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EDITORIAL

In the Editorial of the April 1946 Number of this Journal, we, had thought it fit to bid farewell to the Alma Mater "while handing the flame over to our successors in the management of this periodical." But, as circumstances have turned out, our farewell was premature and it has been our privilege to edit also the present Number. Since then the conferment of degrees has taken place in the University Church and the new doctors are busy carrying on the work rendered sacred by the memory of the glorious names of many a son of the Athaeneum in the different fields of intellectual activity.

While humbly praying that we may not be unworthy of walking on the path of our forbears, we propose to keep constantly in touch with those we leave behind and with the future members of the Law Society.

AN UNPLEASANT SITUATION

It is common knowledge that confessions in criminal matters must be made deliberately ; otherwise, a reason for inadmissibility arises. This rule is not only explicitly declared in the law but it has received much attention in jurisprudence. However, in spite of such a thorough exploitation of its inroads, this principle has lately been shown to be virtually stultified by a serious obstacle militating against its effective actuation. It is with no spirit of generosity or mercy which admittedly would be misapplied virtue, that we are manifesting a doubt as to whether the law, as it stands, really leads to the goal it aims at.

The main point is this : if the law insists upon disregarding any confession provoked by means of promises, threats or violence, it should not fail to grant a remedy that would effectually bring to light the flaw of such confession without at the same time conducing the unsuspicious to a weird strait.

Very often the only means of proving a flaw in the confession is the deposition of the accused himself during the trial. According to the law the accused may offer his evidence, saving exceptional circumstances, only before the start of the defending counsel's address and when he chooses to testify he may be questioned on any point relative to the case, not excluding the most natural query as to the veracity of the confession, independently of the threats or promises.

Even a superficial study of human psychology will reveal that a man will not take upon himself the commission of a crime with which he had no connexion, unless he is suffering extreme torture or labouring under some psychological condition. One will have to admit that these two contingencies are by no means the normal feature. The unlucky barrister would

consequently be brought to a strange nonplus : either instruct the client to deny having said the truth—an attitude which is a first-rate incitement to perjury—or tell his client to abandon his allegation of violence, thus rendering his case well-nigh hopeless : and the will of the law will be frustrated on account of a flaw immanent in the law itself.

One may perhaps observe that it is only those who are really guilty that are puzzled and, maybe, ultimately adversely affected by this state of things. Those who are innocent will find no hesitation in asserting that what they declared was untrue nor will they require any prompting. This is perfectly correct; but, is it in accordance with the dictates of Reason to give a man a "privilege" that one knows, will most surely lead him to the gallows or to imprisonment, as the case may be, unless he finds shelter behind the desecration of all that is most holy? Indeed, it is a queer sort of liberality. And if his barrister makes him realise what his position really is, would that not be tantamount to being privy to a perjured criminal?

Any barrister determined to do his duty in accordance with the voice of his conscience and in the way which is demanded by the nobility of his profession will undoubtedly revolt against his being put into such a hopeless quandary whose key lies in sheer dishonesty. One of the leaders of our Bar lately suggested that a preliminary enquiry be held anent the validity of the confession. The accused would in that case be able to give his evidence only on the circumstances attending the confession and *not* on its merits. Later on he may or may not take, advantage of the option which the law gives him; but, whatever course he chooses, he would be acting freely and not under the necessity of destroying the *regina probationum* that the Prosecution brings forward. Naturally, our Courts of Law have not allowed such a procedure, for the very simple reason that the Judge is not the legislator. One can expect a remedy only from the Law Officers of the Crown or from the Criminal Code Commission. We feel that the urge is sufficiently powerful and convincing. It is not generosity that we insist upon : truly, it must have its place in life but in matters criminal normally the harm outweighs the benefit; it is only the spirit of fair dealing that lies at the root of this suggestion .

PERSONAL NOTE TO OUR GOVERNOR

On the appointment of H.E. Mr. Douglas, Malta has not only the second Civilian Governor in her history, but also the first Governor who is a member of the legal profession; with great confidence therefore, we do hope that he will devote particular attention to the legal activities in the Island. Substantially, the wisdom and juridical exactitude of Maltese law do not admit of doubt ; one thinks with gratification that a Commercial Code is being drafted and one may be inclined to entreat the Commission entrusted with the task to do its utmost with the view to expediting its work, *if* that can be done without prejudice to view to value of the Code. We have hitherto insisted that uniformity in the law, both in regard to form and content, should be retained with extreme solicitude. We are no supporters of blind conservatism but we cannot withhold our regret in seeing the conciseness and limpidity of our laws being superseded by the comparative complication of contemporary legislation. If life has become more complex, we should at least refrain from intensifying the chaos. Undoubtedly, laws cannot be rendered *too* simple ; it was Napoleon's desire to have a Code couched in terms intelligible to all, but he had

only attempted the simplification of several provisions of law when he perceived that "over-simplicity in legislation was the enemy of precision": He willingly gave up what he himself called "over-simplicity", but we daresay, he (or his advisers) never indulged in sheer verbosity or in endless sentences. We have followed the remarkable model produced by French legal talent and thus Maltese legal tradition has remained unruptured ; in fact Roman law had been in force for centuries and the Code Napoleon was mainly a well-balanced condensation of Roman legal thought mixed, though at times imperfectly, with the more liberal sentiments that had rooted themselves in French Customary Law.

Several other matters, we humbly submit, deserve serious investigation. It is not too pleasant for us to go on harping on topics which have already received their share of attention from us but our deep conviction in the necessity of certain reforms being effected prevents us from standing demurely apart satisfied with having completely performed our role.

Our readers may perhaps have noted that a particular suggestion has been brought to the ore in our editorials more than once (1), and this third reference to it, we hope, will not lessen its chance of being accepted. Let us try to imagine (if our imagination can go so far) a barrister who is quite incapable of understanding the language of all the judgements delivered by our Courts of Justice before 1935; unable to make out what the wills and contracts in our Archives say; unable to consult 90 or 95 per cent of the Law books to be found in the Island to which constant reference has been made in Maltese jurisprudence up to the present day; unable, indeed, to understand the original text of our laws. A much longer enumeration could easily be made out but, for brevity's sake, we may say that such a barrister would be *unable* to practise his profession in a proper manner.

This, we hope, lays out the unshakeable foundation of the proposition favouring "the re-introduction of Italian as a compulsory subject in the Preparatory Course of Laws and in the Matriculation Examination for candidates intending to join such a Course." The present University Statute virtually *prohibits* a barrister "in potential" from choosing Italian in his Matriculation (2) ; it does not give him an opportunity to study it in his Preparatory Course and actually *penalizes* him if he chooses it in the first year of the Academical Course of Literature, in the sense that he will have to study it over and above all his other subjects. His Excellency the Governor, as a man of law, will most surely realize that the disadvantages mentioned above in hibit anyone from practising in a serious manner; he may not appreciate the full extent of the disability but, if the opinion of *anyone* in touch with matters legal is asked for, we can entertain no doubt of the result.

At a plenary meeting of the Law Society held on the 29th November, 1945, a suggestion recommending to the General Council of our University "that students intending to join the Preparatory Course of Laws should be given the option to take Italian in their Matriculation," passed onwards unopposed. Had it been a meeting of all the members of the legal profession starting from the Chief Justice to the youngest lawyer it might perhaps not have had a different result. The recommendation in itself is only a half measure and we have given support to the more definite view because we think it to be a more logical consequence of the common premise. However, in any case, this second proposition is likewise acceptable because, at least, it gives a chance to the students themselves to redress the evil in some manner.

(1) Vide *Law Journal,* Vol. I, No. 2, pages 6-7 and Vol. I No. 3, pages 6-7.
(2) Vide Vol. I, No. 3, page 7).

We doubt not that deep interest will be taken by His Excellency personally who will be able to evaluate for himself the support which our suggestions deserve and we know we can depend upon him. With this belief we can at present gratify our desire.

We have already directed the attention of the public towards certain anomalies existing with regard attention Maltese citizens domiciled abroad or contracting marriages with foreigners. No improvement has been bruited; we believe the Government has already given these matters its consideration, although it may perhaps be incited to augment its efforts with the object of having a solution arrived at expeditiously. We do not wish to make the British Government follow an unprecedented course, but there can be no question as to the deserving character of the instances we mentioned in our last number. (Vide *Law Journal*—Vol. I, No. 4, pages 9-14).

No Maltese jurist has as yet been appointed to sit on the Judicial Committee of the Privy Council, in spite of the many grave arguments tending to the elimination of the inequality of treatment by reason of which we do feel uncomfortable. We fail to grasp the reason for which nothing has been done. (Vide Vol. I, No. 3 pages 8—10) . There are, it appears, only tender hopes of having the Royal University declared autonomous, at least, in the near future. Autonomy means the unshackling of the University from State control; it spells freedom of thought and research—a pre-requisite to the natural, progressive evolution of intellectual values (Vide Vol. I, No. 4, pages 5-6). Barristers are still being required to undergo their one year's practice *after* they finish their seven years' University Course. All attempts to arrive at a moderate solution have failed. These are some of the points mentioned in past Editorials still deserving attention and in order to avoid useless repetition, we make reference to our back numbers.

From the birth of the *Law Journal* we have tried to follow the tradition of barristers, who are reputed to possess sufficient power to express their views in a resolute and categorical manner. We appreciate the possibility of objection being raised against the adoption of some, if not all, of our suggestions : we cannot regret that, because it is in the nature of free men to discuss freely, but what one and all desire is an impartial and enlightened investigation. Nor do we entertain a blind conviction regarding the existence of obstacles in the way of the implementation of our suggestions, but these obstacles will not be prevailed upon only if one's attempts are unattended with serious effort. One may think of the existence of difficulties with real satisfaction, if one is sure of the dynamism of the Governing Body.

GOVERNMENTAL RESPONSIBILITY

The notion of Government, in its evolution, acquires a wider comprehension resulting in major complexity of administrative machinery and in the further whittling of individual initiative, whether directly or indirectly. The causes of this aggrandizement are mostly of a political and economic nature and therefore very sensitive to any variation in the posture of the national and the international. Thus, it cannot allow itself to be crippled by "a priori" rules but it must none the less be dependent on tenets of a higher order. Its aim is the nation's welfare : there can be no justification for the senseless decrying of governmental activity or "interference", as same choose to call it, far its own sake, because in general it is a potent agent

of social reform; but it is indeed to be strongly censured by all freedom-loving people, if it leaves in some phase of its operation a *state of injustice* unattended. In a few words, governmental activity partakes of the nature of all human "means" : it can be good or bad, in accordance with the use which is made of it.

Too much thought can never be employed in such matters of profound importance : one at the end of one's mental peregrinations may never say that the final solution has been achieved for it must be tested by an ever-changing criterion. That, fortunately, is the statesman's mental racking-problem — not the lawyer's. The latter's views are bound to be more sedate, because they are based on foundations bearing the sinews of solidity that stands him in goad stead especially when he is obliged to work in unison with those who fatigue themselves fumbling with the insidious task of Administration. Government, he is taught from his early days, is not the art of devising "short cuts" and common remedies : that was indeed the task of feudal potentates who could choose to be diabolical or angelical according to their whims. An age of constitution-making did not suffice to ostracize arbitrariness and modern times are affording constant proof. Ethically, the Government is bound to preserve untramelled certain forms of individual "wealth" ; it may only affect others to a limited extent and it must faithfully perform all the obligations it incurs in the course of its activity. These are mere commonplaces, once we are adamant in our belief that the State is not the Deity and that, contrariwise, it must be subservient to the realization of man's essential Good. In view of this, Ethics prescribes severe, restrictions on the operation of the governmental structure and, since Law properly can never discard Ethics, it must needs repeat that, although the State may impose duties on its subjects in relation to the circumstances prevailing, it should never infringe on those inalienable qualities which are immanent in man's nature that far all its humanity transcends the human.

In all other matters the State has no more than a faculty of "substitution" and therefore the duty to give compensation in every case in which damage is caused automatically arises. Naturally, this duty exists only in the cases to which the faculty of "substitution" is applicable, and not in matters in which the State may not interfere without abuse : in such instances only the prophylactic virtues of a good contribution can be of assistance. "Naeminem leadere" is a prescription binding the State as much as any individual and the immunization of the State is nothing less than an advanced Pantheistic outgrowth, more dangerous than hitherto in view of the centralization of powers that characterize the modern State.

In Malta there is no *general* law regulating governmental liability. Apart from sporadic provisions jurisprudence has been the only source of rules. It has been established that the Crown is not responsible for a delict or quasi delict committed by one of its servants, unless *culpa in eligendo* be proved; that the Crown is fully liable for breach of contract; that the Courts are incompetent in respect of acts performed "iure imperii", even if they amount to a violation of some contractual tie. These rules are progressive enough but they are open to serious criticism—the natural consequence of vagueness in law.

We hope, in the future, to examine in detail the principles which we think have a claim to the express sanction of the law. At present we only desire to point out the need of enacting laws envisaging the several hypotheses which normally arise, providing new rules and clarifying the old ones. For instance, it must be made clear that the State cannot oppose the negligence of an employee in all those cases in which the law expressly enjoins *the State* to

render some "praestatio" ; besides, contractual liability requires exact delineation, because it is evidently of moment to know what is contractual and what is not.

It is indeed gratifying to think that the Courts have invariably declared the amenability of the Crown to being sued before them, but they have been likewise firm in their decision that the Courts may not adjudicate on acts, pertaining to the State qua State, except on questions of validity. The theory founded on the distinction between acts *jure imperii* and acts *jure gestionis* has been in the main accepted but not more than one judgment (1) dwells on direct responsibility accruing to the Government's detriment in consequence of a breach of a non-contractual character. This judgment stresses the point that one should not lightly "rassegnarsi ad una insuperabile difficolta di conciliare il diritto positivo con la giustizia senza riconoscere e deplorare nel positivo diritto un'imperfezione... Non e' questo interpretare il diritto ma calunniarlo." These indeed are words deserving ponderation. This judgment reduces the Crown's responsibility in the particular case to a quasi-contractual one and it therefore forfeits much of its value; but the positive fact remains that the Crown was held responsible for an act performed *jure imperii.*

We feel that one may look at the distinction between acts *jure imperii* and acts *jure gestionis* not as referring to the jurisdiction of the Courts, *not* as the basis of the right to claim damages but as purely referable to execution. The flaw in the distinction, as hitherto interpreted, consists in the fact that there are certain acts *jure imperii* which imply only the faculty on the part of Government to *change* the lawful state of things i.e. to *substitute* one thing for another, but they cannot dispel the Government's liability or the jurisdiction of the Courts. In such cases therefore the Courts should have the right to order the payment of damages without their being able to demand positive reinstatement. In short this would involve the existence of *three* classes of acts :

1. acts *jure imperii* necessitated by public policy and affecting the very essence of social co-existence, e.g. public morals, national defence, etc., in regard to which the Government is not liable in any way.

2. acts *jure imperii* in relation to which the Government is responsible for damages but not for specific performance.

3. acts *jure gestionis.*

This three-fold distinction does extend the Crown's liability but it does not extend it more than that of several less liberal Continental States : in fact the position here and, still more, in England, is paradoxical. We feel that if due weight is given to such a distinction the door will be open to just legislation, incorporating the law of governmental responsibility; and, in the interim, extreme care should be employed in the drafting of legislation in order to be on guard against the so-called "practical" measures which constitute a novel form of tyranny.

REPORT ON EXAMINATIONS

In several Government Examinations the Examiners are asked to draw up a Report detailing the merits and demerits in general of the papers so that the candidates will know against which

(1) Camilleri vs. Gatt (1902) Ist. Hall, Civil Court.

errors they must be more on their guard. Of course the comments and recommendations which the Examiners make are bound to refer to the generality of the papers and may or may not be applicable to individual cases but, in the long run, they will be helpful to all and can in no way work to the detriment of anyone.

In the University this system has never gained favour. We can hardly explain why, allowing for the tendency in all forms of human activity to repose trust in "what was done in the Past". We admit it may prove of some inconvenience to the Examiners to have to draw up a Report after that their sufficiently irksome duties are performed, but one may note that the Examiners are furnished with all the material, they require unconsciously while examining the papers and the Students, arid, therefore, the drawing up of the Report does not entail any substantial stress.

They may think in one examination that the students were apprehensive in expressing their personal views; in another they may feel that the papers lack conciseness and precision in treatment; in another they may be inclined to advise the students, or the lecturers, as the case may be, to take a more doctrinal outlook and so forth. As matters stand, the Students have no means, officially recognised, to become aware of their shortcomings. It would be advisable, we feel, to amend the University Statute in the sense that Examiners will in future be required to present a written report dealing with the Examination in general with special reference to the way in which the Students tackled or ought to have tackled the "pericula" set to them.

PUBLICATION OF LAW REPORTS

During the past decade life has had abrupt changes : and the legislator under effect of shock may have at times acted under this anaemic sort of condition : the tragic, the dismal and the normal have had their share in the grand orchestration. With life, law has been subject to change : justly or unjustly, severe restrictions have been laid an all sides and the Courts in their role of protectors of civic liberty have constantly attempted to rationalize the burthens which certain laws imposed, albeit not always effectively. In this manner the pronouncements of the Courts often do not find a counterpart in past judgments and they therefore are of the greatest importance to law practitioners. This notwithstanding not one judgment delivered from 1935 to the present day has received detailed publication.

It is indeed surprising how barristers can manage to keep abreast with jurisprudence; only a boundless spirit of fraternity between barristers can make it possible. But even if barristers pool their knowledge of recent case-law, it is abundantly clear that the publication of Law Reports is to be taken in hand without delay.

With regard to judgments prior to 1935 we feel that it is disgraceful that complete sets of Law Reports are nowhere to be found. If one happens not to have had one's father a barrister, one is barred from having a complete set of Law Reports. The Government should try to re-print all the extant judgments which have so far been delivered by our Courts; say, a volume every year would enliven the hope of many lawyers to have their own set of judgments. We know that all this spells hundreds and hundreds of pounds but everyone will agree that the pre-

sent position is as unfair as it is ludicrous.We also suggest that the judgments of the Judicial Committee of the Privy Council should be included in the Law Reports. The Judicial Committee in hearing appeals from the Courts of Malta and Gozo is in reality acting as a Maltese Tribunal advising His Majesty on Maltese affairs and its judgments reasonably fall within the general category of "Decisions of the Maltese Courts". Likewise to be included we deem the judgments of the Courts of Gozo in their superior jurisdiction and also the decisions of the Courts of Judicial Police as Courts of Civil and Commercial competence. We see no reason for which these judgments are to be excluded.

It has been hitherto the practice to publish *only* the judgments delivered by the appellate Court in all those cases in which an appeal is filed. We find a few judgments of the Courts of first instance which were published but these instances are meaningless when compared with the thousands of judgments delivered by the Courts of first instance, which are left to be a prey to the worms that mark the lapse of time. No words will adequately convey the reprobation which one feels for this senseless jettisoning. It is true that technically once an appeal is carried on to a close, the judgment of first instance loses its binding force but its intrinsic merits and its erudition cannot be lost, and they entitle it to be reproduced in some part of the Law Reports, maybe in some special appendix.

JUDGE A. PANNIS O.B.E., LL.D.

The death of Judge Parnis has deprived Malta of one of its most prominent citizens—one who was a very brilliant member of the legal profession. At the time of his death Judge Parnis had long retired into private life but his dynamic personality was still very strongly felt by all who came in contact with him.

Judge Parnis who was born in 1860, was called to the Bar in 1879. He showed great promise at the very outset of his career, and soon acquired a very extensive practice, specializing in Commercial matters in which he was looked upon as the leading lawyer. He was appointed Professor of Commercial Law in the Royal University, in 1905, but soon relinquished this professorship on his elevation to the Bench. As Judge he presided for many years over His Majesty's Commercial Court. In 1919 he was created an Officer of the Most Excellent Order of the British Empire and retired from the Bench in 1925.

The General Elections of 1927 saw Judge Parnis contesting a seat in Parliament as a Constitutional Candidate for the Fifth Electoral Division. He was returned and was appointed Minister for Justice. He believed in reciprocal toleration and his kindly manners endeared him to a host of friends in the political and social spheres.

The spirit of service to the country and to society at large which Judge Parnis and other members bf the legal profession have shown in the past, cannot but stimulate our ambition and clench our resolves to take a manly and noble part in the task of upholding the tradition which those that came before us have set up.

EDITORIAL

Law is not an exact science. Despite the majesty and gravity with which its administration is properly vested, it is a very human affair after all. It has to do not with scientific axioms or scientific formulae but with the everyday concerns of ordinary citizens—MACMILLAN.