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EDITORIAL

THE VICE-CHANCELLOR AND RECTOR MAGNIFICUS

THE main feature of the Graduation Ceremony held on 4th October, was the installation of Prof. J. Manchè, B.Sc., M.D., as Vice-Chancellor and Rector Magnificus of the Royal University. The event was marked by a large attendance of old and new students who enthusiastically applauded the appointment of the new Rector Magnificus, which was read by the Secretary of the Royal University. On taking his chair on the dais, the Rector Magnificus delivered an address expressing his deep sense of the onerous duties ahead of him and his wish that under his guidance the University will bring forth men of character, conscious of the efforts that society demands of them. We feel that the noble words of the Rector Magnificus are a kindly light which will lead us on through the University with success and indeed even in our future careers. The address had a deeper significance especially for us members of the Law Society who are not acquainted with the genial ways of Professor Manchè in the lecture-room; it was an introduction which made us aware that we had gained a friend. The ceremony over, students and members of the Academic Body proceeded to the University where the Rector Magnificus was met by a large gathering of his new sons and daughters and amid loud cheers he was carried shoulder high to his office. We avail ourselves of this opportunity to assure the Rector Magnificus that the University Students' Law Society will earnestly endeavour to help him achieve his high hopes and aspirations and we offer our sincerest congratulations.

A WELCOME TO NEW STUDENTS

We extend a word of welcome to the new students who intend taking up the study of law. Earnestness and assiduity are the keynotes of success in law and the basis upon which the legal prestige of a country is based. "The advancement of legal

studies in a country", says Lord Wright, "must depend, not on machinery, or as I have heard it called 'educational plant', but on the quality of the men who make that advancement the object of their life-work and of their ambition". Elsewhere Lord Wright urges the law student to use his University days to master the subject becoming thoroughly conversant with the settled and established rules. "The method of applying these rules in practice you will learn by studying the selected cases put before you by your teachers, and also by the moots which have become so valuable a part of the lawyer's training". We wish the new students to become acquainted with the Law Society which in its turn will as usual afford them in due course with every opportunity of taking part in moots and debates as well as of reading their papers or publishing their articles in this journal. For the study of law, as Lord Wright adds, does not consist in mere accumulations of learning which are little more than a dead weight but in acquiring the legal aptitude, the habit of mind which makes one instinctively know what is the legal way of approaching the problem, of selecting the relevant facts, of appreciating the true lines of inquiry, and of knowing in what part of one's library one is to turn for the guidance of authority. The intricacies of the law have indeed taxed the best brains the world has produced, but the earnest worker must not be daunted. He must rather remember the words of Judge Donovan that the study of law to a beginner is like entering a dark tunnel — the start is always the darkest. Gradually light breaks in, and soon it seems like daylight.

THE NEW STATUTE

The Rector Magnificus has, we realise, the hard task of putting into practice the new Statute of the Royal University. Though this Statute embodies various and far-reaching improvements we cannot fail to submit that the solution given to some questions is far from what in our opinion would constitute the correct one. It is with no peevish spirit that we point out certain undesireable provisions but, on the contrary, with full faith that our suggestions will not fall on barren ground. Of course the first provision we find fault with is that a student after receiving a thorough training in law extending over a period of five years and having annual examinations qualifies merely for

a bachelorship, whereas previously the same curriculum of studies led to a doctorate. This is a provision which is not warranted either by common sense or authority. The degree of Bachelor of Laws does nowhere include a comprehensive and detailed study of the various branches of law. It is generally obtained after sitting for two examinations in certain branches of the law only which the student is, up to a certain extent, at liberty to choose. The whole course normally extends over three years. From a comparison of the two systems the prejudice which the new arrangements entail is blatant. But it does not stop there. The discrimination between the Course of Law and the Course of Medicine adds insult to injury. Without effecting any substantial changes in the curricula of the two courses the same period of study in the one leads simply to a baccalaureate whereas in the other to a doctorate. Though we feel that the system for granting a doctorate under the old statute could have been improved upon no alterations should have been attempted if a discrimination between the courses would have to be made.

We turn now to another issue. The new Statute provides that graduates of the University may be admitted to the degree of Doctor of Laws not less than five years after having qualified for the degree of Bachelor of Laws. This means that at least five years must elapse before a thesis can be submitted to obtain a doctorate. We note that this restriction is not in line with what foreign Universities require which, we submit, take the more correct view of the matter. For writing a thesis, rather than practical experience in the Law Courts, one requires a thorough grounding in law which a University curriculum should amply offer. We must here add that without research work one cannot delve deeply into the subject of one's thesis and so tackle the problem by reaching at the roots of things. As the Rev. Professor P.P. Saydon said in the address which he delivered during the Foundation Day Celebrations, 1947, "Research is an easy word to say and write on paper, but not so easy to translate into action..... Moreover, research demands a constant use of fully equipped libraries and up-to-date laboratories. All that means money and money in large amounts which cannot possibly be obtained from the students' fees. Without adequate financial help no research is possible, and without research a University has no reason to exist". We submit that a complete and up-

to-date edition of the Law Reports is an essential clement for such research. But, as we have already pointed out in previous issues of the Law Journal, the student of law has not at his disposal a complete copy of the Law Reports, and the last reported judgements date to the year 1935 which is anything but up-to-date.

Lectures in Maltese Legal Terminology seem to acquire greater importance with the passage of time. We fail to realise any practical value in extending these lectures for a whole period of four years, and then strangely enough we come to the sanction that there shall not be any examination for those students who have attended regularly the lectures on the subject. The other students will have to sit for an examination. It is beyond us to gauge for what reasons such a measure of a mixed nature has been taken when the Statute offers various disciplinary actions.

Finally we would like to suggest an amendment to the provisions regarding the selection of subjects for the Matriculation examination. As things stand a candidate can obtain his Matriculation Certificate without sitting for the Latin and Italian examinations. The Statute however provides that candidates who do not select Latin as one of their subjects in the Matriculation examination or equivalent examination shall at the same session or at any other session take Latin as an additional subject before taking up the studies leading to admission in the Coure of Laws and certain other Courses. This is quite justified, but it is not complete, because a similar provision requiring prospective law-students to sit for the Italian examination is essential. Local documents relating to legal and judicial matters have up to recent times been drawn up or published mainly, if not exclusively, in Italian. It is true that recent reforms have up to a certain extent altered the position. We think however, and it cannot be gainsaid, that a good knowledge of Italian is essential for the study of law both in order to consult local authorities, preeminently the Law Reports, as well as in referring to continental authorities, whether judgements or text-books, which form the basis of the greater part of our law and which continually provide the means for solving intricate problems. We are aware on the other hand, that recent amendments have, contrary to what was previously the case, given candidates intending to join a Course of Law the option to choose Italian as one of their

subjects. This is however, far from sufficient, and we trust that as our suggestion contained in The Law Journal, Vol. I, No. 3, has up to a certain extent been acted upon our present views on the matter will be given due consideration.

A PROPOSED AMENDMENT OF THE CRIMINAL CODE

A Bill purporting to amend s. 382 of the Criminal Code and to extend the competence of the Court of Judicial Police has been read a first time in the Legislative Assembly. In spite of the criticisms which lately have been levelled against this Bill we think that it would constitute a beneficial innovation in our Criminal Law. In the first case it aims at extending the jurisdiction of the Court of Judicial Police in that crimes liable to imprisonment or hard labour for a term up to twelve months can be tried by the said Court, whereas previously only those crimes punishable with three months imprisonment or hard labour could be so tried. But the provision which has caused some concern is that the Attorney General may, if he thinks it expedient so to do, send subject to the consent of the accused, any person charged with an offence punishable with imprisonment or hard labour for a term exceeding twelve months but not exceeding three years, to be tried and dealt with by the said Court: provided that if the accused pleads guilty to or is found guilty of the offence charged, such Court may not, saving any lower minimum prescribed by law and without prejudice to the application of sections 23 and 23a, sentence him to any punishment exceeding its ordinary jurisdiction. It is not quite true to say that this is an innovation because as the law stands the Attorney General may send for trial by the Police Court any person charged with a crime punishable with imprisonment or hard labour for a term which does not exceed six months although it exceeds three months, which is the limit of the normal jurisdiction of the Police Court, if there is no objection on the part of such person. So that the Bill does not propose to introduce a measure which is totally unknown to our Criminal Law, but it aims at extending the competence of Police Courts on well-defined lines and with a greater degree of certainty than the present laws afford. Thus whereas s. 382 (3a) merely says that the Attorney General may send for trial before the Police Courts any person charged with a crime pun-

ishable with imprisonment or hard labour for a term exceeding three months but not exceeding six months, the Bill clearly lays down the rules and conditions when this can take place. The Attorney General must decide as to the expediency of availing himself of the measure having regard to the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or a serious character and all the other circumstances of the case, including the adequacy of the punishment which the Police Court would have power to inflict. These guiding factors and indeed the whole Bill are taken from the Criminal Justice Act of 1925. Like its model the Bill provides that the accused shall be asked whether he desires to be tried by a jury or consents to the case being dealt with summarily. It is therefore no unwarranted encroachment upon the right to be tried by a jury as the accused is in all cases given the option and a reasonable time to make up his mind. Moreover if the Court deems it necessary the accused is given an explanation of the meaning of the case being dealt with summarily. Such explanation is not contemplated by the present laws. We trust that if the Bill becomes law the honest advice of advocates and legal procurators will contribute to its successful application in practice.

It is not to be forgotten, on the other hand, that in England by the Summary Jurisdiction Act, 1879, the accused in the graver of the *non-indictable* offences has the right to claim to be tried by a jury. A moderate extension of summary jurisdiction is, however, very beneficial both in the interests of the accused and in the interests of the administration of justice. In fact the accused is saved much time and expense and is relieved from the stigma which a trial by jury may give rise to. In the interests of the community justice is more speedily administered. Professor Kenny says that the tendency of modern legislation is towards giving enhanced importance to these courts of summary jurisdiction. An American writer Pendleton Howard in his book Criminal Justice in England has referred to the system of extending the competence of Courts of summary jurisdiction as the most important development in the administration of English criminal justice during the last half century. Professor Kenny however warns us that this may bring about a tendency

of ignoring the more serious elements of crime and of dealing with cases on a less serious basis, e.g. house-breaking is treated as larceny. High Court Judges have pointed out that the practice of dealing summarily with indictable offences of a serious nature was becoming far too common. The power should only be exercised, Professor Kenny continues, when there is an absence of circumstances rendering the offence of a grave or a serious character. The same learned writer says that the system possesses certain anomalies which are pointed out by those who advocate the extension of summary jurisdiction. Thus a man who steals jewellery worth a hundred pounds from an open house may be tried summarily while a man who opens a closed door and steals a packet of cigarettes may not.

As we have stated the Bill is a transplanting of the Criminal Justice Act, 1925. But there is a substantial difference between our law and English law. English law first of all distinguishes between three classes of offenders: children (i.e. those under fourteen years of age); young persons (i.e. those who are over fourteen but under seventeen years of age), and adults (i.e. those who in the opinion of the Court have attained their seventeenth year of age). According to the Children and Young Persons Act, 1933, a Court of summary jurisdiction may deal with any indictable offence other than homicide committed by a child. By the Summary Jurisdiction Acts, 1879, 1899, any indictable offence except homicide committed by a young person may be dealt with summarily subject to certain conditions of expediency. The Criminal Justice Act, 1925, (S. 24 and Second Schedule), however, specifically lays down a comprehensive list of crimes for which an adult may under certain circumstances similar to those outlined in our Bill, be tried summarily. The Bill before the Legislative Assembly in this respect departs from its model as it is of a general character.

We submit that on the whole the Bill is a step in the right direction. In so far, however, as it does not distinguish between adults and minors we think that it could be improved upon by limiting its effects to adults and introducing another Bill on the lines of the Children and Young Persons Act, 1933. As things stand the appearance of children in the Criminal Court to stand trial by jury falls short of the modern methods of treating juventile delinquency.

PROFESSOR G.E. DEGIORGIO, LL.D.

With heartfelt regret we heard of the death of Professor Degiorgio which occurred in London last August, through a road accident while he was attending the Conference of the Universities of the Commonwealth. Professor Degiorgio was a very prominent personality in the various aspects of civil life. His activities in the political sphere constituted his outstanding characteristics. In 1921 he was elected to the Legislative Assembly for the Seventh Electoral Division and later in 1924 he held the post of Deputy Speaker and Chairman of Committees. His continuous and lively interest in active politics achieved greater successes in 1932 during the last Nationalist administration when he was elected Speaker. Professor G.E. Degiorgio's political career was crowned when he was elected Vice-President of the recent National Assembly and published a draft constitution. His aptitude for politics was shown in the prominent part he took in the meetings of the Assembly and by his cool judgement and calm exposition of facts which solved many heated discussions during the hectic sittings of the Assembly.

At the time of his death he was Professor of History of Legislation and Acting Professor of Constitutional Law. His widespread activities did not hinder him from executing his duties as professor and both students and the Law Society have lost in him a ready helper and a very willing adviser.

THE HON. PROFESSOR C. MIFSUD BONNICI. LL.D.

Another prominent personality the news of whose death came to us last August is Professor Mifsud Bonnici. At the time of his death he was for some time in forced retirement owing to ill health. Professor Mifsud Bonnici was also a very popular figure both in law and in politics. As a lawyer he excelled in Criminal Law, and his brilliant oratory contributed greatly to his success in trials before the Criminal Court. He played an active part in politics during the last self-government as a member of the Nationalist Party. He was also a Minister for the Treasury during the Nationalist administration. Apart from his legal and political activity he had also a keen interest in literature and he wrote poems first in Italian and then in Maltese.

Agricultural Law in Malta*

By Prof. V. Caruana, B.Litt., LL.D.,
and Fortunato Mizzi, LL.D.

Summary: Introductory. — I. Ownership of land. — II. Modes of acquisition of ownership. — III. Emphyteusis, leases and share tenancy: (*A*) Emphyteusis; (*B*) Agricultural Leases; (*a*) Time limit of contracts; (*b*) Dissolution, tacit renewal and preference; (*c*) Remission or abatement of rent in case of loss of the crops; (*d*) Improvements by tenants; (*e*) Obligations of the tenant; (*C*) Metayage. — IV. Servitudes: (*A*) Distances; (*B*) Right of way and water course; (*C*) Acquisition of easements by prescription. — V. Hiring of farm hands, *communio inter fratres* and hiring of animals. — VI. Sale of produce.

Introductory

The Maltese group of Islands consists of Malta and Gozo and the two small islets of Comino and Cominotto which are situated in the channel between the two main islands. The archipelago is in the central channel which connects the Eastern and Western basin of the Mediterranean Sea; the distance from Sicily is 80 Km., from Tunisia 320 Km., and from Tripoli 320 Km. The chain of islands stretches 29 miles from North West to South East. Malta is nearly four times the size of Gozo and the total area of the group is 114 square miles (306 square Kilometers). Agriculture is the chief industry of the islands though at first sight it would appear that there is no extensive cultivation owing to considerable tracts of fertile soil being concealed in the valleys or hidden behind the numerous and high stone walls which serve as boundaries and provide shelter for the crops from strong winds; the fields are small and for the most part composed of terraces by which the soil has been walled up along the contours of hills with enormous labour to save it from being

* Reprinted from the half-yearly publication "*FOOD AND AGRICULTURE: International Law Journal*" No. 1, (January-June 1947) issued by the Temporary Bureau in Europe of the FAO (Food and Agriculture Organization of the United Nations), Rome (Italy).

washed away (1). The area under cultivation is 43,000 acres; the area under irrigation comprises but 4% of the area farmed; water is the prime necessity of the farmers and considerable works are being undertaken to extend the provision of water which would naturally increase production (2). Before the British domination Malta was governed by the Civil Law (Diritto Comune) with the usual additions of usages and of Municipal Laws the latest compilation of which was framed under Grand Master De Rohan and is known after him as "Codice di Rohan" (1784). Towards the second half of the last century the codification of the Maltese Laws was started by means of Separate Ordiances and those which related to property were consolidated by Ordinance VII of 1868. In the Revised Edition of the Laws of Malta in force on December 31, 1942, the Civil Code, including the Law of Persons occupies Chapter 23 of the Edition. Ordinance VII of 1868 closely followed the pattern of the Great French Codification and the various amendments most of them of slight importance, made since the year 1868, incorporated in the Revised Edition, have not weakened to any appreciable degree the unalloyed individualism sanctioned by the Code Civil. Agricultural legislation proper began making its appearance only after the Department of Agriculture was formed in 1919-1920, and the principal enactment which governs leases of rural tenements is the result of the War Emergency and will expire when the emergency is proclaimed ended.

In this article we propose to give a broad outline of Maltese Law affecting land ownership and tenure and while dealing more diffusely with typical Maltese institutions which have practically disappeared from other legislations.

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(1) N. ZAMMIT in a brochure written on the occasion of the Paris Exhibition 1867 writes in glowing words of the toil of generations of farmers who have accomplished this feat: "Cette activité infatigable l'emporte sur la nature avare de ses dons; elle a, on peut dire, façonné une campagne; elle impose un tribut à la stérilité, de la terre. Ce n'est pas que ce sol soit tout un rocher aride, c'est une hyperbole géographique. Mais promenez vos regards autour de vous sur ces champs, ces clôtures, ces prés, ces fermes; vous n'y rencontrerez partout que l'empreinte de la main de l'homme, la patience et la conclusion de son travail."

(2) STOCKDALE: Report on the present condition of Agriculture in the Maltese Islands (1934).

I—Ownership of land

According to a rough estimate one third of the land is owned by the Crown, another third is owned by the Church or under the administration of Ecclesiastical and Charitable Corporations and the balance is privately held. About one fifth to one quarter is the freehold of farmers farming their own land; owing to the affluence of the farmer class after the war and to the high prices ruling, a considerable portion of the land privately held has passed in the hands of the tenant. State and Church owned land is not easily alienable in full ownership, but emphyteusis in perpetuity or for a long period used to be largely resorted to by both Institutions, which contract conveys to the grantee the utile dominium or quasi-ownership of the land subject to the payment of gound-rent. The division of property under the existing laws of Succession applies not only to lands held in ownership or under an emphyteusis but also to those held under an ordinary lease and consequently the majority of the farms are small, averaging between 3 to 4 acres in extent so that it may be reckoned that the area under cultivation is divided into 11,000 holdings.

The only remedies afforded by the law against this fragmentation of holdings are the right of preference allowed in leases in favour of co-possessors and the right of pre-emption. The right of preference will be dealt with later or under the heading of leases. Pre-emption is the right granted to co-owners *pro indiviso* in the case of sale of undivided portions of things immovable by their nature and of the *dominium utile* (Section 1509 of the Civil Code) as well as in the case of *datio in solutum* (Section 1529) and of any emphyteutical or sub-emphyteutical grant (Section 1576). This right is also granted to persons related to the seller by consanguinity and to owners of neighbouring tenements. A similar right is that of preference which is competent to the "dominus" in the case of alienation of the *dominium utile* or of the improvements by way of sale, transfer *in solutum* or sub-emphyteutis and to the emphyteuta in the case of transfer of the *dominium directum* by way of sale or transfer *in solutum*, Section 1595 (1) and (2). These rights are competent by law and are not dependent on any agreement such as the Retratto Convenzionale and Vente à Réméré of the Italian and French Civil Law which correspond to the Right of redemption (*Jus luendi grazia*) of Maltese Law (Section 1530 and following sections).

The consolidation of land ownership may be the result also of the Retrait Successorial which is given to the co-heirs in case any of them assign his rights to a stranger in order to exclude him from the division (Section 953). These rights apply not only in case of rural tenements but also in case of urban tenements. In the case of neighbouring tenements mere contiguity is not sufficient to attribute right of pre-emption; it is necessary that an easement exist between the two tenements and in this case another advantageous result achieved by means of the rights of pre-emption is that of extinguishing the easement by merger (Sect. 517 (1). The advantages deriving from pre-emption and rights of a similar nature are however largely offset by the obstacle created thereby to the free circulation of property, prospective acquirers are discouraged by the knowledge that a third party may come forward and assume in their stead the transaction which may have cost them much time and trouble and it is for this reason that the contracting parties resort to all kinds of uses in order to evade the right of pre-emption which has thus become a prolific source of litigation. This explains the disappearance of these rights from other legislations.

II—Modes of acquisition of ownership.

The ownership of the land extends by right of accession to the fruits thereof and all constructions, plantations or works made therein (Sections 604 and 605); the list of things immovable by nature given by Section 345 includes, besides lands and buildings, springs of water, conducts which serve for the conveyance of water in a tenement, trees attached to the ground, fruits of the earth or trees, so long as they are not separated from the ground or plucked from the trees and any movable thing annexed to a tenement permanently to remain incorporated therein. The things immovable by destination according to Art. 524 of the Code Civil are not mentioned by Maltese Law and they must be considered as moveables. The consequence is that under Maltese Law a movable thing can become immovable only in consequence of accession; it appears that the Maltese Legislator has accepted on this point the ideas expounded by Marcadé in his Commentaries on Art. 523-525 of the Code Civil.

The fruits of the earth or of trees, even before they are detached, are considered as movables for the purpose of making

them liable to attachment and also when they are the subject of a sale or other disposal, as things distinct from the earth or a tree and to be separated therefrom (Section 346). The usufructuary may sell the fruits that are pending, and, in such case, if the usufruct terminates before the fruits are gathered the sale shall continue to be operative and the owner is entitled to receive the price of such fruits as have not yet been gathered but he shall have no action against the buyer who may have paid the price of such fruits to the usufructuary before the termination of the usufruct. (Sect. 379).

In connection with occupancy Section 599 pays homage to the honey industry to which, according to tradition Malta (Lat. Melita) owes its name: "The owner of a swarm of bees has the right to pursue them over the tenement of any other person, subject to his obligation of making good any damage caused to such tenement, where the owner has not pursued the bees within ten days to be reckoned from the day on which he became aware of the tenement on which they had settled or has discontinued the pursuit for ten days, the possessor of such tenement shall be entitled to take and retain them".

III—Emphyteusis, Leases, and Share Tenancy.

The case of farmers farming their own land accounts only for a relatively small portion of the cultivated land; lands which are leased by the farmers account for the bulk of production and, it may be added, for the bulk of agricultural lands. Lease may be of two kinds: (a) Long or perpetual lease or Emphyteutis and (b) Short Lease.

(A) *Emphyteusis.*

Emphyteusis has proved itself to be a very suitable kind of tenure especially in the case of land requiring or liable to improvement and it used to be freely resorted to both by the Government and by the Church, because while it simplifies the management of the property it stimulates the tenant to do his utmost to improve the land by securing his tenure to him and to his successors in perpetuity or, at least, for a lengthy period. Emphyteusis is defined by Section 1576 as a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent, which the latter binds himself to pay to the former either in

money or in kind, as an acknowledgment of the tenure. The emphyteuta (*padrone utile*) has practically all the rights of an owner: he may alter the surface of the tenement provided he does not cause any deterioration; he is entitled to any profit which the tenement may yield and has the right to recover the tenement from any holder even if such holder is the *dominus*; he is also entitled to the treasure trove found in the tenement saving the portion due to the discoverer (Section 1585). All improvements made by the emphyteuta appertain to him during the continuance of the emphyteusis and he may alter their form; but he may not destroy them without the express consent of the *dominus* (Section 1587). On the other hand the emphyteuta is bound to carry out any obligation imposed by law on the owners of lands and to keep and in due time restore the tenement in good repair (Sections 1586 and 1588).

The division of the land among the successors of the emphyteuta or the alienation by him of portions thereof to third parties does not produce the division of the ground-rent, which owing to its being an acknowledgment of the tenure is indivisible saving any agreement to the contrary. Ground-rent is also inalterable so that the concession in favour of an ordinary tenant of the abatement or remission of rent in case of loss of crops (Sections 1666-1678) is not available to the emphyteuta; indeed even if the tenement perishes in part and the remaining part is not capable of yielding a rent equivalent to the ground-rent the emphyteuta may not claim a reduction of the ground-rent though he may demand the dissolution of the emphyteusis (Section 1603 which is derived from the Constitution of the Emperor Zeno Cod. Just. 4. 66. 1).

These rules apply even if the amount of the ground-rent has been fixed with reference to the value of the fruits of the tenement. As a rule an emphyteusis also provides for the carrying out of improvements within a stated period and failure to fulfil this obligation or failure to pay the ground-rent for three years (*mora triennalis*) is generally sanctioned by the forfeiture of the emphyteusis. This apparent bias in favour of the landlord is compensated by the length of tenancy, the moderation of the ground-rent, the right of the emphyteuta to demand payment of the price of the improvements or of a part thereof in case of premature cessation of the emphyteusis regard being had to the

enhanced value of the tenement and to the remaining period of the emphyteusis (Section 1611). Emphyteusis has been acknowledged as a contract which gives a fair deal to landlord and tenant (provided the landlord does not impose different and more exacting conditions) and therefore conducive to the improvement of tenements and to the betterment of the conditions of the farmer class (1). A Government Commission reported over seventy-five years ago in favour of the perpetual emphyteusis of all Crown lands but the report was not acted upon and the rumours which have been current for some time of impending legislation to enable the emphyteuta to redeem the ground-rent and thus pay off the superior owner had acted as a deterrent to emphyteutical grants.

B. *Agricultural Leases* (a) *Time limit of contracts.*

The time limit of a contract of lease may be expressly agreed upon by the contracting parties or else implicitly derived from circumstances tending to show what the contracting parties' intention was concerning the duration of the lease. In the absence of such an agreement or of such circumstaces, the letting of a rural tenement shall be deemed to be made for such period as is necessary for the gathering of the produce of four years, or else, if the tenement is not capable of producing fruits, for the period in respect of which the rent is calculated. According to custom, in default of an agreement to the contrary, the "rural" year begins on August 15th and expires on August 15th of the following year.

The law requires on pain of nullity that leases of rural tenements entered into for a period exceeding four years be expressed in a public deed or a private writing (See Judgments recorded

(1) P. CARLO GIACINTO, Prof .of Botany, *Saggio di Agricoltura per le Isole di Malta e Gozo*, Messina 1811, writes (p. 29).

"... Nei tempi passati alcuni Signori e tutti i luoghi pii andavano a gara in dare i loro fondi suddetti (grandi siti incolti) con tenui annue pensione ai buoni contadini o in enfiteusi per tre generazioni oppure per anni 99. Terminano alla giornata molte delle dette enfiteusi, sono quindi costretti i livellarii, pagare il duecento o trecento di più all'anno per avere gli stessi terreni a semplice affitto .Oh quanto più volentieri molti di essi intraprenderebbero la coltivazione di qualche nuovo terreno se averlo potessero alle medesime condizioni di quel di prima... perchè gli affitti dei terreni sono sempre portati (nelle locazioni brevi)dai proprietarii al ragguaglio dei prodotti dei quali sono capaci".

in Vol. VII, p. 375 and Vol. XXIV, p. I, p. 300 of the "Collezione ecc.").

As will be seen later on, however, leases under the Metayer System are dissolved by the death of the lessee, notwithstanding that the term of the lease may be still running.

It is to be noted, moreover, that when a tenement is granted on lease for a period exceeding sixteen years, such grant shall be deemed to be an emphyteutical grant if it is made under conditions in accordance with the provisions governing emphyteutical grants rather than with those relating to contracts of letting and hiring. In such cases the grant is null and void unless it is expressed in a public deed.

The provisions of the law governing the dissolution, the tacit renewal and the right of preference in leases having for their object rural tenements were, up to the year 1941, exclusively contained in the Civil Code.

In the year 1941, however, the enforcement of the abovementioned provisions of the Civil Code was suspended with regard to practically the major and most important part of rural tenements by the coming into force of certain Regulations enacted under the Emergency Powers (Defence) Act 1939 and 1940, as applied to Malta by the Emergency Power (Colonial Defence) Orders in Council 1939 and 1940.

Before attempting to summarize the contents of the Regulations, as subsequently re-enacted in the year 1943, it is convenient to begin with an outline of the general provisions relating to the subject-matter under consideration as laid down in the Civil Code. Leases for rural tenements excluded from the operation of the said Regulations continue to be governed by the Civil Code which, besides, will automatically come into force again for all rural tenements as soon as these Regulations lapse : unless in the meantime it is otherwise ordained.

In dealing with the dissolution of leases of rural tenements the Civil Code lays down that such leases cease "*ipso iure*", without the necessity for either of the contracting parties to give notice to the other, on the expiration of the term of the contract. This rule obtains not only when such term is expressly agreed upon by the contracting parties, but also when, in the absence of such an agreement, it is presumed by the law itself. On the contrary leases having urban tenements for their object cease

"*ipso iure*" on the expiration of the term only when such term is expressly agreed upon by the contracting parties. With regard to urban tenements, in fact, the necessity for either of the contracting parties to give notice to the other to quit at a certain specified time before the expiration of the term is not dispensed with whenever the duration of the lease is presumed as provided in the law.

A contract of lease may cease even before its term has elapsed if the lessor has reserved to himself the power of dissolving such lease in case of sale or other alienation of the tenement given on lease. Unless otherwise agreed upon in the contract, however, the alienee who desires to avail himself of the power thus reserved in the contract whereby a rural tenement was given on lease is bound to give notice to the lessee one year before.

The dissolution of a lease may also be demanded before the expiration of its term if the lessee uses the thing let for any purpose other than that for which it was intended, or in a manner which may prejudice the lessor. With special reference to rural tenements, the law, lays down moreover, that the lessor may demand the dissolution of the lease should the lessee abandon the cultivation thereof or should he fail to cultivate them as a "*bonus pater-familias*", provided the lessor may suffer thereby a prejudice in respect of which no security was given him. In a Judgment recorded in Volume XXII, part II, page 414 of the "Collezione di decisioni delle Corti Superiori dell'Isola di Malta" it was held that the tenant who takes possession of the water existing in a rural tenement and transports it to another place causes a prejudice to the landlord who is thereby entitled to demand the dissolution of the contract. Such water, in fact, as exists in a rural tenement is to be used for irrigation and what is left of it after having served such purpose is to be saved for future use.

A renewal of the lease is deemed to have taken place whenever, on the expiration of the term of lease, the lessee continues and is suffered to continue in the enjoyment of the rural tenement let to him. The renewal is deemed to have taken place for such a period of time as is necessary for the gathering of the produce of one year and on the same conditions and with the same rights and duties obtaining under the original grant.

A renewal of the lease having a rural tenement for its object is deemed to have taken place not only at the expiration of the term expressly agreed upon, but also when such term is presumed according to law. In a judgment of the Court of Appeal of Malta, recorded in Vol. XXVI part I, page 199 of the above mentioned "Collezione di decisioni", it was laid down that the same rule did not apply to leases having urban tenements as their object when the duration of such leases was presumed as provided in the law. As the law expressly provides that in such cases the contract shall not cease unless previous notice is given by either of the contracting parties, should the lessee remain and be suffered to remain in the enjoyment of the tenement, the lease will be deemed to have continued under the original grant without ever having been renewed.

In respect of a new lease of a rural tenement, the law grants a right of preference to each of the co-owners of such tenement on the same conditions offered by others. If there be no claims on the part of co-owners the said right of preference is granted to the lessee of the last preceding lease.

In order validly to exercise the right of preference, the lessee of the last preceding tenancy is to accept the conditions offered by or agreed upon with others, or else, as the case may be, he is to accept the conditions proposed to him by the lessor, even though he could prove that the lessor intended to let out the tenement to others on less onerous conditions, provided in the latter case the conditions proposed to him by the lessor are by the Court deemed reasonable.

The law enumerates several cases wherein the right of preference granted to the tenant in the last preceding lease is not competent. The greater part of these cases deal with certain specified facts, the verification of which during the last preceding lease renders the lessee in such tenancy not meritorious of the right of preference. The remaining two cases are the following: (i) if the lease is granted for not less than one year to a person related to the lessor by consanguinity or affinity up to the degree of cousin inclusively, and (ii) if the lessor declares on oath that he does not intend to let out the rural tenement before the lapse of one year, or that he does not intend to let it out, within the said time, on conditions less onerous than those refused by the lessee.

Having thus outlined the provisions contained in the Civil Code with regard to the dissolution and tacit renewal of the right of preference in leases of rural tenements, we shall now deal briefly with the above-mentioned Regulations which were first enacted in 1941 and subsequently repealed and re-enacted in 1943 under the Emergency Powers (Defence) Acts 1939 and 1940, as applied to Malta by the Emergency Powers (Colonial Defence) Orders in Council 1939 and 1940.

These Regulations lay down the conditions under which, notwithstanding anything to the contrary contained in the Civil Code, the sitting tenant of certain rural tenements, hereinafter specified, is empowered to resist an undue increase of rent or a change of conditions of the lease or an order of eviction from such tenements.

The rural tenements with which the said Regulations are concerned are those consisting mainly of arable land which are habitually given or taken on lease for the growing of crops and cognate agricultural purposes, and include farm-houses and outbuildings which are let as an integral part of the rural tenements themselves. We shall refer to such rural tenements as "fields" this being also the term by which they are denoted in the Regulations. Leases of grazing grounds, orchards, vineyards, holdings mainly used for the growing of trees and vines and such other rural tenements as do not come under the definition of a "field", are not provided for under these Regulations but under the Civil Code.

The right to resist an undue increase of rent, a change of conditions or an order of eviction is granted to the person (hereinafter referred to as the tenant), to whom a field is leased by the person (hereinafter called the landlord) who is entitled to receive in ownership the rent of that field, or, if there be more than one co-owner, by the person who habitually receives a specified portion of the rent. In case of more than one tenant, only those tenants to whom the field is leased jointly and specifically are entitled to exercise the rights under consideration.

The benefits deriving under the said Regulations are granted not only to those tenants who work the fields themselves but also to those tenants who sublet the fields, in whole or in part, to others with the consent of the landlord. For the purpose of these Regulations, the lease of a field previously held by the

sitting tenant's lineal ascendant or descendant, by his widow or widower, or by his son-in-law or widow daughter-in-law, while not married, is deemed to have been held by the sitting tenant himself.

The said Regulations deal exclusively with contracts of letting and hiring for an agreed total period not exceeding sixteen years for a rent in money or other consideration payable yearly in one or more instalments and with tacit renewal of such contracts. It is expressly laid down, however, that long leases (emphyteusis) and leases under the Metayer System are not provided for under the Regulations.

The landlord who desires to increase the rent or change the conditions of the lease or obtain an order of eviction is to give the tenant at least three months' previous notice by means of an official letter, whereupon, if the sitting tenant considers that the change of rent or conditions or the order of eviction constitute an undue hardship on himself, he may, not later than one month before the proposed change or order would come into effect, submit an application for the disallowance or modification thereof to a Board, called the Agricultural Leases Control Board, constituted under the Regulations in question.

The tenant's opposition to an increase of rent and, or alternatively, to a proposed change of condition will be upheld by the said Board if, by comparison with rents and conditions of tenancy, prevailing in comparable fields in the same parish, such increase or change would not appear to be equitable. For this purpose, the Board will have regard principally to the average quality and depth of the soil, the nature of the sub-soil, the direction in which sloping land is facing, the accessibility of the field and its distance from the closest village.

The Board, moreover, will uphold the tenant's opposition, even though the increase of rent and change of conditions appear to be justifiable, if this is due to improvements of a permanent character effected in the field during the preceeding eight years by the tenant himself or by a member of his family without there having been any undertaking or compulsion to effect such improvements.

With regard to the tenant's opposition to eviction, the Board's decision is not governed by hard and fast rules, for although several cases are enumerated wherein the Board is not

to allow the tenant's application, the Regulations also lay down that the tenant's opposition is not to be upheld when there are good reasons for resisting it. Naturally, however, for the purpose of deciding which are good reasons, the cases under which the Regulations expressly set aside the tenant's application are of invaluable assistance.

These cases deal with certain actions or omissions on the part of the tenant such as do not warrant the conferment upon him of the privileges obtaining under the Regulations. Apart from considerations concerning the behaviour of tenants, the Regulations consider a good reason for not allowing the tenant's application the landlord's proof that he requires the field to be used for agricultural purposes by himself personally or by any member of his family personally for a period of not less than four consecutive years.

The following are actions and omissions on the part of the tenant upon the proof of which the tenant's opposition may not be upheld :

1. If he sublets the field without the consent of the landlord to any person other than a co-tenant thereof or a member of his family.

2. If, during the last two years of the tenancy, he allows the field to lie fallow for at least twelve consecutive calendar months;

3. If, during the same period, he fails to repair such walls of the field as it was his undertaking to repair, or deliberately damages carrob, fig or other fruit trees in the field by excessive cutting back on through habitually allowing goats to graze thereupon, or habitually disregards other conditions of the lease;

4. If, during the same period, on at least two occasions he delays in paying the rent or an instalment of the rent due for more than one month after payment has been demanded by the landlord.

The occupation, however, on payment of compensation by or on behalf of the Fighting Forces of a part of a field is not a good reason for resisting the tenant's opposition under the first two cases above-mentioned.

(c) *Remission or abatement of rent in case of loss of crops.*

The benefit of the remission or abatement of rent derives its existence from the commutative nature of the contract of let-

ting and hiring. Rent is paid by the tenant in consideration of the enjoyment of the thing which the lessor binds himself to grant him. In applying this principle to leases of rural tenements yielding fruits, the law entitles the lessee to demand the remission or, as the case may be, an abatement of the rent whenever, by a fortuitous event, the whole crop of one year is lost or at least so much of it is lost that the value of the seeds and the expense of gathering in such fruits is not equivalent to one half of the rent agreed upon. In the former case the lessee is entitled to demand the remission of the whole rent and in the latter an abatement of the rent corresponding to the difference between the value of the remaining fruits and the amount of rent agreed upon.

If the time of the lease does not exceed one year, the lessee shall be entitled to a remission or to an abatement of the rent, as the case may be, in the event of the happening, during such year, of the circumstances above-mentioned.

If, on the other hand, the lease is made for more than one year and the total or partial loss of the crop of the year is suffered during the last year of tenancy, the remission or abatement of rent is allowed only if, on striking a balance between any excess and deficiency of the previous years, there remains no profit sufficient to reduce the loss sustained in that year to less than one half of the rent. If, however, the total or partial loss does not occur during the last year of tenancy, the balance above-mentioned is struck only in respect of the previous years. If no remission or abatement is found to be due, the lessee may not renew the demand in respect of the same year on account of loss sustained in the following years but if, on striking the said balance, the loss is found to be greater than one half of the rent, the issue of the remission or abatement of rent is definitely settled only at the expiration of the lease, when another balance is struck of any excess and deficiency in respect of the crops gathered during the whole term of the lease. Before the expiration of the lease it is lawful for the Court only provisionally to exempt the lessee from the payment of the rent in proportion to the loss sustained. In this case, however, if, during the continuance of the lease, the lessor grants to the lessee the remission or abatement of the rent of one year in consideration of the loss sustained in that year, he is not entitled to demand the

payment of the amount remitted if no remission or abatement of rent is found to be due at the expiration of the lease, unless he shall have reserved to himself such right in granting the remission or abatement.

The remission or abatement of rent may no longer be claimed :

1. If the lessee fails during the time of the ripening of the fruits and before the gathering thereof, to demand, by writ of summons, that the loss be ascertained;

2. If the lessee pays the rent without reserving to himself the right to recover it in the event of any loss, unless such rent has been paid in advance;

3. If the loss of the fruits occurs after they have been separated from the soil, provided the lease is not made under the Metayer System;

4. If the cause of the loss existed and was known at the time the lease was contracted;

5. If the lessee, by an express convenant, undertakes to bear any loss caused by fortuitous events. Such covenant applies only to ordinary fortuitous events, such as hail or the excessive abundance or scarcity of rain, and does not apply to extraordinary fortuitous events, whether foreseen or unforseen.

(d) *Improvements by tenants.*

There are no express provisions for agricultural improvements carried out by tenants of rural tenements and the general terms of Section 1653 allow of its being applied also to such leases and to the crops and plantations existing at the termination of the lease. The distinction is made between improvements made without the consent of the landlord and those made with his consent. In the latter case the landlord will have to pay for the improvements unless he has safeguarded himself by a stipulation to the contrary; in the former case the lessee may remove them restoring the thing to the condition in which it was before they were made : provided as regards improvements existing at the termination of the lease that he can obtain some profit by taking them away and provided the lessor does not elect to keep them and pay to the lessee a sum equal to the profit; in case of trees and vines this means practically that the landlord pays for their value as fire-wood.

With regard to crops and application of manure or other improvements of the soil e.g., by recent digging, trenching, filling and ploughing it is the custom that the accounts take place and are settled between the former tenant and the new tenant, the landlord thus keeping himself free from any disbursements; in the case of market-garden produce to the cultivation of which the better class soils are devoted in Malta as a rule the former tenant is allowed to retain possession of the field after the termination of the lease until he has disposed of the produce. The question of improvements is engaging the Government's attention and legislation intended to afford security of tenure and a right of compensation in respect of improvements has been actively studied and would probably have been enacted had it not been for the Constitutional Crisis and the imminence of the grant of Self-Government. In the meantime the Emergency Regulations already referred to do not allow improvements voluntarily effected by the tenant to be taken into account for the purpose of supporting the landlord's demand to the rent.

(e) *Obligations of the tenant.*

Obligations of the tenant consist in (*a*) payment of rent; (*b*) the cultivation of the holding according to the rules of good husbandry; (*c*) the carrying out of repairs.

(*a*) With regard to the payment of rents it is the custom that payment is made yearly on August 15th, in arrears; very often the rent is divided into two instalments payable in either on August 15th and on December 25th or on Easter and on November 11th (St. Martin's Feast). When payments are made on any other date but August 15th that is due to an extension of the time for payment allowed or agreed to by the landlord so that e.g., the Easter payment is a postponed payment of the rent due for the year ending August 15th last (v. judgments reported in the Malta Judicial Reports Vol. XXI, p. 2, p. 331 and Vol. XXII, p. I, p. 64). In this connection it is interesting to recall the provisions of the law of sale concerning the fruits of the thing sold. The principle laid down by Section 1444 is that from the day of the sale all fruits shall belong to the buyer, fruits which are uncut and unplucked at the time of the sale shall belong to the buyer although they had been sown by the seller (Sect. 1445). The rent of rural tenements which had not

fallen due at the time of the sale shall also belong to the buyer (Section 1446). There has been much uncertainty and litigation as to the meaning of the expression "Not fallen due". A judgment of the Civil Court of the primary instance held that in case that the rent of the rural tenement was by agreement payable in advance the buyer was entitled to it if the sale had taken place before the expiring of the period for which the rent was paid; and that if according to the usages above referred to the payment of rent due for the year ending the 15th August were postponed to November 11th, Christmas and Easter, supposing the sale to have taken place between August 15th and any of the said dates it would be owing to the seller.

This Judgment was reversed by the Court of Appeal (Vol. XXIV of the Judicial Reports, p. 641) which ruled that if by agreement the rent is payable in advance the seller will be entitled to it if payment had already become due after the sale.

(*b*) That the cultivation of the holding be carried out according to the rules of good husbandry is a tacit condition; it is sometimes expressly stipulated and accompanied by the sanction of the termination of the lease before the expiring of the period agreed upon, at the demand of the landlord.

(*c*) The repairs generally envisaged are those of the rubble boundary walls whch also serve the purpose of holding the soil in case of fields on different levels. These walls may be built of loose stones and they must be twelve feet high in the case of party walls between two courtyards or between two gardens in which there are chiefly oranges or lemon trees; eight feet high if between two gardens in which there are chiefly trees other than those mentioned above and five feet high if between two fields (Section 445); the custom is that if the portion of the wall (whether party wall or not) to be rebuilt does not exceed the length of one cane the expense is to be borne by the tenant; if it exceeds it is to be borne by the landlord.

(C) *Metayage.*

Contracts of leases under the Metayer System, whereby the lessee binds himself to cultivate land under a covenant of sharing the produce with the lessor, have in common with contracts of partnership the sharing of the profits, the element of trust commonly known as the "*affectio societatis*". Whereas, however,

a contract of partnership, is based on the trust which all parties are supposed to have in one another, in a contract of lease under the Metayer System, the element of trust is only presumed on the part of the lessor in favour of the lessee, the latter being the only person responsible for the good administration of the rural tenement and for the gathering of the fruits which such tenement is capable of yielding.

The provisions of the law are in line with the foregoing considerations :

1. According to Section 1675 of the Civil Code the lessor is to bear a proportionate part of the loss of the fruits, even if such loss occurs after the fruits have been separated from the soil, provided the lessee is not in default for delay in delivering to the lessor the latter's share of the profits.

2. Section 1705 of the said Code introduces an exception to the general rule contained in Section 1703 by laying down that the lessee of a rural tenement let to him under the Metayer System cannot sub-let such tenement unless such power is expressly granted to him by the lessor.

3. Section 1678 of the said Code introduces an exception to another general principle by laying down that the lease of a rural tenement entered into under the Metayer System is dissolved by the death of the lessee.

As was pointed out in a judgment recorded in the "Collezione" above mentioned in Volume XXIV, part I, page 602, our law has put an end to the controversy as to whether a contract of this kind should be classified with contracts of letting and hiring or else with contracts of partnership, by means of the above-quoted Section of the Civil Code, wherein the contract in question is called "a lease".

IV—Servitudes.

As Maltese law (Sections 437-525) closely follows the French Civil Code, it is our intention to mention only those provisions, peculiar to our land laws, concerning (*A*) The distances from the boundary to be observed in planting trees, (*B*) The servitudes of Right of way and of Water-course and analogous matters, (*C*) Acquisition of Easements by Prescriptions.

(A) *Distances.*

It is not lawful for any person to plant in his own tenement tall stemmed trees at a distance of less than 8 feet or other trees

at a distance of less than four feet from the boundary between his tenement and that of his neighbour; vines, shrubs and hedges and all other dwarfed trees not exceeding the height of seven feet may be planted at a distance of not less than one foot and a half from the said boundary. Notwithstanding the observance of the said distances, however, the neighbour may if the trees are causing him damage demand that they be uprooted at the expense of the owner: in which case the Court may allow the owner the option either to uproot the trees or to cause ditches or other works to be made at his expense sufficient to prevent all damages.

A person over whose tenement the branches of the neighbour's trees extend may compel him to cut such branches and may gather the fruits hanging from them.

Moreover if the roots extend into his tenement, he may cut them off himself (475).

(B) *Right of way and water-course.*

The two more important servitudes for agricultural purposes are those of right of way and of water-course, which may be either necessary or voluntary (created by the act of man). There is a legal servitude of the right of way in two cases: (*a*) for the purpose of repairing a wall or other work common between two neighbours (Section 483) and (*b*) for the purpose of giving an enclave tenement an outlet to the public road (Sec. 484). The legal servitude of water-course is attributed to a tenement which cannot receive water from fountains or other deposits of public water except through neighbouring rural tenements belonging to other persons. These servitudes may be claimed and enforced by the owner of the tenement but so far as the matter is one of possession the *actio spolii* may be exercised by the tenant and against the neighbouring tenant (Sections 571 and 572). Moreover litigation concerning right of way and water-course or the right of drawing water from cisterns is not uncommon between farmers of separate portions of a tenement or of separate tenements belonging to one owner; in which case though there can be no servitude yet rights of a personal nature come into being on the strength of an agreement of the tenants between themselves or by reason of the conditions imposed by the common landlord and in case of difference of opinion it is necessary to determine on very uncertain evidence the manner in which these rights are

to be exercised according to the kind of cultivation and to the season of the year. In questions of possession the rights and obligations of the dominant and servient tenements are determined by the mode of enjoyment during the preceding year or when the easements are exercised at intervals of more than one year, by the last user thereof (Section 574). Another matter which has a tendency to become the source of contention is that concerning the flow of water which is governed by Section 440 in the sense that tenements at a lower level are subject in regard to tenements at a higher level to receive such waters and materials as flow or fall naturally therefrom without the agency of man; this section expressly forbids the owner of the lower tenement to do anything which may prevent such fall or flow and the owner of the higher tenement from doing anything to aggravate the servitude; but the prohibtion of the law is often disregarded and contentions arise between the tenants with the owners' intervention. Another important provision (Section 442) grants the right to the owner of the higher tenement to lead the water running through the public road into his own tenement in preference to the owner of the lower tenement; when however one of the owners requires the water for the use of man or for watering animals or for watering trees which are ordinarily watered, preference will not depend on the situation (higher or lower) of the tenement but on the purpose for which the water is wanted (Section 443).

(C) . *Acquisition of Easements by prescription.*

Servitudes created by the act of man are distinguished into continuous and non-continuous, and apparent and non-apparent. Those which are continuous and apparent may be acquired by virtue of a title, by prescription and by the disposition of the owner (Section 494); continuous non-apparent servitudes and discontinuous servitudes whether apparent or not can only be created by title(Section 505). Our legislator (Manuscript of Sir Adriano Dingli who was the author of Ord. VII of 1868) has taken care to add (in order, as he states, to avoid a serious difficulty of interpretation to which the French Code gave rise), that they cannot be established by prescription or by the disposition of the owner (Sec. 506, I). The second paragraph of this Section contains a peculiar provision which has been the object of much discussion and of judicial pronouncements. It runs as

follows: "Nevertheless, the easement of right of way for the use of a tenement may be acquired by prescription of 30 years, if such tenement has no other outlet to the public road; and any other easement which on the eleventh of February, 1870, was already acquired under previous laws, may not be impeached". Dr. J.J. Cremona in an article published in the local quarterly Review "Scientia" (January-March 1944, Vol. XL), on the acquisition of easements by prescription expresses the opinion that this provision was borrowed from the Sicilian Code which laid down (Art. 694): "Nevertheless right of way for the service of certain specified tenements may also be acquired by thirty years possession, provided such way be not regarded abusive and it will be considered abusive if there be some other way sufficient for the service of the same tenements". After some uncertainty it has now become a settled point that the effect of the provision contained in the last paragraph of Section 506 is that the right of way established by prescription in favour of a tenement which was enclave, cannot be revoked under the provision of Section 486 in case that the right of way ceases to be necessary in consequence of the opening of a new road or to the incorporation of a tenement with another tenement contiguous to the Public Road (Judgment of His Majesty's Court of Appeal in re Sammut "utrimque", October 18th, 1921, and in re Sant v. Cassar, May 11th, 1934). The principal argument in favour of this interpretation is that otherwise Section 505 could not have any effect whatsoever once that the right of any servitude established by law in favour of an enclavè tenement need not be attributed to such tenement over again by prescription. It may be that this argument is not entirely sound because another effect might be that of preventing the change of the position and mode of the easement after continuous use during thirty years (v. Art. 685 of the French Civil Code). The ruling of an earlier judgment of the Court of Appeal (in re Randon vs. Pace, 16th June, 1893. Judicial Reports Vol. XIII, 288 and 514) was to the effect that if the reason for the establishment of the easement of right of way had been the necessity thereof, on the cessation of such necessity the servitude should also cease if such was the probable intention of the parties at the beginning. This judgment quoted that of the Court of Appeal of Venice 6th April, 1876 reported in Giur. Italiana Vol. 28, p. I, Sez. 2851, PACIFICI MAZZONI,

Trattato delle Servitù Prediali, 787; PARDESSA's *Servitù Prediali*, No. 266. The last part of the 2nd paragraph of Section 506 refers to the acquisition of Easements in virtue of immemorial prescription wich was abolished by Ord. III of 1863. The requisites for such prescription according to a judgment given by the First Hall of the Civil Court in re Cassar Desain vs. Piscopo Macedonia January 9th, 1877 are that the witnesses must have been already born in 1823; that they give evidence *de visu* for a period of forty years and also evidence *de auditu a majoribus quod majores ita viderint et nihil in contrarium audiverint et de publica voce et fama*, according to the gloss to Chapter I de Prescript. No. 6to. *Decretalium* expounded in judgment No. 56, 7th Part of the *Rota Romana* among the *Recentiores*. Evidently such conditions cannot concur any longer and the possibility of proving the acquisition of an Easement by prescription ab immemorabili may be excluded.

V—Hiring of farm hands, "communio inter fratres" and hiring of animals.

The farms being as a rule of a small size are run by the farmer and his family, and outside labour is resorted to only occasionally during spring-time when farming operations are exceptionally busy. Farm hands are engaged by the day and for short periods: their timetable is from sunrise to sunset. The Maltese farm was at one time a self-supporting unit and even up to our own time the custom is that during the lifetime of the parents and sometimes even after their death, whatever the age of the children or grand-children, all the profits and all the investments are regarded as being the sole ownership of the head of the family. This custom is hard to die even though it has received a setback as a consequence of the levying of succession duties. After the parents' death a *communio inter fratres* sets in characterized by the pooling of all profits, absence of any accounts, payment from the common fund of all expenses for the upkeep of the farm and of the family and for the needs of all and single who however do not draw any wages; under these conditions marriage is not encouraged, and if it does take place, those of the partners who marry, as a rule are obliged to leave the partnership and sometimes, *pro bono pacis*, to surrender their share of the leased fields. The requisite of a public deed

which is required for the validity of such general partnerships (Section 1743) is ignored by the farmers without any evil consequence since the Courts in any case take into account the fact that a common ownership exists and allow the liquidation and partition thereof.

Most farmers own the animals they require for farm work, and transport. Leases of cattle are not common and in the Maltese Civil Code the chapter "Of Leases of Cattle" of the French Civil Code (Art. 1800-1831) has been left out; similar leases may however be agreed upon and the usual clauses are that the tenant pays the hire and is responsible for the maintenance of the cattle for any injury owing to his fault (V. *Judicial Reports*, Vol. III, p. 892).

VI—Sale of produce.

The sale is effected through brokers who sell the produce to the green-grocers on a commission basis. Regulations governing the sale of agricultural produce by *pitkali* (middlemen) were issued on the 20th April, 1945. The *pitkali* cannot sell agricultural produce otherwise than by auctions and bids must be made *viva voce*; no longer than one hour after the final bid the broker is to issue a voucher attesting the weight or quantity of the lot sold by acceptance of that bid and the gross price at which the sale of that lot was effected both to the vendor of the lot and to the purchaser. The transactions must also be entered on a book showing the quantity and nature of the produce received by the *pitkali* from each farmer, when and to whom the produce was sold and the price realized at the sale. While *pitkali* have thus been brought under control, Cooperative Agricultural Marketing Societies have come into existence and the first cooperative law was enacted on July 8th, 1946, to provide for the Constitution and Regulation of Cooperative Societies (Ordinance XXXIV of 1946).

First Offenders Under Maltese Law

By H.W. Harding B.A., L.P.

THE local law relating to First Offenders is contained in Section 23 of our Criminal Code. Before dealing with the said section in some detail, it would not be amiss to make a brief reference to its historical origin.

Section 23 was first introduced in our Criminal Code by Ordinance XI of 1900. In its original form, the said section, which was culled from the English Law on the subject, was limited to minors because — as the Crown Advocate of the time stated in the Council of Government (Sitting, May 16th, 1900) — the mental outlook of persons under age was not sufficiently mature and experience had shown that, in the case of minor offences, prejudice to their standard of morality that might derive from their imprisonment far outweighs, from the standpoint of the interests of society, the advantage which might be expected from their confinement in prison. This limitation was strongly criticised by Mr. Azzopardi, a member for the Third District, who, whilst admitting that due consideration was to be given to minors since, on account of their tender age, they were unable to cope with the wiles of the world, nevertheless felt that some consideration was to be given also to those who for long years had led an honest life and who in a moment of weakness committed a crime. The latter — Mr. Azzopardi further stated — would have even stronger motives to reform themselves than a minor. They would lose all they had built up during the past, if they were sent to prison. They would have a family whose honour would be at stake. Furthermore, English law did not admit of the said limitation. These arguments failed to convince the Crown Advocate and the section was passed unamended. But, later on, Mr. Azzopardi's views prevailed and by Ordinance XVI of 1921 the said limitation was abolished.

It has been stated that the said section has been culled from English law. Under this law up to 1861 there was no statutory provision relating to persons convicted for the first time. It was however the practice of the Courts to discharge, upon recognizance to come up for judgement, persons convicted for the

first time of minor offences. Under the Larceny Act 1861, and the Malicious Damage Act 1861, the power to discharge conditionally a first offender in cases of larceny or malicious damage was laid down in the law. The Probation of First Offenders Act, 1887, extended this power of the Courts to other offences (besides larceny and malicious damage) and to offences punishable with not more than two years' imprisonment. This Act of 1887 was superseded by the Probation of Offenders Act, 1907, afterwards amended by the Criminal Justice (Amendment) Act, 1926.

It may be added (see La Polizia vs. Borg, 30th January, 1923) that although Section 23 has been suggested by a like provision in English law, still its special wording should not be lost sight of and it should be at all times coordinated with the other provisions of the Criminal Code in which it has been embodied.

The said section runs as follows:

(1) Where any person, who has never been previously convicted of a crime, is convicted of grievous bodily harm excusable under this Code, or of theft not aggravated by violence, or of fraud, or of the crime referred to in Section 339, or of any other offence punishable with not more than two years' hard labour or imprisonment, the Court may, if, having regard to the trivial nature of the offence, the circumstances under which it was committed, the age, character and antecedents of the offender, it should deem it expedient so to do, declare the offender guilty, and instead of sentencing him forthwith to any punishment, direct that he be released on his entering into a recognizance that he will not commit another crime, if he is guilty of a crime, or another contravention, if he is guilty of a contravention, within the time established for the prescription of the first crime or of the first contravention.

(2) If it shall be proved that the offender has committed a second crime or a second contravention within the time referred to in subsection (1) of this section, he shall be liable to the punishment laid down for such second crime or contravention, and the Court may also sentence him in respect of the first offence of which he had been found guilty as provided in the said subsection.

The first question that falls to be discussed is whether conditional release under Section 23 constitutes a mere conviction without sentence proper or includes also the latter. In The Police vs. Pawlu Calleja, 20th September, 1941, the Court, relying on a previous decision (La Polizia vs. Borg, 30th January, 1923), held the view that a decision ordering the discharge of the accused under Section 23 of the Criminal Code constituted a sentence proper, the punishment being provisionally suspended, and that such a decision is not an exemption from punishment.

This judgment seems to conflict with that in The Police vs. Isabelle Blanc, 5th December, 1936, where it was held that a person conditionally released under Section 23 of the Criminal Code is convicted but *not* sentenced. The Court in this case observed that Section 23, in its opening words, refers to an accused person who has been *convicted* of an offence specified therein. Furthermore, the said section goes on to say that, in the circumstances therein mentioned, the Court may *declare the offender guilty and instead of sentencing him forthwith to any punishment* direct that he be released on his entering into a recognizance. The Court therefore drew the inference that the word "convicted" properly means *only* the declaration of guilt and does *not* include the sentence of the Court. This view falls in with that expressed in Wharton's Law Lexicon where the word "conviction" is defined as "the act of a legal tribunal adjudging a person guilty of a criminal offence" and in Byrne's Law Dictionary where the term is defined as "the declaration of guilt". It is in accordance with the decision taken in England in the case Rex v. Blaby, 1899 (2 Q.B. 170) where the Court for Crown Cased Reserved, presided over by Lord Coleridge as Chief Justice and composed of five of His Majesty's Judges, ruled that the word "convicted" must be taken to refer only to the finding of a verdict of guilty and not to include the sentence or judgment of the Court.

The decision given in The Police vs. Isabelle Blanc is supported by subsection 2 of Section 429, Cap. 12, (vide words in italics) which lays down that "Where the award of punishment has been suspended under the provisions of section 23, the offender may, within the term prescribed in subsection (1) of this section, appeal against *the judgment which has declared him guilty of the offence*". Moreover, S. 520 (Cap. 12) in envisaging

the case of a first offender who has subsequently committed a second offence (violating the terms of his recognizance) states that in any such case the Court (totidem verbis) "shall proceed to sentence the offender....." This wording seems to imply that as yet there was no sentence proper.

If Section 23 is taken to mean only a declaration of guilt (conviction) and not a sentence proper, it would follow that such conviction is not taken into account for the purpose of an increase of punishment in the case of a recidivist (See Rex vs. Giuseppe Deguara, 11th December, 1942, which confirmed Rex vs. Carmelo Aquilina, 10th June, 1911). For relapse to be an aggravation of punishment the law requires not only a declaration of guilt but a sentence awarding punishment. This may be conveniently argued from Section 49 which defines a recidivist as a person who "after being *sentenced* for any offence by a judgment which has become absolute, commits another offence" as well as from the spirit underlying an increase of punishment in case of a relapse: the second or subsequent punishment is increased because it is considered that the first punishment proved to be inadequate. If no punishment was awarded because of the application of Section 23, a more exemplary punishment is not called for.

Section 23 can only be awarded where a person, who has never been previously convicted of a crime, is convicted of grevious bodily harm excusable in terms of law, or of theft not aggravated by violence, or of fraud, or of the crime referred to in Section 339, or of any other offence punishable with not more than two years' hard labour or imprisonment. Lately, an amendment was enacted by Ordinance VI of 1947 according to which the Court may, even if the theft is aggravated by violence, grant a conditional release, if the offenders are minors and if the violence consists merely in the circumstance of the thieves presenting themselves unarmed in a number of more than two.

Interpreting the section our Criminal Court in Rex vs. Spiteri, 14th October, 1920, held that the limitation of the liability to a punishment not exceeding two years' hard labour or imprisonment as a condition for the applicability of the said section referred only to offences other than theft or fraud in which case the limitation was not operative. Moreover, in Rex

vs. Francesco Magro, 3rd October, 1903, the Court held that the law, when referring to *any other offence punishable with not more than two years' hard labour or imprisonment* had in mind the punishment to which the offence as such is subject without taking into consideration any extraneous circumstance which, without altering the nature of the offence, might constitute a reason for aggravating the punishment thereof. This, in fact, is the literal meaning of the words of the section and is consonant with the intention of the legislator which was evidently that of restricting the operation of Section 23 to those offences which are not in themselves of considerable gravity.

The Court, in granting the benefit of conditional release, takes into consideration the trivial nature of the offence, the circumstances under which it was committed, the age, character and antecedents of the offender. Thus Judge Debono, in Rex vs. Maria Carmela Bonnici, 17th January, 1905, granted conditional release in view of the fact that the accused was of good character and the jury had added a rider to their verdict recommending the accused to the clemency of the Court. Vice-versa, in Rex vs. Bartolomeo Cefai, 4th March, 1908, the Court refused to apply this section as it appeared that although the accused had not been previously sentenced, he was, however, notoriously of bad character.

Finally, the question arises: Can Section 23 be applied in the case of a conviction for a second offence *before* the conviction for but *after* the commission of the first offence? — The question was solved in the affirmative in Rex vs. Alfred Rizzo et, 20th October, 1938. In that case, one of the accused Borg, after committing the first offence, had committed a petty theft of which he had been meanwhile convicted by the Court of Magistrates and released conditionally. The Court in this case applied Section 23 in respect of the first offence on the ground that, as at the time of the commission of the first offence, Borg had not been sentenced for any crime, and as Section 23 was meant to be applicable in the case of the first crime, Section 23 could be properly applied. However, this would appear to be a somewhat liberal construction. Moreover, there would be the anomaly of the benefit of Section 23 being awarded twice.

It may not be amiss to add that Luigi Maino in his text-book "Commento al Codice Penale Italiano" (3rd edit. Vol.

I, P. 61, p. 106), speaks very highly of the benefit of first offenders and makes reference to the writings of Prins and Lammasch in the Bulletin de l'Union internationale de droit penal (Ann. 1. 161). He states further that the system of conditional release with regard to offenders "costituisce un freno assai più potente, perchè sono essi direttamente gli interessati ad evitare la recidiva."

THE GENERAL GOOD

"Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of **one** nation, with **one** interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good resulting from the general reason of the whole".

BURKE.

* * *

THE RULE OF LAW

The process of re-establishing the rule of law once it has been shattered is slow and difficult; it is so much easier to destroy than to rebuild. But until the world once more becomes law-abiding it cannot hope to regain peace and happiness.

LORD MACMILLAN.

The Defence of Conjugal Subjection In the Criminal Law of Malta

By J.J. CREMONA, B.A. (Lond.), D.Litt. (Rome), LL.D.

SECTION 34 of the Criminal Code of Malta lays down as follows:

> "No person shall be liable to punishment if at the time of the act or omission complained of, such person—
> (a) was in a state of insanity or frenzy; or
> (b) *was constrained thereto by an external force which he could not resist.*"

The external force mentioned in the last paragraph of this provision of law may be either physical or moral, and a form of moral coercion improperly so called is civil subjection, which may be either public or private. Our Criminal Code, like the French Code and unlike the Italian Code, does not contain an express provision on the subject of civil subjection. It is proposed, however, to consider here the position of private civil subjection with regard to the married women in the Criminal law of Malta.

It is well to start by enunciating the general principle that civil subjection arising from the domestic relations of husband and wife is no defence in Maltese Criminal law and affords no exemption to a wife unless it amounts to such coercion as is envisaged in the last paragraph of the abovequoted provision of law. This may be taken to the general principle governing the subject under investigation.

The defence of civil subjection in respect of the married woman was expressly raised (for the first time, I daresay) in *The Police v. Rita Spiteri and Mario Spiteri*, in which I held brief for Mario Spiteri. By a judgment of the Criminal Court of Magistrates of the 2nd August, 1944, Rita Spiteri was found guilty of having, in Valletta, during the preceding two years, by several acts committed in pursuance of the same design, made false oaths required by law before Labour Officers lawfully authorized to administer oaths and was sentenced to hard labour for a term of seven months and to general interdiction for a term of five years, and her husband Mario Spiteri was also

found guilty of having, by several acts committed in pursuance of the same design, knowingly received a sum exceeding ten pounds but not exceeding one hundred pounds obtained by means of fraud, through his wife's false oaths, and was sentenced to imprisonment for a term of five months. Before that Court Rita Spiteri had set up the plea of coercion by her husband and the presiding magistrate (A.V. Camilleri, now one of His Majesty's Judges) had disallowed the plea on very sound grounds. On appeal the same plea was urged by her, and Harding, J., in an elaborate judgment delivered in His Majesty's Criminal Court in its appellate jurisdiction on the 30th October, 1944, remarked as follows: "The contention of the defence that Rita Spiteri, being a married woman, should be considered, in such a case as this, as having acted under coercion by her husband cannot be accepted by this Court. Even though one were to examine the practical cases to which, *in pari materia*, the doctrine of coercion was applied by English Courts, one must aver that any presumption eventually admitted by English case-law in this connection will fail whenever evidence is adduced that the wife acted voluntarily in assisting her husband. The only coercion under our law is that mentioned in the second subsection of Section 35 of the Criminal Code [now Section 34 (b)]; it is beyond question that *obbedienza gerarchica* in the domestic field (or *timore reverenziale*), as a form of coercion improperly so called, cannot exempt the wife from criminal liability because it does not do away with the consciousness of her wrongdoing nor with the voluntariness of her determination. Therefore the Magistrate was right in remarking in his earlier decision, on remitting the evidence to the Attorney-General, that in the case of a charge brought against husband and wife, there is no presumption under Maltese law that the husband has exercised his power over the wife with a view to committing the crime... Wherefore the contention of coercion, in the absence of proof of coercion in the sense admitted by our positive law, cannot be accepted. This does not necessarily imply that such considerations may not, in appropriate cases, have a bearing on the application of punishment." As a matter of fact, in the case under review, Harding, J., concluded by affirming the judgment of the Inferior Court as regards the merits of the case, but reduced the punishment applied to Rita Spiteri to imprisonment for five months, so that

the punishment restricting the personal liberty of both husband and wife came to extend over the same period of time, as the learned judge avowed his inclination to give weight to the circumstances that Mario Spiteri, as head of the family, should not have passively acquiesced in, but should have actively prohibited, the commission of the offence by his wife.

In England the common law accorded a special privilege to the wife by raising *prima facie* presumption that a felony (other than one of extreme gravity such as treason or murder) committed by a married woman in the actual presence of her husband was committed by her under his coercion and was therefore excused, even though there were no proof of any actual intimidation by the husband. Still, as Kenny says in his *Outlines of Criminal Law* (1945 Edit., p. 83) "this presumption of subjection was only a *prima facie* one; rebuttable by proof that the wife took so active a part in the crime as to show that her will acted independently of her husband's". This principle was affirmed in *Reg. v. Crose* (1838), 2 Moody 53 (K.S.C. 66). As from June 1st, 1926, however, this presumption was abolished, and actually section 47 of the Criminal Justice Act, 1925 (15 and 16 Geo. V. c. 86) lays down as follows: "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of and under the coercion of, the husband."

It is unquestionably relevant to mention here that, doubtlessly acting on the assumption that this presumption had been, at least once before, admitted by our Courts, the defence had, in the Spiteri case, cited *The Police v. John Vella and Rita Vella*, determined by His Majesty's Criminal Court in its appellate jurisdiction on the 30th October, 1943. Harding, J., however remarked that that case was different from *The Police v. Spiteri* abovequoted inasmuch as it had dealt with the presumption of the possessor's identity in the case of the discovery of incriminated objects in a house occupied by a man and his wife. In the Vella case some bedsheets, which were proven to be Crown property, were discovered by the Police in a chest of drawers in a house occupied by Rita Vella and her husband John

Vella. This circumstance, the learned judge observed, should not operate to the prejudice of the wife *alone*, but at least of both the husband and the wife. As a matter of fact, the learned judge went on to remark that on this subject he was rather inclined to follow a principle established in English case-law that unless there are circumstances to show clearly that the wife was acting separately and without her husband's sanction or collusion, it is taken that objects unlawfully found in the house of a husband and his wife are in the possession of the husband. In this connection the learned judge cited *R. v. Booler* (2 Cox, C.C. 272).

The same principle was reaffirmed in a more recent case in which I happened to be prosecuting, *The Police v. Angelo Camilleri and Concetta Tanti*, determined by His Majesty's Criminal Court in its appellate jurisdiction on the 23rd February, 1948. In that case some lengths of material alleged to have been stolen, were found by the Police in a house occupied by the two appellants who were living together in concubinage. Harding, J., however, remarked that even if the Court were to apply the principle affirmed in *The Police v. Vella* to the case of two persons who, like the appellants, were living in concubinage, in the present case the demeanour of both the appellants in the course of the Police investigations was such as to show that both were assuming responsibility for the unlawful possession of the goods in question, in spite of their endeavours to justify such possession. Incidentally the doctrine of marital coercion in English case-law does not apply to cases of mere cohabitation and this privilege accorded to a wife does not extend to a mere concubine, as was held in *R. v. Court* (1912), 7 Cr. App. R. 127.

Finally it would not be amiss to note that even in our Civil Code, as in the Italian Code and formerly in the Code of Este, the Albertine Code, the Neapolitan Code and the Code of Parma) and also in the French Civil Code and in Roman Law (Fr. 22, D. *de rit. nupt.* (XXIII, 2) : L. 6, C. *De his quae vi metusve* (II, 20) mere reverential fear (*timore riverenziale*) is not enough to invalidate a contract; and Section 1023 of our Civil Code lays down as follows : "Mere reverential fear towards the father, mother, or other ascendant, or towards the husband, shall not be sufficient to invalidate a contract, if no violence has been used."

The threefold distinction : Furtum Rei, Furtum Usus and Furtum Possessionis

By J.M. GANADO, B.A., LL.D.

ACTUALLY, no such distinction is formally made in the Digest and it has been urged with reason that no such formal distinction is in any way even authorised by the texts. It is true that the "trio" has acquired quite a lot of importance on account of its having been allotted a seat in the definition of theft itself; but one notes that in several works the distinction is not considered as indicating various types of theft (e.g. in Pothier, Voet, Vico). And it appears that this is the correct attitude; in fact were it not for the stress laid in fr. 1. 3. on this trichotomy, one would probably not have thought about making the distinction at all but only to regard the various cases as different features or applications of the same notion.

The first difficulty that is met with refers to the literal meaning of the definition itself :— "Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve". Monro in his book on theft includes two distinct translations : one joining up the last phrase with "contrectatio", following what is stated in the Institutes (where 'lucri faciendi gratia" is left out), the other following the literal construction by connecting the last phrase with the idea of benefit or advantage. Both have very great defects that throw a rather strong light on the doubtful origin of the definition itself; but, as far as it is possible to translate the definition, as it appears in the Digest, it must be said that the second mode above indicated seems to be more justified. The greatest point in its favour is the clear repetition in "vel ipsius rei". If what Huvelin and Donatutti say were true, the definition in its original form would have read : "Furtum est contrectatio rei vel ipsius rei..." which is an extremely clumsy way of expressing oneself. On the other hand, if Pampaloni and Bonfante have their way, the definition would extend only up to "lucri faciendi gratia" and the rest would be an "addendum" escogitated by some jurist who wanted to illustrate the wide and changeable notion of theft.

In regard to the grammar of the passage, it is quite clear that all is not well. On the one hand, "contrectatio" of intan-

gible things is hardly conceivable and on the other "lucri faciendi gratia rei" is not at all correct either; in fact, Ferrini, for instance, stresses that Latin syntax does not allow absolutely of such a construction.

The discrepancy between the definition as it appears in the Digest and in the Institutes is indeed puzzling. It is of course much more probable that the words "lucri faciendi gratia" were left out in the institutes rather than that they were newly coined in the Digest. But, if that is so, it may make one think that the compilers were used to the expression "contrectatio usus" as they made no attempt at all to remedy the precarious position in which the three genitives found themselves; but this is hardly convincing, although it appears that some writers regard it as a positive argument. The fact that such a thing as "contrectatio usus" did grate on the ear of the jurists of those early days is borne out by the translation in Greek which we find in Theophilus' Paraphrase. In Ferrini's Latin translation the passage runs as follows: "Furtum est alienae rei contrectatio pessima, quae eum qui furtum patitur vel circa ipsam rem laedit vel circa usum eius vel possessionem. Circa ipsam rem veluti cum hominem tuum subripiam, circa usum veluti cum id quod mihi in unum diem utendum datum est, diutius retineam. Circa possessionem demum cum id quod tamquam pignus retinendum datum est, vel tamquam depositum, quasi dominus possideam". This indicates that even in the early period the distinction between res, usus and possssio was understood as being grafted on the disadvantage caused, or, from the positive angle, on the advantage derived.

The passage fr. 1. 3. is supposed to have been taken from Paulus' thirty-ninth book "Ad Edictum"; and if it were Paul himself who had formulated the new definition, how is it that he abandons it in his "Receptae Sententiae" which is probably a later work, apart from any question about its authenticity. In his "Receptae Sententiae", he adheres to the traditional, probably Sabinian, definition of theft which is mentioned in Gellius, followed by Gaius (III, 195) and possibly also by Ulpian (fr. 66) who however adds "ut lucri faceret". (Incidentally, the authenticity of the relative passage of Ulpian is impugned by Huvelin and by Albertario). Paul, however, changes the traditional "invito domino" into "dolo malo" which is decidedly

much more correct and which eliminates one of the grounds on which the Sabinian definition has been severely criticised. None the less it is indeed strange that Paulus should have abandoned a definition which is superior and again adhered to the one traditionally followed. It has been suggested that Paulus did not mean to give a definition in his extract from his Sententiae but only to deal with a specific case, but if one considers the position of the relative sentence and the wording, one cannot very well doubt of Paul's intention. And, if the longer definition belongs to Paul in actual fact, one cannot very well find any solution other than that in his Sententiae Paulus more or less repeated the traditional definition without attributing to it too much importance.

Attempts have been made to explain what Paul could have meant, exactly, by his novel way of defining furtum. Birnbaum suggests that "lucrifaciendi gratia" means nothing more than "with the animus of acquiring" and in this way the genitives will follow splendidly. (This interpretation, as will be seen, is not at all justified by the texts, as it involves the acceptance of the modern notion of "furtum usus" that is completely alien to Roman Law). Rein thinks that "contrectare" in the meaning it acquired in later times, does not convey anything but "usurp" and therefore it could stand pretty well with such intangible things as "usus" and "possessio"; this solution, though attractive, decidedly conflicts with the logical meaning tha has to be attributed to the word as evinced by the constant use that is made of it in the texts.

It appears that in the early 20th century, the extract containing Paul's definition was considered to be indubitably authentic: in fact, we find, for instance, Ferrini saying that "nemo sanus" can deny that the definition in the Institutes derives from the slightly longer one reproduced in the Digest, which probably was not coined by Paulus himself (who, it is stated, did not have a very original mind) and which he might perhaps have culled from Julianus' works. If this were true, it is amazing how the definition did not find supporters or even critics and did not have any repercussion at all on the judicial discussions that were going on in regrad to the subject in hand. The expression "furtum usus" is hardly ever found; while the phrase "furtum possessionis" appears very seldom and has caused much controver-

sy on the proper translation. But in any case it is quite clear that, as has already been observed, the distinction is not one on which the Roman doctrine of theft was built up. It seems that it made no difference whatever whether a particular set of circumstances fell under the one or the other category : the jurists ignored completely discussions of that nature—a fact which inevitably leads to the inference that the distinction could not have possibly exercised any influence on the historical development of the law of "furtum". It is true that the penalty applicable was identical; but that cannot be considered to have been the *cause* of an identical treatment. Rather, the application of the same penalty is a pointer towards the absence of a distinction and a result of the cases having been grouped together.

The divergence which exists between the definition as preserved in the Digest and in the Institutes is at the same time curious and instructive. Huvelin thinks that the notion of "lucrum facere" was given prevalence, if not introduced, by Justinian's compilers themselves. But, is it probable that anyone should discard deliberately one's own innovations? And, the compilers cannot be considered to have been guilty of underestimating or under-stressing the conceptions introduced or modified by them.

It seems as if one does not possess adequate data to venture launching a solution. On the one hand, it is quite clear that the threefold distinction did not have a say in the Classical discussion of the law; indeed, Hitzig categorically states that writers who came later than Paulus are not even aware of the distinction. None of the Classical jurists ever essays to outline the limits of one category as opposed to the other. On the other hand it does not appear to be the custom of the compilers not to incorporate the distinctions formulated by them, in the discussion of cases. If the two normal solutions are thus excluded, a third would remain possible, namely, that the generalisation was a pre-Justinianian attempt to formulate a comprehensive rule that would cover most of the cases of theft—but which did not have the virtue or the time to gain a proper hold on juristic thought; besides, it may be that it was too abstruse a distinction to admit of easy infiltration into the bulk of the texts. Its Eastern origin throws much light on the strange syntax occasioned by joining up "lucri faciendi gratia" with the genitives, or alternatively,

on the weird notion of "contrectatio usus", if one thinks of the difference in the shade of meaning pertaining to the corresponding Greek words. In fact Ferrini considers Theophilus' Paraphrase as being impotent to furnish an argument in favour or against any possible mode of translating the definition; besides, its being relatively late, it is subject to the consideration that the Greek term corresponding to "contrectatio" has a much more restricted meaning which necessitated an arbitrary rendering into Greek. For our purposes, it is enough to note that the variances that exist between the Latin and the Greek wording might possibly have helped in the production of a sentence which judged by normal Classical syntax appears decidedly weird.

The final invocation of Natural Law, as Albertario says, carries on its face the signs of doubtful origin.

It, consequently, appears possible that the definition in 47. 2. 1. 3. is a pre-Justinianian attempt to make a generalisation, which substantially was neither necessary nor useful, as it was a natural consequence of the rule that "amotio" was not essential and that the interest in the safety of the things is a much wider conception than the interests of the owner as such; but, although its utility was thus rather doubtful, it must be admitted that the trichitomy, as formulated did not hit too wide of the mark. Of course, it is a distinction which cannot have resulted automatically out of sheer practice but it must have received formulation at one of the renowned Law Schools in the East, about which so little is known. But from what is known, it appears that the standard of studies was far from unsatisfactory and the fact that several of the compilers came from the Law Schools increases the probability that certain rules that had been formulated in the Schools should have been accepted in the new Codification.

If we accept such a conclusion, it would be rather awkward to try to find out what the distinction actually meant, or rather what it was intended to mean: the cases mentioned in the Digest present no ordered application of the pattern presented by the distinction and that explains the doubt which still prevails in connexion with points of "furtum usus" and furtum possessionis".

In Gaius and Justinian's Institutes a well-known case in which theft is committed by unlawful use of a thing is men-

tioned as a sort of illustration of the rule that theft need not consist in "amotio" but "generaliter cum quis alienam rem invito domino contrectat". "Itaque" (and the word is worth noting)—then follow the cases of the pledgee and of the depositary; the designation of the offence is simply unqualified 'furtum committit'. It appears that from the connexion between the parts of J. IV tit. I. 6. characterised by the "itaque" some jurists have been led to interpret the rule as reproducing the distinction; in other words "furtum rei" would be "furtum (rei) fit... cum quis intercipiendi causa rem alienam amovet" and "furtum usus"—"cum quis alienam rem invito domino contrectat". That would apparently leave furtum possessionis unaccounted for; but this objection is dealt with by a very ingenious mode of interpreting the notion of "furtum possessionis", that would thus be easily covered by the words "cum quis alienam rem invito domino contrectat".

I do not believe at all that we can derive any assistance from this passage, appearing both in Gaius and in the Institutes. It merely contains the enunciation of the "contrectatio" principle and does not cover any recondite mysteries. Gaius in writing it, did not have any ulterior motive in mind and the case he mentions is an ordinary case in which there is no "amotio".

From Gellius we learn that the rule that such illicit use of a thing as theft was quite old : "... idque Brutum solitum dicere, et furti damnatum esse, qui iumentum aliorsum duxerat quam quo utendum acciperat item qui longius produxerat quam in quem locum petierat"; and, incidentally, we also do learn that no distinction in theory or in practice was made.

At one time it was thought that the three types of "furtum" indicate three distinct and separate types; while on the other hand others were inclined to think that the distinction referred to the purpose which the thief had in mind, the notion of theft being one and unchangeable. The first point of view is clearly disproved by all the texts, other, perhaps, than the definition itself; while the second point of view leaves "furtum possessionis" out of the picture—it, however, has the merit of its having been accepted in the law of later times, resulting in the modern legal notion of "theft of use".

It is true the intentional element does exercise much influence in theft. Paul tells us, for instance, that "contrectatio"

must be made "dolo malo"; from Sabinus (via Gellius) we know that for use to be illicit, it is necessary that the user *should* have known (iudicare deberet) that the use was being made "invito domino". But we do not come across any clear instance in which a carrying away is not deemed to be theft because there is some peculiar purpose. On this matter, difficulties are met with in regard to the mere intention to destroy or to the mere intention of gratifying one's passion. As to the former, it is highly probable that the rule was that one must have acted "animo furti faciendi" and not only "tantum damnum dandi", although the principle does not invariably apply as for example in D. 12. 4. 15, when the supposed thief acts merely to cause the death of a "servus alienus" without the intention of appropriating him or of deriving any use or profit. As to the latter, there is some difficulty in reconciling what Paulus says in 83. 2. with what Ulpian says in 39; apparently, neither 83. 2. nor the first sentence of 39 has ever been alleged to be an interpolation. Apart from a possible justification arising from the woman's position as a prostitute in 39, it is suggested that the proper rule is the one found in fr. 83. 2. as it was typical of Classical law not to enquire into ulterior motives in a way that would take one far from the objectivity of the situation. Ferrini considers that 39 derives from a strained interpretation which Ulpian had of "lucri faciendi animus"; while it is probable, as Biondi says, that the notion of compensation with disgrace which is suggested, is an interpolation.

All other cases of unlawful use which the texts present refer to people who have already, by reason of a contract, the thing in their detention; borrowers, tenants, depositaries and pledgees, for instance, are mentioned but we never find instances of people who are deemed to commit an unlawful use, if in order to use the thing, they must take it away first from the owner's possession. This is said to be in conformity also with old Byzantine tradition in general; only the more recent Greek tradition departed from the rule. And the cases mentioned by Gellius, coming from Quintus Macius and Brutus and in that mentioned by Valerius Maximus, possibly as Huvelin thinks, in accordance with the same tradition, we only have instances of people detaining "nomine alieno", who put the thing to an unauthorised use. The apparently general wording used by Paulus in fr. 40:

"qui iumenta sibi commodata longius duxerat *alienave re invito domino usus sit furtum facit*", is no proof to the contrary. The clause in italics cannot be understood separately from its contents. It is true, the words "aliena re" seem to suggest that a new clause is being taken up, still the phrase "usus sit" cannot be interpreted as "carrying away with the purpose of using". Besides, Paulus' paragraph seems to be a mere part of the traditional claim mentioned by Huvelin. Consequently, it appears that according to the texts, who takes away a thing from its owner without the latter's consent, for some motive or other (save "pietatis causa"—unchaining of a slave), commits furtum rei ipsius.

But was the intention of whoever formulated the distinction actually that? Were it not for one consderation, mentioned hereunder, it would have been extremely doubtful. A differentiation between the one who steals with the intention of permanently appropriating the thing and the one who carries the thing with the intention of using it and then returning it, is not at all illogical or unjust; and it would have been highly harmonious with the moralising attitude that prevailed. Besides, this point of view is confirmed by later Byzantine-Greek doctrine on the subject, but, it seems to be ascertained that Byzantine law and custom at the time of and before the compilation of the Digest was not in favour of such an analysis, as one can infer from the Index of Cyrillus in the Basilica and from other sources. Besides, the tendency of later Byzantine thought is explained by such writers as Ferrini as having been due to an attempt to reconcile Ulpian's fr. 39 with Paul's fr. 83. 2. Ulpian was said to have decided that in taking an "ancilla aliena libidinis causa" there is no "furtum rei ipsius"; while Paul says on the same hypothesis that there is theft that is furtum usus. From such explanation, a new notion of "furtum usus" grew up.

Incidentally, it may be stated that an examination of the discussions that rage in regard to 52.20 cannot be of assistance in determining the notion of "furtum usus". It appears that the allegations that are made by Ferrini and Albertario would turn the passage into: "si quis asinum meum coegisset et in equas suas... dumtaxat... admisisset, furti tenetur." If that is true, the passage would confirm the view expressed above. But even if we leave the passage as it is, it throws no adverse light on the

notion of "furtum usus" at all, apart from the fact that it gives us an instance in which unauthorised taking merely for use may not be theft.

As to "furtum possessionis" no separate crime exists in modern criminal law bearing that name; but it is a commonplace that theft in modern law is a crime against possession—an idea that instantly reminds one of the maxim "furtum possessionis fit". It is generally thought that the mention of possessionis in the definition refers to cases of a "furtum rei propriae" by a debtor from the pledgee, by the bare owner from the usufructuary and by the owner from the bonae fidei possessor or from the commodatarium who has a "ius ritentionis" on the thing. The trouble about all this is that in the relative passages there is not even the slightest reference to possession and nowhere is a penal protection of possession made mention of (e.g. fr. 19. 5; 20. pr.; 14. 2; 54. 4; 60. besides, the phrase "rem contrectare" is employed in 20. 1 : et eam contrectavero), and it is admittedly strange to include under the term of possession which is a technical one also the case of "ius ritentionis".

Schirmer and Huschke present a remarkable theory; they say that the one who said : "... ait possessionis furtum fieri; idcirco autem hereditati furtum non fieri..." is in reality Publius Cervidius Scaevola and not Quintus Mucius Scaevola who is never called by the surname Scaevola alone. It is quite clear that Cervidius Scaevola was fully aware of the cases in which there is theft of things not in the possession of anyone (e.g. 43. 11. 70). Consequently, Schirmer concludes that it is impossible that a Roman lawyer should have considered as a requisite of theft the possession of the victim, when one thinks that the alienation with knowledge of an extraneous thing amounts to theft. However, in all the cases which are considered as "furtum possessionis" there is always the right belonging to someone to reclaim possession or at least detention of the thing by a real action. Such an eventuality does not exist, it is said, in the case of an inheritance not yet accepted.

Ferrini says that he does not see any difference between the case of the heir prior to material possession of the thing and that of the owner of a thing that has been mislaid. Besides, he disagrees with the interpretation of the word "possession"; he says that "possessio" is used in the purely technical sense con-

firmed expressly by the reference to its two elements; "quae facti est et animi" (which words are suspected of being interpolated by Albertario).

One of the cases reputed to come under "furtum possessionis" is the sale by the pledgor who is in the possession of the thing that had been hypothecated. In such a case no "possession" is stolen. Secondly, it is most improbable that the Romans should have looked upon the bare owner as stealing "possession" from the usufructuary. It looks as if the general interpretation of this type of "furtum" is not at all satisfactory, when one comes to apply it to the texts.

Ferrini proposes a solution that was also adopted in several old works—a solution which is extremely ingenious, although at first sight a bit far-fetched. He says that the depositary or the pledgee who manifests his decision to keep the thing commits "furtum possessionis" because without removing the thing from the patrimonial sphere of the owner he usurps possession.

In regard to the case of the pledgee, it may be objected that the pledgee has already possession; but on the other hand it is suggested that the pledgee would be changing his derivative possession into a proper and original possession—a distinction which as far as is known is nowhere else suggested by the texts.

Ferrini concludes that it is not the thief's intention that characterizes the offence—but the way in which he acts (il modo dell'atto suo)—and in these cases there is a "mutatio possessionis". (This is not perfectly exact as the depositary has no possession, so in his case it is not a mere "mutatio" but in any case it must be something more).

It must be said that there is a passage from Celsus (Dig. 47. 2. 68 pr.) which confirms Ferrini's line of thought: "infitiando depositum nemo facit furtum: nec enim furtum est ipsa infitiatio, licet prope furtum est. Sed si *possessionem eius apiscatur* intervertendi causa facit furtum". Another very strong bit of evidence is to be found in Gellius when dealing with Sabinus' view on the theft of immovables:— "condemnatum quoque furti colonum, qui fundo quem conduxerat vendito *possessione eius dominum intervertisset*". Besides, Dig. 41. 2. 20 proves that the words "intervertere possessionem" were, so to say, part of ordinary phraseology in regard to serious breaches of bailees. The passage deals with the case of a commodatarius (or possibly

"precarium tenens") who fails to make traditio in favour of the lawful purchaser and it is stated that there is no interversion of possession if there is a just ad reasonable cause: "nam nec tum quidem dominus *amittit possessionem* cum reposcenti in commodatum non redditur: quid enim si alia quaepiam fuit iusta et rationabilis causa non reddendi? non utique eius *rei possessionem intervertit*".

It seems to be extremely likely, if not certain, that the phrase "furtum possessionis" did not cover such cases. It is quite possible however that that notion was meant to include other cases such as "furtum rei propriae". However, it does not appear either that there are really cogent reasons that make one believe that "furtum rei propriae" was indeed considered under this head. It is true that at some stage in the history of the law of theft, the furtum rei propriae must have made jurists think twice, but in the period of developed law, when the orbit of theft had more or less acquired its full dimensions, no special effect was necessary in order to incorporate such cases of "furtum" with the bulk of ordinary cases. And one must remember that according to the conclusions already submitted, the birth of the qualification "furtum possessionis" (if not in wording, at least in notion) came extremely late.

The much controverted passage which contains the sentence "possessionis furtum fieri", aforequoted, to my mind, has no connexion with the present discussion. If Ulpianus had wanted to tell us that there existed such a thing as "furtum possessionis" he would surely have given us as illustration an instance when this "furtum possessionis" takes place; while actually he gives us a case in which no furtum at all can be committed—a fact which makes one translate the governing maxim in the sense that "furtum" is a lesion of possession. Positive evidence in favour of the contention that "furtum possessionis" means furtum by the owner appears to be very scanty, if at all existent. Buckland states "it was furtum possessionis for an owner to take the thing from one who had 'ius in rem' against him, usufructuary, pledgee or the like or even from a conductor with a right of retention for expenses". He refers in the footnote to D. 47. 2. 15. 1., 19. 5, 60; Gaius 3. 200; Inst. 4. 1. 10. But these passages do not even remotely suggest that they are dealing with "furtum possessionis". It is only constant subsequent doctrine

that looks at furtum possessionis in that light. So that it appears that Ferrini was perfectly justified in impugning the validity of such a construction.

The other solution outlined above labours under a disadvantage in that it is bound to approximate a bit too much "furtum usus" to "furtum possessionis"; and perhaps it may be suggested, (and up to a certain extent rightly) that there must be an error in the logic of the whole situation. On the one hand, the more modern notion of "theft of use" has been severed from the Roman "furtum usus", as something that has hardly anything in common, *because* the Roman Law did not have any regard, or at any rate too much regard, to the intentional factor or motive. And, therefore, how is it that the distinction, maybe meant to be the fundamental one at least in form, is actually based on the specific intention on the bailee's part—whether he wants to appropriate it or whether he wants to use it in an unauthorised way and, of course, manifests such a state of mind. The difference would ultimately result in stressing the specific intention of using (i.e. of not appropriating), exactly that element which has been repudiated in interpreting "furtum usus".

Ferrini, although he does not mention anything, must have foreseen the possibility of such an argument and he states that "furtum usus" and "furtum possessionis" belong to one class, as opposed to "furtum rei ipsius". But that does not settle the objection since the sub-distinction would always remain unexplained.

However, it is not amazing that the distinction should remain, at least partly unaccounted for. Considering the details furnished by the texts, it looks as if Ferrini's analysis of "furtum possessionis" is the only one that receives backing. But it leaves the position a bit queer both in regard to the proportion of the component parts of the distinction and in regard to the logical aspect aforequoted.

But one must recall that, if it is true that the distinction is a very late creation, it cannot possibly tally exactly with the law as unfolded in its varied application. The generalisation which today figures so prominently still carries the traces of its humble origin and is as puzzling as a case of mistaken diagnosis.

Debate*

The Motion before the House was: "That Semi-Responsibility should be recognised in our Criminal Code."

Professor A. Mamo, B.A., LL.D., kindly consented to take the Chair.

Mr. J. Brincat, proposer, stated that in the history of our Criminal Law we find that on various occasions attempts were made to introduce a provision in our Criminal Code to deal with the case of semi-responsibility. In 1850, Sir Adriano Dingli proposed the incorporation of such a provision, and so did Sir Arturo Mercieca in 1909. The proposer held that the opinion of two such eminent jurists was of great weight and constituted a clear proof of the need of recognising such a theory.

The proposer pointed out further that the motions might have been defeated because such theory was not accepted in English Criminal Law. But as our Criminal Code was based on the Neapolitan Code and our temperament was that of Southern Europeans we should rather imitate the Italian Criminal Code and mete out a lesser punishment to a semi-responsible criminal. The opinion of several Italian authors was then quoted.

It was generally objected that it would be very difficult to prove the existence of semi-responsibility. This objection however was not very serious, for in fact, in Italy, Japan and Sweden, where such theory was being put into practice, its application was not found to be difficult.

Mr. F. Dingli, the opposer, began by describing a semi-responsible man as one who is less capable of thinking and willing than a normal one. To the admissibility of the theory of semi-responsibility he found three objections. Firstly, the effects of such theory were detrimental to the accused, for he would be sentenced to imprisonment instead of being sent to a mental hospital. A half normal person is not normal and so he should not be subjected to a lesser punishment, but should be sent to hospital for treatment. Secondly, he stated that it

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* Reported by G. Schembri, B.A.

was practically impossible to distinguish between the half normal and the totally abnormal, and thirdly, even if this were possible, it would be unnecessary. In practice the jury classified such a person as insane. Mr. Dingli quoted two cases Rex vs. Pizzuto (1919) and Rex vs. Busuttil (1940), where the jury gave a verdict of insanity, notwithstanding the opinion of medical experts to the contrary.

Mr. O.J. Gulia, B.A., L.P., seconded the proposer. He pointed out that it might seem cruel to send a half normal person to prison, but it was by far more inhuman to send such person to the gallows. The speaker went on to explain that our law is totally at variance with English law in the matter of insanity. He reviewed the development of the various theories on insanity in English Law, from the Wild Beast Theory to the McNaughton Rules, which did not deal at all with irresistible impulse. English Law was criticised in this matter even by English writers. Villiers, Chief Justice of the Cape of Good Hope, admitted the possible existence of a weak will, and such opinion was being followed now by English Judges.

Psychiatrists have accepted the theory of semi-responsibility, for indeed it was quite logical that a state of mind between the normal and abnormal should exist.

In the recent Connell case, the jury, while giving the verdict of guilty for one of the accused, Burnell, requested the Court to exercise its clemency as Burnell was of weak will. The Court could not comply with the request of the jury, as the law did not provide for such a contingency, and the death sentence was passed on Burnell together with the other accused.

Mr. E.P. Sammut, B.A., seconder of the opposition, began by stating that in Italian Law the introduction of such provision met with considerable opposition. Some psychiatrists disapproved of this theory.

In 1909, the Crown Advocate opposed Sir A. Mercieca's motion on the ground that there was no definite criterion to determine the existence of such state of mind. If a person were abnormal to such an extent as to merit a decrease in punishment, then it would be more just to classify him as insane. As to the objection that a person once remitted to a mental hospital was never released, Mr. Sammut drew the atten-

tion of the proposer to the existence of a Board which released persons meriting discharge.

He was of opinion that an express provision relating to semi-responsibility would be dangerous as jurors would be inclined to attribute the slightest abnormal conduct on the part of the accused to a state of semi-responsibility. It was the legislator's duty to maintain an equitable balance between public security and humanely directed clemency.

The debate was then declared open to the house.

Mr. G. Degaetano opined that our law recognised semi-responsibility implicitly since it allowed a latitude in the amount of punishment. An amendment was thus only required in the matter of homicide.

Mr. A. Cachia, B.A., begged to differ from the opposer's statement that a semi-responsible person was a lunatic, and so in practice he would not be sent to a mental hospital. Justice was not to be sacrificed because of the difficulty of proving the existence of such a state of mind.

Mr. J. Schembri, B.A., expressed himself in favour of the motion and stated that such doctrine was admitted with regard to homicide in the law of Scotland.

Mr. W. Gulia, B.Sc., said that one should not lose sight of advances made in psychiatry. Semi-responsible persons were not normal. The community should cater for all individuals and so such persons should receive a treatment different from that of normal ones. The best solution would be an institution intended exclusively for such persons.

On being put to the vote the motion was carried by 7 votes against 4, with 1 abstention.

Prof. Mamo then examined in a masterly way the arguments brought forward by both sides of the House. He stated that the doctrine of insanity in English law was surely inadequate, if we were to consider the McNaughton Rules as the whole of the law on the matter. But in practice this was not the case. While English law might not be the best on paper, it was unsurpassed in its practical administration. The lack of a provision in English law dealing with semi-responsibility was remedied very adequately by the non-existence of minimum punishments, leaving the judge unfettered in his discretion to mete out the punishment he considered most suitable according to

the circumstances of each case. Moreover English Law provided a variety of preventive, reformative and remedial treatments which enable the Judge to deal with the case before him in the most satisfactory way. In Italian Law the minimum punishment was fixed and hence they felt the need of introducing a provision dealing expressly with semi-responsibility.

Not all writers agree as to the existence or otherwise of the semi-responsible man. The majority of modern psychiatrists stood for the affirmative proposition. The difficulty arose when one came to frame a provision of law to regulate such matter. The suggestion of the proposing side that semi-responsible persons should be kept in prison for a lesser period would entail among other unacceptable consequences their earlier return to society. Such procedure might be detrimental to society. The best solution was that suggested by Mr. W. Gulia that a special institution should be set up to cater for such persons. A practical solution in Malta, concluded Prof. Mamo, might be the abolition altogether of the minimum punishment and the provision of modes of treatment of offenders other than by fines or imprisonment, e.g. probation service homes for the mental deficient and so on.

DEMOCRACY

True democracy is that system which in the words of De Tocqueville "may be reconciled with respect for property. with deference for rights, with safety to freedom, with reverence to religion."

LORD MACMILLAN.

Law Reports

H.M. COURT OF APPEAL

The Noble Giorgio Cassar Desain vs. Marquis James Cassar Desain Viani et

Judgment delivered on 25. 6. 45

CONFIRMED BY JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—14. 10. 47.

Defendant who was the actual holder of a primogenitura founded by the Noble Cleric Dr. Gio Batta Cassar, had since 1931 added the surname Viani to that of Cassar Desain, thereby contravening the order of the founder. Plaintiff claimed that his brother, the defendant, had forfeited the entail and that the primogenitura should be given over to him, being in 1931, the legitimate successor. Marquis James Cassar Desain Viani pleaded that he had not yet forfeited the entail as the Court could grant him a period of time in which to conform with the testator's orders.

Held: that the order did not imply a dissolving condition but only a 'modus' and that defendant should incur forfeiture of the primogenitura if, within one month he failed to undertake, by a note to be filed in the Registry of the Court, never more to bear the name Viani together with the name Cassar Desain.

Plaintiff and defendant were the surviving sons of the Marchese Giorgio Riccardo Cassar Desain who had succeeded to a primogenitura which was founded in 1781 by the will of the Noble Dr. Gio Batta Cassar in the records of Notary Paolo Vittorio Giammalva in favour of the lawful male line descending from the Noble Salvatore Testaferrata and the property was to descend in accordance with the rules laid down in the will "in perpetuity" — a direction which was valid in 1781, though after 1784, the date of the Code de Rohan, no primogenitura could be instituted so as to extend beyond the fourth degree.

The successors to this primogenitura have borne the surname of Cassar Desain in accordance with the provisions of the will, wherein it was stipulated that if the holder of the entail were to add other surnames then from that moment of con-

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

travention he who should succeed in accordance with the provisions of the will, should succeed to the said primogenitura. Defendant had at least from 1931 borne the surname Cassar Desain using also the surname Viani. Plaintiff claimed that his brother had forfeited the entail and that being in 1931 the lawful successor he should take over the property forming the entail in question. Defendant pleaded that plaintiff had no interest to promote the suit for even if defendant had forfeited the lands these would pass to his son born after 1931, in accordance with the provisions of the said will, and further pleaded that he had not yet incurred forfeiture as the order did not imply a dissolving condition but only a 'modus'.

In H.M. Civil Court, First Hall, Mr. Justice Montanaro Gauci pointed out that plaintiff being "within the vocation" was entitled to bring the defendant's failure to observe the terms of the founder's disposition to the notice of the Court. He further held that defendant had acted in error and that his error was excusable. Defendant had not forfeited his primogenitura but was to file a note undertaking not to add any surname to that of Cassar Desain. The entail was to pass to the first born child of defendant in case of non-compliance with the undertaking.

Plaintiff's appeal was dismissed by H.M. Court of Appeal and upheld defendant's plea. It was argued that in order to decide whether in the case of forfeiture the lands should pass to plaintiff or to defendant's son, it was essential to interpret the provision in question in the light of the other provisions of the will, in terms of the rules which govern the interpretation of wills and laws. The provision which set down the penalty, by its diction implied a reference to the other rules of the will. In fact it emerged that the founder's will was that the entail should always be held by the direct male line of descendants of his heir and had laid down various rules in order to safeguard this succession. Furthermore the testator had nowhere shown in his will that the line of descendants of the person who failed to comply with his orders should be penalized.

In order to decide whether the order in question implied a resolutive condition or a 'modus' it was essential to examine the law prevailing at the time of the foundation as was held in re "Caruana vs. Sir Gerald Strickland" (Vol. XVIII P. II. Pg. 106). The doctrine of Aretinus which owes its origin to

Angelus Aretinus who taught at Bologna and Ferrara in the 15th century and is described as 'eximius juris consultus saeculi XV' in Fierli's "Celebriorum Doctorum Theoricae", was well established as a guiding principle of construction at the date of the foundation of the Cassar Desain primogenitura. The distinction between a 'modus' and a 'conditio' was plain. If it was laid down in the will that the successor to the property should enter upon the enjoyment of it only after he had fulfilled some obligation, then he could never acquire the property until he had fulfilled that obligation. The term was not construed as a 'modus' and the heir was not subject to the penalty of forfeiture because he could not forfeit that which never had been his. Where however the obligation was to be performed after the acquisition of the property the case was not simple. On a strictly literal construction the wording of the will might appear to provide for an immdiate forfeiture. The law however, was against such forfeitures, regarding them as odious and as generally producing a result contrary to the true intention of the testator. It was therefore presumed that, whenever an obligation was imposed on the heir after, and not before, the acquisition of the property, the provision was to be read as a 'modus'. The Court when the matter came before it had to decide first whether a contravention had been committed and next, if a contravention was proved, whether the circumstances were such that the defaulter instead of being immediately dispossessed should be permitted to retain the property if he gave an undertaking to observe the obligation in future. The permission was always granted when the contravention was excusable. Where there had been no culpa gravis on the part of the defaulter, the contravention was excusable.

The terms of the testamentary provision further suggested that the founder had only a 'modus' in his mind. He laid down, in fact, that in case of contravention of his order the holder would forfeit the entail "ex nunc", and had he willed a resolutive condition he could have laid down that the forfeiture should occur "ex tunc".

The case was brought before the Judicial Committee of the Privy Council and their Lordships, Lord du Parqq, Lord Morton of Hennyton and Lord Macdremont in dismissing the appeal pointed out that there was no doubt that the clause of the

will under consideration should be read and construed in the light of the common law of Malta, which was Roman Law based primarily on the laws of Justinian, but developed by the interpretation of civilian jurists into a system — the usus modernus juris Romani — which perhaps would have seemed strange in some of its aspects to the lawyers of Justinian's day. The tradition of the Roman Law had been to give great weight to the opinions of the learned. This tradition was followed in the 14th and 15th centuries when the Roman law was being refashioned or at any rate adjusted to meet new conditions and problems: continental lawyers of that period, in the words of Sir William Holdsworth, "made their law depend upon the common opinion of the legal profession to be gathered principally from legal treatises" (Holdsworth's "History of English Law" Vol. I p. 220).

Their Lordships considered the authorities on which the Courts of Malta relied and were of opinion that the case had been decided on a correct view of the law. Their Lordships accepted the doctrine exposed by De Valentibus in his work "De Ultimis Voluntatibus" (Vol. 2 P. 1 Votum XXVIII) published in 1744. This book of authority was also referred to by the Privy Council in an appeal in which the title to the Viani primogenitura was in question: Desain (Marquis) v. Viani (1925). De Valentibus professed to be stating familiar rules, and authorities to which their Lordships were referred, bore him out. It had come to be regarded as a general rule, hardly (if at all) subject to exception, that where an obligation was imposed which was to be fulfilled, on pain of forfeiture, after acquisition of the property, it had to be construed as a 'modus'. This was illustrated by a judgment of the Rota Romana in 1667, (S.R.R. Decis CII at p. 132, coram R.P.D. ottalora).

NEWS AND VIEWS

During the Graduation Ceremony which was held on the 4th of October, the Degree of Bachelor of Arts was conferred on Mr. Maurice Gambin and Mr. J. Zarb Cousin who are both members of the Law Society. Several members have qualified for the Diploma of Notary Public. These are: Mrs. G. Degiorgio B.A., Mr. J. Agius, Mr. A. Cachia B.A., Mr. S. Camilleri, Mr. G. Degaetano, Mr. J.V. Galea, Mr. A. Grech, Mr. O.J. Gulia L.P., Mr. E. Lucia, Mr. A. Mifsud L.P., Mr. V. Ragonesi L.P., Mr. A. Rutter Giappone L.P., Mr. J. Schembri B.A., and Mr. G. Schembri B.A.

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We extend our congratulations to Mr. J.M. Ganado B.A., LL.D.. Mr. E. Busuttil B.A., LL.D., and Mr. J.J. Cremona, B.A., D.Litt., LL.D., on their appointment as lecturers in Roman Law, International Law and Constitutional Law respectively.

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Dr. Busuttil is still away from the Island and will therefore not be in a position to take up his duties immediately. We have been assured that an acting lecturer is to be appointed without delay.

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Dr. Ganado is at present Assistant Lecturer in Roman Law at University College, University of London. The Society has certainly every reason to be proud of its first President who has attained such success at an early age.

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Mr. F. Montanaro Mifsud, Rhodes Scholar for 1948, has taken up residence at Oriel College and is reading for a Degree in History.