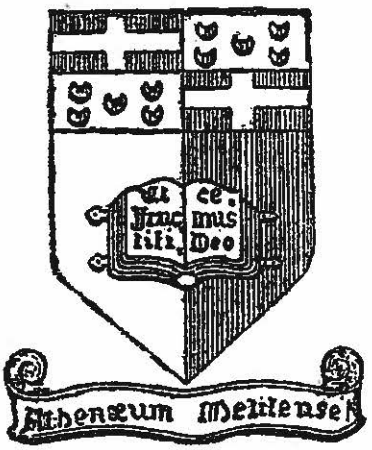
A REVIEW OF THE
UNIVERSITY STUDENTS'
LAW SOCIETY



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"Legum servi sumus ut liberi esse possimus"

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EDITORIAL

THE 1947 CONSTITUTION

IN welcoming the long-awaited return of Self-Government we cannot but recall the words of His Honour the Chief Justice in the inaugural address of the Law Society: "It is the hearty and distinterested co-operation of the rising generation, to which you belong, that will make the grant of Self-Government a success especially in its experimental stages". That these words were taken to heart is evidenced by the large number of past law students who are taking part in the political awakening. The importance of the lawyer's part in the future conduct of Self-Government cannot be overestimated for, as Lord Macmillan points out, "the law provides the citizen with a mechanism of life whereby all the incidents of his relations with his fellow-beings are regulated and the element of friction eliminated by definite and familiar adjustments". It is true that, as Froude observes, "our human laws are but the copies, more or less imperfect, of the eternal laws, so far as we can read them" and that the law as framed and administered by fallible human beings must always fall short of the ideal standard of justice, but, on the other hand, it is equally true that it is the lawyer's privilege, as it is his duty, to promote that kind of order in the community which results from the formulation and administration of just laws. In taking an active part under Self-Government let our legislators bear in mind Lecky's warning that "Legislation is only really successful when it is in 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."

On perusing the Letters Patent we cannot but feel that the legal draftsmen have kept in view the principle embodied in Sir Thomas Maitland's memorable address to the Judicial Authorities assembled at the Palace at Valletta, on the 2nd

January, 1815: "The great principle upon which it is the intention of His Majesty that the Government of these Islands should be conducted is,—that there should be a complete separation between the Executive, the Legislative, and the Judicial Authorities,—that each should be independent of the other,—and that while, on the one hand, the Judicial Authority should be restrained in the closest manner from interfering with the Legislative or Executive,—so, on the other, the Executive authority should be prevented from any undue interference with the judicial proceedings."

Whilst considering that the Constitution, notwithstanding its demerits, is a big step forward, we note with pleasure the repetition in the Constitution of the clause that H.M.'s Judges may not be removed from office except on the ground of proved misbehaviour or incapacity: *quam diu se bene gesserint*, for, as Viscount Cecil of Chelwood observed, "the independence of the judges is by far the most important guarantee of the liberty of the subject that can possibly be devised, and that the moment you allow the judges to be at the mercy of the political power, you are destroying the great guarantee of the freedom of the people".

INAUGURATION OF FORENSIC YEAR

In a pamphlet entitled "Inaugurazione dell'Anno Giudiziario", issued by the Maltese Minister of Justice in 1933, it was announced that it was the intention of Government to solemnize with due pomp the inauguration of the forensic year. Nothing came of the proposal. With the return of Self-Government we feel that the new Minister of Justice would be taking a step in the right direction if he were to carry the proposal into effect. In doing so, he would be introducing a practice long since followed by other countries. In fact, the forensic year in England begins with a special service at Westminster Abbey followed by a procession, headed by the Lord Chancellor, through the Central Hall of the Law Courts. So also in France and Italy the re-opening of the Courts is duly celebrated by means of speeches in the great Hall of the Palace of Justice and in the Corte di Cassazione respectively. The Chamber of Advocates should also take up the proposal in collaboration with the authorities and the Judiciary.

APPEAL IN CRIMINAL MATTERS

The question of an appeal in criminal matters is a long-standing one in Malta and has from time to time been discussed by eminent local barristers but, it seems, to no avail. We cannot but express dissatisfaction at this status quo for the desire to provide an exceptional remedy against a wrongful conviction or a substantial miscarriage of justice is, indeed, a laudable feeling which should deserve every attention. In considering the matter, however, one must bear in mind the words of Chief Justice Sir John Stoddart who, in introducing certain other important legal reforms in the Maltese Criminal Law, stated that any such reforms must be "long meditated and carefully examined" and that one must proceed "with deliberate caution". Of course, the question must be viewed as restricted to appeals in the case of trials before His Majesty's Criminal Court since a Court of Criminal Appeal already exists in Malta for appeals from judgements given by the Criminal Court of Magistrates.

In contributing our own solution to the problem we would suggest two alternative remedies: either the setting up of a Court of Criminal Appeal or the appointment of one or two eminent Maltese jurists to sit on the Judicial Committee of the Privy Council in the case of an appeal from Malta.

It is not strictly correct to state that no appeal exists at present from a sentence of His Majesty's Criminal Court. In fact, as is pointed out by Charles James Tarring M.A., in his book "Law relating to the Colonies": "It is the settled prerogative of the Crown to receive appeals in colonial cases. The King has authority by virtue of his prerogative to review the decision of all colonial Courts whether the proceedings be of a civil or *criminal* character, *unless His Majesty has parted with such authority*". That this is so has been lately evidenced by the Strologo and Connell appeals. If, therefore, a Court of Criminal Appeal were set up, it might be rightly objected that there would be the possibility of two appeals,—one to the local Court and the other to the Privy Council. To obviate this difficulty we suggest that power be given to the local Legislature —as it was given to the Dominions by virtue of the Statute of Westminster, 1931—to abolish appeals to the Privy Council, or that an amendment of the Constitution by Letters Patent be made whereby His Majesty waives the prerogative of hearing appeals.

In setting up such a Court we would be conforming local legislation with "The Criminal Appeal Act 1907" (7 Edw. 7. c. 23). It is true that this act was passed, as Sibley remarks, "in the teeth of a strong opposition", which included some of the most eminent of English barristers, amongst whom the Earl of Halsbury, but, on the other hand, it is equally true that no one in England to-day would dream of abolishing the Court of Criminal Appeal. It might be objected that what is analogous to an appeal on questions of fact already exists since, in terms of Section 498 of the Criminal Code, a new trial (in which a fresh jury is empanelled) may be ordered in the case of a conviction whenever the Court is of opinion that the verdict of the jury is wrong, and that the expediency of allowing an appeal on a question of law would appear to be greatly minimized, if not altogether eliminated, by the fact that similar questions are already dealt with by a Court consisting of such a number of Judges as would form a *quorum* under the Criminal Appeal Act, sec. 1, subsec. (2). It might be pointed out that such a measure would greatly diminish the sense of responsibility in the jury and would virtually deprive the prisoner of the benefit of the doubt since, in the words of Sir William Grantham, it would make juries "less mindful of giving prisoners the benefit of the doubt, because they would have the chance of appeal". It might be observed, moreover, that such legislation would substitute trial by judge to trial by jury with the disadvantage that the Appeal Judges will have before them, to use the pregnant phrase of Sir J.T. Coleridge, "the dead body of the evidence without its spirit" whereas the trial judge or judges had full opportunity to see "how the witnesses looked, how they spoke, whether they hesitated, or how they stood the test of cross-examination".— All this notwithstanding, we strongly feel that the setting up of a Court of Criminal Appeal, subject to the abolition or waiver of the right of appeal to the Privy Council, would give the greatest possible guarantee for the safeguarding of the lives and liberty of His Majesty's subjects in these Islands since it enables criminal cases to be dealt with by local men who are in touch with local conditions.

As an alternative remedy and *rebus sic stantibus*, we would repeat the suggestion made in a previous Editorial that one or two Maltese jurists be appointed as Privy Councillors. Such

a measure would be most helpful to the English Judges who in Maltese cases have to interpret and apply Maltese Law and the principles sanctioned in Maltese jurisprudence. All that is required is that the Appellate Jurisdiction Act, 1929, which makes similar provisions for India, be made to extend to Malta.

SHORTHAND WRITERS

By Ordinance No. VI of 1947, Section 474a was added to the Criminal Code. It is provided in Subsection (1) of this Section that "Shorthand notes shall be taken of the proceedings at the trial on indictment of any person before His Majesty's Criminal Court, sitting with or without a jury". It was further provided later on in the Ordinance that this subsection was not to come into operation until a date be fixed by the Governor by notice published in the Government Gazette. It seems that Section 474a is doomed to be a dead letter since no date has as yet been fixed by the Governor. We need hardly point out that the importance of shorthand writers in the Criminal Court is paramount, especially lately with the possibility of an appeal to the Judicial Committee of the Privy Council, since the taking of shorthand notes would enable the Privy Council to have a *verbatim* report of all the proceedings before the local Criminal Court. In this way the possibility of misleading reports would be avoided. It need not be pointed out that even a slight omission or alteration of the summing up might make a world of difference.

THE REVISED EDITION

We have already made reference in these columns to the Revised Edition and the boon it is to lawyers and law students alike. There is, however, one fly in the ointment but the remedy is easy. The Revised Edition, which covers all legislation up to the end of 1942, was, owing to war-time exigencies, published in 1945, with the consequence that amendments enacted between 1942 and 1945 refer to the articles as they were before the Edition was published and not to the articles as found in the Edition. In England it is customary to publish a special volume bringing the aforesaid amendments in line with the laws in the Edition and it is pertinent to ask whether such a procedure should not be adopted in Malta. It is, therefore, suggested that

Government should expedite the appointment of a competent person (presumably an ex-member of the Commission) to carry out this work.

ARCHIVES

It has come to our knowledge that at the beginning of the war a huge number of books belonging to the Archives were transported for safety's sake to a house in Mdina and it seems that, although the war has now long been over, no steps have been taken to transport them back to Valletta, the Island's capital. Lawyers, who need consulting these books continually, have to travel to and fro, thus losing much precious time. Moreover, there is the danger that such books, not being properly looked after, be damaged. It is suggested therefore that Government should hasten the transport back of such books.

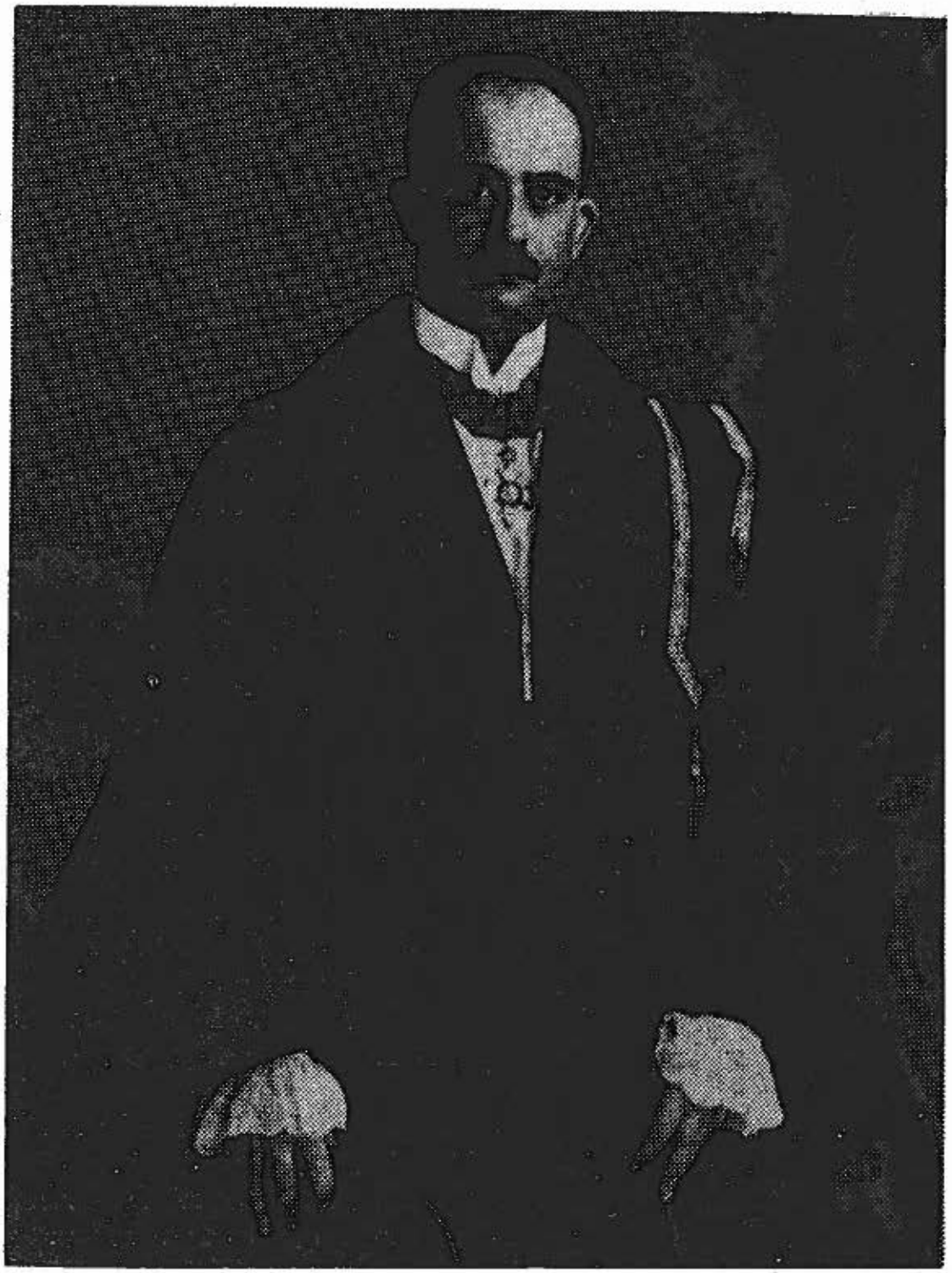
LAW LIBRARY

Unfortunately for law students there is in our Alma Mater no law library which is worthy of the name. This is, indeed, a very sad state of affairs, especially when it is considered that it deprives the earnest student of the opportunity of carrying out research work and delving deeper in those branches of law in which he wishes to specialize. We are fully aware of the fact that a large grant of money has been made for the purpose of expanding and modernising the University Library. That this is so is borne out by the continual flow of recently published medical and theological books. We, therefore, call upon all professors of law to furnish the University authorities with a list of modern legal literature. Such a procedure would facilitate and expedite the building up of a Law Library.

LORD INSKIP

The death of the Rt. Hon. Sir Thomas Walker Hobart Inskip, P.C., C.B.E., K.C., LL.D., First Viscount Caldecote, at the age of seventy one was announced in England on October 11th.

Born in 1876, he was called to the Bar by the Inner Temple in 1899 and he took silk in 1914. Later he held the offices of Solicitor General and of Attorney General. His very successful legal career was crowned in October 1940 when he was appointed Lord Chief Justice of England in succession to Lord Hewart which office he held until he resigned for health reasons in January 1946.



SIR MICHELANGELO REFALO, Kt., C.B.E., B.A., LL.D.

SIR MICHELANGELO REFALO *

(By HUGH W. HARDING, B.A., L,P.)

"The life of a great advocate is a social document" —
Walker-Smith.

"THE little Island of Gozo sends us the sweetest flowers and the finest fruit but we also get from there the best brains and the best personalities" (1). Thus spoke the Most Noble Count Dr. A. Caruana Gatto at a dinner held at the Casino Maltese to celebrate the conferment of the honour of Knighthood on Sir Michelangelo Refalo.

Born, like one of his eminent predecessors, Sir Adrian Dingli, in Gozo on the 1st March, 1876, Michelangelo Refalo, son of Vincenzo, a Notary Public by profession, and of Agatha née Cachia, passed the first years of his life in the bosom of a family where the proper education of the children was a paramount duty. At the age of 12, his father sent him to the Archiepiscopal Seminary of that Island, where he was educated under the direction of those experienced and unrivalled teachers, —the Jesuit Fathers. From early childhood he showed exceptional brilliance, and a Jesuit Father predicted his meteoric career. In 1891,—still at a very early age—he matriculated for the Malta University, obtaining his degree of B.A. in 1894 and graduating in law in 1898. Called to the Bar one year later, he soon gave the most luminous evidence not only of that extraordinary intelligence which he had revealed from early boyhood, but also of his first-rate legal attainments which brought him to the forefront of his profession at a very young age and at a time when not a few "stars" shone brightly in our legal firmament, which comprised men who would have done credit to any Bench or Bar in the world (2). After a few years in the exercise of his profession, under the guidance of Professor

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Editor's Note: We should like to thank Magistrate V. Refalo, LL.D., Mr. J. Ellul of the Attorney General's Office and Miss Hilda Castaldi, Assistant Public Librarian, without whose kind help and cooperation it would have been difficult to write this biography. Our thanks are also due to Dr. A. Stilon De Piro, LL.D., and the Rev. J. Delia,, S.J.

(1) Malta Chronicle, 31st January, 1921.
(2) Malta Chronicle, 21st December, 1923.

Benoit Ullo Xuereb,—one of the most eminent barristers our Island has produced—he soon became the leading commercial lawyer of his time (1). He was also one of the foremost barristers pleading in the Criminal Court, where later on he was to distinguish himself as judge. Yet recognition of his abilities came rather late from the Government of the time and it seemed as though the confident prediction of Professor Ullo Xuereb that young Refalo would attain the highest posts in the Island was destined to remain unfulfilled. But true worth is bound to forge through in the end; and by force of sheer merit Dr. Refalo scaled the first rung of the administrative ladder and reached the top with meteoric rapidity.

In 1907 he succeeded Professor Dr. Alfred Parnis, on the latter's elevation to the Bench, as Professor of Commercial Law in the Malta University, and not long afterwards, in 1910, he was appointed Assistant Crown Advocate. In 1912 he wrote an account of the Commercial Laws of Malta which was reproduced in a volume published by Messrs. Sweet & Maxwell dealing with the Commercial Laws of the British Possessions and Protectorates. In 1915 he was called upon to undertake the arduous and onerous task of Crown Advocate on the elevation of the late Sir Vincent Frendo Azopardi to the Chief Justiceship. He thus became also an Official Member of the Council of Government of the time.

In his new capacity Professor Refalo soon made his mark as one of the ablest Crown Advocates Malta has had, even though his predecessors had included such distinguished lawyers as Sir Antonio Micallef and Sir Adrian Dingli. The office of Crown Advocate under the regime of the time was the most important, onerous and complex post under the Government. The Crown Advocate was the Legal Adviser of the Government, both local and Imperial, the head of the Executive next to the Lieutenant Governor, the Chief Magistrate of the Island, the Public Prosecutor and the Official responsible for legislation; and each of these manifold capacities Professor Refalo filled with the greatest credit to himself and with corresponding benefit to the Island (1). The manifold and thorny problems which confronted the Island as the result of the world upheaval of

(1) Il Popolo di Malta, 22nd January, 1924.
(1) Malta Chronicle, 21st December, 1923.

1914-1918 called forth to the fullest the display of his extraordinary ability and marvellous energy, and both his legal and administrative measures during that critical and fateful period will stand out among the finest tributes to his memory. As Crown Advocate he was responsible in particular for the promulgation of the laws relating to Succession Duties, Entertainment and Stamp Duties.

In 1918 his signal services were rewarded with the Commandership of the Most Excellent Order of the British Empire. In 1919 he was appointed Chairman of the Commission set up to enquire into the causes which gave rise to the disturbances of the 7th June, 1919. Finally, in August of that year, he was appointed to fill the vacancy created by the death of Sir Vincent Frendo Azopardi and thus Professor Refalo became Chief Justice and President of H.M.'s Court of Appeal at the age of 43 years —the youngest Chief Justice in the British Empire. In this manner he became also Vice President of the Council of Government. His Excellency the Governor, referring to Professor Refalo's appointment as Chief Justice, in the Council of Government, after stating that Professor Refalo's advancement had been "thoroughly well earned and deserved by the meritorious and able manner in which he had carried out his duties" and that the administration of justice in the British Empire had never failed, standing, as it did, for integrity, justice and equity, went on to say that the reputation of the British Empire for the high standard of justice was safe in Professor Refalo's hands (1).

During this period Chief Justice Refalo laboured quietly, but none the less efficiently, to obtain our Constitutional liberties, always keeping in mind the fact that he was, above everything, a Maltese who had the welfare of his country at heart. He was also instrumental, together with Sir Augustus Bartolo and the then Lieutenant Governor W.F.C. Robertson, in fostering the erection of a Malta War Memorial after World War I in the form of a children's ward at Zammit Clapp Hospital.

In 1920, he was presented to His Majesty King George V at Buckingham Palace, and he availed himself of that favourable opportunity to submit to His Majesty, in the name of the Maltese people, their feelings of deepest gratitude for the new Constitution promised to them; to which His Majesty replied

(1) Debates, Sitting No. 74, 30th August, 1919.

that his solicitude had always been, and always would be directed towards the prosperity and welfare of these Islands; and he was happy to give, through the grant of a Constitution, a tangible proof of his recognition and appreciation of the loyalty of the Maltese people. His Majesty expressed his confidence that the Maltese would be able to administer their public affairs with that ability and patriotism whereof their history affords outstanding examples (1). During his stay in London he was invited to assist at the hearing of cases in the English Courts of Justice and he sat on the Bench with the English Chief Justice. The following morning some of the leading papers in London appeared with the caption "Two Chief Justices on the Bench."

In 1921, His Majesty set the seal on his brilliant career by the conferment on him of a Knighthood, which, in the words of a leading newspaper, was "a Royal recognition of personal worth and merit" (2). All classes, from the highest to the lowest, rejoiced over the honour bestowed on the Chief Justice. The reason for this was not far to seek; it was in the personal attributes of the man, in his invariably courtesy and amiability to all, in his uprightness, and, above all, in his utter contempt for ostentation and idle display. Indeed, the new Knight Bachelor was a living illustration of a great writer's dictum that "true merit is like a river, the deeper it becomes the less noise it makes."

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Such in brief was Sir Michelangelo Refalo's rapid and brilliant career. A biography, however, would not be complete without a review of those personal qualities and attributes which went to make the man, both in public and in private life.

With regard to his public life, as a young lawyer, his admirable intelligence, his common sense, his great industry and irreproachable honesty soon brought him a numerous and select clientele and marked him out for higher offices.

As a Professor, he gave a fresh and enlightening impulse to legal studies and was idolized by his students.

As Crown Advocate, he soon won the respect and admiration of all those who came in touch with him. He was soon

(1) Malta Chronicle, 4th January, 1921.
(2) Malta Chronicle, 31st January, 1921.

noted for his power of lucid expression both in word and on paper and for the masterly exposition of facts and opinions given by him to the Government and to the Forces. To him problems that worried other people presented no difficulties. He worked in difficult and critical times but he overcame all obstacles in his usual masterly way.

As Vice President of the Council of Government, the speeches he made reflected invariably public opinion. His prudence and moderation served to tone down the feelings of others when these ran high. He directed the discussions with impartiality and with that tact which characterised every action of his (1).

As Chief Justice and President of the Court of Appeal, he revealed all those qualities which go to make the ideal Judge. He exercised his functions with dignity, intelligence and impartiality, earning prestige for himself and for our Tribunals. He possessed deep learning, a firm grasp of legal principles and a capacity beyond the common for apprehending and marshalling complicated facts. The principle he always followed was that the law should govern and not men.

Sir Michelangelo Refalo was endowed in a pre-eminent degree with those sterling qualities of mind and heart which are essential qualities in a man entrusted with the lives and property of citizens (2). No judge was more imbued with the true spirit of justice and fairness which evoked the deepest respect of all litigants. His addresses to the jury in criminal trials were a model of clarity of exposition and fairness.

Sir Michelangelo Refalo had in a high measure that interest in the things that pertain to human life, and that knowledge of the intricate workings of human nature, which, united to a sound knowledge of the Law, constitute the best equipment for judicial office. He was, indeed, to use the words of Lord Hewart, when speaking of a great English judge, "a wise, experienced and humane Judge with a consummate knowledge of human nature and the world."

His vast legal attainments, as revealed in his brilliant judgments, and his deep sense of duty fully deserved the praise of the late Lord (then Count Sir Gerald) Strickland: "There is

(1) Il Popolo di Malta, 22nd January, 1924.
(2) Malta Herald, 20th December, 1923.

no doubt whatsoever that he did by his personality raise the respect due to the administration of justice in Malta by very many degrees. Without, and it is suitable that I should avoid, any comparisons with the past—I hope I may be allowed to bear testimony to the fact that the administration of justice in Malta for promptitude and efficiency has been raised by Sir Michelangelo Refalo to such a point that it compared, to my mind, favourably with the administration of justice in England and in other places of the Empire" (1).

Like the late Lord Justice Darling Sir Michelangelo Refalo possessed a very pretty wit and a strong sense of humour which revealed his humanity. Like Lord Darling he knew just when to be firm and when to introduce the human touch. Like him he was gifted with that lightning association of ideas that is the basis of *extempore* humour. But his judicial duties never suffered from the fact that he was a born wit. Nor was his humour in the Courts ever irrelevant; one of its most striking features was that it was so extraordinarily *à propos*. Indeed, in Jury cases, his witticisms very often served another useful purpose in addition to that of providing some light relief, which would assist the Jury in keeping their minds on the task; not infrequently they constituted the most effective method of epitomising the point for the benefit of the Jury. His wit was never used to wound. It was rarely laboured, and never unkind. As such it was an asset to him both as Judge and man. What was said of Lord Darling may be very well said of him : "It was his happy fortune to demonstrate day by day to all concerned that in order to be wise it is not necessary to be dull. Ridentem dicere verum quid vetat?" (2).

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So far we have considered Sir Michelangelo Refalo's personal qualities in public life. If Sir Michelangelo Refalo achieved greatness in the service of his country, he shone, if possible, even more brightly in private life. He was the true type of Christian in the strict sense of the word—a model husband and father, a sincere and loyal friend, a supporter of the friendless and needy, he possessed that rarest and most valuable of combinations,—a brilliant mind and the kindest of hearts. As the late Sir Augustus Bartolo pointed out in the Legislative Assembly, he was "the true

(1) Legislative Assembly, Sitting of 20th December, 1923.
(2) "Life of Lord Darling", Walker-Smith, p. 300.

Christian soldier, the devoted husband, the self-sacrificing parent, the faithful friend, the helper of the poor and needy, the champion of Justice, in one word, the model of the Christian citizen'' (1).

Sir Michelangelo Refalo displayed no pride in his rapid rise to the highest place in the Judiciary or when honours were conferred upon him. These honours failed to make him giddy as in the case of persons of mediocre calibre and he always remained his old self. To his old clients he remained ''the Advocate'', to his students ''the Professor'', to his friends ''their loyal friend''. To him pride was a stranger.

His versatility revealed itself in the interest which he displayed in literature and art. Many of his friends remember him as a notable 'cello player in an orchestra of talented amateurs. He was a connoisseur of French and Italian operas, knowing practically all the librettos by heart. He himself wrote the libretto of the opera ''Frazir'', composed by Maestro Paolino Vassallo.

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Unfortunately for Malta, Sir Michelangelo Refalo was not destined to serve his country for long. On the 20th December, 1923, coming like a bolt from the blue, the news spread throughout the Island that Sir Michelangelo Refalo had passed away in the small hours of the morning; the distressing news created the deepest consternation from end to end of the Island. For although it was generally known that Sir Michelangelo Refalo was on sick leave, as the result of what was generally believed to be a slight attack of influenza, very few people knew that he had developed bronchitis and had taken a turn for the worse the day before. At 11 o'clock on the night of Wednesday, 19th December, 1923, his condition became very grave and the last rites of the Church were administered to him and death intervened shortly before 5 o'clock on the following morning.

When on his death bed, not many hours before Providence had decided to set an end to his career, he turned to his medical advisers and asked of them: ''Non c'è qualche rimedio estremo?'' What problem could he have been faced with of which he would not have found a solution, he must have felt then!

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(1) Legislative Assembly, Sitting of the 20th December, 1923.

The death of Sir Michelangelo Refalo was described by all local newspapers as a public calamity and a national loss, a loss which Malta could ill afford at any time but which fell particularly heavily at that juncture when the Island was still in the experimental stages of Self-Government and needed the services of just such men as were endowed with the brilliant qualities that adorned Sir Michelangelo Refalo. The profound feeling of sorrow produced throughout the Island by his death revealed itself in his funeral which was truly a national tribute of homage to the memory of one of Malta's most brilliant and beloved sons and in which the cortege was headed by His Excellency the Governor, attended by the whole of his personal staff (1).

Again, the words of Viscount Hailsham on Lord Darling may very well be applied to Sir Michelangelo Refalo: "He leaves behind him the memory of a gentleman, who, doing nothing common or mean in his search for distinction, did not shrink from the high office which came to him and endeavoured to discharge its duties in the spirit of those distinguished men who had sat before him on the Bench and as an example to those who shall come after" (2).

Sir Michelangelo Refalo is no more. Like the "soul of the just" which the poet so fittingly likens to the comet, he has gone back to his heavenly abode, "doomed in his airy path awhile to burn, and doomed, like it, to travel and return". But his name shall live in Maltese history and shall be enshrined in Maltese hearts, and even from the world beyond, his voice will appeal to us to follow his noble and brilliant example in the great cause of duty.

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(1) Malta Chronicle, 22nd December, 1923.

(2) "Life of Lord Darling", Derek Walker-Smith.

THE ENGLISH CONSTITUTION AND THE FUTURE

(By Francis Montanaro Mifsud)

THE present age is one of transition, of great, often violent, upheaval in practically every sphere of human activity; and the legal-political sphere is no exception. Therefore it would not be amiss to pause for a moment and try to see how this remarkable, this eminently human, phenomenon, the English Constitution, is faring in the midst of these changes. The success of this brilliant work of improvisation (for such it is), modified and extended through the centuries as occasion demanded, has been a mystery to foreigners, who have tried to imitate it but have discovered that it is a plant that grows only on English soil. There are, I think, two important reasons why the English Constitution has been on the whole a successful experiment in government. The first is that it is mainly the product of lawyers, of persons, therefore, with a practical working knowledge of the law. The corresponding institutions of other nations, perhaps more intellectual than the English, have often been the creation, not so much of lawyers, as of abstract philosophers and politically ambitious generals, and have wholly or partially broken down in consequence. The other reason is, of course, England's unique geographical position which has enabled her to put her system into practice without outside interference. Had it been otherwise, the lawyer would have been helpless, as international lawyers have reluctantly realised when confronted with superior force.

The English Constitution is *unwritten*—in the sense that some of it is unwritten, the so-called common law. The statute law, which covers a much wider field of activity than the common law, has never been codified and cannot, therefore, be found in a single document, as, for instance, the constitution of the United States. This has given rise to a kind of formlessness attaching to the English Constitution. It is, in Anson's words, "convenient rather than symmetrical". Further, it has justified itself, and, in fact, survived at all, by its adaptability to changing circumstances. This has in turn made possible a continuity (which would not otherwise have been achieved) revolving round

the idea of personal rights, and these, although many have now been covered by statute, are all grounded in custom — a fact which explains the prestige that still attaches to the common law. The principle that the state exists for the sake of the individual and not the individual for the state pervades, or has done until recently, the constitutional law of England. In fact, we may say that the "state", in the sense in which it is often used on the Continent, does not exist.

With that preliminary survey of the constitution, we may now proceed to give a description of the functions of its various parts, making reference where necessary to their history: we will then discuss very briefly the adequacy of this system of government to meet the new needs of the country. Walter Bagehot, in his well-known classic, *The English Constitution*, divides the parts of the constitution into *dignified* and *efficient* parts, and this distinction will fit in excellently with our purpose, though we may not concur entirely in his opinion of the value, the functions, and the relative importance of each. The dignified parts are those, according to Bagehot, which possess all the semblance of power and command the respect and obedience of the multitude, while the efficient parts are those where the real power resides. The most important of the dignified parts is, of course, the King, and we must understand his place in the constitutional set-up to appreciate fully the working of the system as a whole. He is the supreme organ of government, the executive power is exercised in his name, laws require his assent to come into force, he can create an unlimited number of peers and dissolve the Commons; but the royal prerogative is so controlled by statute that his political power is purely theoretical and his personal influence all but negligible. A situation can be imagined, of course, though it is hardly likely to arise, in which a corrupt Parliament is engaged in the systematic legal suppression of the people's liberties—in these circumstances the only remedy, short of revolution, would appear to be its dissolution. Such a possibility in the present unsettled state of human affairs cannot be ruled out absolutely, and in such a case a good king would be a very efficient safeguard of the constitution.

More important, however, are those qualities of the Monarchy which, in Bagehot's words, "excite and preserve the reverence of the population"—its illustrious ancestry (the present

king is a direct descendant of Alfred the Great), its symbolic value, its semi-religious or mystic character. These cannot be accurately described, their power cannot be estimated with precision, Bagehot appreciates their usefulness but does not, it is submitted, pay them all the respect they deserve. It is a matter for regret that his cold, dispassionate analysis, admirable in its own way, sometimes misses the finer elements of the constitution. He seems to suggest that the *dignified* parts of the constitution are a kind of "opium for the people", existent only to awe and reassure the uneducated, to occupy their vacant imaginations and prevent them from indulging in idle and dangerous experiments. This is a very superficial way of looking at things, for symbolism is a real and natural faculty of man, educated or uneducated; if there are persons to-day lacking in reverence for these things, the example of the Victorian utilitarians, their betters, must have had something to do with it. The King is, first of all, a safeguard against any apotheosis of the State, with all the malign influence that such a thing entails. Further, the King inspires a much higher degree of loyalty among the great mass of the population than some abstract entity, like the short-lived Cromwellian Commonwealth, can do. The status of Englishmen as "subjects" rather than "citizens", with its emphasis on duties, accounts for the spirit of service which is largely responsible for England's past achievements. The King holds his office "by the grace of God", and is in a very real sense Defender of the Faith, being the personification of all the anti-materialistic forces in the people, and the fountain of justice, of honour, and of mercy. He can do no wrong, and high treason, so often meritorious in other countries, is in England felt as a violation of the law of God as well as of man. He represents all the finer qualities of the nation and each of his subjects partakes of his majesty. The Crown is, in fact, an excellent example of the way the English solve their problems. While Continental scholars and statesmen racked their brains for formulas with which to settle their various constitutional problems, Englishmen chose, or "stumbled on", a sign.

Importance has been given to facts which are not normally described as falling within the purely legal sphere : it is submitted, however, that these are facts which no constitutional lawyer can rightly ignore. A "strictly legal" attitude will narrow, and, therefore, distort our vision.

"Blackstone tells us that it was a saying of Lord Burghley's that England could never be ruined but by a Parliament. The saying may have seemed a clever paradox when it was first uttered; but to us it is a truism, tinged with a note of prophesy". These words are taken from Sir William Holdsworth's essay on "The Influence of the Legal Profession on the Growth of the Constitution" (1), and give us an idea of the immense power which Parliament wields for good and for evil over the lives of the people. By Parliament most of us mean the House of Commons, for the House of Lords belongs more to the dignified than to the efficient, side of the Constitution and in this respect is less important than the Crown. Nevertheless, it will be better for the present purpose to take the two houses together and consider them as one unit. Parliament, from being merely a check on the absolute power of the Crown, is now the supreme authority in the realm : there is no law that Parliament (strictly speaking, the King in Parliament) cannot make, and no other authority can question the validity of an Act of Parliament. This result was only arrived at after a long and bitter struggle, which ended with the expulsion of the Stuarts and in which the lawyers on both sides played a prominent role.

At the close of the constitutional contest, Parliament, fearing lest the Crown might in the future resort to the exercise of indirect influence over public affairs, inserted a clause in the Act of Settlement providing for the separation of the legislative and executive powers of government; but this was found to be an unworkable formula and fortunately repealed before it was put into operation. Statesmen solved the difficulty by entrusting the executive power into the hands of a committee or Cabinet, enjoying the confidence of the majority of the House of Commons. The principle that "the Kings reigns but does not govern" was now a constitutional dogma : it was enforced against George III (who afforded the last serious royal challenge to the authority of Parliament) and was further safeguarded by the exclusion of the King from Cabinet meetings, in accordance with the spirit of the Glorious Revolution.

It was largely due to the lawyers, Holdsworth thinks, that "the mediaeval ideal of of the rule of law was so connected with the legislative powers of Parliament that it became a far more

(1) *Essays in Law and History*, p. 97.

practically useful ideal than a reliance on a fundamental law" (2). We cannot accept as valid to-day Dicey's notion of the *rule of law*, without making serious reservations. The expression "rule of law", according to Dicey, included three distinct though kindred conceptions:

1. The absolute supremacy of regular law as opposed to the influence of arbitrary power, so that no man is punishable except for a distinct breach of the law established in the ordinary legal manner before the ordinary Courts of the land.

2. Equality of all citizens before the law, and, therefore, the absence of *droit administratif* or anything corresponding to it.

3. The constitution is not the source, but the result, of the rights of individuals, which derive from the ordinary law of the land.

Dicey's analysis of the English constitutional machinery in 1885 was in the main true to fact. He failed to see, however, "the shadows which futurity casts upon the present", and was, moreover, guilty of the error into which many Victorians had fallen, that of believing that things were as they should be. To-day state officials have been clothed with legislative and even judicial or quasi-judicial powers and personal rights have been systematically hemmed in by statute—to such an extent that the rule of law, as a principle particular to England, is gradually becoming unreal.

Bagehot and Dicey believed that the English Constitution had in their day become as perfect as a human instrument could be expected to be, and, moreover, had taken a mould which was was more or less permanent and which would not admit, nor require, further organic changes. In this they were wrong—fondly and egregiously wrong. The penalties for their mistake we are paying to-day. Their view-point was accepted by statesmen and lawyers with the result that law failed to keep up with social change. The progressive re-adjustment of the constitutional framework which had been one of the most interesting features of English constitutional history was brought to a standstill, and the new factors which demanded such a re-adjustment were overlooked or under-estimated. The new factors, the legacy of *laissez-faire* with its accompaniment of vast accumulation of wealth in the hands of the few and a standard of living border-

(2) **Op. cit., p. 81.**

ing on subsistence level for the many, are all connected with the social and political awakening of the working classes, and their increasing desire to participate in the government of the country. The outward prosperity of the nation blinded its leaders to the fact that the Victorian aristocracy of wealth, which had superseded the ancient aristocracy of rank, would have to make way for that brand of democracy with which we are familiar today. Bagehot at least, however, foresaw, even though with misgiving, that the time was not far distant when the two major parties would bid against one another for the vote of the working man.

We have now come to the stage when a general distribution of services among all manner of men is being demanded and ,for better or for worse, achieved. Further, it has been decided, rightly or wrongly, that this distribution is the responsibility of the State. This has brought about naturally what is known as the administrative process, which has meant that the administration, in fulfilling its new functions, finds it necessary to enter into fields which previously were exclusively reserved to the legislative and judicial organs of government. As E. C. S. Wade observes (3), the administrative process requires a wide discretionary power on the part of the official which is inconsistent with that measure of assurance (taken for granted in the past) that forseeable consequences will ensue from a particular course of action and that, if those consequences are disturbed, the law will ensure a remedy. This is a perilous situation and lawyers have been justifiably alarmed, for we are on the verge of a tyranny, which is perhaps the most morally degrading—a bureaucratic tyranny. If a solution is to be found, it will have to be found soon, for things are getting out of hand, with officialdom consolidating its position, gradually making itself indispensable in all spheres of activity and trying to leave no other alternative to this kind of regime than anarchy.

America, faced with problems similar to those of the United Kingdom, is tackling the question by means of an Administrative Procedure Act, which amounts to a kind of code of administrative law. The Act, passed last year, is based on recommendations made by the Committee appointed in 1939 at the request of President Roosevelt to enquire into the "need for pro-

(3) L.Q.R., Vol. 63, p. 165.

cedural reform in the field of administrative law." The Act provides for "antecedent publicity" to be given to administrative legislation, and the establishment of "places at which and methods whereby the public may secure information or make submittals or requests"; and provides also that all federal administrative regulation ,with certain special exceptions, shall not come into operation until 30 days from publication. It also deals with the conduct of administrative hearings, and provides that the person who decides must hear. It, further, recognizes the right to be heard orally, to be assisted by counsel and to have access to reports which inspectors of the administrative authority may have prepared. It requires, also, reasoned opinions in all administrative decisions. Finally, it provides that "any person suffering legal wrong because of any agency action, within the meaning of any relevant statute, shall be entitled to judicial review thereof".

This measure, as the brief reference to some of its main provisions should show, can safely be expected to achieve its purpose, namely, the radical curtailment of the discretionary power of officials. E. C. S. Wade, however, suggests a different remedy for England, which would be more in keeping with the legal traditions of the country and which, in his opinion would be adequate in the circumstances—the development of the machinery of the order (formerly the old prerogative writ) of *mandamus*, to make it effective to enforce a public duty (4). For this purpose, it will be necessary to let the order, which does not at present lie at all against the Crown, to operate against the Crown in its capacity of provider of social services, and for the Courts to evolve a standard conception of duty which officials not concerned with the sovereign power of the State owe to individual members of the public. "What is essential," Professor Wade goes on, "is that over and above the political doctrine, of ministerial responsibility there should be a standard of administrative process. The standard should be regulated by law, and safeguarded by a right of appeal to the court. As a minimum there must be guaranteed a fair hearing and full consideration of a complaint without bias in the judge... Wide discretion there must be in all administrative activity, but it should be discretion defined in

(4) Loc. cit., p. 169 et seq.

terms which can be measured by legal standards lest cases of manifest injustice go unheeded and unpunished."

The English Constitution, old as England, always has been suffused with the idea of individual freedom and individual responsibility: the assumption by the State of its new functions is not, as such, incompatible with this idea. What we have to guard against is the tendency of the executive to rob the judiciary, not of its independence, but, what is equally fatal to individual rights, of its jurisdiction. It is not possible to do without an impartial arbiter between the conflicting claims of public order and private freedom, with impunity. The constitution is a well-tried instrument; it has been the means by which England rode safely through many a storm; it has ensured a great measure of social stability; and, if it is discarded in the future, the reason will not be that it is rotten within or obsolete, but because of widespread unwillingness or inability to work it. In any case, it is extremely unlikely that it would go down alone, but rather in a general conflagration together with the many other ideas and institutions that go to make up the English mode of life. The matter ultimately rests with the people—it is for them to elect a free Parliament, which alone will reassert its sovereignty and can adequately safeguard the rights of the subject.

The sovereignty of Parliament is the cardinal point whence the whole constitution derives its motive power. As the Monarchy is the static element, Parliament is the dynamic. It is vital, therefore, that Parliament should overcome, to borrow Holdsworth's phrase, "those analogues of the overmighty subject—Unions and Trusts" (5), and not resign its power to those extra-parliamentary forces that have made use of the bi-party system as a screen for their manoeuvres. The bi-party system itself is, it is submitted, breaking down: besides the obvious disadvantage of excluding from the government, except in the gravest national peril, the able men belonging to the party in opposition, it has made it very difficult for an independent to get elected to Parliament, and, if once elected, it makes his position all but nugatory. The party system has, further, entailed a degree of loyalty at the expense of personal ideals and individual conscience not altogether beneficial to the country. This is precisely

(5) Op. cit., p. 96.

the time when the private member, possessing the necessary insight to appreciate current problems and with the courage to express clearly his convictions, will be of the utmost value. We cannot dismiss as entirely baseless Hilaire Belloc's charge that there are tacit understandings between the parties to the detriment of a gullible electorate, and a number of the so-called conventions, if properly analysed, would seem to be nothing else. If private members are in Parliament in sufficient force, they will be able to guard against this danger; and, when the storm is approaching, they will be there to sound the tocsin, lest the people be taken unawares.

There is no cause whatsoever for despair as yet; but neither is there any room for complacency, for complacency now will be the death-knell of England's great liberal and parliamentary democracy.

LAW AND POLITICS

"Liberty which the law assures to us is ever at the mercy of politics. Where the political system of a country breaks down, then the rule of law which needs a sound political structure for its support collapses in turn and there is substituted for it that horrid arbitrariness which is the negation of law. Thus it is true that Law and Politics are indissolubly linked together."

LORD MACMILLAN.

CRIMINAL LIABILITY

"If one thing be more obvious than another in matters of Criminal Law, it is that it is a fatal mistake, unless you wish to bring the law into discredit, to try to impose on people criminal liabilities which the public morality of the time does not accept."

LORD JUSTICE SLESSER.

ADOPTION

(By NOTARY V. FORMOSA, LL.D.)

(Assistant Director of the Public Registry)

ADOPTION is the legalised recognition of the child of other parents as one's own. According to Berlier, Adoption is "un atto di consolazione per l'adottante e un atto di beneficenza verso l'adottato".

In olden times, adoption was known in several countries but its functions were different from those which it has nowadays, inasmuch as it was a political and religious institution. In Ancient Greece, it was necessary that the adoptor should have no *male* children and that he should be fourteen years older than the person to be adopted. A man could adopt during his lifetime or by provision in his will; if he died intestate, without leaving a son, his next-of-kin stepped in, for it was in the interest of the state that a family be not extinguished.

Adoption was also known in Roman Law, which considered it necessary as a means to prevent the extinction of great names and families, and to keep alive the cult of family ancestors. Roman Law distinguished between "adoptio" (adoption proper) and "arrogatio" (arrogation). The former referred to the adoption of a person "alieni juris", that is, the person adopted had to be still under the father's control (patria potestas); in the latter case, the person adopted was completely independent (sui juris). In both cases the adoptor had to be childless, and in either case the result was that the adopted person passed entirely out of the fathers authority into that of the adoptor by formal purchase (mancipium). The adopted person took the full name of the adoptor, to which was added an adjectival form of his own gentile name. Women could be adopted but only if they were under paternal control, and could not themselves adopt. According to the texts of Roman Law "l'adozione imita la natura", and so the person intending to adopt must have had the physical capacity to procreate. This, however, disappeared during the Empire, when also women were given the right to adopt, though they could not exercise "patria potestas". In all times, the interference of public authority was considered necessary for the validity of arrogation, because it altered the common law of

family, and this alteration could not be effected unless by means of a special law.

Legal adoption of children was unknown to English Law until the Adoption of Children Act, 1926. In this respect English Law resembled French Law. It is true that French Law recognised adoption, but under conditions rendering it impracicable: thus, the adoption of persons who were under age was inadmissible. Now, according to a French Law of 1923, persons under age may also be adopted. Under the Adoption of Children Act, above mentioned, only the adoption of a person under 21 is permitted. French and English Law differ from German Law inasmuch as in English and French Law, the Court, before granting adoption must be satisfied that it will be for the welfare of the person to be adopted, whereas such a requisite is unknown to German Law.

Several countries do not as yet recognise this institution, e.g. Holland and Portugal. In Russia adoption exists, but it is governed by rules which vary according to the different social classes. This institution of adoption exists also in our law, which includes under the denomination of adoption the act which according to previous law was called arrogation. According to our law, adoption is only allowed to those persons of either sex who have no legitimate or legitimated descendants, who have completed fifty years, and who are at least eighteen years older than those whom they intend to adopt. No dispensation is allowed as regards the condition that the adopting person must have completed fifty years. Such a dispensation may be allowed according to the German Civil Code. Our legislator has not allowed adoption in case of persons who have legitimate or legitimated descendants at the time of the adoption. Adoption in this case would be most detrimental to the rights of the legitimate or legitimated descendants, once that the law grants to the adopted child the same rights on the estate *of the adopted*, as those of a child born in wedlock. Moreover if a legitimate child is born to the adoptor after that the adoption has taken place, it would likewise be null, if the child had already been conceived at that time. This, at least, is the theory of Demolombe, Laurent, Aubrey and Rau, who state that in this case we should apply the rules "infans conceptus pro nato habetur, quoties de commodis ejus agitur". Thus, according to these authors, a child who is

only conceived is as much an obstacle to the adoption as a child born beforehand. Valette is contrary to this theory, for, as he states, the adopting person may be ignorant of his child's conception. As regards the manner of determining the time of the conception of the child, it is generally held that one should apply the rules of gestation, which are specified by law.

It is also noted that the law speaks only of "legitimate or legitimated descendants", and says nothing of "natural children". From this one can imply that adoption is allowed in case of a person who has a natural child.

Can natural children be adopted? The law in section 135 states that "the illegitimate children mentioned in Sections 129 and 130 may not be adopted by either of their parents". Sections 129 and 130 refer to adulterous, sacrilegous and incestuous children. Hence we may deduce that simple illegitimate children, that is, natural children who do not fall under Sections 129 and 130 can be adopted by either of either parents.

Persons in Holy Orders, or bound by a solemn vow taken on religious profession, are not allowed to adopt. More persons cannot adopt one person, and this to avoid dangerous rivalries between the adopting persons. Nor can one person have more than one adoptive child unless they are adopted by the same act. In the case of a husband and a wife both have the right to adopt at the same time. Italian Law requires the mutual consent of both spouses in this case, but no such mention is made in our law. The adopted child assumes the surname of the adoptor and *adds* it to his own. Thus, if, say, Carmel Borg is adopted by John Pace, the full name which the adopted child assumes would be Carmel Borg Pace, and not Carmel Pace Borg.

Adoption is a solemn act, and so at all times the interference of public authority was considered necessary for its validity. In our case adoption can only take place with the authority of the Court of Voluntary Jurisdiction, at the demand of the persons who wishes to adopt, who is to file a "ricorso" to that effect in the Registry of the Court of Voluntary Jurisdiction. The requisite documents are also to be attached. If the application is upheld, a decree to that effect is delivered. Generally, adoption is effected, or rather executed, by means of a public deed. In this case, the draft deed of adoption is filed in the said Registry, in order that it may be examined by the judge, who then fixes a

day for its publication with his intervention. The decree of adoption would have no effect before the aforesaid deed is executed.

The Registrar of the Court above-mentioned is then to register the adoption in the Public Registry, within fifteen days from the date of the said act, and to deliver to the Director of the Public Registry an authentic copy of the public act and of the decree containing the adoption. The Director shall then register the adoption by means of a note in the margin of the register of the adopted child's Act of Birth. The request made by the Registrar, the copy of the deed and of the decree are to be attached to the Original of the Act of Birth of the adopted child. The necessary alterations and addenda are to be made in the Index of the said Act of Birth.

The adoption or legitimation of any person whose Act of Birth may not have been registered in the Public Registry is to be made in a book destined for that purpose; and in any such registration ,any particulars required for the formation of an Act of Birth or such of them *as may be known* are to be stated. In this case, the Registrar is also to remit the aforesaid authentic copies to the Director who has to make a true copy thereof in a book kept for that purpose. The expression "that may be known", which the law makes use of in this case, and which refers to legitimations and adoptions of persons whose Act of Birth may not have been registered in the Public Registry, is important. As a matter of fact, in the case of persons whose Acts of Birth have been registered in the Public Registry, all the particulars necessary for the formation of an Act of Birth, are essential, and the law itself provides the way how to obtain the said particulars. However, in the case of the legitimation or adoption of persons, whose Acts of Birth are not registered in the Public Registry, all such particulars as are required for the drawing up of an Act of Birth, or such of them as may be known, shall be stated, (para. 3, Sec. 325). Thus, in the latter case under consideration, it is enough to gather all the possible information which tends to establish the particulars required for the formation of an Act of Birth. Thus, the information given orally or verbally by one of the parents, or a declaration made by them in a public deed, would be acceptable. The words "that may be known" seem to imply also that the production of

the adopted or legitimated child's Act of Birth, duly authenticated, is not a requisite which is absolutely essential for the registration of the Act of Adoption or of Acknowledgemnt. A ruling based on these principles was given by the Court of Revision of Notarial Acts in a case raised by the late Notary L. Gauci Forno who had asked the Director of the Public Registry to annotate a Legitimation relative to a child whose Act of Birth had not been registered in the Public Registry.

Section 326 of the Civil Code states than when a request for an annotation is made, an authentic copy of the public deed, judgment *or* decree, relating to the adoption, judicial declaration of paternity or maternity, or legitimation, is to be delivered to the Director of the Public Registry *by the part making the request.* From the wording of the law, one may argue that any person can make the request for the annotation of an adoption, so long as he delivers to the Director the documents required by law: however, Section 326 is closely related to Section 153, and so both sections are to be jointly interpreted. In fact, in the latter section the law imposes the duty on the Registrar of the Second Hall to register the annotation in the Public Registry within fifteen days from the date of the deed of adoption. Thus the party who makes such a request is always the *Registrar of the Court of Voluntary Jurisdiction.*

The law in the same section speaks of "judgment *or* decree". Once the law speaks of decrees, one has necessarily to understand decrees of our Court of Voluntary Jurisdiction. Should we interpret Section 326 extensively? If we were to do so, then the party making the request for an annotation of an adoption executed abroad, can produce an authentic copy of the act of adoption. However, that would be going too far, for the provisions of the law, in this matter, should be interpreted "strictissime". It is true that the law mentions "a copy of the judgement" in this section, but it is submitted that these words are to be connected with the following words of the same provision of the law, that is, "judicial declaration of paternity or maternity, or legitimation", and not with the word "adoption". It is the copy of the deed and the copy of the decree which refer to the adoption: the copy of the judgment refers solely to the judicial declaration of paternity or maternity, or legitimation.

Of course, we are not implying that an adoption which is

valid abroad, may not be valid also in Malta. However, because it is valid it does not necessarily follow that its annotation can be made in the Public Registry, by producing a document testifying to the adoption executed abroad. Our law, on this point, mentions only those documents required by the procedure prescribed for adoption in these islands; it does not state "or any other documents which may prove the adoption". Hence it is quite evident that Section 326 of our Code refers only to adoption in Malta. However, in my opinion, it might be possible, in cases of adoption executed abroad, to apply to our Courts asking that the necessary "exequatur" be given in order that the registration of such an adoption may be effected in Malta.

The law requires that the adoption be brought to the knowledge of the third parties, and it is for this reason that certain formalities are prescribed for the purpose of rendering it public. According to the Italian Law "l'adozione è *senza effetto*, se non è stata inscritta nel termine segnato dalla legge". No similar provision is to be found in our law.

Before concluding this survey on adoption, it may not be amiss to mention two cases thereon, which cropped up in Malta, and which fall within the field of Private International Law.

The first case (in which the writer happened to be the Notary appointed by the Court to draft the deed of adoption) concerns the adoption of an Italian child who was brought to Malta by a married couple when in Sicily some months ago. As soon as they reached Malta with the child, born of unknown parents, the married couple applied to the Court of Voluntary Jurisdiction in order to be authorised to adopt the child in question. The Judge of the said Court appointed Prof. V. Caruana to state his views on the matter. The learned lawyer pointed out in his report that the child could not be adopted before attaining the age of 18 years, as required by Italian Law, which was the only law applicable to the child proposed to be adopted. Italian Law, in fact, provides that "l'adozione non potrà in nessun caso aver luogo prima della maggiore età dell'adottato"; and this ,perhaps, owing to the fact that, if the law were to render persons under age capable of being adopted, it would have been necessary to reserve to the adopted person the right to renounce to the adoption, as soon as he will become of age according to law—which, of course, would render adoption very unstable.

Basing its ruling on the report of Professor Caruana, the Court of Voluntary Jurisdiction did not uphold the application. Eventually, the child attained 18 years, another application was filed, and the required authority was finally given.

As adoption affects the status of both the adopter and the adopted, the law which in practice is applied by most countries in cases of adoption which crop up in Private International Law, is that which refers both to the adopter and the adopted child. That means that both laws are to be taken into account; thus, capacity and formality are regulated by the personal law of both parties. If the law of the adopter and the law of the adopted child are conflicting, the adoption would be invalid, as in the case "Camenzuli vs. Camenzuli", in which our Civil Court held that an adoption purported to have been made in Ontario, Canada, by a Maltese domiciled in Malta of a child born in Canada was null and void, because the requisites established by Maltese Law were lacking. The Court quoted an article by F. A. Mann entitled: "Legitimation and Adoption in Private International Law", in which the writer held that "for the validity of an adoption, both the personal laws of adopter and person adopted must be satisfied".

Finally, it may be stated that in cases of succession, that is, if the adopting person dies, the law of the deceased's domicile at the time of his death should apply, and not the original law (the law of adoption).

KNOWLEDGE IS POWER

"My own experience convinces me that there is no branch of knowledge which does not at one time or another prove of service to the lawyer in his practice. Over and over again in the stress of advocacy I have found that information, which when I acquired it seemed to have no relation to my daily work, has suddenly come to my aid."

LORD MACMILLAN.

RETROSPECTIVE EFFECTS OF LAW

(By S. CAMILLERI)

IT has been often said that Law is an organism which is continually undergoing changes as Society passes from one stage of its development to another. This development necessitates changes in and additions to the express provisions of the law, and such changes and additions have given rise to the so called Doctrine of Vested Rights or, as it is called by continental writers, Theory of Retroactivity of Law.

This theory has for a long time furnised the subject-matter of controversy and elaborate treatment by a number of renowned jurists. In certain countries, the legislator has expressly dealt with the matter : our laws contain no express general provisions and therefore, to determine whether a new law is to operate retrospectively or not, our Courts have had to rely on the works of authoritative writers or on the judgements delivered by foreign Courts. Regarding the principles followed in our law about *Ius Transitorium*, we will deal later on. Our purpose here is to give a general account of the development of the rules on the matter under consideration and to ascertain which principles are mostly upheld by modern writers, and what these principles should be in order that the aim of all Laws — namely, the administration of justice—be achieved.

In certain cases there is not, and there cannot be, any doubt as to the retroactivity or otherwise of a new law : it is obvious that a transaction the effects whereof no longer exist cannot be affected by any change of law. Thus, if a contract is made under one law and all obligations arising therefrom are carried out by the respective parties, in such a way that there no longer exist any relations arising from that contract between the parties; or in case a particular dispute is conclusively settled by the Court under one law, then if that law is substituted by a new law, the latter can have no effect on that contract or on that decision. It is impossible in such cases to apply the law retrospectively for the simple reason that once a fact has been done and absolutely consummated before the enactment of the new law, it would be altogether unreasonable.

nay simply ridiculous, to regard it as not having taken place. Conversely a fact which, under the law in force at the time it occurs, can produce no right, would still be without effects if the law is changed in such a manner that a similar fact occuring under the new law would give rise to a right. It is said that there can be no right — and, therefore, no obligation — unless it is given by law, either directly, when it is acquired immediately by the operation of an express provision of the law, or indirectly, when it results from some fact or transaction which the law recognises as productive of such right. It would not, therefore, be logical to create a right out of a fact which occurred previously, when that fact could produce no effects whatsoever under the law in force at the time of its occurrence. It might be objected that the new law considers the said fact as productive of that particular right: it is, however, in virtue of the new law that such a fact is capable of giving rise to the said right, so that when such new law did not exist the said fact could not give rise to the right: that the right might arise the fact must occur at a time when by law it is capable of producing such a right. To hold that the right exists because of the previous occurrence of the fact amounts to saying that the new law was in force at a time when it was not yet enacted or that the fact took place at a later date than it really did.

In certain cases, the legislator expressly declares a law to be retrospective; in others, the law is, of its very nature, retroactive: such are *Interpretative Law* and *Lex Confirmatoria*. These cases do not present any difficulty. Controversy exists in those cases where a right is acquired under one law, which is subsequently altered. Should the right be affected by the change, or, in other words, which of the two laws is to govern the said right?

The general opinion in this respect has, since the days of the Romans, been that a new law applies to events and relations occurring after the date of its enactments and that it should not be applied retrospectively: "Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari" (Codex: L. 7 de legibus). According to Lassalle this principle had been recognised even before the days of Roman law by Greek philosophy. Many arguments have been brought forward in its defence, the most convincing and the one adduced

by the great majority of writers, being that of the stability of legal transactions upon which depends social order. Society at large, as well as the several members thereof, are anxious that such stability obtains at all times; and such stability cannot be preserved if the rights and obligations given under one law were to be abolished or tampered with by a subsequent one. As Pacifici Mazzoni aptly points out, if such a course were to be followed by legislators, its effect would be that of undermining the confidence and trust the individuals of a society have in existing laws, and this would inevitably lead to disrespect of, and ultimately disregard for, such laws. To give retrospective effect to the new law would, in certain cases, not only be detrimental to the stability of transactions, but would further be unfair and unjust in so far as a person to whom a right had accrued under the old law, might be deprived thereof and, therefore, punished for the very fact of his having conformed to the requirements of the law in force at the time the right in question arose, and because he had obeyed, respected and put trust in such laws.

The legal maxim 'laws provide only for the future and should not be retrospective' is justified on solid grounds. Its importance, indeed its necessity for the welfare of the community, has been appreciated at all times. Lasalle holds (it has been remarked above) that it had its place in Greek philosophy. That it was observed under Roman Law emerges clear from the many dictums found in that law to the effect that laws shall provide only for the future. Notable amongst them is the famous law (already quoted) of Justinian inserted in the Codex (1. 7 de legib.), mention of which had already been made in the Codex Theodosianus: "omnia constituta non praeteritis calumniam faciunt, sed futuris regolam imponunt". This general principle is reproduced in Canon Law: "quoties novum quid statuitur, id solet futuris formam imponere, ut dispendiis praeterita non commendet, ne detrimentum ante prohibitionem possint ignorantes incurrere, quod eos postmodum dignum est vetitos sustinere" (Ch. 2, I. de constitut.); to the same effect it is provided in Ch. XIII de constitut., that the 'constitutiones' are enacted "non ad praeterita, sed ad futura tantum extendi, cum leges et constitutiones futuris certum sit dare formam negotiis, non ad praeterita trahi". It is noticeable that the provisions of Canon Law are very similar to those of Roman Law.

It must be here pointed out that though in Roman Law the principle of non-retroactivity of laws was laid down, it was not yet properly defined; so much so that Weber holds that it was a recognition by words rather than deeds. It is perhaps more correct to accept the view of Gabba that, (in his own words) "nel diritto giustiniano il principio della non-retroattività non è stato sufficientemente analizzato, ne debitamente limitato". Gabba further maintains that though observed under Roman Law, the said principle was as yet undeveloped and unstudied: the legislator incorporated it in the laws because he *felt*—rather than *reasoned*—that he should do so.

The said principle continued to be upheld for many years. However, it was too general; no proper limits were set to its operation. It cannot now be accepted as it was then understood. Be it noted that even under ancient laws there were departures from the said principle: many imperial 'constitutiones' were to operate retrospectively, e.g. L. 27 C. de usuris, which decreed: "jubemus etiam eos, qui ante eadem sanctionem ampliores, quam statutae sunt, usuras stipulati sunt, ad modum eadem sanctione taxatum ex tempore lationis ejus suas moderari actiones". So also Justinian decreed that all his legislation—or at least, as some jurists, e.g. F. Bergmann, believe, the Institutes and the Pandects—was to have retrospective application: "Leges nostrae suum obtinere robur ex tertio nostro felicissimo sancimus consulatu....." But such departures were only made in special enactments and there was no general principle to that effect.

In time jurists argued that a subsequent law must necessarily be better than a former one. A new law, as Pacifici Mazzoni remarks, is introduced to correct the one which it substitutes and to introduce the new principles and rules resulting from progress made in the field of legal science. It would be only too reasonable — the said jurists argued — to apply the new law immediately not only to all transactions and events occurring after the promulgation of the new law, but also to all juridical relations, whether they be the effects of a fact, event or transaction that took place after the enactment of the new law or before such enactment. Not to give such an application to the new law would be against public welfare: the old law is substituted by the new law because the latter is better suited to

govern the juridical relations arising between the members of a community; and if this is true when the relations arise out of a fact which takes place under the new law, it is equally true when such relations are the ulterior effects of a fact which occurred under the former law.

This new doctrine is of no small importance: its truth and sound reasoning has struck a number of jurists who, in dealing with the principles of Transitory Law, have paid serious attention to it. Thus Gabba, speaking about the said view, declares: "Questa proposizione (i.e. the doctrine in question) ci pare evidente, e ci fa meraviglia che da quasi nessuno scrittore sia stata posta a base degli studi del così detto giure transitorio". So also Rudhart, in his 'Controversen im Code Napoleon', maintains that the said principle should form the basis of any study about Transitory Law; Merlin (Effet Retroactif e Pass), is of opinion that, as a general rule, laws are retroactive: to the same effect Theodosiades (Essai sur la non retroactivité des lois), writes: "la loi novelle, toujours preferable à l'ancienne, *doit recevoir la plus large* et la plus prompte application.....".

This new attitude towards the application of new laws had its repercussions over the universality of the principle — so far unchallenged and unqualified — of non retroactivity; with the introduction of the practice of publishing Codes the need for laying down proper limitations to that principle was strongly felt. During the nineteenth century, in fact, we find a number of celebrated lawyers — amongst whom Merlin, Mailler De Chassat, Ferdinand Lassalle, Rudhart, Bergmann, Tonso and Gabba — devoting much of their time to find some general rule whereby to determine whether a new law, whatever its subject matter, was to be applied retrospectively or not. Confronted with the two above-mentioned doctrines, jurists soon perceived that any theory, to be reasonable and acceptable, should take both the said doctrines into consideration. Many of them maintained that the one lays down the general rule, the other the exception: the rule is that laws are not retrospective, but this rule, as almost all other rules, has its exceptions. Lassalle does not accept such a proposition; he points out that when an alleged exception to a principle proceeds from the very nature and character of that principle, then there is not a true and actual exception, since the most complete determination of an

object is ascertained through putting to that object its proper limitations. Gabba shares Lassalle's view, "Imperocchè la pretesi eccezione al principio di cui discorriamo (he refers to the principle that laws are not retrospective), provenendo dalla natura medesima dell'oggetto a cui il principio riferisce, cioè dalla natura della legge, non sono propriamente tali....." It follows that the said two views are not so conflicting that to admit the one we must exclude the other: as we have seen they are not even a rule and its exception. On the contrary, they are two fundamental elements of one and the same rule; they are the complement of one another. Together they furnish the subject matter of the so called theory of non-retroactivity, since this consists in determining what juridical relations arising before the enactment of the new law are to be governed in accordance with the one view rather than with the other. To resolve this question various doctrines have been propounded: of these we shall mention the most important.

It should be noted at this juncture that these doctrines attempt to lay down a general rule, which may be applied to any and every institute comprised in the legal system of a modern society.

Pacifici Mazzoni states that the doctrines to solve the problems of *Ius Transitorium* can be reduced to five, whilst Gabba points out that up to the time of his taking up the writing of his "Teoria della Retroattività delle leggi", five doctrines had been propounded. He was of course leaving out his own theory: including it there would have been six theories. The difference between Mazzoni and Gabba is accounted for by the fact that Mazzoni considers Gabba's theory as an improvement on that of Lassalle: to Mazzoni Gabba's doctrine includes that of Lassalle and he was, as we shall see, justified to do so.

To return to the doctrines about Transitory Law: according to Bergmann (Das Verbot der ruckwirkenden Kraft neuer Gesetze im Privatrechte), followed by Bornemann (Erorterungen im Gebiete des Preussischen Rechts), one should decide whether a law is retrospective or not from the express provisions of the law; in case the legislator's intention cannot be ascertained through the expressions of the law — in other words in case of doubt — the new law should be applied retrospectively; and this, as Bergmann maintains — because the new law is an im-

provement of the former one, and thus should be given the widest application. According to Gabba this theory is untenable, because more often than not, the legislator's intention cannot be inferred from the words of the law: indeed, if this were possible there would be no need for any theory on retroactivity, since the sphere of application of the new law would be determined by the legislator himself. Lassalle's criticism of Bornemann who, as it has already been remarked, shares the views of Bergmann on the matter under consideration, is to the same effect. Lassalle further holds that whenever the legislator's intentions cannot be ascertained from the wording of the law, it should be argued that the legislator intended that which the nature of the subject matter of the law in question requires.

Another theory lays down that if a law is conducive to public welfare and order — is enacted for public utility — it is retrospective; otherwise it is not. Lasalle and Gabba do not accept this theory: indeed even if it were theoretically admissible, such doctrine would, practically, be of no value, since the concept of public utility and order is not susceptible to exact determination. Gabba points out that there is another theory which bears a strong resemblance to this, namely the one holding that prohibitive laws are retrospective. This theory is indeed more plausible than the former: it is upheld by a number of renowned lawyers, amongst whom, John Voet (ad Pandectas, De Ritu Nuptiarum), Henne (de legibus ad praeterita trahendis), Lassalle and Bergmann. Briefly, these writers hold that a prohibitive law, precisely because it is such, is above all private interests and, consequently, even above acquired rights: hence it should be given the widest application. A 'prohibitive' law is one which forbids the creation of one or more juridical relations.

Confuting this theory, Gabba points out that it does not accord with facts. Nor is it acceptable on scientific grounds: for the very same reasons that it is not correct to argue that the legislator, in imposing a *command*, intended it to have a retrospective effect, so also it cannot be said that he meant his *prohibition* to operate retrospectively. This theory has been also rejected by Savigny, Zeiller and Weber.

The third theory is that favourable laws are retrospective; in other words, those laws which better the conditions and posi-

tion of the citizens are retrospective, whereas laws which worsen the citizen's position are not retrospective. That this theory does not furnish an adequate and practical criterion is shown by the fact that favourable laws have a retrospective effect only when their retrospective application causes no detriment to acquired rights: it follows that not even favourable laws are retroactive whenever retroactivity may be prejudical to vested rights. In effect, the said doctrine boils down to this, that new laws are to be applied as widely as possible, since they are an improvement on former ones, and thus more just and favourable to the citizens. The doctrine consequently is of no practical value since it is but a reiteration of the principle, universally accepted, that laws are, as a rule, retrospective: as such, it fails to satisfy the object which it was intended to satisfy, namely, setting proper limitations to the said general principle.

The next doctrine is that propounded by Savigny. It is based, as practically all the theories of Savigny are, on the distinction between the laws respecting the acquisition of rights and those respecting the existence or mode of existence of rights. By "acquisition" of a right Savigny means, in the words of Gabba "il trasformarsi un istituto giuridico astratto in rapporto giuridico personale", and by "existence" of a right, he intends "il riconoscimento di un istituto giuridico in generale per parte della legge"; from such recognition one can deduce whether the particular institute exists or does not exist, or whether it exists in one form or in other. Savigny lays down two general principles: firstly, that the laws governing the *acquisition* of rights are not retrospective; secondly, that laws referring to the *existence or mode of existence* of rights are retrospective.

Criticising Savigny's doctrine, Gabba remarks that he (Savigny) uses the same expressions now in one sense and then in another. His conclusion, therefore, is necessarily erroneous since, by firstly attributing a certain meaning to a term and, later another meaning to that same term, he, in reality, passes from one concept to another totally different — as different, in fact, as the first meaning given to the term is from the second. Moreover, Savigny's classification of law into two kinds, (namely that respecting the acquisition of rights and that respecting the mode of existence of juridical institutes), is, in practice at least, without foundation, for the mode of existence of a juri-

dical institute is necessarily determined by those qualities and rights that are acquired through such institute: so that if a law provides that through a particular juridical institute a certain right may (or may not) be acquired that law refers to the acquisition of rights and, at the same time, to the mode of existence of the particular juridical institute, since such a law affects and modifies the nature of that institute. Lassalle, like Gabba, does not accept Savigny's doctrine. He maintains that the same law refers to the *acquisition* of rights when considered from the point of view of the individual, and to the *existence* of rights when considered from the point of view of its object. Lassalle, therefore, seems to concur with Gabba that, whatever its theoretical value, Savigny's distinction between laws referring to acquisition and those to existence of rights, is of no practical importance.

The aforementioned doctrines, as it has been said, are untenable. They fail to solve the problems of Transitory Law; they do not furnish an adequate criterion and, moreover, are scientifically erroneous. The solution has been found in the "Doctrine of Vested Rights", which was propounded for the first time by Ferdinand Lassalle. Before him, other writers had stressed the importance of taking vested rights into consideration when dealing with retrospective effects of law; but none of these writers succeeded to formulate a plausible doctrine: nor did they establish the exact notion of vested rights. It was in the hands of Lassalle that this doctrine took a coherent form: it is true, as we shall presently see, that Lassalle's doctrine was not perfectly correct, but it was destined to form the basis of all study carried out on this question of legal science in the years that followed its publication in 1861, in a book entitled "Die Theorie der erworbenen Rechte".

It is to Lassalle's practical genius and common sense that the success of this theory is mainly due. He was not subject to abstractions: all through his work, even in passages of abstract reasoning, he never loses touch with reality. He grasps the importance of the principle that laws should be retroactive, since a new law is more conducive to public welfare, but at the same time he admits that an individual should not be deprived of a right which accrued to him under the old law, for such a deprivation would amount to a punishment of that individual's trust

in the laws existing at the time he acquired the right in question. Such reasoning seemed so convincing to him that he regarded non-retroactivity of laws as being synonymous to protection of vested rights: when Lassalle declares that laws are not retrospective, he simply means that vested rights should not be violated by the application of a new law. If his doctrine were to be reduced to a formula, that formula would amount to this, namely that a new law should be given the widest possible application, provided that such application does not prejudice vested rights. To apply a law retrospectively, Lassalle argues, is to disregard, to ignore and set aside human personality itself: retroactivity, in such a case, is the violation of Man's free will, of his freedom of action, of his responsibility, of his rationality. For, is it not as a free, reasonable and responsible being that the law punishes the evil-doer, that it acknowledges the rights acquired through an act willed and performed by him? A person punished under a new law for an act he committeed before the enforcement of such law is punished unjustly, because he committed such an act freely and deliberately, knowing that under the law in force at the time of its commission, no disadvantage could ensue from such an act. So also, if a new law were to operate retrospectively in a way to deprive a person of a right he acquired previously through a free and voluntary act, that law would violate that person's free will as well as his freedom of action. It is by such lofty principles that Lassalle defends his assertion that vested rights should be respected: before him, Stahl had upheld the same principle on similar grounds, maintaining that it is only when all the rights legitimately acquired by him are respected and safegarded that man can attain to the fulness of his personality.

To understand this theory, it is necessary to determine what is a vested right. According to Lassalle, a vested right is one which comes into being through a free and voluntary act of man. This definition is in complete conformity with the the reasons brought forth by Lassalle in defence of his contention that vested rights should be protected from the retrospective operation of the new law. If such rights are not respected then man's freedom of will and action would be violated; but such violation takes place only when a right brought into being through a free and voluntary act of man is abolished or in any other manner

prejudiced. For Lassalle, therefore, a vested right, in order to be immune from the application of the new law, cannot but be one acquired through the personal activity of its subject, and it is only when such a right is prejudiced by the application of the new law that such law cannot operate retrospectively. It is due to this contention that Lassalle's doctrine did not prove completely successful. For, though, as it has been observed above, this doctrine, in the general enunciation it makes, is correct, yet it is, as Gabba rightly maintains, incomplete, and this because it does not contemplate all kinds of vested rights. Though it is true that most rights acquired through the personal activity of the holder are vested rights (and, therefore, cannot be affected by a law coming into force subsequently to their acquisition), it is likewise true that not all vested rights are so acquired. Gabba points out that despite the fact that the majority of vested rights are acquired by the personal and voluntary intervention of the acquirer, there are a number of rights which, though coming into being by the mere operation of the law, in other words "ipso iure", are none the less inviolable—such that is, as cannot be prejudiced by the retrospective operation of the new law. Lassalle's doctrine does not take this latter class of rights into consideration. This doctrine is also incomplete — as Pacifici Mazzoni tells us—in so far as Lassalle failed to give a sufficiently comprehensive definition of vested rights He holds that once a right has been acquired through a voluntary act of an individual, it is necessarily a vested right: and this, as Gabba says, is not correct: "mentre quasi sempre i diritti acquisiti sono la conseguenza di atti di voluntà degli individui, posti in essere a tale scopo, non può dirsi però che acquisiti siano sempre e quindi inviolabili da una legge nuova, i diritti provenienti da una tale fonte."

For the above reasons, Gabba regards Lassalle's doctrine as incomplete. However, he readily accepts the general principle laid down by Lassalle that the new law should not be applied retrospectively to the detriment of vested rights. This is in fact the gist of the theory propounded by Gabba. His renowned work is but a defence of this principle. By careful illustrations and minute analysis, he shows that positive law, both ancient and modern, when declaring that laws should not be retrospective, simply means that vested rights should be respected, that

whenever no prejudice would result to such rights, the new law should be applied as widely as possible; that such a rule was upheld by Roman Law; that modern legislators have acknowledged the truth of this principle and the justice it embraces. In conclusion to his review of Positive Law about Ius Transitorium and the progress therein made, Gabba writes: "anche in questa parte del diritto, come in tutte le altre, i concetti dei legislatori si sono venuti determinando sempre più col progredire della Civiltà. Codesta determinazione consistette precisamente in ciò che dal volgare e vago dettato che le leggi non debbano retroagire, ando svolgendosi, e diventò finalmente persuasione generale il principio che: 'la vera ragione e il vero limite della retroattività delle leggi consistono unicamente nel rispetto dei diritti acquisiti'." With the same end in view, namely to prove the truth of the contention that non-retroactivity is based solely on the respect for vested rights, he shows that all theories brought forth to solve the problems of transitory law, except that founded on the concept of vested rights — i.e. the doctrine propounded by Lassalle — are either erroneous or of no practical value whatsoever. Obviously, however, the doctrine of vested rights is practically meaningless if the concept of vested right be not clearly established and defined: the acceptability of this doctrine is bound up with the definition of vested rights and, in fact, it is because Lassalle failed to give such a correct definition that his theory is incomplete.

In attempting to arrive at a correct definition of vested rights one should take into consideration not only the fact that the violation of a vested right offends human personality, but also — and this is of no minor importance — that such a violation results in an actual diminution of the holder's estate. Gabba, accordingly, lays down this definition, namely that a 'vested right is one which is the consequence of a *fact* capable, under the law in force at the time of its occurrence, of producing the said right, and this even though the opportunity of availing one's self of the said right has not arisen before the enactment of the new law, *and* which, according to the law prevailing at the time the said fact took place, had come to form part of the estate of him to whom it had accrued". It should be noted that in the above definition Gabba does not use the expression "vested right" in its wide meaning which includes also rights already

consummated, but in the restricted sense so as to include only those rights which have been acquired under the old law, but which have not yet been perfected at the time the new law is enforced.

It would appear from the above definition that Gabba defends vested rights not only because a violation of the same would offend human personality but further on the ground that it would cause actual and material loss to the subject of such rights. It is for this reason that he does not accept Lassalle's definition : the latter did not take such loss into consideration. The addition made by Gabba of the requisite that the right should have come to form part of the holder's estate is of importance, because it implies that vested rights do not include mere expectations and abstract faculties. Broadly speaking, both these are simply possibilities of acquiring a right and, therefore, not rights proper. Since an abstract faculty or a mere expectation is not an actual right—but simply a potential one—a law which does away with such faculty or expectation would cause no injustice at all .Thus if A has the expectation of succeeding to his father's estate on the latter's death, he cannot complain of an actual damage if a new law is passed under which he would not succeed to his father's estate, because strictly speaking he had no right so long as his father was alive : it is only with the death of his father that his right would have materialised. So also if, under a law, an alien has the "faculty" of owning a vessel, he cannot complain of a change in the law which deprives him of such "faculty", since so long as the "faculty" is not exercised, there is only *a mere possibility* of acquiring a right.

The above is in brief an outline of the theory of non-retroactivity of laws expounded by Gabba and of his definition of vested rights. This doctrine has practically been universally accepted by Italian writers, such as Bianchi, Borsari, Fulci and Polignani, who have expounded an identical doctrine; indeed, though certain Italian jurists differ slightly from Gabba in applying the general rule to the various questions of Transitory Law, none of them lays down any other doctrine. Italian Courts have unfailingly applied Gabba's definition and his teaching regarding the nature of vested rights. Gabba's doctrine has likewise been accepted by the great majority of non-Italian writers. The German jurists Pfaff and Hoffman hold that the said doc-

trine is neither practical nor exact because—they say—the notion of vested rights is rather vague. Hoffman maintains that a new law, provided it is conducive to the "betterment of juridical relations" should govern such relations even when they are the effects of an event or fact which took place before the enactment of the new law. Hoffman's theory is similar to, not to say identical with, the doctrine that favourable laws should be universally applied irrespective of vested rights, which doctrine, as it has already been said above, was effectively confuted by Gabba.

French teaching on the matter under consideration is not altogether clear. Aubrey et Rau lay down the general rule that laws are retrospective but they hold that this principle is to be observed in those cases only when the application of the new law does not prejudice vested rights. To them, however, the protection of vested rights is a corollary of the sovereignty of the law and a condition necessary to public welfare. It is not that it would be unjust to the individual, but that it would be against public interest, that vested rights are respected. These jurists, as almost all other French jurists, attach more importance to public interest than to the individual. It is noteworthy, however, that Laurent, though attaching the same importance to public interest, upon which he bases his doctrine (as indeed Aubrey et Rau and other French writers do), reports a number of judgements which accord fully with the doctrine of vested rights. French doctrine on this matter, seems to be based on two different considerations: public interest and respect for vested rights. These considerations, it seems, tend to become infused one in the other, since public welfare demands that what the citizen acquires under one law, he should retain under a subsequent one.

Our Courts have often applied the principles laid down by Gabba. A number of judgements delivered by Maltese Courts are to the effect that, rights acquired under one law are not affected by a change in that law. As far back as 1857 in the case "Pace Balzan vs. Busietta", both H.M.'s Commercial Court and the Court of Appeal accepted the view of T.G. Reinharth: "Quaecumque negotia jam ante legem novam latam, quoad essentiam suam, fuerant perfecta, licet consummationem suam, suosque effectus ab ictu demum post legem novam futuro eoque non extensivo, adhuc expectent, ea ad praeterita, omnino

referenda sunt, adeoque ex anterioribus legibus, nequaquam vero ex nova lege lata dijudicanda, modo non integrum sit negotium juxta novae legis, placita emendandi et perficiendi". (Osservaz. ad Christianeum). In this case, the Court of Appeal, declaring that "i diritti che risultano alle parti da una contrattazione..... sono al coperto delle innovazioni in contrario di qualunque legge posteriore", observed that, unless he expressly says so, it is unlikely that the legislator, in passing a new law, intends to cause detriment to rights already acquired before the promulgation of such new law. The principles laid down in "Pace Balzan vs. Busietta" have since been repeatedly upheld in subsequent judgements, e.g. In "Grognett vs. Caruana", decided in 1862, in "Speranza vs. Gauci" decided in 1864; in "Brincat vs. Cassar", in 1864, and in "German vs. Eynaud" in 1866. In all these judgements our Courts have followed the doctrine of Gabba; no definition of vested rights (as far as the writer is aware) has been given by our Courts, but it is perhaps safe to state that they would, in all probability, accept Gabba's definition. In conclusion it must be noted that this definition is a general one which cannot be of practical value unless it is applied particularly to the several questions relating to Transitory Law. Speaking of this definition, Gabba in fact declares: "Se altri troverà che quel concetto generale possa veramente essere addottato come principio fondamentale nella teoria della retroattività noi non possiamo intanto dimenticare che in una materia tanta complessa, il principio fondamentale, benchè indispensabile e retto, non ha tuttavia pratica utilità se non come punto di partenza per trovare principii più concreti, dedotti da quello per via di successive determinazioni".

COUNSEL'S DUTY

"It is not for the counsel himself to prejudge the question at issue. His duty is to see that those whose business it is to judge do not do so without first hearing from him all that can possibly be urged on his side."

LORD MACMILLAN.

MOOT *

ALFIO GIUNTI was born in Italy of Italian parents in 1880; he was brought to Malta by his parents in 1886. He was baptised and brought up in the Roman Catholic faith.

It is known that by the year 1910 he had an extensive business in Malta where he had also purchased a villa. He had also a great estate in Italy and was the owner of a factory there and was director of several companies carrying business in Italy.

In 1911 he went to Italy and there married Rachele Moricca by going through a civil form of marriage. He returned to Malta in the same year and in 1912 he applied for, and was granted, British Nationality. There were three children of this marriage, Giulio, Charles and Louis; they were all educated in Malta.

Alfio Giunti died in 1946, and by a will made in Malta in 1944, he left all his property to his wife Rachele as his universal heir.

Giulio, Charles and Louis have instituted proceedings against Rachele Giunti for the 'legitima portio' as the legitimate children of Alfio Giunti. Rachele Giunti contends that the children are not according to the Law of Malta legitimate as the marriage between her and Alfio Giunti was not a valid marriage according to Maltese Law.

Professor W. Buhagiar, B.A., B.C.L. (Oxon.), LL.D., kindly consented to hear the case.

Counsel for plaintiff: Mr. J.V. Galea and Mr. O. Gulia, B.A., L.P.

Counsel for defendant: Mr. G. Schembri B.A., and Mr. G. Degaetano.

Mr. Galea maintained that the question was one of classifying the rights on which the plaintiffs were basing their claims to the succession. Counsel for plaintiffs contended that by the civil marriage contracted in Italy, valid by Italian law, the decuius had contractually instituted his children as heirs and

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* *Reported by F. Montanaro Mifsud.*

thus given them a vested right which the will made in Malta in 1944 could not negative. The contractual institution of an heir was revocable, admittedly, but not unilaterally. Mr. Galea explained that one of the parts of the marriage ceremony in Italy was the reading to the spouses by the public official concerned of the law relating to the family, including the provisions regarding the succession rights of any future issue, which the spouses are presumed to have accepted.

Mr. Schembri, for the defence here pointed out that if Mr. Galea's contention was correct, absurd conclusions would result, such, as, for example, that no one could freely make a will after marriage. Moreover, it was recognised in all countries that all agreements made in view of a forthcoming marriage would lapse, should the marriage, for some reason or other, fail to take place.

Professor Buhagiar ruled that the reading of the Code was a mere formality, and in any case the important thing was to determine the domicil of Alfio Giunti at the time of his marriage to Rachele Moricca for on that question depended the validity or otherwise of the marriage.

Mr. Gulia spoke next. He said that, as Alfio Giunti's domicil of origin was Italian and that as the onus of proving a change of domicil rested on those who pleaded it, he would listen to the arguments brought forward by the defence and reserve the right to reply to them afterwards.

Mr. DeGaetano, who held that by 1911, when the marriage to Rachele Moricca took place, Alfio Giunti had acquired a Maltese domicil, made a reference to the facts of the case. We know that Alfio Giunti came to Malta with his parents in 1886, at the age of six. What happened between 1886 and 1910, is not at all certain, but we do know that he had an extensive business in Malta. He also purchased a villa — one of the strongest indications of a change of domicil recognized in jurisprudence. On the other hand, he was also the owner of a great estate and of a factory and the director of several companies in Italy: this would not, however, require his continuous presence there, and, in any case, such circumstances should not be given overmuch weight, for otherwise we will forced to maintain that a domicil of origin can never be lost, as Cheshire says in his review of the English case, Ramsay vs. Liverpool

Royal Infirmary. Mr. DeGaetano further stated that Alfio Giunti's conduct from 1911, also supported his contention: he went to Italy married an Italian woman, in Italy, but came back soon after to Malta to live presumably in his villa, acquired British Nationality and educated his children in Malta.

Mr. Gulia quoted Cheshire to the effect that, "unless the decuius has loosened all the ties that connect him with the country of his origin, the acquisition of a new domicil will only rarely be admitted", and brought to the support of his case a description of the facts in Winans vs. A.G. The possession of a factory and a great estate and the directorship of several companies in Italy were sufficiently strong proofs of the retention of Italian domicil.

Professor Buhagiar, after reiterating his ruling on the point of classification raised by Mr. Galea, made a further examination of the facts of the case, and came to the conclusion that the marriage between Alfio Giunti and Rachele Moricca was invalid because the former had by that time acquired a Maltese domicil and according to the prevailing ideas of Maltese Law one of the conditions for the validity of the marriage of a Maltese wherever celebrated was the observance of the formalities required by the Council of Trent.

Professor Buhagiar's decision was based on the following grounds :Alfio Giunti was brought by his parents to Malta, a child of six. He did not come for business purposes (what his father's motives in coming to Malta were, and whether he later acquired a Maltese domicil cannot be determined) but by 1910, a year before his marriage, he had an extensive business in Malta. This and the fact that he acquired British Nationality in 1912, must have entailed his presence in the island for a considerable time. Moreover, we know that he was staying in Malta immediately before the marriage and returned soon after. These circumstances would seem to satisfy the condition of residence requisite for a change of domicil. Proof of the existence, at the time of the marriage, of Alfio Giunti's intention to make Malta his permanent home rests primarily on the fact of his having purchased a villa in Malta — a villa which subsequent events seem to suggest that he purchased with the specific purpose of making his conjugal home: although he married an Italian woman and in Italy, he returned to Malta almost immediately. Further

evidence of the intention of abandoning the domicil of origin some time prior to the celebration of the marriage is the naturalization so soon after. Finally, the education of the children in Malta, although Alfio Giunti was a man of substance and could well afford to send them to Italy, was an indication of his having severed all ties, except some purely commercial, with his native land.

The further question as to whether the plaintiffs, despite the nullity of the marriage, had any right to the succession of the deceased was not discussed.

A LAWYER'S TRAINING.

For the preservation of the position of a learned profession and for the promotion of efficiency in the art we practice it is essential that the lawyer should be steeped in literature and keep his mind constantly refreshed and renewed by contact with the great thinkers of the past. So only can he attain to true eminence.

LORD MACMILLAN.

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THE INSTITUTES OF JUSTINIAN

"No law book has been so much admired for its method and elegant precision and none has been so frequently printed, translated, imitated and commented on as the Institutes of Justinian."

LORD MACKENZIE.

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THE LAW'S FUNCTION

"The law provides the citizen with a mechanism of life whereby all the incidents of his relations with his fellow beings are regulated and the element of friction eliminated by definite and familiar adjustments."

LORD MACMILLAN.

LAW REPORT *

H.M. Civil Court, Second Hall.

Application filed on behalf of Cynthia Margaret Colombos.

Decree given on 4. 9. 47.

Cynthia Margaret Colombos was domiciled in England and her father died before she reached the age of 21. She was a minor according to English Law but had attained majority according to Maltese Law having reached the age of 18 at the time of her father's death. She promised to sell immovable property in Malta and applied to the Competent Court for authorisation to effect the transfer.

Held that the authorisation was not required.

Ganado J. pointed out that in Private International Law the general rule is that questions of capacity to transfer immovable property are determined by the law of the land where the immovables are situated. Both English text-writers and English Case Law agree that the 'lex situs' is the governing law in all such cases. Cheshire in his treatise on Private International Law (1) states that capacity to transfer immovables whether by sale, gift, mortgage or devise, is regulated by the 'lex situs'. If full age is attained in country 'A' at 21, and in country 'B' at 25, a person 22 years old domiciled in A, cannot execute a valid conveyance of lands lying in B, whereas a person of the same age, even though domiciled in B can effectually convey lands in A (2). The same writer quoting Buckley L.J. says: 'Mr. Dicey's language, I think, is correct, that a person's capacity to make a contract with regard to an immovable is governed by the *lex situs*'. Story in his book on Conflict of Laws defines the question clearly: 'So if a person is incapable from other circumstances of transferring his immovable property by the law of the *situs* his transfer will be held invalid although by the law of his domicile, no such personal incapacity exists. On the other hand if he has capacity to transfer by the

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* **Reported by Mr. J.A. Micallef LL.D.**

(1) **P. 540.**

(2) **Cp. Sell vs. Miller (1860). ii Ohio State 331; Beale ii, 25.**

law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile' (3).

In European countries the general rule is that capacity in contracts relating to immovables is determined by the 'lex situs'. Section 7 of the Italian Civil Code lays down: 'I beni immobili sono soggetti alle leggi del luogo in cui sono situati'. Some Italian writers opine however that questions of capacity are governed by the personal law of the party, which according to the Italian system, is the law of Nationality. The Italian writer Fiore examines the theories submitted by different writers on the question and in conclusion remarks: 'sembra perciò più ragionevole il dire che le qualità fondamentali giuridiche della persona vanno regolate dovunque dalla legge della sua patria'.

In this particular case the evidence submitted showed that C.M. Colombos was 19 years old and of British domicile at the time of her father's death. She had not therefore attained majority according to the law of her domicile but she had full capacity to transfer immovables according to the 'lex situs' and according to her personal law. She was the daughter of a person who was born in Malta and therefore was a British Subject of Maltese Nationality. In these circumstances the learned judge held that applicant had capacity to enter into a contract of sale and therefore the Court's authorisation was not necessary.

H.M. Civil Court First Hall.

Pietro Vella vs. Fortunata Galea.

Judgment delivered on 8. 2. 47.

Pietro Vella by a Schedule of Preemption and Deposit exercised his right of Preemption against Fortunata Galea over the property situated at 192, High Street, Mellieha, Malta. On the 25th April 1945, plaintiff decided to withdraw his deposit and give up his right of pre-emption. Seven months later when the legal term for the exercise of the right of pre-emption was still running P. Vella filed a fresh schedule of pre-emption and deposit against defendant in respect of the same property.

Held that plaintiff by withdrawing his deposit had renounced

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(3) Vide O'Dell vs. Rogers 44. Wis. 136.

to his right of pre-emption and the second schedule was therefore, null and void.

Camilleri J. remarked that Sec. 1502 of the Civil Code (Chap. 23 Rev. Ed.) and Sec. 946 of the Code of Organisation and Civil Procedure (Chap. 15 Rev. Ed.) taken together, limited the right of the person exercising pre-emption in as much as the party exercising such a right could not recede therefrom after that the party against whom such right was exercised had signified his acceptance thereof by means of a judicial act. In such a case the party exercising the right of pre-emption could not withdraw his deposit because, through the declaration of the party against whom such right was exercised, a quasi-contract came into existence. If however the party against whom such right was exercised, did not file a declaration by means of a judicial act, the party exercising the right of pre-emption could renounce to his right of pre-emption and withdraw his deposit.

The learned Judge further argued that our Civil Code 'in subjecta materia' laid down that the right of pre-emption is exercised by the filing of the schedule of pre-emption accompanied by a deposit made within the term fixed by the law and that the only exception was Section 1521 providing for a sworn declaration in the schedule by the party exercising the right of pre-emption to the effect that he is not aware of the amount of the price or of the expenses made in connection with the sale. The deposit in such a case must be made by the party exercising the right of pre-emption on being served with a judicial act. If the deposit is not made within ten days, the schedule of pre-emption shall cease to be effectual saving the power of the party presenting the schedule to exercise again the right of pre-emption by presenting a fresh schedule. It would not be idle to add that this new schedule presupposes the failure on the part of the party exercising the right of pre-emption to make the deposit within the legal term and not the withdrawal of the deposit made after the exercise of such a right. Hence the deposit cannot but be considered as an essential formality in the exercise of the right of pre-emption (vide Sec. 1498, 1499, 1500-1504, 1507 Civil Code).

In view therefore, of the importance attached to the deposit

the Court agreed with legal text-writers that the withdrawal of the price by the party exercising the right of pre-emption before the party against whom such right is exercised has shown his acceptance is to be considered as a tacit renunciation to the right of pre-emption. An old judgment of the 'Supremo Magistrato di Giustizia' confirmed this view: 'Chi ha il diritto di retrarre se incomincia ad esercitarlo, e poi pentitosi se ne astiene, lo può liberamente fare; ma una volta ceduto tale diritto, non vi è luogo a pentimento' (vide Vol. I Lib. III, Cap. X 'Del Retratto' pag. 440 Dec. XXI Dto. Municipale di Malta by Sir Ant. Micallef). Pothier in his treaties on pre-emption commented on the point in question in the following words: 'Se il retraente avesse ritirato dallo Uffizio dei Deputati il prezzo che ha depositato *non vi è dubbio* che sarebbe decaduto dal retratto; ritirando esso il deposito equivale ad una rinunzia per sua parte'. (Pothier Trattato dei Retratti Cap. IX para 391 Vol. II, pag. 958).

Similar views are expressed by Troplong in his treatise on Sale (1), by Merlin in his Repertoir (2) and by Corradini in one of his passages in the work entitled 'De Jure Prelationis'. This latter writer however in his treatise remarks that he favours the view that if a fresh deposit is made 'res adhuc integra et intra tempus concessum' the presumption of a tacit renunciation should be disregarded and the party exercising the right of pre-emption could not be considered as having waived such a right. But this latter view, the judge pointed out, was contrary to what was stated in Sec. 946 of the Laws of Organisation and Civil Procedure (Chap. 15) whereby the party exercising the right of pre-emption could at any time before the resale withdraw his deposit, provided he gave up his right of redemption. Hence the Court was of the opinion that plaintiff could not exercise again his right of pre-emption and be reinstated 'in integrum' by a second deposit.

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(1) Para 725.

(2) Vol. XVII pag. 539.

NEWS AND VIEWS

We welcome the students of the Academical Course of Laws (1947-51) who have now become members of our Society. It is hoped that they will take a keen interest in the Society's activities.

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Mr. J.M. Ganado LL.D., B.A., who was President of the Law Society during the first three years of its existence and who devoted much time and energy in the interest of the Society and its members is now undergoing a post-graduate course at University College, University of London.

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Another member of the Society who is pursuing his studies in England is Mr. R.A. Stained B.A., Malta Rhodes Scholar for 1947. Mr. Staines has taken up residence at Worcester College, Oxford, and is reading for a Degree in Jurisprudence.

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Mr. E. Mizzi, B.A., LL.D., returned to Malta early in Summer after attending a post-graduate Course at the London School of Economics, University of London. He won the Government Travelling Scholarship as first student in the Academical Course of Laws (1941-46).

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The Foundation Members of the Law Society were sworn in as advocates during a ceremony which was held in the Main Hall of His Majesty's Court of Appeal on Monday 23rd June, 1947. An address was delivered by the President of the Chamber of Advocates and by His Honour the Chief Justice.