by non-Catholic writers, such as Hobhouse, and Vincenzo Giobarti, in his *Del Primato Morale e Civile Degli Italiani,* says: "

"Il potere unificativo e pacificativo d'Europa appartiene tant piu ragionevolmente al Pontefice, che non si puo con minor pericoko di abuso, con piu speranza di profitto e con maggiore agevolezza di esecuzione, collocare altrove... Se la monarchia universale, un sogno, come l'alleanza democratica dei popoli, immaginata da certi filosofi, si puo bene sperare, senza assurdo una confederazione morale e civile di tutte le nazioni, a mano a mano che esse enteranno nel giro della fratellanza e della paternita spirituale, stabilita dal Crisitanesimo. L'unica paternita di tal genere e il Papa, il quale e quindi l'unico principio acconcio ad attuare la fraternita dei popoli."

But also Gioberti himself was a dreamer, and the study of International Law can never bear any fruit if it discards the actual state of things and limits itself to making suggestions as to what ought and what ought not to be done. The physician who instead of curing his patient's disease, bores him with lecturers on the perfection which nature lacks, ruins his time and also the time (if not the life) of his patient.

More practical than Grotius and Gioberti are Mazzini and Comte, who come to the conclusion that each nation is a member of the family of nations which constitutes humanity, possesses duties as well as rights in virtue of its position, and derives a higher honour and more lasting glory from its services to the greater whole of which it is a part than from any exhibition of superior strength shown in rivalry with its fellow members. Just as International

Law rests in its beginnings on the conception of humanity as incarnate in the person of every human being, so in the consummated conception of right and brotherhood between nations, it touches the other pole modern ethics—the conception of humanity as a whole, the sum of all human beings. The Englishman owes a duty to England. He does not owe the same duties to Spain or France, but he owes them recognition as members of the family of nations, and there are times when he can best serve England by reminding her of what is due to them. The true patriotism—patriotism not circumscribed by the narrow limits of the border lines—is the corner stone of true internationalism.

And yet, we are bound to admit, such a corner stone does not in fact exist. The ideals of thinkers and statesmen do not coincide at all with the practice of nations. Optimistic statesmen, about twenty years ago, would have thought that the civilized world had passed through the age of blood feud in which any quarrel gave rise to a war of extermination. There was even a time when it was thought that custom had restricted the sphere of fighting, excluded non-combatants from the ring, and prohibited the general massacre of the king folk. But the tragedy is being acted beneath our very eyes which shows us clearly that twentieth century man is a primitive as his forefathers of the remotest antiquity, and the outcast Cain is still thirsty for the blood of his brother Abel. When the League of Nations was founded, it was believed to be an improvement on the Hague Tribunal, for this Tribunal had no power except the moral power of an appeal to opinion. "The next stage is to institute a Court for the settlement of disputes," wrote Hobhouse in 1906 (Morals in Evolution), "it is not difficult to imagine a time when the decisions of that Tribunal shall have gained such authority that to dispute them will be held at once an outrage on justice and a menace to the world's peace—such a menace as would provoke a combination of powers to coerce the recalcitrant party. But Hobhouse was only reasoning in a vicious circle, for recalcitrant parties will never be lacking so long as man is man. What the Gospel has not succeeded in doing alter twenty centuries is hardly to be achieved by any human institution.

When in 1871, representatives of Russia, Austria, France, Germany, England, Italy and Turkey met in London ta establish the international principle that no state can be exonerated from the observance of treaties of permitted to modify its own stipulations without the consent of the contracting parties, it was thought strange that nations still existed that thought themselves and others capable of violating this elementary moral principle—the sacred character building sand castles within the reach of the irresistible violence of the Ocean. For how can nations have a common juridicial conscience, says Tullio Giordana (*La proprieta private nelle guerre maritime*) if men do not agree even on general ideas?

But in spite of all this, there *is* a positive law of nations. The fact that murders, thefts, frauds are being commited every day is no argument against the existence of Criminal Law. Similarly, the instability of the character of man is no proof of the inexistence of a Law of Nations. On the contrary, it is exactly this instability that is the juridical foundation, the very *raison d`etre* of International Law, as it is the innate tendency of the individual towards crime that forms the justification of Criminal Law.

For the student of International Law, therefore,, this term stands only for positive International Law, that is the sum of rules that actually govern the rights and duties of States in

their reciprocal relations. (Tullio Giordana). All the rest is nothing but philosophical speculation, philanthropic effort, rhetorical pomp. It is not doctrines and books that determine progress; but the collective force of the masses; and if form time to time a thinker appears who exercises a real influence on the progress of his times, like Voltaire or Beccaria, it is because such a thinker has found expression to a reform that had already silently taken place in the intimate consciousness of the masses. He has found the happy means of revealing collective consciousness to itself. This is why, in spite of the restlessness of human aspirations; such numerous associations have sprung up in recent years, associations of commerce and industry , of scientific research; of art, religion, music, letters. For there are common interests that make man call to man across the boundaries of States. We have witnessed the institution of the International Postal Union, the Universal Telegraph Union, and the Universal Wireless Telegraph Union; and we have positive international agreements for passenger and freight transportation by sea and land, international maritime codes and shipping regulations, international rules of patent and copyright, international rules of war itself.

It has been well said *(Hon. D.Jaques Hill: World Organisation and the Modern State)* that ever since the beginning of the modern era two opposing views of the State have been struggling for predominance. These are:

I. The *Macchiavellian* view that States are wholly unlimited powers owing no responsibility to one another by no rights and obligations save those they choose to establish, and by these only so long as they do not choose to repudiate them; and

II. The *Grotian* or *Althusian* view that States exist for the establishment and maintenance of rights, that therefore their powers are limited and that they have duties towards one another, being themselves members of a society of States. At various times and in different States one or other view has prevailed; but the growth of inter-community is turning the scale ge4nerally in the most civilized States in favour of the Grotian view, which, after all, is nothing but an exposition of the Gospel doctrine. For the State is a juristic person, and a juristic person cannot claim arbitrary rights in respect of another juristic person without denying the very nature of both. Just as the life of man in a " state of nature" is, in Hobbies' famous phrase, "solitary, poor, nasty, brutish and short," so the life of a Stated that chooses to remain irresponsible, unsocialised, a political Leviathan beyond the greater law, must also be poorer, more unhappy, more brutish. Poorer, because of the economic insufficiency of each State, mire unhappy, because of the all-round insecurity of men's lives and wealth; more brutish, because public polity reflects and reacts upon every standard of life. One civilized people cannot hurt the interests of another without hurting its own as well. Consider the significance of such a statement as the following made by P.A. Molteno in *contemporary review*, February, 1914: The trade of Germany with the British empire "has more than doubled since 1902, and has now reached the enormous total, in 1911, of 185 millions sterling. In fact... one tenth of our population are absolutely dependent upon German trade." What has been said of England with regard to Germany, can be said of any state with regard to any other state; and, in the words of R.M.Maciver (Community, Book III, Chapter IV) "one civilized community, in destroying the commerce and capital of another, is destroying or injuring the investments of its own members."