

In the Privy Council.

No. 31 of 1938.

ON APPEAL
FROM THE COURT OF APPEAL, MALTA.

BETWEEN

EDGAR SAMMUT in his capacity as Collector of Customs
and HIS HONOUR SIR HARRY LUKE, C.M.G., as the
Legal Representative of the Government of Malta, and
by a Note, filed on the 11th May 1937, the Honourable
EDWARD R. MIFSUD, C.M.G., O.B.E., in his capacity as
Secretary to the Government in lieu of SIR HARRY
LUKE, C.M.G., absent from these Islands, and by a Note
filed on the 2nd June 1937, His Honour SIR HARRY
LUKE, C.M.G., in his capacity as Lieutenant Governor
having returned to the Island assumed the proceedings
of the suit in the place of the Honourable EDWARD R.
MIFSUD, O.B.E., C.M.G., and by a Note of the 4th
March 1938, EUSTRACHIO PETROCOCHINO in his
capacity as acting Collector of Customs took up the
proceedings in lieu of EDGAR SAMMUT (Defendants)

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- *Appellants*

AND

THE HONOURABLE MABEL STRICKLAND as
Attorney of the Right Honourable GERALD LORD
STRICKLAND, G.C.M.G., LL.B., COUNT DELLA CATENA
in virtue of a private writing filed in the Records of
the case "*Hon. Mabel Strickland v. Anthony Bartolo*"
pending before the Commercial Court ; and by a Note
filed on the 27th April 1937, the Honourable EDWIN
VASSALLO, A. & C.E. in view of the absence from these
Islands of the Plaintiff nomine, entered an appearance
in the Suit on behalf of the Right Honourable GERALD
LORD STRICKLAND, who is absent from these Islands
as per Power of Attorney dated 2nd March 1937 filed
in the Suit "*Hon. Mabel Strickland v. Anthony
Bartolo*" pending before His Majesty's Commercial
Court, and by a Note filed on the 16th October, 1937,
the Honourable MABEL STRICKLAND, having returned
to the Island took up the proceedings on behalf of
the Plaintiff, Right Honourable LORD STRICKLAND, who
is absent from these Islands, and by a Note dated the
3rd day of December, 1937, Plaintiff the Right
Honourable GERALD LORD STRICKLAND, COUNT
DELLA CATENA who having returned to the Island took
up the proceedings (Plaintiff)

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- - - - - *Respondent.*

RESPONDENT'S CASE.

Case for the Respondent.

p. 68. 1. This is an Appeal from a judgment of His Majesty's Court of Appeal of Malta, delivered on the 4th of March, 1938, on an issue raised upon a payment of Customs duty under a law purporting to have been enacted by an Ordinance made by the Governor of Malta which the Respondent challenged as having been enacted "ultra vires." The judgment declared that the said Ordinance No. XXVII, of 1936, dealing with taxation was not validly enacted, wherefore the duty demanded thereunder from the Respondent is not to be paid.

p. 79, ll. 14, 15. 2. The decision of the Court of Appeal in favour of the Plaintiff, now Respondent in this Appeal, was based on the following considerations. The Court held that Malta was a possession of the Crown not acquired by conquest or by cession from another State nor by settlement by British subjects, but by a compact between the inhabitants and their new sovereign, and that its acquisition was perhaps the first instance of what is known as the right of self-determination. Though thus distinguishing the mode of acquisition of the territory from that of the ordinary form of cession, the Court held that in fact from 1800 onwards the King exercised not merely full executive authority over the islands, but also legislative authority in the form of proclamations, and notifications. The validity of such exercise of power was justified by the Court of Appeal on the ground of usage according to the principles of Roman law, but no other authority was adduced. 10 20

p. 81. 3. The Court, however, pointed out that in accordance with the unquestioned doctrine of constitutional law, the grant of representative institutions to a possession deprives the Crown of prerogative power of legislation for that possession, unless a special reservation is made in the instrument of grant, as laid down in *Campbell v. Hall* (1 Cowp. 204), and that by the creation of representative government by Letters Patent of April 14, 1921, the power to legislate by prerogative was definitely lost, except in so far as the power was expressly retained as to certain matters of imperial concern which were reserved to the control of the Crown. The Ordinance in question was not passed in connection with any such reserved power, and the right of the Crown to authorise its enactment depends therefore on the question whether the power of the Crown to legislate and to delegate legislative power on a non-reserved matter to the Governor had been restored by the operation of (1) s. 1 of the Malta (Letters Patent) Act, 1936 (which provides that "The Malta Constitution Letters Patent" of 1921 shall have effect as if there were thereby reserved to His Majesty 30

full power to revoke or amend by further Letters Patent all or any of the provisions of the Malta Constitution Letters Patent, 1921, as subsequently amended), and of (2) the Letters Patent of August 12, 1936, revoking the Letters Patent of 1921.

4. The Court held that these instruments were insufficient to replace the Crown in the position as to prerogative legislative power which it occupied before the issue of the Letters Patent of 1921. The ground of this decision was that in instruments in which it was desired to reserve to the Crown legislative power, despite the grant of representative institutions, it was necessary to include not merely a power to amend or revoke any provisions of such instruments, but also an express power to legislate by Order in Council, as had been done in prior grants in Letters Patent of 1849, 1887, and 1903. The omission of this express power in the extension of authority given by the Act of 1936 must be regarded as negating the right to assert it, in so far as it had been surrendered in 1921. The usage on which the right of legislation by the Crown had rested prior to 1921 had been abrogated by the grant of autonomy, and could not be revived.

5. The Respondent submits that an essential preliminary to the determination of the legal issues involved is a clear understanding of the unique manner in which Malta became part of the British dominions. The following statement supplements that given in the judgment of the Court of Appeal :—

(A) The Sovereign Order of the Knights of St. John of Jerusalem was expelled from Malta by force of arms in 1798, by Napoleon Bonaparte, and thereby the rights of the Order and those of any overlord were extinguished according to established principles of International Law.

(B) The First French Republic in 1798 acquired the Sovereignty of Malta by conquest.

(C) The Sovereignty was subsequently acquired from the French by a conquest in which the victorious co-belligerents were the insurgent Maltese, the English, the Portuguese and the Neopolitan King of the two Sicilies. The Russians were also at war against Napoleon, and proposed to participate actively in the conquest of Malta. They went so far as to despatch troops for Malta, but the Maltese, exercising Sovereign authority, refused to let them land, and Captain Ball, appointed by Lord Nelson to advise the Maltese, felt in duty bound to support that exercise of Maltese Sovereignty notwithstanding that it was against the policy of the other allies that had agreed to allow the Russians to land in Malta. The Russian troops were, instead of Malta, sent to Corfu.

p. 151.

(D) The King of the two Sicilies claimed at the time of the capture of Malta by Napoleon a feudal overlordship, inasmuch as he claimed to be a successor of the Emperor of Charles V in the Kingdom of Aragon. The Knights had obtained Malta from Charles V in 1530 by a grant subject to a tribute and to a reversion in favour of the Emperor's successor in case the Knights left Malta voluntarily. This charter is published with the Appendixes in the Malta Marriages Case dealt with by the Judicial Committee in 1896 by a judgment printed with the Record in this Appeal.

(E) The English Government as represented by Admiral Lord Nelson found it convenient during the Napoleonic Wars to support the above claim to Malta of the King of the two Sicilies as the legitimate heir of Charles V, but the Maltese emphatically repudiated any right of the Neapolitan King of the two Sicilies, who was not able to preserve it. In fact, the Grand Masters had previously established an independent sovereignty. Moreover, the Neapolitan King was unable to perform the duties corresponding to the rights he claimed : he failed to send adequate troops, and he did not provide food to avoid the famishing of his alleged "vassals." In the circumstances the Maltese acquired a paramount title by force of arms as co-conquerors of Malta together with their Allies.

(F) In 1798 the Maltese rose in arms against the French, the Rebellion immediately became a Successful Revolution, and the Maltese Islands thereupon were administered by an established Government that maintained armed forces, administered civil affairs and besieged the French garrison in the fortress in Valletta.

(G) During the siege Lord Nelson in the name of the Allies landed Captain Alexander Ball to assist the Maltese as "liaison officer." Sir Alexander assumed the designation of Head, or Leader, of the Maltese and presided over an Assembly elected to govern. Sir Alexander John Ball gave advice which at the same time was what he judged to be in the interest of the Maltese independently of the policy of the British Government. The Maltese were assisted in the blockade against the French by British and Portuguese ships that prevented the relief of the garrison holding the fortified capital.

(H) After the Maltese Islands, with the exception of the Valletta fortresses, had been conquered by the Maltese, a few British and Neapolitan troops were landed to assist in the reduction of Valletta.

(I) In two years the fortress of Valletta capitulated, and General Pigot, as the officer commanding an English force, signed a capitulation in the name of all the Allies. The term "Allies" included the Maltese.

(J) The Maltese were persuaded (or required) by General Pigot to disarm before entering Valletta, but this does not alter the facts up to that date, nor does it alter the title of the Maltese to Malta under International Law as that of conquering co-belligerents.

10 (K) Sir Alexander John Ball, under instructions of Lord Nelson (printed in the appendixes to the Record of the Malta Marriages Case), insisted with General Pigot that the Maltese should have been placed in possession of the fortress in order that they should hand it over to the King of the two Sicilies; and he protested strongly against the attitude of General Pigot as an attitude assumed against the policy of the British Government.

20 (L) General Pigot, of his own authority, defied Lord Nelson's orders and claimed Malta by "conquest." His letter justifying or exculpating himself is printed in the Record of the Malta Marriages Case.

(M) The King of the United Kingdom appointed as Civil Commissioner at Malta Sir Charles Cameron who, in His Majesty's name, in 1801, published a Proclamation which embodied the substance of the pacts arrived at with the Maltese People. The Proclamation is also printed with the Malta Marriages Case, and is in the following terms:—

To the Maltese Nation.

30 Charged by His Majesty, the King of Great Britain, to conduct all the affairs (except the Military), of these Islands of Malta and Gozo, with the title of His Majesty's Civil Commissioner, I embrace, with the highest satisfaction, this opportunity of assuring you of the paternal care and affection of the King towards you; and that His Majesty grants you full protection and the enjoyment of your dearest rights. He will protect your churches, your holy religion, your persons and your property.

His paternal care extends to the hospitals, and other charitable institutions, to the education of youth, to orphans, to the poor and to all those who recur to His beneficence.

40 Happy People! Whom the hand of God has saved from the horrible misery and oppression, under which groan so many innocent nations receive with gratitude all this goodness from

a King, who is the father of his subjects ; who protects the weak against the strong ; the poor against the rich ; under whose dominion all are equally protected by the law :

Hitherto you have conducted yourselves with decorum and submission to the legitimate authorities ; and your ancient fame in arms has not been tarnished by the defence which you lately made of your country.

Commerce being now extended, the arts and sciences encouraged, manufactures and agriculture supported and industry rewarded, Malta will become the Emporium of the Mediterranean, and the seat of the content. 10

To execute such gracious commands of my Sovereign is not less my ardent desire, than it is my sacred duty. My door shall be open to all ; I will hear every One's plea, I shall be ready to render justice ; to cause the law to be observed, tempering them with clemency, and to receive every information which shall have for its object the welfare of the Maltese ; and above all, I shall devote myself to the means of promoting the cultivation and manufacture of cotton, and of introducing and maintaining plenty of food in these islands. 20

CHARLES CAMERON.

Palace, July 15, 1801.

(N) In accordance with the above Proclamation, the King of the United Kingdom accepted and exercised a Protectorate over Malta, and the King's Representative at the outset took care to adhere to the attitude of being in charge of the Protectorate.

(O) The Treaty of Amiens of 1802 purported to restore Malta to the Knights of St. John and guaranteed the Independence of Malta. But the proposal was unacceptable to the people of Malta, who were anxious to retain British protection and to be received as members of the British Empire on conditions securing them due constitutional government. The Maltese Deputies published a Declaration of Rights in the name and with the authority of Representatives of the Maltese Nation in the following terms :— 30

DECLARATION OF RIGHTS.

(Translation.)

OF THE INHABITANTS OF THE ISLANDS OF MALTA AND GOZO.

Malta, 15th June 1802.

We, the Members of the Congress of the Islands of Malta and Gozo and their dependencies, by the free suffrage of the people, during the siege, elected to represent them on the important matter of ascertaining our native rights and privileges 40

10 (enjoyed from the immemorial by our ancestors, who, when encroached upon, have shed their blood to regain them), and for fixing a Constitution or Government, which shall secure to us and our descendants in perpetuity, the blessings of the freedom and the rights of just law, under the protection and Sovereignty of the King of a free people, His Majesty, the King of the United Kingdom of Great Britain and Ireland, after long and mature deliberation, we make the following declaration, binding ourselves and our posterity for ever, on condition that our now acknowledged Prince and Sovereign shall, on his part, fulfil and keep inviolate his compact with us.

1st. That the King of the United Kingdom of Great Britain and Ireland is our Sovereign Lord, and his lawful successors shall, in all times to come, be acknowledged as our lawful Sovereigns.

20 2nd. That His said Majesty has no right to cede these Islands to any power. That, if he chooses to withdraw his protection and abandon his sovereignty, the right of electing another sovereign, or of governing these Islands, belongs to us, the inhabitants and aborigines alone, and without control.

3rd. That His Majesty's Governors or Representatives in these Islands or their dependencies are, and shall ever be, bound to observe and keep inviolate the Constitution, which, with the sanction and ratification of His said British Royal Majesty, or his representative or plenipotentiary, shall be established by us, composing the General Congress elected by the people, in the following proportion, viz. :—

30 CITIES :—Notabile and Casal Dingli, 14 members ; Valletta, 12 ; Vittoriosa, 4 ; Senglea, 4 ; Cospicua, 4.

CASALS AND BURGHS :—Birchircara, 6 members ; Attard, 3 ; Lia and Balzan, 3 ; Curmi (also a city), 12 ; Nasciaro, 4 ; Gregorio, 8 ; Siggieui, 4 ; Luca, 3 ; Guida, 1 ; Zurricco, 4 ; Micabiba, 2 ; Crendi, 2 ; Zabbar, 3 ; Tarshien, 2 ; Hasciach, 1.

40 4th. That the people of Malta and Gozo, and their representatives in popular Council assembled, have a right to send letters, or deputies, to the foot of the Throne, to represent or to complain of violations of rights and privileges, or of acts contrary to the constitution of the Government, or of the spirit thereof.

5th. That the right of legislation and taxation belongs to the Consiglio Popolare, with the consent and assent of His Majesty's representative, without which the people are not bound.

6th. That His Majesty the King is the protector of our holy religion, and is bound to uphold and protect it as heretofore ; and without any diminution of what has been practised since these Islands have acknowledged His Majesty as their Sovereign to this day ; and that His Majesty's representatives have a right to claim such church honours as have been shown to the regent of these Islands.

7th. The interference in these matters spiritual or temporal of no other temporal sovereign shall be permitted in these Islands ; and reference in spiritual matters shall only be had 10 to the Pope, and to the respective Generals of the Monastic Orders.

8th. That freemen have a right to choose their own religion. Toleration of other religions is therefore established as a right, but no sect is permitted to molest, insult or disturb those of other religious professions.

9th. That no man whatsoever has any personal authority over the life, property or liberty of another. Power resides only in the law, and restraint, or punishment, can only be exercised in obedience to law. 20

Signed by all the Representatives,
Deputies, and Lieutenants of
the Villages and Towns.

(P) The Treaty of Amiens did not become operative, and the islands remained under the régime established in 1801 as described above.

(Q) It is clear from this narrative that in origin the British title to Malta rested on a protectorate of International Law, conferred by mandate of the people of Malta acting through their representatives, and accepted by the Crown. It is 30 also clear that the Maltese people expressed their anxiety to have the enjoyment of control of legislation and taxation through a popular Council as set out in clause 5 of the Declaration of June 15, 1802. It rested with the King to decide when to convert this protectorate into possession, as appears from *R. v. Crewe* ; *Sekgome, Ex parte*, 1910, 2 K.B. 576, and *Southern Rhodesia, In re*, 1919, A.C. 211. The decisive step was duly taken in 1813 when Sir Thomas Maitland, appointed Governor and not like his predecessors since 1800 Civil Commissioner, intimated the determination of the King " henceforth to recognize the people 40 of Malta and Gozo as subjects of the British Crown." The recognition of this position by the treaty of Paris in 1814 and by the Congress of Vienna in 1815 did not confer any title under constitutional law but merely constituted international recognition

of British sovereignty. In the same way in 1814 the treaty of Paris marked the recognition by France of the British sovereignty in India which had been asserted by Act of Parliament in the previous year (A. B. Keith, "Constitutional History of India, 1600-1935," pp. 115, 116).

6. The history of this period throws a clear light on a fact which in the view of the Respondent the judgment of the Court of Appeal leaves unexplained. The Court accepts the statement of the Crown Advocate that from 1800 to 1836 legislative powers as well as executive were vested absolutely in the Crown, but does not suggest what, it is submitted, is the historical explanation of this fact. It rests on the situation existing when Malta was only under the royal protection and had not been accepted as a part of the Empire. During that period the powers of the Crown rested on the protectorate, and in accordance with the current view of the legal powers of the Crown under a protectorate, and with the actual power vested in the hands of the Crown during the period of Europe at war when Malta was dependent on security from attack afforded by British protection, proclamations and notifications with legislative effect to meet emergent needs were enacted by the representative of the Crown. That no redress against such regulations was claimed was natural. Not only was such action plainly necessary to provide for the state of affairs supervening on the termination of the old regime, but no action could have been brought in a British Court, since the defence of "Act of State" would have been pleaded with full effect (Anson, "The Crown" (ed. Keith), i. 318-20). The legislative measures taken by the representative of the Crown during the protectorate were clearly referable to a quite different legal source from those taken after the islands were elevated to the status of British possessions by the acceptance of their people as British subjects.

7. To find a legal source under constitutional law for the legislative measures of the Governors from 1813 presents great difficulty. The Court of Appeal stresses usage in accordance with the principles of Roman law, which is the basis of Maltese law, as giving justification to the exercise of prerogative legislative power. It is submitted that the authorities relied on by the Court are not applicable to such a constitutional issue as the acquisition of legislative power, even were it conceded that the matter falls to be governed by Maltese law. But it is further submitted that the royal prerogative as regards British possessions, which was introduced into Malta by the annexation effected in 1813, is part of British sovereignty, and is based on the common law of England, and that in the matter of legislative authority its ambit must be determined by the common law and not by the law of Malta from which it did not derive its origin, and which could not limit it. It is submitted that there is no authority for the view that legislative authority can be made legal as against British subjects by reason of the fact of its mere exercise, and that on the contrary

the Crown, whenever it has become aware that it has been exercising legislative powers through delegation to a Governor, without due authority, has not failed to remedy the departure from law, either, as in the case of New South Wales in 1823, by applying to Parliament to grant such powers, or by itself granting a representative constitution as in the case of Nova Scotia in 1758 or of Vancouver Island in 1856, or by placing the territory under the authority of a colony possessing representative government, as when in 1820 Cape Breton was placed under Nova Scotia; in that case the administration had been carried on since 1784 without the summoning of an Assembly though by strict law no 10 legislation was possible without such a body. When such an irregularity could take place in Cape Breton where the inhabitants were familiar with the constitutional rights enjoyed in surrounding provinces and legally theirs, it is not surprising that the people of Malta acquiesced in a state of things which as submitted in paragraph 6 above had a perfectly regular origin, and could have been called in question only after the admission of Maltese to the status of British subjects.

8. Though the origin of legislation by enactments made by the head of the Government alone was legal, and though its continued exercise after annexation when its legality was open to doubt can be understood, 20 it must not be thought that the Maltese were satisfied with the position in which they were placed. But their demands for representative institutions were in part met by constitutional changes in 1849, 1887, and 1903, and in very full measure by the Letters Patent of 1921. That instrument while it definitely reserved certain matters from the power of the bicameral legislature then conceded conferred the boon of responsible government in all matters essentially local and domestic. This process of constitutional development explains the fact that in Malta the fundamental questions of the rights of the Crown were not raised in the Courts. Under the constitution of 1887, for example, all local legis- 30 lation had to be passed by the Governor with the Legislative Council which was constituted on a representative basis, and, if legislation were refused, recourse had to be had to the Crown in Council which claimed a paramount power to legislate, but which, in practice, would act only on important cases involving imperial issues. To challenge that power would, in view of the fact that Malta was an important fortress, merely have brought into action the powers of Parliament. On the other hand, by accepting the position it was possible for the people of Malta to secure the advantages of responsible government in matters not of imperial interest. In the constitution of 1921 which was introduced with general 40 assent, deliberately given for the people of Malta, the authority of the Crown apart from the legislature, now made bicameral on the usual British model, was confined to reserved matters. It was to be exercised in future normally by the Governor acting alone under section 12 of the Letters Patent, constituting the Office of Governor, of 1921 (issued contemporaneously with "The Malta Constitution Letters Patent" of 1921), but also if

thought fit by the Crown in Council. This re-introduction of a power of legislation by the Governor alone was accepted simply because it was definitely and formally restricted to the matters reserved from the legislature of the island by the Malta Constitution Letters Patent, 1921.

9. In Lord Milner's despatch formally communicating the constitution of 1921 stress was laid on the fact that, in deference to the wishes of the National Assembly, the body of citizens which was urging the concession of responsible government, no power to legislate by Order in Council was reserved in matters falling within the purview of the new legislature, and that both the Crown and the Governor under delegation from the Crown would have legislative authority only in respect of reserved matters. See Ap. II.

10. This agreed constitution of 1921 suffered difficulty in operation in 1930 and was for a time administered under a modified form of government in which the ministry in office at the time when it was found necessary to suspend the full operation of the constitution were available to advise the Governor, upon whom responsibility was devolved under the Malta Constitution (Amendment) Letters Patent, 1930 and the Malta (Temporary Government) Order in Council, 1930. After enquiry by a Royal Commission and the enactment of the Malta Constitution Act, 1932 which validated these and certain other instruments and provided for certain changes in the Letters Patent of 1921, none of which are relevant in this matter, responsible government was re-established and a general election held in 1932. pp. 127-30.

11. On November 2, 1933 it was considered by the British Government again necessary to suspend the constitution, and ministers were removed from office by the Governor, the reasons given including failure of the ministers to carry out loyally the rules as to teaching languages in the schools which had been laid down in 1932 as a condition of the restoration of the constitution. It was also stated that there was financial embarrassment which might be regarded as affecting an imperial interest. This suspension was taken in lieu of the normal alternative of inviting the leader of the opposition to take office with a view to ascertaining the wishes of the electorate which, as expressed by public meetings throughout the territory, suggested that a general election would have returned a majority ready to support a ministry which would have operated the constitution loyally in every regard, and would have safeguarded the finances of the country, which in point of fact were still in a healthy position, there being no public debt, and a surplus on the consolidated fund supported collaterally by large saleable assets.

12. Following on the suspension of the constitution the Governor assumed full legislative power, as well as executive authority, thereby depriving the electors of any control over the legislation or executive government of the territory. Such a state of affairs being a complete

pp. 102-4. departure from previous conditions and involving so serious a diminution from the rights of British subjects in Malta, the Respondent called in question the validity of the plenitude of legislative power claimed by the Governor in a case raised by *The Hon. Mabel Strickland v. Salvatore Galea* in respect of a matter affecting private property, namely the validity of Ordinance XI of 1934. On the decision of the Court of Appeal being given against the Plaintiff in that case, it was proposed to appeal to the King in Council, but action in this sense was rendered impossible by the passing of the Malta (Letters Patent) Act, 1936, by s. 2 of which all Ordinances enacted between July 12, 1932 and 15 July 1936 were validated. 10

pp. 149, 150 13. The same position applies to another appeal, in this case by the Respondent in his own name on the general constitutional issue on behalf of the rights of British subjects born in Malta, on points of law substantially identical. It was admitted by the Under Secretary of State in the House of Lords that the passing of the Act in question would interfere with the obtaining a decision from His Majesty in Council on the legal issues, but it was pointed out that, if the views of the Respondent were upheld, the position in Malta from the legal point of view would become chaotic. Not only therefore were all the Ordinances validated, but as stated in para. 2 above, the Malta Constitution Letters Patent 1921 were altered in the 20 manner therein set out.

14. It has therefore been necessary for the Respondent to bring under judicial review an Ordinance enacted subsequent to the commencement of the Act of 1936, and to claim as a matter of fundamental right for British subjects in Malta that—apart from deliberate derogation from this right by Act of Parliament whose complete sovereignty is fully acknowledged—the Crown never has had and does not now possess any power to legislate for Malta except with the aid of a representative legislature. It is submitted that the view that the Crown had at any time since annexation of the islands such prerogative power is not supported by any judicial 30 authority other than that of the Malta Courts, and that the view of those Courts that the existence of such a power can be founded on usage is unsupported by authority. It is submitted that the misunderstanding as to the prerogative of the Crown arises from confusion of the circumstances under which Malta became part of the dominions of the Crown with those of an ordinary cession when one state transfers to another sovereignty over territory formerly belonging to the former state. In such a case of cession the absolute right of the Crown to legislate is established by the decision in *Campbell v. Hall*, 1 Cowp. 204, though as Lord Mansfield therein insists the terms of cession must be regarded as sacred and inviolable, and the 40 Crown would internationally be liable to complaint if they were not. But the reason for this ruling seems clearly based on the fact that cessions such as were known to Lord Mansfield were made by sovereigns of territories

over which they exercised absolute sovereignty, which was handed over to the British Crown in the case in question by the Sovereign of France. Lord Mansfield had not before him the quite different case of a free people accepting British sovereignty, and the *dicta* which are cited by the Court of Appeal from standard textbooks will be found on examination simply to be based on the rule in *Campbell v. Hall*. So far as the Respondent is aware, there is no pronouncement of the King in Council which in any way decides the issue, nor has it been presented to His Majesty for decision, beyond that set out in Appendix V.

- 10 15. It is submitted that the case of a people who voluntarily accept British sovereignty should not be assimilated to that of a people surrendered without consulting their will by an absolute ruler, or to that of a conquered people (in whose case Coke ascribes the unquestioned plenitude of royal prerogative to the fact that by conquest a king has *vita et necis potestatem*), and that their position ought in point of law to be assimilated to that of British subjects who settle overseas. In their case it is established law that the Crown cannot legislate for the territory they occupy by prerogative, and may only confer a constitution of representative type, unless special power to confer a more limited constitution and to
- 20 legislate is conferred by Act of Parliament; the latter course has been held necessary from time to time as in the Acts of 1843, 1860 and 1887 dealing with British Settlements and other measures (Ridges, "Constitutional Law of England," ed. Keith, 1937, pp. 473, 474, 478-80). It is recognised that in the special circumstances of Malta, as in those of many British settlements, restriction of authority of a local legislature may be requisite, but it is submitted that this restriction should be applied by Parliament, and that such a condition does not afford any justification for asserting over a people who voluntarily come under the Crown the unfettered power which the Crown may assert over surrendered territories and conquered lands.
- 30 16. Of territories in like conditions there are apparently none to be cited. In the case of New Zealand the title over the islands may be held to rest on the treaty of Waitangi of 1840 under which the native chiefs surrendered their sovereignty to the Queen. But no effort was made by the Crown to base legislative power under constitutional law on that surrender; instead legislative power was conferred only by Act of Parliament, whence it may be deduced that the advisers of the Crown were not prepared to regard this voluntary cession of authority by the chiefs as constituting a cession of the type dealt with in *Campbell v. Hall*. In the case of British Honduras, in which finally British sovereignty was recognised
- 40 and the settlers accepted as British subjects, no claim of legislative authority was ever put forward by the Crown, and the existing constitution derives directly from a representative constitution recognised and approved by the Crown. It is doubtful if the constitution of the Fiji Islands acquired by agreement with the natives in 1874 can be deemed to rest on the

prerogative by reason of cession, but similar authority could have been conferred under the British Settlements Act, 1860. The cases of Kenya Colony and Southern Rhodesia present special features differentiating them from the case of Malta, which stands out therefore as *sui generis*, so that a decision governing the constitutional rights of its people would not run counter to any principle of constitutional law established by His Majesty in Council or the Supreme Court of Judicature.

p. 81,
ll. 31-7.

17. It is submitted therefore that, accepting the contention of the Defendants in the Court of Appeal, now the Appellants in this appeal, that the effect of the revocation of the Letters Patent of 1921 was to place the Crown in the same position which it enjoyed previous to the issue of the said Letters Patent, the result is that the Crown did not possess any power to legislate for Malta otherwise than with Parliament or a local legislature of representative character, and that the Ordinance XXVII of 1936 is *ultra vires* and void. 10

pp. 83, 84

18. Should however it be held, contrary to the view of the Respondent, that the Crown prior to the Letters Patent of 1921 did possess legislative power over Malta, it is submitted that this power was surrendered except as regards certain reserved matters by the Letters Patent of 1921, and that s. 1 of the Malta (Letters Patent) Act, 1936 did not restore to the Crown the power to legislate on non-reserved matters which it had surrendered in 1921. As pointed out in the judgment of the Court of Appeal which the Respondent adopts, the words chosen are not apt to effect the purpose of giving that power, if it existed, and it is easy to give to them a full meaning without ascribing to them such an effect. The provision runs: "The Malta Constitution Letters Patent of 1921 shall notwithstanding any limitation imposed by section 68 thereof, have effect as if there were thereby reserved to His Majesty full power to revoke or amend by any further Letters Patent any or all of the provisions of the Malta Constitution Letters Patent of 1921, as subsequently amended." It is easy and natural to read this authority as wholly consonant with recognition of the fact that in 1921 the ordinary power of legislation by the Crown had been abandoned, power being kept only in respect of reserved matters, including, it should be noted power to define such matters, as provided in s. 68 of the Constitution Letters Patent of 1921. The new authority given extends to revoke the Letters Patent of 1921 as was done by Letters Patent of 12 August 1936. This leaves it open to the Crown to reconstitute the legislature, to lay down the franchise, to regulate its privileges, to determine the relations between its Houses, and to determine any other matters so long as it observes the rule that it must create for purposes of legislation on non-reserved issues a representative legislature; the ambit of that term is defined in the Colonial Laws Validity Act, 1865, s. 1. In the alternative 30 40

the Crown could have amended the Letters Patent of 1921 in any way consistent with the same rule. The power thus interpreted is plainly one eminently reasonable; it could be used to take away responsible government on the score that local conditions were not well adapted for it, while still preserving for the people their just control over non-reserved subjects of legislation by requiring their assent in a representative legislature. When so complete and satisfactory a meaning can be placed on the terms of the Act, it is submitted that the interpretation given to it by the Appellants in this case cannot be supported.

10 19. The Respondent claims therefore that the form of government purporting to be given to Malta by Letters Patent of August 12, 1936 (under the authority of the Malta (Letters Patent) Act, 1936 and of s. 21 of the Letters Patent of 1921 constituting the office of Governor) is invalid in so far as it purports to confer on the Governor or to vest in the Crown legislative power on any matters not included in those matters which are reserved from the legislature of Malta under "the Malta Constitution Letters Patent," 1921, and that therefore the taxation imposed by Ordinance No. XXVII of 1936, on the importation of goods from Japan, not being a reserved matter, is invalid. Power such as is claimed for the Governor and
20 the Crown under s. 15 of the Letters Patent of August 12, 1936, if it is to apply to non-reserved matters, must be conferred by a new Act of Parliament.

20. The Respondent recognises that the upholding of the judgment of the Court of Appeal will necessitate the amendment by Act of Parliament of the present form of government in which general legislative power is illegally exercised by the Governor and the framing of a new constitution. He submits, however, that in framing such a constitution the advisers of His Majesty are constitutionally bound to give the fullest consideration to the historical fact that Malta came under British sovereignty by the voluntary assent of her people in the full and just expectation that their
30 new sovereign would safeguard the rights which they formerly enjoyed under the Council of the people created by a Norman ruler in the eleventh century, which had a long and useful history, and had been restored by the leaders of the nation for the purpose of conducting a victorious war in 1798 and 1799 against Napoleon Bonaparte. Representative government is claimed as the just right of the people of Malta, on grounds alike of history and of their character as British subjects; moreover, as in the Constitution of 1921, due regard was paid to the privileges of the holders of the titles of nobility recognised by the Crown on the annexation, so in a new constitution these rights can claim consideration. Some measure of responsible govern-
40 ment may properly be anticipated as possible in a not distant future when more settled conditions prevail in the Mediterranean area. The defects in the operation of responsibility were due not to permanent but rather to causes of temporary character.

21. The Respondent prays therefore that the judgment of the Court of Appeal may be confirmed, and that he should be awarded the costs of this appeal, for the following amongst other

REASONS.

- (1) THAT the title of the Crown to Malta rests not on cession or conquest but on the voluntary acceptance by the people of Malta, allied with the Crown against France which had acquired sovereign authority, of British protection, and later of formal sovereignty.
- (2) THAT acquisition of sovereignty in this manner by the Crown conferred on the Crown no constitutional authority to legislate or impose taxation, or to delegate such powers to the Governor, but gave only the power to conduct the executive government of the territory and to legislate for it with the aid of a representative legislature, or of Parliament. 10
- (3) THAT the claim of authority as regards matters of legislation and taxation was asserted in the first instance under the regime of a protectorate, and during that period was not open to question in any British Court or in Malta. 20
- (4) THAT the continuation of the exercise of these rights after the grant to the people of the status of British subjects involving the conversion of the territory into part of the British dominions, was in law a usurpation, acquiesced in by the people but subject to protests, and that such acquiescence is not a source whence acts not themselves within the prerogative of the Crown can derive validity.
- (5) THAT the grant of a measure of representative government to Malta by the constitutional changes of 1849, 1887, and 1903 met in considerable degree the demands of the Maltese people, and the grant of responsible government in local issues by the constitution of 1921 presented a solution of their claims as combined with the admitted necessities of the character of Malta as a base of imperial defence. 30
- (6) THAT even on the assumption that it was possible to maintain that by acquiescence the legislative and taxation powers assumed by the Crown had acquired legal authority, and retained such authority, the effect of the Malta Constitution Letters Patent, 1921, was to extinguish 40

all legislative and taxation authority on the part of the Crown under the prerogative, except in regard to those matters reserved by the constitution from the control of the new legislature.

(7) THAT power to restore authority to the Crown in non-reserved matters could thereafter be granted only by Parliament.

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(8) THAT the provisions of Section 1 of the Malta (Letters Patent) Act, 1936, are inept to confer any such authority on the Crown, but have, interpreted in their natural and literal sense, a full and reasonable meaning, and should not be read as authorising the Crown to subject the people of Malta to a regime under which legislation and taxation can be imposed on British subjects by the sole action of the Governor.

20

(9) THAT section 15 of the Letters Patent of August 12, 1936, which provides that "The Governor may make laws for the peace, order and good Government of Malta," is wholly *ultra vires*, since on the grounds set out in paragraphs (1) to (4) the Crown did not acquire on the annexation of Malta power to legislate or to delegate legislative power to the Governor; but, if it should be held that such power was acquired by usage or otherwise, nevertheless by the constitution of 1921 such power as regards non-reserved matters was surrendered, and has not been revived, so that in any case Ordinance No. XXVII of 1936 which imposes taxation and does not deal with a reserved matter is null and void.

STRICKLAND,

Della Catena.

A. BARRIEDALE KEITH.

APPENDIX I.

The relevant part of the Malta (Letters Patent) Act of 1936, having regard to such powers as may be claimed by the Governor to legislate without representative institutions, is the following :—

10 “ (1) The Malta Constitution Letters Patent of 1921, shall
 “ notwithstanding any limitation imposed by Section sixty-eight
 “ thereof, have effect as if there were thereby reserved to His
 “ Majesty full power to revoke or amend by any further Letters
 “ Patent all or any of the provisions of the Malta Constitution
 “ Letters Patent of 1921, as subsequently amended.

“ (2) It is hereby declared that all Ordinances of the Governor
 “ of Malta enacted and promulgated during the period between the
 “ commencement of the Malta Constitution Act of 1932, and the
 “ commencement of this Act were validly enacted and promulgated
 “ and were within the powers of the Governor.

“ (3) (i) This Act may be cited as the Malta (Letters Patent)
 “ Act 1936, and shall come into operation on the fifteenth day of
 “ July, nineteen hundred and thirty-six.”

APPENDIX II.

20 The following is an extract from the Despatch of Secretary of State
 Lord Milner transmitting the Constitution Letters Patent of 1921 :—

“ (1) (ii) The National Assembly has further asked that if an
 “ Act of Parliament could not be passed, powers should not be
 “ reserved to legislate by Orders-in-Council. This request has
 “ been granted so far as matters falling within the jurisdiction
 “ of the new Legislature are concerned and no provision has been
 “ inserted in the Constitution Letters Patent (Instrument ‘ A ’)
 “ reserving the right to legislate by Order in Council.

30 “ (11) 12. It is, however, clear that some method other than
 “ an Act of Parliament must be retained for dealing with matters of
 “ Imperial interest on which the local Legislature is incompetent
 “ to pass laws and hence the power of legislating by Order in Council
 “ on these subjects, is necessarily retained in Clause 12 of the
 “ Second Letters Patent (Instrument ‘ B ’).

“ . . . Notwithstanding these reservations Malta . . . will
 “ under the new Constitution, enjoy powers of self-government
 “ as great (or, indeed greater, in so far as Malta will have the
 “ control of Postal Services and of Customs and Excise) as, for

“ example, the Australian State of New South Wales . . . or
 “ any of the States of the American Union, and further,

“ It will be seen that the main body of the Constitution is,
 “ as the National Assembly desired, irrevocable by any other
 “ instrument issuing in the United Kingdom other than an Act
 “ of Parliament.”

APPENDIX III.

Evidence as to who were, in the capture of Malta from the French, the principal co-belligerents is given in an “ Essay on the Military Policy and Institutions of the British Empire ” published in London in 1810 10 and penned by Captain C. W. Pasley :—

“ The Maltese did not take up arms to assist us. They (not
 “ we) were the principals in the war ; and we went to their
 “ assistance, at a time when they had, from circumstances, a
 “ right to treat with us as an independent State, upon terms
 “ binding to both parties. It was they (not we) who may claim
 “ the principal share of the merit of expelling the French garrison :
 “ for although we had power enough to have conquered both them
 “ and the French, such an enterprise would have required almost
 “ as great a force as that which we sent to Egypt . . . and might 20
 “ have cost us much blood. But with such a handful of men, as
 “ that which we actually employed in Malta, so far from expelling
 “ the French, we would not even have remained one moment on
 “ the Island without the powerful co-operation of the natives.”

APPENDIX IV.

Legislation by Order in Council of 11th of February 1852, applied to unconquered territory under the Crown, and was revoked by Order in Council of 29th December 1853, in regard to the Channel Islands, the Order in Council of 1852 having been challenged and counteracted by parallel legislation, after a case had been remitted to the Judicial Committee 30 of the Privy Council, and left undecided. The sequel confirms—that the correct course is legislation by a locally elected Parliamentary Assembly, or by the Imperial Parliament, as in 1801, when an Imperial Act was passed to deal with Maltese Trade, and to declare that Malta is in Europe.

p. 105.

(See note (q) Hailsham Edition of “ Laws of England,” Vol. VI, p. 462).

APPENDIX V.

In 1830, on the claim of Caruana Dingli for repayment of 40,000 Maltese "Scudi" lent to the Grand Master Ferdinand de Hompesch, the Judicial Committee expressed the view (*retranslated from Italian*):—

"that the English Government does not recognise its actual title
"of Sovereignty over the Island as derived from the French
"Republic, but solely from the will of the People of Malta, who
"freely chose for their Government Great Britain."

(See Alfred Mifsud's "History of the Origin of the Sovereignty of
10 England over Malta," p. 451.)

APPENDIX VI.

The position of Malta within the Empire as a "Protectorate" is substantiated by the speech of Lord Melville at the House of Lords on the 23rd May, 1803, in the following terms:—

20 "Besides it was to be considered that we went to the aid of
"the Maltese previously engaged in their reduction of the French
" . . . We ought, therefore, to secure the Maltese, a form of
"wise and suitable civil government to be enjoyed by them under
"the protection of the British Power. This object ought to be
"prosecuted and settled without any delay, so that . . . we might
"be entitled to say that the people of Malta, under a form of
"government agreeable to their wishes, were now established
"under the protection of Great Britain . . . and under our
"protection alone, Malta could be rendered independent and
"happy."

The word "independent" is taken to imply independence from the imposition of Laws otherwise than with the authority of Maltese or British Parliamentaries Assemblies.

No. 31 of 1938.

In the Privy Council.

ON APPEAL

From the Court of Appeal, Malta.

BETWEEN

EDGAR SAMMUT and Others

(Defendants) - - - *Appellants*

AND

The Honourable MABEL

STRICKLAND (Plaintiff) - *Respondent.*

Case for the Respondent.

BLOUNT, PETRE & CO.,

8 Carlos Place,

Grosvenor Square, W.1,

Solicitors for the Respondent.