

# LAW JOURNAL

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## EDITORIAL

### A NEW EPOCH

"IF it is really the case", writes the Editor of "Britain Today" in the July, 1945 number, "that wars are turning points between epochs, then we are standing on the threshold of a new epoch whose character we have yet to discover or, better still, create," and, indeed our little island forms no exception. Postwar reconstruction plans, proposed changes, indicative of that health spirit which characterizes nations conscious of their role in the great drama of international upheaval—all point out to the fact that we who have lived through some of the worst pages of the last war, feel quite prepared to shoulder the task that we who have lived through some of the worst pages of the last war, feel quite prepared to shoulder the task of participating in the general re-birth and desire for the New. This intellectual epidemic has left no field unexplored.

We are witnessing the formation of a catholic Institute which we are justified in hoping, will be a monument *aere perennius* to its founder—our present Archbishop. We have studied with pleasure the plans put forward by Mr. Austen St. B. Harrison and Mr. R. Pearce S. Hubbord concerning our University and our Law Courts in their report accompanying the Outline Plan for the Region of Valletta and the Three cities. Family life, social welfare, the theatre, agricultural prospects—all matters, ranging from the drafting of a new Constitution down to the development of the local wine-trade—have come within the sway of this social phenomenon. The constant contact with death which we have experienced in the recent past has deeply rooted within us a craving after life—a life in which the old is to be discarded as a failure and the new to be avidly sought after. Even in the masses this craving after the new is clearly evident. Luxuries which most people did without in pre-war days, when they could easily and cheaply be got, are today freely indulged in even by the "poorer" classes. People have realized that life is short and beset by snares on all sides. This pagan philosophy of *carpe diem* is indeed to be deplored but, if mingled with a righteous spirit, some good will come out of it all, when life has gone back to normal and society, intellectual and political revolutions. The Past has shown that an inexplicable sense of sobriety pervades the universe and it is consoling to think that however turbulent the waters of Genesareth there is always a Christ ready to quell them.

### THESES FOR DOCTORATES

Nor, amid this curious conglomeration of the serious with the ludicrous, has the academic constitution of our university been spared. Most of our readers will probably have followed the recent correspondence in the local Press concerning the system of granting Degrees.

We do not intend to enter into the merits of this correspondence. Much good will and a sincere desire to benefit our Alma Mater has been shown on all sides. But we cannot help admitting that the introduction of the thesis system in the case of candidates for a doctor's degree would be a very welcome innovation; although it can freely be said that Doctors of our University, in whatever Faculty, can hold their own with honour both here and abroad.

Nor do we hesitate in showing our disagreement with those who would exclude the teaching of Maltese Language and Literature from the University curriculum. A promising group of Maltese writers whose calm "kindly light" is Monsignor Psaila on whom the Degree of Doctor of Literature (*honoris causa*) has lately been conferred, are doing their best to build for Malta a new literary tradition which posterity will consider as one of the most precious gems of our national heritage.

## CHANGES IN UNIVERSITY STATUTE

Lately, some changes were made in the University Statute and Regulations and we feel it our duty to disapprove on of these changes for practical, if not for sentimental reasons. In our Editorial of the May, 1945 number, we expressed the opinion that Italian ought to be compulsory for students intending to join the Faculty of Laws for the reason that all Government published jurisprudence so far has been published in Italian (with the exception of the last volume) and also because of the fact that all acts of civil life in Malta were drawn up in Italian down to 1935; and the "Times of Malta" in its issue of the 22<sup>nd</sup> March, 1945, whilst disagreeing with our views regarding compulsion, declared Italian, if optional, to be a "choice of all those students who desire to become *more proficient lawyers*." (The italics are ours).

In May, 1945 Matriculation candidates could, if they wished choose Italian as one of their Matriculation subjects. The picture has now been changed by reason of an amendment in the University Statute which appeared in the Government Gazette of the 21<sup>st</sup> August, 1945 (Govt. Notice No. 400) . In virtue of this amendment, the Stature now in force lays down that Latin is compulsory for those intending to join the Faculty of Literature (a Faculty that includes the Preparatory Course of Laws); but, as only *one* subject may be chosen from Group B, Italian which comes under this group has to be left out.

This must be due to an oversight; and it is with the confidence of people who know that right is right and that culture in the liberal sense of the word is to be kept distinct from party politics that we propose a return to the old statute. We cannot believe that it was the will of the people responsible for the amendment in question to make Italian optional for students entering the Faculty of Medicine or Engineering, but barred for students intending to become lawyers and priests!

## A CHAIR OF PALEOGRAPHY

In connexion with the importance of Italian, side by side with Latin in the Matriculation for Law students and in the Preparatory Course of Laws, we think it not out of place to remind our readers of the thousands and thousands of unexplored documents, contracts and wills of the times preceding the advent of the Order of St. John. Such documents, written in Latin or

Italian, are to be found not only in Government Archives but also in private family archives as well as in the old registers of certain parishes, as there was a time in the history of our Islands when wills and contracts could be drawn up by priests.

It is to be regretted that such documents which could throw much light on the civil life of our ancestors in the periods running from the coming of count Roger, the Norman, to the donation of Malta to the Knights of St. John of Jerusalem by Charles V, should be left a prey to worms and the ravages of Time. A Chair of Paleography in our University, which it will be optional for students to choose, will help much in bringing to light one of the most obscure and least known pages of our history.

### **CONSTITUTION OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN MALTESE CASES**

From comments which are of a pure domestic character we now pass over to discuss a point of more general interest — a point concerning appeals from our Law courts to the Judicial Committee of His Majesty's Privy Council.

His Majesty the king, as the "Fons justitiae" by Prerogative can receive petitions of his courts in the Empire, and, these petitions are referred to the Judicial Committee of the Privy Council in order to tender its advice; in fact, technically the Judicial committee is not a Court of Justice, but on the other hand, it has emancipated itself from the position of a mere counselor. In our case, civil causes may go before the King in Council from the Court of Appeal and from the Court of Magistrates for the Islands of Gozo and Comino in secondary instance when the subject matter is over £500 and when the question for adjudication is of great social interest. An appeal from the judgements of the Criminal Court is also possible.

In Maltese cases the Judicial committee has to interpret and apply Maltese Law and the principles sanctioned in Maltese Jurisprudence. There is no doubt that the Judicial Committee is composed of jurists who have risen to great heights in the legal sphere and who have all-through made themselves prominent for their erudition, penetration of mind and their good sense in dealing with questions of fact. Even a glance at the names of the members of the Judicial Committee will unmistakably bring home the most satisfying idea that some of the best legal brains will consider the intricate problems that go up for adjudication. But Maltese Law and case-Law have to be applied and these are by no means similar to English Legislation, for they have had a development that is fundamentally diverse. Would it therefore not be helpful to the eminent English Judges to have the assistance of one or two Maltese jurists, who have likewise attained eminence in the legal field? It is obviously very difficult for a Judge who has been constantly in touch with a particular legal system to detach himself from that system and apply a completely different body of laws according to the interpretation traditionally given to it in local judgments, couched in languages which he probably does not understand. The degree of difficulty will decidedly not remain identical, if two jurist bred-up in the orbit of operation of the special local laws and customs are appointed Privy Councillors and invited to take part when Maltese cases come up for adjudication.

We note that in a speech delivered at the Jubilee Luncheon of the Society of Comparative Legislation, the Right Honourable Lord Macmillan pronounced the following words: "People have sometimes said to me, 'How on earth do you manage in the Judicial Committee of the Privy Council to administer Hindu law one day, Mahommedan Law the next day, then French Law, and then again Roman-Dutch Law, and so on through the whole gamut of Jurisprudence?' At first it seems an impossible task; but after a good many years there this great truth has been borne in upon me—and I have realized it more and more from year to year—that after all, Justice is one; and that the methods, technique and the forms which it assumes in different countries are only its trappings." However, once the Judicial Committee has to decide *according to the law* and is not a mere equitable arbiter, the argument in itself may not entirely surmount all possible objections. Incidentally, at the same Luncheon the Right Honourable viscount Bennett who, it appears, belongs to the Canadian Bar, remarked that it was "a matter of some satisfaction to know that the society of Comparative Legislation exists. We in some of the far-off Dominions think there is good reason for it, at least, when arguing before the Privy Council!"

In reality, as the law now stands, the Crown can appoint one or more Judges of certain specifically named colonies and dominions to be members of the Privy Council. No extension of this Act has been made, as far as is known, in regard to Malta which is consequently in a position inferior to that of other parts of the King's dominions. "Provision is made for two paid members, being Judges or ex-judges of Indian High Courts, or barristers, advocates or vakils of fourteen years' standing, who hold office during good behaviour, retiring at age 72, by the Appellate Jurisdiction Act, 1929" (Ridges-Constitutional Law). All this makes one unable to understand the cause of the differentiation which is being made in relation to Malta, although perhaps it may be explained away by the fact that there has never been any attempt to procure a remedy in this direction. Privy Council has now dawned upon us and we have made the suggestion in all humility and respect, convinced that we have not spoken in vain.

## NON-RETRACTIVITY OF THE LAW

We wish to make reference to Govt. Notice No.468 published on the 29<sup>th</sup> September, 1945 not on its merits, because we have already declared our opinion in the 1<sup>st</sup> issue of the Law Journal but on account of its having been applied immediately by the University Authorities contrary to all principles of Transitory Law. A law is enacted for the future and not for the past; so that, saving an express contrary provision of law, vested rights arising before the promulgation of the law will not be affected in any way, and in an analogous sense it may be said that the legislator should derogate to this rule only if exceptional circumstances justify such a derogation, on condition that certain inviolable rights of the individual suffer no prejudice.

When students start a university Course, they should continue to be regulated by the Statute obtaining on the beginning of the course; and nothing less than an abuse of sovereign power can subvert the position. A student who undertook to complete a particular Course should not find himself presented with any new condition, for the completion of that Course; in fact, any alteration would be intrinsically unjust, and indeed govt. Notice. No. 468 has not been given retroactive force by an express provision which is a condition *sin qua non*.

In general no distinction between private and public law is to be made apart from the difficulty in ascertaining what is really "public" and what is not. As far as we can see, Government Notice No.468 is not a matter necessitated by public policy or by notions of public order or that it involves questions of procedure. It would be totally unjustifiable to say that a law of a public nature (whatever that may mean) needs no specific provision to give it retroactive force : the very notion makes one shudder, when one thinks that criminal law is a branch of public law.

After all, this is not a matter of pure theorizing on our part. It is upheld by many judgments of our Courts of Justice, among which we find one which interests us closely, dealing as it does with the application of the University Statute. His Majesty's court of Appeal in Flynn vs. Zammit nominee (1926) declared one of the contentions of the defendant inadmissible because he "la disume dalla disposizione dell'art. 40 dello Statuto Universitario vigente, quello cioe, del 1921 mentre tale Statuto non puo evidentemente applicarsi alla fattispecie presente, sorto sotto l'impero dello Statuto universitario del 1915 e da disciplinarsi pertanto coilo disposizioni di tale Statuto". The 1921 Statute had been enacted when the plaintiff had started his Course. The Court thus declared that no modification in the Statute was operative in his regard.

## **CIVIL LAW NOTES**

In the first issue of the *Law Journal* we expressed our desire to have the Civil and Commercial Law Notes translated from Italian into English. We are glad that steps were taken immediately by the Government; in fact a translator was appointed with the charge of preparing a translation of Professor Caruana's Civil Notes. It is rather disappointing that only a very small part of the Notes are now ready. The University Authorities have now been approached with the purpose of hastening the translation and the stenciling of the Notes so that the junior Law Students may have the opportunity of utilizing them. We have the assurance of the Honourable the Rector of our University in the sense that no stone will be left unturned to have the Notes translated, typed out and distributed in good time. We are glad to say that the typing has now been taken in hand; but we take this occasion to point out that the matter should continue to receive serious attention and all measures should be adopted to ascertain that the Notes be given to the present junior Law Students *at least* concurrently with the lectures or, better still, ahead of them.

## **PROFESSOR E.C. VASSALLO, M.A., LL.D.**

Malta has had the misfortune of losing a great luminary of legal science in the person of Professor E.C.Vassallo, whose death occurred on the 20<sup>th</sup> September, 1945.

Born in October, 1874, he had already attained his degree of Master of Arts at the age of twenty-one after having obtained the first prize in the Matriculation Exam. In 1898 he graduated in Law obtaining the 1<sup>st</sup> traveling Scholarship, which gave him the opportunity to continue his legal studies in London for one year.

For the community in general professor Vassallo will ever be remembered as a refined gentleman and a barrister of extensive practice in the civil and commercial lines; for the University he will live as a painstaking and efficient Professor of Constitutional and

International Law; for these entrusted with the administration of the Island his name will revoke a personality worthy to be called to the posts of Assistant Crown Advocate, Crown advocate and chief Justice—posts' which his innate modesty prompted him to refuse; for the legal profession, he will always be mourned as an excellent Vice-President, President and lastly Hon. President of the Chamber of Advocates. In fact now, on his final departure, the memory of Professor Vassallo was highly eulogized by His Honour the Chief Justice, sir George Borg, Kt., M.B.E., LL.D., and Professor V. Caruana, B.Litt., LL.D., in speeches delivered at the Law Courts.

An eminent barrister, professor and citizen, Professor Vassallo has vanished from amongst us. The man is gone but his name has become a symbol of all that is best and noblest in our race.

### **MAJOR ADRIAN DINGLI O.B.E., M.A., LL.D**

Since the appearance in our last number of the short biography of His honour Sir Adrian Dingli, C.B., G.C.M.G., LL.D., for which the authors 'Mr. Joseph Ganado, B.A., President of the university Students' Law Society, and Mr. Joseph Micallef were deeply indebted to Sir Adrian's son, Major Adrian Dingli for the biographical Notes and comments tendered, we have been very sad to hear the news of the death of the latter.

Born to Sir Adrian from his second wife, Amy Mildred Mary, daughter of W.H. Charlton of Hesleyside, Northumberland, he took his M.A. degree in Malta a few months before his father's death and then proceeded to Italy where he succeeded in obtaining the degree of Doctor of Laws, a degree followed after the lapse of about three years by the LL.D. of our University.

In England, after the necessary preparation he was called to the Bar, and as a lawyer he excelled in Private International Law, especially in its relation to the status of Italian subjects, their property, family law and laws of succession, in such a way in the British Army he took part in the fighting in France. In him the lawyer, the citizen, the man were all the direct outcome of a person whose leading light was the principle that "it is not the purely material things that matter most in life but it is the peace that comes from the consciousness of having striven to the best of our natural abilities after knowledge", as he himself wrote to Mr. Ganado.

His greatest ideal in life, as he states in the above-quoted letter, was to follow the path traced by his father. "on the other hand," he continues, "fortune and inclination have cast me into the maelstrom of a wider and more modern world in which judgments are harsh and the waters are troubled. Yet values are the same and eternal : 'plus ca change et plus c'est la meme chose'; and, in an analogous sense remember that 'tutto il mondo e paese' and that intellectual citizenship of the world is a high achievement".

As a son of our Alma Mater, a true Maltese and a member of the Empire he is at the same time, in the words of the late Lord Strickland, "a representative of all that is best in England."

To his glorious name, the honour of a grateful nation. To his soul, the peace which his integrity so well deserves. In our hearts he will be entombed with all that veneration due to the worthy son of Sir Adrian Dingli, the father of our present laws the link between the past and the present.

# JUDGE DEBONO

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

PERHAPS out of all the makes which now only constitute appropriate epitaph to the great legal luminaries of the past—perhaps the one most familiar to Law Students is that of Judge Paolo De Bono. His “Storia della Legislazione in Malta” and his “Fallimento nel Diritto Maltese” form part of the curriculum of the legal studies carried out in our University. I need, therefore, make no introduction; his works have ensured, maybe, perennial fame. But can we say that we *know him*? His legal works and his elaborate judgments stand forth in perpetual testimony of his acumen and the heights of legal doctrine to which he did attain. But to know *the man*, we have to review the “ups and downs” of his life, the unostentatious work which he silently and perhaps unremuneratively performed his efforts to tread the path of virtue by giving counsel and assistance to the needful and in general, all the elements which reflect on the inward life, on the Spirit — for the Spirit makes the man.

“The life of a great advocate is a social document, for the impinges in his works on public affairs, commercial affairs and the domestic affairs of all classes of the community”. Walker Smith’s curt statement faithfully reproduces judge DeBono’s career : in its conciseness of style and universality of outlook it portrays the life of a great Judge and barrister, like Judge DeBono’s in its true perspective. In fact Judge DeBono’s kindness of character and his natural tendency to protect the weak make up the best education one can have in the art of good advocacy, nav, in the art of good living itself. Every citizen must be the slave of his duty; let us forget our rights for a moment : let us thing only of our duties, thus making the best we can of this flicker of life that is at our disposal. That is the cry that the elements unfolded in Judge DeBono’s life breathe forth to receptive dispositions.

On the 14<sup>th</sup> July 1852 a humble family of Valletta was numerically increase by one and that “one” was young DeBono. The boy at school gave clear evidence of his intellectual rang; after a few years at the Lyceum he passed the “Esame di Ammissione” of the Faculty of Laws and was later registered with the course of Laws and was later registered with the course of Laws at the University. His affability and nobility of character gained him the friendship and admiration of his Professors and fellow-students; in the academical field the results attained in his examinations decidedly reveal his attainments in the legal science. In the examination of admission to the Faculty of Laws he was “approvato unanimamente”. The following were the theses that fell to his lot during the four academical years :

I Year — “Organizzazzione della Camera Alta e Bassa del Parlamento Inglese” (the 98<sup>th</sup> thesis)—20<sup>th</sup> June, 1871—“approvato unanimamente e con lode”.

II Year — “Furto e spiegazione delle sue qualifiche” (the 99<sup>th</sup> thesis)—19<sup>th</sup> June, 1872—“approvato unanimamente e con lode”.

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\* ( We wish to express our thanks to the Honourable Mr. Justice Robert F. Ganado and to the Honourable Mr. Justice Edgar Ganado for the great help which they kindly tendered to our President in the compilation of this short biography. We also feel grateful to the Honourable Mr. Justice W. Harding, Mr. J.L. Pace, Mr. L. Sammut Briffa and Mr. A. Ganado who have also afforded valuable help. — *editor*).

**JUDGE PAOLO DE BONO, LL.D.**

*(By courtesy of the Hon. The Rector Royal  
University of Malta.)*

III Year — “Che cosa e il contratto di appalto”—17<sup>th</sup> June, 1873—“approvato unanimamente e con lode”.

IV Year — “Immissione ed Amministrazione dei beni del debitore per salviano” (49<sup>th</sup> thesis)—13<sup>th</sup> June, 1874—“approvato unanimamente e con lode”<sup>(1)</sup>.

He was finally awarded the Government First Scholarship and this is of greater significance, when in his course there was Mr. Giovanni Grech Mifsud, a very capable young man<sup>(2)</sup>.

On the 2<sup>nd</sup> August, 1874 he graduated as Doctor of laws, i.e., when he was only 22 years of age. He then went to Naples to continue his legal studies, and there he met many eminent Professors, who very soon formed golden opinions of the young man’s capabilities and anticipated a brilliant future. He had particular associations with the famous Italian criminals, Enrico Pessina to whom Dr. DeBono donated a copy of the Criminal code of Malta—a donation which evoked the highly favourable comments Pessina makes in regard to our Criminal Laws. His stay in Naples gave the final polishing touch to his profound knowledge of Criminal Law and Jurisprudence, the more so when our Criminal Code is based on the Neopolitan Code. His connexion with criminal legislation in operation as practised in Italy produced in him glowing love for the liberal spirit which ties at the root of our criminal laws, constituting a sound, spiritual background of Justice, Equality and Freedom. However according to his opinion the Criminal Code required revision, as he clearly states in his “Storia della Legislazione:”. As far as I am aware, he never made any concrete suggestions as to the reforms which he visualized, except for the 1900 and 1903 reforms; probably his unexpected departure from amongst the living cut short any intentions he might have had. But, as in the criminal field he was a really accomplished master, his opinion deserves the fullest consideration.

On his return to Malta he was called to the Bar and on the 8<sup>th</sup> November, 1876, he was sworn in before the Court of Appeal.

The rapid growth of his practice was really “phenomenal”. In just over one year he had already established a name that elicited respect amongst all classes of the community. “In 1876”, says the Daily Malta Chronicle (rather dogmatically) in its issue of the 21<sup>st</sup> November, “*he was already the leading barrister* (my italics) in Malta for criminal cases”. “The ‘forum’ which more than all the others throws aspiring young barristers under the mysterious gaze of public opinion for “adjudication” is the Criminal Court and it was exactly in that Court that the young barrister decided to make his real debut, impressing the most unemotional of jurymen with his remarkable eloquence and brilliance of thought. Naturally he had triumphs as well as setbacks but the barrister’s performance or non-performance of his duty must not be judged by such materialistic criteria; it is only the prisoner that looks at things from that angle.

In Dr. Debono’s case triumphs there decidedly were and They’s murder case was the one which unmistakably evinced his skill in handling criminal cases and above all his extra

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1. The members of the Council of the Faculty of Laws were: Dr. Saverio Schembri, Rector; Dr. Giuseppe Randon; Revd. Canon Dr. M.A.Mifsud; Dr. Giuseppe Gasan; Professor Sigismondo Dimech ; Professor Dr. N. Criscimanno.

2. Dr. Grech Mifsud formed a very wide practice at Alexandria, Egypt. He was appointed Judge in the British Division but after some years he resigned from office on account of certain orders issued to the consular authorities by Lord Cromer—orders which were deemed by Dr. Grech Mifsud to be an interference in the judicial proceedings. He then started again practising at he Bar and formed a very extensive practice for the second time.

ordinary power of persuasion that invariable attended his forensic orations. If defect there was, it can only be mentioned to his credit ; his thoughts were too deep : his speech, the messenger of the carefully planned sequence of ideas, was too brilliant a medium for some jurymen who complained that he was too far above them. But, of course, this only referred to the occasional flashes which the great power of the intellect cannot restrain, even when it endeavours to keep itself down on the same intellectual plane of the hearers <sup>(3)</sup>.

Another case worthy of mention was an Infanticide case. On the 30<sup>th</sup> July, 1890, there appeared in Court Maddalena Camilleri and Marianna Bartolo, the latter assisted by the Advocate for the Poor, Dr. Z. Roncali, (later Judge) who on account of ill-health could not be present at the trial and the Court in virtue of the power conferred upon it by law, appointed Dr. DeBono to act as counsel for the defence. As his duty bade him, he readily accepted, although no remuneration was according to Law due to him; he only asked for 24 hours to examine the case. The following day he turned up fully prepared for the fight and no doubt he clearly brought home the trend of circumstances which logically knit together presented sound reasons for excuse. He also urged that Art.233 was applicable to cases of Infanticide, a question which was not free from doubt and which has lately provoked considerable discussion in the Press. But the day had also in store for him a surprise which made him at first blush but which he treasured to his dying day. During the summing-up Judge Dr. Giuseppe Gasan referred several times to counsel's defence in highly eulogistic terms and finally with a clear, strong voice incisively referred to Dr. DeBono as a barrister *di forze veramente gigantesche* — at which Dr DeBono made a gesture denoting that the Judge was burdening him too much. Such an expression, unlike many others, survived its birth and when friends mentions it to Judge DeBono in later years, he happily smiled in silent recollection.

The Commercial Court saw him equally brilliant and incessant research made him a master in the commercial field as much as he was in the criminal one. From his practice in the two courts there unequivocally emerged to the light of day the reason of his success or, rather, more exactly a factor which helped up in the "ladder" of his profession and which later made of him a much-respected and much-feared minister of Justice. He was a remarkably shrewd and swift cross-examiner: on the one hand helpful to well-meaning, God-fearing witnesses, on the other hand he featured as a terrible antagonist to knaves and quibblers, that were made to cringe before the flourishing of his "steel" — that was Paolo DeBono, the barrister and the Judge. He was, however, even-minded of the fact that "the bullying of witnesses apart from the decencies involved has no part in great advocacy; good counsel never find it necessary or desirable to bully a witness.... It is left to inferior counsel to try and mask their own inadequacy by bluster and discourtesy; but it is a device that rarely impresses a Jury and never deceives the Bench"<sup>(4)</sup>.

In 1885 the Chairs of Criminal Law and Commercial Law were vacant. In those days the Royal University was passing through an era of reform. The then Director of Education, Mr. Sigismondo Savona, intended to raise the standard of studies both in the Secondary

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3. The Press was unanimous in eulogizing Dr. DeBono. For instance the "Public Opinion" in its issue of the 28<sup>th</sup> May, 1889, in a foreword to the précis of Dr. DeBono's speech for the defense said: "It is only a skeleton and is no more to be compared to the beautiful oration delivered by Professor DeBono than a living beauty to its fossilised remains". The case was The Queen vs. Attard and Bartolo. The prisoners were two boatmen charged with having murdered a British soldier. DeBono appeared for Bartolo, who was declared "unanimously not guilty".

4. "Lord Reading and his cases", page

Schools and at the University and the means he first adopted was to appoint young and energetic professors. With regard to the above Chairs there were, of course, several “possibles” but the one who stood prominent amongst them was Dr. Paolo DeBono, who was appointed Professor on the 1<sup>st</sup> October, 1885. It appears that amongst the students of the time (now all dead except very few) there was unanimity in that his lectures were really praiseworthy. The “Daily Malta Chronicle: for instance in its issue of the 21<sup>st</sup> November, 1906, said:”...his pupils, some of whom are now prominent members of the Bar, are not yet tired of extolling the splendid lectures on Commercial and Criminal Law delivered to them by the gifted Professor.” And in truth, both branches of the legal science gave Professor DeBono golden opportunities to exploit his immense legal training; the depth and width of his outlook, the quickness of his mind in grasping the nature and intricacies of the difficulties which must have dogged his way, combined with unflagging labour on his part—all strengthened the hopes of his well-wishers and kept the perilous stream of success securely on its regular flow.

He was elected Secretary of the Chamber of Advocates, which office he occupied for many years and the Chamber, already excelling for being very active and undaunted (when at times those virtues were called into play) received greater impulse through the dynamic energy of its new Secretary; he “had the rare and chivalrous courage never to be deterred from the support of a cause or the prosecution of an inquiry, because it was unpopular or because he might suffer by taking it up”<sup>(5)</sup>.

In fact all the communications, reports etc., forwarded by the Chamber of Advocates to the Government or to the Press all bear his signature; amongst others, mention may be made of the Report regarding the reforms in Education proposed by Keenan in 1878—a report that made history. Likewise worthy of mention is the letter forwarded by Dr. DeBono under the direction of the Chamber of Advocates to the Secretary of State for the Colonies refuting the insulting suggestion made by Sir Penrose Julyan in his Report of the 25<sup>th</sup> March, 1879, that the Maltese barristers fomented litigation and making suggestions in regard to judicial proceedings and the Language of the Courts.

While vividly interesting himself in all the various manifestations of man’s inner self, he had particular predisposition towards literature and philosophy. “To hear him talking on classics and philosophy was one of the best of intellectual feasts” exclaims a friend (Mr. S. Flores) who had been in close touch with him for many years. Poetry—the shrine of crystallized thought — looked like some unearthly force that sharpens man’s sense of beauty, that makes his emotions tinkle and gives a profoundly inspiring approach to the realms of Goodness and Beauty. Philosophy, on the other hand, gives a sound substratum to man’s intellectual development, accompanies him through life, interposing its guiding influence in all his dealings ; it helps to give mind its due, that is predominance over the emotions, which are in their turn refined by the sense of beauty instilled by the understanding of the spirit of literature and art. Thus wedded together literature and Philosophy give man his natural outfit for life and, when added to all this, we have an essentially religious education naturally tending to a solid conviction in the unshakeable foundation of the norms of Christian ideology, it could be easily foretold that *much* could be attained.

From his early brilliant entry into public life up to the sudden advent of mortality’s Foe,

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4. S.Flores:”A pen-picture of Judge DeBono”, page

he was all through the typical friend of students. The year 1880 found the young barrister in close contact with the directing elements of Flores' College, ever-ready to give advice and to make suggestions for the advice and to make suggestions for the advancement of education, demonstrating an intimate knowledge of the educational problems of the time. As years rolled on, his love of students constantly grew in intensity in the same way as his understanding of the young mind became more secure, fraught with greater power of discrimination between the needs of one and the requirements of the other. Very often, at times every fortnight, he used to pay visits to Flores's College every time remaining for several hours, asking questions to the pupils generally regarding Latin and Italian Literature. As can be easily understood, these visits, although admittedly very beneficial, were invariably greeted with rather concerned boyish faces, ignoring what the day might have in store and, no doubt, afraid that things might take a bad turn; but, after all was over, smiles of satisfaction generally bedecked their looks, for Judge DeBono always wore a friendly, encouraging expression, giving way to a stern gaze only on infrequent occasions. During these visits the Judge figured as the educationist and he wanted to employ tact not intimidation (which would have killed his purpose) in communicating to them the beauty of literature or rather in developing those faculties by which guise it might have adopted. His attitude as he educationalist stood in strong antithesis with that of the examiner <sup>(6)</sup>.

An anecdote characterizing his attitude to examination may here be narrated. In the later days of his life he was examining the students of Flores' College in Latin Syntax and Literature. Three students got full marks. He proposed that the three students should be submitted to another examination, although the procedure does not appear to have been fully in accord with the normal rules regulating the conduct of examinations. The three students gravely accepted, probably in order not to play the role of cowards. In the second examination all three succeeded in attaining full marks for the second time. In the third examination one of them failed to get full marks, while the other two <sup>(7)</sup> kept up their first places. No fourth paper was set and the contest was thus brought to a close, in order not to prolong the torture any further.

From 1882 onwards he was appointed Examiner at the Royal University in several subjects; Latin and Italian Literature, Law, Philosophy, and Political Economy all formed at different periods subjects with regard to which he was called upon to perform the duties of examiner. With intelligent, studious lads he had the reputation of being a good examiner, very friendly and very "nice"; with the other type of students the position loomed less bright, making of him a dangerous "doubtful". In the written test every question was "fresh, stimulating, going to the heart of things.... Allowing possibilities to the mediocre, while opening splendid opportunities to the most brilliant"<sup>(8)</sup>

In the Oral Examinations, with students lacking the requisite knowledge he was perhaps

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6. He attributed the lowering of the standard of studies to several causes, among which the lack of good teaching and the very uncommendable system regulating the Examinations. Before the Educational Committee of 1897 he mentions two astounding examples: In a Latin-Italian translation a student said that "intestatus" corresponded to "senza testa". In another instance, while lecturing on the Press Laws, Judge DeBono (then Professor) referred to the date "otto Thermidor" . A student enquired : "Signor Professore, otto e nome?" The professor answered : "Si, e Thermidor cognome".

7. E.H. Ganado (now one of His Majesty's Judges), and A.V. Bernard (now retired Chief Government Medical Officer).

8. Flores : op. cit., page

of the nasty sort, unleashing heaven and earth on the trembling victim. He, of course, never unjustly victimizes anyone, for he always limited his questions to what was reasonably permissible, but he never could tolerate the possibility of a student graduating without possessing the knowledge which was logically expected of him. His severity was indeed actuated by his love of the students themselves and of his fatherland.

Education of the young, in short, fascinated him from the early days of his manhood for he always kept in mind, to quote the well-known adage, that “we live for our children”<sup>(9)</sup>. He became the ultimate resort of students insisting for some reform; whether it was a master ignoring Latin syntax and limiting himself to Literature or a Professor of Science of Law explaining theories against those which the Council of Law (maybe undiplomatically) had imposed—Judge DeBono was always ready to help and to see the distracting cause put right. He was a prominent member of the Malta Senate (another word for an autonomous Board of Education having under its control the entire educational system of the island) from 1895 to 1897. i.e., up to the Senate’s abolition. Incidentally it may be stated that he had taken a very active part during those two years, as is clearly evidenced by the Minutes which were boldly, though very irregularly, published by Mr. Sigismondo Savono in the “Public Opinion” and later on published by the Government. The learned Judge also gave evidence before the Committee appointed to report on the advisability or otherwise of retaining the Senate. He opined that the abolition of the Senate was completely uncalled for, because that Body had always functioned in a way that reflected nothing but honour on its name; it had always assisted the Director of Education with the exception of one instance i.e., when the Students of Medicine had been called upon to undergo an examination after having received only 30 minutes notice. The Senate decided that the students were right in protesting. He also mentioned a case when the Students of the Faculty of Laws had been suspended for one month by the Director. He thought that the Director had rightly inflicted the punishment but the majority entertained the opposite opinion. One can easily see the strong, independent fibre, that gave sinew to his personality. The Senate was however later abolished because its policy stood at loggerheads with the educational reforms which the Government had been for an appreciably long time vainly trying to introduce. A year later the Statute of the University was reorganized and a non-autonomous General Council was created. Judge DeBono was ready to help: in fact that same man who had so strenuously opposed the abolition of the old Senate had now a great share in the sectional reconstruction necessitated by the change. He was severely censured for his willingness to collaborate: but now after the fading away of those ephemeral sensation evoked by a spirit undaunted even after defeat, we can fully perceive the nobility of Judge DeBono’s attitude ; by refusing to give a helping hand he would only have harmed those belonging to the younger generation whilst the forum of his conscience kept on reminding him that, as Sisraeli said, “The Youth of a Nation are the trustees of Posterity”. In spite of the fact

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9. In matters relating to education his opinion carried great weight with all and he was considered as one of the leading personalities of the Island in the educational field, as is evidenced by the “Lettera al Dr. Paolo DeBono” regarding the “Istruzione Letteraria in Malta” (kindly lent to me by the Hon. Mr. Justice W. Harding, B.Litt., LL.D.). In the letter the writer said that he admired “il vostro ardore e zelo per il miglior avviamento degli studi leterari in questo isole” and later we find: “... molte. Ben so, inarcherebbero le ciglia per lo stupore a tal mia riflessione, non pero voi, illustre amico, ne altri che a voi pari di scienza ed esperienza e usato a guardare I fatti, massime I piu gravi e di maggiore importanza, d’ogni lato.”

that his opinion had been disregarded he was still in harness for the education of the young and his efforts went on, on their incessant move towards the ideal goal at which he aimed <sup>(10)</sup>.

“Thinking is easy ; action is difficult ; to act in accordance with one’s thoughts is the most difficult thing in the world”. (Goethe) I would not say positively that these words have their specific application in the case of Judge DeBono i.e., in other words, that Judge DeBono invariably, in his public or private life, performed “the most difficult thing in the world”; that would be leading perilously on the verge of senseless, blindfolded adulation, but it can be said that in no occasion of his life, as far as is known, was there ever any suggestion that he had acted against his principles of fair dealing or against his own beliefs. He himself states in his dedication of his book on History of Legislation to Sir Adrian Dingli, that he was happy to be dedicating it to a Chief Justice who was already in retirement in order not to be understood as a sign of sheer adulation “che io tanto aborro”. There could be no brandiloquence in his essentially just and amiable spirit; at times he disregarded his own interests perhaps to a censurable degree and he was always thinking about the ways and means of relieving destitute families. It was a necessity for him to do something : he *had* to do succour the needful and he left no stone unturned in doing it; for instance the “La Valette Societa di Mutuo Soccorso” and other such charitable Societies know him as their founder. A great writer has said and in truth on can here repeat :”Mark that man who seeks good in everyone : there goes a magnificent soul!”

In 1892 he was appointed one of His Majesty’s Judges; he was exceptionally young (only 39), the more so in those days when only barristers who were relatively advanced in age were appointed Judges, because there was no age limit for their retirement from office <sup>(11)</sup>. It appears that Nature decided to accelerate his course through life; but in spite of his comparatively young age it is a fact that not the slightest taint of immaturity was attributed. He had been for 16 years extensively and unremittingly practising at the Bar, devoting himself entirely to his work and taking no active part in politics, but at the same time,

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11. The following is the letter, dated 14<sup>th</sup> March, 1892, forwarded by the Governor of Malta to the Right Honourable Lord Knutsford : My Lord—I have the honour to report that Dr. Lorenzo Xuereb, one of Her majesty’s judges, who is now in his 84<sup>th</sup> year has requested permission to retire from his office and that I have accepted his resignation.

1. For filling up the vacancy caused by Dr. Xuereb’s retirement, I have appointed provisionally and until her Majesty’s pleasure be known , Paolo DeBono Esqr. LL.D., one of the leading Barristers and Professors of Law in the University of the Island.

2. Dr. DeBono, who is 40 years old, obtained his warrant to act as Advocate on the 6<sup>th</sup> November, 1876; and although he is not one of the senior members of the Maltese Bar, his talent and learning coupled with sound judgment and probity have earned for him a very high reputation and as a consequence, an extensive private practice. His appointment as Professor of law, which he will now have to relinquish, was made on 1<sup>st</sup> October, 1885.

3. I beg to solicit that Your Lordship may be pleased to submit this appointment for Her Majesty’s confirmation.

very round-spoken about his political views <sup>(12)</sup>.

He used to begin work just before the peep of dawn at 3.30a.m. and during the day except for a few hours in the evenings he kept company to those incomparable friends—his papers and his books.

His elevation to the Bench found DeBono the same man. His daily routine went on unaltered. "So absorbed, indeed he was wont to be in his studies, that, social though he was, he denied himself all the attractions of Society" <sup>(13)</sup>. He presided over the Commercial and Criminal courts, in which he was as brilliant as when he practised at the Bar. In the civil Court he sat on one occasion for about one year, the Civil Court Judge having taken sick leave; during this period he wrote such elaborate judgments and such masterly expositions of the civil line

For full eight years (1898-1906) he was the regular judge of the Criminal Court, when composed of one Judge and formed part of the same Court when composed of three Judges, together with Sir Joseph Carbone and Judge Luigi Ganado and, on the retirement of the latter, Judge Baron Alessandro Chapelle (afterwards Sir Alessandro). Judge DeBono's name stands inseparably associated with the reminiscences of the Judge's splendid summings-up. He never had the occasion to preside at a murder trial or in a case involving the penalty of over 12 years imprisonment, because the three Judges above referred to were all his seniors but, nevertheless the numerous important cases over which he did preside gave him the amplest opportunity to demonstrate his remarkable clarity of thought and power of exposition, that made captive many a hearer. In fact, DeBono's summing-up was "judged by the legal caste and by public opinion—"that mirror of life", as Thackeray calls it—as real masterpieces of exposition, revealing intensive analysis by an acute and penetrative mind. The strong acumen he put into play in sifting the mass of evidence (often very complicated and of dubious relevance), his impressive skill in linking together the separate parts of the chain overshadowed all-through by circumstantial evidence—all made him the bearer of the much-feared, though much-revered, name that Posterity knows.

A note of severity decidedly predominated in his addresses; when there was some doubt, he pointed out, when there was no real doubt, but only some misleading camouflage, he inevitably unmasked the reality of things, not imposing his opinion, but at the same time not allowing any trick to do its work with some absent-minded (or unintelligent) jurymen. This explains the note of criticism which either occultly or manifestly inspired certain articles in some newspapers. And it appears that unbiased opinion has it that the underlying spirit of severity was only a natural feature of Justice itself. In Judge DeBono Malta had a man with a very generous spirit : his life reveals a tender heart, easily enslaved by Pity's passionate touch, but, while performing his duties, he had sufficient strength to disallow the sense of pity from overcoming him, although it unquestionably made itself felt. This reminds me of what Sir

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12. Characteristic of him is the remark which he made while giving evidence before the Committee created to make investigations on the Educational System. Judge DeBono said that he thought that the examinations were not being conducted in the proper way. On being asked by the Crown Advocate (who was one of the members of the Committee) whether he had expressed this view to the Director of Education, judge DeBono replied: "L'ho detto a lui, l'ho detto ad altri, l'ho detto pubblicamente ancora, perche disgraziatamente non so celare quello che penso."

13. Flores: op. cit., page

Edward Marshall Hall during the Seddons' trial said :”Gentlemen, I often think when I look at the great figure of Justice which towers over all our judicial proceedings; when I see the blind figure holding the scales I often think that possibly the bandage over the eyes of justice should not be wrapped by prejudice or undue influence one way or the other; but sometimes I think it is put there so that who gaze should not see the look of infinite pity which must always temper justice in a just man...”

While performing his duty in a way that spoke for itself, he demanded the same intransigent spirit on the part of others; to him, as to all noble-spirited people, there could be no compromise with duty's ordinances. And in consequence of this frame of mind he could not help exacting the performance of the duty of others up to the last jot and tittle : with him there could be no excuse, no ways of escape for people doing things in a happy-go-lucky fashion and he severely reprimanded and even punished any serious transgression, again not without some severity. A remarkable instance was when he condemned a barrister to three days imprisonment for contempt of Court. It appears that the barrister in question had pronounced some serious insults against the Court and Judge DeBono instead of inflicting the less severe forms of punishment of suspension of *multa* decided to employ drastic measures. Incidentally, it may also be stated that he was at times rather irascible, naturally, given an adequate cause and, when very angry, he was perhaps rather inclined to give his reprimands a much too high dose of severity. During sittings, perhaps more than at any other time, it was incumbent upon everyone concerned to concentrate upon what was being done in order to avoid running the risk of being severely reprimanded.

There was hardly any important commission appointed by the Government relating to Law and Education, in which judge DeBono was not a figure. But apart from his civil activities, he was also singled out for his profoundly religious sentiments; in fact he was on several occasions elected Prefect of the Onorati Congregation. On the birth of the 20<sup>th</sup> Century, when a statue of our Redeemer was erected at Rabat, Judge DeBono was invited to deliver an address on the most auspicious occasion. Again in 1904 he was the one whom his brethren chose in order to make an address to celebrate the Golden Jubilee of the Immaculate Conception Dogma. “These discourses were indeed sublime, clear, aspiring—the gentler, sweeter and tender feelings which are the crowning glory of the Christian speaker”<sup>(14)</sup>.

Malta is still deeply indebted to her noble son for the fruits of his labour—fruits whose beneficial effects are still being sensed by the Maltese in general to-day. Primarily we have the numerous additions and alterations in the Criminal Code which were effected in 1900. It is in reality an open secret that all legislation from 1898 to 1906 was in the main inspired by the gifted Judge; but it is not out of place to make particular mention of the 1900 Reforms of the Criminal Code because the then Crown Advocate publicly advised elected members of the Council (Dr. Fortunato Mizzi and Dr. Bonnici) to discuss their objections and doubts with judge DeBono. To him we therefore owe the introduction of the notion of a continued offence (art : 20) with the equitable diminution of punishment it carries with it; the provision dealing with the material concurrence of offences, with the substantial mitigation of punishment suggested by the theory that the addition of punishment does not partake of the nature of a pure mathematical addition; to him we owe important amendments in Art :23 (for First Offenders) a number which carries a meaning even with the most uneducated. Those appealing from the judgments of the Criminal Branch of the Courts of Magistrates of Judicial Police have to be

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14. Flores: op. cit., page

thankful to him for his liberal amendments. All these provisions and countless others are the permanent carriers of the spirit of justice, not unblended of the great Maltese citizen.

Indeed, as Disraeli once said :”life is too short to be little”; to Judge DeBono it was remarkably so, but in his short span of life he did not toil in vain. During his lifetime he geared the wealth of his benevolent spirit with the complicated machinery aiming at social welfare; for the future and for posterity he left two works of fundamental importance<sup>(15)</sup> : one dealing with the History of our legislation, the other with the Law of Bankruptcy. No words of mine could be an adequate evaluation of their merits from they were written ; one feels that one must leave the task of appraisal to every man or woman that may cast his or her eyes on the two books. It suffices here to bring out the spirit stimulating the Judge to adorn our legal literature (which is unfortunately very meager) with his two works : “Aiutare I giovani e dunque il principale mio intento”—that is the immediate cause of his labour and, maybe also the maxim of his life.

The French “Revue de la Jurisprudence Financiere” in its issue of the 10<sup>th</sup> march, 1898 said :”Cet ouvrage, concu dans l’esprit le plus pratique, et avec le sens juridique le plus developpe, precise avec une grande clairte le regles de la jurisprudence en matieres de faillite dans l’ile de Malte. C’est, du reste, le resume des lecons de Droit Commercial que le tres-estime juge au Tribunal de Malte enseignait lorsq ‘il etait professeur a la Faculte de cette ile.

“Nous l’avons parcouru avec le plus grand interet et nousy avons trouve des enseignements et des lecons, que nes magistrates feraint bien de s’approprier, et don’t l’application, rendrait plus simple et plus pratique notre legislation si arrieree encore sur le faillites.

“Mais le juge DeBono n’est pas, du reste, un inconnu pour nos lectures, qui ont pu, mantes fois, apprecier avec quelle lucidire, il s’est assimile les principes de Drooit Francais en metiere de Finances.”

In his judicial career, as has already been said, he presided over many important trials. Two officials embezzling thousands of pounds from Government funds; an “expert” minting false currency and innumerable other important cases formed the object of his moving addresses to the Jury. But one case, dealt with at the time of his death deserves particular mention.

On the 15<sup>th</sup> November, 1906, Pacifico Vella, Domenico Tonna, and Innocenzo Magro were arraigned before H.M.’s Criminal Court accused of having committed a highway robbery of £845 belonging to Messrs Cassar Torregiani at a place on the Zebbug Road. The trial went on for several days. Just before the beginning of the summing-up, the Foreman of the Jury (Mr. A.German, L.P.) said that he wished to make an important declaration . the Judge beckoned him to go on. Amid profound silence shrouded in an air of expectation he stated that one of the jurymen had communicated with a Police Inspector. Eyes instantly switched in the direction of the Judge, who with an inflamed aspect ruled that the trial would go on and that the question would be dealt later. Two of the accuses (Vella and Magro) were in due course

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15. Equally useful was his short History of Malta translated into English by Professor Fallon and into Maltese by G. Muscat Azzopardi who in dedicating his work to Judge DeBono says:” a kemm Malta jibqalha mqar wiehed bhalek, mhux biss id-dehen kbir li bih zejnek Alla, imma l-qawwa u l-irgulija ta’ dawk il-Maltin li hemm imsemmija fl-Istorja taghna, jibqghu wkoll jitwemmnu.”

declared “not guilty”, one (Tonna) was declared “guilty”. On being asked, the Foreman stated that the communication related to the one who had been declared “guilty”. He was ordered to reveal the Juryman’s name and after several minutes of terrible rating the Judge remitted the case before the Criminal Court composed of three Judges, but in the interval—four days later—he died<sup>(16)</sup>.

On Tuesday, 20<sup>th</sup> November, 1906, in the morning at 9.00 am sitting of the Criminal Court was held. The Judge lunched at about 3.00 p.m., because the jury had some difficulty in arriving at a valid verdict. At about 7.15 p.m. he was at the Casino Maltese in the company of Mr. R. Vadala and Mr. Briffa. He told them that he was feeling unwell and they made him sit down on an armchair. He was given some *cognac* and later he felt better. He told Mr. Briffa that he had smoked a cigarette, which he thought was the cause of it all. After some time he went home<sup>(17)</sup>. At 10.00 p.m., while he was retiring for his night study, he again suddenly felt unwell and a few minutes later he lapsed into a state of unconsciousness—for the last time, never to regain consciousness once more. Dr. G. DeBono and Dr. Said after having examined their unconscious patient declared that it was a very serious case of cerebral congestion. He remained in the same condition all night finally succumbing to the unconquerable Enemy at 11.15 a.m., on Wednesday, 21<sup>st</sup> November, 1906.

The funeral took place on Thursday, 22<sup>nd</sup> November, 1906. Strada Reale (now Kingsway) was thronged with people of all classes and the impressive conflux of people on such an occasion is perhaps the best proof of the esteem in which he was held by all. The following gentleman acted as Pall-Bearers: His Honour Sir Joseph Carbone, G.C.M.G., K.C.V.O., LL.D., Chief Justice; His Honour E.M. Merewether, C.V.O., C.M.G., Lieutenant-Governor and Chief Secretary to Government; Judge Baron Chappelle, LL.D., Senior Judge ; the Hon Professor V. Frendo Azopardi LL.D., Crown Advocate; the Hon. Sir Richard Micallef, G.C.M.G., Comptroller of Charitable Institutions; the Hon. Professor E. Magro, M.D., Rector of the University; Dr. O.Grech Mifsud, C.M.G., President of the Chamber of Advocates and Mr. P. Ellul, Vice-President of the Chamber of Commerce. The Press (of whatever political views) was unanimous in eulogizing the great Judge. In those sad days there was, however, a note that beset many hearts finally finding itself pronounced in the “Risorgimento” of the 26<sup>th</sup> November, 1906 in this very just remark :”E intanto il nostro governo che premia spesso le nullita con decorazioni ed altro, non penso mai a premiare tanta scienza e dottrina con una onorificenza!”

At least, in this case as a sign of gratitude the government proposed that a pecuniary grant be given to Judge DeBono’s family from public funds. The Crown Advocate in addressing the council (which unanimously adopted the proposal)said “... I beg to be permitted to make reference to the sad event which gave occurrence to this motion... On the 21<sup>st</sup> November last we heard that Judge DeBono had been suddenly and unexpectedly removed by death from amongst us. Judge DeBono was a man of uncommon ability. He excelled as a barrister as a professor of Law, as a Judge. He widely contributed to the credit of his native in the cause of education. Apart from the performance of his ordinary duties as Judge he lent

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16. The Criminal court did not specifically deal with the question relating to the verdict’s validity, because it ruled that the trial had to be held again once the presiding Judge had died (with the result that no other Judge could sign the judgment). Finally Tonna was declared “not guilty”.

17. St. Lucia Street, Valletta over the shop of Andrea Bonaci, now demolished.

valuable services to the Government on several important occasions; and this grant which forms the object of my motion of a vote which His Excellency the Governor has been pleased to authorize to be brought before this Council, though it may be, is made as a mark of the esteem in which the Government held the man whose untimely death we have all deeply mourned.....”

There was no period of decline in his life : he was energetic and brilliant up to the very last : he was only 54. His dramatic severance from this world of men was as benumbing as the onrush of Success through life had been. “A faked greatness does not last” (Andre Maurois ) but real greatness does, and, as his remains were mournfully borne away. Malta knew that one of her best sons had departed.

# PROBLEMS OF SOCIAL MEDICINE

(By Professor W. Ganado, B.Sc., M.D., M.R.C.P)

I WAS asked to discuss the problems of Blood Grouping with reference to paternity, but I suggested a change of subject in order to avoid the impression that Forensic Medicine was the only common ground for the legal and the medical professions. There is much in common also in the problems of Social Medicine. The University has been, and is bound to remain. The intellectual leader of the country; with the restitution of Self Government its importance will increase ; many of our law givers will come out of it. It is therefore proper that students of law, as possible legislators of the future, should be acquainted with the problems of health with reference to social life.

The underlying principle of Social Medicine turns round the old adage *Salus populi suprema est lex*. This principle is accepted universally but few appreciate that the *Salus populi* cannot be safeguarded adequately if the State does not interfere in many aspects of social life.

State interference in preventive medicine has developed in three phases. The earliest phase was concerned only with the prevention of epidemics. These are so terrifying and so disruptive of social life that they have attracted attention first and foremost. Legislation for their prevention and control is many centuries old, but the quarantine laws of the past were based on false principles. The medical approach to the problem was still unscientific. The existence of the bacteria as factors of disease had not yet been discovered. Infection was still attributed to miasmas which were believed to emanate from filth or from putrefying material in air, soil or water. The term "malaria" still commemorates these mistaken conceptions of the past. Quarantine laws based on these principles led inevitably to failures and a rigid intervention on the part of the State caused often discontent and opposition.

With the development of the study of Bacteriology, the role of micro-organisms in infections was proved beyond doubt. It was also possible to show that many of these organisms have peculiar habits in the manifestation of life and modes of dissemination and introduction into the human body. Thus it became possible to track the source of an epidemic and to follow with considerable detail the path of its propagation. Intervention by the State Health Authorities has now become rationally controlled. Though it is not yet possible to exterminate the micro-organisms that cause infective disease, we can often disrupt the conditions under which they multiply and disseminate and, above all, we can obstruct their approach to man. When contact of the micro-organism with man cannot be held in effective check successful action can lie also in the raising of man's resistance to infection by artificial methods. Vaccination against small-pox and inoculation against the Enteric Fevers are well-known examples of these methods. Legislation to enforce compulsory immunisation may be required when the dangers of an epidemic are serious enough. All these and other measures amount very often to compulsion and entail in addition a considerable expenditure which is in a large part recurrent; but the wisdom, utility and equity of this policy are so evident that the principles on which the legislation is based are not questioned and the necessary funds are always voted ungrudgingly.

The successes of Bacteriology have been so clamorous that for many years bacteriology reigned supreme and the other factors of disease were for the time ignored or at least minimized. The acceptance of the truth was however only delayed. It is now fully recognized that in addition to the parasitic factor, there are multiple other factors which are intimately

correlated with environment and social life. State activities to influence these factors have been (and are still) slow and attended with much procrastination. Were the effects on health as startling and dramatic as in epidemic diseases no effort or expense would be spared in stamping them out, for every member of the community, be he rich or poor, would realize that he himself might be the next victim; but because their action is insidious, and because they threaten most the poorer classes, their ravages are to some degree hidden from the community so that the social dangers they involve are not taken so seriously as they should be. It stands to the merit of the second phase of Preventive Medicine that much, though fragmentary, legislation was enacted to ensure protection against the main dangers.

Disease can even be congenital. The new-born child can carry with it a parental inheritance of ill-health which can be manifest at birth or show later in life, even as late as in old age. But congenital defects are not necessarily hereditary, they can result also from a faulty gestation. The foetus, sheltered in the womb from the hectic disturbances of the outside world, can in its turn be subjected to the effects of maternal ill-health, constitutional defects or gross lack of hygiene. Notwithstanding the compensating mechanisms of nature, an unhealthy gestation can seriously impair the future health of the mother and lead to the birth of a puny baby or of a baby who will develop ill-health later. The importance of the periods of labour and of the puerperium need no comment. In a few dramatic hours lives can be crippled or lost. It is to be emphasized, however, that maternity is in itself not a disease but a physiologic process; and is therefore expected to run an uneventful course in normal mothers who secure adequate ante-natal care. Catastrophes are apt to occur when ignorance, poverty or lack of facility impedes ante-natal care. It is one of the duties of the State to provide pregnant women with adequate protection. It is not enough to arrange for expert attendance during labour. Even in the hands of the most experienced, intervention can prove then to be untimely. The mother, for her own and for the sake of her new-born, of her family and in the long run of the community, must be guided from her early months. Ante-natal clinics with sufficient facilities within easy reach of all pregnant women are necessary. The teaching of hygiene to all married women is advisable. Necessitous mothers must be helped with funds or in some other way. Whenever circumstances suggest, legislation must protect them from such abuses as over-work, lack of rest or of adequate sleep, deficient diet, etc.

Parallel with the problems of maternity stand the problems of infancy. In many countries infancy has received meticulous attention mainly as an effect of their low-birth rate, which has necessarily imposed a strict economy on infantile mortality. It has been realized however that the effort is useful for its own sake. The child is father to the man. "The foundations of a healthy life must be laid in childhood".

Our infantile mortality ranks with the highest in the world though it is now on the decline. The causes for this high mortality are complex. Most of them are social. The birth-rate is high, our families large, the economic resources limited and the standard of living as a rule very unsatisfactory. Lack of compulsory education leads to lack of knowledge in the most elementary principles of hygiene amongst a good section of mothers; the housing is bad, the diets often inadequate, the climate with its long, hot, dry summers adverse. Yet many babies could be saved and many more brought up in better health, if more mothers could be instructed not to keep their infants, underfed, badly clothed or unnecessarily exposed to infections. The

problems of infancy in Malta are vast and complex and serve as a pointer to show how backwards we stand towards the solution of our social problems.

The growing child faces new dangers. Growth necessarily implies good feeding. Deficient nutrition in this period is apt to be followed, more easily than in others, by ill-health, and may even leave permanent disabilities. The faculty of walking and of romping about confers to the child initiative but adds greatly to its dangers. Traumatia, measles, whooping-cough, diphtheria, scarlet fever, the pneumonias, tuberculosis are common events. In some cases specific inoculation can afford a high degree of protection, but as a rule the child has to rely on its natural defences. The foresight, wisdom and determination of the administrators and legislators of the country will determine how much the child's natural defences will be upheld by good housing, rational town-planning, sunshine, fresh air, adequate food, cleanliness and good habits.

A further danger to childhood lies in mental trauma. Mental hygiene must have its foundation in these early years. The intellectual faculties of the child have little, if any, critical power; the unbridled phantasy and the emotions can therefore leave impressions so deep rooted as to determine behaviour for after life. The main conflicts between the instructive reactions and behaviour that is accepted as socially correct must be faced in childhood. In the few formative years the child must pass from a state comparable to that of primitive man to one of cultural and social development which mankind has taken centuries to attain. If the child is to be a useful and cultured citizen and at the same time is to preserve a temperament that will allow it to enjoy life and not develop nervousness, obsessions, anxieties and hysterias, an enlightened system of child guidance is useful. The control of schools, of child reformatories and in general of all educational movements by a medical service is therefore fully rational.

If a School Medical Service is numerous enough and is adequately trained and equipped, it can prove to be one of the main pillars of national health. It can extend its activities far beyond the routine supervision of children in the class-room. It can help the development of muscle and bone by a scientific direction of physical training and of outdoor sports; it can control the school curricula to avoid mental strain and to facilitate the receptivity of the child; it can train the teachers to a full understanding of the physical, mental and moral problems of childhood and puberty; it can propagate the principles of general hygiene. Above all, it can submit all the children to a periodical medical examination to detect the early presence of disease. This is in fact one of the big advantages of compulsory education. It gives equal opportunities to all children. A child of the poorer class, whose disease might remain undetected for a long time, gets the opportunity of individual medical attention, so that a sounder foundation for the adult health of the nation is established.

Periodical examinations on a large scale even if at long intervals, are desirable also in adult life; but at present there is little opportunity for them. The District Medical Services are not meant for this strenuous task' as they are, they have barely enough time to cope with manifest diseases which are common and dangerous as tuberculosis. These special services would not wait for the patient to seek for advice, but would themselves invite periodical attendance, especially in the case of contacts, to detect the illness as early as possible when treatment is easier more hopeful, shorter, and less costly.

In adult life health is often related to occupation. Where factories are numerous factory laws have been enacted. So far this necessity has not been felt in Malta since our occupational diseases are rare. Yet there is ample scope to improve the condition of the labourer in this respect. Though the occupation may not be dangerous in itself, many labourers are compelled to work in surroundings which are unnecessarily dangerous to the general health through lack of ventilation, sunshine, good lighting, etc. It must certainly be within the aims of any labour movement to ensure adequate hygienic protection for the labourer during work and to invoke legislation in this respect.

Intimately connected with the health of the labourer are the problems which result from "want". The fear of economic insecurity for himself and especially for his family in case of longed unemployment, disease, death and even old age, leads frequently to anxiety states, dyspepsias, deficiency diseases, inadequate rest, incomplete treatment of disease, deficient rehabilitation after illness, tendency to relapses and is one of the strong contributory factors in the incidence of pulmonary tuberculosis. It is often argued that medicine, like the church, should not dabble in economics and in politics. Yet modern Medicine feels it a duty to point to the community fundamental truths and to insist that the *Salus Populi* can never be safeguarded satisfactorily if the Atlantic Charter's "Freedom from Want" is not kept as a lofty goal to aim at.

Another vast problem is housing. Apart from the emergency conditions which have resulted from the war, housing is a problem in itself. Too many of the houses in our town slums and in our villages are obsolete and unhygienic. Many are built on a style which has evolved from the military exigencies when aggression by Turkish Pirates was a living threat; they are now badly lighted, poorly ventilated, difficult to keep clean and to keep free from pests and insects. A large number have no water supply or have only a primitive one. They are unprovided with drainage and open into narrow, tortuous, unkept streets. The majority were overcrowded even before the present emergency; some accommodate domestic animals in dangerous vicinity to man. Life in such surroundings is dangerous and depressing. The problem is not only sanitary. It is also educational and social. The house is the sanctuary of the family. Degrading houses loosen family ties, turn the children into scamps, contribute to social discontent and work for class hatred. The necessity to face the problem has been repeatedly urged by our Health Authorities before the war, but things have remained much as they were. The heavy expenditure which is required, vested interests and apathy are obstacles. The problem is now again on the table with a greater probability of success; but it is certainly an anomaly that to obtain reform in housing wholesale destruction of houses by enemy action was necessary.

Of equal importance is the problem of diet. Unlike other machines, the human organism requires material not only as fuel but also for wear and tear, growth, repair and reproduction. Hence human diets must be calculated not only in terms of quantity, but also of quality. It is a fact that a large section of the population in pre-war days was underfed, not so much because enough food was not taken, but because the correct articles were not chosen in their proper proportions. So long as to a mixed and proper diet, but when penury curbs appetite the only guide is hunger. The cheaper bulky foods are then chosen, with the frequent omission of one

or more essential food factors. This leads to the so-called deficiency diseases, whose danger lies not only in themselves but also in the predisposition to infections as tuberculosis.

The experiences of controlled rationing in many countries during this war have brought home the fact that, wherever it was possible to follow the principles of scientific nutrition in rationing, the health of the poorer classes was raised to a much higher standard, without increasing the purchasing-value of their diet above their possibilities as calculated by pre-war standards. This has been possible in a large part because old-standing habits and time-honoured prejudice had to be given up. Prejudice, habits and commercial propaganda have popularized undeservedly certain products of little or no value, whilst other useful articles are avoided. Biochemical study has led to the production of many preserved and dried foods which can be sold at a cheap price. If these are supplemented by a few other articles a fully nutritious and hygienic diet can be worked up at a price within the reach of everyone. If the poorer classes were to be directed how to spend their money better, many of the problems of nutrition would be solved.

It is essential at the same time that a carefully guided fiscal and economic policy be followed. Indirect taxation is in itself a danger to the standard of living of the poor. Strict precautions are necessary to avoid influencing the cost of any essential food article directly or indirectly. Supplementary foods can be distributed free of charge or at a nominal price to those that really need them. A step in this direction is the distribution of the milk and cod liver oil to school children during school hours. The distribution of other foods to other groups may present considerable administrative difficulties. It is however useful to emphasize that children are not the only members of the family that call for help. Experience has shown that the mother fares worse of the whole family. She gives preference to the father, as the bread-winner, and to the children out of maternal instinct. She is often last to realize that she requires food more than anyone else. She has to cope with pregnancies, nursing, haemorrhages, etc. though not usually the bread-winner she has to face the difficulties and troubles at home; she is the core of the health of the whole family. Ill-health and malnutrition can be reflected very easily in the offspring.

Enough has been said to show how multiple, varied and frequent are the causes of ill-health. It is not surprising that with the modern high standards of good health, the unhealthy are found to be the more numerous. The concept of health has altered. Health is no more considered as a static condition, the mere absence of demonstrable disease. A concept based on dynamic equilibrium is now accepted. The human organism is always reacting to the changes which take place within and around it. If the body is perfectly balanced within itself and in regard to the outside world, and if in addition it has the potentiality to regain its equilibrium easily, whenever this has been disturbed, perfect health is enjoyed. This standard of health is only theoretical. In reality no such ideal exists. Life is always under some handicap so that some abnormality is inevitable; but the power of compensation to the abnormality is inevitable; but the power of compensation to the abnormalities can be great. Well compensated abnormalities are of ten undetected; but even, when they are noticed, if they are slight and the reserve powers are great so that the individuals has the full enjoyment of all his faculties, good health is said to be present. When the disturbance exceeds certain limits (which are conventional and ill-defined), so that full enjoyment of one's faculties is considered

to be poor, disease is said to be present. There is no sharp and clear-cut boundary between health and disease. The difference is one of the degree of disbalance and of reserve powers.

This concept of health dominates this third and present phase of State Medicine. The term "positive health" has been used for the purpose, not because health can be otherwise than positive, but because it has served to emphasize the necessity of developing health in either direction : by avoiding disease and by increasing the reserve powers against it through natural and artificial methods. It has been shown that the potentialities of enjoying health and of avoiding illness are much increased with a sound parentage, proper standards of housing, town-planning, ventilation, sunshine, fresh-air, nutrition, exercise, recreation, sleep and mental rest. There is nothing new in these suggestions. What is new is the emphasis which is laid on them. The approach to the problems of disease is now physiological as well as pathological and the stress is laid equally on both.

From these concepts and from the fully-grown conviction that no reform can be adequately effective if the State does not interfere by appropriate legislation modern Social Medicine is evolving. When State intervention was invoked in the past centuries against epidemics, the inspiration lay more in the instinct of self-preservation than in a feeling of charity or social righteousness. In the subsequent periods, charitable motives played a great part, though a utilitarian mentality which measured every social move in terms of economic gain or loss, jarred many a healthy reform. In Malta, charity was a strong motive. It was fostered by Christian principles and the traditions which followed the activities of the Knights Hospitallers. The Government Department which to a few years ago was chiefly responsible for this social work, revealed its motives in its very name of Department of Charitable Institutions. This Department has now changed its name. apart from any other motive for this change the term Charitable is anachronistic. Charity is plausible on the part of the individual, but on the part of the modern State, there is no place for it. What is given is the full right of the people. All the citizens have an equal right to live up to good standard of health; as a corollary all the citizens have a right for all the requirements that are essentials to maintain health. This is not a new principle; but emphasis is now laid on the right of citizens to expect State interference by appropriate legislative or other measures to ensure that facilities for the preservation of health in the widest sense come within reasonable reach of all.

The objections to this principle are numerous. It is claimed that its implications are wide and too difficult to put into effect so that its open proclamation creates difficulties to the State, and leads to discontent by emphasizing class distinction. This objection is open to the criticism that the proclamation of a truth is never profitably adjourned; any attempt to suffocate truth will end in discomfiture. The recognition of a principle is the first step for success. Social discontent will be greater if a class realizes that its rights are encroached upon. Indeed the principles mentioned above are so just (and in the long run so utilitarian too) that their adoption should never become object of dissension or strife but should serve as a lofty goal to aim at by all.

Another objection turns round the biological fact that in all limited space overcrowding leads necessarily to limitations in the standards of health. This objection would hold, if we had no possibilities for Emigration. The rational approach to the problem is to improve the education of the masses and make emigration easier.

A third objection is financial and economical. It is pointed out that we cannot afford to adopt easily the social schemes which countries richer than us are with difficulty attempting to put into effect. The objection would be sound if one insisted that these social reforms were to be rushed. Everyone will agree that reforms of a vast entity will require long years to become a reality. We cannot put the cart before the horse, but in such matters a start is always good. We must also give precedence to other social measures. Thus the introduction of compulsory education will be a reality in the not distant future. The principle for its adoption has been universally accepted and that is a deciding factor. Yet only a few years ago compulsory education was considered a utopia. May in a few years time the reforms of Social Medicine be in equally position!

# “ACTIO DE IN REM VERSO”

(By E. Mizzi, B.A.)

*JURE naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiozem* is one of the few rules of natural law which pervade all legislations, notwithstanding that the legislator has not taken the trouble of formulating it expressly. It is, in fact, a fundamental principle of equity and, we may add, of law, that any advantage acquired without a legal title at the expense of others is to be returned by the person receiving it.

As a sanction to this rule of equity the law grants an action against that person whose estate has been increased *cum iniuria et alterius detrimento*, which is called by modern writers *action de in rem verso*.

The theory of unearned profit, as many others which are based on equity and natural justice, derives from Roman Law. Where it was necessary consequence of the *suum cuique tribuere*. The action granted by Roman Law took the special name of *condictio*. The original *condictio* was divided into several branches, each of which had characteristics of its own. There were e.g. the *condictio indebiti*, the *condictio ob turpem causam*, the *condictio ob iniustam causam*, and so on : all of them, however, aimed at the restitution of unearned profit, and were known as *condictiones sine causa*. They were finally classified by Justinian, who, moreover, in order to facilitate such restitution created a *condiction suppletoria* — the *condictio sine cause stricto sensu*, which could be availed of in almost all cases of *locupletatio sine causa et cum aliena iactura*. These facts, show that unearned profit was severely repressed by the Romans.

Besides the *condictiones*, Roman Law had several other actions having the same purpose. Among these actions we find one which deserves our attention in view of the fact that we owe to it the name of our modern action. We are referring to the *action de peculio et de in rem verso*. Contrary to what has been said by some writers, this was a single action, though including two headings: “*Eadem formula, et de peculio et de in rem verso agitur*” (Gaius). It referred to the particular case of a *filius familias* who contracted debts without the *jussum patris* : the creditors could sue the father but only up to the amount of the advantage derived by him (*in rem versum*) and within the limits of the assets of the *peculium* (*de peculio*).

It results clearly that the modern *action de in rem verso* does not derive from this action, which referred to a special case but from the more general action — the *condictio sine causa*. Modern French authors have arbitrarily taken the second heading of the Roman action in order to give a name to that which aims at the restitution of unearned profit in all cases. It would have been more logical and more historically correct had this action been called *condictio sine causa*.

Unfortunately modern legislations, saving few exceptions, do not grant this action specifically. There is hardly any doubt however that it exists at law. In fact, apart from a few unimportant exceptions (such as Vittorio Mori), all writers agree that the *action de in rem verso* must be admitted as a general remedy for all cases of unearned profit and as a sanction to the rule of equity *nemini licet locupletari cum aliqua iactura*. The majority prefer to proceed cautiously : they hold that the intention of the legislator of admitting this action may be argued from several provisions of the law, which, they say, are nothing else but an application of this

great principle of equity. Thus, in articles 265, 266, 267, 275 and 277, though in conformity with the other principle *accessorium sequitur principale* the law entitles the owner of the thing to “all that it produces or that becomes united to or incorporated with the thing” still it binds him to make good any loss sustained thereby by a third party, notwithstanding that *stricto jure* all the accessories are his. Similarly in art. 731, where the law deals with *indebit solution, the accipiens*, even though the thing be no longer in his possession and even though the thing be no longer in his possession and even though he be in good faith, is bound to restore the value of the thing to the *solvens* up to the amount of the profit he may have derived. In art 860 it is stated that, though payment is null if made to an incapable person, it is, this notwithstanding, valid “if the debtor can show that it was applied to the benefit of the creditor”. Several other articles may be quoted; such as arts. 929, 1438, 1665 and 635.

Other authors, finding this method of research dangerous, hold that “equity is in itself one of the objective elements which determine the solutions required by positive law” (Geny); and if we accept this view there would be stronger reasons for acknowledging the admissibility of this action at law.

French and Italian jurisprudence are equally explicit; and the same thing may be said of our jurisprudence. There are, in fact, several judgements delivered by our Courts which go to prove this last assertions. Vide : Grixti vs. Manduca, 8<sup>th</sup> April 1870; Diacono vs. Mac Kay, 17<sup>th</sup> October 1888; Scicluna noe vs. Watson noe, 15<sup>th</sup> July 1901; Tonna vs. Cachia Zammit, 23<sup>rd</sup> May 1924; Dr. E. Said noe vs. The Most Noble Marquis D Testaferrata Bonnici Axiaq, noe. Et. In the last mentioned judgement the Court was even more explicit and stated that “there is no doubt that this action must be admitted as a general principle and as an ordinary means for preventing unearned profit, whenever the conditions required by the traditional development of this action concur.” The Court furthermore hoped that *in jure condendo* the legislator might consider the expedience of formally acknowledging this action in a special provision of the Code, as has been done by the Swiss, German and Japanese legislators.

Much has been said on the nature of this action. We shall however limit ourselves to pointing out, in brief, some of the theories which have been suggested by modern French writers.

According to several jurists this action depends on the quasi-contract *negotiorum gestio*. As Laurent says, it can only be exercised in case there has been an interference in the affairs of another, which, however, owing to the defect of one of the conditions required by law, could not give rise to *negotiorum gestio*. As against this theory, which is known as the theory of abnormal *negotiorum gestio*, it is said that not all cases of unearned profit imply such interference, whilst equity insists that unearned profit be returned in all cases.

According to others the ground for this action is quasi-tort. The ground for civil liability—they say—is fault : now the person who receives unearned profit is bound to return it because he is at fault i.e. because he is not entitled to keep it. However, it is objected that no fault can be imputed to a person whose estate may have been increased at the expense of others without any act on his part and perhaps even without his knowledge.

Planiol’s view may be reduced to this simple statement : every quasi-contract resolves itself into a *locuplatio sine causa*, and the group of quasi-contracts is strengthened by the addition of all cases of unearned profit : these cases have not been classified and named by the law as quasi- contracts, but they are so. They may in fact be called innominate quasi-contracts.

Baudry- Lacantinerie et Barde do not admit that every quasi contract, especially *negotiorum gestio*, is a case of unearned profit. In fact, they say, the liability of the *dominus rei gestae* is not limited to the restitution of the advantage derived by him : article 724 of Ord. VII of 1868 lays down that “if the affair has been well managed, the interested party, even though the management has by accident failed to be of any advantage to him, is bound to fulfil the obligations contracted in his name by the manager; to indemnify him in regard to such obligations as he may have entered into in his own name; and to reimburse him for all necessary or useful expenses, with interest from the day on which they shall have been incurred.” So also the obligation of the *gestor* to continue in the management of the affair until the heir of the *dominus* is in a position to do so himself, cannot evidently arise from the theory of unearned profit. But they accept the view that every case of unearned profit is a quasi-contract; and they add that this opinion is shared by the majority of writers.

Ripert et Tesserie have formulated a very original system. They depart from the theory that he who creates risk should bear it, and they argue that he who gives rise to an advantage should enjoy it. “a new benefit has been procured, a useful result has been attained, and two persons claim it : the law must prefer one of the two, and it is natural that it should choose the one who has given rise to it : the other one, who has received it, must consequently return it.” However one of the natural consequences of this theory would be that if the advantage derived exceeds the loss incurred, the one who has been its cause would be entitled to the total amount of the profit. This would exclude the condition *cum alterius detrimento*, which exclusion would render the modern action contrary to equity, since the defendant should not be bound to return more than what has been sustained by the plaintiff, and consequently its very ground for existence would vanish.

Whatever be the true nature of this action one thing is certain : the *action de in rem verso* is based on considerations of equity. It is not a sanction to a contractual obligation, but a sanction to an obligation imposed by equity viz. the restitution of any *locupletatio sine causa*.

This traditional principle has been acknowledged in a judgement given by the Court of Appeal in re Scicluna noe vs. Watson noe, 15<sup>th</sup> July 1921 (Vol. XVIII. P.26) : “ Il rimedio sussidiario ‘de in rem verso’ basato sulle disposizioni contenute nel titolo omonimo del Digesto (Lib XIV. Tir. III) ....fu concessione nei casi in cui l’azione ex contractu non e esperibile . tale azione ha il fondamento e ad un tempo il suo limite nel vantaggio recato al terzo, ed ove questo manchi, non puo essere esercitata.”

Very important consequences derive from this principle : in the first place consent is not an element; on the contrary the obligation is imposed even against the will of the defendant. In the second place the defendant need not be capable at law : a minor, therefore, or a married woman or an interdicted person is also bound to return any unearned profit, because this obligation arises *ex aequitate* and not *ex contractu* (Vide : Quattromani vs. Buchini Lebrun, 21<sup>st</sup> May 1923, Vol. XXV).

We have dealt, in brief, with the historical origin, admissibility at law and nature of this action. But certainly the most important matter refers to the conditions which are necessary for the exercise of the *action de in rem verso*.

It is important to repeat before going any further, that this action has not been regulated by Law and therefore, as a judgement of the French Court de Irequets (15<sup>th</sup> June 1892) has stated does not mean that no conditions are required, or that they cannot be determined : it simply means that, as the law does not specify any, only those conditions required by equity and

admitted by tradition should be regarded as necessary, and that it is not lawful to apply here rules proper to other institutes of law.

It seems that no serious questions have been raised as to what conditions are required. However it is not an easy matter to decide what is to be regarded as necessary. But the difficulty has been, to a large extent, reduced by a judgement delivered by the Civil Court, First Hall, 16<sup>th</sup> June 1936 in *re Said noe vs. Marquis Testaferrata Bonnici noe. Et.*, which accepted completely Baudry-Lacanterie's opinion that "in definitiva, le condizioni dell'azione de in rem verso sont rte : 1. l'arricchimento; 2. il vincolo di casualita; 3. il carattere ingiustodell'arricchimento." In view of this pronouncement of our Courts we can accept Baudry-Lacantinerie's opinion as being the state of things under our law.

There must therefore be, in the first place, an advantage or an enrichment. In ascertaining whether this condition concurs or not only those advantages consisting in an increase in the value of the estate are to be taken into account : a mere moral advantage is not sufficient. Quid if instead of carrying out improvements the plaintiff incurs necessary expenses which prevent the defendant's property from perishing or from deteriorating? Baudry-Lacantinerie is of opinion that such expenses would also be covered by this action, because they may also be considered as an advantage, provided they be necessary. In fact the value of the estate would be increased because it would be prevented from decreasing. The advantage would in this case amount to the expenses incurred viz. that sum which the defendant would have to pay for the preservation of his property.

A very important principle, in connection with this requisite, has been established by our Courts : an advantage can only be regarded as such whenever it is derived on a gratuitous title; otherwise it would not be an advantage. If a person receives something which is due to him, or gives some other thing in return for that which he receives, it can never be said that he has enriched himself.

"Si dice che una persona sia divenuta piu ricca col denaro e colle cose altrui quando essa l'abbia avuto a titolo lucrative, e non a titolo oneroso" (*Diacono vs. Mc.Kay*). The same principle was confirmed in *re Grixti vs. Manduca* : "L'azione equitativa de in rem verso non e esercibile contro un creditore con titolo oneroso, il quale abbia in buona fede esatto e consumato la cosa a lui dovuta, sebbene l'estinzione del debito sia seguito con denaro o con alter sostanze somministrate da un terzo al debitore."

The second requisite is the relation of causality. In other words the relation between the act of the plaintiff and the advantage derived by the defendant must be that existing between cause and effect. The plaintiff must show that he has procured an advantage to the defendant by means of an act of his or a sacrifice on his part. This is a question of the Court to decide whether such relation of causality exists or not

A difficulty has been raised with reference to this second condition, which it is very useful to examine. It is quite certain that this condition concurs when the act or sacrifice of the plaintiff gives rise directly to an advantage which is acquired by the defendant. Now what happens in case the advantage is not derived directly but only through the intervention of a third party?

This difficulty arose in two judgements which we have already mentioned viz. that given by the French cour de requetes on June 15<sup>th</sup>, 1892 and in *re Said vs. Testaferrata Bonnici* (June 16<sup>th</sup>, 1936). The facts of the case decided upon by our Court were the following : Said had supplied Pace with wood, beams and paint for improving a tenement belonging to Testaferrata Bonnici, which Pace had on lease. These materials were actually made use of for this purpose.

Pace was subsequently declared insolvent and Said consequently sued Testaferrata Bonnici for the restitution of the profit derived therefrom. Very similar were the facts of the French case : a trader had sold manure to the tenant of a field; the contract of lease ended before the crops were gathered, and the trader sued the landlord on the ground that the manure sold by him to the tenant had procured an advantage to the defendant, because it was he who gathered the crops.

Both Courts gave judgement for the plaintiff.

Baudry-Lacantinerie comments favourably on the decision of the French Court. He adopts the distinction proposed by Ripert et Tesserie : if all that the third party does is simply that of causing the plaintiff to do an act which procures an advantage to the defendant, then the plaintiff would always be entitled to this action. An example would be different if the third party has to intervene again, after the performance of the original act of the plaintiff. In order to solve this delicate question Ripert et Tesserie have suggested another distinction :if from the very outset i.e. when the original act is performed, the advantage is destined to be derived by the defendant, especially if such destination results from the very nature of the act or from the purpose which the plaintiff has in mind or from the fact that he believes to be dealing with an agent of the defendant, there would be a sufficient relation of causality between the act of the plaintiff and the advantage acquired by the defendant. Otherwise i.e. if the advantage has no specified destination the *action de in rem verso* would not be admissible.

A further objection was raised by the defendants in both cases : is the fact that a contractual relation exists between the plaintiff and the third party an obstacle to the exercise of this action? The defendants pleaded that were the *action de in rem verso* admissible, notwithstanding the existence of such a contract, its exercise would violate the rule *res inter alios acta tertio neque prodest neque nocet*, since such contract would affect parties extraneous to it. To this objection Baudry-Lacantinerie gives the following answer : “La risposta e facile. Come ha fatto osservare la corte di cassazione, il proprietario e obbligato verso il negoziante non per le somministrazioni di concimi fatte all’affittuale, mia a causa del vantaggio che ha ricavato dall’uso di questi concimi sulle proprie terre. La regola ‘res inter alios acta e dunque rispettata.” In other words this action is not a consequence of the contract intervening between the plaintiff and the third party, nor is it in any way related to it : its only cause is the advantage derived by the defendant.

This principle was expressly accepted by our Courts in the judgement mentioned above; and it was also implicitly admitted by the Court of Appeal in re Tonna vs. Cachia Zammit, which allowed the exercise of this action on the part of a contractor who had been charged with carrying out works in a tenement by several co-owners, against the other co-owners, not withstanding the contractual relation existing between the contractor and his employers.

It may be finally pointed out that an actual and material transfer of property from the plaintiff to the defendant is not essential : otherwise this would imply the exclusion of the *action de in rem verso* in all those cases in which the defendant obtains unearned profit directly from the activities of the plaintiff.

The third requisite is the unjust character of the advantage : it is necessary that it be *sine causa*, or as the Romans used to say *cum iniuria*. This means that if the defendant can avail himself of some juridical fact which entitles him to keep the advantage derived, he cannot be deprived of it by means of this action.

The words *sine causa* may lead to misunderstandings. Though, as Ripert et Tesserie observe, from a certain point of view the enrichment must be without cause, it necessarily has

for its cause an act or a sacrifice on the part of the plaintiff. It would be better, therefore, to talk of an unjust advantage.

Baudry-Lacantinerie gives us a case where this condition is wanting : a tenant improves or repairs a tenement which he has on lease; but in virtue of a clause in the deed of lease any repairs or improvements carried out by the tenant or by his order are to benefit the landlord on the termination of the contract, without the payment of any compensation. The tenement is actually improved, and the tenant fails to pay the contractor, who, therefore, on the termination of the contract of lease, sues the landlord. Can the latter plead the right to which he is entitled in virtue of the said clause? Jurisprudence answers the question in the affirmative, and we may even include our Courts (Judgement, June 16<sup>th</sup>, 1936). In fact the inclusion of such a clause in the deed of lease means that the advantages arising therefrom are taken into account in establishing the rent; so that the landlord is only entitled to them because of an equivalent sacrifice on his part. It cannot, therefore, be said that the advantage is unjustly derived; on the contrary there is no advantage in this case, since what is acquired is acquired on an onerous title.

We may finally examine, in brief, the effects of the *action de in rem verso*.

The purpose of this action is the restitution of unearned profit : consequently the plaintiff cannot obtain more than the amount of the loss sustained. On the other hand it would not be fair for the defendant if he were to return more than what he has derived; and we have seen that this action is a consequence of a principle of equity. We may therefore conclude that the defendant is bound to return the loss sustained by the plaintiff if the profit derived exceeds the loss; and inversely he is bound to return the profit if it amounts to less than the loss incurred.

In conformity with the principle that the parties to a lawsuit are to be placed in that position in which they would have been had justice been administered immediately, the advantage is valued according to the state of things existing at the time of the demand. It follows that if the advantage acquired by the defendant has, through a fortuitous event, ceased to exist, this action cannot be brought.

# EXCUSABLE HOMICIDE

A note on the historical development of Art:233 of the Criminal Code  
(By A. Ganado, B.A.)

Art. 233 reads : Wilful homicide shall be excusable :

1. when provoked by a severe bodily harm, or by any crime whatsoever against the person, which is liable to a punishment higher than one year's hard labour or imprisonment;
2. when committed in the act of resisting in the daytime, the scaling or the breaking of enclosures, walls, or the entrance of a house or of an inhabited apartment, or of the appurtenances which may have a direct or indirect communication with such house and apartment;
3. when committed by a person who was acting under the immediate influence of an instantaneous passion or mental agitation owing or which he was, in the act of committing the crime incapable of reflection;
4. when committed by a person who acting under the circumstance stated in art : 229, has exceeded the limits imposed by the law, by the authority or by necessity; provided, however, that if any such excess is due to such person being taken unawares, or to fear or fright, the same shall not be liable to punishment.

In order to its being declared that the offender was incapable of reflection it is necessary, in cases of provocation, that in the fact the homicide be attributable to heat of blood and not to a deliberate intention to kill or to cause severe bodily harm, and that the cause be such as would, in men of ordinary temperament, commonly produce the effect of rendering them incapable of calculating the consequences of the crime.

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In a general sense homicide may be defined as : *Violenta vitae hominis ademptio* or *hominis caedes*. In this definition no distinction is made between a homicide deriving from a lawful or unlawful cause. Our law gives no definitions of homicide, but classifies it into:

- I. Wilful or voluntary homicide (art : 218);
- II. Involuntary (art : 231);
- III. Excusable (art :233)
- IV. Justifiable (art : 229).

It is only with excusable homicide that we are at present concerned. Willful homicide is excusable, when, though the offender is not exempt from liability, he is, because of certain circumstances accompanying the act, not fully responsible and therefore, the degree of the offence, and consequently of the punishment, decreases. As Nicolini says : "La scusa consiste unicamente nell'ragion motrice del reato cioe nell'efficacia deell'affetto : la quale debba essere di tale forza che senza la sua azione il reato non avrebbe avuto lungo, ma non di tanta forza da togliere all'intutto l'imputazione." Thus, in order that homicide may be excusable it is necessary that there be certain circumstance accompanying the act, and these circumstances must be such as to bring about a change in the state of mind of the offender.

Our law contemplates the cases of excusable homicide in art : 233. The historical origin of this article whilst being of particular interest in itself is of great practical importance in the interpretation of the wording in accordance with the spirit of the law.

Paras : 1 and 2 of art : 233 can be traced back to the first Draft Code of Penal Laws published in Malta under British rule in 1836, which was compiled by five Maltese Commissioners <sup>(1)</sup> and sent to the Government together with a Report in 1835. after its publication it was submitted by the Secretary of State to the Royal Commissioners of Enquiry <sup>(2)</sup> who were appointed in 1836, and these suggested that it be revised by the Maltese Commissioners before being promulgated. Of the original five commissioners, the only two then still living <sup>(3)</sup> prepared in 1842 a revised project which was by order of the Secretary of State submitted to a Scotch advocate, Mr. Andrew Jameson, who in a very learned Report suggested various amendments and correction, omissions of some provisions and additions of others. The draft of 1842 together with Jameson's Report was submitted to Dr. Micallef, the Crown Advocate (afterwards Sir Antonio, President of the Court of Appeal) for his consideration. The revised code was approved by the Council of Government in 1845 and resubmitted to Jameson who made a second Report in 1846. the draft code was again approved by the council of Government and was published in 1848. when in 1849 the Council of Government was reconstituted by the admission for the first time of elected members the draft code came up for discussion before the newly-formed Council of Government at its first sittings in 1850.

In the draft of 1835, art : 299, which was taken from art : 377 of the Neapolitan code, read as follows : "Gli omicidi volontari saranno scusabili,

1. se fossero provocati da grave offesa sulla persona o da qualunque siasi crimine contro le persone;

2. se, fuori del caso contemplato nel no. 2 dell'art :296 <sup>(4)</sup>, fossero commessi nell'atto di respingere di giorno la scalata, o la frattura dei recinti, fei muri o dell'ingresso di una casa o di un appartamento abitato o delle loro dipendenze che immediatamente o mediatamente avessero comunicazione con tale casa o appartamento.

In the draft of 1842 this art. Was numbered 211. In this new project, para : 1 was amended by substituting the word "delitto" to that of "crimine" and by adding after "delitto" the words "portante a pena maggiore di due anni di prigionia". In para : 2, the words "fuori del caso contemplato nel nro.2 dell'art : 296" were omitted, since no. 2 of art : 296 of the draft of 1835 was left out altogether in the new draft. By proposing an alteration of the terms of art : 211, no. 1, Mr. Jameson intended to enlarge considerably

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1. The Commissioners were : Claudio-Vincenzo Bonnici, Ignazio Gavino Bonavita, Giuseppe-Francesco Falson, Filippo Torriggiani, Francesco Chappelle.

2. John Austin, George Cornwall Lewis.

3. Ignazio-Gavino Bonavita, Francesco Chapelle

4. No. 2 of art : 296 considered the following as one of the cases of actual necessity of lawful defence : "Quando l'omicidio e le offese sull persona fossero commessa nell'atto di respingere, anche di giorno, la scalata, o la rottura dei recinti, dei muri, o delle porte di entrata in casa o nell'appartamento abitato, o nelle loro dipendenza aventi comunicazione come sopra, in luoghi che non fossero entro l'abitato o prossimi a quello, cosicche si potessero chiamare in soccorso I vicini, e quelli potessero accortere."

the application of the plea of adequate provocation excited by personal violence <sup>(5)</sup>. In the Appendix he suggested that after the words “more than” the words “two years” be deleted and the words “one year’s” be inserted <sup>(6)</sup>. Dr. Antonio Micallef concurred in Jameson’s suggestion and para : 1 as amended was later passed by the council of Government with the insertion of the words “di lavori forzati o” before the words “di prigionia”. Para : 2 was passed as it stood in the draft of 1842. since that time paras : 1 and 2 have never been amended. In the draft of 1848, the article became article 227 and passes as art : 218 into the Code promulgated in 1854, and paras :1 and 2 of art : 299 of the original draft of 1835 are now paras : 1 and 2 of art : 233, the code of 1854 having been renumbered in 1901.

In the draft of 1842, para : 4 of art : 211 read as follows :

“4. se vi concorresse qualche altra valevole circostanza attenuante il dolo” ; that is, the concurrence of attenuating circumstances was considered as an excuse for homicide. The theory of attenuating circumstances which Jameson described as one of the prominent features of the new Code found its application also in this particular article of the draft. This theory was criticized by Cornwall-Lewis in a memorandum submitted to the Government on the Project of Penal Laws of 1835. In his observations, Mr. Lewis, referring to the power given to the Jury to declare the existence of attenuating circumstances, remarked that this theory was an imperfect means of supplying for the deficiencies of the law. The Maltese Commissioners in their Report accompanying the draft of 1842 stated that they agreed perfectly with Mr. Lewis on this point, but they held on the other hand that “qualunque sia il progresso che la legislazione abbia finora fatto presso qualsiasi nazione, si e tuttora da per tutto ben lontani dalla desiderato perfezione, che possa convenientemente dispensare un legislatore dal ricorrere a questa vaga, e vero, ma assai provvida teoria, la quale sola puo valere, ad impedire che in infiniti casi, la legge non devenga assai ingiusta.” The Commissioners also referred to the reasons brought forward in the Report of 1835, reasons which had induced the then five Commissioners to adopt unanimously the theory of attenuating circumstances. They finally stated that they still adhered even more strongly to their opinion<sup>(7)</sup>.

After a lengthy consideration of the subject, Jameson recommended the suppression of the theory as one of the basic theories of the Code, and consequently for the same reasons, advocated the omission of para : 4 of art : 211 which was merely a particular application of the general theory. This suppression was approved by the Executive government of Malta and para : 4 was omitted in the draft of 1848.

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5. A Jameson—“Report on the proposed code of Criminal laws for the Island of Malta and its Dependencies”; page ,29 September, 1843.

6. Appendix to Jameson’s Report, entitled “Amendments and additional Articles in the order of the Draft”; Title IX, Ch.V, page

7. “Rapporto di Sir Ignatius G. Bonavita, Presidente della Regia corte di Appello, e del Dr. Francesco Chappelle, Giudice di Sua Maesta, due dei Commissionari gia nominate per la formazione del Codice per l’Isola di Malta e sua Dipendenze, in virtu della Commissione spedita da Sua Eccellenza il Luogotenente Governatore nel di 13 Novembre, 1834, fatto sulla revisione dei due Progetto, l’uno delle Leggi Penali e l’altro delle Leggi di Organizzazione e Procedura Penale, ordinate da Sua Eccellenza il Governatore con lettera del Segretario Principale di Governo, del di 18 Dicembre, 1839”. La Valletta, 14 Febbraio, 1842.

Para : 3 and the last paragraph of art : 233 are of special interest and importance. There is no trace of such provisions in the draft of 1835, just as there is no trace in the French and Neapolitan Codes of the time. It was in 1842 that the two Maltese Commissioners inserted a provision as para : 3 of art : 211 which ran thus :

“3. se fossero commessi da persona che avesse agito sotto l'immediata influenza di una istantanea passione ossia agitazione di mente, per cui nell'atto del delitto fosse incapace di riflettere.

Per dichiararsi essere stato l'accusato incapace di riflessione, e necessario che la causa fosse tale che in uomini di ordinaro temperamento produrrebbe comunemente l'effetto di renderli incapaci di calcolare le conseguenze del delitto.”

Jameson says that “this provision seems to have been derived from the Bavarian and other German codes”. This may or may not be so. However, it is significant that this article reproduces faithfully in its context Dr. Bonavita's views when in 1823 he wrote a Memorandum on the Criminal Legislation of Malta which he later submitted to Sir John Richardson, a distinguished English Judge, one of the twelve Justices of the High court of England., who, being in Malta for reasons of ill-health, was in 1824 appointed Commissioner for the purpose of making a Report on the Laws and Practice in force in these Islands and of suggesting the necessary reforms. In this Memorandum Bonavita stated with regard to this subject that the legislator was to keep in mind two guiding principles. On the one hand, considering the temperamental character of the Maltese people there was an absolute necessity (arising from a principle of particular justice towards the offender) of showing towards the individual becoming guilty of an offence because of the heat of anger or passion, a portion of that indulgence shared by a mad-man, an infant, and all those who have not the right use of reason. On the other hand, the legislator was to do his utmost to avoid that a man should arrive at the stage of giving free rein to his passions and of allowing his emotion to overpower his reason thus guiding him to unpremeditated excesses <sup>(8)</sup>.

This is exactly what Bonavita sought to do when as one of the two surviving Maltese Commissioners he was drawing up the draft of 1842; whilst admitting the excuse of instantaneous passion or mental agitation, he required that the offender be still under its immediate influence when committing the act, and that he be incapable of reflection, that is, that the cause be such as would in men of ordinary temperament commonly produce the effect of rendering them incapable of calculating the consequences of the crime. This latter limitation may have been taken from the Ionian, Bavarian or other German Codes which have a similar provision. Richardson, in his Report of 1826, acting most probably on Bonavita's observations had inserted a paragraph providing for an excuse for homicide : “If any person willfully but without premeditation, shall by any means cause the death of another in the heat of passion occasioned by any affray, quarrel or other recent provocation not otherwise provided for law, every person so offending shall be adjudged to suffer imprisonment.....” <sup>(9)</sup>. However, in four specified cases, notwithstanding that the homicide be committed upon or in consequence of any affray, quarrel or recent provocation, the homicide was to be deemed to have been committed with “pre-ineditation, one of the cases being, for instance, “if the person

8. V. Sir I. G. Bonavita : “Carte relative al Codice Criminale del 1854”, Vol. I, “Memorandum on the Criminal Legislation of Malta” (1823), now the property of Judge R.F. Ganado.

9. J. Richardson—“Report on the Laws of Malta”; App. B; Bk. III; Ch. I; para.4.

killed shall have been father, mother, or other lineal ancestor of the offender”<sup>(10)</sup>. Considering that Bonavita had mentioned this excuse in the memorandum sent to Richardson and had commented at length upon it and that Richardson had suggested provisions dealing with this excuse it is rather strange that nothing in this regard is to be found in the draft of 1835.

Jameson severely criticised the provision of the draft of 1842 and he would not recommend the retention of this article unless considerably modified, the excuse of instantaneous passion being, according to him, very dangerous among a southern race and contrary to the sound principles of criminal responsibility. However, he admitted that “there is a great difficulty in coming to a satisfactory conclusion upon this matter, so as to reconcile due regard to human infirmity with the protection of life and the due administration of justice”. Yet he considered that, notwithstanding the great difficulty of laying down satisfactory positive rules upon this subject there were some obvious qualifications of the plea of excuse which might and ought to be defined. The mere existence of uncontrollable passion as an extenuation of homicide, apart from the justness of the cause of provocation, would introduce dangerous latitude into the law on the subject<sup>(11)</sup>. These and other considerations led Jameson to recommend certain modifications namely: “art : 211 no. 3. 1<sup>st</sup> clause after the word “reflection” insert the words “and provided that in fact the homicide be attributable to heat of blood and not to a deliberate intention to kill or do great bodily harm”. He also added an article when the excuse should not apply, as for instance, in the case of slight provocation or when the passion was provoked by mere words or gestures of reproach, contempt or derision<sup>(12)</sup>.

Jameson considered the matter of such vital importance that he treated it more fully in the Notes appended to the Report. He passed under review the most important Codes and Laws of foreign countries. The Ionian, Bavarian and other German Codes were based upon erroneous theories of criminal responsibility and very mistaken views of humanity. The French escapes the difficulties of the subject by means of their theory of attenuating circumstances which was an evasion not a solution of the difficulty. The Law of Scotland demanded more self-command in cases of inconsiderable wrong than the Law of England, the latter admitting dangerous latitude for any interference, however inconsiderable, with the person. He finally concluded that “it humbly appears to me that the provision of the Project, would lead to very dangerous consequences in any country or climate and that these would be probably aggravated among such people as the Maltese” and he then went on to illustrate this statement<sup>(13)</sup>

The Crown Advocate, Dr. A. Micallef, had this to say on Jameson’s proposed amendments and additions : “la correzione suggerita dal sig Jameson sull’art : 211 e fondata sulle ragioni mi sembrano molto legali e convincentissimo e quindi non credo che la riforma proposta dal sig. Jameson possa essere disapprovata”<sup>(14)</sup>. On the strength of this recommendation Jameson’s suggestions were accepted by the Government and inserted as art : 227 in the revised Draft published in 1848. Mr. Jameson in his Report on this Draft

10. Ibid. para. 1, no. iii

11. Jameson’s Report; (1843); page

12. Appendix to Jameson’s Report—Amendments etc—Title IX, ChV, ps c&ci

13. Appendix to Jameson’s Report : “Notes of observations on particular articles”—Note D; p.cxxxiv

14. Osservazioni dell’Avvocato della Corona (Dott. A. Micallef) sul rapporto del Sig. Jameson intorno al progetto si Leggi Criminali”. Osservazione CXX sull’art :211.

acknowledged the fact that “ the excuse of instantaneous passion in homicide so dangerous among a southern race is retained but the limitations suggested by me with the view of restraining its dangerous latitude have been adopted<sup>(15)</sup>.

When in 1850 this Draft came before the Council of Government, the Crown Advocate, at the sitting of the 7<sup>th</sup> of May, moved an amendment to art : 227 no. 3 where the article referred to the state of mind of the accused when he was incapable of reflection. He moved that after the words “e necessario” in the 2<sup>nd</sup> clause of para :3. the words “nei casi di provocazione” be inserted, *in order to show that the first clause contemplated the state of mind of the accused in general without taking into consideration any provocation.* This amendment was adopted *nem. con.*

Dr. Adriano Dingli (at the time an elected member of the Council, afterwards Sir Adrian, President of the Court of Appeal), then proposed an amendment to the last part of art : 227 which included the five cases suggested by Jameson where the excuse should not apply. Dr.Dingli moved that the excuse was to apply in the first two cases , that is, in case of slight provocation, or when the passion was provoked by mere words or gestures, but the punishment was to be heavier than the ordinary punishment for excuses of instantaneous passion. The Chief Secretary (Mr. Lushington), on behalf of the Government, opposed the amendment and supposed the amendment and supported Mr Jameson’s suggestion that the excuse should not apply in these two case. Eventually, on a division the council adopted Dingli’s amendment by seven votes against six <sup>(16)</sup>. These two cases formed a separate article (art : 219) on the promulgation of the Code in 1854. Sir Ignatius Bonavita (then retired President of the Court of Appeal ) in his unpublished Notes on the Criminal Code of 1854 expressed himself against the introduction of this article, which was later repealed by Ord. V of 1868 <sup>(17)</sup> (when Sir Adrian Dingli was Crown Advocate ) — experience having probably shown the ill consequences of such a provision. The other three cases ere inserted in the Code of 1854 as Nos. 1, 2 and 3 of art : 229 and this article has since become art :235.

Since 1854, the two clauses of para : no. 3 of art : 218 of the Code of 1854 have been separated by the insertion, in 1909, of para :no. 4, and the second clause of para : no. 3 has been removed to the end of the article which, as already stated, became art : 233 in 1901. Para : 4 was introduced by a Bill entitled “Criminal Laws Amendment Ordinance” which was read for the first time at the sitting of the Council of Government of the 23<sup>rd</sup> December, 1908. the amendment introduced by the Crown Advocate as Art. 13 of the Bill ran as follows : “il seguente inciso e aggiunto dopo il terzo inciso del primo paragrafo dell’art : 233 delle dette leggi : 4. Se fossero commessi da persona, la quale, agendo nelle circostanza prevedute nell’art : 229, avesse ecceduto I limiti imposti dalla legge, dall’authorita o dalla necessita”. This clause was taken from the Italian code <sup>(18)</sup>. Explaining this amendment the Crown Advocate (Dr. V. Frenzo Azzopardi, afterwards Sir Vincent, Chief Justice and President of the Court of Appeal) at the above mentioned sitting pointed out that this paragraph contemplated “what is styled in the Italian Law ‘un eccesso di difesa’ or ‘un’eccesso nell’esercizio dei propri doveri’”. Since at the time there were no provisions for similar offences under our law, the Jury, if only

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15. Jameson’s “Report on the revised Draft of the proposed code of Criminal Laws for Malta”. Edinburgh, 22 May, 1846.

16. “Il Portafoglio Maltese”—16 Maggio, 1850; p.

17. Proclamation : 21 December, 1868.

18. V.Italian “Codice Penale”; arts: 50 and 376

practical considerations were kept in sight, was faced with this alternative: either to excuse the accused on the ground of the heat of passion (when such passion had actually nothing to do with the offence), or discharge him because of lawful defence (while in reality it was not a case of pure lawful defence). And, under these circumstances, jurors of ten arrived at undesirable conclusions, the offenders being acquitted because there was no special provision in the law on the subject <sup>(19)</sup>

Dr. A. Mercieca (afterwards Sir Arturo, Chief Justice and President of the Court of Appeal) moved an amendment to that of the Crown Advocate by proposing the addition of the clause "Ma un taleccesso non sara punibile se l'autore vi e incorso nella sorpresa, nel timore o nello spavento". When at the sitting of the 5<sup>th</sup> May, 1909 the art : was discussed in committee, the Crown Advocate stated that he was not disposed to accept the amendment of Dr. Mercieca which neutralized his own amendment of Dr. Mercieca which neutralized his own amendment. Dr. Mercieca rose to explain the purport of his proposed amendment and he was supported by Mr. F. Azzopardi, a learned legal procurator and leader of the elected bench from 1906 to 1911. the Crown Advocate then stated that he concurred perfectly in what the Honourable members had said and the only point on which he might be at variance referred to the question as to whether such a disposition as that proposed by Dr. Mercieca was to be inserted in the Code or whether the matter should be left to the discretion of the Judge, as was the case of the Italian law. Seeing that he was entirely of the same opinion as that of the hon. Members in regard to theoretical considerations, he would find no difficulty in having the disposition inserted in the law. Thus he declared he would not oppose the amendment <sup>(20)</sup>. Consequently, art. 13 as amended was passed nem. con. and it finally figured as art: 21 of the Bill as promulgated by Ord. VIII of 1909 on the 24<sup>th</sup> September of that year.

The interpretations of para : 3 of art : 233 claims our particular attention having recently given rise to much discussions in the Press, among University Law Students and among members of the legal procession. The point at issue was whether, according to the law as it now stands , the excuse of instantaneous passion or mental agitation would apply or not to a case of infanticide.

The best interpretation available of any law is that given by the legislator himself : *Eius est interpretare leges, cuis est condere*. In fact, as Prof. V. Caruana says in his notes on Prolegomena and Roman Law, "Legislative interpretation is universally obligatory because it is one with the law which interprets and it can only be made by the legislative power". Now, in the case, we have already seen that the Crown Advocate, when moving an amendment to the second clause of art : 227 no. 3, at the sitting of the 7<sup>th</sup> May, 1850, expressly stated that he was proposing the amendment to show that the first clause contemplated the state of mind of the accused in general without taking in consideration any provocation.

Moreover, Sir Ignatius Bonavita who was the retired President of the Court of Appeal when the Code of 1854 was promulgated, expressed himself as follows in his unpublished noted written after his first reading of the Code : "... in tale seguente paragrafo si speiga cio che si richiede per importate secondo la legge la capacital di riflettere — nei casi di provocazione — cioe quando questa incapacita succede solamente in seguito di una dat

19. V. Debates of the Council of Government, 1908-9. Vol. XXXIII, ps. 149-150

20. Ibid . ps. 1132-1137

provocazione ed a questo caso e ristretta la spiegazione qui contenuta. Non potrebbe estendersi all'altro caso quando la incapacità avvenisse senza conseguite la provocazione caso benissimo inclus nei termini del numero tre che sono generici e compresi indistintamente d'ogni caso di incapacità si riflessione qualunque sia stata la causa senza punto far dipendere questo stato di incapacità da alcuna provocazione <sup>(21)</sup>. And in his additional Notes written later, by which he revised and enlarged his former Notes, he stated : "il nro. 3 di quest'articolo col paragrafo che ne continua la disposizione, nel progetto conteneva una sanzione sull' stesso caso, in termini generali espresso nel nro. 3 e per la debita intelligenza ulteriormente e con dettagli spiegata nel paragrafo susseguente. I riformatori del progetto nella loro mania di fare cambiamenti allo stesso vi introdussero in quel paragrafo le parole 'nei casi di provocazione' e con ciò, facendo che il numero tre contemplasse un caso ed il paragrafo un'altro del tutto distinto dal primo, snaturarono il fine cui le due parti dell'articolo, o per meglio dire del nro. 2 dello stesso, miravano, rendendole entrambi imperfetti"<sup>(22)</sup>.

This interpretation has recently been followed by local jurisprudence. The case "Rex vs. Sant" when the accused was charged with attempted murder may here be mentioned. In his summing-up, Judge Giovanni Pullicino, then A/President of the Court of Appeal, directed the Jury to accept the interpretation given by the defence that art : 233 no 3 contemplated the excuse of instantaneous passion or mental agitation, independently of any provocation.

It is thus manifestly clear that Art. 233 in para : 3 and in the last para : considers two distinct cases; one of the state of mind of the accused in general and the other of mental agitation in cases of provocation. A contrary opinion can hardly be logically entertained in the face of such authoritative and irrefutable evidence and of such a consensus of opinion. However, whether art : 233 no. 3 provides sufficiently for infanticide is another matter. Once the interpretation of art. 233 as given above is accepted, it is undoubted that an infanticide committed under the influence of instantaneous passion or mental agitation would fall under para : 3 ; in support of this contention we have the application of that paragraph to cases of Infanticide by our Law Courts and the opinion of leading barristers, such as Sir Philip Pullicino and Professor G. E. DeGiorgio.

The excuse of instantaneous passion or mental agitation was adopted in a case of infanticide in re "Regina vs. Giuseppa Sultana" in 1861; the Court composed of three Judges (Sir Antonio Micallef, presiding) directed the Jury to accept the excuse, the existence of mental agitation having been actually proved. In another case, "Regina vs. Maddalena Camilleri e Marianna Bartolo" in 1890, the Jury, (seven against two) declared "essere l'accusata Marianna Bartolo rea del delitto imputatole nell'atto di accusa, colla circostanza, pero, che la Marianna Bartolo, nei commettere il delitto, agiva sotto l'immediata influenza di una istantanea agitazione di mente per cui era incapace di riflettere". Marianna Bartolo was subsequently condemned to 20 years imprisonment. Maddalena Camilleri was declared "not guilty". Again, a few years ago, the Attorney-General (Sir Philip Pullicino) filed a Bill of Indictment admitting that the killing of the child was excusable influence of mental agitation.

Moreover, as Sir Philip Pullicino, later acknowledged in a letter to the "Times of Malta" :

21. V. The Criminal code of 1854 annotated by Sir I. G. Bonavita, now the property of Judge R. F. Ganado.

22. V. Sir I. G. Bonavita: "Carte relative al Codice Criminale del 1854"; Vol. III—'Articolo da Rivista', p. , belonging to Judge R. F. Ganado.

His Majesty's Judges have invariably satisfied public opinion in Malta<sup>(23)</sup>. And, as Professor G.E. DeGiorgio pointed out in an article published in "Lehen is-Sewwa" : "Hadd minn dawk il-luminarji (referring to Sir Antonio Micallef, Mr. Andrew Jameson and Sir Adrian Dingli), la l-kompilaturi u lanqas ir-revizuri tal-Progett, ma hassew il-bzonn illi jittrattaw f'artikolu specjali, il-figura gjuridikata l-infanticidju, ghaliex dehrilhom illi l-artikolu 233 kien bizzejjed anke ghal dak id-delitt"<sup>(24)</sup>. One may here add that the omission cannot have been due to an oversight, the more so when one considers that infanticide was dealt with separately in the Neapolitan Code of the time which formed the main basis for the drawing up of our Criminal Code.

Thus it is firmly established that the law, as it now stands, provides for certain cases of Infanticide. However, the question still remains : but does the law provide sufficiently for every case of Infanticide which deserves the excuse of mental agitation? The law requires that the offender be acting under the *immediate* influence of an *instantaneous* passion or mental agitation, and that he be incapable of reflection, and it is this limitation of the excuse, if interpreted rigorously and restrictively, that gives rise to the difficulty, as another contributor to "Lehen is-Sewwa" signing under the name of "Gregarius" has very appropriately pointed out<sup>(25)</sup>. If any change is considered necessary, in order to remove any possible doubts on the matter, the best solution would be the insertion of a proviso laying down clearly that Infanticide shall be excusable when committed by the mother of the child under the influence of mental agitation (due to the effects pf childbirth( owing to which she was in the act of committing the crime incapable of reflection. If such mental agitation does not result from the evidence before the Court the accused should, in my humble opinion, be held fully responsible for the commission of the crimes and, therefore, liable to be convicted for willful homicide.

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23. "Times of Malta"— 6 December, 1944 p

24. "Lehen is-Sewwa"—3 February, 1945, p

25. "Lehen is-Sewwa"—6 January, 1945

# MOOT

## FARRUGIA NOE. VS. SPITERI\*

In 1926 Mr. Spiteri, a Maltese Roman Catholic, domiciled in Italy, married Miss Agius, a Maltese Roman Catholic domiciled in Malta. The marriage took place in Italy according to the rites established by the council of Trent i.e. not in accordance with the provisions of Italian law which, at that time, required civil marriage. In 1927 Mr. Spiteri abandoned Mrs Spiteri and contracted a second marriage in 1940, in Malta, with Miss Arnold according to the rites prescribed by the Council of Trent.

Mr. Spiteri, on a charge of having committed bigamy, has pleaded the nullity of his marriage with Miss Agius. The Criminal Court has decreed that the question of the validity of the marriage was to be decided upon by the Civil competent authority. He is now being summoned by the Public Prosecutor before the Civil Court to shew cause why his marriage with Miss Agius should not be declared valid.

Professor W. Buhagiar, B.A., B.C.L. (Oxon), LL.D., kindly consented to hear the case.  
Counsel for plaintiff: Mr. J. M. Ganado, B.A.;

Mr. V. Frendo.

Counsel for defendant: Mr. A. Ganado, B.A.;

Mr. E. Busuttil, B.A.

The first question to be dealt with was a plea in bar raised by the defendant: it was contended that the Courts of Malta were incompetent to decide on the validity or otherwise of the marriage contracted in Italy between Mr. Spiteri and Miss Agius, in view of the principles of Private International Law (at least as interpreted by English Courts<sup>(1)</sup>), that for the purposes of pronouncing upon the status of the parties as well as for affecting that status, the Court of the law which regulates or determines the personal status of the parties has an exclusive jurisdiction; except in cases where the Courts of the *locus celebrationis* would also be competent. It was further stated that the domicile of the wife, who if the marriage had been void would have retained her Maltese domicile, was not an argument in favour of the competence of the said Courts; because, as Cheshire holds<sup>(2)</sup>, the mere performance of a marriage ceremony should invest the parties with a common domicile; and therefore the established rule in such a case is that the Court of the husband's domicile, and that Court alone, is competent to annul the marriage.

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\* Reported by Edgar Mizzi, B.A.

1. The court of Appeal in *re Valentini vs. Valentini* decided on the 19<sup>th</sup> October, 1923 (Vol.

xxv, Pt. 1, P.636) held that in the absence of provisions of Private International Law in our Code it was usual for His Majesty's Judges in Malta to have recourse to the principles of English Private International Law. Vide also *Smith vs. Muscat Azzopardi*, 4<sup>th</sup> February, 1936, First Hall Civil

2 G. C. Cheshire—Private International Law, second edition, pages 343 and 344.

Professor Buhagiar thought it unnecessary to examine the pros and cons of this view; but he upheld the competence of the Courts of Malta on the ground that once the said Courts had to decide on a question of bigamy, and they were quite competent to do so, they were necessarily competent to pronounce also upon the validity or invalidity of both marriages which together constituted the crime of bigamy.

The point at issue was then examined. Unfortunately our Courts—it was pointed out – have held different views on the matter. There are judgments which state that the law governing the formalities of marriage is the personal law of the husband <sup>(3)</sup>; and it may be stated here that, according to recent judgements, following English Case Law, the personal law is taken to mean the *lex domicilii* <sup>(4)</sup>. There are however other pronouncements which follow the prevailing view in Private International Law that the *lex loci celebrationis* should apply <sup>(5)</sup>. This difference of opinion, however, did in no way affect the case under review, because both views led, in that case, to the same, conclusion, viz, the nullity of the marriage, since the husband's domicile was Italian, and the marriage was celebrated in Italy—the law of which regarded the marriage, at the time of its celebration, as null.

This notwithstanding Professor Buhagiar upheld the validity of the marriage. Independently of what law should govern the formalities of marriage—he stated—it is a fundamental principle of Private International Law that any foreign law which is repugnant to the public policy of the *lex fori* is to be disregarded and cannot be applied by the Courts of the *forum*. “There are certain national sentiments, prompted by a sense of decency, of justice or of morality which rightly or wrongly appeal to be sufficiently important to merit unflinching observation by the Courts. There is a distinctive policy... to which the application of a foreign law must always remain subject” <sup>(6)</sup>.

In this case the application of Italian law would have implied the nullity of a marriage contracted in Italy by two Maltese Roman Catholic persons one of whom was domiciled in Malta, according to the formalities required by the Council of Trent. On being analyzed the case presented the following important facts; the husband, though domiciled in Italy, was of Maltese origin and a Roman Catholic; the wife was a Roman Catholic, a Maltese and domiciled in Malta; the marriage was celebrated according to Canon Law, which is the law of the parties religion and of Malta cannot, for reasons of public policy, declare such a marriage null. Such a

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3. Vide. *La Primaudaye vs. Cutajar* (Vol. XVIII. Pt. 1. P. 96); *Warrington vs. Carter noe*, on appeal (Vol. XXV, Pt. 1); *Bessolo vs Ellul*, 2<sup>nd</sup> December 1933 : *Dr. Frendo Azzopardi noe. Vs. Doyle* (Vol. XXVII, Pt. 2, P. 387)

4. In the *Court vs. Kreslake* decided by the first Hall, Civil Court, on the 9<sup>th</sup> July, 1934, it was stated that the personal law is for us the *lex domicilii*. In earlier judgments, however the personal law was taken to mean the *lex patriae*. Vide the judgments mentioned in footnote (3).

5. Vide *Nuzzo vs. Ardonio* (Vol. XVIII, Pt. 2, P.322); *The Court vs. Kreslake*, 9<sup>th</sup> July, 1934 *Vella vs Vella*, 9<sup>th</sup> February, 1940

6. *Cheshire. op. cit.* P. 139

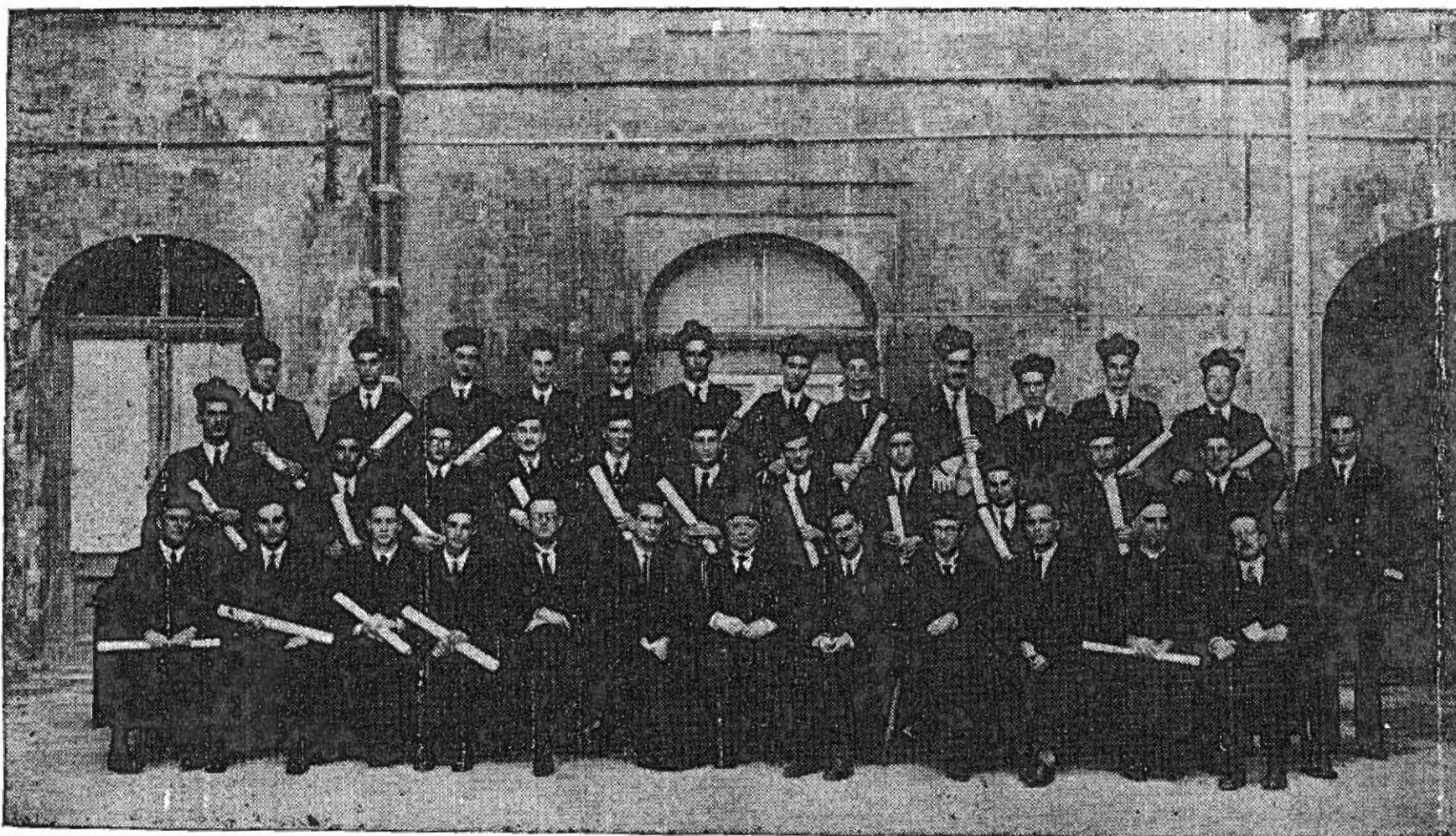
declaration—he said—would be repugnant to our senses of decency and of morality and to our religious sentiments. The behavior of a Maltese person, even though the ties of nationality be somewhat loosened through a change of domicile, who on being charged with bigamy contests the validity of his marriage celebrated abroad in terms of the law of our Church and of our law and according to the dictates of his conscience, simply because he happened to marry in a place where the formalities complied with by him were without effect is against our distinctive policy<sup>(7)</sup>

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7. An *obiter dictum* by judge Mercieca (later Sir A. Mercieca C.J.) in *Warrington vs. Carter* (Vol. XXV, Pt. 2, P. 433) may here be mentioned. He was prepared to accept the principle that the personal law of the husband should govern the formalities of marriage if it was a limited to mean that the courts of Malta could not declare null a marriage solemnized abroad according to the rites of the Roman Catholic church but without conforming to the requirements of the *lex loci*. The probable reason for this assertion is that such a declaration would be against public policy in Malta.

**HIS Honour Sir ADRIAN DINGLI, G.C.M.G., C.B., LL.D.**

*(We intend publishing some biographical notes on eminent Judges and Barristers and we have thought it befitting to publish in our first issue the photograph of Sir Adrian Dingli, who, as is well-known, is the author of the greater part of our Civil Laws. A short biography will be included in the second issue).*



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