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EDITORIAL

FAREWELL

In sending this number of the *Law Journal* to the Press, we pause and think. When the time comes for the next issue we students of the Academical Course of Laws 1941-46 who were responsible for the birth of this Journal will have left the University where we have spent, perhaps, the happiest years of our life. We do not intent to be sentimental or to give out the heart-rending song of the dying swan ; but, as John Drinkwater in the introduction to his anthology of English verse, "The way of Poetry: rightly observes : "Nothing in the world gives people so much pleasure as making things" ; and we cannot help feeling a certain pride when we look back and recall those great and terrible days when the Journal came into being and when we set the foundation of what we may look upon as a tribute of love to our Athaeneum.

It is with hope not mixed with anxiety that we pause on the threshold of this august institution and bid farewell : anxiety, because the future is always veiled in mystery, especially in periods of transition like the present; hope, because handling the flame over to our successors in the management of this periodical, we are confident that it will be left burning and handed over and over again : a pageant of youth and activity that will defy time and will live on to the great glory of our land and of our Alma Mater.

AUTONOMY OF THE UNIVERSITY

This brings us to a point which is very near to our heart—the autonomy of our University. It is exactly in order to remain faithful to our principal that the university is not to mix with politics that we advocate autonomy. We do not intend to criticise those who are of contrary opinion— their motive can be quite good and their personal point of view candid and sincere. But the fact always remains that if the University is controlled by the Government it will be turned into an ordinary Government Department and will become a wrestling ring for the upholders of the different political parties. The curricula of studies the subject to be included in the syllabi and, above all, the choice of Professors will depend on the whims of the members of the political party in power. And if this state of things ever comes into being will our University be worth of the name?

In the May, 1945, number of *Britain Today* Sir Charles Grant Robertson writing about British University in his article "The idea of a University: says ; "The autonomy of each university has been most jealously guarded, with the result that these self-governing corporation have been able to develop, freed from central Governmental control... the manipulation of the Crown and the turning of teaching by the political party in power."

In England, the State contributes substantially to University funds. But, in order that the University may preserve their autonomy, such contributions are accepted through a special

body. *The University Grant Committee,* composed "of men and women, themselves the product and guardians of academic freedom. The independence in fact of the universities", Sir Charles goes on to say, "has come to be an accepted axiom of British political and social life, and any attempt to impair that independence would be strenuously resisted by the university, with the full support of public opinion. In short, the British mind is convinced that a university can only achieve its purpose by working in a free air, with an unqualified right to learn, teach and find truth, as best it may."

Besides in the Report of the Commission on Higher Education in the Colonies to parliament, the principle of autonomy for colonial universities is strongly upheld as the following excerpts (Chapter VIII page 34) will show : "In our view it is essential that Colonial Universities should be autonomous in the sense the Universities in Great Britain are autonomous... Only if autonomy so understood is allowed, can that degree of freedom of teaching and research be secured which is fundamental to a university only in these conditions can the highly expert task of maintaining proper academic standards be carried out."

THE REVISED EDITION OF THE LAW OF MALTA

This Edition is destined to form an outstanding landmark in the history of Maltese Legislation. In it we have at last, a complete collection of all the laws now operative I Malta, from the inception of British rule up to 1942, wisely arranged in groups so that each set of law forma complete whole, with highly elaborate and useful alphabetical indexes, chronological tables and tables of variances. We hear that the laws relating to the different instituted are now to be published in separate form ; and perhaps it would not be unwise to issue separate booklets containing the alphabetical indexes and tables which form such a characteristic feature of this education. We are sure the publication of such booklets would be of high practical value to law students and practitioners alike.

To the compilers of this edition who in it have raised for themselves a monument *aere perennius* go our heartfelt thanks and congratulations.

THE LEGAL SECRETARYSHIP

It is with no spirit of criticism if the work done by the Legal Secretary who has lately relinquished the post or of any of his predecessors that we are making a suggestion while voicing the opinion which we deem to be universal; and we hope it will be received by all in the spirit with which it is being made.

The post of Legal Secretary was created in 1921 when a Diarchical system was established ; and, then, it was not useless or illogical to have a legal adviser concerned exclusively with the so-called Reserved matters. The Crown Advocate advised the local Government and it was nothing but just that the Governor should have his own legal adviser. The disadvantage deriving from the legal secretary's unacquaintance with Maltese Law and

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Jurisprudence will no doubt have been felt by His Excellency, as was the case with His Majesty's Force ; but this is not the principal point which we want to make out.

It was somewhat strange that in 1936 when the 1921 Constitution was finally revoked that the post was not abolished ; from the early days of British domination no such post existed and, if its creation was necessitated by the Diarchy of 1921, its existence could not be logically prolonged so as to subsist even when its raison d'etre had been extinguished ; and now it has long been extinct.

We do not know what form the new Responsible Government will take ; we do not like to indulge in guesswork and we are here directing our thoughts to the present state of affairs and not to the unknown future. At present the Legal Secretaryship is vacant and we wish that the Authorities concerned should ponder on the advisability of filling the post again or of abolishing it and letting matter take a free course with the drafting of the Constitution. The Attorney-General assisted by a competent staff is the fulcrum of the government machine from the legal view-point ; and we fail to appreciate the reason why the long-established order should be set out of great by the addition of an extraneous element, at once superior in rank to the Attorney-General and unable to control , if control there need be. We submit that with all the best intentions in the world, no Legal Secretary could ever feel himself competent to advise on local law ; and if he tries to help in ,matters of a more general nature, such as the drafting of Legislation, he would undoubtedly be rending good work but he would also be distributing harmony, in substance as well as in form, which has long prevailed in our legislation ; that would be an inevitable fault ensuring from his having been brought up in a legal system at variance with our legal traditions. The drafting of legislation can be done as it has always been done by the Attorney-General and in such a case our Laws will continue to present that harmony which has been a characteristic feature.

In 1943 the Legal Secretary was appointed Chairman of the War Damage Commission ; the post is very onerous and it must have absorbed the energies of the Legal Secretary well-nigh *in toto*. He was a hard-working, well-meaning gentlemen and he did successfully use his best endeavours to manage the war Damage funds as best he could. But what we should like to stress is that his appointment to such an onerous post is quite capable to speak for itself.

ON BEING CALLED TO THE BAR

A little change in the Code of Civil procedure regarding graduates who intend to obtain a warrant to practice as barristers will, we are sure, be a very welcome innovation. Section 79 lays down that in order that a graduate be authorized to exercise the profession it is necessary that 'he has... for a period of not less than one year regularly attend at the office of a practicing Advocate of the Bar of Malta and its Dependencies and at the sittings of the Superior Courts". Thus, a student who after matriculation, has gone through a seven years' course prior to his graduation as Doctor of Laws, must wait for yet another year in order to obtain the necessary authorization to exercise the profession.

We are far from thinking that the prescribe year of practice in the office if a barrister, together with attendance at Court is not essential for the graduate who aspires to a forensic

career, On the contrary, the change we uphold would lengthen this period of initiation considerably. Instead of first graduating in Law and then practice the profession for a year, why are not law students made to attend a barrister's office during, say the last three years of the Course in order that they may get the warrant immediately after graduation? This would have the advantage of saving time and giving the law students an opportunity of seeing the practical application of the principles he acquires as a student in much the same way as the practical side of the curriculum in the Academical Courses of Medicine does for the medical students.

AN ANOMALY

A most disconcerting fact about the position of Maltese citizens in some countries has come to our knowledge ; and we are publishing the facts stated hereunder and making suggestions hopeful that the matter will be seriously taken in hand by the Civil and Ecclesiastical Authorities both in Malta and in England.

There are some countries such as China, Kashgar, Bahrein, Kuwait, Maskat and Morocco in which the system of Capitulation still prevails and in consequence foreign jurisdiction is exercisable. I Egypt the system was modified by the existence of the so-called Mixed Courts. In 1949 the Mixed Courts will be abolished and only the Egyptian Courts will function. In 1937 British jurisdiction was restricted by Order in Council to two cases only : (1) those of the British Forces and the Military Mission and (2) certain issues of state.

We have come to know that in the British Courts which were as a result set up English Law is applies in regard to all British subjects, and naturally to all Maltese citizens. One can easily guess that a state of affairs at times in profound dissonance with our Faith and laws, has been brought about as matter of course. It is enough to say that in such places Maltese married couples may be, or have actually been, divorced. The considerations, presumably with a legal grounding, leading up to such conclusions will be examined later; but on the very face of things, there appears to be a deeply incised irregularity ; the system of Capitulations was evolved owing to the incompatibility of Oriental system with Western civilization and we are afraid that in the manner in which it has been handled in practice it is not attaining the avoidance of *all* incompatibilities.

As all questions of Private International Law do, the matter under review presents innumerable pitfalls into which one may inadvertently run and, in order to facilitate matters no less than for clarity's sake, we are limiting our attention to two cases, by far the most frequent : firstly the case of a Maltese British citizen temporarily residing domiciled in one of the abovementioned countries.

In the first case we see no peculiarity, because the application of ordinary principals conduces to the enforcement of Maltese Law in matters affecting the personal status of Maltese citizens. The British Courts ought to consult the law of the palace of domicile once, as it well-known, English law adheres to the theory giving prevalence to the Law of the Domicile. In the second case *stricto jure* the British Court would have to apply also the law of the Domicile without accepting any eventual *renvoi;* but that would obviously run counter to the purpose for which British Jurisdiction in foreign land exists. And it appears that consequent upon a necessary departure from strict rules of law the British Courts, whether Consular or not, have taken the practice of applying English Law with the aforementioned results.

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Once the principles ensuring from English Case-Law have to be relinquished care should be taken that a logical solution is made out. It is true that the Anglo-Saxon doctrine of Domicile in such circumstances is productive o no acceptable solution ; but, if recourse is had to the criterion designated by Nationality there is no reason why the latter theory should be restored to only *in parte.* The traditional English outlook has been that the system of Nationality is likely to render applicable a law with which all connection has been long lot or perhaps with which there had never been the slightest connection. This reason is no doubt formidable ; but its force is definitely *not augmented* by the fact that after that the Continental Tribunal determines the political system to which an individual finds himself attached, it passes on to ascertain *which* municipal system obtain in a particular case. Thus, if a cause comes up for adjudication before a Continental Court, Maltese law is enforced both if the Maltese *propositus* is domiciled in Malta or not, in spite of his British Nationality. The trend of thought as hereunder described is responsible for such a mitigation of the absolute rule of Nationality : when the national law is composed of several systems of law, reference is made to the law of the district or canton in which the *propositus* is registered or, failing such registration, the place of domicile. If the latter criterion does not fall in with the peculiarities of the case the law of the domicile of origin I applied.

If the same sequence of ideals is made use of by the British Courts exercising jurisdiction under a foreign law, a fair solution would be meted out to the case which is demonstrably the more frequent. The Nationality theory is in general discarded ostensibly for sound reasons ; why pray should a mitigation of that theory be overlooked, when the Domicile rule breaks down? And, if the theoretical side of things is for some reason or other thought not to be convincing? It was declared *In re* Askew (1930) 2 Ch. 259 that there was of any part of the British Empire, was the National law of a British subject. The relevance of this judicial dictum is self-evident.

We may therefore conclude by saying that, with all due respect we have to sound a not of dissent with those advocating the application of English law to Maltese subjects circumstanced as above. At law we fail to see ant motive that would appear plausible, or, mush less, over-riding. Let it not be thought that we do not appreciate the possibility of having a plethora of cases each with a multitude of difficulties. Nevertheless every category of cases has to be tackled separately, though coherently, and by far the majority of Maltese citizens residing broad fall under one of the two cases. We therefore submit that legislative intervention would afford the best and most unambiguous solution to an anomalous state of things that is calling for a remedy.

A BRIEF

It has been well said : "Life is infinitely stranger than everything which the mind of man can invent" and the great truth in life is that abnormal situations require a somewhat extraordinary, if not downright abnormal, treatment. That is a rule that must be of guidance to all human legislators who must at all times be prepared to confront unheard-of situations and *in ispecie* we may refer to the Nationality laws which, we suppose, have been out-paced by the

exigencies of the moment that is to say by reason of wholly unforeseeable circumstances. We are in this note briefly referring to cases which have recently come into the limelight and which, in our humble opinion, merit the attention both of the English Legislature and of the British Diplomatic Corps.

Not a few Maltese women and of the British Diplomatic Corps military men, thus acquiring Yugoslav Nationality and contemporaneously losing their former British Nationality. By a Yugoslav law recently enacted all men who did not act in conformity with the directions therein set in detail were looked upon as forfeiting their Yugoslav Nationality. We are not in the know of the special reasons that may have necessitated such measure nor are we concerned with the internal policy of foreign countries ; but what we do know is that the Maltese women whose husbands did not submit to the Yugoslav law lost their nationality and became stateless with no other right save that of taking a Nansen Certificate, which of its very nature does not receive protection from any particular State in the world.

How long this state of things will hold good no one will venture to predict whether diplomatic action will prove successful it is rather difficult to say. And, therefore, we feel that the case of these women should receive a considerate response from the Authorities of London who should use their best endeavours to facilitate matters to those who have emerged the most hard-bitten from the great conflict that too many of us may be now a thing of the past.

A special provision may perhaps be inserted contemplating the case of these one-time Britishers marries to Yugoslavs. A British lady joined in matrimony with an American or a Frenchmen may still retain her British Nationality ; so that, it does not appear that a re-grant of Nationality to these Maltese women would breach any rule of public policy. After all, we must remember that the Law's mission is to apply physic to the ills of all and the more queer and extraordinary the malady, the more difficult and abnormal will be the cure.

ON "FOREIGN" EX-CONSCRIPTS

A case of doubtful nationality, it appears, has been for some time engaging the attention of the Government and we hope that we shall not be blamed, if we give vent to our desire that the hardships with which certain "Maltese" citizens are being visited should be expeditiously terminated.

Prior to the Lateran Treaty of 1929 between Italy and the Hole See only civil marriage was recognized by Italian law and as a result the Ecclesiastical marriage was not productive of civil effects. It so happened that many Maltese citizens contracted marriage in Libya in according with Roman Catholic rites without undergoing the formalities prescribed for civil marriage. According to English law the validity of a marriage in regard to its form is to be tested by reference to the *lex loci celebrationis* and therefore the marriages under review are looked upon as invalid with the logical consequence that the issue deriving from such matrimonial unions are considered as illegitimate and, as such, unable to take advantage of the faculties which the Nationality laws confer upon the legitimate issue of British subjects. The first question is this : should the Courts be called upon to determine the nationality of these individuals will they consider the marriages celebrated as detailed above valid and pronounce accordingly?

Maltese Case-law on this point is not at all constant, so that no view can be expressed with certainty but we venture to state that as far as it is humanly possible to make forecasts on such matters, the Maltese Courts would consider the marriages as fully valid and all consequences originating from this fact would be thereby given full force. It is true that the general rule of the prevalence of the *lex loci celebrationis* in matters of forms is also sanctioned in our Jurisprudence ; but the rule has to be applied always *subjectae materiae* and in the eyes of Maltese law marriage is predominantly of religious significance and, as acorollary, some are inclined to consider the Catholic rites as attaching to capacity and are therefore subject to the personal and not to the *lex loci.*

Apart from all these considerations it would be against the public policy of Malta, were a Maltese Court to decide that a Catholic marriage is invalid. The Maltese Law of Marriage is the Canon Law and it would be contradictory, at least substantially tough perhaps not technically, for a Maltese Court to pass over a Catholic marriage as a nullity *owing* to it's being an Ecclesiastical union, whatever be the circumstances under which that marriage was contracted and wherever celebrated. Incidentally, it would be pertinent to remark that in a Law Society moot Professor William Buhagiar, LL.D., B.C.L. (Oxon.), B.A., Professor of Private International Law, was for the opinion that we are here maintaining (v. Law Journal, Vol. I. Part 3, page 65). The suggestion that the Nationality Law, being a British Act, must be applied *in toto* as if it were being applied in England cannot for one moment be entertained. Public policy knows no such bounds and whatever the law that comes to be applied, it is always a Maltese Court that has to apply it.

In the light of the above we feel bound to lament that such marriages should have been constantly qualified as invalid, at least as far s the British Nationality of the issue is concerned.

No case as yet has come for authoritative ascertainment by a Court of Justice ; one need not go through the whole gamut of Jurisprudence to become aware that the issue is not as clear as one may desire it to be. But should not the legislator tender at least the ordeal of awaiting their statue to be decided upon after all the necessary procedure has been gone through? And, after that many of these individuals wee enrolled in the British Armed Forces, as British citizens, is it just that they be now repudiated and all ways barred to them save that of Naturalization? One would require a profoundly apathetic spirit not to be urged into action.

SIR ANTONIO MICALLEF *

(By A. GANADO B.A., *with -reproductions from the local Press)*

L'ignoranza o l'indifferentza delle opere e dei monumenti degli avi e la maggior sventura d'un popolo, una macchia d'ingratitudine e d'irriverenza verso coloro che ci lasciarono un'eredita santa di sapienti tradizioni e di glorie non periture—GIOBERTI

IT is very right and just—nay, it is a duty—to render praise to whom praise is due : to record and labours and virtues of those of our ancestors who have honoured their country, carrying its name and fame for beyond our native shares; and thus to afford the rising generation luminous examples of moral rectitude, of unwearying industry, of noble and manly sentiments. One of the noblest and worthiest sons of Malta is Sir Antonio Micallef ; his life is a model life of probity and learning, honour and modesty. During his seventy nine years of peregrination on this earth which he considered as a stepping-stone to the next, he became the object of universal admiration, esteem and affection. He was an eminent and talented jurist, a warmhearted patriot, a most loving father.

Of a tall, slender but stately figure, he had a severe and characteristic countenance, always brightened with a smile. His mild, sober way of talking, his eloquent and forcible style of exposition left vivid and lasting impressions upon people he met. Throughout a long and bright career he gave ample proof if proof were needed, of his vast intelligence, deep wisdom and consummate knowledge of the law. Still a child he was known to possess admirable qualities, almost incredible at his age ; his precocity presaged things to come. As a young barrister he made rapid progress by his devotion to his profession, by his affability of character and pre-eminent ability ; as a Crown Advocate he attained distinction both as Public Prosecutor and as Legal Adviser to the Government. After twenty-six years on the Bench, first as a Judge, then as President of the Court of Appeal, he left the velvet chair of the Forum to occupy one in the Palace ; shortly after, he retired into private life with the conviction of having always performed his duties honestly, conscientiously and with independence. During his last years of comparative repose, always willing and eager to serve his country, he continued to take a deep interest in public affairs; he kept up a constant correspondence with the Government, submitting projects for legal reforms and making other suggestions on various matters of national interest. In 1889, he died, leaving behind him to continue his work a worthy successor, no less a conspicuous personality than Sir Adrian Dingli. We will not take upon ourselves the invidious task of settling precedence between two such celebrities as Sir Adrian Dingli and Sir Antonio Micallef. Suffice it to say that in legal acumen they are both incomparable and that they have both devoted their whole

(* We wish to express our thanks to -the ('Honourable Mr. Justice'. Comm ; Robert F. Ganado, LL. D., for the great -help he. -tendered,. to the author- of this biography. We also feel indebted to Mr. L: Sammut Briffa , B.A., Mr. A. Cremona and Mr. J.M. Ganado, B.A., for their valuable help.-EDITOR).

untiring energies to the welfare of their countrymen.

On the second of April, 1810, Antonio Micallef , the son of respectable parents, was born in Citta Vittoriosa. His father, Giuseppe Gaetano, was a notary by profession. He was brought up in an intensely religious atmosphere, and the education imparted to him by his parents developed to the full his mental faculties and produced a gentle, generous and noble heart. It is not for us to narrate his life during infancy ; it is a life enveloped in a veil of secrecy ; it is written in the mother's heart and no living man can tell that story. Still at a very tender age he gave himself up to the serious and assiduous study of Jurisprudence, of which he was destined to become one of the greatest luminaries. He showed great proficiency in his studies and completed very successfully his Course at the University, thus obtaining, in 1828, the degree of Doctor of Laws with honours— honours he had well merited by his fanatical love of study coupled with a singular talent and an extraordinary memory. He was, at the time, eighteen years of age. Shortly afterwards, lie devoted himself to the exercise of his profession of which he became so brilliant an ornament. Within a few years he had acquired a substantial practice and his fame as a learned and hard-working advocate was already echoing far and wide; many prophesied that he would one day occupy with great honour to himself and to his country the highest positions of the legal hierarchy.

At the age of thirty-two he was appointed to succeed Dr. G. Bruno as 'Crown Advocate. The Governor, referring this fact to the Secretary of State for the Colonies stated that Dr. Micallef was one of the most eminent advocates at the Bar, and that in so far as his nomination was concerned he considered it to be "the best arrangement that could have been made both for the interest of the public and the Government" (1). A typical comment on his appointment is that of the "Malta Mail and United Services Journal" which declared ; "This young man has become celebrated amongst us by several works on the law from his pen, as well as on account of his profound erudition, so that his nomination has given universal satisfaction, inasmuch as true merit has received the reward which was so justly due to it" (2). The office entrusted to Dr. Micallef was, at the time, after that of the Chief Secretary to Government, the most eminent in the Maltese administrative system.

His functions were many and various ; his responsibilities, heavy. He assumed office at a time when practically the whole European Continent was fermenting with revolutionary ideas ; Mazzini and others were stirring up the spirit of national unity in the nearby peninsula ; whilst an incessant flow of refugees was making its way towards our Island. This state of affairs had serious repercussions in Malta, where political agitation showed no signs of abating. Matters of vital importance arose during this period causing many conflicts between Church and State. With the controversy as to the appointment of a Co-

(1) Lieutenant Governor's Office. Despatches: Governor to Secretary of State. 27th October, 1842; No. 70.

(2) Malta Mail etc.; 11th November, 1842.

adjutor and Successor to the Archbishop, Mons. Caruana, still undecided, two questions of considerable interest troubled the waters(3). The one referred to mixed marriages, the other to the administration of pious foundations. The former was destined to cause trouble until the last decade of the century ; the latter was practically vetoed by the Secretary of State (3a).

In 1850, the Criminal Draft Code on which work was begun as far back as in 1831, came up for discussion before the newly constituted Council of Government. At first all proceeded smoothly, but when the title dealing with "Offences against the Respect due to Religion" was on the tapis, there was a. storm. In affairs such as these, Dr. Micallef, in virtue of his official capacity, was obviously in an anomalous position. He was the legal adviser of the Government in all matters, not only of internal, but also of external policy, so that his situation to a certain extent was also connected with political functions ; he was the framer of the laws proposed in the Legislative Council on the part of the Government ; then, on top of all, he was a Catholic. In a word, his situation was such as to require a man of the greatest learning and experience in order to fill it efficiently. Besides his duties in Council, he had to appear in Court to defend suits on behalf of the Government or prosecute (in his capacity as Public Prosecutor) before the Criminal Court or the Court of Special Commission sitting with a Jury. He invariably sustained the numerous responsibilities devolving upon him in a manner which did him the highest credit and for which he was later amply rewarded.

Before becoming Crown Advocate, Dr. Micallef had occupied many important posts. From 1829 to 1842, be was a Reporter (Estensore) in the Courts of Law (first in the First Hall of , the Civil Court, then in the Court of Appeal and in the Supreme Council of Justice) and a clever commentator of the judgements delivered by our Tribunals. In 1841, he was nominated a Member of the General Council of the University and of the Special Council of the Faculty of Laws. During the same year he became Legal Adviser to the Monte di Pieta.

Upon a statement of his services enclosed by the Governor in a despatch to the Secretary of State (4) he was created a. Companion of the Most Distinguished Order of St. Michael and St. George. Five months later, important changes took place in the judicial field. On the retirement of Sir Ignatius Bonavita, Judge Paolo Dingli succeeded him as President of the Court of Appeal, and Dr. Micallef, whom the Governor, Sir William Reid, described as an able lawyer and a gentleman for whom he entertained a high respect was elevated to the Bench. In the Governor's opinion as well as in the public estimation, he was the fittest person to be made a judge (5).

(3) At the time, the Governor was Sir Patrick Stuart, (1843-1847).
(3a) A. Laferla: British Malta; page 189.
(4) L.G.O. ; Govt. to S. of S.: 18th March, 1853.
(5) L.G.O. ; Gov. to S. of S. ; 27th December, 1853, No. 253.

The choice was, indeed, a happy one. The great amount of causes waiting for trial had been for a long time previously the subject of constant and just complaint. In May, 1854, Reid reported that since the appointment of Dr. A. Micallef a great change for the better had taken place and he enclosed a comparative statement to testify to that fact. He concluded : "I believe it to be only justice to Dr. Micallef to say that the change has been to a great extent brought about by his legal knowledge, assiduity and firm conduct combined" (6). Moreover, the excellent conduct of Judge Micallef had the beneficial effect of influencing others to exert themselves (7). By this time he had already become the leading personality in the Island, and was loved, revered and esteemed by the whole population.

During Sir Richard More O'Ferrall's Governorship, a new Legislative Council was constituted which was formed for the first time under British rule of both Official and Elected Members. As Crown Advocate, Dr. Micallef was *ex-officio* an Official Member of that Council, of which he was, after the Chief Secretary, the most influential member and the ablest speaker on the Government side. As a legislator and reformer, Dr. Micallef holds an honoured place in our annals. His enlightened views and his firmness in maintaining them made his services in the Council of Government most valuable whilst the new Codes were under discussion (8). During his term of office he compiled many important Ordinances, some of which are still in force today. Ordinance I of 1846, for instance, entitled "Per emendare le leggi in materia di fallimenti" , brought up to date and simplified our Bankruptcy Laws by substantially modifying and improving the Proclamation of 1815. It was based for the most part on the French Code of 1808 and is still applicable *in toto* today, only slight alterations having been made when it was promulgated as part of our Commercial Code in 1857.

He played a major part in the formation of the Criminal Code, the Code of Organisation and Civil Procedure and the Commercial Code. In 1844, the Government submitted to Dr. Micallef the Criminal Draft Code of 1842 and Mr. Andrew Jameson's Report thereon, directing him to give his opinion as to whether it was expedient to adopt in whole or in part the amendments and alterations proposed by Mr. Jameson and whether, according to his idea, the adoption of those alterations and amendments would change the spirit and the fundamental basis of the Draft Code. Dr. Micallef stated in reply that the greater part of Mr. Jameson's proposals were quite compatible with the spirit and the basis of the Draft and their adoption would be very useful and beneficial. He then proceeded to analyse and comment, in a lengthy memorandum, Mr. Jameson's amendments and alterations (9). His observations proved of great help in the discussion of the Draft Code of 1842 in the Council of Government in 1845. When the new Draft Code of 1848 came before the Council of Government in 1849, Dr. A. Micallef worked on it privately in conjunction and in concert with Dr. A. Dingli (then an Elected Member), besides taking a prominent part in the discussions in

(6) L.G.O.; Gov. to S. of S.; 25th May, 1854, No. 31.

(7) L.G.O.; Gov. to S. of S.; 26th January 1855, No. 14.

(8) L.G.O.; Gov. to S. of S.; 26th January, 1855, No. 14.
"Osservazioni dell'Avvocato della Corona (Dott. A. Micallef) Rapporto del Sig. Jameson intorno al progetto di Leggi Criminali".

(9) Composed of Sir Ignatius G. Bonavita. Dr. G.B. Mifsud, Dr. A.M. DeBono, Dr. G.B. Camilleri, Dr. G. Conti.

the Council. The Code was finally promulgated in 1854, some months after Dr. Micallef's elevation to the Bench. To turn now to the Code of Organisation and Civil Procedure, the Commission (10) appointed in 1848 to draw up such a Code presented its Draft about two years later. During the drafting of this Code, Dr. Micallef kept up a constant exchange of views with Sir I.G. Bonavita who, however, could not agree on many points with Dr. Micallef's proposals. When the Draft Code was presented for discussion in the Council of Government, numerous amendments put forward by Dr. Micallef were adopted.

In the drafting of the Commercial Code, Dr. Micallef took a prominent and leading part. In 1848, he was appointed a Member of the Commission issued on the 18th September for the purpose of drawing up a Commercial Code for the Island of Malta and its Dependencies (10a). The Draft Code drawn up by this Commission was sent to the Government in 1853, and, during the same year, it was published for general information. It was then introduced in the Council of Government, where it formed the object of much deliberation, but did not give rise to ally important controversial discussion ; it was passed by Ordinance VII of 1854, and transmitted to the Secretary of State for Her Majesty's confirmation before promulgation. In England, this Draft received considerable and anxious attention. The guiding, principle on which Her Majesty's Government would wish to frame its decision—stated the Secretary of State—was maintain the commercial jurisprudence of Malta without reference to British precedent, whenever that jurisprudence regarded matters of exclusively Maltese interest and in which there was no probability of collision between this local jurisprudence and that of the rest of the Empire. But to endeavour to preserve uniformity in the regulation of those matters in which the Law of Malta must necessarily come into contact with the law of the rest of the Empire, and in which the absence of uniformity must lead to confusion or conflict of jurisprudence, to the detriment, principally, of Malta itself.

These matters were almost wholly confined to the branch of Maritime Law, which constituted the second book of the Code, and thus the first book of "Trade in General", the third of "Bankruptcy", and the fourth of "Jurisdiction, Prescription and grounds of inadmissibility in commercial matters" were not open to such objection as would induce Her Majesty's Government to advise the refusal of confirmation by the Crown. The Secretary of State, therefore, while disallowing the promulgation of the Code, recommended that these three books be brought into operation separately from the second ; with regard to the latter, he sent his directions to the Governor, pointing out the necessity of making the provisions of the Code correspond, as far as possible, to those of the Merchant Shipping Act, should the Maltese Legislature decide that the codification of Maritime Law was necessary at all. He finally stated : "It is not with out regret that I am obliged thus to point out the necessity of reconsideration on a subject which has been treated with so much care and so much ability by the legislature and by your legal assistants. I regard the Code before me, imperfect as I must consider it on this head of

(10a) The other Commissioners were: Judge F. Chapelle, Dr. G.B. Mifsud, Dr. A.M. DeBono, Dr. P. Sciotino.

Maritime Law, as a remarkable indication of the skill and industry of the compilers. It is only the desire to render the work more complete, by placing it in harmony with the general legislation of the great commercial Empire of which Malta forms a part, which has induced Her Majesty's Government to take the course communicated to you by this present Despatch" (10b). The course suggested by the Secretary of State was adopted, and, whilst the first, third and fourth books were incorporated by the Crown Advocate (Dr. Dingli), with slight alterations, in Ordinance XIII of 1857, the second book was promulgated, substantial modifications having been introduced, in five separate Ordinances, in 1858.

Upon being made a; Judge, Dr. Antonio Micallef had to give up his seat in Council to Dr. Adrian Dingli, who succeeded him as Crown Advocate. However, in view of his knowledge and experience of the work of that legislative body, and of the exceptional qualities he possessed, the Governor was yearning for an opportunity to recommend him to be replaced in the Council. The occasion came in 1855, when Rear-Admiral Houston Stewart resigned his seat as an Official Member of the Council, in consequence of his having been appointed Second in Command of the Fleet under Sir Edmund Lyons; in virtue of this appointment, he was about to leave Malta. The Governor immediately substituted him by Judge Micallef (11). This time, however, he adorned the Tapestry Chamber with his presence for a very short time. Dr. Bruno, another one of Her Majesty' Judges and an Elected Member of the Council of Government, took a determined stand against the Government and put himself in active opposition to many of its measures. This gravely perturbed the Governor, Sir William Reid, who consulted Dr. Dingli on the matter. The latter stated in a Memorandum that he considered it desirable and expedient that H.M.'s Judges, including the President of the Court of Appeal, should be made ineligible to the Council of Government, whether by popular election or in virtue Of Domination by the Crown. He submitted various reasons in support of his opinion, in which Judge Micallef entirely concurred (12). Consequently, Supplementary Letters Patent were issued, in May, 1857, ordering that no Judge of any Superior Court of Justice in Malta should thereafter be capable of being a Member of the Council of Government. Thus Dr. Micallef and Dr. Bruno had to resign their seats(13).

As a Judge Dr. Micallef was just, humane and painstaking, and his kindness of heart and amiable disposition endeared him to everyone ; he was ever distinguishers for his independent character, clear judgment and high principles. His judgements were admired for their perspicuity and deep penetration not only by Maltese lawyers, but also by celebrated Continental jurists. Some of them are masterly expositions of legal doctrine ; others, a detailed study on particular aspects of historv of legislation : many are elaborate treatises on

(10b) V. Printed Despatch from Her Majesty's Principal Secretary of State for the Colonies to the Governor of Malta dated 10th February, 1857, together with the enclosed copies of a Report and a Memorandum from the Board of Trade dated respectively 21st November, 1856, relative to the proposed Commercial Code of Malta.

(11) L.G.O.; Gov. to S. of S.; 26th January, 1855, No. 14.

(12) L.G.O.; Gov. to S. of S.; 18th November, 1856, No. 116.

(13) L.G.O.; Gov. to. S. of S.; 16th May, 1857. No. 70

delicate points of interpretation of the law (14). His addresses to the Jury were usually short, but comprehensive, cogent and conclusive. His pre-eminence on the Bench received the due consideration of the Government, for, upon the retirement of Sir Paolo Dingli, he was chosen to succeed him as President of the Court of Appeal, and ex *officio,* as Judge of the Vice-Admiraltv Court. The Governor. Sir Gaspard Le Marchant notifying his nomination to the Secretary of State, wrote that Dr. Micallef was considered one of the ablest. lawyers of the island and he had already discharged with prominent ability, during the previous five years, the office of Judge (15). Le Marchant also recommended to the Secretary of State that his name be submitted to the Queen for Her Majesty's consideration to be graciously please to confer upon him the honour of a Knight Commander of the Most Distinguished Order of St. Michael and St. George. In fact, in 1860, he was promoted to such a high dignity : the investiture took place at the Palace, Valletta, on the 27th July of that year, together with the investiture of Sir Paolo Dingli, Dr. Adrian Dingli (his son) , and Mr. Victor Houlton (16).

Though Dr. Micallef was one of the junior judges on the Bench, his appointment to the Presidentship met with general approval and was chronicled in the Press with the greatest pleasure. He had long been pointed out as the probable successor to the aged President. Much was expected of him ; much was given. Sir Antonio Micallef was a magistrate (and here we borrow a few words of a well-known English writer) whose rare talents were used to vindicate justice, humanity and toleration, the principles of sound philosophy, the principles of free government. A friend once said of him : when he was presiding over H.M.'s High Court one felt something of an internal satisfaction in looking at him ; it was at least well understood why he was in that place, why he had gained his laurels, his distinctions, why he had become so conspicuous. It was his favorite and most pleasing occupation to delve deeply into the vast ocean of legal science (16a). He became the oracle of the Forum, and won for himself the affection and esteem of the Bar as well as the approbation of all concerned in the due administration of justice. During his twenty five years on the Judicial Bench not only did he discharge the functions of his high office with impartiality and fearless independence, but he proved himself to possess those other qualities—kindness, affability and generosity—without which a man, however great his intellect, and however commanding his talent, cannot be pronounced to be a good Judge. Sir Antonio sat in the Court of Appeal, in the First Hall of the Civil Court, and in the Criminal Court, besides occasional cases when he was surrogated to the Judge of the

(14) The most important of his judgment which are still quoted by the Judges and invoked by lawyers up to the present times refer to controversies on entails, societa conjugale, and other questions regulated by the Cide De Rohan. A very long and elaborate judgment on fideicommissum (entail) is worth of mention, viz: Conte Gio. Francesco Sant vs. Barone Cav. Sceberras Trigona et, (V Colezione di decisioni dei Tribunali di Malta: Vol. II, p. 421).

(15) L.G.O. ; Gov. to S. of S.: 28th June, 1859. No. 74.

(16) L.G.O.; Gov. to S. of S.; 28th July. 1860, No. 64. (Sir Paolo Dingli became G.C.M.G.; Sir Antonio Micallef, Sir Adrian Dingli, and Sir Victor Houlton, K C.M.G.).

(16a) He was particularly interested in the study of Criminal Law. In fact, in 1830, he left for Italy with Dr. Gius. Randon and Dr. Ferd. Caruana Dingli where he studied Criminal Law for two or three years at the University of Pisa under the direction and guidance of the famous Italian jurist Carmignani. (I am indebted for this information to Not. Rosario Frendo Randon, LL.D.).

Commercial Court. The Criminal Court was the Court in which the pressure of work was most to be felt ; this notwithstanding, even when he became President, the Government entrusted to Sir Antonio, well noted for his scholarship, tact, massive energy, and zeal for work, the treatment of criminal causes.

Sir Antonio's great power of endurance and extraordinary capacity for long-protracted labour were really wonderful, the more so if contrasted with the apparent delicacy of his physical constitution. He often sat in complicated criminal cases from nine o'clock in the morning until an advanced hour of the night, retiring only for a. very short period, seldom longer than half an hour, and taking no nourishment whatever except a cup of coffee. To cite just one example, during the trial of Enrico Assenza for forgery in 1860, which lasted for several days, he sat daily from 9 a.m. until a very late hour of the night. On the last day of the trial, he made a very deep impression on the assembled multitude, when, after listening to the opening address from the Crown Advocate and to the conflicting evidence brought forward on both sides, to Dr. Dingli's reply and the prisoner's rejoinder, he delivered, at a late hour, his address to the Jury in his clear high-sounding voice without showing the least sign of weariness or fatigue, and in less than two hours set forth in most logical order the whole facts of the case, examining in detail all the evidence and apportioning to each part its proper weight, explaining in his lucid style such points of law as bore upon the question at issue, thus rendering what appeared to be a most complicated case comparatively easy for the Jury to determine upon. The Jury returned a verdict of guilt and the accused was sentenced to six years imprisonment with hard labour. In the course of this trial, the accused raised several pleas of defence, (some of which had to be determined upon by a Court composed of three Judges), thus giving occasion to Sir Antonio to make several important pronouncements on interesting points of law.

In 1879, Her Majesty conferred upon Sir Antonio a signal honour by promoting him G.C.M.G. The whole Maltese people took occasion to render tribute to the man who had by now become a popular idol. A beautiful page man our native history was written on that fateful day. Addresses of congratulation signed by all classes of the population were presented to him by various deputations. The nobles ; the Council representatives of the people ; the lawyer, notaries, and legal procurators ; the doctors ; the traders ; — all gave him their homage. As the address presented by the Elected Members of the Council in the name of the whole Maltese nation stated, the honour conferred upon Sir Antonio "ha. colmato di gioia e di soddisfaziane tutta la popolazione Maltese, che ha sempre ammirato ed onorato nel Supremo Giudice dei nostri tribunali la profonda dottrina, la intemerata integrita, la perfetta indipendenza e le altre virtu di mente e di cuore di che Ella e ornata." Risorgimento, one of the leading papers of the day, rightly remarked that these spontaneous acts and touching manifestations were "dimostrazioni generali di affetto, di stima, e di popolarita immensa a nessun altra persona pubblica giammai fatta a Malta, almeno durante la dominazione del Governo inglese" (17).

And yet Sir Antonio had not yet reached the apex of his brilliant career. In 1878, Prince de Bismarck, one of the most remarkable characters of the 19th century, applied to

(17) 2 Ottobrre, 1880.

all the Governments of Europe asking them for a Report on their respective legislation, with come remarks on the same (18). As Crown Advocate, Sir A. Dingli was instructed to draw up the Report on the Civil Laws of Malta. Shortly afterwards, however, Sir Adrian was sent to Cyprus as Legal Adviser to the new Commissioner, Sir Garnet (later Viscount) Wolseley. In 1879, when Sir Adrian returned to the Island, the Secretary of State again pressed for the Report, but Sir Adrian was at the moment engaged in Council and other business requiring all his time and could not therefore immediately comply with the Secretary of State's request. He said he hoped to be able to prepare the Report in April during the short Easter vacation. But more important matters again cropped up which engaged the Crown Advocate's attention, and, consequently, in August, 1879, the Secretary of State asked the Governor whether he could find it possible, with the assistance of Sir A. Micallef, to furnish the required information relative to the Civil Laws of Malta for which the German Government had been waiting for fourteen months (19).

Sir Antonio was excellently versed in this matter and thoroughly informed and qualified to perform such a task. In the very short space of under two months, he compiled a lengthy Report which was transmitted to the Secretary of State on the 9th of October and thence conveyed to the German Chancellor (20). Some months later, the Secretary of State sent a very flattering despatch to Sir Antonio wherein he expressed the encomium with which his comprehensive and interesting Report had been received by Bismarck, to whom it had been directed at the request and charges of Her Majesty's Government (21). This Report, besides increasing the fame of the then President of the Court of Appeal, won for him marks of approval and appreciation of his ability both from the Government of Germany and from the Imperial Government, who thought it proper to express their admiration and high esteem of the rare talents of Sir Antonio Micallef with an official document of the highest importance which should interest all Maltese as it adds to the glory of their nation. It is a striking and convincing proof of the truth -of the maxim that "'genius is of no country."

After having served his country for a period of fifty one years, Sir Antonio felt that he could no longer sustain the arduous tasks devolving upon him in virtue of his exalted office ;

(18) L.G.O.; S. of S. to Gov. ; 13th May, 1878. No. 32.

(19) L.G.O.; S. of S. to Gov. ; 5th August, 1879, No. 214.

(20) L.G.O.; Gov. to S. of S.; 9th October, 1879, No. 127.

(21) Moreover, the S. of S., writing to the Governor, stated: "I considered that this Report, having been drawn up evidently with great care by so distinguished a jurist as Sir Antonio Micallef, would be likely to prove of great use to the Government of Malta, as a presenting a valuable compendium of the Laws of the Colony and I have, therefore, caused it to be transmitted into English before being communicated to Count Munster. I enclose a copy of this translation and I would suggest that it seems very desirable: to have it printed. Should this be done I request that you will forward copies for the use of this Department". L.G.O.; S. of S. to Gov.; 17th December, 1879, No. 273. (The enclosed translation of the Report was sent to the Printing Office by the local Government. However, nothing was done, and, as far as is generally known, the Report is nowhere to be found).

consequently, in September, 1879, he tendered his resignation which was regretfully accepted on the 2nd November, 1880 ; Sir Antonio was then septuagenarian (22). The Governor, acknowledging the highly meritorious and faithful services performed with ability and loyalty, and yet with firm character, fearless independence, by this distinguished law officer, recommended him for a full pension of Lm600 per annum (the amount of his salary) and rightly surmised that His Lordship, the Right Hon. Earl of Kimberley, (Secretary of State for the Colonies) would not consider the suggestion as too high a recognition of Sir Antonio's deserts. In fact, the Secretary of State, announcing his assent to the Governor's recommendation, stated that he was giving this assent as a recognition of the very important services which Sir Antonio had so ably and ungrudgingly rendered to the Government Of Malta, in the discharge of public duties altogether in excess and beyond the scope of those which he was paid to discharge (23).

In October, 1880, elections to the Council of Government were to be held. As Sir Antonio was about to retire, some of the local papers presented his name as a candidate, after having ascertained that, if elected to a seat in Council, he would accept it. A section of the Press, however, raised an objection to the validity of his election, asserting that, according to the Letters Patent of 1857 which precluded H.M.'s Judges from being Elected Members of the Council, he was ineligible. Notwithstanding that the validity of his election was thus placed in serious doubt, and that in consequence a number of electors did not vote for him, fearing lest they should be throwing away their vote : notwithstanding he did not, in any way, solicit votes or conduct canvassing on his own behalf : yet the country gave a palpable proof of the veneration in which it held its illustrious President of the Courts, and Sir Antonio was returned with a considerable number of votes. The matter, however, was not to be disposed of so easily. A protest was entered by Dr. Z. (later Judge) Roncali,

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(22) The, following letter was laid oil the table of the Council of Government on the 7th December, 1880, at the request of Elected Members:

Chief Secretary's Office;

Valletta. 2nd November, 1880.

Sir,

I am to acquaint you that in conformity with instructions received from Her Majesty's Secretary of State for the Colonies, His Excellency has been pleased to accept the resignation of your seat on the Judicial Bench, as President of the Court of Appeal.

In signifying to you His Excellency's acceptance of your resignation, I am at the same time to convey to you the expression of His Excellency's deep regret that this Community will be deprived in future of services, which extending over so long a period as thirty eight yers have been continually distinguished for the loyalty, fidelity and makes ability with which they have been rendered, and for the advantages which they have conferred on the public at large.

To Sir Antonio Micallef. VIC. HOULTON.

(23) L.G.O.; S. of S. to Gov.; 3rd January, 1881, No. 156. A letter to this effect, dated 14th January, was sent to Sir Antonio Micallef

contesting the validity of Sir Antonio's election (24). It seems that the Law Officers of the Crown in Malta were not sure that things had been done in the legal way, and that the letter or the spirit of the Letters Patent had not been violated ; in case there had been violation, propel measures should be taken to put matters right.

It results from the Despatches that Sir Arthur Borton's opinion differed from that of the Law Officers. He wrote to ask for the Secretary of State's directions, stating: "3. As Your Lordship is aware, the spirit of the Letters Patent of 1857 and the purpose for which they were framed, was to prevent, in future, a Judge, w*hen holding office* (as was the case with Judge Bruno when an Elected Member in 1856), from being an Elected Member of the Council at one and the same time that he held a high judicial office under the Government, but as far as I can learn, no interference was ever contemplated with officers whose resignation had been accepted and who were no longer servants of the Government. 4, I may add that if no legal objection is shown to exist in the case of Sir Antonio's election, his becoming a Member of the Elected Bench would be likely to prove of service to the Government, and would add dignity and efficiency to the- Elected Bench (25). The Secretary of State diplomatically thought it advisable to have the question discussed in the Council of Government. The local government, fully awake to the implications that might arise out of such a discussion, thought it proper to communicate the Secretary of State's dispatch to Sir Antonio who did not for an instant hesitate to declare that his election was legal and valid, whatever might be the opinion expressed by the Legal Advisers of the Colonial Minister or those of the local Government. But, he went on, as it was not becoming for him to appear before the Council to advocate and contend for his election before his political adversaries, he would tender his resignation from a Member of that Council, provided the Government would proceed to a new partial election, in order to give the people an opportunity of electing in his stead a person who enjoyed their entire confidence.

The Government could not accept Sir Antonio's resignation before Dr. Roncali had withdrawn his caveat against Sir Antonio's election. The Chief Secretary to Government, therefore, called on. Dr. Roncali at his office, and explained to him all the circumstances of the case ; the latter declared himself ready to withdraw the protest. A new election was held about two months later, in January, 1881, and Sir Antonio was returned by a clear majority. On the day the results became publicly known, the inhabitants of Misida assembled before Sir Antonio's residence in large numbers and cheered him in the most enthusiastic manner. A deputation headed by Count Dr. G. Messina, then presented Sir Antonio with an address of congratulation signed by two hundred of the inhabitants of Misida and Pieta expressing their great joy at his election as a representative of the people—a circumstance which did great honour to the population and to the Council—and their hope that he might long be spared to serve his country. Other addresses of congratulation, drawn up in similar terms, were sent to Sir Antonio from several parts of the country, to all of which he replied with heartfelt gratitude and overpowering emotion.

On the 19th January, 1881, he passed through the streets of Valletta amidst the applause

(24) Dr. Runcali would have been elected, had Sir Antonio's election been really null and void.
(25) L.G.U.; Gov. to S. of S.; 3rd November, 1880, No. 195.

and cheering of the public on his way to the Tapestry Chamber, with his honest, old face wearing a rejuvenated expression. The Chamber itself was seldom so crowded as on that eventful occasion, when Sir Antonio took the oath of fealty and his seat as a representative of the people. Sir Antonio, evidently, did not intend to let the grass grow under his feet, but meant to do his duty by his constituents. He began by proposing measures affecting intimately the liberty and property of the people : measures which were the outcome of a man who had administered justice for almost thirty years in these Islands, and the fruit of much study and labour. At the first February sitting, he asked for leave to introduce an "Ordinance to amend and to consolidate the Police Laws." Subsequently, he introduced other important amendments to the local laws, such as, for example, the proposal to merge the Commercial Court into the Civil Court, to consolidate the Criminal, Civil, and Civil Procedure Laws, to amend the laws and fees affecting Advocates and Solicitors, and the laws respecting Notaries. He also submitted to the Council other valuable suggestions, among which was that of the re-establishment of District Committees ; this matter has again been raised by the Government very recently.

Of his Council perorations, the eloquent and exhaustive speech he delivered on the 30th November, 1881, is well worthy of notice. By way of introduction to an Ordinance to amend the Laws of Organisation and Civil Procedure, he proceeded to outline the history of the formation and enactment of the Code of Procedure. He then went on to unveil in classic, masterly style his ideas and projects on the new draft laws. Towards the conclusion of his speech, he opined that the Official Members of the Council of Government should have a free and unfettered vote on matters of legislation, and asserted that as far as he knew, the Secretary of State or the Governor were not interfering as to how the Official Members should vote. He ended up with a prophetic note : "Puo essere che ho sbagliato : ma se ho sbagliato non faro altro che sottomettermi al mio fato, e, dopo adoperati i mezzi legali presso le autorita competenti, ma inutilmente, passero alla mia, solitudine dicendo col Psalmista : *`Super flumina Babylonis illic sedimuset flevimus, cum recordaremur Sion.'* (Malta)." And so it came to be; disappointed and with a bitter sense of frustration he realised he was mistaken. By his resignation, less than four months after this memorable speech, he seemed to say : Forgive me if I am retiring to bewail in the, solitude of Misida—*Super flumina Bab,ylonis*—the maladministration of the Government. Ho sbagliato! However, in my disillusionment, I augur future generations better times, when there will prevail the motto "*Cedant arma togae*".

Sir Antonio did not on that account cease from taking a deep interest in public affairs : he was too, public-spirited to forsake his country in time of need. As 'Public Opinion' (26), said, he drew up and submitted to the local and the Imperial Government several schemes for amending the Constitution of the Council of Government, in which he displayed deep acquaintance with the working of the British Constitution and with the Government of the

(26) 5th April, 1889. 'Public Opinion' was the organ of Mr. Savona, Director of Education, from 1880 to 1887

most important Dependencies of the British Crown. Besides, by means of a series of letters directed to the Chief Secretary and to other Official and Elected Members of the Council, and duly published in Risorgimento, he projected many reforms of a Civil, Commercial and Criminal nature, some of which were subsequently adopted. In his endeavours to benefit his country he was assisted by the Marquis Bugeja who, when an Elected Member of the Council of Government, submitted several of Sir Antonio's views both to the local authorities and to Her Majesty's Government.

Finally, after some years, Sir Antonio had to desist from devoting hiself to any kind of work : his health was, slowly but surely, deteriorating. , Death overtook him on the 5th April, 1889, at Notabile, where he had fixed his residence a few years previously. The news of his demise spread like wildfire filling with gloom all classes of the population : he was deservedly respected and esteemed. Until the beginning of the year he appeared to enjoy fairly good health ; he then contracted a somewhat serious illness from which, however, he had been slowly recovering. During the period of his sickness, the reading of ascetic books and of the Holy Bible were his greatest comfort in his sufferings ; whilst the recital of the Divine Office had been for a very long time his favourite spiritual indulgence. Almost daily he received the Holy Eucharist, until fortified with the grace of the Last Sacraments, he died the death of a true and farvent Catholic. His two outstanding virtues during this period were complete resignation to the will of God and detachment from all temporal and material interests. This detachment had been his guiding light throughout his long, laborious life ; he had been noted for his excessive modesty and humility, which were on a par with erudition, nobility and dignity. Of ambition he seemed to have none, unless that can be called ambition to do all that belongs to a man's duty in life as well as it is possible to do it : duty was the, one law that seemed continually to regulate and animate, his noble life. On his death-bed, he expressed his last wish to his son Alfonso Maria : he wanted his funeral and interment to take place as modestly and unostentatiously as possible, without pomp or any other sort of wordly display. His wish was faithfully adhered to, and, after having battled with marked success against the adversities of life for full seventy nine years, he was laid to rest in the family tomb in the Parochial Church of Casal Balzan. On the morrow of his death, as a sign of mourning, the Courts were closed.

Many appropriately remark that our legal literature is very meagre. Few realise how much scantier it would have been were it not for the frequent flourishes of Sir Antonio's prolific pen. In 1839, when he was still twenty nine years of age, his first legal publication saw the light of day ; it was an elaborate "Trattato delle Procedure Civili nel Foro di Malta". This was followed two years later by the first volume and four years later by the second volume of his "Diritto Municipale di Malta compilato sotto De Rohan G.M. or nuovamente corredato di Annotazioni". On both works he must have expended much time and labour ; both are the product of the most careful and exacting research work ; both were largely instrumental in securing for him in 1842 the important post of Crown Advocate. The former is a commentary on the Laws of Civil Procedure which were then very confused, scattered in various legal enactments ; the latter is a commentary on the Code De Rohan, with notes in

which as the author says "abbiamo indicato l'origine della legge e l'antica giurisprudenza, il nesso col diritto Romano, Canonico e Siculo, le riforme e la nuova giurisprudenza, la consuetudine e gli usi dei Tribunali" (27). Whilst these annotations on the Code De Rohan is one of those books forming the backbone of the juridical library of any Maltese lawyer, the "Annotazioni alle Leggi Criminali", which he published under the anonymous, in 1870, is invaluable for the advocate practising at the Criminal Bar. A minor, though useful work of his is a

(27) V. Prof. G.E. Degiorgio: Notes of History of Legislation. Page 8.

ARE GENERAL PARTNERS IN "COMMERCIAL PARTNERSHIPS" ALWAYS TRADERS?

(A lecture delivered by Professor F. Cremona LL.D.)

THE subject of this lecture Concerns the juridical status of those person who, in the contract of commercial partnership, are styled as "general partners". because they are held by law to guarantee without any limitation as to the amount and in and *in solidum* between them al the obligations entered into by the partnership to which they belong. These general partners are to be found in the partnership *en nom collectif* and in the partneiship enr *commandite.* Now, are these general partners to be considered always and under all circumstances as traders in terms of law. And, consequently, are they to benefit from and bear the consequences of all the provisions of the law enacted for and against traders? In other words, does a general partner become a trader in terms of law solely because he happens to be a general partner abstracting from the fact whether in his private individual life he actually exercises objective acts of trade in his own name? It is to this question that I propose to give an answer.

Up to the present day our Judicial Bench and the members of our Bar have never questioned the quasi-unanimous opinion held by the Commentators of the French Commercial Code and of other Commercial Codes, which—as our Ordinance XIII of 1857—are based on it, namely that the said general partners should be considered traders. But this opinion has for a considerable time now been subjected to severe criticism by a group of commercial jurists, headed by Prof. Vivante (Trattato di Diritto Commerciale. Vol. II, fifth edition), who—taking due consideration of all the innovations introduced in the commercial laws—regard the opposite view as being based on more sound arguments.

It is because of all this that I considered most befitting that this very important controversy should form the object of a lecture to the University Students' Law Society—a society to which we should be extremely grateful and thankful were it only for its convening of these monthly meetings wherein legal matters are discussed, and the members of the legal profession should do all in their power to help it extend its activities to other periodical manifestations. Then, again, another consideration which prompted me to choose this subject is that its juridical discussion is not of a purely academic nature, on the contrary, as we shall see later, it has a very practical bearing. In fact, the legal consequences for a general partner will vary considerably, according as to whether he is considered a trader or a non-trader.

I have already mentioned that the quasi-totality of the commentators of the commercial laws based on the French Commercial Law of 1807, amongst whom are such eminent jurists as Lyon-Caen and Renault, Dalloz, Vidari and Manara, consider the said general partners, as such, traders : their assertion is not based on an explicit provision of law but is deduced by way of reasoning from what is to be found in certain articles of the commercial law when dealing with bankruptcy. In fact if we refer to articles 248 and 263 of our

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Ordinance XIII of 1857, which correspond substantially to articles 438 and 458 of the French Commercial Code, we shall find therein established that "in case of a bankruptcy of a partnership under a common name, the declaration (to be made by the administrators) is to contain also the name and the place of residence of each of the partners bound *in solidum"*, and, further, that, when a partnership under a common name is declared bankrupt by the competent Court, the seizure shall "be made not only in the principal house of the company but also in the separate residence of each of the partners." Now all this is established by law—those commentators argue—because the bankruptcy of a partnership *en nom collectif causes* also the bankruptcy of each general partner, and as only traders can be declared bankrupt, it naturally follows that the general partners are considered by law traders. This argument simple and clear in itself, was sound enough and even logical at a time when the unlimited responsibility of general partners was considered to be founded on a contract of mandate—whether expressed or implied—which was entered into between the said partners and the administrator of the partnership, who by law was to be necessarily one of them, to the effect that the latter was to evercise trade in the name, on behalf and in the interest of all concerned, and this notwithstanding that such trade was exercised collectively under the partnership's name.. This principle is still accepted in England, though not in Scotland, as the one by which the law of ordinary partnership as against that of company partnership is to be governed Lindley in his "Treatise on the Law of Partnership" states : "Partners are called collectively a firm... The "firm is not recognized by English lawyers as distinct' from *the* members composing it. "In taking partnership accounts and n administering partnership assets, Courts have to "some extent adopted the mercantile view, and actions may now, speaking generally, be "brought by or against partners in the name of their firms ; but, speaking generally, the "firm as such has no legal recognition. The law ignoring the firm, looks to the partners "composing it ; any change amongst them destroys the, identity of the firm ; what is "called the property of the firm is their property ; and what are called the debts and "liabilities of the firm are their debts and liabilities. In point of law-Lindley continues—a "partner may be the debtor or the creditor of his co-partners, but he cannot be either "debtor or creditor of the firm of which he is himself a member. "

But this notion respecting the nature of a partnership's name—better known as *ratio or nomen societatis*—has been substantially altered in all continental Commercial Codes based on the French one. The contract of commercial partnership itself, though based on the contract of partnership as embodied in the Civil Law, has felt the influence of that change and must therefore be interpreted accordingly, far it is safe to say that such an important commercial contract cannot be considered in its true light unless and until all the fundamental principles upon which Commercial Law itself is based are given their due.

And first and foremost is that fundamental principle that persons—whether physical or juristic—acquire the status of trader only if they exercise objective acts of trade by profession in their own name : no unilateral or even bilateral declaration, no registration in any place whether public or private, no amount of business-knowledge can substitute

the requisites which the law lays down as a *sine qua non* condition for acquiring the said status : and even mercantile usage is unable to alter this state of affairs, for it can never derogate any provision of commercial law. Now—say the critics of the abovementioned commentators have the general partners as such, all those requisites which the law requires from a person to become a trader? Is the business run by the administrator of a partnership carried in the name of each and everyone of the general partners or rather is not this trade exercised in the name and solely in the name of the partnership, which constitute a *juridica persona* and as such must be considered as and kept distinct from the persons, who—whether they hold a limited responsibility or an unlimited one—have cooperated to create it? If this were so, in what way would a general partner, who—say in his private life has never thought of exercising one single objective act of trade—be said to *expendere nomen suum.* It is immaterial to argue that the general partners actually divide between them the profits deriving periodically from the business run in the partnership's name and that consequently it can be said that that business is run solely in their exclusive interest, because what the law requires is that the trade is run in one's own name and not necessarily in one's own interest, and the latter is not enough to meet the requirements of the law if the former is lacking : an accurate analysis of the juridical position of the commission-merchant would amply prove this point.

Then again in terms of law a commercial partnership is considered "a trader" the moment it is constituted, while on the other hand all other physical and juridical persons acquire that status after they have exercised objective acts of trade, consequently in this latter case an interval of time must necessarily elapse from the moment said persons decide to exercise trade and their becoming trader. Now—argue the said critics—if the general partner, as such, is to be considered a trader, he would acquire that status the moment the partnership is formed and consequently prior to his exercising objective acts of trade, and no disposition of the law warrants any person to admit such an exception to the general rule.

And, finally—continue the said critics—if a general partner is considered a trader only because he happens to be a general partner and not because of the fact that in his private life he has acquired that status through the exercise of objective acts of trade, he would have to be considered as subject to all the duties imposed by law on traders and therefore he would be obliged to keel proper trade books and abide by all the provisions of the law relative to the publication of marriage settlements, as, in default, the Court may declare him to be a fraudulent bankrupt. Now, would it be possible for him to comply with all those legal requirements? And, in particular what kind of trade books would he have to keep?

But this criticism brought forward against the long-accepted practice of considering the general partner, as such, a trader has not been left unanswered. Ulisse Manara in his work entitled *Delle Societa e delle Associazione Comerciali* considers in detail each and everyone of the said arguments and gives his reasons why they should be disregarded as legally insufficient, though he speaks of thenm as being "gravi per chi segue la dottrina pur

cosi diffusa che fa delle societa "cornmerciali altrettante persone giu-ridiche" (Vol. I. n. 6, p. 14) : his reasons may be briefly summarized under two main headings :

a) In the first place he maintains that all general partners exercise trade collectively not only in the name of the partnership formed between them—the *ratio, nomen* aut *signum societatis*—but also in their own respective names, of which the said "*ratio, nomen* aut "*signum societatis*" is nothing but a synthetic and at the same time a collective expression "or manifestation. "La ragion sociale e', bensi, il nome della societa—states Manara—...ma "e il nome della societa espresso col nome collettivo, sia pure abbreviato, dei saci che sona "commercianti it quanto soci; di quei soci, vale a dire, che esercitano il commereio "colettivamente, ossia stretti fra loro dal vincolo sociale, senza limiti di responsabilita : e, "dunque, in buona sostanza il nome collettivo di questi soci " (ibid n. 221 p. 491). For this purpose and to this effect the partnership's name may be said to express and represent the *corpus totius societatis et nomina omnium socioumt simul collect.* Consequently the trade exercised in the name of the partnership is one exercised also in the name of each and every general partner, who would therefore be said to *expendere nomen insimul* and this whether the. name of a given general partner is actually to be found mentioned in the *ratio societatis* or whether it happens to be included under the common designation of "& Co.", for in all cases and under all circumstances the law provides that the names of the general partners should be brought to the notice of third parties through the formalities of publication which constitute an essential element for the legal constitution of a commercial partnership. The true legal meaning of the words *expendere nomem* with reference to the exercise of acts of trade, corresponds according to Manara, to the acceptance of an unlimited, direct and personal responsibility of all consequences, legal or otherwise, which may derive from the said exercise. Now—he asserts—this is exactly what the general partners as such do : they undertake to answer personally, unlimitedly and *in solidum* between them for all the obligations entered into in the partnership's name.

In the second place and as a corollary of the above he passes on to demonstrate in what way all those legal provisions established for traders in general are also applicable to a general partner as such. As to trade-books, it will be his duty to register in same all those transactions which are entered into by the partnership in the interest of all partners, saving the inclusion of those items of a strictly personal character, such as domestic expenses, whenever their inclusion is required by law; for, in effect, it is for those transactions that he has undertaken to answer personally and unlimitedly and it is for those transactions that the partner ship's creditors can exercise against him an *action directa* in terms of law. As to the applicability of the other duties, no serious difficulty would arise; nor would a general partner suffer any hardship if, because of the fact that he is considered a trader, the *mixta praesumptio*, whereby every act performed by him is deemed to be an act of trade whenever from the act itself it does not appear that it is extraneous to commerce, should apply to him.

The application of all these provisions of law to general partners should not, therefore, be considered an obstacle to their acquiring the status of traders; nor can it be said that the general partner is being subjected to any provision of the law unawares for he should know before

deciding to become a general partner that by so doing he will be considered a trader for all purposes of the law.

So far we have considered the question at issue only from a doctrinal aspect in the sense that I have tried to explain as briefly as possible the most important arguments for and against the solution of it one way or the other : it is now my intention to consider it from a totally different angle and to see which of the abovementioned two theories appears to be juridically admissible in terms of our existing commercial law. I do not pretend that the opinion expressed by me on this subject is to be considered, necessarily as the only possible one according to our law : far from it. Interpretation of the provisions of the law may vary considerably. But whatever its worth, I shall feel completely satisfied if it were to-succeed in bringing forward other legal men to give their views on such an important subject.

According to my way of thinking the whole question is linked in intimately with another of perhaps greater importance and which cannot possibly be left unconsidered—were it only in it's general aspects—if one is to arrive at a solution which can be said to satisfy a legal-minded person. The first question one is to ask oneself is: does a commercial partnership constitute a *juridica persona* in terms of our obtaining commercial law? If the answer to this fundamental question is in the affirmative, then the solution of the question cannot be but one, i.e. that a general partner, as such, is not a trader. And it is not out of place here to note that Prof. Vivante bases his theory on that assumption, namely that according to the Italian Commercial Code of 1882 commermercial partnerships are to be considered as *personae juridicae,* while on the other hand Prof. Manara holds the opposite view as shall be mentioned later.

The solution of this second question would perhaps be easier if one were to deduce it from the provisions of the abovementioned Italian Code of 1882 which abrogated that of 1865, because—apart from many other considerations—that Code expressly lays down in the third paragraph of article 77 that "le societa anzidette (i.e. the partnership *en nom collectif,* "the partnership *en commandite* and the limited liability partnership) costituiscono rispetto ai "terzi, enti collettivi distinti dalle persone del soci," which "enti collettivi" are in article 8 of the same Code recognized as traders for all intents and purposes of law. But the position according to our law is slightly different, at least as it exists present: for while that part of Ordinance XIII of 1857 dealing with traders has been substituted by Act No. XXX of 1927, the part dealing with Commercial Partnership still remains in its original form. Thus while article 4 of Act XXX of 1927 reproduces substantially the contents of article 8 of the Italian Commercial Code at least in so far as Commercial Partnerships are concerned, nothing is to be found in our law which is similar to or of the same nature of Art. 77 of the said Italian Code. That, however, is certainly not enough to decide *a priori* that a commercial partnership is not a *juridica persona* according to our law. For in fact—apart from the consideration that the personality of a commercial partnership is not created by the law, but must eventually be the necessary and inevitable corollary and effect of the contract of partnership—such a juridical aspect may result and may be deduced from other provisions of the law.

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And for this purpose art. 4 of Act XXX of 1927 is of paramount importance : it lays down that "the term trader includes those persons who by profession exercise acts of trade in "their own name and *commercial partnerships."* This article of law in recognising the status of a trader to all commercial partnerships, must necessarily be constructed as having a wider meaning than the words contained in the abovementioned article 77 of the Italian Commercial Code :it purports to recog nise that status *erga omnes* and not limitedly to third parties as in the case of the said article 77 "rispetto ai terzi". And juridically it means much more than that : it implicitly admits that as such, a commercial partnership is and must he considered as an *ens juridicicm*, capable of acquiring and of exercising all rights pertaining to traders and subject to a11 the duties and sanctions, which the law imposes upon them in general. It must be admitted that the inclusion of the words "and commercial partnerships" must have been made for a specific purpose and I can think of no better way of elucidating that purpose than by reproducing the comments of Mancini on article 8 of the Italian Commercial Code—which contains the same words above quoted : Senator Mancini, who was one of a number of eminent jurists entrusted with the drafting of the Italian Commercial Code, asserts that those words were added "per mettere fuori dubbio la personalita giurdica delle societa' commerciali, negata invece alle semplici associazioni in partecipazione e per denotare che costituite le societh commerciali, le medesime fin dal momento della loro legale costituzione sono persone rivestite della qualita di commerciante prima ancora e senza richidere da parte di questi enti collettivi una prova dell'esercizio abituale del commercio." (Marghieri "I motivi del 'nuovo Codice di Commercio", Vol. IV , pag. 29).

But art. 4 of Act No. XXX of 1927 has introduced no new theory : it simply tends to solve the *vexata quaestio* existing in all countries amongst jurists, who while all agree as to the rights pertaining to and the duties imposed upon the commercial partnership, as distinct from its members, argue as to the real juridical character attributable to it. The said article of law embodies the natural and juridical consequence of other legal principles contained in both the commercial and in the civil laws, whereby the contract of commercial partnership is regulated and wherefrom the true juridical character of such partnerships emerges.

In fact if one, were to comment upon such general principles governing commercial partnerships, one is bound to admit the juridical reality of the following considerations :—

a) In the first place our law—whether it be the Civil or the Commercial one—always regards a commercial partnership as being something different and distinct from the members composing it. This principle received its full application by the law itself when it admits—as it often does—the possibility of the existence of juridical relations as between the partnership on the one hand and every member composing it on the other. It is because of it that one can say that a partnership may be creditor or the debtor of each and every one of its members (art. 1425-VII1868). The application of this fundamental principle appears to have no juridical limits and any kind of contract or agreement may be entered into between the partnership and anyone of its members. In all such cases the law admits of no preferential treatment in favour of the said member, because of the fact of his being a partner, but for all legal purposes he is regarded as if he were—and as a matter of fact he is—a third party transacting business with the partnership. On the other hand in all such

cases the partner is not considered to be transacting business or to be entering into any agreement or contract with the other partners, but solely with the partnership and independently of the members composing it. All this means that the law recognizes in the partnership a *subjecturra juris* distinct from the persons composing it. This argument alone would suffice to discard that theory, supported by Manara and others, which considers that the constitution of a commercial partnership can only give occasion at the most to the existence of a state of *communio* between the members composing it .

b) In the second place it emerges also from our law that the commercial partnership is a *subjectum juris* endowed with its own estate, which must be considered and kept separate and distinct from that pertaining to each and every partner : and this principle of the separation of the partnership's estate from that of its members must be strictly adhered to from the moment a commercial partnership is formed up to the very last stage of its liquidation, whether this be a voluntary one or the consequence of a declaration of bankruptcy : *separatorum separata est ratio.* This principle of separation of the partnership's estate from that of its members has established as a corollary the fundamental distinction between the creditors of the partnership and the separate creditors of each member composing it, the legal effects of which are of the greatest importance and cannot possibly be summarized here.

c) In the third place the commercial partnership as a *subjectum juris* constitutes an autonamou[5] organization from the moment it is formed up to the moment it is definitely liquidated. In fact from the very first moment of its constitution it acquires a name, a legal domicile, a capital and it directs all its activities towards the attainment of the objects for which it has been formed. And above all this, it is endowed with a will of its own and with effective means to attain its objects. The participation and concurrence of the partners or shareholders are necessarily required to obtain what is by law considered as being nothing else but the will of each and every member composing the partnership. On the contrary it often happens that the will of the partnership is diametrically opposite that of the partners or of the shareholders taken *singulatim.* For in effect the partnership's will is not and does not correspond to the simple arithmetical addition of the united wills of the partners : that will is manifested at meetings of the administrators or of the directors and in very many cases at general meetings—which meetings are to be regularly convened and wherein all the requirements of law—expressed or implied—are to be strictly adhered to. It is generally the result of a voting taken at such meetings and, as I have already I said—it may not and it often does not correspond to the separate will of each administrator, director, partner or shareholder, who takes part at the said meetings, for the law does not impose unanimity as a *sine qua non* requisite for the legal formation of it. These principles apply not only to limited liability partnerships, but also—though necessarily in a lesser degree, to partnerships *en nom collectif* as it clearly emerges from article 1433 of Ordinance No. VII of 1868. No doubt as the partnership in its true nature is a *persona ficta,* so is its will : but both the *persona ficta* and the consequent *ficta voluntas* are juridical realities.

Now if the abovementioned three considerations are admitted as being well-founded at law, one cannot but recognize to a commercial partnership the character of a true and proper *juridica persona* with all the consequences which that recognition would imply. And the first and foremost of these consequences would be that if the partnership's name is not the synthetic and collective expression or manifestation of the separate names of all the partners, then the

exercise of objective acts of trade in the former's name does not amount to an exercise of trade in the latter's names. How can then a general exercise as such, consider himself a trader if he does not exercise objective acts of trade in his own name? Are we entitled to admit such an exception to the general rule established in art. 4 of Act. No. XXX of 1927, which—as I have already mentioned has always been considered as one of public policy? And even—if one had to admit by way of argument that a general partner as such is a trader, when would he acquire that status? He would acquire it at the very moment the commercial partnership acquires it in terms of law, i.e. as soon as it is constituted. But in this case while the said article 4 has expressly granted the status of a trader to a commercial partnership from the very moment it is formed and without the necessity of any exercise of acts of trade, nothing is contained therein or in any other provision of the law to warrant the extension of that exception to other persons, whether they be physical or juridical, whether they be partners or not. In other words no matter in which way the point at issue is considered, it will always be necessary in order to arrive at the conclusion that a general partner, as such is a trader to admit and establish one or more exceptions to the fundamental rule of public policy that traders are those persons who by profession exercise acts of trade in their oft name, and the admission of such exceptions cannot be justified by strict legal arguments.

Then again if one had to admit for the sake of argument that a general partner, as such, is a trader, it would be interesting from a legal paint of view to consider the following applicationof that theory. We have it from article 53 of Ordinance No.XIII of 1857 that "a limited partner in a partnership *en commandite* can do no act of management of the partnership, nor can he be employed for the business of the partnership even by virtue of a procuration" and in terms of the following article in case of contravention of the said prohibition, the limited partner shall be bound *in solidum* with the general partners for all the debts and all the obligations of the partnership : in other words all this means that in such an eventuality the limited partner becomes *ipso facto* and *ape legis* a general partner. Now, one may ask, would he also become a trader the moment he assumes the role of a general partner? I do not see why he should not, for if the theory is admitted it should apply to all general partners : but the fact would remain that that particular person would have acquired the status of a trader, with all the privileges and sanctions which the term implies, for having contravened a provision of the law instead of for having exercised objective acts of trade in his own name.

It appears, therefore, from all the above arguments that the theory which does not consider the general partner, as such, a trader, is more convincing, even if we apply it to our commercial law. There remains, however, one final point which must be mentioned in order that the question at issue be fully argued.

In fact if one had to accept the theory that general partners, as such, are not traders, then how would one explain and justify the contents- of articles 248 and 263 of Ordinance No. XIII of 1857, wherefrom one may infer that in case of bankruptcy of a commercial partnership, all general partners are to be considered as bankrupt with all the consequences which that word implies, if it can be easily affirmed that in terms of our law only traders can be adjudicated

bankrupt? I admit that the difficulty is serious, but not unsolvable. Modern writers on Commercial Law, notably Rocco and Bonelli, have tried—and I think successfully—to explain this apparent contradiction. It is an established fact that general partners are only to be found in those commercial partnerships wherein what is called "the personal element" prevails, and that as a consequence the legislator has allowed himself to be influenced by that prevailing element in establishing certain provisions which were to govern those partnerships, and which in themselves appear to be of a special and sometimes of an exceptional nature, dictated only in the interests of the partnership's creditors, who in transacting business with the partnership take in good account not only the partnership's estate, but also that pertaining to each and every one of the general partners as the persons responsible with the partnership for all the latter's obligations. The inference usually drawn from the said articles 248 and 263 of Ordinance No. XIII of 1857 is exactly of this type.

From the unlimited and personal responsibility of each general partner, which constitutes a genuine external manifestation of the personal element, derives the important consequence that all adverse physical, juridical and financial vicissitudes, which affect it, provokes a repercussion on the partnership itself and may cause its dissolution (art. 1439 nos. 3 and 4 of Ord. VII of 1868). Now from the said articles 248 and 263 of Ord.. XIII of 1857 we infer the contrary case i.e. the financial catastrophe of the partnership has the effect of provoking a repercussion on the general partners, and the latter are declared bankrupt *ope legis* when the former is so declared by the Commercial Court at the request of its administrators or of anyone of its creditors. Now this is caused not because the general partner is a trader, but in the interests of the partnership's creditors in order to facilitate the liquidation of the partnership itself. The bankruptcy of the general partner in such cases must be regarded as a sanction established by law rather than an application of the general principles of law : without it the partnership's creditors may be delayed in settling definitely their claims. (*Bolaffio* : Il Cod. di Comm. commentato. Vol. I, par. 113. Fifth Edition.)

Then again if we examine the true juridical nature of the declaration of bankruptcy of the general partners, we shall find that it is exceptional and ***sui generis :*** in fact it is the only case of bankruptcy declared *ope legis* and without there having been a request to that effect either by debtor or by one of the creditors. In the second place under the general principles governing bankruptcy when debtor asks for his declaration of bankruptcy or when the creditors or any one of them proceed against him and demand such a declaration, the Court according to circumstances may or may not declare that debtor is in a state of bankruptcy, but when a partnership is so declared the Court has no other choice but that of declaring all general partners bankrupt.

The position therefore may be summed up thus : the jurist is bound to admit an exception no matter which theory he considers more acceptable. If he accepts the theory that general partners, as such, are traders he will have to do so by way of an exception the express wording of article 4 of Act No. XXX of 1927 : an exception which in no way can be inferred from the law. If he accepts the theory that general partners, as such, are not traders he will have to do so by way of an exception to the general principle that only traders can be declared bankrupt : an exception which can be inferred from the law. Of the two the second still remains to be the

more legally based one : if this be admitted the corollary would be that the commercial partnership does not communicate to the general partners, as such, its status of trader, but only and in the event of its bankruptcy its state of bankrupt and his in the sole interest of its creditors. This interpretation of the law seems to be more logical and beneficial to the general partner, who—if considered a trader without having exercised one single act of trade in his own name—would suffer unnecessary hardship in the eventuality of the partnership's bankruptcy.

The position in itself—as it actually is—is anomalous and it is to be hoped that future legislation should provide the necessary means to remedy it in such a way that while all rights pertaining to the partnership's creditors be fully safeguarded, general partners, and especially those who have no say in the administration on the partnership, be freed from have possibility of ever being subjected to unnecessary hardships.

THE PROBLEM OF JUVENILE DELINQUENCY

(By A. Cachia)

NOTHING stimulates and arouses in us emotions so diverse as the problem of juvenile delinquency. We cannot disregard the increasing importance of such a problem, and if we have to enquire into the stark reality it is only with a shameful eye but a merciful heart. Bacon says that "judges ought (so far as the law permitteth) to cast a severe eye upon the example, but a merciful eye upon the person." The reason is manifest. All anti-social tendencies require to be repressed ; and this is more so in the case of a child if we are to make of him a dutiful citizen rather than a hardened criminal. *Malta supplet aetatem*; Hale tells us, so that that if the offender is not *doli incapax* it is in the interest of all that the significance of his guilt be brought to his mind. But, on the other hand, we are not to lose sight of the fact that the transgressor is young—and here mercy comes in. There must have been something subversive in his education, in his environment, or maybe heredity has played its part as the criminal pedigrees of various young offenders show. Hence it is that "the law is disposed to look upon the child rather as a victim than as an aggressor, and to him it extends, with greater eagerness, its aid, its sympathy and its indulgence" (1).

The problem of the adolescent criminal becomes even more urgent in view of its insistence. In East London where the incidence of delinquency is very high one child in 300 is brought before the Juvenile Court every year, and the proportion is almost doubled in New York. Statistics reveal only the cases in which there has been police intervention so that as a London magistrate has observed "with vigilance sufficiently increased, the number of charges could be doubled, trebled, or quadrupled."

The whole subject is susceptible both to a scientific and to a legal treatment. What is of the utmost importance is not the crime committed but the criminal and before reforming the latter we cannot hope to get rid of the former. We must fight the cause to banish the symptoms. Plainly then it is a part of individual psychology.

The scientific investigator institutes an extensive research into the life-history of the offender. He builds a mould on which to reform the growing child. He examines the child thoroughly ascertaining in the first place his past history, what were the influences to which he was subjected and which probably led to the commission of the offence. This is a very vast enquiry, but still the work is not complete. The present situation of the child cannot be omitted in such an examination. The psychologist reconstructs with precision the emotions and reactions predominant during the actual transgression. Finally the child's future prospects must be safeguarded. This can only be achieved by a prolonged treatment because whatever his past

(1) C. Burt: *The Young .Delinquent,* p. 20.

records are his future movements may not easily be deduced. This methodical treatment of the child must thus be conducted in three different directions. The transgression itself is to be only one part of the examination. It is a mere outburst occasioned by some conflicting reactions in the offender's personality, and it only reveals to the experienced investigator the ingredients for which he must look. All this may seem rather impracticable and that in any case being based on presumptions it cannot lead to genuine results. But magic plays no part in psychology ; and it is surprising "how much of psychological treatment is little more than sound common sense applied by an expert" (2).

There is however a great divergence between the method of the psychologist and that of the magistrate as far as the age of the offender is concerned. Our law, for example, lays down that a child is *doli incapax* up to the age of 9 years. Such a "chronological cleavage" is indeed expedient for administiative needs, but it can hardly be accepted by the psychologist, notwithstanding that it takes into consideration the average child. The phychologist is not interested in birth-days and calendars and when a case presents itself to him he does not take the age of the child as conclusive for all practical purposes. What interests him is the actual intelligence and temperament of the child and these he assesses apart from any prejudiced conception based on the child's age. Professor Burt calls this intellectual development of the child "mental age" as distinct from "natural age" . The magistrate on the other hand considers the "natural age" of the child as conclusive for all legal purposes which to the psychologist seems to be both arbitrary and unjust.

Apart from the minor disquisitions on the subject, it is important to consider the elements which acting together, one perhaps to a greater extent than the other, have instilled in the child a propensity towards delinquency. First and foremost the everlasting question of heredity presents itself to us—what influence, if any, have the hereditary conditions of the young offender on his personality? Some argue that heredity is the decisive factor on the principle that figs never grew upon thorn. The born-offender is "the foredoomed legatee of ancestral depravity and vice", and the question of uprooting his inborn tendencies is a hopeless undertaking.

Without committing ourselves to such an extreme it is to be admitted that certain elements are found in the personality of the young delinquent the sources of which are to be traced in his ancestry. It may also be that his mental power of discriminating between right and wrong is defective without impairing in the least his intellectual abilities. Thomas Wainewright, an inborn genius and a callous murderer, is more than we require as an example of this type of criminals. Some authors allege that this moral depravity is due to heredity which means in a few words the biological transmission of guilt. English Law denominates such persons as "moral imbeciles" and their misdeeds are presumed to be due to some "mental defect coupled with strong vicious or criminal *propensities"* (3). However heredity only enfeebles the child's potentialities who, as a consequence is more liable to fall into the snares of evil : it is in no way an irresistible impulse in that direction.

Another moulding influence in an individual's character is his early environment. Unless

(2) J. Watson : *The Child and the Magistrate,* p. 84.

(3) Mental Deficiency Act, 1913, Sec. I (d).

one's physical constitution is strong enough one is sure to fall a prey to an eventual epidemic and likewise if the child is not brought up in the principles of right and justice the probable consequence is that the ravaging influences of his vicious environment take the upper hand. The home conditions and the family relations and affairs of the growing child are a decisive factor in shedding some light on the child's future behaviour. The home is for him (I speak of the normal type) a little world where he acts and reacts upon the example of his elders. I do not say that all evil tendencies which reveal themselves in the man have their roots in the experiences of childhood, but surely this is the time most favourable for sowing the seeds of crime.

Poverty is to a great extent the predominant feature in the majority of young delinquents. It has repercussions on the moral and physical constitution of the child and leads to various other evils. Poverty can have different meanings. The majority of writers rightly consider poor those who have not enough means for subsistence; others rather inappropriately make of poverty a relative term—the lack of means for maintaining a certain social standing, the outcome of irresistible desires on the one hand and insufficient means on the other. They argue with Seneca *si ad natum vives, nunquam eris pauper; si ad desiderium, nunquam, dives.*

Poverty leads to overcrowding in the home—various individuals of all ages and of both sexes are huddled together so that it is difficult to keep proper dignity and personal decorum. In such circumstances the child gets the worse of it. When the parlour, the kitchen and the nursery are all crammed into one room, how can the child give vent to his playful fancy? He is everywhere in the way, his mother sends him to play with his friends in the street, while generally his rather philosophical father goes to spend "a nice quiet evening" in the village pub depriving the homed his beneficial influence. In a word "the leisure hours are vacant; and an active mind in a joyless home will soon find mischief for the idle hand" (4). But we must not commit ourselves to saying that poverty is a propulsion to crime far that would be, as Stevenson puts it, "a calumny on the noble army of the poor."

Poverty may be only one of the elements against which the youngster has to struggle to attain a normal degree of self-discipline. Various other subversive factors may exist within the immediate circle of his family relations and which, as a consequence, have an influence on his general behaviour from the very first moment when he is launched into the world. However no hard and fast rule can be laid down as to the effects such influences may produce because much depends on the manner in which the child reacts to his environment. I have treated of poverty comparatively at length not because it is the decisive element but because different writers maintain various and conflicting views on the subject. So much so that Healy (5) hardly touches upon the subject while Breckinridge and Abbot rather exaggerate the actual state of affairs in saying that "nine-tenths of the delinquent girls and three-fourths of the delinquent boys come from the homes of the poor" (6).

We may not argue however as Healy does that as troubles mainly originate in the home it is

(4) Burt, op. cit., p. 91.
(5) *The Individual Delinquent.*
(6) *The Delinquent Child and the Home.*

such homes that we must blame when a criminal type emerges. It is to be kept in mind that subversive conditions at school, evil companionships during leisure hours or during work, unemployment and various other environmental conditions may have a greater effect on the personality of the juvenile, though this is not generally the case. However, Professor Burt unhesitatingly asserts that "it is the personal reaction to a given situation that]makes a man a criminal, not the situation itself" (7).

The multifarous causes which engender a criminal propensity in the child are clearly, as I have said, mainly of psychological and social importance. Soon however the problem of juvenile delinquency turns out to be of a purely legal character when the child has to be brought up for trial and his punishment assessed.

Ever since Sir William Harcourt in 1880 emphasised to Queen Victoria that the child who finds himself committed with adult criminals "comes out of prison tainted in character amongst his former companions... and he soon lapses into the criminal class with whom he has been identified" (8), progress has been made in the treatment of young offenders. But we are indebted to America as the pioneer in the establishment of Juvenile Courts, for as early as 1881 Chicago had a Juvenile Court. In England the Children's Act of 1908 became the principal turning point and reforms have been carried out which greatly revolutionised the treatment of the young offender.

The importance of simplicity in these courts cannot be exaggerated. All precautions should be taken to ensure that the child is not bewildered and that he understands what is going on. An Oliver Twist "trembling at the awfulness of the scene" can hardly lead to the proper administration of justice. Moreover the Young Persons Act of 1933 provides that only those authorised or specially permitted may attend the proceedings and that no newspaper shall reveal anything that may lead to the identification of the child.

What is more interesting nowadays is the effect of war on juvenile delinquency, Generally every long war brings with it a wave of crime. During the Napoleonic wars a special committee was appointed as the increase in crime was alarming. In England during the Great War, 1914-18, the number of persons under 16 convicted for indictable offences increased from 14,325 in 1913 to 24,407 in. 1917. Watson things that "so far as juvenile crime is concerned , it is well to bear in mind that children in war-time are intrinsically no more wicked than in time of peace." It is only that certain circumstances as absent fathers and mothers, severer lighting restrictions, intensive air-raids, excessive wages and evacuation "have combined to develop that spirit of mischief which in children, more often than not, is merely a younger and more- wayward brother to that spirit of adventure which we all admire" (9).

It is therefore of the utmost importance that great care should be taken especially nowadays to correct such wayward tendencies of young offenders. The war has brought destitution dis-

(7) Op. cit., p. 188.
(8) A. G. Gardiner: *The Life of Sir William Harcourt,* vol. I, p. 395.
(9) Watson, op. cit., pp. 20-21.

ease and moral lassitude on many children but various scientific and social improvements have lightened the burden of poverty and sickness, and it is to be hoped that "what has thus been done for obstacles to health and happiness must now be attempted for the wider and profounder evils that beset the growing soul" (10).

(10) Burt, op. cit., p. 22.

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JONES vs. CARDWELL noe. et.

MESSRS. Falzon Brothers purchased a machine from the Government of Malta for Lm2,000. The Government undertook the obligation of supervising the transport of the machine to, a certain factory, without, however, taking any responsibility for breakages etc. ; it was also agreed that the transport expenses were to be borne by the purchasers and that a particular Transport Firm was to be entrusted by the Government with the task. Mr. John Attard, a trustworthy Government employee, was charged with the duty of supervising the carriage of the machine. Mr. Attard, together with the employees of the Transport Company, without asking for permission used a small cart belonging to purchasers in order to convey the machine into a room of the factory of Messrs. Falzon Bros. The cart which was defective, broke down, seriously damaging the machine.

On a demand being made to the interested Government Department for payment of damages caused on account of the negligence of the Government employee, Mr. Farrugia, the Head of Department, without the proper authorization admitted outright the Government's responsibility and the Treasurer, Mr. Dimech, in spite of the lack of authorization, issued a bill of exchange payable at sight in the Government's name for Lm300 (assessed damages) against Mr. Scicluna who, was debtor to that Government Department for the sum of Lm300. Messrs. Falzon Brothers endorsed the bill in favour of Mr. Jones, who after three weeks from the date of issue fruitlessly presented the bill for payment to Mr. Scicluna. The bill had not been presented for acceptance. He, however, failed to comply with the legal terms for the drawing-up of a protest. He informed Falzon Bros. of the whole position and an assignment of all rights of action anent this matter was made by Falzon Bros. to Mr. Jones, who however declared that he did not renounce to any rights he might have according to law. Later, Mr. Jones notified the Government of the assignment.

Mr. Jones is now actioning the Lieutenant-Governor as the representative of the Government for the payment of Lm300 in virtue of the bill of exchange, once the Government is in possession of the "provvista" , Mr. Scicluna having settled his debt in due course after Mr. Jones's demand, and, subsidiarily, as assignee of Falzon Brothers, for the payment of Lm300 as damages resulting from the act of a Government employee during the execution of a Government contract. In the same writ of summons an action is also instituted against Falzon Bros, subordinately to the first action, for the payment of Lm300 arising out of the cause (i.e. the original debt) for which the bill of exchange had been endorsed.

The Court before which the actions are instituted possesses civil and commercial competence.

Mr. Farrugia, Mr. Dimech, Mr. Attard and the Transport Co. have been called into the suit as interested parties.

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* Reported by Victor Frendo and Joseph M. Ganado, B.A.

Professor F. Cremnona, LL.D., kindly consented to hear the case.
Counsel for Cardwell noe. : Mr. J. Desira Buttigieg.
Mr. V. Ragonesi.
Counsel for Mr. Jones : Mr. V. Borg Costanzi.
Mr. R. Staines.
Counsel for Messrs. Falzon Bros. : Mr. J. Grech, B.A.
Counsel for Transport Co. : Canon C. Farrugia,
B.Litt., D.D., B.L.Can.
Counsel for Mr. Farrugia and Mr. Dimech : Mr. C. Schembri.
Counsel for Mr. Attard : Mr. P. Saliba.

Mr. Borg Costanzi opened the case by affirming that notwithstanding that the protest had not been drawn up, his client could action the Government as the holder of the "provvista" in virtue of sec : 299. The bill bore on its face no irregularity and therefore the Government was responsible on this ground independently of any other question. As to the subsidiary demand, he submitted, the Government was legally responsible for the reason that the damage had been caused by its man datary during the performance of his duties.

Mr. Desira admitted that the Government would have been responsible if the ordinary action of redress had been exercised according to law ; but, since other persons were appearing in the suit for its integration, further questions of responsibility had to be discussed. Mr. Farrugia could not prejudice the Government because in admitting the Government's responsibility outright he was clearly abusing of his office. The same could be stated in regard to Mr. Dimech who had issued the bill without any "cause" whatsoever. Attard's duty was merely to supervise the transport and **not** to meddle with the transport as such ; he therefore exceeded the limits of his mandate and according to well-established principles of law no liability could accrue to the principal if a tort was committed by the mandatary, except in the case of existence of *culpa in eligendo*, which in this case was altogether out of the question.

Mr. Grech for Falzon Brothers said that ones the protest had not been filed within the legal term, no responsibility could arise from the enforcement. The only source of responsibility that remained was the assignment of rights, the warranty of which referred by law only to the price. No price was here mentioned, so that presumably the assignment had been gratuitous in which case, Mr. Grech submitted, there evidently arose no right of redress.

Mr. Schembri appearing for Mr. Farrugia and Mr. Dimech submitted that there was no doubt as to the Government's responsibility because the signature of the Treasurer was binding on the Government. The question whether there was any right of redress was not within the orbit of this suit and therefore he declared that he was refraining from discussing that point.

Mr. Saliba for Mr. Attard said that the latter's duty was to supervise the transport and not to see whether the means of transport were faulty or otherwise. It was up to the Company to see that suitable means be used and it was no concern of his client to enter into this merit.

Canon Farrugia said that the Company's employees had acted beyond their mandate in using a cart which had not been given to them for the purpose. Therefore their *culpa* was of a tortious character and, since *culpa in eligendo* had neither been alleged nor proved, the

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Company was not responsible in any way ; responsibility weighed on the employees personally.

Professor Cremonia delivered judgment in the following sense :

The action brought forward by Jones contained three claims which had to be considered separately : the first against the Government based on the bill of exchange ; the second also against the Government and subsidiary to the first based on the assignment made by Falzon Brothers ; the third of a subordinate nature to the first was against Falzon Brothers for the payment of Lm300 arising first of the "cause" that is, the original debt for which the bill of exchange had been endorsed.

In regard to the first claim Professor Cremona noted that it was an established principle that bills of exchange gave rise to an autonomous and independent right which, in this case, plaintiff as endorsee had acquired in respect to all the signatories of the bill and therefore also against the Government i.e. , the drawer of the bill. The action brought forward, by the plaintiff

was one of recourse for non-payment. Two pleas had been set up :

a) that plaintiff had lost the right of redress, as he failed to make the protest for non-payment ;

b) that the Government was not to be held responsible for the payment of the bill, because the bill had been issued by the Treasurer without the necessary authorization.

Professor Cremona held that both pleas were not well based at law. The law provided that the right of recourse shall revive in favour of the holder against the drawer or endorser who after the expiration of the term prescribed for the protest....., has received on account or by way of compensation, or in any other manner, the funds assigned for the payment of the bill and, without doubt, the Government did receive from Scicluna the funds assigned for the payment of the said bill. As regards the second plea there arose the question as to the Government's liability deriving from an act of one of its employees, when the act was actually in abuse or in excess of the powers granted to such employee. On the strength of the principles laid down by Bonnici and by Giorgi, which on various occasions had been applied by our Courts, it appeared that when an employee perfoms an act which ordinarily pertains to his official position-such as the case under review—the Government is to be considered bound to honour it, saying any right of redress against the employee *"si et quatenus"* This apart from the question whether such a plea could be set up in terms of sections 253 and 254 of the Commercial Code.

In view of the above plaintiff's first claim was allowed and as a consequence it was not necessary to consider the remaining two claims,

* * *

A BARRISTER'S DUTY

"I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty." *Johnson.* "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a Judge." *Boswell.* "But what do you think of supporting a cause which you know to be bad?" *Johnson.* "Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly ; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong and he is right.. It is his business to judge: and you are not to be confident in your opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion." *Boswell.* "But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?" *Johnson.* "Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the Bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the Bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk his feet." – (Boswell: *Life of Johnson).*

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HOPKINS vs. HOPKINS*

IN 1935 Mr. Hopkins while domiciled in Spain contracted marriage in Malta with a Spanish lady domiciled in Spain. In 1942 they established their domicile in Malta. In 1944 an action for personal separation was successfully made by the husband on account of adultery committed by his wife. The community of acquests was dissolved by the judgment. By "nota" presented by Mr. Hopkins' counsel a few days after the judgment Mr. Hopkins declared that he was renouncing to the effects of the judgment.

Mrs. Hopkins later actioned her husband for the payment of half of the "common property" according to Spanish Law i.e. the savings accumulated and the property acquired during the period running from 1935 to 1942; her share was due to her by Spanish Law in *all* cases.

Mr. Hopkins pleaded that in virtue of the "nota" he had filed in the Court of Appeal, the effects of the separation had come to an end, thus rendering the wife's action devoid of any

legal foundation. Subsidiarily, he submitted that half of the community of acquisitions was not due because separation had been pronounced by the Court of Appeal in the sense that the wife was subject to all the penalties established by the law in case of adultery and the acquisitions were in the main the result of Mr. Hopkins' industry. He stated that, since the marriage had been celebrated in Malta, the Maltese community of acquests was applicable from the very start.

The Court of first instance dismissed plaintiff's claim on the ground that once the husband had renounced to all the effects of the separation and the judgment had been in his favour on all paints, no action could arise out of the separation. The wife had the duty of cohabitation and there was no right to take any part of the community of acquests, because the community was still alive in virtue of the husband's renunciation.

Plaintiff appealed from the judgment given on first instance.

N.B. Spanish Law provides that the wife's share is due to her in all cases (inclusive of the case of personal separation).

If Spanish Law were to be applied in regard to the acquisitions made between 1935 and 1942, Mrs. Hopkins' share would amount to Lm500 more than that reckoned by Maltese Law.

Professor V. Caruana, B.Litt., LL.D.. kindly consented to hear the case.

Counsel for appellant : Mr. Joseph M. Ganado, B.A. ; Mr. Mifsud Montanaro.

Counsel for respondent: Mr. Edgar Mizzi, B.A.; Mr. George Degaetano.

The first question dealt with was raised by *Mr. Mifsud Montdnaro* as the inadmissibility of the note of renunciation filed by Mr. Hopkins : it was contended that the sentence of separa-

* Reported by Mr. Paul Mallia, B.A.

tion created a new *modus vivendi* between the parties which could not be altered except by the will of both parties. In fact, according to sec. 77 of the Civil Code, apart from the cessation of cohabitation, no other effect of a separation could cease except in virtue of a contract by a public act, and it was obvious that there could be no re-union except by mutual consent. In support of his contention appellant quoted Baudry Lacantinerie, Laurent and Italian case-law. The power to ask for personal separation was a potestative right—said Mr. Mifsud—it might or might not be exercised ; but once it was exercised by Mr. Hopkin. his wife had every right to abide by the decision given. This plea was not contested by respondent : as a matter of fact Mr. Mizzi admitted the arguing of the appellant and the matter stopped at that.

Mr. Ganado then rose to discuss the point at issue. Up to 4942, he said, the Spanish Law applied regarding the community of acquests of the spouses, i.e. the law of the matrimonial domicile. He submitted that sec. 1360 should not be interpreted strictly *ad litteram* and that for the application of the Maltase community of acquests it was necessary that Malta should have been the place of the matrimonial domicile. He referred to the second paragraph of sec. 1360 from which the spirit of the law could be derived, to the Code De Rohan and to a judgment given by the First Hall, Civil Court—Smith vs. Muscat Azzopardi 1935—*per* Harding J.

Mrs. Hopkins was therefore asking only for the payment of what was "hers" by Spanish Law. When in 1942 the parties established their domicile in Malta a new community of acquests stepped in and the first one was ideally liquidated : the half of the "common property" acquired during the period running from 1935 to 1942, which the wife was claiming, became, in virtue of such a cessation a sort of paraphernal property which could in no way be denied to the wife. In fact, Mr. Ganado continued, this share was certainly *not dotal* ; it could not fall into the community of acquests established under Maltese Law : it could not, therefore be other than paraphernal property, which, owing to the cessation of the community of acquests, belonged to the wife even as to administration.

It might be pleaded—said appellant—that section 64 gave the Court the right to direct the cessation of any community of acquests *for the future,* but, he pointed out, sec. 64 had no direct influence on the case, because that matter had been finally settled by the judgment of separation. Appellant was simply demanding the half of a community of acquests which had ceased with the change of domicile. As to the possible objection of the respondent that Mrs. Hopkins was subject to all the penalties established by the Law among which penalties was that of the loss of the right for the half of the acquisitions which, during marriage, might have been made by the industry chiefly of the other party, Mr. Ganado retorted that the penalty would obviously not be applicable to the property claimed for the reason explained in the preceding paragraph and that, in any case, penalties must be interpreted restrictively : if the Law spoke, it must be presumed that it knew what it spoke about; it referred only to the Maltese community of acquests and to no other, it was not fair to say that our legislator intended the penalties applied by him to apply to order of things brought about by a foreign legislator. It was imperative, Mr. Ganado said, that there should be a line of demarcation between that "common property" which existed up to 1942 and the "community of acquests" which came into being in 1942. *Even if one could think,* said appellant, *of some continuity* (which was not correct) between the community of property existing up to 1942 and the community of acquests established under Maltese Law, the penalty inflicted by the Law of

Malta could not apply : in the matter of the application of the *lex fori* a distinction had to be made between what concerned public policy and what was of a purely private character; were section 56 (which lays down the penalties inflicted to the party who may have given occasion to the separation) a provision of public policy it would certainly have applied to the wife's share of the "common property" existing up to 1942; it was evident, however, that this section of the Law was of a purely private character.

Mr. Mizzi then rose to defend his thesis. He upheld that as from 1935 it was the Law of Malta which regulated the community of acquests between the parties; in fact, section 1360 of the Civil Code laid down that "a marriage celebrated in these islands produces *ipso jure* between husband and wife community of acquisitions": where the law was clear—he pointed out—one should not resort to any interpretation. The law made only one distinction viz. that between marriages celebrated in these Islands and marriages celebrated abroad, and therefore any other distinction would be beyond the scope of the law. He also stated that this was also the probable intention of the legislator, as could be inferred from the reference to the Code De Rohan and to Story made by Sir Adrian Dingli in his "Notes".

The second point discussed by Mr. Mizzi was that the lass of one half of the acquistions which during marriage might have been made by the industry chiefly of the other party was an effect of separation and had nothing to do with the effects of the community of acquests. With regard to the effects of the separation—it was pointed out—there was no doubt but that the law of Malta, as the *lex fori*, applied; moreover the parties were domiciled in Malta. A doubt remained whether, if Spanish Law governed the relations between the parties during the period running from 1935 to 1942, because of their domicile in Spain, this effect of separation could affect the acquisitions made during that period. Respondent submitted that it could, firstly, because once the *lex fori* governed the effects of separation it was immaterial whether the parties were at one time domiciled in Spain or not ; secondly, because the words of the law "during marriage" covered the whole period from 1935 to the date of the judgment; thirdly because the nature of the Spanish community of acquisitions was very similar to that regulated by Maltese Law.

In answer to appellant's statement that the Spanish community, if it ever existed, had been ideally liquidated respondent suggested that no such liquidation had ever taken place and that, on the contrary, it was still in force, though relating only to the property acquired between 1935 and 1942.

Finally, the respondent raised the plea of *res judicata :* the sentence of separation was final and absolute ; the demand of the appellant was only a camouflaged means of avoiding the sentence of separation.

Mr. Ganado then rose to rebute this last-mentioned plea. The plea of res judicata, he said, could only be raised with regard to matters expressly adjudicated upon : here—it was evident—it was merely the interpretation of the first judgment that was being discussed. This view was upheld by the "judge".

Prof. Caruana, in giving judgment, upheld appellant's view that up to 1942 it was the Spanish Law, as the law of the parties domicile that applied to the community of acquests but—

he pointed out—there could be no doubt that the Law of Malta was applicable as to the effects of separation both because the law of Malta was the *lex fori* and also because it was the *lex domicilii* of the parties at the time of the action of separation. Now one of the consequences of the application of the Law of Malta was exactly that the guilty partner forfeited any right he or she might have had for the half of the acquisitions which, during marriage, might have been made by the industry chiefly of the other party (sec. 56 para. 2). The point at issue was whether this rule was to be applied to any community of acquisitions or whether it was to be limited to that community of acquests which had arisen under Maltese Law. Prof. Caruana thought that section 56 might logically be extended to *any* community of acquests existing between the parties. The reason behind sec. 56, in fact, was that the guilty partner should not derive any benefit from the acquisitions of the innocent partner. This effect of the separation was a penalty imposed against the guilty partner—it should, therefore, be extended to every community of acquests existing or which might have existed between the parties and not simply to that which arose under Maltese Law. The one half of the acquests, Prof. Caruana said, might be likened to the so-called *lucri nuziali* (nuptial gains) regarding which there was no doubt but that they had to be returned to the innocent partner. The fact that there were two different community of acquests should not be an obstacle to the application of section 56 para. 2. Under these circumstances, Prof. Caruana was of opinion that the sentence of first instance was to be confirmed, though on grounds different from those mentioned by the first Court, and the appeal rejected.

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A CONFESSION

"Lord Reading and his cases" by Walker-Smith, page 127: "It is always good tactics to confess a mistake—as long as it a miscalculation and not an ethical mistake—.....for nothing pleases a Jury more than to reflect how much better they would have handled the situation themselves."

* * *

JUSTICE IN MOTION

"The Lord Chief Justice of England in Rex v. Hurst, 1924, 1. K;B. 256 said: "Justice should not only be done, but be manifestly and undoubtedly seem to be done."

* * *

A DEBT

Bacon — "I hold every man a debtor to his profession."

* * *

LAW AND LIFE

Legislation is only really successful when it is harmony with the general spirit of the age. Law and statesmen for the most part indicate and ratify, but do not create. They are like the hands of the watch which move obedient to the hidden machinery behind. - *Lecky.*

DEBATES*

DEBATES have so far figured very prominently in the Society's programme of activities; indeed, it would be more correct to state that the holding of debates was the Society's main function this year. The standard displayed by the speakers was, on the whole, quite good ; it is clear that debating talent is certainly not lacking among members of the Society. If one has to express a note of regret, it is, that the response from some students has recently been anything but encouraging with the consequent result that the last two debates have been poorly attended. We look forward to more cooperation in the future, for it is in the atmosphere of debate that the student develops his personality and acquires that confidence and sense of judgment which cannot but stand him in good stead when he embarks on his professional career.

The first debate of the year took as back to Montesquieu's doctrine of the Separation of Powers. George Zammit B.A. (Lond.) , who was supported by Joseph Agius contended 'That the Separation of Powers enunciated by Montesquieu, does in fact exist'. In his speech the proposer laid particular stress on the fact that the famous French writer propounded his theory subject to evolution. It was natural, the proposer said, that we could not expect to witness complete separation between the legislative, executive and judicial powers ; one would be insulting the genius of a Montesquieu if one were to maintain that his theory stood for complete and absolute separation. The opposition was led by George Degaetano and Maurice V. Arrigo. It was pointed out that the French jurist was not, as many maintained, the originator of the doctrine ; his theory was a restrictive interpretation of the previous doctrines of the Separation of Powers. Today Montesquieu's theory had not found application in any system on the Continent ; the nearest approach to it was in the American Constitution, but even here with the growth of subordinate legislation, separation tended to break down and could not be said to exist.

From the trend of the debate it became clear that the opposition had attracted more adherents to its side and it eventually carried the day by a majority of six votes.

A very interesting debate came up for discussion when Antoine Cachia with Joseph Abela, as seconder, proposed his motion 'That the notion of the born criminal is false'. The proposer said that to admit the notion of the born criminal one had to admit that there were persons who from birth manifested certain Criminal traits which inevitably lead them to the commission of crime. In other words, an irresistible impulse was essential—a certain irresistible influence which distingushed them from habitual criminals in whose case the cultivation of crime was not irresistible. The proposer referred to certain absurd theories according to which born criminals could be recognised by certain physical traits. He admitted that heredity played an important part in the formation of an individual but it was not the exclusive factor which overcame everything else. What was inherited was only a predisposition to crime; or an enfeeblement of character which if left to itself, could never lead to crime. Joseph Abela said that many upheld the theory of the born criminal because they confused the different notions of environment and heredity.

Oliver J. Gulia L.P. and Anton Calleja B.A., led the opposition very convincingly. The

* Reported by Eric P.Sammut.

former started by expressing disapproval of the proposer's Conception of a born criminal. He said that it was at variance with the meaning popularly attributed to the term. When we refer to a born artist we do not ordinarily mean a person who, from the very moment of birth was an artist, but one who has such ability that he has come to be considered by the public as a born artist. It was the same with the born criminal—a man who in the pursuit of crime had shown such nefarious dexterity and whose life had been a record of evil and anti-social acts. Relapse, he contended, proved indirectly the existence of born criminals i.e. : people who possessing an evil disposition, were bent on crime. As regards the purposes of Criminal Punishment, it had been proved beyond doubt that reformation as an aim of legal sanctions, had failed in one crucial test ; the reason being that it was by no means universally applicable. There were those 'so inextricably rooted in wrongdoing that no prospect existed for inducing in them an honest way of life'. These considerations which emerged from researches of modern criminologists could not but lead to the conclusion that born criminals in the sense given above, did actually exist. Anton Calleja referred his listeners to Freud and others and their findings in the field of Psycho-Analysis. These taught us that man was subject to an innate impelling influence which manifested itself in different directions and differed from one individual to another. In some persons this developed, into a tendency to commit crimes.

The speeches of the principals were followed by a lively discussion when the motion was open to the House. Robert Staines, said that the acceptance of the notion of the born criminal would be tantamount to a denial of the freedom of the will, as the proposer himself had pointed out, and as such it appeared to him to be untenable. Wallace Gulia B.Sc., expressed himself in favour of the opposition. He would not be so bold as to contradict the principles evolved by Gregor Mendel who pointed out that heredity was a determining influence in nature and that therefore criminal traits could be passed on to a succeeding generation.

The final voting was 12—7 in favour of the motion.

The subject which was next discussed was—in the words of Victor Frendo the proposer—as much of topical as of legal interest. The proposer said that, following the judgment delivered in the Strologo case, there had been a demand for the establishment in Malta of a Court of Appellate Jurisdiction in Criminal cases. The principle of appeal had been recognised from the earliest times; it was as old as the composition of the Courts themselves. There was a supreme Court of Appeal in Rome ; in England, even in the feudal era the principle of appeal was recognised. He referred to other countries where Criminal Appeals were allowed. In support of his contention he quoted Professor Mortara who wrote that once we approved of the principle of appeal there appeared to be no reason why this right should be denied in criminal matters. The proposer went on to say that appeals were allowed from the Courts of Magistrates. In the case of the Superior Courts it was only in Civil and Commercial cases that appeals were allowed but for some unknown reason a person brought before H.M. Criminal Court could not

lodge an appeal. He was fully aware of the fact that the introduction of such a Court would involve many difficulties but he held that the administration of justice was to be the first and foremost consideration.

The proposer concluded by saying that he failed to understand why a person was given the right to appeal in a case which dealt with an obligation to pay a sum of Lm 1,000 but was refused this right when his very existence was in the balance. S. Camilleri said that Chief Justice Holt had referred to appeals as 'the badge of English liberty'. In England there was not only a Court of Appeal but also a further appeal to the House of Lords on a point of Law. He drew attention to the marked contrast between this system and that prevailing in Malta.

It was true that appeals to the Privy Council were sometimes allowed but only in the case of a flagrant violation of justice. He considered that the expenses involved were, in most cases, beyond the reach of the average citizen. Moreover he did not look upon the Privy Council as the court which was to deal with appeals from Malta when it was possible to establish a local Court of Appeal. The fact that appeals lay with the Privy Council in certain cases, was in itself an acknowledgement of the necessity of setting up a Court of Appeal. On behalf of the opposition Victor Borg Grech said that he considered appeals necessary in civil and commercial cases as there was no jury. In a Criminal Court the decision as to whether a person was guilty or not rested with nine judges. He was of opinion that by the introduction of a Court of Appeal the administration of justice would be hampered because it is important that punishment should immediately follow the decision of the Court. The Romans, he said, looked upon an appeal as the juristic remedy to repair the mistakes in a judgment of the Court. He referred to the provisions of Section 498 of the Code of Criminal Procedure, whereby the judge is empowered to recommit the case where he considers the jury's verdict erroneous. These provisions were, in his opinion, sufficient safeguard against the commission of any injustice.

George Schembri, who seconded the opposer said that the English system could not in any way be compared with the local one. There was no judicial functionary in Malta corresponding to a Justice of the Peace in England. It was only natural to expect a different procedure in the latter system. He mentioned the safeguards to the interests of the accused to which the opposer had made reference and. concluded by saying that the fact that appeals were allowed to the Privy Council in extreme cases was an indication that no local court need be established. Paul Mallia B.A., was of opinion that there was no necessity for the established of a Court of Appeal. That would mean that the accused would be subjected twice to trial ; in cases of trials causing a sensation the jurymen sitting in the Appeal would have already formed an opinion. A system which stood the test of many years was not to be brushed aside because of exceptional cases.Hugh Wm. Harding L.P., also expressed himself against the motion and stated inter alia that the Royal Commission of 1913 did not recommend the introduction of a Court of Appeal because of the limited number of judges.

After Victor Frendo's winding up, a division was taken, the motion being approved—6 in favour and 5 against.

In the last debate which was held, Victor Ragonesi, L.P. , advocated the abolition of the system of trial by jury. The proposer started by answering some objections put forward by those who upheld the retention of the system. Some contended that the jury's verdict was more humane and supported by public sentiment. The proposer argued that the basis of Criminal Law' was that justice should be done. Those who maintained that jurors were necessary in order that justice may be administered according to public conscience were

contusing the duties of jurors with those of legislators. Nor could he agree with those who held that a jury would be more independent than a magistrate in times of public disturbances. The trial of M, Laval, during which the members of the jury assumed a hostile attitude to the accused, showed that this argument did not have much weight. The proposer reminded his listeners that the judge was bound to give reasons for his decision whereas jurors did not give their reasons. If trial by jury were abolished, definite reasons and motives underlying a judgment would be given in every case. Many supported the system on the grounds that it produced independent judgments of the man in the street. Experience had shown, on the other hand, that Jurors followed the directives and dictates of the presiding judge. There were also definite cases where jurors could easily prejudice rather than help the administration of justice. Typical cases were those where member, of the jury came from the neighbourhood of the place where the crime was committed or when they had previous knowledge of the facts. Moreover it was difficult to draw a borderline between questions of fact and questions of law. A juror would not find it easy to understand the weight of a question of fact which was closely interlinked with a point of law.

Robert A. Staines who led the opposition traced the development of the jury system. It originated in Roman times, received an impetus in mediaeval England and spread to all civilised countries. It was based on two fundamental principles viz : the right of every citizen to judge and be judged by his equals and the necessity of separating questions of fact from questions of law. The man in the street was as capable of deciding questions of fact as any learned judge. He: was perhaps even more capable in the sense that the judge is bound to become too used to the administration of justice, acquiring a tendency to lean to the side of the Prosecution. It was in this connection that Stoddart had referred to the 'perversion of mind of judges'. With regard to the possibility of having biased jurymen the opposer thought that it was easier to have a prejudiced judge as the accused had the right of refusing no less than three jurors. Dicey who was no ardent supporter of the jury system had stated that the worst iniquities committed by Jeffries would not have been possible unless he had accomplices among the jurymen. We certainly could not afford to discard this system.

J. Desira Buttigieg who supported the opposer said that the system of trial by jury afforded a guarantee to the public, to the accused, and to the State. The man in the street was more capable of understanding the passions and the workings of the human mind. The judge, as a human being, was liable to error but the State exonerated itself of any responsibility for these errors when trials were conducted on the jury system. The system also excluded the possibilty of any interference on the part of the Executive with a view to influencing the Court's decision. The judge was liable to have a preconceived opinion as he could have access to the file of proceedings before the actual trial. George Degaetano expressed himself against the motion. Crimes injured the community and it was only right that individuals selected from the community itself should be called upon to judge. Historically, the judge was the successor of the jury. He was of opinion that a set of men led on by a judge were far less liable to be biased.

Oliver Gulia L.P. rose to extend a helping hand to the proposer. He considered it difficult for the jury to go against the leaning of the judge ; the real responsibility rested with the presiding judge. Newspaper comment before the ttrial could easily

impress and prejudice a juror. Modern journalism could more easily affect the common man than the judge.

The majority of the members present supported a conservative policy in this respect and the motion was easily defeated.

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THE ROCK OF REFUGE

Lord Hewart : "Amid the cross-currents an shifting sand of public life the law is like a great rock on which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts at any rate he can get Justice." On another occasion he says : "How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion, and without any ground being specified should believe that he has had Justice?... It is a queer sort of Justice that will not bear the light of publicity."

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THE VITAL SPARK

Concluding part of Sir Edward Marshall Hall's address to the jury in the Seddons' trial ; "Gentlemen, the great scientist who have been here have told much of the manual of science and of the deduction that can be made from science. There is one thing scientist have never yet been able to find, never ye been able to discover with all their research and their study, and that is how to replace the little vital spark that will call life. Upon your verdict here depends, so far as I am concerned the life of this man. If that verdict is against him that vital spark will be extinguished and no science known to the world can ever replace it."

AKNOWLEDGMENTS.

TEMI MINORE MALTESE - by the Honorable Sir Arturo Mercieca, Kt., LL.D., M.A. rtd. Chief Justice and President of the Court of Appeal.

It is indeed unfortunate that only two hundred copies have been printed. The book contains in synthetic form no less than a description of that little world enclosed within the precincts of the Law Courts that brims over with activity every morning. There is such a motley crowd, such close contact between the wise and the foolish, the prudent and the extravagant, that one need not at all wonder at the endless variety of weird combinations. At times pitiful, at times rather uninviting, but always new and exiting. This is the spectacle that Sir Arturo portrays in this little volume. Hardly ever parting with a subtly humorous atmosphere, he narrates many incidence and anecdotes with precision—evidently the result of a most retentive and observing eye. Coupled with a fresh, lively exposition, his mastery of language has done him good service in registering the Message from the not remote Past—from that sphere of activity in which the author lived for several decades and which he himself designated: "Una cinematografia vivente".

To all those who participated in the incidents that are mentioned or, maybe, occupied a prominent role, the book must have recalled many memories of the days of old which, naturally, appear all the more radiant. To the young the anecdotes carry more impersonal meaning but they do not fail to impart a sure inkling of the friendly spirit and strangely enough, the hilariousness that pervade the Palace of Justice ant to instruct them in the great maxim of life—that all things should be taken in the proper mood.

JOURNAL OF COMPAATIVE LEGISTLATION AND IN- TERNATIONAL LAW—per British Council.

BRITIAN TODAY—per British Council.

We are proud to acknowledge our thanks to the British of Council who are kindly favoring us with the issues of the :"Journal of Today". It would be superfluous to sing the praises of these periodicals and to recommend their perusal to our colleagues. The names of writers who subscribe to them, some of whom are celebrities the constructive work of comparative legislation which is being achieved and the wide circulation they enjoy, are attributes too well-known to need any recommendation. G.Z.