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EDITORIAL

FORENSIC PRACTICE

THE question of forensic practice required of law students before obtaining the warrant to exercise their profession has recently engaged the attention of the Legislative Assembly. As things stood before Act LXII of 1948, students after having obtained the academical degree of Doctor of Laws were required to attend regularly at the office of a practising advocate and at the sittings of the Superior Courts in order to be called to the bar. This caused much inconvenience and prejudice to law students who after a full seven year course at the Royal University were expected to undergo another year of practical training. Various efforts were made in the past to remedy this state of affairs but with practically no success. The said Act has happily altered the position. It provides that persons regularly following the academical course of law in the Royal University may start their forensic practice at any time after the 31st day of December of the last scholastic year of their course, instead of at any time after obtaining their degree. This enables graduates in law to start practising their profession six months earlier than was previously the case. The expediency of the reform is quite obvious especially in view of the length of the course for graduating in law. Moreover students have all the facilities of attending the sittings of the Superior Courts in the periods between lectures. The new measures were recommended by notable members of the legal profession and also by the University Authorities. It is hoped that the same facilities will soon be extended to students attending the course leading to the Diploma of Legal Procurator.

THE TREATMENT OF JUVENILE OFFENDERS

The treatment of adult criminals is quite up to modern standards whether as regards their moral, intellectual and physical welfare or as regards the state of the prisons. This, however, is not the case also with juvenile offenders who on account of their immature age and lack of experience merit special

consideration. It is submitted therefore that in this respect our Criminal Law leaves much to be desired in comparison with the English and American systems. Although it is universally held that a young criminal requires a treatment which is essentially different from that to which older criminals are subjected, the only alternative our law affords to the prison is the Approved School. The first offender's benefit which is no characteristic of juvenile delinquency does not solve but evades the problem. It would not therefore be amiss to mention the two most imprtant ways of treating juvenile delinquency, namely, the Borstal Institutions and the Probation System, which have characterised the need of looking on the delinquent child from the angle which befits his ripening faculties. It is hoped that it will not be long before the necessity of a reform in this direction is felt and adequate steps are taken to remedy the present situation.

It is not very gratifying to read in the Report on the Malta Prisons for the year 1947-48 that "every effort is being made to completely segregate the young men prison, and bring it into line with the Borstal Institutions in England in so far as the local regulations and laws permit." The very fact that juveniles are kept in prison, whether segregated from adult criminals or not, strikes at the root of any Borstal Institution worthy of the name. Mr. Watson, who has a wide experience in treating with juvenile delinquents, severely censures the system whereby unruly juveniles are sent to prison not to be kept there but to see whether they are suitable for Borstal treatment. "For despite the efforts of the Prison Commissioners to avoid contamination by older offenders, despite the setting aside of special blocks in some of the larger prisons as collecting centres for young persons, despite the excellent work which is done by the women visitors, prison remains and will remain a hopeless place for boys and girls." Moreover it is to be remembered that Borstal is by no means a prison. Its purpose is not to punish the offenders but to train them into good citizens, to afford them with every opportunity of learning how to live honestly in society. This is so much so that the Borstal system is organised on the same lines as an educational institution. The only restrictions which are imposed on the inmates of a Bostal institution are merely necessary for the maintenance of discipline. The officers in charge wear no uniforms, the boys are divided into

houses each having its own teams, and those who are more worthy are allowed to smoke. The Borstal Association then, which has been described as one half of the Borstal system and which is acquainted with all the inmates individually, takes care of them after their release from the institution. All this is essentially different from imprisonment which, moreover, as pointed out by Mr. Watson has a sordid glamour which makes the young miscreant feel important; he has the inverted satisfaction of being treated like a grown-up gangster, whereas he ought to be treated like a naughty boy.

In Borstal treatment the child is kept away from home, and this is the fundamental difference between this kind of treatment and the probation system. The child on probation remains in his home and the normal run of affairs is apparently unbroken in spite of the intereference of the probation officer. A Home Office Report stated that the essential principle underlying the probation system is supervision of the offender in his own home. "It is by far the most appropriate measure", writes Professor Cyril Burt, "where the causes of delinquency lie chiefly in the environment, and beyond the circle of the child's own home". Probation is not an acquittal. It is defined by Mr. Watson as "a system whereby an offender who has been found guilty, instead of being sentenced, may with his own consent be bound over in a sum of money under the supervision of a trained social worker and released for a trial period." It amounts to giving the offender another chance to prove his honesty, failing which he may also be brought to answer for the original offence. Conditions are imposed on him to secure that the occasions of crime are avoided, such as not to frequent certain places or to associate with certain persons. The magistrate is to explain to the child in plain words and in a friendly manner that he is being sent on probation and what probation amounts to, what duties he is expected to fulfil and what are the sanctions.

But in spite of all good intentions the success of probation depends on the efficiency of probation officers and on its strict application to suitable subjects. In England each probation area has its own probation officers whose work is supervised by a probation committee. The probation officer has to see to the welfare of the child during the probation period, he has to see

that the conditions of probation are begin carried out and to report any breach to the Court; but above all he is to be the best friend of the probationer giving him advice and encouraging him to overcome his difficulties. A misguided sense of mercy in sending an offender on probation when the proper treatment was to send him to an approved school or to Borstal may lead to ruinous results. Probation is only to be used when the circumstances of the case warrant its application. Professor Burt says that "the most obvious instances of failure (of the probation system), coming before my notice, have been those in which a little more knowledge beforehand might have revealed that probation would be unavailing — children with inherent mental or temperamental defects, children already hardened in bad habits, children coming from homes where the detrimental factors defied all efforts to correct them."

The probation system which has been applied in England with much success since 1907 has not yet reached our shores. We read however in the Report on the Malta Prisons that the matter is engaging the attention of the Government. We trust that more substantial steps are to be taken thereby helping to ease the problem of the treatment of juvenile delinquency.

FEES OF NOTARIES AND BROKERS

There seems to be an anomaly in our law in the disproportion between the fees due to a notary and the commission due to a broker. It is true that the work or services rendered by the one may have no bearing to those rendered by the other. Yet it is undeniable that in a great number of cases they are required to take part in the same transaction though from a different point of view, the one from the juridical and the other from the economic angle. It is here that their services converge and we may compare the roles they respectively play. The broker's task is merely to get the parties to a transaction together, he acts as the link between supply and demand. The duties he has to perform entail no particular difficulty or responsibility if he acts in good faith and does not commit any breach of trust. The notary on the other hand is a public officer who is to be endowed with those finer qualities of character and who is to be of such a mature age as to guarantee the fulfilment of his duties. He is to possess a deep knowledge of the

law in order to execute his office properly. He is the person who sets the seal to a transaction by drawing up the appropriate deed which is to govern the relations between the parties, and for which he is ultimately responsible. It is on account of the importance and responsibility which attach to the functions of notaries that their acts are subject to revision by a magistrate. Yet in spite of this substantial difference between the functions of a broker and of a notary in connection with the same transaction the remuneration which the law grants to a notary often constitutes a fraction of that granted to a broker. Thus it is the practice, sanctioned by s. 1412 of the Civil Code, that in the case of transfer of moveable property the rate of brokerage is of one per centum, and in the case of transfer of immoveable property it is of two per centum. On the other hand there is no percentage laid down for establishing the fees of notaries but the Notarial Profession and Notarial Archives Act establishes a scale of fees and accessory charges payable to notaries. In practice this works out to the prejudice of notaries. To illustrate this we may take as a practical example the transfer of an immovable worth £10,000. In this case the broker's fees would rise to £200 whereas the notary is only entitled to receive £12. 10s. No consideration of economic utility can justify such a disproportion.

THE LAW REPORTS

We take the opportunity once more of saying a word about the Law Reports. Occosionally a few old judgements are published in a rather unenergetic effort to bring the Law Reports up-to-date. The last judgements published date to over ten years back, and these in view of the quick evolution of case-law may well be termed old. In looking for an authoritative interpretation of the law or for the solution of cases not contemplated by the law none but the most recent judicial pronouncements can be relied on with safety. It is true that certain principles laid down years ago are still being applied, but it cannot be denied that later judgements often overrule such principles in accordance with the developing theories of law. Only the latest judgements can contain the right interpretation of the law in relation to the ever-changing needs of society. It is therefore in the interests of a proper and uniform adminis-

tration of justice that all the judgements delivered by our Courts should be easily accessible. As it is lawyers often lack the opportunity of knowing various important decisions, which is a serious handicap when analagous cases arise in practice. Moreover about half the volumes of the Law Reports which have up to now been published are out of print. It is submitted that these volumes should be reprinted in order that we may be in a position to acquire a complete if not up-to-date set of the Law Reports.

THE COMMERCIAL CODE.

Our Commercial Code, saving a few honourable exceptions due to Act XXX of 1927, dates back to 1857. We have not yet had the benefit of partaking in the great development which commercial legal theory has made in the past one hundred years. It is at one time a wonder and a compliment to the wisdom and foresight of the legislators of 1857 that, in view of the new legal reations which modern life has given rise to and in spite of the revolution in the means of communication which has occured during the last fifty years, it has been possible to adapt to modern needs rules enacted nearly a century ago. This is mainly due to the elasticity and comprehensiveness of many of the provisions. Thus, for example, if on account of the facilities of communication then prevailing in a contract of affreightment for the conveyance of goods in a general ship our law has required the master to sail with the first favourable wind it has also added the alternative "or on the first favourable opportunity". Provisions similar to this together with an equitative interpretation of the law have enabled a system based on principles of law and circumstances of life which in certain respects may be considered obsolete to regulate the relations consequent to modern needs.

Law is of its nature dynamic and it tends to change with the continuous development of the relations it governs. This is especially so with respect to commercial law. If law in general may be considered as a vital organism the commercial law is surely the best expression of such vitality. The formalities of civil law find here their minimum application. Traders evolve new juridical relations to suit their varying needs and often where possible modify the operation of the law accordingly.

But where this is not possible it is only just that the law should be changed. Thus it is due to considerations of expediency and to the activity of traders that the contracts of Account Current and Insurance have been created. But though the former has been brought up-to-date in accordance with the modern and prevailing theories of the indivisibility of remittances and the transfer of ownership, the latter is only partially treated by the Commercial Code. In fact our Code provides only for Marine Insurance, the other kinds of insurance being regulated by analogy from this or according to the principles of foreign laws. Our Bankruptcy laws are also in various respects defective and fall short of the modern conceptions of this institute. The law on Bills of Exchange can also be considerably improved, such as, to mention an instance, by acknowledging Bills of Exchange as executive titles. Last but not least our Company Law leaves much to be desired in the fifty sections in which it has been embalmed.

A Commission was set up some years ago to review the Commercial Code. The project of Professor C. Mallia paves much of the way to the desired goal. It is hoped that the work, difficult though it is, be expedited especially in view of the recognition in the Speech from the Throne, opening the Third Session of Parliament, of the necessity to remodel and modernise our commercial laws.

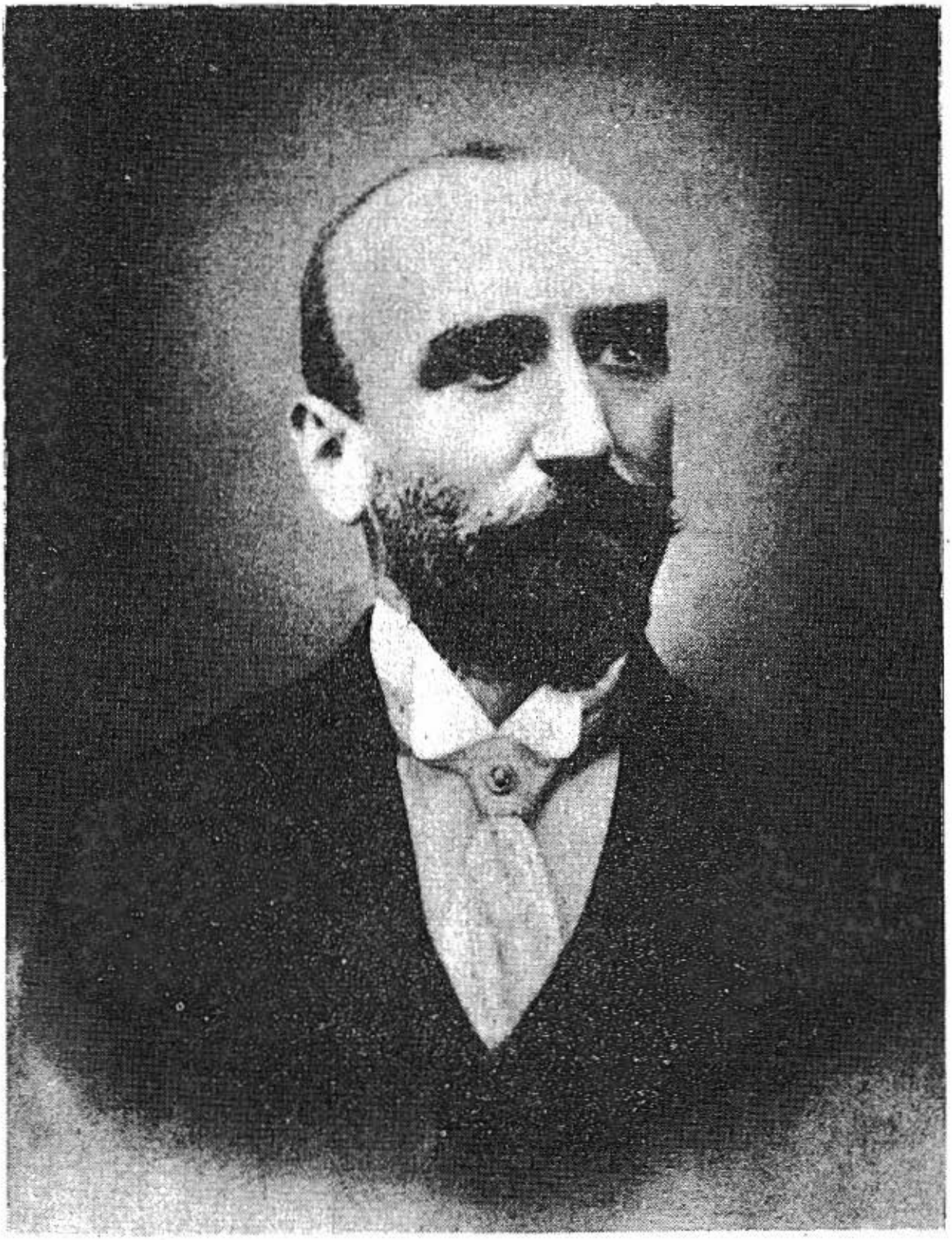
THE LAW COURTS.

Though in the Speech from the Throne the need of reforming certain branches of law was emphasised we notice that nothing was said about the premises of the Law Courts. In other countries the Law Courts consist of dignified buildings in such a manner as suits the majesty of the law and the administration of justice. They are not merely the place where rights are redressed but the emblem of the freedom of the people and of the supremacy of the law. This is no futile craving for aesthetics in style and architecture, but an essential element for inspiring all those who have recourse to the Courts of Law with a sense of awe which contributes to a proper administration of justice. Though the present Law Courts meet to a certain extent with the practical needs of the people yet one cannot fail to notice a touch of improvisation. It is true that in

the process of reconstruction we must put first things first, but if there is enough labour to divert from the housing problem then the building of Law Courts worthy of the import they have to a democratic constitution comes first on the list. In times as these we must not lose the opportunity of erecting buildings to suit the modern conception of Courts of Law, rather than be content with making the Courts of Law suit premises which were not intended for the administration of justice. As far as the Lower Courts are concerned we feel that a reform is more urgent as the state in which they are as well as the rush of cases hardly give any credit to the nobility of the legal profession.

BLESSED CONTARDO FERRINI, LL.D.

We are including in this issue a biographical article on the life of Blessed Contardo Ferrini. We are sure that those who were accustomed to see in its place biographical notes on the most distinguished Maltese lawyers will read with pleasure the short account of a holy man who was himself an eminent lawyer. It is a great inspiration to all who read the article of the necessity of looking after our spiritual welfare and of its compatibility with the daily requirements of life. It is this thought which has determined the author to write the article and which has given us the greatest pleasure in publishing it. Blessed Contardo Ferrini shows us that there is no gap between religion and science and that we may devote our life to the one without in any way neglecting the other. It is most fitting therefore that the University Students Law Society has unanimously chosen Blessed Contardo Ferrini as their Patron. In the near future a framed picture of our Patron will be hung, with due permission, in the lecture-room of senior law students. Meanwhile we look forward with confidence towards the Canonisation of our Patron which, we hope, is not far away.



BLESSED PROFESSOR CONTARDO FERRINI, LL.D.

Blessed Professor Contardo Ferrini LL.D.

By JOSEPH V. GALEA

CONTARDO FERRINI was born in Milan on the 4th April 1859, to Luigia Bucellati and Commandatore Rinaldo Ferrini, a famous professor whose work in the field of science is well known. Two years after Contardo's birth, Rinaldo bought a small villa at Suna near Lago Maggiore. There Contardo spent his childhood, running, healthy and happy, in the garden of the villa and on the shores of the lake. When he started going to school, he was at once marked for his sensitiveness which provoked much teasing from his fellows. Still he loved them all the more "for the sake of winning my ideals" he used to say.

In the Lyceum he was distinguished for diligence, holiness and for the ease with which he wrote verses. His habit of reflection and his force in arguing made his friends style him "Aristotle"! With some good school - fellows he founded an "Accademia Domestica" with the purpose of discussing and revising the subjects studied at school. During free hours and on holidays his favourite haunt was the "Bibliotheca Ambrosiana."

At the age of seventeen he entered the University of Pavia and took up his studies at Borromeo College. Here he was as sensitive as ever but he was loved for his sympathy and broad-mindedness as well as for his saintliness. He concluded his studies at Pavia with a thesis in Latin, which was accepted 'cum laude' on "The legal knowledge that may be derived from the poems of Homer and Hesiod." The Bishop of Pavia on congratulating him asked him what had helped him to obtain such high honours. Ferrini without saying anything, showed him a little cross he always kept about him.

As soon as he ended his studies at Pavia he won a Government scholarship and thus at the age of twenty-one he left for Berlin for the purpose of reasearch work in Roman Law. There he was moved by the good example of some German students and he yearned that the same Catholic spirit should prevail among students in Italy which in his times, the times of the Risorgimento, left much to be desired.

Contardo had early shown his liking for law, but he liked law in its philosophic aspect. He loved arguing, not so much in the law courts as in private, and he found sufficient matter for arguing in Roman Law. His inclination was enhanced by his acquaintance and friendship with several famous professors of Roman Law at Berlin, such as Pernice and Zachariae von Lingental. The last one eventually instituted him heir of all his scientific works. From this time onwards the life of a professor had a special appeal for him. Indeed, no one was more fit for the job. For his research he had a firm grounding; he spoke and wrote well in German; and he understood and could read French, Spanish, English and Dutch; of the dead languages he had studied Latin, Greek, Hebrew, Syrian and a snatching of Coptic and Sanskrit. At Berlin Ferrini published his "Parafrasi Greca delle Istituzioni attribuite a Teofilo."

On his return to Italy the authorities of Pavia recognising his worth, created a chair for the study of the History of Roman law in order to be able to keep him within their University. Thus at the age of twenty-four he became a professor as he had wished teaching, studying and writing books of no mean standard. With his students he was always friendly and not for once sarcastic. Besides he knew that from the chair he could really accomplish a high mission i.e., that of inspiring youth with high religious ideals.

In Roman Law Professor Ferrini was an authority and yet he never tired of pondering over what he had already written to see whether they stated the truth in the light of whatever advances he made. Study was a pleasure for him in so far as it was the search after Truth: "I am pleased that in my studies I have always sought for the Truth", he wrote. During this period he published his "Storia del Diritto Romano" (1885); "Il Diritto Romano" (1885); and "Diritto Penale Romano" (1888).

From 1887 to 1890 he lectured at the University of Messina where the Government had sent him and where he found students of a rather indolent character. Here he yearned for his native surroundings. During this "exile", however, he was immensely comforted by his love of study till in 1890, he was called to lecture before the students of Modena where he made a great success as a Professor in a subject which others often

submitted as dry knowledge but which he turned into living wisdom mainly through the enthusiasm with which he taught and through the clear and exact expression of his thoughts. At Modena the friendship was started with the famous Prof. Luigi Olivi then lecturing on International Law. In 1892, Ferrini was elected Cavaliere della Corona d'Italia, but he did not speak about it with anybody and great curiosity was aroused when his mother on emptying his case on one occasion found... a Knight's Cross!

In 1894, he returned to Pavia, and the year after to Milan. In political matters, which in those days too often trespassed the boundaries of religion, he always stood by the directions of the Holy See. Later, when he felt himself in duty bound to benefit by his skill the Catholic cause, he presented himself as a candidate and was eventually elected a member of the Council of Milan until the Catholic party was defeated and its members, among which Contardo, were thrown out. During all this period Contardo made it a point to carry out his duties in this regard with perfect diligence and faithfulness; indeed there were times in which he hardly had time for lunch in order to be able to attend as many meetings as possible.

Contardo Ferrini used to behold God in everything: "Art, Science, Nature, everything leads us to God. His spirit nestling in the hearts of the just makes them love all that is beautiful, true and worthy." Indeed the great thing about him is that in all his diverse and preoccuping tasks his soul was united to God always: "It is only our feet that touch the earth, our souls should be lost in God." The way to holiness chosen by Ferrini was the simplest and the shortest. He too like St. Theresa of the Child Jesus recognised that modern life elicits modern ways. We must have a lift for heaven. Daily mass and holy comunion, a visit to the Holy Sacrament every evening, devotion to Our Lady and St. Aloysius and a quarter of an hour meditation daily unless he could find more time. He laid a special importance on the last saying: "Holy Meditation is essential to those who wish to love God. Without it the soul loses all holiness and finds little relish in sacred matters." He had a great wish for the salvation of souls and he knew that among students he could be of great service in this respect. All this was clearly the cause of the smile which always lingered in

his look. Not that his life was an easy one but his holiness and the great ideals for which he strove kept him happy all along. Indeed he once wrote: "A smile may in some cases be the greatest act of courage, the highest self-denial, a marvellous act of faith."

One of Contardo's prayers was that he should regain the innocence of childhood. His love of children was intense; during parties he used to prefer to the company of the elder people that of children, to whom he spoke, playing or carrying them on his shoulders and sowing in them the seed of goodness. On one occasion one of his friend's children refused to obey his mother answering her back with a definitive "No!" "Come", said Contardo, "Let us go out into the garden and bury Mr. No." which they did in a little hole in the soil over which Contardo stamped his foot saying "Hereunder Mr. No is buried for ever and ever." The child became at once all thoughtful and he rarely disobeyed his parents again.

Contardo's mother seeing him love children so much thought she might well suggest some wealthy person with the view of marriage. But his usual answer to such proposals was that he simply had no time to think it over. A neighbour wished that he should marry one of her daughters and on their coming together with Ferrini from a walk which she had suggested she asked Contardo: "Which of the two do you like best?" "The Third", he answered.

His spouse was wisdom. He had published at least three great works besides those already mentioned namely "Teoria Generale dei Legati e Fedecommessi", "Manuale di Pandette" and "La Costituzione degli Ateniesi", a translation from Aristotle, with an introduction and notes as it was one of some Egyptian papyri which had recently been discovered.

However it cannot be denied that what made him renuonce to the married state was mainly his love for the highest form of perfection. Indeed he had taken the vow of perpetual chastity. But all this was in keeping with his great love of study.

On one occasion his colleague at the "Biblioteca Ambrosiana", Mons. Mercati, discovered a memorandum book and he invited Ferrini to examine it in order to decide on the importance of its contents. With great joy he discovered fragments of a collection of laws of the ninth century made by Emperor

Basilicus and which had been considered as irretrievably lost. Together with Mons. Mercati with great patience and eye-strain he deciphered, one by one, those words as they stood covered by another writing who knows how many years after. Thus he published his "Frammenti dei Basilici" and it cost him seventeen thousand lines to decipher.

His "Esposizione Storica del Diritto Penale Romano", "Delle Servitù", "Il Tipucito", "Il libro Siro Romano", as well as a new Italian edition of the Corpus Juris were all published after his death. But even during his life he was known as the greatest Romanist in the world. In his works he tried to compete with the greatest German jurists and he succeeded to such an extent that Mommsen himself, one of the most famous among them, had to declare that as for studies in Roman Law the twentieth century will be called after Ferrini and that Ferrini had transferred the pre-eminence of such studies from Germany to Italy. It was in this way and not by empty or high sounding words that Ferrini expressed his patriotism.

But one asks "How could he, who so early loved the open-air life and the mysticism of God's embrace advance so rapidly in the field of scientific research? "He himself answers: "Se i miei studi approdarono a qualche cosa lo devo alla preghiera.... La preghiera mi fa amare il raccoglimento, la solitudine, il lavoro". In truth his studies themselves were an unceasing prayer. He used to teach his pupils too that even in laws God manifests Himself and he used to explain how Divine Providence throughout the ages governs humanity and how humanity by means of laws fulfils Its designs. This he did because even among his own students materialism was rampant and while he fought it with all his might he looked sadly at the plight of his enemies: "Oh perchè in un cuore adolescente l'odio di Dio? Perchè l'odio dell'Increata Bellezza, del Bene Supremo? Non temete che il suo guogo sia aspro: non temete che Egli rifiuti dopo il tuo rifiuto, che v'abbandoni dopo il vostro abbandono, che v'insulti dopo la vostra bestemmia e irrida alla vostra disperazione. No, Egli è il Padre; correte al Suo amplesso divino.....

"Oh, sentitela tutta la dolcezza della dottrina Cattolica, gustatela nella sua intima verità e pensate se l'uomo ne può far senza! Pensate se l'uomo potrebbe vivere nelle molteplici

tribolazioni della sua povera vita, se non vi fosse questa sovrumana idea che le poche gioie dell'esistenza purifica e i molti dolori lenisce....."

"Oh Sia Lui, Lui solo il Dio della gioventù: non risuscitate numi pagani, oscene personificazioni del male! Non l'incomposta esultanza di Bacco ma la mite gioia del Paracleto rallegri i giorni della vostra esistenza!

"Non temete: Egli è il Dio dei giovani e giovane Egli stesso a tempo, poichè rimane sempre lo stesso e muta come un vestimento l'antico universo. Rimane sempre lo stesso e brilla perenne il lieto sorriso di Lui, brilla nei fulgidi colori del grembo sciolto del fiore, brilla nella volta stellata di un cielo senza nubi, nelle nevi dorate dell'Alpi mie!"

These quotations and others of the kind taken from his religious writings "Un pò d'Infinito", "Scritti Religiosi" and "Pensieri e Preghiere", are enough to show the mysticism which is so clearly marked in Contardo Ferrini. They show, too, with what earnestness he worked in the field of Catholic Action. Before he died he had hoped to write a treatise to show the influence of Christianity on laws and on the formation of civilisation. He had also hoped to be able one day to put all his knowledge as an apologist at the service of a Catholic University the creation of which in Italy was the greatest desire of his.

All the writings which I have last quoted and to which may be added another one: "Sul Recente Positivismo nella vita pratica", show that the central theme of Contardo's Apologetics is man's yearning for the Infinite. "Limitations oppress us and we are always looking for lands beyond every horison that arises before us." This yearning he himself felt more and more as an Alpinist. His father had founded a sort of club—Alpino at Suna and throughout his life the mountains were his peace, his rest and an inspiration of noble thoughts. "Dopo pochi giorni che sto curvo sui libri sento il bisogno di addrizzarmi e acchiappo allora le montagne e corre per le libere cime e dimentico volentieri cattedre e libri", a letter to a friend says. The mountain he preferred was Monte Rosa which glitters with its eternal snow. Surrounded with the vast silences and with the charm of panoramas he climbed and climbed all day. From the mountains he returned with renewed vigour, with a mind ready

for new thoughts and projects, with a springy gait, rosy cheeks and his head thrown upwards.

Contardo Ferrini firmly believed that the beauties of nature had a great effect on character and that the love of these beauties should find a place in the education of every individual. That is why he used to tell his pupils: "Povera adolescenza che non conosce altro passaggio che il corso, altri orizzonti che quelli del balcone, altri spettacoli di natura che quelli letti sui libri!" He admits: "Le gite Alpine mi fanno un gran bene non solo fisico, ma anche morale; mi ritemprano il carattere e mi elevano a pensieri diversi dai consueti." "Datemi", he says on another occasion, "Datemi quel ragazzo ch'io lo conduca per le Alpi nostre. Impari a vincere, in quegli ostacoli di natura, le future difficoltà della vita; impari a gioire al sole nascente contemplato da uno sperone di monte, al sole cadente che incenda i vasti ghiacciai, al chiarore di lume che scherza nella valle deserta; colga il fiore che cresce al limite delle nevi perpetue ed esulti di tanto riso di cielo fra quegli orrori di monti! Quel ragazzo tornerà fattosi uomo e la sua coscienza morale non ne avrà scapitato."

His company even in his open air life was always interesting. Often he used to discuss geological matters and oftener still to quote by heart from poets starting from Dante and down to Carducci, Zanella, Porta and others. He greatly admired the wisdom of life among the countryfolk, their sense of Providence, their peace of mind and joy in a fearless living. This lesson he used to carry to his pupils, the lesson, that is, that what matters is not what one does but **how** and **why** one does it. The Christian farmer is better than the pagan professor. The believing farmer has a plan in life, he knows its value and he has a remedy for its evils; the pagan professor teaches but he does not know how to **live.**

Humility is the way to the Infinite but one would ask: "How could Contardo Ferrini with all his successes remain humble?" He says: "Humility is founded on Truth." Contardo allowed everyone to correct him when their opinion was founded but when it was not he firmly resisted them; not however before he had pondered for long over the pros. and the cons. looking at the matter from all points of view. When he saw he

was in the right, he would not hesitate to stand against the greatest minds. He had the real scientific spirit.

Above all he was a gentleman. On one occasion, to quote one instance, having set out for a walk with some friends, they were compelled by a heavy rainfall to take cover in the house of a parish priest of Bondione. The rainfall was incessant. In order to keep the company gay he took up his pen and wrote:

"Un piova inesorabile
Ci trattiene a Bondione;
Ci darem dunque a ineffabile
E crudel disperazione?
Non è questo uno specifico
Opportuno in fede mia!
Per la vita è necessario
Praticar filosofia!
Se non fosse mai piovuto
O piovuto sol più tardi,
Non avremmo conosciuto
L'eccellente Don Riccardi....."

His company was always interesting and he always did all he could to keep men in the same mood of perfect happiness as himself. It was also because of this that his friend Olivi had planned with him to go on a journey together to the Holy Land; but while they prepared, the Heavenly Jerusalem was awaiting Ferrini. Olivi had to go alone and Contardo was to rest for a while at the villa of Suna amid the recollections of his childhood because of a disease which developed into heart trouble. This notwithstanding as soon as his condition bettered he resumed his lecturing and in one of his last letters he says: "Fui preso nelle spire degli esami e delle lauree e ne uscii più morto che vivo, per la fatica e per il caldo." Also during this period he endeavoured to accept the invitation to form part of a Government Commission and he had travelled to Milan for this purpose.

However he had to retire to Suna once again where he continued for the few weeks till his death, working on his three main books which were pre-occupying him at the time: the edition of the Tipucito, that of "Libro Suo Romano", and "Servitù Prediali". Being accustomed to walks as well as to study he could not give up visiting his mountains. On one occasion having roamed for some time in the vicinity of Monte Rosa

with a friend, he was suddenly taken ill and drank from the first spring he met. In a fortnight's time he developed typhoid fever of which he died on the 17th October 1902.

Certainly no life could be more useful in showing the fallacy of the supposed struggle between science and faith. In Contardo Ferrini nature and grace, science and faith have all endowed their best gifts and it is because of this that the Royal University Students Law Society has decided to put before its members the sublime ideal of this Blessed Professor and at the same time to invoke his aid and protection in the toilsome road that is for its present and future members to plod.

CORRESPONDENCE

Christ Church,
Oxford.
9th January, 1949.

Sir,

Thank you so much for your gracious word of congratulation on my appointment as Lecturer in International Law and Conflict of Laws.

May I at the same time press for a corrigendum in your next issue in the form of an addition of the Degree B.A.Hons. (Oxon) after my name. As it is, I am quite frankly at a loss to discover whether I come under "News" or "Views".

Yours, etc.,
EDW. BUSUTTIL.

We assure our Correspondent that in future all precautions will be taken to allay any suspicion of bad blood—The Editor.

Bilateral Promise of Sale

By GEORGE SCHEMBRI, B.A.

AS our Civil Code deals expressly with unilateral promise of sale in Section 1407 (1) and omits to mention bilateral promises of sale, it may not be out of place to examine the real position of the latter in our law. Such bilateral promise is in common use and it is essential to establish its real nature so that one can deduce its true effects. The utility of such investigation is all the more felt when one considers that bilateral promises of sale are more common than unilateral promises.

A promise to sell is to be kept clearly distinct from a mere *offer*, which creates no obligation. To the *offer* must be added an *acceptance* so that an obligation might be said to exist. Thus if A promises to sell a thing to B, who accepts such promise, a unilateral promise is contracted; if B, besides accepting the promise of A, promises on his part to buy the thing, then there is a bilateral promise of sale. Hence, while in a unilateral promise only the promisee may ask for its execution, in a bilateral promise any party may compel the other to fulfil the agreement.

Section 1589 (1) of the French Civil Code lays down that a promise of sale is equivalent to a sale when both parties are agreed on the price and the thing. In French law the nature of such agreement is quite clear. It amounts to a definitive sale for, as French commentators say, once there is a bilateral agreement as to price and thing the requisites of sale concur and the transaction is to be so considered notwithstanding that the parties have termed it a *promise* of sale. The Italian Civil Code is completely silent on promises of sale, so that Italian Courts and commentators are free to settle the nature of such agreement in accordance with the general principles of civil law. A great number of Italian writers have followed the French School; others hold that under no circumstances whatever should a bilateral promise of sale be considered as equivalent to a sale.

Prior to examining the reasons which the latter group of Italian commentators adduce to prove that a bilateral promise of sale cannot be equivalent to a sale, we shall see whether there

is any practical utility in considering promises of sale as something different from sale.

In terms of Sec. 1422 (Civil Code) the sale of a *res aliena* is nuil. But it is quite legal for the parties to contract a bilateral promise of sale, wherein it is agreed that the sale of a *res aliena* shall take place at a future date, when such thing shall have been acquired from its owner. If we were to hold that there were no difference between a bilateral promise of sale and a definitive sale it would be impossible to effect such a transaction.

In the sale of immovables it is common practice in Malta to conclude a bilateral promise of sale as a preliminary act, so that the buyer might investigate the seller's financial position. Every diligent buyer conducts such investigation, for if the property to be sold is hypothecated, he might be evicted. It is true that the law requires the seller to warrant the peaceful possession, but if after the eviction the seller is found to be insolvent, such warranty would not avail the evicted buyer, who would have to bear the loss. Hence the practice of concluding the preliminary agreement, so that if any of the parties finds any reasonable objection to the conclusion of the definitive sale, the latter will not take place and the promise of sale is dissolved without any of the parties having run any risk at all.

There are various other cases wherein the promise of sale is found of practical benefit. As a public notary is not always found at hand, the parties find it quite convenient to enter into this preliminary contract by means of a private writing. It is even of great use in sales of property which require, prior to their being carried out, the authorization of the court of voluntary jurisdiction.

One may safely conclude that in practice there is a place for bilateral promise of sale, since it performs a very useful function. Besides, it is a principle of civil law that the parties may enter into any agreement so long as it is not prohibited by law or contrary to morality or public policy. As in our law there is no express provision on the matter, it would be too arbitrary for the Court to hold that a bilateral promise of sale is equivalent to a sale, notwithstanding that the parties have expressed their intention to contract only a *promise* of sale.

Our case-law, though rich in the matter of bilateral promise of sale, does not contain any single pronouncement on

the *nature* of such agreement. In all judgments its nature has been presumed to be that of an agreement made up of two unilateral promises; never has a judge adopted the French view. We have already seen the practical basis of the view followed by our Courts; now we shall inquire into its theoretical juridical foundation.

C. F. Gabba (1) writes: "Promessa bilaterale di contratto è obbligo convenzionale di porre in essere un contratto. È quindi la promessa bilaterale di contratto, come dice Coviello (Dei contratti preliminari nel diritto moderno italiano, 1896, p. 18) un contratto essa stessa; è un contratto che ha per oggetto un contratto futuro. Due persone o parti cioè, le quali intendono porre in essere fra di loro un dato contratto definitivo, ma attualmente, per qualunque motivo non vogliono o non possono porlo in essere, si obbligano però reciprocamente a porlo in essere più tardi."

The object of the bilateral promise is, therefore, the *conclusion of a future definitive contract*, and not the *thing* forming the object of the future contract. The necessity of mentioning in the bilateral promise the thing and the price arises from the fact that otherwise the future definitive contract would not be sufficiently specified if mention of thing and price were omitted. Surely, a mere promise to conclude a future sale, without specifying the object and price of such future sale, would be too vague and hence no serious promise at all. It is therefore essential that in the promise of a sale mention should be made of all the necessary elements of a definitive sale. If such elements are not expressly specified their determination should not depend on the mere will of any of the parties. As our Courts have always considered a bilateral promise of sale to consist of two unilateral promises, one may safely apply the provisions of our Code relating to unilateral promise. The fixing of the price may therefore be left to one or more persons mentioned by the parties (Sec. 1403 (2), or to one or more experts not mentioned (Sec. 1404) or it may simply be agreed that the price is to be the fair price (Sec. 1408). In all such cases the fixing of the price is not left to the arbitrary will of any of the parties.

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(1) "Contributo alla dottrina della promessa bilaterale di contratto", Nuove Questioni di Diritto Civile Vol. I. (1912).

The two other requisites of contracts in general—capacity and consent—must also concur. The parties to the promise of sale are to be capable of contracting at the time of such agreement. A married woman without her husband's consent or Court's authorization, a minor, an interdicted person, may not conclude a promise to sell, in accordance with the general principles of civil law. A very interesting point was decided by the Court of Appeal in *Debono et* vs. *Falzon*, 21. 5. 1947. *Inter alia* the Court had to decide whether a promise to sell property belonging to minors entered into by their father who had forfeited his paternal authority was valid at law. One of the parties contended that since the father lacked paternal authority he could not represent his children on the act. The Court applying Sec. 1042 (2) held that the father bound himself in favour of another person to the performance of an obligation by a third party (in this case the minors). The father was personally bound to see that the children did actually transfer the property to the other party. If he failed he would be liable for the payment of an indemnity, but no specific performance of the promise of sale could be ordered. In order that the promise of sale could produce its full and usual effects the ratification of their father's action by the children was required. In this particular case, the Court held that such ratification was afforded by the decree of the Court of voluntary jurisdiction reinstating the father in his paternal authority and authorizing the sale.

The consent of the parties to enter into a bilateral promise of sale must also result clearly. There should be no doubt as to the intention of the parties to conclude merely a preliminary contract and not a definitive sale. As Gabba says : "E questa certezza può tanto desumersi dalle parole del contratto, quanto dalle circostanze nelle quali il contratto è stato fatto. È una questione di fatto codesta, che tocca al giudice decidere" (2).

A promise of sale must in some cases comply with certain formalities in order that it may be valid. Sec. 1277 (a) lays down: "Any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property" shall on pain of nullity be expressed in a public deed or private writing. Thus, in the pro-

(2) op. cit. p. 138.

mise to sell immovables or transfer rights over immovables a private writing at least is essential, and as the First Hall held in *S. Micallef* vs. *E. Micallef et*, 1921 (3), "fino alla redazione della scrittura, non vi sono che mere trattative non aventi alcun valore obbligatorio per alcuna delle parti." Promises of sale of property other than immovable require no formalities and may be concluded even verbally.

Before passing to the effects of such agreement, it is important to establish the nature of the obligation which arises from it. All writers agree that the obligation is personal and not real. If the promisor disposes of an immovable promised to another, the promisee cannot recover it from such third party; he has no real right over the thing pomised. This personal obligation is an obligation *to do*, for as Gabba writes: "L'obbligazione assunta in virtù della promessa bilaterale di contratto è il *contrahere*. Ora questo *contrahere* è un *facere*" (4).

What happens if any of the parties unjustly refuses to abide by the promise? Can one compel the other to perform his part of the obligation, or may he sue him only for damages? Text-writers do not agree as to the correct solution of this question. Cuturi (5) and Tartufari (6) opine that as it is a personal obligation *to do*, a judgment of a Court cannot enjoin its specific performance, since a Court's order cannot replace the will of the party, which is the essential element of a contract. Gabba (7) expresses the same opinion: "In virtù del canone *nemo potest praecise cogi ad factum*, comune al diritto romano ed al diritto odierno, l'azione per far valere una promessa di contratto, sia unilaterale, sia bilaterale, come ogni azione avente per oggetto un *fare*, non può mirare ad una coazione giudiziale del promittente, che non la mantenne spontaneamente. Quale effetto giuridico può conseguire contro la volontà del promittente restìo, l'altro promittente che agisce in virtù della promessa di contratto? Non potrà certamente l'attore valersi del diritto datogli dagli articoli 1220, 1239 (Sec. 1770, 1192 (2) of our Civil Code) di fare adempiere la pro-

(3) Coll. Vol. XXIV, II, 484.
(4) op. cit. p. 154.
(5) Della vendita, della cessione e della permuta, Napoli, 1891, p. 61.
(6) Il Codice di commercio commentato, Bolaffio e Vivante, Vol. II n. 41.
(7) op. cit. pp. 165, 166.

messa di altri, a spese del promittente resti0. Imperocchè il *contrahere* è una manifestazione di volontà, che di sua natura non può essere fatta se non da chi l'ha promessa, e dallo erede suo, non mai da una estranea persona in vece e nome di quello."

Other writers, however, hold that the promissor may be compelled to perform specifically his obligation, if he is in a position to do so. Pothier (8) writes: "Dall'altra parte si dirà che la regola *nemo potest cogi ad factum* e quella pure che le obbligazioni *quae in faciendo consistunt* si risolvono necessariamente nei danni ed interessi, non ricevono applicazione che rispetto alle obbligazioni dei fatti esteriori e corporali, i quali fatti non possono supplirsi che in una condanna dei danni ed interessi. Ma il fatto il quale è l'oggetto di una promessa di vendere non è un fatto esteriore e corporale della persona del debitore; può questo supplirsi mediante una sentenza, come l'abbiamo esposto, la quale ordinerà che non volendo il debitore eseguire il contratto di vendita, la sentenza terrà luogo del contratto. Questa opinione pare addottata nella pratica, siccome quella la quale è più conforme alla fedeltà che deve regnare tra gli uomini per l'adempimento delle loro promesse." Such also is the opinion of Baudry Lacantinerie et L. Segnat (9) and of Giorgi (10).

Our legislator followed the latter view. Sec. 1407 (1) reads: "A promise to sell a thing..... if accepted, shall create an obligation on the part of the promisor to carry out the sale, or if the sale can no longer be carried out, to make good the damages to the promisee." Our law is in this matter quite definite. The payment of damages is subsidiary, for it may be resorted to only if the specific performance is impossible, either because the thing no longer exists or because it has been disposed of. The responsibility for the performance of the obligation or for the payment of damages rests on the persons who are parties to the agreement and on their respective heirs.

Specific performance or payment of damages may only be demanded if a party fails unjustly to perform the obligation. In *Portanier* vs. *Grima*, 24. 3. 1939, the Court of Appeal held that in order to be exempted from complying with the obligation it is permissible for the buyer to prove the existence of any fact which

(8) Vendita, II, n. 479.
(9) Trattato Teorico-Pratico Di Diritto Civile, XIX, n. 66.
(10) Teoria delle obbligazioni, III, p. 169.

may be a sufficient ground for the rescission of a definitive sale, in view of the fact that the preliminary contract would finally lead to the contract of sale.

All judgments agree that a just cause frees the parties from complying with the obligation. An example of just cause is afforded by well-grounded fear of being in future molested in the peaceful possession of a thing (11). The principle enunciated in *Sciberras* vs. *Scicluna*, 1898, (12) : "Niuno è tenuto a devenire alla esecuzione della promessa di comprare un fondo, del quale non può avere il pacifico godimento per cause imputabile a chi ne ha promesso la vendita", has been reaffirmed in many subsequent judgments (13).

Not any kind of fear of molestation amounts to a just cause. "Il timore ragionevole di molestia non può avere per causa che un *diritto di proprietà o altro diritto reale sulla cosa* a cui un terzo pretende o per effetto del quale il compratore potrebbe in tutto o in parte essere evitto dalla medesima" (11). In this case, *Testaferrata Olivier* vs. *Bartolo*, the Court of Appeal did not deem to be a just cause for non-performance of a promise of sale the fact that the seller did not possess other property free from hypothecs so as to serve as sufficient security for the buyer against eviction. The Court observed that the warranty of peaceful possession requires only a general hypothec and not a special hypothec over a particular immovable, so that for the purposes of law a general hypothec over present and future property is considered to be sufficient warranty. Indeed, in order to effect a sale one need not prove that he has other property free from hypothecs, the value of which amounts to that of the property being sold (14). The parties may, however, validly stipulate in the promise of sale a condition that the seller is to possess property not hypothecated to serve as security; such condition must be expressly laid down.

What is the position if the property which is being sold itself is subjected to hypothecs? May one refuse to buy because of

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(11) Testaferrata Olivier vs. Bartolo, C.A. 1923, Coll. Vol. XXV, I, 435.

(12) Coll. Vol. XVI, II, 344.

(13) Vide also Scifo vs. Zammit, Vol. XVIII, II, 129; Portelli vs. Tabone, XXV, I, 773; Vassallo vs. Galea Testaferrata, XXVI, I, 801.

(14) Vide also Col. Gordon vs. Sac. Zammit Falzon, C.A. 16. 12. 1921.

such burden? In *Vassallo* vs. *Galea Testaferrata* (15), the Court of Appeal held that "ipoteche accese per garanzia di stabili venduti o posti in divisione, o per sbanchi effettuati, non sono per regola generale e salvo l'apprezzamento dei fatti e delle circostanze particolari, bastanti per dare diritto al debitore del prezzo di beni di ricusarne il pagamento. Tali ipoteche, però, sono sempre da prendersi in calcolo, quando si tratta di difesa consentita da uno che acquista immobili e li rivende, facendone commercio, molto più quando vi ricorrono altre cause da far giustamente temere il pericolo di evizione o molestia." The Court further pointed out that this principle was applied by our Courts to promise of sale in the judgments reported in Coll. Vol. XIII, pp. 455, 509, and in *Ebejer* vs. *Grima*, F.H. 11. 3. 1914.

The prospective buyer has a right to refuse to abide by his promise if he learns that the property is heavily hypothecated *after* the conclusion of the promise. Such right pertains to him also if, *at the time* of the conclusion of the promise, he is aware of such hypothecs, which have for their cause an act of the seller himself; for indeed, if the hypothecs are due to an act beyond the control of the seller, the promise must be fulfilled once that the buyer knew of their existence. Troplong (16), who makes this distinction, states that the knowledge of such hypothec on the part of the buyer "non basta a provare che egli abbia voluto assumerne i rischi comprando ed incaricarsi degli oneri, imperocchè egli ha potuto pensare ed eziandio deve avere naturalmente supposto che il venditore avrebbe pagato i suoi debiti e così fatto cessare le cause della ipoteca" (17).

In the above quoted case *Portanier* vs. *Grima*, the Court of Appeal discussed whether the allegation that a house was haunted amounted to a just cause for not performing the promise of sale. The judgment of the Court of first instance, confirmed by the Court of Appeal, quoted two authors holding opposite views on the matter. Troplong (18) is of the opinion that it is ridiculous in these days to assert that a house is haunted. Other writers however hold that if from the evidence it results that a house is really haunted and as a consequence the peaceful possession may

(15) Coll. Vol. XXVI, I, 801.
(16) Vendita, n. 418.
(17) Vassallo vs. Galea Testaferrata, XXVI, I, 801.
(18) Vendita, n. 548.

be disturbed, the prospective buyer is justified not to abide by his obligation to buy. The Court of Naples in re *Colombo* vs. *Scotto*, 12. 10. 1915, held : "Non costituisce turbativa del pacifico godimento della casa locata l'asserzione che la causa stessa è abitata dagli spiriti, a meno che non si dia la prova che il godimento sia realmente turbato dall'avverarsi di fatti obiettivi rilevati e controllati da più persone senza prevenzione e passione" (19).

It is common practice in these Islands in the case of a promise of sale of immovable property to give to the person who promises to buy the faculty of briefing a lawyer to examine whether there be any just cause for fearing molestation. Surely the prospective buyer may avail himself of this opportunity, but may he refuse to perform his obligation just because the lawyer advises him not to carry it out? In other words, is the advice of the lawyer conclusive? A distinction must be made : If in the agreement both parties agreed to subject the performance to the condition of a favourable decision of a lawyer named in the deed, then the opinion of the lawyer is conclusive. (20). If, on the other hand, the condition of consulting a lawyer is reserved by one party only, then the opinion of the lawyer is merely consultative and does not bind the other party; in such case only the Court's decision that there is a just motive relieves the party from the performance of its duty (21).

May a person be compelled to buy a tenement forming the object of a promise of sale, if it is destroyed while he is in delay? In *Calleja et* vs. *Vella*, the plaintiff asked the Court to order defendant to pass to the contract of sale of a tenement in terms of a bilateral promise of sale between them. While the action was still pending before the Commercial Court the house was partially destroyed by enemy action and the defendant *inter alia* pleaded that he could not perform the final contract since there was a change in the subject-matter. Both the Commercial Court and the Court of Appeal, 13. 7. 1942, upheld defendant's plea on the strength of Sec. 1425 (Civil Code) which reads : "(1) If at the time the contract of sale is made, the thing has totally perished, the contract is void. (2) If the thing has perished only in part, the buyer may elect either to repudiate the contract or to de-

(19) Fadda: Giurisprudenza sul Cod. Civ., IX, n. 219.
(20) Dr. Pisani vs. Xuereb, IX, 53.
(21) Testaferrata Olivier vs. Bartolo, Coll. Vol. XXV. I, 435.

mand the remaining part at a price to be fixed proportionately by means of a valuation." In this case the house was partially destroyed and the buyer elected not to buy; a matter which he was free to do since the law granted him an absolute option. Both Courts however observed that plaintiff could sue defendant for damages if it could be proved that defendant was in delay.

A matter decided by our Courts on various occasions relates to the fee due to a broker if after the conclusion of a promise of sale the definitive sale does not take place. Sec. 1412 provides: "In the absence of an agreement, brokerage shall be regulated at the rate of one per centum in the case of sale of movables, and two per centum in the case of sale of immovables." This section deals only with the brokerage fee due in the case of sale, and as a promise of sale is not equivalent to a sale the Court of Appeal, in *Schembri Bugeja* vs. *Darmanin* (22), held that the rates fixed in Sec. 1412 did not apply to a promise of sale. In such case the fee is fixed by the Court, if it is not settled by agreement beforehand (23).

An agreement of promise of sale is not binding indefinitely on the parties. The law in Sec. 1407 (2) fixes the period in which it retains its binding effect: "The effect of such promise shall cease, if the promisee within three months from the day on which the sale could be carried out, fails to call upon the promisor, by means of a judicial intimation, to carry out the same, unless the parties shall have fixed a longer time." It is to be noted that the three months begin to pass from the day on which the sale can be carried out. Thus in the case of a promise to sell entailed property, the Court of Appeal held that the three months began to run from the day of the disentailment (24).

The three months mentioned in this section constitute a term of prescription subject to interruption. As the Court of Appeal stated in *Pace Balzan* vs. *Ellul* (25), "quella limitazione di tempo, entro cui si può constringere il promittente ad eseguire la sua promessa, ha secondo la legge gli effetti di una prescrizione

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(22) Coll. Vol. XVI, I, 115.

(23) Cesareo vs. Cardona, C.A., Coll. Vol. XII, 125; Curmi vs. Saccone F.H., Coll. Vol. XVII, II, 19; Buhagiar vs. Colombo, C.A., Coll. Vol. XXI, I, 251.

(24) Sciberras D'Amico vs. Cilia, Coll. Vol. XXVI, I, 270.

(25) 20. 8. 1879.

per la quale si ha da intendersi stabilito il termine di tre mesi, che può essere soltanto interrotto per altri tre mesi mediante atto giudiziario, e così via; altrimenti l'effetto della promessa viene a cessare'' (26). In *Mifsud et* vs. *Strickland* (26), the Court of Appeal pointed out further: ''La promessa reciproca di vendere e di comprare deve riputarsi come una convenzione unica e completa, e basta per mantenerla in vigore, l'interpellazione fatta da una sola delle parti per atto giudiziario entro il trimestre.''

Sec. 1407 (2) further implies that the parties themselves may, in the agreement, fix the period of time during which such promise is to remain operative. It is important to note that such period is considered to be of a different nature from that of the term fixed by law. Here it is not considered as a term of prescription, but according to a judgment given by the Court of Appeal in *Portelli* vs. *Tabone* (27), the lapse of the agreed period produces a *forfeiture of rights*. As the Court stated in this judgment, the term ''non può essere modificato o prolungato senza che intervenga un nuovo consenso dai contendenti a differenza dei termini legali o processuali, che se non perentori, sono per disposizione espressa della legge prorogabili per giusta causa. (Art. 103 delle leggi di Org. e Proc. Civ.). Si deve infatti assumere, nell'ipotesi del termine contrattuale, che ciascuno degli stipulanti abbia subordinato il suo consenso alla professione di quel termine, per modo che non possa essere lecito all'altro contraente di allontanarsi da quel patto senza il previo consentimento dell'altra parte.'' In such case a judicial intimation to perform the obligation made within the period agreed upon does not prorogue the term. The only remedy for the aggrieved party is to demand judicially the performance of the obligation after that the term has expired. Such action, however, must be started soon after the lapse of the term.

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(26) Vide also: Mifsud et vs. Strickland et. C.A. Coll. Vol. XXVIII, I, 8; Azzopardi vs. Mallia, F.H. Cell. Vol. XIV, 57.

(27) Coll. Vol. XXV, I, 773.

Reduction and cancellation of registrations of hypothec and privilege

By NOTARY VLADIMIR FORMOSA, LL.D.
(*Assistant Director of the Public Registry*)

THE Civil Code, after dealing with the manner of registration of Hypothecs and Privileges, passes on to speak of their cancellation and reduction, in sub-title V of Title XXIII, a subject which is of the utmost importance, especially with respect to those intending to exercise the Notarial profession.

The cancellation of a registration (annientamento giuridico d'una inscrizione) may take place either by the consent of the creditor or in execution of a judgment which must have become a "res judicata". A judicial cancellation or reduction takes place, of course, when the creditor is unwilling to give his consent for the cancellation or reduction, in which case, the interested party institutes an action before the Competent Court to obtain his objective. We may also have the case of a judicial reduction of a registration if it is shown that the registration can be restricted as to the property affected thereby, without injuring the interests of the creditor. Similarly, a reduction of the property subject to hypothec may take place in the case of general conventional hypothecs created to secure a right contingenet upon an uncertain event, e.g., debt of warranty of peaceful possession, or debt in security of the execution of contracts for supply and services.

It is to be noted that the law requires a "*public deed*" in order that registrations be reduced or entirely cancelled. The reason is that a cancellation or a reduction of a registration is an alienation of real rights, and the law requires that all transactions affecting immovable property or real rights thereon should be brought to the cognizance of third parties by means of the relative Note to be presented in the Public Registry.

The expression "public deed" as indicated in Section 2165, must be given a strict interpretation. Thus, a document containing the acknowledgement of a total or partial payment of a debt, and which is enrolled (transuntato) in a public deed, would not comply with the law. This principle is based on the teachings of Giorgi who states that "le parti possono depositare pres-

so un Notaro un testamento olografo, o un'atto privato di altra natura, e pubblico sarà senza dubbio l'atto del deposito ricevuto e disteso dal Notaro; ma non per questo diviene pubblica la scheda depositata." A case on this point arose in 1925, when the late Notary Francesco Giorgio Schembri attempted to file in the Public Registry a Note of Reference resulting from a receipt which had been enrolled in his records. The Note was rejected, and the reasons submitted by Notary Doctor Vincent Gatt, then Assistant Director, who based his sound arguments on the theory of Giorgi, were also approved by the Crown Counsel.

We have seen that in case of a sentence of the Competent Court ordering the total or partial extinction of a registered debt, it is necessary that the judgment must have become final and binding (res judicata). Section 271 of the Code of Organization and Civil Procedure states: "A judgment subject to appeal, ordering the cancellation of any hypothecary registration, may not be given effect to by the Director of the Public Registry, without a certificate from the Registrar that no appeal against such judgment has been entered and that the time for entering an appeal has elapsed." This certificate is of the utmost importance, for, if a registered debt is cancelled, it cannot revive that is, if a right has ceased to exist, its effects cannot be restored. The only remedy, if we might call it a remedy, after all, would be to file a new Note, which would not, however, enjoy its former priority, but would only rank as from its new date of registration. An important decision on this point was delivered by His Majesty's Court of Appeal on the 7th June, 1897, in the case "Carmela Grech et vs. Pietro Paolo Mompalao DePiro et." The point at issue was that the plaintiffs tried to revive a note of registration which had previously been cancelled, on the ground that the payment of the credit to which the note referred was not made to the true creditor. The Court of Revision of Notarial Acts upheld plaintiffs' claim, but His Majesty's Court of Appeal revoked this decision "giacchè il ristabilimento della inscrizione non può, secondo le nostre leggi, effettuarsi altrimenti che mediante una nuova inscrizione, non essendo fra noi conosciuto altro mezzo di inscrivere l'ipoteca che quello indicato nelle disposizioni del Codice Civile, le quali disposizioni, in difetto di altre, sono applicabili, senza distin-

zione tanto nel caso in cui si tratti di nuova ipoteca, quanto ove si tratti di fare rivivere un'ipoteca già inscritta, ma che fosse stata, per errore e senza titolo legale, cancellata." This shows how important these Notes of Cancellation are, and why more attention is given to these Notes than to any other Note which is filed in the Public Registry.

According to Section 2164, a registration may be reduced:—

(a) If a part of the debt is extinguished (riduzione),

(b) if the right of the creditor, previously affecting the whole of an immovable, or several immovables, is restricted to a part of such immovable conveniently separable therefrom, or to one or some only of such immovables (restrizione).

In other words we may have a reduction of the amount of the credit as such, or we may have a restriction of the security. With regard to the former case, an easy example would be the consent given by a creditor for the reduction of a registration once that a partial payment of the amount due is paid by the debtor. It is to be noted that the Notary concerned with the deed of payment is not to register in the Public Registry "the direct payment, whether total or partial, by debtor to creditor, but *the consent given by creditor for the cancellation or reduction of the credit*. Direct payments as such, as in the case under review, are not to be annotated in the Public Registry. Of course, we may have a direct payment by one of two co-debtors in solidum to the creditor — in which case such an annotation may take place, in view of the fact that the co-debtor paying will enjoy a subrogation against the other co-debtor.

A restriction of security takes place when, for example, the creditor who has been enjoying a privilege and a hypothec to safeguard his rights, does not think it any longer necessary to continue having all these safeguards, and so he gives his consent for the reduction of the registered Note in the sense that it should remain safeguarded only by the hypothec or by the privilege. We may also have the case of the creditor renouncing to his rights of privilege or of hypothec over a particular immovable, and maintaining all his rights firm and valid over all the remaining property of the debtor.

If the creditor has not the power to alienate, he cannot give his consent for the reduction or the cancellation of the registration, for broadly speaking a reduction or a cancellation

is an alienation of real rights. Of course, he can obtain the necessary authorization from the Court. Thus, for example, a minor who enjoys a general legal hypothec of tutorship can give his consent for the reduction or the cancellation of the relative note of registration, only on the attainment of full age.

We have already seen that registrations may be reduced or entirely cancelled by the consent of the creditor. Though at first sight, it may seem that the consent of the creditor is a "sine qua non" requisite, Section 2166 states: "If the total or partial *extinguishment* of a registered debt results from a judgment which has become "res judicata" or from any other public deed, the cancellation of the registration, or the reduction thereof as to the amount of the debt, may be effected *without the consent of the creditor.*" When examining this section, we come to the conclusion that a Notary may annotate at the Public Registry a cancellation or reduction of a registered debt if from the deed published by him it appears that a credit has been paid entirely or partially, even though there may not be the consent of the creditor for such purpose.

The word "extinguishment" in the above quoted Section 2166, is however of the utmost importance, and it must be given the right legal meaning. It must be given the interpretation of Section 1188 which enumerates the modes of extinction of obligations. Thus, from the note of cancellation or of reduction which is presented for registration, it must clearly appear that the total or partial extinction of the registered debt has taken place in one of the ways specified in Section 1188, e.g. payment, merger.

The Note to be presented to the Director of the Public Registry consists of a true copy of the original registration together with the particulars required to demand the cancellation or the reduction of the credit, which is to be inserted in the fifth column. Before accepting such note for registration it is necessary to ascertain whether there are any eventual previous annotations with regard to the same credit, that is, one is to see whether any notes of reference relating to the note in question had been entered in the Public Registry prior to the date of presentation of the note of reduction or of cancellation. One is to see, for example whether any payments with subrogation had been effected by third parties; whether a total or partial

cession of the credit had taken place, and if in the affirmative, who is the present assignee; whether a previous reduction of the credit was consented to, and so on. These annotations are carefully examined by the Director who is to see whether their contents are compatible with the note of cancellation or of reduction which is presented to him. All this shows that a clear distinction has to be made between the case of a registration of a credit and the case of a cancellation, reduction or modification thereof. In the former instance, the Director is not so strict in the examination of the note of registration, because it is the case of a preservation of rights, and so if the requisites established by law are complied with, he immediately accepts the note for registration, because it is to be borne in mind that the question of priority is of paramount importance in the case of ranking of several hypothecary or privileged creditors; moreover, it is to be noted that an eventual error in the original registration may be remedied by means of a new registration, or in case the debtor considers himself aggrieved by the registration, he may apply to the Court for the cancellation or reduction thereof. But in the case of a reduction or of a cancellation of a registration, the position is fundamentally different, and so the Director is more rigorous in his examination. It is no longer a case of preservation of rights — on the contrary, it is a case of a reduction or of an annihilation of rights, which, if not properly and legally made, might cause irreparable damage.

It is important to note that a registered credit cannot be cancelled, if a previous payment (with subrogation of rights had been made to the creditor by some third party either "de proprio" or by delegation of the debtor, or of one of the co-debtors in solidum. The creditor, in this case can only give his consent for the reduction of the credit, in the sense that it should remain firm and valid for the said subrogation in favour of the person who had effected the payment on account or in full settlement. A decision in this sense was given by a decree of the Court of Revision of Notarial Acts on the 21st April, 1928, following an application of the late Notary Arturo Leone Ganado. The Court was of the opinion that the Director of the Public Registry was correct and in conformity with the law, when he insisted that the note in question should have been worded in such a way that there should have appeared

clearly and without any doubt whatsoever the fact that the registration was to remain firm also for a subrogation which was previously annotated. I need hardly add that if a credit had been previously assigned "in toto", it is only the assignee (cessionario) who is entitled to give his consent for the reduction or cancellation of the said credit, and not the creditor (assignor).

The title of these notes is also worthy of attention. Te law in Section 2170 states that the note must contain an indication as to whether a reduction or the cancellation of the registration is demanded. Due importance must be given to this requisite and unless the demand for the cancellation or for the reduction clearly appears, the note cannot be accepted for registration. Another important requisite in Section 2170 is "an indication of the judgment, or deed, under which the reduction or cancellation is demanded." This shows that in the case of a sentence it is important to specify the Court ordering the cancellation or the reduction of the note, as well as the date of the pronouncement of the judgment. In the case of a public deed, the date of publication and an indication of the Notary who published it, are essential.

A very important Section is Section 2171 which runs as follows: "When the reduction of a registration is demanded, the sum or property in respect of which the registration is to continue to be operative shall be stated in the note." Thus, it is clearly enunciated that it is not enough to state that the credit or the note has been reduced by a certain amount. The law does not state that we should express by what amount or by what property the credit has been reduced or restricted: but it clearly stresses that we should express in the note to what amount or to what property the registration is to continue to hold good. Thus, it is absolutely incorrect to state that the registration is to be maintained for the remaining part of the credit or for the balance. This condition, after all, is only a corollary to Sections 2132 and 2147 which clearly establish the rule that the 'amount' of the credit due must be specified in the note of hypothec. A ruling stressing the principle enunciated in Section 2171 is to be found in a Decree delivered by the Court of Revision of Notarial Acts on the 24th September,

1929, following an application of the late Notary Luigi Gauci Forno.

On the basis of Section 2132 and 2147, and in view of the fact that third parties examining the notes of Reduction should have a clear statement before them as if they were examining a ledger, without having to resort to indirect means which might lead them to mistakes relative to the amount of the credit or to the property in respect of which the registration is to continue to be operative, one would appreciate the sound and practicable wording of Section 2171. It must, however, be stated that it is not always possible to express clearly to what amount the registration is to continue to hold good. The law in fact, exempts certain legal hypothecs from the absolute necessity of establishing an amount in the registration (Sec. 2149). We may have, for instance, a general legal hypothec in favour of minor children against their tutor for the good administration of their property. In these notes, generally, no amount is fixed. When one of the minors becomes of age, he would be capable to give his consent for the reduction of the note, but he would not state to what amount the registration is to continue to hold good: that would be impossible in this case, for no amount had been fixed in the original note of legal hypothec, and so he would only state that the note should remain firm and valid in so far as it regards the interest of the other minor children. Like this we may have other instances, but the rule established in Section 2171 should be interpreted strictly, and it is only in exceptional cases like the one just quoted that we can or rather we have forcibly to depart from the literal wording of the law.

Can a creditor in a registration including several co-debtors "in solidum" release some of them, and leave the remaining debtors burdened with the whole debt? The creditor may do so, but the 'acceptance' is required of the debtor or of the debtors who are to be burdened with the debt, once that some of them are to be released. This acceptance, of course, is only important is so far as it affects the internal relations of the co-debtors, and not vis-a-vis third parties who may claim the whole amount from any one of the co-debtors. What in the case of several debtors who are however not bound jointly and severally between them? The answer is in the negative, and a note

framed in a way as to remain firm and valid only against one of the debtors, would not be accepted for registration by the Director. If that were to be allowed, we would be extending the obligation of one of the co-debtors mentioned in the note, against whom the registration would solely be maintained — which would be contrary to the law. Such an annotation would also have prejudicial effects, for vis-a-vis third parties, each debtor in the original note was only responsible for his quota of the debt, and so how can an annotation be made in the margin burdening one of the debtors with the whole debt. Moreover, if that were to be upheld, we would have a novation, in as much as one debtor would be burdened with the quota of the other co-debtors, and in this sense we would have a new debtor with regard to the hypothec or privilege.

Before concluding this short survey, it may not be amiss to mention one final case in connection with the cancellation or reduction of registrations. This refers to the case of a cancellation or a reduction of a credit which is asked for by a legatee of the deceased creditor. In practice, this is not a very common occurrence; however, the principle to be applied in such a case is not altogether well known. First of all, can a legatee give his consent for the cancellation or reduction of a credit pertaining to the deceased creditor? It seems, "prima facie", that the answer is in the affirmative. However, in such cases we have to see whether the credit in question bears any interest and also, whether the legatee is a legatee of all the credits of the deceased or only of one particular credit. If the credit bears interest and the person demanding the cancellation or reduction is only a legatee of that particular credit, then we have to see whether the interests due up to the time of the demise of the creditor have been paid or not. If they have not been paid then the concurrence of the heirs of the decuius would also be required to give their consent for the cancellation or reduction of the interests which had accrued up to the time of the death of the creditor and which, however, had not been settled, as the interest due up to that time does not pertain to the legatee but to the heirs of the deceased. The concurrence of the heirs would not be required if we have the case of a legatee of all the credits of the deceased creditor, for if one is a *"legatee of all the credits"*, he is necessarily also a legatee of the interests

which had accrued up to the time of the creditor's death.

There is much more to be said on the subject under review, but space does not permit me to continue to deal with it more extensively. I hope that the principles above quoted would be of great interest and of practical value to those who will soon start exercising the profession of a Notary Public.

TO BE A LAWYER.

The luxury of pleasing others, enjoyed alike by actors, singers, and lecturers, is shared by lawyers. They show it in looks, express it in words, and tell it in tones of speech that thrill and captivate hearers and inspire the young with an early desire to be like such leaders. With this longing after greatness few believe in the hindrance to success, and most young men allow a free fancy to picture the future in guilded colouring. As thought crosses leagues and spans oceans in space as soon and as easily as across the street, so the ambition leaps from youth to greatness without the steps that lead upward on the rounds of fame's steep ladder. — Judge J.W. DONOVAN.

In Search of A Style

By CHEV. J. GALEA, M.B.E., M.D., D.P.H.

IN 1943 the "Għaqda tal-Kittieba tal-Malti" (Association of Maltese Writers) submitted to the Government of Malta a memorandum on the advisability of correct terminology in legal documents and official enactments.

In 1934, by Proclamation issued by H.E. Sir David Campbell dated 21st August 1934 amending Section 57 of the Malta Constitution Letters Patent 1921, Maltese was adopted as the official language of the Law Courts of the Maltese Islands, a measure which opened a new era in the civic life of the Islands and which was hailed as a pledge of national assertion in domestic affairs.

The great Napoleon, before attaining dictatorial power, in introducing his Code of Laws to the French people had insisted that the law was to be presented within the smallest possible compass and in a form clear, logical and complete (1). It is true that later on, after assuming the Imperial Crown, Napoleon became reluctant to have his subjects fully conversant with the law, but when he took possession of our Islands he lost no time in introducing his own language in local Courts of Law and administration (2).

A movement for the introduction of our national language in our Courts of Law had been going on for well over a century. Schlienz writing in 1838 about the importance of our language as a means of uplifting the outlook of the masses, asked : "How shall the Maltese become acquainted with the laws? In what language shall they learn the *carmen necessarium*, a just knowledge of their natural rights, the rule of their civil conduct.....? For again, if this knowledge is to be acquired in the Italian, the great-

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(1) Grant & Temperly: "Europe in the Nineteenth Century" page 110.
(2) Paolo De Bono: "Sommario della Storia della Legislazione in Malta" page 264.

There was however some doubt as to the suitability of our language as a means of expression of the tenets of justice; it was maintained that the Maltese language is not pliable enough to er part of the people are excluded from the benefits thereof'' (3). serve as a vehicle for expressing the correct views and aims of legislators. So ingrained was this misconception in the mind of high Government Officials, that they opposed with all their means the introduction of Maltese in the Law Courts on the false assumption that such an innovation would lower the dignity and prestige of the Courts and spell disaster to Court proceedings.

Such opposition was overcome but it led to an inevitable reaction : it was felt necessary to take drastic measures for the protection of our language against alien encroachment; this was effected by the elimination or suppression of all foreign and loan words from official documents, whether legal or otherwise.

Thus a drive for purism of diction was set in motion; henceforth official publications appeared in a purity of language that sometimes proved embarassing. Nomenclatures and expressions were trimmed of all traces of foreign forms and the resulting construction sometimes obscured the true meaning of the law and caused not a little inconvenience.

As stated in the Memorandum submitted by the *Għaqda* : ''Maltese, like any other ancient language, cannot very well express ideas of modern thought, in abstract forms, or even technical, philosophic, argumentative and legal parlance, without borrowing from other more modern languages''. Every effort to write on modern or abstract subjects in pure Maltese proved a failure.

Failure in a literary sense does not produce serious consequences, but when legal documents fail to impart the real aims and scope of the legislators, the resulting confusion might upset the peaceful life of citizens.

In matter of legal importance it is impellant that purity should give way to clarity and the style of language should be

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(3) Rev. C. F. Schlienz: ''Views on the Improvement of the Maltese Language'', page 25.

such as to avoid confused or doubtful interpretation. Dr. Falzon in his "Annotazioni" states that uncertain interpretations of the law may be quoted in defence of the accused. He comments: "E quindi non vi ha concussione, se la percezione, comunque illegale, fondisi su di una interpretazione di legge, la quale comunque sia poco esatta, può nondimeno valere a scusarlo" (4).

Legal documents should be drawn in clear, simple and possibly idiomatic style, but when such a style cannot express the exact sense of the legal context, it should be permissable to borrow from foreign sources..

The Memorandum laid stress on the vocabulary and the construction used in legal documents and made pertinent remarks on their choice and usage.

Lately a tendency has arisen amongst few modern Maltese writers to coin new words by a process of derivation from ethymological roots; this has been mostly marked in certain nominative and adjective forms. This process of inventing new words has always been a risky one and should be deprecated in official use where only terms with old established and definite meaning should be employed. Such new words may be fancied in poetical effusions but are incongruous in matter-of-fact documents such as legal instruments and official injunctions.

In translations from foreign texts, we have often observed that the construction is cumbersome and dragging, the reason being that the translators were often unable to give a proper Maltese rendering to original texts. It is always very hard to express faithfully in one's own language the purport and spirit of a text originally written in a foreign tongue, but the difficulty may be much increased by the rejection of the help of loan words and/or by too servile an imitation of the foreign pattern.

Every language has its own intrinsic forms of construction and translators should abide faithfully to native characteristics of speech and writing. Defective translations have been the cause of serious misunderstandings which might even embroil an individual in futile litigation.

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(4) Avv. Giuseppe Falzon: "Annotazioni alle Leggi Criminali", page 252.

A former Chief Justice of Malta, Sir John Stoddart, advised against the use of obscure or incomprehensible terms when he wrote: "Such words ought either to be altogether omitted, or explained by others better adapted to the general understanding" (5).

Another defect to which reference is made in the Memorandum, is the frequent and indiscriminate use of certain obsolete and archaic words which cannot but mar the fluency of modern expressions. Their use in legal documents, as the Memorandum rightly remarks "is nothing else but the fossilization of the Maltese language".

This haphazard use of vocabulary, terminology and phraseology not only impairs the true sense and creates difficulty of understanding, but sometimes borders on the ridicule. Such words as "robgħ" for "one fourth", "marfgħa" for "storage", the suffix "aġġ" as in "wasletaġġ" for "her coming of age", the expression "tidlik Scott" for "Scott's Emulsion", cannot but raise a sarcastic smile on the lips of many a fastidious reader.

Since the submission of the "Għaqda's" Memorandum, our Codes of Laws have been reprinted and now form a complete set of statutes. This work was done by a commission, The Statute Law Revision Commission, which deserves full credit for the excellent work produced by it. The Maltese texts of laws have been admirably rendered, having all the clarity, simplicity and accuracy as behoves the dignity of the Law.

The publication of the Maltese texts should serve as a standard to be aimed at by future compilers of legal enactments; indeed the task of those responsible for the publication of legal and official documents, will in future be much simplified for they now possess an excellent pattern on which to shape their work.

In submitting their Memorandum to Government the Mem-

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(5) Sir John Stoddart: "Third Annual Address delivered on Occasion of Opening a Commission Issued under the Law for establishing at at Malta a modified 'Trial by Jury'," page 31.

bers of the "Għaqda" were actuated by a single motive: the desire to assure the success of their native tongue by the adoption of a rational system in its official use. They deprecated both pedantry and levity in official documents; their contention is that such documents should be issued in correct form and with all the dignity inherent to their nature.

Legal Maltese could and should be written in a polished form which would be comprehended without causing mental strain or effort. In order that this might be achieved commonplace terms and mediocrity of style should be eliminated and only perfect literary standard and fluent style should be employed. If this is realized in responsible quarters, the Memoandum of the Għaqda will not have been submitted in vain.

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The Historical Development of the Criminal Code

By ALBERT GANADO, B.A., LL.D.

THE reforms introduced in the Criminal Law and Procedure claim the student's particular attention, because these laws are the surest index of the degree of civilization and political liberty of a people. Thus it is that the history of criminal legislation marches hand in hand and in harmony with political history. This reflection of an eminent Italian jurist is excellently illustrated by the historical development and final codification of the Criminal Laws of Malta after the expulsion of the French from the Island.

When, in 1530, these islands were arbitrarily granted in fief to the Order of St. John of Jerusalem by Emperor Charles V of Spain, the laws in force therein, whether civil or criminal, were Sicilian, mainly based on Roman Law. Undoubtedly, Roman Law was most adapted to the needs of the country: besides being founded on sound philosophical principles, it was suited to the Latin temperament, customs and education of the Maltese people; it was also the Common Law of most European countries.

But the passing of time brought in its wake the progress of science; the change of customs, of ideas, and of Governments; the birth of new ideals. These factors necessitated radical modifications in the whole system of law of every country, and, more especially so, in the criminal branch of legislation.

Great strides were achieved by Science of Law in most of the countries of Europe from the middle of the eighteenth century onwards. Our island, unfortunately, was rather slow in catching up with the pace set on the Continent. The "Codice Municipale di Malta", compiled during the Grandmastership of De Rohan, and promulgated on the 17th July, 1784, was certainly an improvement upon the "Leggi e Costituzioni Prammaticali" of Manoel de Vilhena, issued in 1723. But it preserved the inquisitorial system of criminal trial: it did not guarantee the independence of the judges: it contemplated only a certain number of crimes: its whole system of punishment was open to severe criticism. The rules laid down savoured too much of arbitrary and

despotic principles; the leading maxim of the compilers seems to have been: "*Quod principi placuit legis habet vigorem*".

The Code de Rohan was the last legislative measure of importance enacted under the domination of the Order. On the 12th June, 1798, the island passed into the hands of the French, after a short symbolical resistance on the part of the Knights. On assuming supreme power, Bonaparte issued a number of decrees, but very few of them touched on criminal matters (1). The French domination in Malta was short lived, for, on the 2nd September, 1798, when Napoleon had already left for Egypt, the Maltese rose against their French oppressors and penned them up in Valletta and the Three Cities. Though, it was not until two years later that the capitulation of the French garrison was signed.

England was one of the allies Malta had in the fight against Napoleon's troops. She played her cards well, and, on the expulsion of the French, at the instance of the Maltese, she took the island under her protection (2), guaranteeing, at the same time, to the inhabitants the full enjoyment of their own laws, religion, rights and privileges. But the British Government's subsequent conduct was the cause of violent protests on the part of the Maltese, who maintained that the promises given had been violated and that the nation "was groaning under a reign of unlimited despotism". Thus a political agent, Mr. John Richards, was appointed in London to fight for the cause of the Maltese people with the British Government. In the instructions sent to Mr. Richards (3) the demands of the Maltese took a positive and concrete form.

They vigorously condemned the "abominable Code of Rohan, in which no limitation was put to the power of the Grandmaster", and recalled their numerous entreaties for the reinstate-

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(1) All French laws and decrees were held to be null "per difetto di potere" by His Majesty's Court of Appeal, presided over by Sir Adrian Dingli, Chief Justice, on the 7th January, 1885, in re "Depiro vs. Grech Delicata".

(2) In 1814, the signatories of the Treaty of Paris recognised full British sovereignty over Malta.

(3) The first part of these instructions were published by George Mitrovich in "The Cause of the People of Malta"—London, 1836. The second part, containing the six formal demands of the Maltese people, I have not yet found in any printed publication, and I am reproducing it hereafter from a manuscript copy I possess of these Instructions.

ment of the Consiglio Popolare (Popular Assembly) which had been arbitrarily abolished by Captain Ball. They prayed that His Majesty might be graciously pleased to command that, until a regular form of government be established, the following regulations might, by his royal command, be observed in Malta and Gozo :

"I. That the Maltese people may have a legitimate channel through which to state their grievances, and that the complainants may be protected from the vengeance of those who govern them.

II. That the sentences of the Judges be not influenced or controlled by the Governor, who may have power to pardon only in criminal matters; nor the Judges be removed at the pleasure of the Governor.

III. That torture which, according to the Code de Rohan, is in the power of the Governor, and a species of torture insupportably distressing, be abolished.

IV. That persons, particularly those in offices, be not forced to sign petitions or attestations, and that their refusal be not punishable by imprisonment and loss of office; and, if it shall appear that such documents have been, by fear, or any degree of compulsion, extorted, that they be held non-valid.

V. That some means be devised to prevent letters on mercantile or family concerns from being intercepted.

VI. That no Englishman or Maltese be banished from the island, much less sent to the coast of Barbary."

On the 28th February, 1810, an "Appeal of the Nobility and People of Malta" was transmitted to Mr. Richards. He was pressed to repeat his applications to the Ministers of the King for the restitution of Malta's ancient sacred rights, the principal among them being these :

"1st. A free representation of the people, or Consiglio Popolare, with the power of sending deputies or memorials to His

Majesty in Council, whenever our rights are found to be injured (4).

2nd. Independent tribunals (5).

3rd. A press free, but not licentious, nor offensive to religion (6).

4th. Trial by Jury (7) — either in the manner practised in England, or according to our own ancient usage, which was an appeal, in every case, from the sentence of the Judges to the Consiglio Popolare.

In fine, a constitution which shall unite the spirit of our ancient, free, and only legitimate government, with that of the English constitution; our religion always being kept inviolate." (8)

These exact terms formed part of a petition submitted on the 10th July, 1811, to His Majesty the King by almost all the nobility and other respectable inhabitants in the island. Besides, Nicolò Capo di Ferro, Marchese Testaferrata, was sent to England by the Maltese to explain their grievances and to plead the national cause (9). His Majesty's Government, after the receipt

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(4) After hard and protracted struggles of the Maltese for constitutional liberty, gradually and very niggardly some constitutional rights were granted to them by the British Government. An Advisory Council to help the Governor was created in 1835. By Letters Patent of 1849, an elected element was introduced into the Council of Government. In 1887, the elected members were granted a majority in the Council, but little by little this "Constitution" was shorn of its best parts. By Letters Patent of 1903, the state of things that had been established in 1849 was reverted to. A form of self Government was granted in 1921, and after some mutilations, the Constitution was withdrawn in 1933. Six years of strict Crown Colony rule followed. In 1939, elected members were again admitted to the Council of Government. A revised form of self government was once more granted in 1947.

(5) This wish of the Maltese was the first to be satisfied: the independence of the judges was one of the earliest reforms introduced by Sir Thomas Maitland on instructions he had received from the Secretary of State.

(6) Liberty of the press was first guaranteed under British rule by Ordinance IV of 1839.

(7) This institution was first introduced in the Island in 1815 for crimes of piracy. In 1829, it was extended to the gravest crimes, and, in 1845, to crimes subject to a punishment the duration of which exceeded five years.

(8) Mitrovich—Ibid. ps. 18-19.

(9) Ibid—ps. 20-25.

of the petition, and the correspondence which took place between Lord Liverpool, Secretary of State of the Colonial Department, and the Marquis Testaferrata, ordered a Commission to be opened at Malta in 1812. One of the membes of the Commission was Malta's Civil Commissioner, Hildebrand Oakes, who had insulted the signatories of the 1811 petition, in a printed publication which was affixed in all public places, and who had removed from office some of the subscribers, one of whom was the distinguished Chevalier Parisio (10). The appointment of Oakes as one of the Commissioners was unfortunate and impolitic, and gave a partisan colour to the Commission at its very inception.

The other two Royal Commissioners were William A'Court, previously Chargè d'Affaires at the Court of Palermo, and John Burrows, Chief Justice of Dominica. The members of the Commission were instructed to proceed to a full investigation of the Civil Polity of Malta in its various relations and dependencies. They found that the practice and administration of the laws was infinitely more objectionable than the laws themselves, which, generally speaking, appeared to be founded upon just and equitable principles. They reviewed the formation and jurisdiction of the different tribunals, pointing out the principal imperfections they remarked in each. Commenting on the Courts of criminal jurisdiction, they criticised the dilatory proceedings of three distinct tribunals "in consequence of which an individual, whether innocent or guilty, was exposed to languish for years in prison at the mercy of Judges whose conduct might be influenced by caprice, or even by a baser motive."

They urged the necessity of placing the Judges on a more respectable and independent footing; opined that, in a criminal trial, the accused with his advocate should be present during the whole of the process; recommended that, contrary to former practice, no appeal should lie, except in capital cases, from the Grand Criminal Court to the Supreme Tribunal of Appeal, and that the shortest possible time should be fixed for the hearing of all appeals coming from the Criminal Court.

The Code de Rohan was, in their opinion, "bottomed on principles of natural and universal Justice." Some laws bordering on severity might undoubtedly be pointed out, but, what-

(10) Ibid—ps. 21 and 24.

ever the letter of the law might be, its practice was lenient in the extreme. Capital cases very seldom occurred, and the punishment awarded by the Court was very rarely in proportion to the enormity of the offence. On the other hand, it had to be observed that the Grandmaster had too much arbitrary power, and throughout the Code no definition was given of his authority, nor was any limit prescribed to it.

They stated that the laws which sanctioned the punishment of torture had been considered as virtually, though not formally, abolished ever since the British occupation of the Island. Justice and good policy required that these should be publicly repealed. Some punishment might also be devised to substitute that of condemnation to the galleys, which no longer existed. It would be more proper to employ the criminals upon the Public Works, or in repairing the roads of the island. With regard to Trial by Jury, they avowed their decided conviction that the introduction of such a form of trial would not only be extremely unpopular amongst the great majority of the Maltese, but also, that it would be found inapplicable to the modes and manners of the inhabitants and totally inadequate to the great end of its institution, the attainment of justice.

They did not think any other very material alteration, apart from those mentioned, was advisable. A total abrogation of the existing laws was a measure to be deprecated; it was neither desired, nor desirable. For "it is no light matter to eradicate the deep rooted notions of right and wrong, of crime and punishment, which have been implanted in a people from the cradle". They thought it would be found more expedient to adapt the remedies to the growth which the tree had taken, than to apply the hatchet to the root (11).

In July, 1813, the Civil Commissioner, Hildebrand Oakes, had to be relieved of his post for reasons of health, and Sir Thomas Maitland was appointed in his stead. The Prince Regent's Commission of the 23rd July, 1813, designated him as Governor and Commander-in-Chief in and over the Island of Malta and its Dependencies. A lengthy despatch of Lord Bathurst, the Secretary of State, of the 28th July, 1813, gave Maitland his instruc-

(11) Report upon the affairs of Malta—30th August, 1812. Unpublished, except for some extracts. I possess a typed copy of this report

tions. In these instructions, all the aforesaid suggestions of the Royal Commissioners are embodied.

Maitland arrived in Malta on the 4th October, 1813. On the 5th, he proclaimed that it would be his duty to introduce such amelioration in the proceedings of the Courts of Law, as would secure to everyone the certainty of speedy and effective justice, and to make such improvement in the Laws themselves, as past experience, or change of circumstances, might have rendered necessary and advisable. Maitland meant business and he did not let the grass grow under his feet. The "ameliorations" he introduced were many and various; his reforms in the legal and judicial field were of the highest importance. Historians are apt to give to Maitland *all* the credit for these salutary reforms. It is far from our intention to detract from the merits and capabilities of such a renowned administrator as Sir Thomas Maitland, but, for the sake of historical truth, we must say that the aforementioned demands and petitions of the Maltese people prove these historians wrong.

In 1814, Maitland issued a "Constitution of the Criminal Court" (12). The first article laid down: "All torture, of every description, is hereby entirely abolished and prohibited". A dark blot was thus finally removed from our legislation! Had Maltese jurists had their way in the compilation of the Code de Rohan, torture would have been abolished thirty years previously (13).

This law further established that there was to be a Criminal Court, consisting of two of His Majesty's Judges; provided that only one of the said judges was to sit, in rotation, to try and determine all offences where the punishment provided by law did not exceed a fine of one hundred scudi, or imprisonment, or transportation for three years. Both judges were to sit in more serious cases. Sentences were to be final and without appeal. In case the two judges could not agree on the sentence to be passed, they were to notify the Governor, who would direct three other Judges, or Members of the Supreme Council of Justice (being Lawyers), to decide, out of Court, upon the sentence to be pronounced, after consulting with the two Judges of the Criminal

(12) Procl. XV—25th May, 1814.

(13) History of the Maltese Islands. By Augusto Bartolo, B.Lit., LL.D. Published in "Malta and Gibraltar" edited by Allister Macmillan —London 1915—p. 158.

Court. The sentence was then to be read, in open Court, by one of the Criminal Judges.

Moreover, among other salutary provisions, it was laid down that should the prisoner plead guilty, or refuse to plead, the Court, before recording same, was "to admonish him, in the most serious manner, of the infallible consequences thereof"; the witnesses were to be examined viva voce, in the presence of the accused, who had the benefit of cross examination; the trial was to be completed within six days; the Governor alone had the power of mitigation of punishment, or of pardon.

The Constitution of the Criminal Court was shortly followed by a complementary measure which constituted the Courts of Magistrates of Judicial Police (14). The Police were divided into two distinct departments, the Executive and the Judicial. The Inspector of Police was placed at the head of the former; the Magistrates of Police were placed at the head of the latter. The powers and duties of the Executive Police were clearly defined. The liberty of the individual was taken care of by the provision that whenever any person was apprehended, whatever the nature or extent of the crime with which he was charged might be, the Executive Police were bound to bring the said person, with the least possible delay, before the Magistrate of Judicial Police; in no case, was a person to be detained for a period longer than forty-eight hours without being so brought up as aforesaid.

With a view to the establishment of the Inferior Judicial Authorities, the Island of Malta was divided in two dictricts. Four Magistrates were to be appointed for the first district; two for the second district. They were competent to try and determine all offences, committed within their respective districts, for which the punishment directed by law did not exceed a fine of fifty scudi, or imprisonment or hard labour for three months. If the offence, as charged, exceeded that punishment, the Magistrate was to sit as a Court of Criminal Instruction, and commit for trial before the Criminal Court; for this purpose the period of ten days was not to be exceeded. The accusatorial type of trial was established, but the proceedings before the Court of Magistrates were to be carried on in the most summary way.

(14) Procl. XXII—1st July, 1814.

The Judicial Estabishment of the Islands of Gozo and Comino was also provided for (15). Two Magistrates were appointed to exercise both civil and criminal jurisdiction. One of them had power to try and determine offences committed in the said islands where the punishment did not exceed a fine of twenty scudi, or imprisonment or hard labour for the space of one month. Both Magistrates were to sit in cases where the punishment did not exceed a fine of fifty scudi, or imprisonment or hard labour for three months.

A substantial alteration in the constitution of the Courts of Judicial Police was brought about some time later (16). Maitland declared that, in order to achieve the end of suppressing, as far as possible, minor offences, it was necessary to establish an efficient and respectable Magistracy, not too great, but still strong enough to enable the Magistrates most effectually to secure the object of their institution. With this end in view, the number of sitting Magisrates was increased; a second Court within the limits of the First District was established, and it was to hold its sittings within the Three Cities (17); a new Court of Magistracy was created to take cognisance of minor offences committed on the high seas, or within the ports and harbours of this Island (18). It was also laid down that, in all criminal proceedings, the evidence of one credible and respectable witness was sufficient for the Court to convict. The powers of the Magistrate of the Ports were defined by another enactment (19).

The appointment of another Magistrate was made in 1818 (20): he was to superintend the markets, and to watch over the conduct of the *Accatapani* etc., under instructions which he was to receive from Government to that effect. The general regulations for the guidance of the Magistrate for the Markets in the execution of his duties were later established;

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(15) Procl. XXVI—15th October, 1814.

(16) Procl. X—25th October, 1817.

(17) This Court was suppressed by Government Notice of the 27th November, 1819.

(18) Amended by Procl. XV of the 16th June 1825; abolished by Ordinance IV of the 11th May, 1840.

(19) Procl. XI—25th October, 1817.

(20) Procl. XI—30th December, 1818. This Court was also suppressed by Ordinance VI of the 14th May, 1839.

these regulations controlled the sale of meat, fruit, wines, bread, cheese, fish and vegetables and the general conduct of the markets (21).

The competence of the Gozo Court of Judicial Police in criminal matters was extended to three years imprisonment or hard labour and up to the fine of five hundred scudi in 1819. But when the punishment exceeded one hundred and fifty scudi, or imprisonment or hard labour for twelve months, three Magistrates together were to sit (22). Additional regulations concerning the Inferior Courts were published in 1823; the competence of these Courts was increased to four months imprisonment and one hundred scudi; the Magistrates were also given power to free persons on bail, and "to enjoin, in cases provided for by law, the precept not to go out during the night" (il precetto notturno), for a period not exceeding six months, under a specific penalty in case of contravention thereof. Special treatment was reserved for juvenile offenders under 17 years of age (23).

Two kinds of offences were also provided for: perjury and unnatural crimes. The punishment established for the latter is worthy of mention as it reflects the severity of the punishments in English law at the time. Article XII of the law laid down that "all those detestable and abominable acts of incontinence which constitute unnatural crimes, shall, if committed with violence, be punished by the death of the party by whom violence shall have been used; if otherwise, by public whipping and by solitary imprisonment, on bread and water, for one year, and subsequent banishment for life" (24). The punishment of

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(21) Procl. IV—14th April, 1819, amended by Procl. XXII of the 19th June, 1822. This law did not produce the beneficial effects hoped for. Thus, by Proclamation IX of the 6th June, 1823, all kinds of fresh meat or pork, and all kinds of fruit and vegetables were decontrolled and declared to be exempt from the "Meta". This was done in the hope of creating a greater competition in the country, and of ensuring a more abundant supply of the better quality of provisions in the markets. Other amendments were introduced by Procl. III of the 25th February, and Procl. IV of the 27th February, 1828.

(22) Procl. XIV—17th November, 1819.

(23) A law for the more effectual punishment and reformation of juvenile offenders was issued by Procl. I of the 7th February, 1828.

(24) Procl. VI—4th April, 1823.

death for these crimes, to say the least, was clearly excessive, even in those days.

The punishments awarded by law for offences of a minor nature, cognisable by the Courts of Magistrates of Judicial Police, were, in many cases, fixed in their extent, and coult not be altered by those Courts, irrespectively of the different shades of guilt in the offenders brought before them. The Lieutenant Governor, deeming it to be more congenial to the principles of distributive justice in minor offences that the punishment be proportionate to the degree of malice, or of evil intention, displayed in each particular case, as well as to the character of the offender, enacted that the Courts of Magistrates of Judicial Police in Valletta were to possess a discretionary power, where the punishment awarded by law was fixed in its amount, to go below that punishment if the nature of the case demanded it (25).

These are the important reforms affecting Criminal Law and Procedure promulgated between 1814 and 1823, the first nine years of British sovereignty over these islands. Until 1825, no further laws were enacted. But, in the meantime, two eminent jurists were setting the basis of a complete and permanent code of Criminal Law and Procedure. One of them was a Maltese Magistrate; the other, an English Judge. The work of both, at this stage, was of the highest importance. What was done by the latter is generally known and appreciated. But the contribution of the former has never figured in the pages of history.

On the 10th December, 1823, Sir John Richardson, a distinguished English judge, and one of the twelve Justices of the High Court of England, came to Malta for reasons of health (26). By His Majesty's Commission of the 18th November, 1824, he was appointed Commissioner for the purpose of enquiring into the Administration of Justice in Malta and its Dependencies; into the Constitution of the Councils, Courts and Tribunals therein established for the Administration of Justice, and into

(25) Procl. X—17th June, 1823.

(26) Government Gazette—12th December, 1823. "Arrived on the 10th instant His Majesty's Packet 'Princess Elizabeth', Captain Scott with mails from England and Gibraltar, 33 days from Falmouth.—Passengers, Sir J. Richardson, Lady Richardson, Miss and Mr. Richardson, and 3 servants....."

the manner and form of proceeding adopted in the same; into the general rules and practice therein observed and followed, with regard to the competency of witnesses and the admission of evidence, both in civil and in criminal cases; and into the Laws and Usages in force in regard to the right of sanctuary, and to all other Ecclesiastical privileges, so far as such laws and usages, directly or indirectly, affected the speedy and impartial administration of justice in the said Councils, Courts and Tribunals. He was also ordered to report on the manner in which such inconveniences and defects as might be found to exist in the administration of the law might be best remedied and supplied; and in which such improvements as could properly be made therein, might be best carried into effect (27).

This formal Commission was issued subsequently to some private correspondence between Richardson and the Colonial Secretary. In fact, in Richardson's report written under the said Commission, mention is made of a confidential report, bearing date of the 30th of April, 1824, submitted to the Principal Secretary of State for the Colonies in pursuance of a private letter of the 8th January, 1824, by him addressed to Richardson (28). As the confidential report related to the same matters mentioned in His Majesty's Commission, Richardson embodied its substance in the formal report he submitted to His Majesty on the 19th August, 1826.

Before we give a general survey of this report, a document of considerable importance which throws much light upon it falls to be examined. In 1823, Dr. Ignazio Gavino Bonavita, a Magistrate of Judicial Police, wrote a lengthy Memorandum on the state of the Criminal Laws of Malta, which he submitted to Richardson (29). Bonavita stated that, though he

(27) Richardson's Report on the Laws of Malta—19th August, 1826. I possess a typed copy of this report. A manuscript copy should exist at the Attorney General's Office.

(28) Ibid.

(29) This Memorandum, written in Italian, consists of 115 pages and is divided into five chapters as hereunder:

Ch. I—The actual state of the Criminal Laws of Malta.
Ch. II—The object of this memorandum.
Ch. III—Of crimes.
Ch. IV—Of punishment.
Ch. V—Of procedure.

acknowledged the worth of Roman Law, he did not think that, after the passage of thirteen centuries, it was still suitable, in criminal matters, to satisfy the exigencies of a modern nation. The Knights were fully aware of the necessity of changing the criminal laws of the island to adapt them to modern needs, but they took no serious steps to provide a remedy. In the Code de Rohan, only a few pages were devoted to criminal law; a certain number of crimes were contemplated, and many of the punishments awarded were disproportionate to the nature of the offence; the subject matter as a whole was treated without any method, and, at times, with ridiculous confusion.

The Memorialist then referred to Maitland's Constitution of the Crimnial Court of 1814. The change brought about by that Proclamation was to be the forerunner of a complete Criminal Code, but, in the state of the laws then prevailing, it did nothing but add to the general confusion. According to the new principles introduced, the judge's duty was "merely to execute the law, be it good, bad or indifferent, but he cannot go out of that law....." (30). Now, Bonavita pointed out, our ancient legislation was built on the axiom "legum verba servare est equitatem amittere"; many of our prammatical laws were promulgated simply "ad terrorem", not to be applied to the letter, and, consequently, the legislator often laid down excessive punishments for minor crimes. To adopt Maitland's new directives would go counter to the intention of the legislator. Another basic principle of Roman Law and of the Prammatical Laws was that the judge, for a just cause, could mitigate the punishment laid down by law. Now this discretion was also denied to the judges.

In the case of offences for which the Prammatical Laws did not provide, Roman Law, which contemplated extraordinary and arbitrary punishments was to apply. Where no pro-

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It is entitled "Memoria sulla Legislazione Criminale di Malta" and is bound in the first of three volumes of "Carte relative al Codice Criminale del 1854." These three volumes, which belonged to Sir Ignazio Gavino Bonavita, are now in my possession.

(30) V. Sir Thomas Maitland's "Address to the Judges, Consuls and other legal authorities, assembled at the Palace of Valletta, on the 2nd January, 1815". Proclamations, Minutes etc.—Government Printing Press—1821.

vision was to be found in Roman Law, recourse was had to an opinion or theory propounded by some author or foreign tribunal, or to ancient usages: the choice of the author or foreign tribunal lay at the discretion of the judge. As things stood, how could the judge perform his duty "merely to execute the law, be it good, bad or indifferent"? In the words of Sir Michael Forster, to know with precision what the laws of our country forbid us to do, and the sad consequences to which we are subject if we voluntarily transgress, is an object of universal interest. Here in Malta, the laws were unstable and uncertain. The need of an urgent reform was imperative.

Bonavita declared that he could not agree with those who wished to see the wholesale introduction of English Law in Malta. In fact, English jurists, Blackstone included, found many defects in the penal laws of their country, and clamoured for reform. Suffice it to say, that, according to English Criminal Law, about one hundred and sixty crimes were punishable by death, — a punishment which he stated, should be almost totally excluded from a new Maltese Code.

Moreover, the laws intended to govern a nation must be suitable for that nation. The legislator who is called upon to draw up those laws, before he enters upon his task, must study and have full cognisance of the nature of the government of a country; of the basic principles on which it functions; of the character and genius of the people; of the climate, an active though hidden force; of the nature of the land; of its local situation; of the greater or minor extension of the country; of the maturity or otherwise of its people; and finally, of its religion, that divine force which influences the customs of a people, and which, therefore, must be the prime consideration of the legislator.

Bonavita then observed that it was not his intention to write a treatise on the theory of Criminal Law; enough had been written on the subject by Grotius, Puffendorf, Burlemachius, Blackstone, Montesquieu, Beccaria, Filangieri and others, whose genius had illumined the world. He merely intended to discuss certain offences and punishments, and a few points of procedure, which, because of the special circumstances and relations of the Island, merited particular attention, that they might serve as a guide to the legislator in the drafting of the laws. In pur-

suance of this intention, he passed on to consider summarily, in four separate chapters, the crimes against religion, the crimes against morals, the crimes against society in general (under which title he grouped together crimes against the safety of the Government, against public peace, and against the administration of justice and other public administrations), the crimes committed to the detriment of the individual (which comprised both the crimes against the person and against the property of individuals). A fifth chapter was devoted to contraventions of the Police Laws.

The prevention of crimes, in a country like Malta, according to Bonavita, was to be more effectively attained by a well ordered police force, than by the infliction of punishment. The inhabitants of the island, about 100,000 in all, were particularly jealous of their reputation. By character, the Maltese were submissive to the law and to public authority, and of an extremely peaceful and quiet disposition. These national qualities rendered more effective the activities of the Police. The purpose of punishment was rather the prevention of crime than ethical retribution. Moderation was to be the guiding factor in the fixing of punishments, unless local circumstances demanded otherwise in some particular case. The punishment of death should be preserved only in exceptional cases, such as murder and high treason. Though under the laws as they stood, the punishment of death was contemplated for a number of crimes, n practice, it was rarely resorted to by the Court, which, as stated, had the power to mitigate the punishment laid down by law.

To compensate for the abolition of the punishment of death, he suggested that, in addition to life imprisonment, in serious cases, the convict be subjected to harder forced labour, to repeated flogging, and to harsher treatment in chains (gradi maggiori di ferri). These would be sufficient to make of the offender an example to others, dissuading them from committing similar crimes. He was setting forth these suggestions, not because

he did not consider them harsh, but because their object was to limit the punishment of death in our code (31).

Bonavita went on: banishment as a punishment was economically convenient for the Treasury. But the Government, were it to be adopted, would have to receive in the Island banished persons of foreign countries which received our exiles. Thus he thought it preferable to substitute banishment by relegation to an uninhabited part of the island, cut off from the social concourse of people. He recommended that simple imprisonment without any forced labour and pecuniary punishments, be adopted for a greater number of crimes, of a light nature, than was the case at the time. With regard to the former kind of punishment, one might object that to maintain a number of persons in prison, without their making any contribution to their maintenance, would prove too heavy a burden on the public Exchequer. To this he answered that this class of convicts was not bound to be numerous, and the State would not spend a huge sum on their account; but, in any case, a humane and liberal government would willingly sacrifice some hundred scudi per month in order to safeguard one of the principal foundation stones of a Criminal Code — the proportion of the punishment to the crime.

The confiscation of land as a punishment was very unjust and contrary to the principles of jurisprudence. It was not to be introduced in any new proposed legislation. By adding to the misery of the individual offender and of his family, it tended to encourage crime, and in this manner defeated the very purpose of punishment. To the credit of the Code de Rohan be it said that this punishment was not contemplated by that code. Even the laws of Justinian condemned this form of punishment; the Novella 17 c. 12 expressly prohibited it because "non sunt res, quae delinquent, sed qui res possident", and the Novella 134 C. ult. restricts it in those cases in which it was contemplated by former laws.

(31) In a footnote written about thirty years later, Bonavita acknowledged that this suggestion was the product of mistaken ideas and notions he possessed at the time. For, once the offender was locked up for life, society had nothing to fear from him, and, therefore, while serving his sentence, he should be afforded the most humane treatment possible.

Finally, the Memorialist turned to procedure. This formed the most important part of criminal legislation, as the possibility of discovering who was innocent and who was guilty, of punishing the latter and defending the former, depended solely upon judicial procedure. Unfortunately, in Malta, whilst Roman Law, the principal basis of Maltese legislation, was held in veneration, the procedural rules of the criminal trial to be found in Roman Law, as, the publicity of the trial, and the examination of witnesses in the presence of the accused, were totally ignored. This state of affairs lasted until 1814, when the old laws of procedure were modified by new ones, modelled on English Law. But even the new laws had many defects. For instance, when the Court acquitted the accused, it always used the same formula, that of "not proven". This formula should not be used, Bonavita stressed, when the Court found the accused innocent, because it might leave a wrong impression on the public at large, the more so since nothing about the trial used to be published, and the written proceedings of the trial were not deposited in Court, but became the private property of the judge.

A dangerous discretion was given to the Attorney General, who had the power to arrest and indict, before the Criminal Court, a person for an offence for which he had been released by one or more Magistrates of Judicial Police, on the finding that he should not be subjected to a trial before that Court (the Criminal Court). Such a provision was not to be found in English Law, and, being contrary to the liberty of the individual, it could degenerate into an abusive and arbitrary power. He was also contrary to the provision that when the two Judges of the Criminal Court could not agree between them, three other judges were to sit with them for the formation of the judgment; the latter had the disadvantage of not having been present at the trial; they had no occasion to hear the accused and the witnesses giving their evidence; they had not the possibility of clearing any doubtful point of fact.

Though he recognised that the system of trial by jury as practised in England was extremely wise and perfect, and constituted the palladium of British liberty, he could not recommend its immediate introduction in Malta, where circumstances different from those in England prevailed. Political crimes were fortunately non-existent; the number of persons financially in-

dependent, and, at the same time, having the necessary experience was small; the restricted area of the island and the smallness of the population, besides other factors, had also to be taken into account.

Other recommendations advanced by Bonavita were these: military personnel should be amenable to the jurisdiction of the ordinary criminal tribunals; the practice of including in a charge the mention of a number of crimes for one and the same fact (e.g. charging the accused as being guilty of falsification, or fraud, or misappropriation, or "stellionato") was to be abandoned; an accused who proffered no answer to the charge brought forward against him, or even admitted the charge, should not be declared guilty and convicted without the hearing of any evidence whatsoever, without having even ascertained the material commission of the crime; the general public should not be admitted to hear the process of criminal instruction, for fear that unknown facts disclosed by witnesses might sound the warning to previously unknown accomplices to effect an escape, or might lead to the disposal of the corpus delicti before the police could lay their hands upon it, but the accused should at the same time be permitted to have with him the friends and legal advisers he desired (32).

When Dr. Bonavita compiled this Memorandum he was only 31 years of age. But even in this initial stage of his career he was not lacking in mature judgment, and sound practical experience. Though inspired by a liberal spirit as an ardent advocate of a reform in the laws, he was against any radical and abrupt change, which would subvert our customs and traditions and shake the whole foundation of our juridical edifice. He was averse to the early introduction of some liberal measures, such as trial by jury, and the liberty of the press, which, in his view, in the actual political state of the country would do more harm than good, if adopted; this might induce one to think that he was too conservative in character: it certainly was the opinion of most of the politicians of his time, and served as a powerful weapon in the hands of his adversaries. But subsequent events showed that his analysis of the situation was more or less correct. Bonavita has left a rich legacy to posterity in his numerous writings: they are the

(32) Bonavita I.G.—Memoria sulla Legislazione Criminale di Malta —1823.

product of his untiring energy and vast knowledge of legal science; frequent reference is made to Filangieri, Blackstone and Beccaria; of particular interest is his study of Maltese psychology.

And now to return to Richardson. Having taken good stock of the situation, this great jurist thought it desirable to recast and re-enact the whole body of the Criminal Law in force in these Islands and, if possible, to abolish all reference to foreign authorities, otherwise than by way of illustration or argument. Thus he started to compile a draft Criminal Code aranged in four books, namely:

I. Of proceedings—containing also diverse general regulations.
II. Of offences against the public.
III. Of offences against the persons of individuals.
IV. Of offences against property.

He succeeded in completing the first and third books, but wrote only one chapter of the second book regarding High Treason, and another chapter of Book IV on Theft, Fraud, etc. On account of failing health, he left the draft incomplete. He was forced to leave the island, in a state of great debility, in June 1825. In England, he hoped he would be able to complete the work he had begun. But his health completely broke down through fresh attacks of asthma, and he despaired of ever being able to carry his plans into effect. Thus he recommended that the completion of his undertaking be committed to the English lawyers who held official stations in Malta, assisted by such of the native Judges and legal officers as they, under the Governor's direction, might think it advisable to consult or associate in the work.

On the Maltese laws he stated that the Criminal Law was in a more defective state and more easily susceptible of amendment and improvement than the general state of the law relating to property and the civil rights of individuals. Thus, he directed his attention mostly to the criminal branch of Law, without overlooking some particular points of Civil Law. After reviewing Maitland's Constitution of the Courts of 1814, he examined the delicate question of the introduction of trial by jury. He agreed with Bonavita that it was not expedient to try such an experiment at the moment. Perhaps after the lapse of a few more years, change of circumstances might warrant the introduction of some kind of jury in certain cases.

Bonavita had omitted to make any mention about ecclesiastical privileges : Richardson now made up for the omission. Sanctuary was the most inconvenient of these privileges, he wrote; no doubt could be entertained, that, in order to give full effect to public justice, the whole of the privilege of sanctuary ought to be abolished, even if the Court of Rome would not give its concurrence. There were two other important ecclesiastical privileges : the exemption of all Clergymen and Religious persons of both sexes from liability to answer for any offence, and to sue or be sued in any secular Court, and from liability to give testimony in any criminal prosecution or civil suit except by the express permission of their Ecclesiastical Superiors. These inconveniences should be remedied, but it would be most desirable, in this case, to obtain, for the necessary reform, the sanction of the Court of Rome.

A similar exemption from the operation of the Criminal Laws and the Jurisdiction of the Criminal Courts of Malta was granted to all persons serving in His Majesty's Army and Navy. Disputes and affrays between individual soldiers and sailors on the one hand, and the lower classes of native Maltese on the other, were not of rare occurrence. Only the latter could be brought up and punished before the ordinary Courts, and the Maltese rightly used to feel this to be a hard and invidious distinction, the more so when they were or thought themselves to be the parties offended against. Moreover, should the exemption of Ecclesiastics be removed, it would become the more invidious to retain the exemption in favour of military personnel. At any rate, the power of the local Government was always on the spot and ready to interpose the prerogative of mitigation or pardon in case of any excess or mistake on the part of the Tribunals.

On criminal punishments, the Commissioner wrote that "at Malta as at other places, the want is much felt, by those who have turned their attention to the subject, of some species of punishment, short of capital punishment, yet capable of acting forcibly by way of example, to be applied to cases of aggravated offences, yet not amounting to the last degree of atrocity". During the time of the Order, such a punishment was found in condemnation to the galleys for life; this, however, had now ceased and could not be revived. The only alternative was banishment from

the Island. An arrangement could perhaps be entered into with the Government of the Ionian Islands to exchange Maltese convicts of this description for an equal number of Ionian convicts to be received in return; such convicts to be employed by the respective governments in coercive labour.

Richardson observed that the Maltese, in general, were of a peaceable disposition. But, with the termination of the War, the unusual quantity of commercial business it had brought to the Island, ceased; the temporary prosperity of the nation had tended still further to increase the number of the population, which was still increasing and could not be sufficiently provided for; the consequence was to be found in the increased business of the Criminal Courts. The more common offences, however, were not of an aggravated character, but consisted chiefly of petty pilferings. He concluded : the remedy lay with the Police; with the limited extent of the Islands, the police might be rendered so efficient as to do more towards the suppression of crime by way of prevention, than could be done by the Criminal Courts by way of punishment.

It has been mentioned that Richardson completed part of the draft Criminal Code he had in mind. The proposed laws he had drawn up were translated into Italian, during his sojourn in Malta, submitted to Mr. Wright, the President of the High Court of Appeal, Mr. Jarvis, the Assessor to the Governor, Dr. Bonnici, the Advocate of the Crown and Dr. Satariano, Assistant Crown Advocate, and they formed the subject of repeated consultations between these gentlemen and Richardson. The latter, in his report, opined that these laws, though they fell very far short of a complete Code, could be enacted with advantage.

Richardson's suggestion, however, was never put into effect. As will be seen later on, other measures, submitted by Dr. Ignazio Bonavita, were instead adopted; thus was the seed sown, but the crop required much nursing, and the season of the harvest did not set in before the passage of a good number of years.

(To be continued)

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LAW REPORTS*

H.M. COURT OF APPEAL

(SIR G. BORG C.J.; GANADO J.; CAMILLERI J.)

Joseph Axisa et vs. A.I.C. Jos. Zammit Bonett et.

Judgment delivered on 29. 11. 1948.

Plaintiffs had granted on lease to defendants the Cinema "Axisa" at Sliema, including its goodwill, police licences and all the necessary equipment for a period of ten years. When the term stipulated in the lease agreement expired, lessors sued defendants in H.M. Commercial Court and asked for an order of eviction against lessees from the cinema premises which they were holding as a result of the said agreement. Defendants pleaded that the Court was incompetent to take cognizance of the case as the matter was governed by the Reletting of Urban Property Ordinance (Chap. 109) and that consequently the Rent Regulation Board was the proper tribunal to order the eviction of defendants from an urban tenement.

Held: H.M. Commercial Court pointed out that the matter was not governed by the law concerning the reletting of urban property as the object of the contract of lease was not merely the lease of the bare premises but included also that of the goodwill which was owned by plaintiffs. The Commercial Court was therefore competent to decide the case. In accordance with the provisions of the ordinary law as laid down in the Civil Code plaintiffs had a right to retake possession of the cinema in question and lessees were therefore ordered to hand over the premises to plaintiffs within fifteen days. Judgment was confirmed on appeal.

Dr. M. Agius Vadalà vs. Capt. H. Parnis England.

Judgment delivered on 29. 11. 48.

Plaintiff applied to the Rent Regulation Board to retake possession of a garage let to defendant as the term of lease had expired. The tribunal **held** that sec. 10 (b) of Chap. 109 governing the reletting of urban property as amended by Ordinance XXI of 1942 was applicable to "any premises", which included therefore, private garages and plaintiff could not ask for the eviction of defendant from the tenement in question unless he

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

proved that the hardship suffered by him was greater than that of defendant. Plaintiff's demand was therefore dismissed with costs.

On appeal, H.M. Court of Appeal revoked the judgment given by the Rent Regulation Board. It was pointed out that the law limited the right of the owner to re-take possession of a premises for his own use or for a member of his family only in the case of dwelling houses. The Court quoted 'in extenso' the debates of the Council of Government during the second reading of the bill containing the above amendment as well as the objects and reasons laid down in the draft Ordinance and it was of the opinion that the spirit of the amendment agreed with the Maltese version of the law which had expressly mentioned 'dwelling houses'. The interpretation of the word 'premises' in the English text could not therefore be extended to include a private garage.

Joseph Axisa et vs. A.I.C. Jos. Zammit Bonett et.

Judgment delivered on 29. 1. 1949.

Defendants by petition filed in H.M. Court of Appal prayed that they be granted permission to appeal to the Judicial Committee of the Privy Council from the judgment delivered bh that Court on the 27 November, 1948. Plaintiffs replied that an appeal to H.M. Privy Council did not lie as the matter in dispute did not amount to £500 in value.

Held. The Court remarked that according to section 2 (a) Order in Council 1909, an appeal as of right was allowed to His Majesty in Council when the value of the matter in litigation was five hundred pounds sterling or upwards. Apart from the fact that it was manifest that the goodwill of the cinema "Axisa", situated at Sliema, exceeded the value of £500, the Court pointed out that it was the practice of the Maltese Courts when the value of the matter 'in lite' was uncertain and indeterminate, to abide by the value attributed by appellants. The Court in support of this view quoted the judgment of H.M. Court of Appeal 'Mifsud vs. Nicosia' (Vol. XXV. Pt. I. p. 650), 'Teuma vs. Rapinett' (Vol. VII p. 35) 'Onor. Vella noe. vs. Apap' (Vol. XVII p. 170) as well as section 762 of the Code of Civil Procedure (Chap. 15). It would be unjust that a defendant of an adverse judgment should be bound not by the

value to himself of the subject matter of the action but by the value originally assigned to it by his opponent. The Court quoted by Bentwich, Privy Council Practice (Second Edition). In fact, 'the proper measure of value for determining the question' was to consider it 'as it affected the interests of the party who was prejudiced by it, and who sought to relieve himself from it by appeal.' Defendants were allowed 20 days to submit a sworn declaration that the value of the matter exceeded £500 and when this was fulfilled they would be allowed to appeal to His Majesty in Council.

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Melita Theologica — A review of the Royal University Students' Theological Association — Vol. I, No. 4.

The Chest-Piece — A review of the British Medical Students Association (Malta Branch).

Lux et Vita — A publication of the University Students Catholic Guild.

La Crociata — Rassegna Mensile di Lettere, Scienze ed Arti.

THE ACADEMICAL COURSE OF LAWS (1944-49)

The Vice Chancellor and Rector Magnificus, Professors of the Faculty of Laws and Graduates.

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