43, 1938

75/1938

IN THE PRIVY COUNCIL

No. 31 of 1938

ON APPEAL FROM THE COURT OF APPEAL, MALTA.

S A M M U T and O T H E R S

Vs.

S T R I C K L A N D

SHORTHAND TRANSCRIPT OF THE ORAL PROCEEDINGS

IN COURT OF APPEAL, MALTA

on 3rd, 4th, and 6th December, 1937.

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HIS MAJESTY'S COURT OF APPEAL

LORD STRICKLAND

vs.

MR. SAMMUT NOE

Sitting of the 3rd December, 1937.

RT. HON. LORD STRICKLAND: I am appearing in this case on my own behalf. Dr. Flores is standing by to help me. I wish to plead personally in this case.

THE COURT: Your lawyers may appear as well. According to Law, it is for the Court to allow any of the parties, who is assisted by counsel, to plead personally. In this case we have no objection to your pleading personally although you are assisted by counsel.

LORD STRICKLAND: May I express my gratitude to Your Honour for that consideration.

THE COURT: So that Dr. Flores may appear as well.

LORD STRICKLAND: I feel deeply the aggravation resulting from the judgment of the Court below, as one who was born in Malta.

I propose to submit the case to this Court under four principal heads. The first is the main contention of the defendants; the second is the main contention of the plaintiff; next, the main contention of the Court below and the judgment in general; and, finally, the position that arises from the correct interpretation of the Letters Patent Act of 1936. I would beg leave to consider each of these four heads under subdivisions to which I shall refer briefly without entering into a detailed discussion.

The main point of defendant is that Malta was acquired by cession. A brief reply to this will be that between the Treaty of Amiens and the Treaty of Paris sovereignty was vested in the people of Malta with a protectorate. After that period sovereignty continued as before.

THE COURT: Before what?

LORD STRICKLAND: The Treaty of Paris.

The Court below and the defendant say that it was not sovereignty. Defendant says things which are irreconcilable.

The second point is that the judgment of the Court below is based on two fundamental errors. It adopts the suggestion of the defendant that the Crown had no connection with Malta before 1812, and it adopts the view that by the Act of 1936 - by the Malta Letters Patent Act - the position of the Crown reverted to what it was before 1921, that is to say that the Crown was empowered again to legislate and to tax by Letters Patent.

THE COURT: I think this is the main point to be decided: whether an Act of Parliament by granting the King the power to revoke or amend the Malta Constitution, implicitly returned to the Sovereign his right to legislate by Letters Patent or Orders in Council, or whether Parliament should not have expressly given that power which, except for the Reserved Matters, the Crown had lost by granting the Constitution. That is the main point at issue.

LORD STRICKLAND: The answer to that is that the Interpretation Act of 1889 entirely debars the adoption of that view by Sections 11 and 38. This Act is quoted in our Note of Submissions, and also the paragraph in the Laws of England, which points out that under the Interpretation Act there can be no particular interpretation or inference as to any detraction from the common law position. Therefore any attempt to argue about inferences is barred outright by the legislation which I have just quoted.

Whatever may be the nature of the prerogative vested in the King of England by the Constitution, England being a "Limited Monarchy", the King cannot do anything which is fundamentally barred by the Common Law, without the intervention of Parliament. I shall submit authorities to that effect in due course. There should have been adequate intervention by Act of Parliament to deprive the People of Malta of their representative institutions.

The other point is against the contention of the Court below that the Act of 1936 revived the position of the Crown existing before 1921 and not existing before 1936. Sections 11 and 38 of the Interpretation Act of 1889 are to be submitted as conclusive on this point.

Your Honour, my main argument against the contention of defendant is taken from the reports of Sir John Stoddart, one of Your Honour's predecessors as Chief Justice, and from the pleadings before the Privy Council in what is known as the Malta Marriages case. There are two copies available of these printed pleadings in Malta: one is in the Royal Public Library here and one was given to me by the solicitors of the other side in England, and so it became my property.

I propose from the history set out in these documents to set out a series facti from which Your Honour will form an opinion as to whether there was, or was not, a "cession".

The first event of importance is the order given by Nelson to Captain Ball to take three ships and blockade Malta. He was to land and be in contact with the deputies of the Maltese people. He had explicit instructions.

THE COURT: During the revolt?

LORD STRICKLAND: Yes. He had explicit instructions that, if a capitulation eventuated, he - Captain Ball - was to hand over the fortresses to the Maltese and that the Maltese were then to hand them over to the King of Naples. Those were his orders. They are to be found here in this collection and, if Your Honour desires, they may be placed at your disposal.

I have also in proof form extracts from the reports of Sir Alexander John Ball. For facility of reference they are useful although they are only in proof.

I am sorry that I have not got three copies of the records of the Marriages Case.

Now to begin with the series facti. When Ball landed in Malta, the insurrection of the Maltese against the sovereignty of the French had become a successful revolution. In International Law, it is a point of great importance to establish the date on which a rebellion becomes a revolution, and when a revolution becomes an organized Government. The Maltese had an organized Government.

THE COURT: This question has arisen with regard to Spain.

LORD STRICKLAND: I have raised it in the House of Lords on two occasions, but I had no answer.

THE COURT: That was too much to expect. Politics are one thing and "jus" another.

LORD STRICKLAND: I will come to that with your permission. Ball landed at a time when the insurrection had become an organized government and he assumed the functions of the Leader of the Maltese nation and of President of their Assembly.....

THE COURT: After the capitulation?

LORD STRICKLAND: No, before. And, under these conditions, the organized Maltese nation conquered Malta and Gozo, the whole of the Maltese Archipelago in fact. Towards the end of the two years' operations, the French were being very nearly starved out and that fact was known throughout Europe; so some troops were sent from Messina - English troops and Neapolitan troops. When the French came to capitulate, their fears had increased considerably because they were under the apprehension that there would be reprisals, murders, and revenge for the twenty thousand

lives that the Maltese are alleged to have lost during the two years' siege. That number may be an exaggeration but the exact figure is immaterial to the legal position. The Maltese lost many lives and the English lost not one; nor did the Neapolitans. And, what is more, the English Government refused at one time to give any money to the Maltese, and the Maltese had to find the money themselves. It was certainly an inexcusable step on the part of General Pigot to prevent the Maltese from being there at the moment of the capitulation. It was a wrong action and he tried afterwards to excuse himself of it. But he had decided that the Maltese nation and their deputies should not be represented in the capitulation and the Maltese troops were told to lay down their arms on the glacis outside Valletta. Sir John Ball, who had other instructions from Nelson, was very angry, and he wrote an angry protest which is recorded in this Malta Marriages Case. But Pigot was the officer in charge of the troops, and Ball was only the civil governor.

THE COURT: Whom did Ball represent then?

LORD STRICKLAND: Ball represented the written instructions from Nelson who was considered to be the representative of the policy of the English Government; and there is no evidence that Pigot got any contrary instructions.

THE COURT: Did not Ball represent the Government of the Two Sicilies for some time?

LORD STRICKLAND: Ball represented such of the Allies as were represented by Nelson. Ball got his instructions from Nelson and Nelson was fighting in the name of all the Allies: of the Russians who promised to send troops and did not: of the Neapolitans who said they had no money to do anything: those were among the Allies.

It is not possible to exclude that the Maltese had been recognized as belligerents. What is of importance in this case is the fact that the capitulation was merely a capitulation of the fortresses. The Island had already been conquered by the Maltese. The Maltese were already in possession of the sovereign authority over the Island of Malta except the fortress.

It is very important to ascertain where Pigot obtained the authority from which to act in the way he did. The Treaty of Amiens shows that the continued policy of the English Government was to give back Malta to the Order of St. John. Pigot acted, however, against that policy. Then Captain Ball wrote to Paget, the English agent at Palermo, about the matter. Paget said that he knew nothing. Paget was the English Ambassador at Palermo. Then General Pigot wrote a letter of exculpation. Captain Ball had protested that Pigot had done things behind Nelson's back, and wanted to know whether Pigot had been given different

instructions. Pigot then writes a letter to exculpate himself with the most impudent boast that he thought it would be advantageous to England to have a title to Malta by conquest, and that that was why he had acted in the way he did. That is barefacedness.

THE COURT: Against the facts. I mean to say that he asserted that the title should be conquest against the facts.

LORD STRICKLAND: He asserted that he had the ambition of creating that title.

THE COURT: And is contrary to the facts.

LORD STRICKLAND: That is my contention. Nevertheless there is a strongly held contention that Malta was acquired by conquest. That appears throughout the correspondence.

THE COURT: There is no longer any doubt about that.

LORD STRICKLAND: It had been very strongly maintained that Malta was acquired by conquest.

I will submit to Your Honour the judgment of the Privy Council in the Malta Marriages Case. Although the whole basis of the case against the Government of Malta was based on the assertion that the title to Malta was by conquest, not a word is found in the judgment of the Privy Council with reference to that point. The question was avoided, and it has always been avoided by those in the highest authority until I have had to meet the judgment from which I am appealing. That is the first time the authorities put their foot into it in a manner which makes it a patriotic duty to leave no stone unturned to obliterate that impression.

THE COURT: You mean to say that the judgment of the Court below established that Malta was acquired by conquest.

LORD STRICKLAND: By cession, and cession is a sub-division of conquest. Conquest, as I will submit, brings in a whole series of international points. Conquest may be changed to sovereignty on terms; conquest may be.....

THE COURT: Conquest, in international law, is used in a different sense and in a different meaning from cession.

LORD STRICKLAND: We have to see that from the point of view of English Common Law, because the King of England has his disabilities according to the Common Law of England.

THE COURT: I think there is no doubt about conquest. My

point is that the other side is not claiming that Malta has been acquired by conquest.

LORD STRICKLAND: If you wish a digression on this point I will make that digression. But I will carry on. I am following the series of events by which the history of the position in 1814 is to be traced. There was a capitulation of the fortress that had been an acquisition of a nation that had established sovereignty over the Island. According to Sir Joseph Carborne, the English Government then became the trustee for the Allies pending the partition of the fruits of victory. In this instance there was no argument on a League of Nations, and no mandates; but that was the position. Then came the compact between the Maltese and the English Government. That compact is recorded - as to what was demanded on one side, and as to what was acquiesced in on the other side - by the Proclamation of Pigot and Cameron, and the interpretation thereof by such a great authority as is Stoddart.

THE COURT: You call it compact and it has been called before a gentlemen's agreement by the Court of Appeal.

LORD STRICKLAND: However, Pigot did not behave as a gentleman. What I want to point out is that in that case it was established that there was a gentlemen's agreement between Great Britain and Malta, and I will explain how that took place. I may also add that I wish to say nothing about the judgment of the other case because the present position is this. After that judgment an Act of Parliament was passed in 1936 to prevent further proceedings. I was determined to go on notwithstanding that the English Government offered me the costs. I have refused that offer twice in the House of Lords and I said I wanted justice for the Maltese. The Government of Malta offered pendente lite not to have our advertisements taken down from the Lift. Then they offered to continue to leave them there so as to eliminate the causa causae. I was then advised by a former Law Officer of the Crown to start the case again on a taxation issue. I was told that I shall win, and that I should leave the first case alone.

Defendant submitted in the Court below that the transfer of Malta to the British Crown took place immediately after the defeat of the French. Later on in the case, defendant stated that the cession was made by Sir Hildebrand Oakes. We have that, if you please, over the signature of the Law Officers.

DR. REYNAUD: I am afraid Lord Strickland has not understood what I have said. We stated that Sir Thomas Maitland took over the Government as Commander in Chief and Sir Hildebrand Oakes was Civil Commissioner.

LORD STRICKLAND: I am entitled to criticise what is put in

writing. An Englishman made a cession or rather perpetrated a cession of the sovereignty in Malta to all the other Englishmen without a mandate from the Maltese nation. The snag that they cannot get rid of is the fact that in 1801 England....

THE COURT: You consider that the right to legislate by Order in Council until 1921 was not acquired at least by use.

LORD STRICKLAND: Prescription under Roman Law is admitted but in English Law it is absolutely denied.

THE COURT: There is no prescription?

LORD STRICKLAND: There is the law of limitation that applies to contracts for six years; but that is by Statute not by Common Law.

THE COURT: There is another point: which laws are to govern this question: the Maltese Law or the Common Law of England.

LORD STRICKLAND: Very easy. The Roman Law is no doubt our Common Law. But the King could legislate by _bandi_, and that is what was done in Malta and not by Letters Patent.

THE COURT: Up to 1813?

LORD STRICKLAND: After 1813 and before.

THE COURT: Not after.

LORD STRICKLAND: Even after that.

THE COURT: After Maitland there was no more legislation by _bandi_ but by proclamations and by minutes.

LORD STRICKLAND: The King is restricted by the prerogative and the Common Law, and the prerogative cannot be altered; the King himself cannot surrender it not even by implication because the King acts as the agent of a nation "Delegatus........

THE COURT: Why does he surrender it when he grants a constitution.

LORD STRICKLAND: Because the Common Law so provides. When the King grants a constitution or promises it, he surrenders the prerogative because the Common Law provides that in an irrevocable way.

In 1801 an Act of Parliament was passed which declared Malta to be in Europe. This act contained also some provisions

with regard to the trade of these Islands. Defendant states that that Act is of no importance because Malta had nothing to do with the English Crown till after the Treaty of Paris. That is a most desparate argument. The Act of Parliament of 1801 came shortly after what is known as Calvin's case. Nobody could own property in England unless he was within the King's allegiance. The question arose after the American separation. A son of an Englishman born in America could not own property in England. The question also arose when a Scotch King came to the English Throne. The question was whether the Scotchmen became entitled under the allegiance of the Scotch King inasmuch as he was King of England. The consequences were so great that a large number of the English judges were invited to pronounce upon it, and the Privy Council wrote a memorandum. That memorandum does not appear in the Malta Marriages Case Supplement, but I have got a copy of it from the Librarian of the House of Lords. I found it in the Library of the House of Lords. The copy may be placed at the disposal of the Court.

In that case the whole theory of what is called the conquest or compact began to be developed; and briefly the argument is this: when there is a conquest by force of arms, the conqueror can force the conquered "sub juqum". If I may quote Latin, this is a classical statement: Jus esse belli ut victores victis quaelibet vellint imperassent. In the days of the Roman Empire, after a great victory it was decided whether the vanquished would become slaves, or be put to the sword.

There is no differentiation in the English Common Law between cession or conquest except that cession is on capitulation and conquest is absolute, at discretion. There was no vitae et necis potestas on the part of Hildebrand Oakes or on the part of any person who gave him the mandate. And it was quite fatal on the part of Cornewall Lewis to invent the phrase "voluntary cession" which in Engllish Law is altogether contradictory. He invented that phrase by a footnote in his book. Now that book of Cornewall Lewis was written to please the public; when Cornewall Lewis wrote a Report to the Secretary of State he said that Malta had been acquired by "conquest". So the man contradicts himself. When writing to the Secretary of State he said one thing and when catering for the people he said something else. "Voluntary cession" in English Law is quite contradictory. A voluntary contract is a contract under which there is no consideration; nothing in it.....

THE COURT: A condition.

LORD STRICKLAND: The condition or consideration is laid down in the Common Law but in English Law if it applies to land.....

THE COURT: The question arises in Malta as to what law is to apply.

LORD STRICKLAND: Maltese Law applies as far as Malta is concerned; but as far as things which concern the King, the King is bound by the English Law, and he is bound in this by English Law to act by Parliament. I explain how his agents in Malta, perhaps by ignorance, perhaps by following the example of Pigot, set aside the English Law. The king is a "limited Monarch" and he cannot impose taxes without Parliament. When the demands of the Maltese delegates were met by Cameron in his proclamation, the King gave to the Maltese the rights of British subjects.

Now may I be allowed to go back? There is nothing in voluntary contract if there is no consideration.....

THE COURT: That is as regards substance, but what about form?

LORD STRICKLAND: As regards substance after 1893, even contracts under seal became questionable, and up to 1893 contracts without consideration as regards land were voidable. Of course these observations are only relevant to show that Cornewall Lewis did not know the Law; he was only posing as a professor when he did not know the rudiments of what he was talking about.

THE COURT: What about an exchange, as, for instance, Germany gives a place to England and England gives a place to Germany in exchange. Would that be a cession?

LORD STRICKLAND: That would have to be ratified by Parliament.

THE COURT: The title would not be conquest.

LORD STRICKLAND: It would be conquest under diplomatic compulsion.

THE COURT: I am not referring to compulsion.

LORD STRICKLAND: Those who say that it must be either cession or conquest or settlement have not reflected that the Isle of Man and the Orkneys became English neither by settlement, cession nor conquest. The Orkneys were the dowry of a princess who married a Scotch King and the Scotch King became King of England and so the Orkney Islands passed to England.

Under the Treaty of Amiens, it was provided that Malta should be given back to the Knights of St. John. The Maltese were not one of the parties to that Treaty. The co-owners of the sovereignty in Malta all renounced their rights in favour of the Knights of St. John except the Maltese; the Maltese kept their share of the sovereignty. We have the principle of

"joint tenancy" in contrast with tenancy in common. The co-owners absorbs the surrendered part of the property. So the Maltese remained the only holders of sovereignty in Malta after the Treaty of Amiens because the Knights of St. John were unable to take up that which was give to them, and the King of Naples who had advanced feudal rights, was unable to protect them. He lost his feudal rights for not being able to protect the Maltese. By the Treaty of Amiens, the King of Naples was given an opportunity to acquire his former rights over the Island of Malta. But under the feudal law, the King of Naples had to protect the Maltese, and maintain the conditions of the fief. He was required to send troops and he was unable to do so, and so far as any rights of the King of Naples are concerned, cadit questio. Napoleon put up one of his brothers as King of Naples, and so the rights of the Bourbons were extinguished by conquest.

THE COURT: Let us go no further.

LORD STRICKLAND: The legal sovereignty of Malta remained with the Maltese nation subject to the protectorate of the King of England. The fact that there was no protest might have been construed scienti et consentienti not fit injuria. That might have been set up as a theory. But as a matter of fact there was the most vigorous protest. The Maltese would not have the Knights of St. John back again at any cost. They remembered their tyranny, and also the ecclesiastics remembered that the Bishop was not allowed to enter their Church through the main door but only through the side door. Nobody wanted the Knights of St. John back and the Maltese sent a deputation to England headed by Baron Nicholas Testaferrata, and there is also the remonstrance made by the Chamber of Advocates which sets out the remonstrances of the elected deputies of the Maltese people. That is dated shortly after the Treaty of Amiens and not before. As soon as they came to know they they protested and the pressure that was put on the non-conformist conscience of England - because England at that time was very religious - was such that they thought that they were breaking their word to the Maltese. And that was one of the reasons which brought down the Treaty of Amiens, as well as War with Napoleon. Now I will ask this question to my friend opposite: if at the time of the Treaty of Paris the sovereignty over Malta was not shared by the Maltese nation when they chose to elect deputies, and by the King of England, to whom on earth did it belong? Sovereignty must be somewhere; it could not be in nubibus. The King's Government must go on somehow...... even alla meglio.

To go back to Roman Law, it was exercised by mandato tacito.....

THE COURT: Negotiorum gestio.

LORD STRICKLAND: That is the best parallel I can find.

THE COURT: We are under the impression that Ball assumed the leadership of the Maltese in the name of the King of Naples and afterwards in the name of the King of England.

LORD STRICKLAND: Whatever he did, or did not do, may be evidence of an attempt to do what Sir Hildebrand Oakes did, perhaps.

The Court will, I am sure, be deeply impressed by the declarations of Sir John Stoddart, the relevant extracts of which I will place at the disposal of the Court. He said that if Malta was conquered, it was conquered by the English from the Maltese. I may assure the Court that I would not dare to make any statement of which I am not conscientiously convinced and which is not supported by authority. Here is an extract from Vatel, an authority on international law quoted a hundred years ago:

> "......If the inhabitants of a town or country, seeing themselves pressed by the enemy, implore in vain the protection of their King, who finds himself not in a state to succour them, so that they are reduced to the necessity of defending themselves as well as they can by their own force and by their own counsels, the right which their ancient master had over them is at an end."

The situation is this. When the Maltese conquered Malta and Gozo from the French, the Knights of St. John were not in Malta. The Knights of St. John had sworn through Grand Master L'Isle Adam to respect the liberties of the Maltese, which liberties included the right to a representative institution called the "Consiglio Popolare". There have been many discussions as to the extent of the jurisdiction of the "Consiglio Popolare". You will find that flatly denied in the report of the Royal Commission of 1830-32; you will find the same flatly denied in 1812 on the authority of an advocate called Dolci.

THE COURT: There is a cardinal now whose surname is Dolci.

LORD STRICKLAND: They found an advocate who told them that the Consiglio Popolare was nothing. As to the advocate's name "Conveniunt rebus nomina saepe suis"...... a special pleader who thinks that the Consiglio Popolare had no powers.

THE COURT: The Commission reported that the Consiglio Popolare had none of those powers which the Maltese at that time pretended they should have.

LORD STRICKLAND: One of the Royal Commissions reported that we had, and another Royal Commission reported that the Popular Council had no powers at all.

THE COURT: Was that an extract from the Malta Marriages case?

LORD STRICKLAND: There is also an extract containing two or three complete debates in Latin of what took place in the "Consiglio Popolare". It is very interesting reading. I made an extract of that when I was Chief Secretary in order to prove that the language of the Knights was Latin.

THE COURT: Up to a certain time.

LORD STRICKLAND: Even after the British occupation they continued to record judgments in Latin in Malta.

THE COURT: My point is this: that the Knights of St.John came because Charles V. gave them Malta he keeping the high sovereignty, so that when the Knights were expelled by the French, immediately the right of the Emperor had to revive. Now when did that right come to an end?

LORD STRICKLAND: That right which was transmitted to the legitimate Kings of Aragon failed in his successors by the law of primagenitura. It failed when the King of Naples ceased to be the legitimate successor; and it failed for different reasons. Firstly, when the overlord ceases to fulfil his duties of overlordship; the vassal must fulfil certain obligations......

THE COURT: But the Knights fulfilled their obligations by paying tribute.

LORD STRICKLAND: The Knights were here first as monks and hospitallers, but by degrees they threw over all obedience and they adopted the kingly crown.

DR. REYNAUD: That was in the time of Grand Master Pinto.

LORD STRICKLAND: Now apart from the capitulation, the King of Naples had become a vassal of another power, the Papal States, and he thereby had lost all the sovereign rights he had. Sovereignty is achieved when a vassal throws over his habitual obedience to his overlord. Later Grand Master Verdala started to give the form of a Crown to his berretta. After the battle of Lepanto, the co-belligerents, the victorious combination, had to meet to divide on the spoils of war, and settle disputes about their respective shares which became very acrimonious. Verdala started showing his independence from the Papal States and to make public to the people of Malta his independence; he put up in a corner of St. George's Square on a monument a column at the foot of which there was a fox in a disrespectful position. In that way he showed his independence and the repudiation of the papal sovereignty. Verdala's coat of arms comprised a fox; that of Cardinal Colonna a column.

Sovereignty was subsequently based on the consent of the Maltese and on such actions that England could perform under the Common Law of England. Their combination, which Stoddart called

"compact" was a collective union. The other side talk of two "cessions" in their pleadings before this Court. They do not know to what way to turn. You can only "confirm" something that had been done previously, and not something that was created just then. I hope my learned friend would not challenge the argument that you can only confirm the continuation of what previously existed, and what previously existed was the development of consequences of the facts between the Treaty of Amiens and the Treaty of Paris, when the Maltese succeeded by their protests not to be given back to the Knights, when the King of Naples was unable to send troops, when the Grand Master did not have the money or the pluck to come here, and because of the protests of the Maltese. It is thrilling to read those protests of the Maltese headed by Marquis Testaferrata. It must be emphasized that in the Malta Marriages case, Marquis Testaferrata has been given the best of characters in a report from the then Governor.

The point of importance is, that besides promising the Maltese their "liberties", the protection of their privileges and of their dearest rights, the King of England gave the Maltese the rights of British subjects.

There are several sorts of protectorates. There are protectorates where the inhabitants are kept in the position of being sub jugum. There are proteotorates where limited rights are given, such as those given under the Roman Law to the Latini Juniani or to dedititii. When a protectorate acquires such rights, those rights undoubtedly include under English Law the right not to be taxed without representation.

Your Honour will find in "Keir and Lawson" a passage in which it is stated that the King cannot exercise the prerogative either to tax or to legislate without the concurrence of Parliament. The Interpretation Act confirms that view, and confirms also that the statutory transfer of authority must be taxative and not by inference.

That is an undeniable consequence of rule under a limited monarchy. In particular as regards settlements, the royal prerogative as far as it existed in theory, is gradually being embodied in statute.

When the Malta Letters Patent Act of 1936 was proposed in the British Parliament, I drew the attention of the Government to the limits of the user of the prerogative of the King but got no answer. They knew they were wrong. I asked the Government to alter the title of the Bill. They would not. I asked them to divide the Bill in two parts. They would not either.

THE COURT: Is not British Parliament omnipotent?

LORD STRICKLAND: Quite omnipotent. However, the doings of the English Parliament are subject to criticism.

THE COURT: They are subject to criticism.

LORD STRICKLAND: Interpreters of Acts are subject to be put in the lunatic asylum.

The sitting was suspended for half an hour.

AFTER RECESS.

THE COURT: In view of the fact that nearly all the submissions you are making are embodied in the very elaborate written statement you have given us, may we have the texts of the laws passed by Parliament in withdrawing the Constitutions in two other cases, that is in the case of Newfoundland, which was withdrawn by the people's demand, and the other case of Cyprus. Can you tell us the precise enactments? Was the Constitution withdrawn or suspended?

LORD STRICKLAND: In the case of Newfoundland I believe it was suspended. It was revoked by Parliament under the cloak of suspension.

THE COURT: And the legislative power was vested in a commission that was appointed and not in the Crown?

LORD STRICKLAND: A case which was identical to Malta was that of the Isle of Man.

THE COURT: How long ago was that?

LORD STRICKLAND: About a couple of hundreds of years ago.

THE COURT: What we want to know is of a withdrawal of a Constitution in a case similar to that of Malta and the text of Act which was passed by Parliament.

DR. REYNAUD: I will try and find one; the one in the case of Cyprus.

LORD STRICKLAND: The Malta Letters Patent Act of Parliament does not withdraw a Constitution; it gives power to alter Letters Patent, for instance Section 68 by giving power to only call Parliament once within five years, or to institute elections by groups, but it does not give power to withdraw all representative rights, because that was lost for ever by the King when representative Government was established in 1887. And the Interpretation Act of 1889 debars any attempt to get round that position. It really hurts me to hear from the other side that the Consiglio Popolare had no powers at all.

DR. REYNAUD: I said that the Consiglio Popolare had no legislative powers.

LORD STRICKLAND: I shall prove that it had powers to legislate as well as to tax.

DR. REYNAUD: Did they ever exercise that right?

LORD STRICKLAND: The report of the sitting of the Consiglio Popolare at its meeting in 1530 ......

DR. REYNAUD: That is when L'Isle Adam came to Malta.

THE COURT: I do not believe that Dr. Reynaud meant the legislative powers of the Consiglio Popolare at that time, but at the time of the Royal Commission's Report just before the English came here. At that time when the Consiglio was suppressed it had no legislative powers.

DR. REYNAUD: Even at the time of the later Grandmasters it never exercised legislative powers.

THE COURT: But the power was there; it was never lost.

LORD STRICKLAND: It is really most painful that ministers of the Crown have been stacked with information from Malta to be able to say that there was never any compact between the Maltese and the English. It is really so painful that they have no business to make these false assertions against the Maltese.

DR. REYNAUD: Of course the people in England know nothing about the history of Malta.

LORD STRICKLAND: (Reads) "Magnificus Antonius Bonella utiusque "juris doctor, judex magnifici Domini Capitani laudat quod "mittantur ambasciatores ad effectum ut proximi; laudat eligendo "ambasciatores Magnificos Jacobum Angaraum de Inguanez, Alphonsum "de Nava et Joannem Antonium Vassallum. Quoad alia laudat ut "Magnificus Dominus Capitaneus. Magnificus Petrus Cassar, "utriusque doctor, laudat quod colligantur voces illorum de "consilio et totius insulae si bene visum fuerit magnificis "juratis et, intellecta eorum voluntate super propositis, accedant "ambasciatores alias electi ex consilio quos quaetenus necesse "erit iterum et de vovo elegit ad Ill$^{um.}$ Do$^{um.}$ ad ei explicandum "voluntatem omnium et faciant et adimpleant universitatis "voluntatem praedictam: Quod pecuniam pro mittendis ambasciatori-"bus laudat quod fiat prout visum fuerit Magnificis juratis "dummodo vadant sum effectu".

Then they dare to say that the Council of the People had no powers! It had powers which now appertain to the Legislative Assembly of the Channel Islands. I went purposely to Jersey and Sark to see how laws are passed and how they carry on their business. They have just the same system as we have had here. In Parliament, they have a chair for the Duke of Normandy just as we have in the co-Cathedral of St.John a chair for the Governor near the King's throne.

THE COURT: Now the incident is closed.

LORD STRICKLAND: Following a point raised by the Court as to

the difficulty that arises as to how the legislative power was exercised in periods of uncertainty and the impression announced by the Secretary of State Mr. Ormsby Gore in the House of Commons that if the first "ultra vires" case were otherwise decided, there would be chaos in Malta, and following the argument put before the House of Commons that in order to avoid chaos - salus populi est suprema lex - something quite extraordinary must be done, the answer is this: scienti et consentienti non fit injuria, in times of emergency and stress. There was a period of emergency before the Treaty of Paris. That cannot be denied. There was a state of confusion. According to our Maltese law, which is taken from the Roman law if nobody complained against a law before a year runs out it was not afterwards open to question. We have the Italian actione pubblica. In the Roman law it is described as the actio popularis. So that there will be no chaos if I am in this case to be refunded a few shillings by the Customs. The only object of this litigation is to prove that the Maltese have a right to their representative institutions. That would not be chaos. I wish to quote one point before closing. This is from Stoddart at page 7.

> "I confess my Lord that as a constitutional English Lawyer I am most disposed to rest H.M's. sovereignty whenever it can be done consistently with truth and legal principle, on the ground of compact. The voluntary choice of a free people seems to me to afford their ruler a more secure as well as a more honourable title than any which he could derive from having them unconsciously delivered over to him by a third power or by compelling them by his own free from involuntarily to submit to his domination. The Maltese in general have a pride in thinking that they voluntarily placed themselves under the protection of the British Crown, and I own that the history of that transaction appears to me to justify this view of their relation to their sovereign.

Stoddart in the second report discusses the acquisition of Malta by conquest, but shows that if he were to have to give an opinion under his oath of office, he reserved the right to come to a different decision. That means that in this case there was no conquest and no cession. Apparently he was writing on the hypothesis of the powers that be and he reported hypothetically.

Now to reply to your Honour as to what parallel could be found about a cession of territory. A parallel is to be found in the exchange of the Orkney Islands and Tangiers.

THE COURT: Would the title be conquest in that case?

LORD STRICKLAND: No title can be contested if it is sanctioned by Parliament. Parliament is omnipotent.

THE COURT: Sanctions the cession.

LORD STRICKLAND: As Lord Hailsham has told me, the British Parliament can do anything except to turn a man into a woman.

THE COURT: Reasonable things.

LORD STRICKLAND: What I stated has been the view of the Lord Chancellor, Lord Hailsham. My submission is that these treaties were subject to ratification. When the Congress of Vienna sat, the four great Powers gave notice to all the other Powers to keep behind the door and be politically shut up. Of course, what was done by the ambassadors is subject to be ratified by Parliament. The treaty power is vested in the King even now; but de facto it is carried out by the Cabinet of the day.

I now summarise the position as regards the first point. As regards the cession of Malta to England, we have done away with the suggestion that there was a Hildebrand Oakes's cession. It is admitted that in 1800 discussions took place between the leaders of the Maltese people and the heads of the armed forces of Britain. We have the testimony of the Remonstrances of the Chamber of Advocates which confirms the unanimous opinion of all the legal authorities in Malta that the Maltese at that time, namely in 1800, had a legally constituted Council. We have incontrovertible evidence of the "compact". We have the proclamations of Pigot and Cameron and the minute of Maitland, and the Congress of 1802. The Proclamations are all a repetition of a virtual compact. They certainly bind the King because the King received consideration in getting the fortresses, in acquiring the buildings of the Knights and the port of Malta. The Maltese received consideration by getting protection and the promise that their dearest rights were to be safeguarded. That was the compact as evidenced by these proclamations. Now this has been challenged by the Royal Commission which His Honour on the right referred to. But since that challenge we have had the speech of Lord Glenelg, the Secretary of State for War and Colonies, we have had the despatch of Lord Grey, and we have had the speech of the late Mr. Joseph Chamberlain. And we have had more than that. We have the Royal Commission which came to divide Malta into Districts before the Constitution of 1887, and their report has the approval of Parliament. Unfortunately no copy of that Report has yet been found in the Public Library.

But there is more than that. In the Colonial Office List there is a summary of the constitutional history of every part of the Empire written by able experts, who revise it every year. There is not a breath about either "cession" or "conquest" as regards Malta. It says: "In 1800 Malta was placed in the hands of Great "Britain; according to the Treaty of Amiens, Malta should have "been restored to the Knights of St. John, but this was prevented "by the commencement of the war and the Islands were officially "annexed to the British Crown by the Treaty of Paris."

In the Hailsham edition of the laws of England there is a list of the parts of the Empire having responsible Government where Malta finds its place. The promise to give Responsible Government I am afraid cannot be insisted upon, but once that Representative Government was granted we have a series of decisions which enable us to insist upon the Common Law in that direction. The Common Law of England consists in the repetition of decisions which established over and over again that once representative Government has been granted it cannot be withdrawn by Letters Patent.

THE COURT: Is there a copy in the records of Calvin's case?

LORD STRICKLAND: I have taken this extract from an old book. It was, in the case of the Bishop of Natal laid down by the Privy Council that once there is a promise of the grant of constitutional Government, the King cannot legislate by Letters Patent.

In the collection of the Laws of England, there is a list of all parts of the British Empire that have some sort of responsible Government; then there is on another page, another part of the book which contains a list of the countries acquired by conquest, and a list of the countries acquired by cession. Malta does not appear in either of these lists. At the end of the paragraph there is a remark that Malta is to be "considered" as a cession. It does not say, it is so. It says: it is "to be considered".

THE COURT: Are there any colonies acquired by compact?

LORD STRICKLAND: Certainly, the Isle of Man.

THE COURT: Any other Colonies?

LORD STRICKLAND: Yes, the Straits Settlements and the Federated Malay States. Most of the latter have been acquired by compact - a compact with the chief or with the sultan or with the leaders.

Now to come to Granada. The Island of Granada had been conquered and lost and conquered again three times. It became part of the British Empire by the Treaty of Versailles of 1783 which was negotiated in New York. That was the result of the destruction of French sea power.

THE COURT: At the time of Nelson?

LORD STRICKLAND: Between the Treaty of Amiens and the treaty of Paris. The battle of 'The Saints' took place, then and very much later the battle of Dominica, which although remaining undecided, destroyed the sea power of France and thereby several Islands of the West Indies like Granada have been regarded as conquered, some of them without any fighting taking place there, but just as a sea power result.

The distinctive meaning between 'cession' and 'conquest' has to be traced to Calvin's case which goes back to Roman law. So I maintain that the Maltese Islands were acquired by compact; and that the agreement under that compact, as far as we have any evidence, is to be found in the proclamation of Cameron, which shows clearly that when the capitulation was negotiated one party declared what it wanted, and the other what it was ready to grant. There is no doubt that there were other conversations, and although that Proclamation was in very niggardly terms and very economically drafted, it says what the English said in the compact and what they agreed to; and that agreement is the guarantee of our religious liberties, our dearest rights and customs etc. General Pigot's Proclamation runs thus:

"Il Generale Maggiore Enrico Pigot, Comandante delle Truppe, Rappresentante di Sua Maesta' Britannica in Malta e Gozo; a tutti gli abitanti di queste Isole:

Nell'atto che io m'indirizzo a voi per la prima volta col massimo piacere v'informo che il Re prendendo la nazione Maltese sotto la sua Protezione mi ha autorizzato come suo Rappresentante di assicurarvi che sara' usato ogni mezzo possibile a stabilire la vostra contentezza e felicita'.

Mentre che mi sono trovato tra voi ho ricevuto le migliori impressioni della vostra buona disposizione e subordinazione alle leggi e della vostra gratitudine alla Divina Providenza col favore della quale la flotta e armata del Re erano abilitate di dare una assistenza effettiva ai vostri bravi sforzi per la espulsione dei vostri nemici, per cui la pace e la liberta' vi sono state ristabilite. Sara' costante mia cura di rendere certa la continuazione di questa felicita'. Dovete sapere che questo bene non puo' provenire se non da una amministrazione delle leggi sempre giusta ed esatta per parte del Governo e per parte del popolo, da una costante ubbidienza e confidenza nelle loro protezioni. Questo colla dovuta riverenza e rispetto della vostra Religione e suoi ministri colla fedelta' reciproca delle vostre azioni deve formare il vostro ottimo stato....

I tribunali di giustizia sono stabiliti e continueranno. E' mio dovere come anche mia inclinazione di rpoteggere la nazione Maltese e di assicurarla del pieno possesso della sua Religione, delle sue proprieta' e della sua liberta'.

(Firmato) ENRICO PIGOT.

Dato in Palazzo della
Valletta,
Febbrajo, 1801.

LORD STRICKLAND: Here is the other Proclamation from Cameron:

"To the Maltese Nation".

"Being charged by His Majesty the King of Great Britain to govern all the affairs of these Islands, of Malta and Gozo, except the military, under the title of Civil Commissioner of His Majesty, I avail myself with great pleasure of this occasion to assure you of the paternal care and affection of the King for you, and that His Majesty grants you full protection and the enjoyment of all your most cherished rights - that he will protect your churches, your holy religion, your persons and your property.

His paternal care extends to the hospitals and other charitable institutions, the education of youth, the orphans and homeless, the poor, and all those that have recourse to this beneficence.

Ye happy people, that the hand of God has saved from the awful misery and oppression under which so many innocent nations are labouring, receive with gratitude so much goodness of a King, father to his subjects, who protects the weak against the strong, the poor against the rich, under whose rule all are equally protected by the law.

Thus far you have conducted yourselves with decorum and shown yourselves obedient to the lawful authorities, and your old fame as warriors has not been disproved in the defence you made lately of your country.

Commerce being now extended, arts and sciences protected, manufactures and agriculture encouraged, and industry animated, Malta will be the emporium of the Mediterranean and the seat of happiness.

To carry out the gracious desires of my Sovereign is not less my ardent desire than my sacred duty. My door will be opened to everybody. I shall hear everyone and shall be ever ready to render justice to all, and make the laws observed, being, however, tempered by clemency, and accept every information that will have for its object the good of the Maltese; and above all I shall occupy myself with the means of rendering prosperous the cultivation and manufacture of cotton, and introducing and maintaining abundance of victuals in these Islands."

(Signed) CHARLES CAMERON.

LORD STRICKLAND: Now here is the letter of Ball to Mr. Wyndham:

"You, Sir, know that when England took possession for the first time of Malta it was stipulated that the privileges of the Maltese would have been maintained and their ancient laws kept in force".

I submit to your Honour that these are the terms of a compact

binding on the King of England; they are confirmed by the inscription on the Main Guard and by a Minute of Sir Thomas Maitland.

Now, had the King the power to legislate by Letters Patent? Calvin's case was before the Law Officers of the Crown in 1801 when instead of attempting to deal with Malta by Letters Patent, they dealt with Malta by passing the Act of Parliament of 1801, declaring Malta to be in Europe. It was a most important point to declare Malta to be in Europe, because historically before the incursion of the Mahomedans into Northern Africa and Europe, Malta was Ecclesiastically under the Church of Carthage.

THE COURT: Is this relevant to the case?

LORD STRICKLAND: Yes, perhaps, to show how the Colonial Office probably started to legislate by Letters Patent in regard to Malta.

When Christianity was abolished in Northern Africa, Malta was put under the Diocese of Palermo as a remanent of the African Ecclesiastical system. The said Act of 1801 was passed to put a stop to an attempt to include Malta as an island off the African Coast, which attempt was developed after the Falkland Islands and African Settlements Act of 1843 and followed by the two Acts repeating that Malta was in Europe. I am convinced that under the provisions of the Act of 1843, notwithstanding that in 1801 it had been laid down that Malta was not an island on the coast of Africa, and that Malta was in Europe, some Colonial Office clerk had started legislating for Malta by Letters Patent. Even for the Falkland Islands, Parliament had to give power to get Letters Patent. There can be no question.

THE COURT: Before the Falkland Islands Act they legislated by Order in Council?

LORD STRICKLAND: Oh no. In view of the decisions and the pronouncements in Calvin's case by a Committee of the Privy Council it was established that legislation by Letters Patent could only originate form vitae necis potestas. Now Your Honour has raised a very difficult point. The King can sometimes legislate by Letters Patent and by Order in Council even for England and even for the Colonies but not for purposes of taxation. We have had the Coal Strike in England as a case in point when the Constitution was for a purpose practically suspended. Now in 1860 the Falkland Islands Act was revoked and the British Settlements Act was passed, which in turn was revoked and re-enacted in 1887. These were the circumstances. In New Guinea which was a settled country, although it is fundamental that in such settlements British subjects can adopt the law of their own country, those who wanted to appeal from a judgment in New Guinea to the Supreme Court of N.S. Wales, were told that they could not and therefore the British Settlements Act was passed

for the purpose of such Appeal. There was a debate in the Houses of Parliament on it.

THE COURT: Your point is that the British Sovereign has the right to legislate by Letters Patent or by Order in Council except in case of taxation?

LORD STRICKLAND: In all cases in which is allowed by the law of England for English people. In England he only has that right as limited by Parliament. I am very pleased that my friend has raised no doubts as to the Falkland Islands Act. The interest of this Court might have been absorbed for more than two days in discussing consequences of that Act.

THE COURT: Do you contend that the King of England has the right to legislate by Orders in Council or by Letters Patent in all cases except in the case of taxation?

LORD STRICKLAND: In all cases in which he is allowed to legislate for English people. But the Law of England expressly forbids him to tax or legislate.

THE COURT: Generally speaking, are these cases few and rare?

LORD STRICKLAND: One of the cases is when there was the Coal Strike.

THE COURT: In cases of emergency then. But as a rule, according to your contention, the King has no right to legislate unless Parliament gives him the power to do so.

LORD STRICKLAND: As regards the first point, I hold that Malta was acquired by compact.

THE COURT: Supposing Malta were acquired by compact, as you contend, then the power of legislation remained with the people, according to your submission.

LORD STRICKLAND: Yes, the power of legislation remained in the people and sovereignty remained in the people, shared by the King. Take the Australian States. They have a Federation there. The King in Australia is held to exercise sovereignty secumdum quid. Sovereignty can be shared, and the sovereignty over Malta between the Treaty of Amiens and the Treaty of Paris was vested in the Maltese people. It must have remained somewhere. It remained in the Maltese people. The Maltese had protested against the Treaty of Amiens. We have the case of Palestine. Palestine was conquered by the Arabs and the English King as allies.

THE COURT: Who is ruling?

LORD STRICKLAND: England is ruling allegedly under a Mandate. The theory is that the Allies by the Compact of the League of Nations surrendered their share of the conquest (which is very small), because England was the major conqueror. The Arabs assisted a little. England in administering Palestine is a 'mandatory' of the League of Nations, which League of Nations had obtained a power to assign a mandate from the Allies of the Great War.

The second point is the judgment of the Court below. May I read the Act of 1936? The Preamble says it is 'An Act to remove the limitations of His Majesty and to give His Majesty power to revoke or amend the Malta Constitution'.

This diction means that the King had no power to legislate by Letters Patent, and on the other hand it does not pretend to revoke the limitation to the prerogative established by the Constitution of 1887. It declared valid certain Ordinances passed by the Governor. Well, that is a euphemistic way of saying: 'Give the Governor a bill of indemnity'.

That Act only gave power to 'amend or revoke' and it was aimed in particular at increasing the powers in the reserved Section 68. When Section 41 was amended it was argued that the amendment was out of place and 'ultra vires'. In Section 41 they put in something incongruous.

THE COURT: You refer to the first part of the Preamble?

LORD STRICKLAND: 'An Act to revoke and amend the Malta Constitution Letters Patent ......

THE COURT: Not a word on legislation.

LORD STRICKLAND: No. 'It is hereby declared that all Ordinances enacted and promulgated ...... are valid'.

That amounts to whitewashing and giving a bill of indemnity to the authority that made the Ordinances. It shows that the drafters of this law knew the common law of England and they interpreted instructions against the Common Law as narrowly as they could. According to the interpretation of my learned friend, the Governor may repeal the Magna Charta. That is the logical consequence of the absurd contention of my learned friend opposite. The Governor may repeal 'trial by jury', the freedom of the press; he may repeal the Immunity of the Judges!

DR. REYNAUD: My learned friend opposite expressed a doubt, that is to say whether when the Constitution of 1887 was granted, there was any surrender of the power of legislation. We say no because there was a wide reservation.

LORD STRICKLAND: A reservation in Letters Patent has no such force whatever. It has no force against the effect at Common Law where a promise was made. The making of a promise

is in its consequences independent of the Letters Patent.

THE COURT: Your contention is that the rule is that when the King promises a constitution, he surrenders the right to legislate or to impose taxation.

LORD STRICKLAND: He can only reserve the power to revoke what is in these Letters Patent.

THE COURT: Our difficulty was with regard to the Constitution of 1887.

LORD STRICKLAND: The promise to give us responsible Government was never revoked. Once the King promises a Constitution, he cannot issue Letters Patent revoking the right.

THE COURT: Parliament can give him back what he has surrendered.

LORD STRICKLAND: It could not take back a promise.

THE COURT: Parliament can restore to the King any right which the Crown has surrendered. The question is whether it should do it implicitly or explicitly.

LORD STRICKLAND: Never implicitly. If I am successful in this case, Acts of Parliament may have to be passed in regard to Malta until there is a grant of representative Government. Otherwise if nobody screams with a year '<u>scienti et consentienti non fit injuria</u>' Or an Act of Parliament <u>may be passed giving the King the</u> power to delegate the power to legislate. However, that would be a terrible step in English law.

THE COURT: Now you are criticising the previous judgment and the pleadings?

LORD STRICKLAND: Yes, I am criticising the pleadings. The Interpretation Acts show clearly that in Sections 11 and 38 of that Act the limitation does not ripristinate a condition of things that did not exist at the time.

THE COURT: Does it expressly say so?

LORD STRICKLAND: Section 11 of the Interpretation Act of 1889 runs thus :

> "(1) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing Enactment,

it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment;

(ii) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation".

Section 38 of the same Act is the following :

"(i) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification and provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(ii) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

a) Revive anything not in force or existing at the time at which the repeal takes effect; or

b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

c) affect any right, privilege, obligation or liability acquired, incurred, or incurred under any enactment so repealed; or

d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or,

e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed."

DR. REYNAUD: The contention on this side is not that the Malta Constitution Act of 1935 revived any previous enactments.

THE COURT: Unless the contrary intention appears.

LORD STRICKLAND: It has to be expressed taxative. When the Constitution of 1921 was granted to the Maltese, Lord Milner explained in his Despatches - when he was pressed by the National Assembly to embody the Constitution in an Act of Parliament - that there was no need of doing so, because the position would be exactly the same. That was the intention of Lord Milner in 1921. If the contrary were the case in 1936, an Act of Parliament would not have been useless.

The main point is that the Maltese held the sovereignty in Malta which entitled them to representative institutions. They never surrendered it. My learned friend stated that the Maltese surrendered it in the Treaty of Paris.

THE COURT: Let us not go back to that point.

LORD STRICKLAND: (Reading from the judgment of the Court below):

> "Plaintiff does not question the power of the Imperial Parliament to pass legislation involving the revocation of a Constitution granted to a Colony: and both parties to the suit agree that the revocation of the Letters Patent of 1921 had the effect of placing the Crown in the same position as existed previously to 1921."

What was the position? In order to legislate for Malta, the British Government had to pass Acts of Parliament. Representative Government had been promised to the Maltese and a representative council was included in the compact of 1801 by the promise to respect the liberties and the rights of the Maltese. That promise has never been withdrawn.

> "Plaintiff however, denies that before 1921 the Royal Prerogative existed as regards Malta. He agrees that a ceded Colony is subject to legislation by Order in Council, but denies that Malta may be considered as a ceded colony; and, therefore, the main point to be established in this case is whether Malta is a ceded Colony or not."

The Crown has no power to take back the Constitution. It can legislate only on reserved matters.

THE COURT: You contend that the Crown had no power to impose taxation. However, before the year 1921, the King exercised his power to impose taxation independently of the promise to grant a representative institution. What we mean is this: that when constitutions and charters were granted, the right of legislating and of imposing taxation was always reserved.

LORD STRICKLAND: My answer to that is that according to the law of England, the King could not do so as King, but as the agent of the Maltese people. The King did it as the agent of the Maltese people, as successor of the Grand Masters and if I had been there at the time I would have come forward ......

THE COURT: It was not legal, but they submitted themselves to it?

LORD STRICKLAND: If it was not protested under a year it became law. Legislation under Roman law originated either in the Senate or in the tribunals....

THE COURT: Why are you applying Roman law in this case? In some cases you tell us that the common law is applicable; now in this case you want to apply the Roman law.

LORD STRICKLAND: I want to show that Malta then was in the position of emergency and the person who governed it governed under Roman law.

THE COURT: We refer to the period 1849 to 1921. The King had always exercised the prerogative of legislation even on money matters in Malta, and there was no question in Court.

LORD STRICKLAND: It could have been proved to be wrong.

THE COURT: After that, Maitland assumed the Government.

LORD STRICKLAND: _Proprio Marte_.

THE COURT: England could never change its status _proprio Marte_.

LORD STRICKLAND: Laws under Roman law were changeable every year by the Praetorian Edict; they could be challenged and if they were not protested within one year's time they remained. If the people submitted for a year, that became settled law, and there is no incongruity in it.

The judgment of the Court below concludes :

> " Ordinance No. XXVII of 1936 having been promulgated in virtue of the powers given to the Governor by the said Letters Patent of the 12th August, 1936, and according to the instructions aforementioned, is valid and legal, and, therefore, plaintiff's contention as to the nullity of same cannot be entertained.

The instructions went so far as to give power to impose taxation.

THE COURT: His Excellency the Governor in a speech said that he would not impose taxation because there was no representation.

LORD STRICKLAND: (Reads) "Plaintiff nomine agreed during the hearing of the case, that the revocation of the Letters Patent of 1921, placed the Crown in the same position which it had enjoyed before those Letters Patent were issued.

This is tendentious.'

"Plaintiff agrees that a ceded Colony is subject to legislation by Order in Council ....

I have already dealt with this point.

"the position of Malta within the orbit of the British Empire is undoubtedly that of a Colony, because according to the Interpretation Act of 1889, and to the Statute of Westminster, 1931, "Colony" is any part of His Majesty's Dominions exclusive of the British Islands and of British India and of the self-Governing Dominions.

THE COURT: Where is Calvin's case quoted?

LORD STRICKLAND: It is quoted in a book which I found in the Library of the House of Lords. The reference to the meaning of the terms 'dominion' and 'colony' in the Statute of Westminster is really tendentious because the word 'dominion' has now absolutely a different meaning to what it was before. 'Dominion' is the enjoyment of the full plenitude of self-Government to day, whilst before it had only a superficial meaning. 'Colony' meant once where settlers had been sent or went.

THE COURT: As a matter of fact the Maltese were always contrary to Malta being referred to as a Colony, because it was not colonised.

DR. REYNAUD: But according to the Interpretation Act it is a Colony.

LORD STRICKLAND: At the end of the 18th century the colonies under English Acts of Parliament were all described as 'plantations'.

THE COURT: But there is nothing in a name.

LORD STRICKLAND: Except a very interesting argument which might be tendentious.

<u>SITTING ADJOURNED</u>.

Sitting of 4th December, 1937.

THE COURT: Your Lordship had to continue your statement. Could we ask you not to repeat the same arguments again, as the substance was already submitted.

LORD STRICKLAND: May I ask that I be allowed to answer a question put to me by the Court yesterday? I have here type-written copies of extracts taken from the Library of the House of Lords with regard to a report upon the Calvin Case. The original copy from the Librarian of the House of Lords I shall leave with the Court. May I say, that in the printed copy of the "Malta Marriages Case" there is a short summary of the Calvin case which is too brief, and does not give much enlightenment. The case reported is a long one and I only beg to give extracts. I now beg to reply to another question about the date of the Isle of Man transfer. The following is from Burke's Peerage:-

> In 1765 their graces (The Duke and Duchess of Atoll) disposed of their sovereignty of the Isle of Man - which they had derived from Sir John Stanley Knight, to whom it had been granted in 1466 by Henry VI to the British Government for £70,000 reserving, however, their landed interest, on payment of £101.15.11 annually and rendering two falcons to the Kings and Queens of England upon the days of their Coronations.

A better example of acquisition by compact may be quoted from the Colony of Fiji where one of the Chiefs had become a paramount chief, but after some time his power diminished, and he made a compact with the English Government, transferring the sovereignty to the English Government. There was a long period of war, and some of the members of the tribe were for the English and others were against, and at last there was pacification. There was a treaty.....

THE COURT:- Suppose there was a treaty without transfer by conquest, and suppose this treaty was broken in by England, what would happen?

THE COURT: Suppose a law was passed contrary to the Treaty: would the fact that it was contrary to the Treaty invalidate the law?

LORD STRICKLAND: You bring me to the most complicated point in international law. Where is the sanction? There is no sanction.

THE COURT: Apart from the sanction, may the law in such case be invalidated by the tribunals?

LORD STRICKLAND: What tribunals? We have the case of Palestine.....

THE COURT: I am putting this point because it would be useful; supposing Malta had been acquired by compact, and England had violated this compact would the tribunals be competent to invalidate anything done against the compact?

LORD STRICKLAND: As to Treaties it is axiomatic that a breach of a Treaty on the part of the Crown is not subject to revision by any English Tribunal. That is laid down by the English common law.

THE COURT: Multo minus in the case of Malta.

LORD STRICKLAND: If you assume that there has been an act of State by which the King of England has approved of a trick by which a compact has been transformed into a conquest, then to bring the King to book for having sanctioned that trick is certainly very difficult. But that is assuming something impossible. We do not assume that the King has sanctioned the perpetration of so gross a wrong, and we assume that we are in the same position towards the Crown as a plaintiff in the colony of Granada was when the case Campbell v. Hall was discussed. And this brings me to the fundamental error of the next part of the pleadings of the other side, and those that we were just touching upon yesterday, where the word 'cession' was concerned. To 'cession' there is a meaning given by Stoddart, and such is the meaning given in the case Campbell v. Hall, where cession is a conquest that ends in capitulation; but simultaneously, in fact concurrently, interchangeably, the defendant sometimes has argued that there was a cession and he has sometimes given to the word 'cession' the meaning of contract. Now he cannot have it both ways; if it was a cession in the sense of Stoddart and in the sense of Campbell v. Hall.....

THE COURT: In the sense of a compact.

LORD STRICKLAND: In the sense of conquest. If it is that sense, then of course, the King has the power to legislate by Order in Council, but if it is the sense of cession which means contract, that is quite a different position. The defendant sometimes argued one way and sometimes another, He says it was a 'voluntary cession' when he means to say a voluntary contract. Then he puts in the word 'cession' instead of 'contract', in the import of Campbell v. Hall changing about so as to prove that Malta was transferred by cession and in order to show that the King has power to legislate by order in Council. Yes, if it was not cession by compact, it was by capitulation; but then he says it was a gentlemen's agreement.

THE COURT: Let us come to our case. Supposing that Malta came to belong to Great Britain by conquest or compact, and one of the conditions was that Malta should have representative institutions; and supposing - as the fact is at least for some time - the King made laws without the help of the representatives of the people, would that be a reason for invalidating the laws in general, apart from the lapse of a year? Is it your contention that these laws would be invalid?

LORD STRICKLAND: My contention is that these laws are only invalid if they are challenged successfully within a year; but also that the King has no right to legislate by Order in Council or Letters Patent for the purpose of legalizing taxation without representation. The next point (answering the question on what was stated yesterday) is the position of the Legislative authority during the period between the conquest of the islands outside the fortress, and the surrender of the Fortress. My learned friend opposite gave me an opportunity of pointing out that there has been divergency of opinion between various Royal Commissions and I submitted to the Court that the last Royal Commission dealt with subjects that are of great weight. I refer to the Royal Commission of Sir George Bowen and Sir George Baden Powell. I submit that the report offers an additional argument in connexion with the characteristic features of the ancient "consiglio Popolare." That Council was formed after the expulsion of the Saracens and its influence diminished after several centuries. Here we have a Royal Commission whose report was sanctioned and approved by Her Majesty Queen Victoria, and which admits with full sincerity the right of the Maltese to a representative assembly. And that, I submit, is conclusive in proving from the report herewith of the debate when I read a report a copy of which I got from the Colonial Office Library.

THE COURT (Judge R.F. Ganado): The report was published as a parliamentary paper in 1888, and divided Malta into districts.

THE COURT (The Chief Justice): I think my colleague Dr. Ganado has a copy of what you are alluding to. We are bound to know, whether what your Lordship quotes exists or not.

LORD STRICKLAND: Here are two quotations from the report in Campbell vs. Ball which may not be at the disposal of the Court, one of which is from Keir and Lawson; I ask permission to leave the book <u>con animo di ritirare</u>. These quotations are very illuminating.

"A great deal has been said, many authorities cited relative "to propositions in which both sides seemed to be perfectly "acceptable, and which are too real to be controverted." (I wish to quote from Campbell v. Hall) - "The stating of some of those

"propositions which we think quite clear, will lead us to see
"with greater perspicuity, what is the question on the first
"point, and upon what hinge it turns. I will state the
"propositions at large, and the first is this:-

"A country conquered by the British arms becomes a Dominion of the King in the right of his crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

"2nd, is that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

"3rd, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning."

Here is a distinction between articles of capitulation and articles by means of contract.

THE COURT: The word "ceded" is used very laxly, sometimes to mean capitulation, and sometimes acquisition by contract.

LORD STRICKLAND: I allude to judgments in the ultra vires case; the court held that there was a cession, but I have pointed out that the words "voluntary cession" were used; but sometimes it was stated that there was a gentlemen's agreement, which of course means something like a contract. If there was a contract we must look for the terms of the contract. If there was a cession in the sense discussed fully by Sir John Stodart, the meaning of the word cession is contrasted with surrender. One is deditio and the other is passing "sub jugum". In this other authority, the case of the Assembly of Jamaica is quoted....

"The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know 'what could be done if the assembly should obstinately continue to withhold all the usual supplies'. They reported thus: 'If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants: but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an Act of Parliament."

THE COURT: Whenever your Lordship hands a report to the Court another copy must be available for the Counsel of Defendant.

LORD STRICKLAND: Yes, before I go on with the analysis of

the pleadings of my learned friend opposite, I have to say that these pleadings are full of repetition of phrases. Here is a definition of a prerogative which you find passim:-

> By the word prerogative we usually understand that special pre-eminence, which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from prae and rogo) something that is required or demanded before, or in preference to all others."

There must be no inference from the statutes dealing with the King's prerogative: if the prerogative is diminished, that must be stated expressis verbis.

DR. REYNAUD: The Royal prerogative is found in the ultra vires case, in all its details, according to the Common law. We are not discussing it, and you are referring to it.

LORD STRICKLAND: As to the word Colony, and its applicability to Malta.....

THE COURT: When the Constitution was being drafted, one of the remarks I made was to remove the word Colony which was included in the Draft, and that was granted.

LORD STRICKLAND: And that evoked a great deal of sympathy.

THE COURT: The laws which refer to Malta do not contain that word. The rule has been adopted not to mention Malta as a Colony. It was a question of sentiment.

LORD STRICKLAND: It was so much a question of sentiment that the Royal Colonial Institute had to change its name to the "Royal Empire Society". There have been colonies which were previously plantations, and some of them have now become Dominions, and the word "Colony" was used hypothetically.

THE COURT: Malta, having such an ancient civilization, loses its dignity when called "colony".

THE COURT (Judge R.F. Ganado): In 1910 an Ordinance was proposed in the Council, which was approved beforehand by the Secretary of State and the elected members opposed the word "colony" and they changed it into "island". There is a dispatch, I believe, of the Governor with regard to its assent.

DR. REYNAUD: May I point out that in the Imperial Act it is stated 'Dominions and Colonies beyond the Seas" and there is no reference to anything else but Dominions and Colonies, for all intents and purposes; therefore Malta is to be considered

as a Colony, independently of anything else. I mean to say from the legal aspect. So that I beg to differ from what His Lordship says.

LORD STRICKLAND: My learned colleague opposite is arguing on the Statute of Westminster, passed quite recently. That statute was a masterly effort to appease the minds in the Dominions desiring to be as independent as possible from the British Parliament, but not independent from the Crown; and the British Parliament adopted a new nomenclature. If anybody had attempted to make the distinction made in the Statute of Westminster, say in 1790 nobody would have understood him. Then Colonies and Dominions were considered as plantations. There is the act of Queen Anne which compels resignation of any member of the House of Commons who accepts office after the passing of the Act. Under that Act Sir Timothy O'Brien on becoming Attorney General of the Colony of Victoria was summoned to England to defend his seat on his having accepted a paid Office of profit, and so was the case raised with regard to myself when I became Head of the Ministry in Malta, where the point is that the word "colony" is a new thing. We might consider the impropriety of confusing laws of distant periods, for instance the laws of the Roman Empire extended over a period of a thousand years; who would have argued in the Augustinian period on what happened to be law in a period of hundreds of years after or before.

Now I wish to quote again from the Judgment of the Court below:

> Consequently before the promulgation of the Letters Patent of 1921, the Royal Prerogative had not been surrendered either in whole or in part, and the Crown had power to legislate as regards Malta. This power still pertains to the Crown as by the revocation of the letters patent of 1921 its position reverted to what it was just before the promulgation of such Letters Patent."

The King's prerogative finishes, and can only be revived by Act of Parliament. The common law is derived from a collection of judgments which takes all "cessions" in the sense of contracts as set out in Campbell v. Hall:

> "Plaintiff has quoted the Act of the Imperial Parliament of 1801, whereby His Majesty was empowered to regulate the Trade and Commerce to and from the Island of Malta, to show that the Royal Prerogative did not exist before 1921, and that at that time the Law Officers of the Crown were of opinion that they had no power to legislate by Order in Council".

That is my opinion. That act declared possession on the part of the King over Malta.

Now, you know, volumes have been written on the word "possession" as applied under the Roman Law. Possession means anything between either <u>de jure</u> or <u>de facto</u>. The Act of 1801 relied on by plaintiff was passed before the Treaty of Paris.

Then we have in the same pleadings that there was a cession before that Treaty. It is convenient for the defendant to say one thing at one time and another thing at another time. In 1801 an Act of Parliament had to be passed to deal with the case of Malta. My contention is that now the King has also to pass an Act of Parliament - and an Act of indemnity - to validate the Letters Patent that were passed in 1936.

THE COURT: What about the future?

LORD STRICKLAND: We must have an Act of Parliament in the future to restore Representative Government in some form. I say that the minimum would be that of the Consiglio Popolare. They ought to give us some form of representative Government, of which at least half the members would be elective.

THE COURT: Whose majority would it be then? One half is not a majority.

LORD STRICKLAND: At least one half. There might be the casting vote of the President, perhaps. I maintain that by virtue of the promises made when the Constitution of 1887 was granted, we are in the same position as Granada was when Campbell v. Hall was decided. But my argument does not go beyond claiming an elective assembly in the form of the one existing in the period between the conquest of Malta by the French and the capitulation of Valletta. I am prepared to maintain that that was a representative assembly, and that all the members were elected by the people by general appeal.

THE COURT: Did they not call him il Capo del casale at that time? Every Casale had its Capo.

LORD STRICKLAND: Yes. There is a schedule of members elected from each Casale attending the assembly, and there is also another contemporaneous record in the submission to the present Secretary of State by the Chamber of Advocates of Malta. They refer to a representation when a Maltese Council re-assembled itself in the same year of the signing in March 1802 of the Treaty of Amiens, when it met in June to protest against it. It is important because it explains how some errors were committed. Before the passing of the act to which I am referring Malta was treated as forming part of Africa, and Africa was not Europe. This shows that there was a sequel of blunders.

In reply to the argument - "The power to legislate on Malta by Order in Council was acquired by virtue of the common law as the prerogative of the Crown and of the sovereign. That is why the King legislates by Order in Council". - As far as Malta is concerned, Malta is a civilized Island and has been civilized

since thousands of years, wherefore this argument of the defendant non sequitur. I also wish to quote the Colonial Laws Validity Act. We all know that the Act itself provides that Acts of Parliament passed by the local legislature and which are duly published in the Government Gazette are unassailable unless incompatible with Imperial legislation. That Colonial Laws Validity Act is dealt with by the Statute of Westminster where it is practically abolished. The defendant's contention is that a ceded Colony is by remote reference to the Statute of Westminster subject to legislation by Order in Council. But this contention should be only applied in the case of a place acquired by capitulation or force, because when a Constitution was established there was no reservation of the power of legislation; namely notwithstanding anything the learned Counsel opposite submitted in his note, the act of 1936 does not abolish facts. The fact that some form of representative Government had been promised.....

DR. REYNAUD: The Act of 1921 was repealed as was the Act of 1932 by the Act of 1936.

THE COURT: His Lordship states that the Act of 1936 does not abolish the fact that a Constitution had been promised.

DR. REYNAUD: Yes, but the Acts granting a Constitution were abolished by an Act of Parliament, which amounts to the same thing.

LORD STRICKLAND: I say that no parliamentary draughtsman would or has drafted an Act to so challenge the common law.

DR. REYNAUD: Unless there is a reservation.

LORD STRICKLAND: The Act of 1932 was an act of indemnity. A clause had been added to section 41 of the Constitution of 1921 by way of an amendment when it ought to have been put into section 68 of the original 1921 Constitution. The Act of 1932 also had an amending clause. It provided that everything done by that Act was to be inserted in the new print of the new Constitution, and when that new print had been authorized by the Governor, that was to be the legal enactment without any quibble or exception. Even as regards the powers of the Constitution of 1921 which gives authority to the Maltese Parliament to alter the Constitution itself.....

THE COURT: By a two-thirds majority.

LORD STRICKLAND: Yes. The Constitution of 1921 gave power to the Maltese Parliament to alter and revoke parts of the Letters Patent. The Act of 1936 says that that power is liable

to alteration by other Letters Patent - within the strict limit of the Letters Patent themselves as reprinted.

Now there is one more point which gives great emphasis to Sir George Cornwall Lewis's concoction of the words "Voluntary Cession" - and this point was mentioned in the previous judgment. The Public Library has refused to hand me the document in connexion with this matter, but if my learned friend sends a telephone message, it will be produced for him. Well, in that document there is a report in which it is stated by Sir George Cornwall Lewis that Malta was acquired by conquest. He wrote this in his official capacity.

THE COURT: Do you want to quote him?

LORD STRICKLAND: Yes, to show that he contradicted himself when suggesting that Malta was ceded on condition, and the Court below was misled into giving weight to his authority because he was a Royal Commissioner. It is an example of the problems that Stoddart lays down. Independently of what he wrote in England, Stoddart argued bravely the Maltese case from beginning to end, stronger than has been in my power since my Cambridge days. Nevertheless Sir John Stoddart in his Second Report discusses hypothetically that Malta was acquired by conquest; but he then expresses his conscience duty saying that he was writing this in his capacity of a reporter to the Secretary of State as he otherwise had a right as a judge to say something different. In the Malta Marriages case....

THE COURT: It was a question of evidence.

LORD STRICKLAND: The Mixed Marriages were left to depend on evidence - Their Lordships stated that all mixed marriages were to be considered right, but implied that when it was a question of transmitting a peerage or immovable property or something else, they might consider evidence and might have to give a different judgment.

If Your Honour is of opinion that there is still something I have not yet dealt with.....

THE COURT: Yes, as regards your last part, that is to say whether it was necessary that the last Act of Parliament should have explicitly granted to the King the power to legislate. In the previous judgment it was stated that as the revocation of the Letters Patent of 1921 had taken place, by virtue of the last Act of Parliament, of 1936, the King, I should say, had received back implicitly the power to legislate, and so matters in Malta returned to the status quo ante.

LORD STRICKLAND: The Act of Parliament does not say this implicitly or explicitly, and going back we come to the point

that the King has to have an Act of Parliament before he can give power to the Governor to raise taxation; and unless the King possesses that power by Act of Parliament for that purpose, taxation is illegal.

THE COURT: Of course, you have already dealt with this point.

LORD STRICKLAND: The point is that there must be no taxation without representation. There is Magna Charta....

THE COURT: Your Lordship is of opinion that this applies to Malta.

LORD STRICKLAND: Of course, and I do not know a way out of it. Now I had better summarize.

THE COURT: You had better.

LORD STRICKLAND: Your Honour has already summarized for me by asking questions. I maintain that by the grant of all the rights of British subjects, the Maltese have the right not to be taxed without representation, and this is in accordance with the principles in Magna Charta.

THE COURT: Would you contend that Malta is still a protectorate? There was a change.

LORD STRICKLAND: Yes, I maintain that the sovereignty of Malta is shared by the people of Malta and the sovereign equally, and that is by international law; unless we are to admit in principle that Sir Hildebrand Oaker was able to give away what does not belong to the giver, or if we are to accept the legal statement of Sir John Stoddart - who was a great lawyer - that if Malta was conquered, it was conquered from us by the English. If this is so, that is another question; but that is not to be supposed. Even if it were true, we must say that it was not so. We must not say that by a trick the King of England assumed something which did not belong to him, and that by the despotic authority of an agent or by the military habit of setting aside all civil laws (soldiers are trained not to say their opinion on anything about the laws except on legal advice). General Campbell thought it right not to talk about law, he used to say I do not know anything about them, and had on principle to send for the Legal Adviser every time. We had quoted also the fact that Sir J. Ball had to use different power from those of the military authorities. We have got the wrong-doing of Pigott not allowing Sir John Ball to sign the capitulation in the name of the Maltese. This I do maintain - I am not ashamed to say it was wrong as a Member of the English Parliament - and I hold

that the sovereignty of Malta is shared between the King and the Maltese nation.

THE COURT: What conclusion do you arrive at then?

DR. REYNAUD: That we can send members from Malta to the English Parliament.

LORD STRICKLAND: This gives force and weight to the common law as laid down by Campbell v. Hall, that once any form of a representative institution had been established, or once that we are promised that much, those rights cannot be altered.

THE COURT: Unless Parliament explicitly gives back.

LORD STRICKLAND: Yes, we have the Common Law as interpreted in the collection of the laws of England, by Halsbury Volume XXVII, which I could not get from the Library.
The conclusion is therefore, that that being the case, the assertion that we were granted a Constitution under the Act of 1936 is untenable.

THE COURT: Therefore it is a misnomer.

LORD STRICKLAND: Yes, the Government know they were doing something wrong when they knew that they wanted to do something else, but they said something to salve their conscience; and that being the case, I seek redress, by asking for an order to get back these few shillings, and opportunity to appeal for costs to the Privy Council. I shall probably be shut out before the Privy Council decides, unless I can find some other means....

THE COURT: Your Lordship has no right to say that.

LORD STRICKLAND: I am speaking hypothetically; if I have said something disrespectful.....

THE COURT: I am not prepared to hear anybody say that if the Court decides one way, he will act in another way.

LORD STRICKLAND: I beg Your Honour's pardon. What I mean is that if I were not to get back these few shillings and we do not get a Constitution of some sort at once, say a Consiglio Popolare, it will be open to me, whenever there is a law for new taxation, to have a try again, until we get a constitution.

DR. REYNAUD: And even then, there will be law suits in other directions.

LORD STRICKLAND: As a matter of course, in the English

Parliament, I might get friends in both Houses, to stand up for me, and there, of course, ministers do not like to cut a very bad figure, and to have no answer. Here public opinion is created by screaming. I feel very deeply that my ancestors are put by these judgments in the position of an inferior race - they should be side by side with the other Nations that form part of the British Commonwealth of Nations, including those I had the honour to govern.

THE COURT: Does Dr. Reynaud wish to answer now?

DR. REYNAUD: His Lordship referred to certain questions of historical facts and other documents, and so I require some time to reply fully.

THE COURT: So, we can continue on Monday.

THE COURT (Judge Prof. E. Ganado): I have a difficulty about the word consuetudo. If the Crown has for a certain period of years, say for a hundred years, exercised the right by Orders in Council and by Letters Patent, has this right been derived through consuetudo?

LORD STRICKLAND: I anticipated the possibility of this question, and I brought with me the latest book on Peerage Law, which says that in England there is no such consuetudo, and even after four or five hundred years there has not been such a thing as barring an action. Before I left England I discussed this question, and I was told that a case is taking place now in Northern England on fishing rights based on a Statute passed during the time of King John in the thirteenth century. I have read a passage about this in the Press, but this has nothing to do with the case here.

THE COURT: Is your Lordship's contention that the British system of law is applicable to this Island?

LORD STRICKLAND: No.

THE COURT (Prof. Ganado): The question that arises is which law is applicable.

LORD STRICKLAND: English Law is applicable as far as power of taxation is concerned, to the King as King of England.

THE COURT (Prof. Ganado): Yes, if the English Law is the Maltese Law.

LORD STRICKLAND: Why did we have a bill of Indemnity in 1932?

THE COURT: So they had acted against a specific act of Parliament?

THE COURT (Prof. Ganado): There was a doubt.

LORD STRICKLAND: During the period of suspension they passed a law when there was no Government at all. The Governor was bound to have an Executive Council, of some sort. He was bound to send for the other members or for the leader of the Opposition.

THE COURT (Prof. Ganado): So that your presumption is that in that case the Governor acted against the written text of the Constitution. The point is that if there is not this consuetudo in virtue of which the Crown, if it did not happen to have the right to legislate, has acquired it.....

LORD STRICKLAND: The King or the Governor cannot acquire that right.

THE COURT: When we say the Governor we mean the King.

LORD STRICKLAND: The King of England can legislate in an emergency, but afterwards there must be a Bill of Indemnity. Salus populi suprema lex. I ask Your Honour to let me speak with the privilege of a Member of the Bar. We are in a continual state of emergency, because the British Government had the right to nominate military Governors, some of whom declare openly that they do not know the law, and do not want to know the law.

THE COURT: I do not think this has got to do.

LORD STRICKLAND: That is my explanation of the conundrum before us. With reference to that part of Canada called Labrador.....

THE COURT: I think you had better allow Dr. Borg to explain this matter.

DR. BORG: In the Labrador case there was a question of ownership, whether it belonged to Canada or a Private Company. It was a concession of about 350 years, and the case came before the Privy Council, and the question of the consuetudo abrogatoria never arose. The question as to whether there was a restriction or a time limit was never raised. Now about the Consiglio Popolare, the Maltese have never renounced these rights. About 20 years ago they raised the question about the Consiglio Popolare, and one of the leading persons during that time is today a member of this Court and one of our luminaries.

LORD STRICKLAND: I wish to file a note of submission and authorities.

THE COURT: I find no difficulty in allowing your Lordship to file anything you have not said or quoted. I do not think there is anything new, but if there is anything, you may submit it.

The Court was adjourned until Monday the 7th December, 1937.

SITTING of Monday the 6th December, 1937.

LORD STRICKLAND

v.

E. SAMMUT NOE

COURT OF APPEAL

DR. REYNAUD: In reply to the submissions put before Your Honour by the Plaintiff in this case I think I am justified in making some preliminary remarks as regards the arguments brought forward by Plaintiff in support of his contention that the Ordinance in question is ultra vires, and he bases the nullity of this law on a point of law, to wit, that Malta became part of the British Empire not by cession, not by settlement, and not by conquest, but by what he calls a compact.

I submit to Y.H. that the point involved in the present lawsuit is one which should be regarded and which should be discussed from the point of view solely of constitutional law; and any other consideration which the plaintiff has submitted in favour of his contention should naturally be discharged. And in order that this point should be made clear, I think that in the first instance I should reply to one of the principal arguments Plaintiff has submitted to Y.H. as regards the applicability of the principles of constitutional law; and I contend, - and I think on this point I am supported by all the authors on constitutional law - that the legislative powers in the Colonies or Dominions beyond the seas are totally different to what they are in the mother country.

We know that the laws of England are made by H.M. Government in concurrence with the House of Lords and the House of Commons, and there they have got special procedures as to how laws should be enacted and in what way they should be passed. In the Colonies and in the Dominions the power to legislate is totally different from what it is in the mother country, and it depends on how far representative institutions in the Dominions or in the Colonies prevail in the particular....

THE COURT: You mean to say that in England the King can legislate by Order in Council or by Letters Patent?

DR. REYNAUD: No Sir. The question is whether and when he

can do so as regards possessions beyond the seas. During the first sitting, or it may be during the last sitting on this case, the word 'colony' was used and certain remarks were made as to whether Malta should be considered as a Colony.

Independently from the Interpretation Act and from the Statute of Westminster, the word 'colony' as applied to Malta has no political character because constitutional writers give the definition and the meaning of the word 'colony'. Colony does not mean places where there were no inhabitants, but for all intents and purposes of constitutional law the meaning and interpretation of Colony is:

> "Any part of His Majesty's Dominsions exclusive of the British Isles and of British India and of the self-Governing Dominions".

The term 'colony' does not include self-Governing Dominions; colony is a geographical and not a political term.

THE COURT: I do not think we are called upon to determine this point. It is indifferent whether you call it a 'colony' or a possession.

DR. REYNAUD: I am simply submitting this remark. I am simply putting this point that colony is for all intents and purposes of constitutional law a geographical term.

This is the first preliminary remark I have to submit.

The second is: Plaintiff in his submissions has quoted different principles of the Civil Law in England as regards tenure, donation, as regards the law of limitation and other points. The contention on this side is that principles of Civil Law have nothing to do in this case, but we have to be guided solely by principles of constitutional law.

THE COURT: That is to say, constitutional law and civil law on general principles.

DR. REYNAUD: I am simply answering Plaintiff's contention that certain principles of Civil Law are applicable in the case as regards tenure, donation, etc.

Having premised these remarks I would like to submit that the contentions of the other side are: that Malta has not been acquired by cession; that there was representative government or representative institutions, when the Island of Malta came to form part of the British Empire in 1800 or in 1813; and that the Maltese who were co-belligerents took possession of the Island and that the sovereignty of these Islands remained with the Maltese and nobody had any right except with their concurrence. As regards this point I would like to submit that the distinction between fortress and the rest of the Island.....

THE COURT: His contention is that the Maltese became sole

owners because they conquered from the French the rest of the Island except the fortress and that the capitulation referred to the fortress, and that in that capitulation the Maltese did not take part.

DR. REYNAUD: As regards this point I may say that this is not supported by history.

THE COURT (Dr. R.F. Ganado): It is supported by Stoddart in his Report in which he says exactly what the Plaintiff submitted in this Court, that the Maltese acquired the rest of the Island while the French were besieged in the fortress, and that the capitulation only transferred the fortress.

DR. REYNAUD: Stoddart was writing many years after; he was not a contemporary and I am referring to history.

THE COURT (Dr. R.F. Ganado): Stoddart was here in 1803.

DR. REYNAUD: But when he wrote that Report he wrote it for another reason. If we were to take that Report we would not find the solution of the historical events that happened in those days.

THE COURT: What we are concerned with is what actually took place.

DR. REYNAUD: Yes, and not whether a certain person had the right or not to exclude the Maltese from the Capitulation, or whether a certain statesman had the right to send a despatch to the Secretary of State on the advisability that Malta should become.....

THE COURT: We are concerned with what actually took place.

DR. REYNAUD: Therefore, we have got the Capitulation in the first instance, then later on the declaration that Malta would be of no use to England and that in the interests of peace England was prepared to give up Malta by the Treaty of Amiens, and that Malta should revert to the Knights of St. John, under certain conditions. The Maltese very naturally had a voice in the matter because they actually were the principal people who fought against the French, and actually they made their voice heard. For with the idea of going back from the Treaty of Amiens, the Maltese had a certain voice in the matter. The trend of events and the activities of Napoleon in the European turmoil had an important effect on the decision. Consequently, it is a

historical fact of great importance, as it has a bearing on the question whether it was the Maltese who said "Malta under the English", or whether it was the Treaty of Paris later, which declared that England should have full sovereignty over the Island. However, at the same time the Maltese had a voice in the matter because we know that actually the Maltese were insistently asking that their interests should become part of the British Empire.

THE COURT: Then the Maltese gave Malta and the Treaty of Paris only confirmed what the Maltese wanted. That is one of the observations of Sir John Stoddart.

DR. REYNAUD: Yes Sir. We have got facts which are written by historians. I say that the voice of the Maltese had a great importance in what happened, but independently.....

THE COURT: A preponderant importance.

DR. REYNAUD: .. England decided to hold Malta. My contention is that Malta and its dependencies became part of the British Empire by the Treaty of Paris and by voluntary cession, unconditionally .....

THE COURT: A compact?

DR. REYNAUD: Not a compact; a cession which means that the Maltese asked the British Sovereign to take over the Island of Malta and its dependencies.

THE COURT: Do you agree that the word 'cession' is used as an equivalent, or something near a 'compact'?

DR. REYNAUD: 'Cession' includes 'conquest' and any other way in which, barring settlement, a possession comes to form part of the British Empire. Constitutional writers say that a Colony comes to form part of the British Empire in three ways: Either by conquest, or by cession, or by settlement. There are no other means by which a possession may become part of the British Empire.

THE COURT: What does 'cession' mean? Is 'settlement' a compact?

DR. REYNAUD: No, 'settlement' is applied when a place is not inhabited.

THE COURT: Do you deny that there is such a thing as acquisition by compact?

DR. REYNAUD: There is the case of Granada.

THE COURT: Besides these three ways you have mentioned there is another one: acquisition by compact or by treaty.

DR. REYNAUD: A sub-division of 'cession'.

THE COURT: We are nearing the point. The acquisition of Malta by England was a cession in the way of a compact.

DR. REYNAUD: Where is the compact? I ask the Plaintiff to show me the terms of this compact.

THE COURT: You may call it so. The question is whether it is held that Malta was acquired by a voluntary cession, a cession sui generis; and this may be construed from the declaration of rights submitted by the Maltese and by the promises made by English statesmen and Ministers who made the gentlemen's agreement. An agreement is something like a compact. There is something like a gentlemen's agreement from which it was established that at least the Maltese have a right for a representative Government. That was established in the other 'ultra vires' case.

DR. REYNAUD: In that case, the Maltese had no right from the legal point of view. The decision given by this Court in the other ultra vires case established a series of facts.

THE COURT: The Maltese have a moral right to representative Government. That is what the case established.

DR. REYNAUD: But not from a legal point of view. That judgment said :- after having gone into details and enumerated the pronouncements of British statesmen, independently of the weight given to the declaration of rights of the Maltese, - that judgment said: The Maltese more than anybody else had a right to representative institutions from a moral but not from a legal point of view. That was the decision of the Court.

THE COURT: If further evidence is forthcoming the Court might vary its opinion.

DR. REYNAUD: I am not saying that the Court should not vary its opinion. I am commenting the decision given by this Court. Going a step further on this point. The Court, after having gone through these pronouncements that the inhabitants of these Islands have a right to representative institutions, the Court held that there was a moral but not a legal right, so much so that the case Campbell v. Hall was referred to, and that judgment laid down that whenever representative institutions are promised or granted to a Colony acquired by conquest or cession, the right of the Crown to legislate by Order in Council ceases, is surrendered unless there is a reservation to that effect and to the extent of that reservation. If there were certain conditions under which the inhabitants of these Islands became the subjects of His Majesty, if the Court held that the Maltese had a legal

right and not a moral right, then the Court would have come to another conclusion, and that conclusion would have been a different one. But the Court went on to say: 'Notwithstanding, this however, although we are of opinion that the inhabitants of these Islands have a right morally to representative institutions, in face of that history by which Malta became a part of the British Empire, this does not mean that the royal prerogative with all its consequences was not vested in the British Crown when Malta became part of the British Empire.

THE COURT: What we asked is whether the word cession has not a sub-division which is nearest to 'compact'. If cession means transfer, who transferred the Islands to the British Crown?

DR. REYNAUD: The Treaty of Paris; the parties taking part.

THE COURT: The nations had no right on Malta, and so how could they transfer a thing which they did not have?

DR. REYNAUD: As regards the right of possession we know that the period which dates from the French occupation, in fact the whole period was very uncertain, and we know that at one time, Sir John Ball, although he was actually head of the Maltese people to direct them in their operations against the French, at one time he took possession, and took the title in the name of His Britannic Majesty, and although he was considering the wishes of the Maltese inhabitants he was actually governing the Island without any interference on the part of the Consiglio Popolare. Because we know that the Consiglio Popolare - and the name of Consiglio Popolare was changed later into that of Congresso - which was dissolved in 1800, was only there as an emergency congress....

THE COURT: We are now discussing the legal point, and the point is that no person can transfer anything which does not belong to him; so that the only construction you can give to that fact at least as far as those who were not allies, and did not take part in the Capitulation where concerned is that when Great Britain was allowed to retain Malta the others stated practically: if you keep Malta we shall not raise any objection.

DR. REYNAUD: Before that England said that she was not going to give up Malta; that was before the first war was on, and before the Treaty of Amiens. Then there was the other consideration, and if England even, or any other nation, took possession arbitrarily of these Islands, we cannot question it to-day and say: Why have you done such a thing?.

THE COURT: On the principle of might is right?

DR. REYNAUD: Certainly.

THE COURT: You do not contend that?

DR. REYNAUD: But this is a hypothesis which is even possible in history. If a power takes possession ......

THE COURT: It is a question of fact.

DR. REYNAUD: The resumption of the European war against France actually pivoted on whether Malta was to become a part of the British Empire or not.

THE COURT (Dr. R.F. Ganado): Before that period the Maltese had elected to have Britain as their protectress, and they asked Ball when he came, to petition His Majesty in that direction. History says that this was done during the period up to the Treaty of Amiens. Now the Treaty of Amiens took place and Great Britain said, 'No, I would not keep any more Malta, and Malta has to revert to the Knights, that is to the ancient sovereigns of Malta. Then the Maltese protected; after, for independent reasons, the Maltese insisted to have the protection of Britain and the Treaty of Paris was signed, when the other nations said to Britain: All right, you may keep Malta in order that peace be established. But from the legal point of view the first compact, so to say, or agreement between the Maltese on the one part and Bal on the other is that there was no other interference .....

DR. REYNAUD: No Sir, because after, the Treaty of Amiens that was a wash out; then there was the declaration of rights that was ignored.....

THE COURT: No execution was given to the Treaty of Amiens!

DR. REYNAUD: There was to a certain extent some execution, but then it was stopped because England insisted afterwards to retain Malta.

THE COURT (Dr. R.F. Ganado): In the correspondence of the Malta Marriages question you will find papers; in the Colonial Office Papers, in the Protestant case, I believe that there is a correspondence that Ball independently of any despatch from the Secretary of State to transfer Malta, said I refuse to transfer Malta on their account. You will find it.

DR. REYNAUD: I have found it, and that the Maltese protected and wanted to retain the protection of Great Britain.

THE COURT: You say that the Treaty of Amiens was a wash out. What had happened between the Maltese and the British before that? Either the Treaty of Amiens had been of no consequence and it had no effect because Great Britain did not want to give it effect, or it had.

DR. REYNAUD: The Maltese were not part of that Treaty; it was up to the parties to give it execution or not; if the Maltese did not execute ......

THE COURT: But in the Treaty of Paris the wishes of the Maltese were considered, and this has been established by the other _ultra vires_ case. The _Melitensium amor_ has been placed before the _Europae vox._

DR. REYNAUD: But the point is that actually Malta was put in possession of Great Britain by that Treaty and by the love of the Maltese, but it does not go further and say that they have got the right to representative government as that consequence.

THE COURT: We are establishing the facts first.

DR. REYNAUD: The parties who confirmed to England said, yes, you will take possession of Malta, but did not go further and say that the _Consiglio Popolare_ of Malta has the right to representative institutions. Another point which I shall touch upon and submit is as regards the liberties and the privileges that the Maltese had prior to the entry of Malta into the Empire. The only institution which we know of is the Consiglio Popolare. Now the Consiglio Popolare had no legislative power. It simply had the rights of a municipality.

THE COURT: Do you refer to the old times?

DR. REYNAUD: During the period from the Norman up to the times of the Grandmasters. It simply had the rights of a municipality. They had the right to appoint certain individuals, to go to the Viceroy of the two Sicilies, to submit to him certain needs of the population. And even when they submitted their representatives, we have got it that the Grandmaster had the right not to accept that representative and appoint somebody else. But they had not deliberative or legislative powers. And this is borne out by Debono in his 'History of Legislation' at page 156, after speaking of the different municipal authorities, he goes on to say:

> Tutee le autorita' municipali sottostavano al Consiglio Popolare. Non era questo, come pur oggi, da parecchi si crede, un 'assemblea legislativa ma aveva il diritto:
>
> 1. Di rappresentare al Sovrano i bisogni del popolo.
>
> 2. Di indicare e domandare i provvedimenti che le circostanze richiedevano.

3. Di provvedere all'annona e alle vettovaglie.
4. Di nominare, salvo approvazione sovrana, certi ufficiali.
5. Di querelarsi contro gli abusi di pubblici ufficiali.

THE COURT: Vuol dire che non passava leggi ma poteve presentare al sovrano.

DR. REYNAUD: Debono says that they had the power to suggest.

THE COURT: That the laws must be passed by the Consiglio Popolare, but they had the power to submit.

DR. REYNAUD: No Sir. He goes on to say:

"Per speciale autorizzazione sovrana di imporre tasse e creare prestiti pubblici".

Consequently they had no right to legislate but to suggest. And then we go on to Sir Joseph Carbone who actually on page 7 of the Malta Mixed Marriages Case states that:

"Malta had a local Municipal Institution known as the Consiglio Popolare which was much less authorised to exercise powers of legislation than is a County Council or a Vestry in modern times".

He comes to the same conclusion that they had no legislative power.

THE COURT: That is only an extract from a Report about the Consiglio Popolare. To prove something it must be quoted in extenso.

DR. REYNAUD: What the functions of the Consiglio Popolare were I find in an extract that is to be found at page 517 of the History of Malta during the period of the French and British Occupations 1798-1815 by Hardman.

THE COURT: Where did he get it from?

DR. REYNAUD: From the report of the 29th June 1812 we have:

"The result of the labours of this Commission appeared in a very able report dated 30th August, 1812.

This report has never been ~~made public in~~ its entirety, but extracts have occasionally ~~appeared notably~~ one in return asked for in the House of Commons and ordered to be printed on the 17th June, 1846.

Consequently the Maltese had no representative instutions under the rule of the Knights.

THE COURT: Legislative powers.

DR. REYNAUD: For all intents and purposes, when there is a representative body, a municipality, there are certain rights.

Consequently after the pronouncement made by statesmen, independently from the weight that should be given to such pronouncements, if the Maltese had no representative institutions from the point of view of constitutional law these promises were that they should enjoy the same privileges, and there was no express promise or grant of representative institutions in the proper sense of the word of legislative power. Consequently then these promises were to be taken in consideration and they do not in any way support the contention....

THE COURT: Cannot there be representative institutions without legislative authority? Representative institutions is not the same thing as self-Government.

DR. REYNAUD: Unless the representative institution has the power to make laws. As a matter of fact the power to legislate ceases when that power is surrendered by the King when he gives power to the Colonies to legislate. Representative institutions without the power to legislate are not representative institutions at all.

THE COURT: Generally speaking, so it is.

DR. REYNAUD: If there are representative bodies that have no power to legislate then we have got the general rule of constitutional law that in virtue of the royal prerogative, the common law, the Crown may legislate by Order in Council. The point I am touching now regards whether the inhabitants of these Islands had representative institutions in the sense of constitutional law or whether there was a promise of representative institutions.

The Plaintiff notes that there was no such thing, because twice in his pleadings he says 'at least representative institutions were promised' when the Constitution of 1887 was granted; prior to that, he knows that there was no promise and no grant of representative institutions, and consequently on the second occasion he said that the Maltese inhabitants were at least granted representative Government in 1887. So this supports the contention that before 1887.....

THE COURT (DR.R.F.GANADO): If we take it as a fact, the Maltese asked for representative institutions before Maitland came over, and in the despatch of Lord Bathurst there is a paragraph in which he says to Maitland: Go and examine the situation and grant representative institutions as soon as possible. That was in 1813.

DR. REYNAUD: Those were instructions and not promises.

THE COURT (DR.R.F.GANADO): Instructions from the Secretary of State to the first Governor of the Island? What does that mean?

DR. REYNAUD: It does not mean a promise and it does not mean a grant. If the Secretary of State says to a Governor go and investigate and see whether representative institutions may be granted, these are simply instructions and have not the power of a grant.

THE COURT (DR.R.F.GANADO): These instructions followed when in the time of Hildebrand Oakes the Maltese protested and asked for representative institutions. A Commission was sent and after that Commission Maitland was sent here to carry out the instructions of that Report. They were the consequence of that Commission.

DR. REYNAUD: Were representative institutions granted then?

THE COURT (DR.R.F.GANADO): That was left in the hands of Maitland. It is another question.

DR. REYNAUD: Instructions given to the representative of the British Government are not promises.

THE COURT (DR.R.F.GANADO): You must see under what conditions they were given.

DR. REYNAUD: If the King gives instructions to a Governor telling him to go into the matter that does not mean either a promise much less a grant.

LORD STRICKLAND: I hope Your Honour will allow me to interrupt because I have been positively misrepresented. I submit that I have been misrepresented as having said that up to 1887 there was no promise.

THE COURT: The shorthand notes will appear. I have already pointed out that Dr. Reynaud said that Your Lordship stated that at least they were granted in 1887.

DR. REYNAUD: The expression 'at least' has got another meaning. After having submitted this point I would like to touch the point at issue from the constitutional point of view. We have got it from constitutional writers such as Anson, Halsbury and others, that actually a colony, a possession, may only be acquired by conquest, cession or settlement, and there is not one constitutional writer who devises another way in which a colony may be acquired. Now as regards conquest as applied to Malta it is quite out of the question; settlement may also be excluded as Malta had its own inhabitants, and consequently we come to the other method and that is 'cession' by which Malta was acquired. Now what form of cession it is we know from the historical events which actually took place between the surrender of Malta to the French up to the period which brings us to the Treaty of Paris.

Now constitutional authors lay down that the royal prerogative is acquired and the right to legislate by Order in Council or by Letters Patent is vested in the Crown in case of a ceded colony.

THE COURT: A ceded colony, in what way, by compact?

DR. REYNAUD: Constitutional writers do not mention 'compact', they simply mention conquest, cession or settlement; consequently Malta must come under cession. So much so that the two constitutional writers mentioning Malta expressly state that Malta was acquired by cession. I am referring to the Law and Customs of the Constitution, by Anson at page 74 where he says:

> "Malta acquired by cession was long governed under a Crown Colony regime, but in 1921 on the analogy of the new Indian constitution a complex system of dyarchy was introduced".

Even in Halsbury and other constitutional writers, when they come to speak of Malta they actually say that Malta is a Colony acquired by cession. Consequently in virtue of the common law prerogative - and this expression is not of my own invention, but of authors of constitutional history - the Crown has the power to legislate by Order in Council or by Letters Patent in case of ceded colonies.

THE COURT: But suppose it is a colony which is acquired by compact. Is this right?

DR. REYNAUD: There are only three ways in which a colony may be acquired, either conquest, settlement or cession.

THE COURT: But cession comprises compact and compact limits the sense of the word cession.

DR. REYNAUD: Compact means that there is a cession by treaty; that means to say there are conditions written or set, under which a treaty took place, as in the case of Grenada.

THE COURT: Why written? Conditions.

DR. REYNAUD: I do not know in constitutional law of any case in which a possession comes to be a part of a State or of an Empire by a verbal agreement. There is no case quoted in any of the Constitutional law. And these authors deal with the way in which Malta has ex professo become part of the British Empire. Consequently according to these principles, Malta became part of the British Empire. The Crown was invested with the power to legislate by Order in Council, and this actually is the opinion which has been held by this Court in the other case, because after going into the different pronouncements made, that same Court has

come to the Conclusion that all this does not mean that the Royal Prerogative was not vested in the British Crown, and the principal consequence of the Royal Prerogative is that of legislating by Orders in Council and by Letters Patent. This principle suffers a limitation. There is the grant of self-government or representative institutions, and consequently unless there is a reservation of the Prerogative of the Crown to legislate by Order in Council or to revoke the concession of representative institutions, the power to legislate, the Royal Prerogative, is surrendered. However, we know, that whenever there were Constitutions granted, that is to say, that of 1849, that of 1887 and that of 1903, there was always an ample reservation that His Majesty reserved the power to revoke in toto the Constitution itself, and consequently whenever there was a revocation of the Constitution, the power of the Crown to legislate by Order in Council was each time restored. In 1921 Self-Government was announced and there was no general reservation, absolutely. So much so that in the White Paper which came before the grant of self-Government, there was expressly stated that the Constitutional Charter of 1921 could not be revoked except by an Act of the Imperial Parliament. In 1936, what happened was that by an Act of the Imperial Parliament powers were given to His Majesty to revoke or amend the Constitution of 1921. In speaking of the Constitution of 1921 I am including the amendments brought about by the Imperial Act of 1932, independently from the Bill of Indemnity which validated certain Ordinances passed by the Governor. When His Majesty, in virtue of the Letters Patent of the 31st August revoked the Constitution of 1921, the King, who had surrendered the power, the Royal Prerogative, to legislate by Order in Council or by Letters Patent, again became vested, in virtue of the fact that actually he had the power from the Imperial Parliament to revoke the Constitution of 1921. And consequently the power of His Majesty to legislate by Order in Council or by Letters Patent was revived and he had all the right to issue Orders in Council, Letters Patent, to constitute the office of Governor, to give instructions for the administration of these Islands, by the right of the Royal prerogative.

THE COURT: The right to legislate came back to him implicitly?

DR. REYNAUD: It was not necessary because the King has the Royal prerogative by common law to legislate by Order in Council. He lost it. When he loses it, if he had reserved that power to revoke, it comes back to him. That power comes back to him by Parliament. Then of course, all matters come back to the status quo ante.

THE COURT: You must convince us that having lost the power to legislate, he got it back simply because the House of Parliament granted him the power to revoke the Constitution.

DR. REYNAUD: It is inherent to the Royal Prerogative. He got the power to legislate by Order in Council and by Letters Patent until such time as he grants responsible Government. When that obstacle is removed there is no necessity for any Act of Parliament to grant to the King the power to legislate by Order in Council. As a matter of fact, the Crown does not derive its Royal Prerogative from an Act of Parliament, but from the common law.

THE COURT: That is true until he loses it. When he has lost it, how does he acquire it again? By Act of Parliament?

DR. REYNAUD: No, the Act of Parliament gives him the right..

THE COURT: The question is whether if the King loses the right to legislate, by revoking the Constitution this power is restored to him, or if an Act was necessary stating that the King shall have back the right which he had lost in granting the Constitution.

DR. REYNAUD: The obstacle to the Crown losing the right to legislate by Order in Council is the grant of representative Institutions.

THE COURT: Constitutional authors do not state that the King cannot use the power to legislate when there is a Constitution but that he loses the right to legislate when he grants or even promises a Constitution.

DR. REYNAUD: Yes, and if he reserves it himself.

THE COURT: We are not speaking of reservations. When the King loses the power to legislate only Parliament can grant it again to him. The point is whether this should not be explicitly revived and restored in him.

DR. REYNAUD: It is not necessary because the King derives this power in virtue of the common law prerogative. If the Royal prerogative was derived from an Act of Parliament I agree, but if it is derived from the common law prerogative....

THE COURT: I put this hypothesis: we know that the King loses the power to legislate in granting a constitution. Now as a hypothesis, perhaps it may be absurd, but suppose Parliament revokes the Constitution which had given the power to legislate to the Maltese and grants this power to legislate to somebody else, other than the King, would the King in this case have back the right to legislate?

DR. REYNAUD: Yes, by Order in Council, in virtue of the Royal Prerogative.

THE COURT: When the King surrenders the right to legislate he can only get it back by an Act of Parliament; now supposing the decision of Parliament is that a third party should have this right, not the Maltese, but somebody else?

DR. REYNAUD: How is that possible?

THE COURT: Just as a hypothesis to show that in order to give back the power to legislate to the King an explicit provision should have been given.

DR. REYNAUD: My contention is that the King would always acquire the right in virtue of the Royal Prerogative.

THE COURT: Not by an Act of Parliament?

DR. REYNAUD: Constitutional writers do not say so.

THE COURT: Can you substantiate this by any authority?

DR. REYNAUD: If Parliament has given him the right to revoke he has acquired ipso facto by the Royal prerogative the right to legislate by Order in Council.

THE COURT: Lord Milner in his despatch commenting on the Constitution told us that the Constitution can only be revoked by Act of Parliament.

DR. REYNAUD: This corroborates my contention. He told us that it is on the safe side, because the King cannot take away the Constitution except through an Act of Parliament. Now that Act of the Imperial Parliament actually took place in 1936, and that made the Royal prerogative in virtue of the common law survive.

THE COURT: That's the question at issue. It can only be given back to the King by Act of Parliament; you will find it in all the authors on constitutional law. It is a loss. Once it is a loss, and an Act of Parliament is necessary to restore the power to the King to take away the Constitution, that authority of Parliament must also extend to giving back the power to the King to legislate, once he has lost it.

DR. REYNAUD: The Royal prerogative does not arise out of an Act of Parliament. If this contention were to be accepted it would mean that the regal pre-eminence of the King is due to the Houses of Parliament, which is not.

THE COURT: The King, as you say, derives the royal prerogative from the common law, but when he surrenders it only Parliament can restore it to him.

DR. REYNAUD: No, Sir.

THE COURT: This appears in despatches and in everything else. Now if Parliament should restore the prerogative it should restore it fully.

DR. REYNAUD: The despatch of Lord Milner accompanying the Constitution of 1921 says that the Constitution cannot be revoked except by Act of Parliament, and this was done in 1936. As a matter of fact in that debate Lord Plymouth stated that the conditions were going to revert to the position as they existed prior to 1921. When such an Act becomes law and the limitation is removed the Crown would be restored to the position which it held prior to 1921 and will have full and undoubted right to legislate by virtue of the royal prerogative; as soon as that limitation disappears the right revives.

THE COURT: This is the contention of His Majesty's Government which the Plaintiff is challenging.

DR. REYNAUD: But he should also show the grounds upon which he is challenging same. The point is that when the limitation is removed, the Crown in virtue of the common law prerogative has the right again to legislate by Order in Council.

When we come to the White Paper the only thing at the Constitution of 1921 could not be revoked Parliament; but it did not go further and say n legislate by Order in Council. Authors of Constitutional law state that when a grant of a Constitution is made the King surrenders the right which he cannot get back except by Act of Parliament.

DR. REYNAUD: The point is, as these authors state, that when the King has surrendered that right by the grant of a Constitution, this can only be revoked by an Act of the Imperial Parliament; it does not go further because the common law sets in.

THE COURT: Ipso jure? You state implicitly?

DR. REYNAUD: As soon as the limitation is removed, the Crown enters into its full rights.

THE COURT: But if it is a loss?

DR. REYNAUD: The loss implies a limitation of the royal prerogative.

THE COURT: The limitation is a suspension, but constitutional authorities do not speak of suspension they speak of surrender. Is there a similar case where a Constitution was revoked?

DR. REYNAUD: There is the case of Cyprus.

THE COURT: It will be necessary to see the instrument.

DR. REYNAUD: As regards what the royal prerogative is I need not enter because this point has been discussed in the other ultra vires case, and of course, the Constitutional authors say in which it consists and whether there is the necessity of an Act of Parliament, and in Malta it says that there it is quite unnecessary. As regards Cyprus, I find in the Law and Custom of the Constitution - Anson - that:

> "Cyprus of which Great Britain enjoyed the use and occupation on certain terms for an undefined period from Turkey was annexed in 1914 and governed under provisions of Orders in Council by a Governor with an Executive Council; but as a result of an outbreak of violence the Constitution was suspended in November 1931 and the legislative power given to the Governor alone.

THE COURT: Cyprus was conquered?

DR. REYNAUD: It is the same thing.

THE COURT: The Constitution was suspended and the power to legislate was given to the Governor?

DR. REYNAUD: By virtue of the Royal prerogative.

THE COURT: It does not say that? It will be necessary to see the instrument.

DR. REYNAUD: Yes, Sir. I cannot find the instrument for the moment. Consequently, if we are to be guided, as we ought to be guided by the principles which I have had the honour to submit to Your Lordships, I think the arguments brought forward by the Plaintiff, in the first instance, about the Act of the Imperial Parliament of 1801 by which Malta was declared to be a part of Europe, and other provisions were actually enacted by which commerce and trade of these Islands were regulated ......

THE COURT: In your note of submission you dealt with this point.

DR. REYNAUD: I need not cover the ground. I refer to my note of submissions as regards the act of the Imperial Parliament of 1801 and the British Settlement Act. We have submitted our reasons why no argument can be derived from the submissions which the other side has brought forward. As regards the legislation by Order in Council prior to 1921, I refer to the Crown Advocate's case in the Mixed Marriages Case at page 10 wherein it is stated that :

"In view of the undertaking given to the Maltese in the name of the sovereign of Sicily, of the Knights of St. John, of the French Republic and finally of the British Government, by Chief Commissioner Cameron, by General Pigot and by Governor Sir Thomas Maitland, for the safeguard of the laws, religion and privileges of the Maltese, and in view of the interpretation which these pledges have constitutionally received ever since, it is established that the law of Malta as administered by the local Courts of Law unless repealed continues to be found in :

1. Constitutions, decrees and sanzioni prammatiche of the Norman Sicilian sovereigns of Malta.

2. Prammatiche, decrees, bandi and codes of the Grand Masters 1530-1800

3. Legislation proclaimed by the representatives of the British Crown, proclamations or bandi and notifications 1800-1836.

4. Ordinances enacted by the Governor with the consent of the Council 1836-1891.

Which shows that actually the power to legislate by Order in Council existed prior to 1921 and I think that the reference to the report of Sir Joseph Carbone has covered all the ground in replying to the submissions of the plaintiff.

THE COURT: Prior to 1921 there were many Orders in Council.

DR. REYNAUD: Sir Joseph Carbone states that it was law.

THE COURT: I understand that both parties wish to file other notes of submissions. If we are to give you permission to file a written submission....

LORD STRICKLAND: I understand that I have that permission which of course, I am entitled to claim, but I feel deeply......

THE COURT: You are not entitled; the Court allows you.

LORD STRICKLAND: Moreover, I am entitled to a counter-reply I think. I much appreciate this concession because it enables me to see the shorthand notes before replying and perhaps Your Honour......

THE COURT: We will take some time to determine this case.

LORD STRICKLAND: Nevertheless, I think it is a duty which should be agreeable and useful to record, if I am allowed to

answer, the specific questions put to me. I think they should be answered in Open Court.

THE COURT: You may do so.

LORD STRICKLAND: Three important questions were put to me, one by Your Honour, one by His Honour Judge Edgar Ganado, and another by Your Honour. The question of Labrador was answered by Dr. Borg. The question about Cyprus deserves an answer. Cyprus was acquired by compulsion. It was subject to a pledge given to France and England for a loan. Interest on that loan was not paid and Cyprus was forfeited.

THE COURT: By Turkey.

LORD STRICKLAND: By Turkey, and Turkey handed over the Island under compulsion because it was a pledge that was forfeited. What my hon. friend said falls to the ground. 'Cession' has the meaning of either 'cession' under compulsion or cession by agreement.

The other question raised by His Honour on Your Honour's left refers to 'consuetudo abrogatoria' about which the Corpus Juris Civilis Codex Lib. VIII Tit. 53 says that:

> "Consuetudo abrogatoria usque longaevi non vilis auctoritas sit; verum non usque adeo sui valitura memento; ut aut rationem vincat, aut legem.

There are various references to the consuetudo agrogatoria, but this is the most recent mentioned which says: that consuetudo abrogatoria going back for many years has an authority not to be despised - (under a hundred years is kept as of small value) - nevertheless remember that its value is not to be pushed to the point of going against common sense or settled law.

There is another point requiring an answer and it refers to the procedure in municipal law and public law. We in Malta although we are under Roman law, once we became British subjects we have duties towards the King as his lieges, and the King has duties towards us. This is reciprocal. As to public law we are under English law and that appears from Stoddart's Report.

As to the praescriptio centum annorum, there is only one mention in the Corpus Juris and that says - that it only applies to the Roman Church as far as it is the Western Church. There is no reference of Praescriptio centum annorum except on that point. Moreover, it is in the Index Novellarum. The following comes from the VII Book of the Code Title 35.

> "Neque mutui, neque commodati, aut depositi, sen legati vel fidei commissi, vel tutelae sen alii cuilibet personali actioni longi temporis praescriptionis objici posse certi juris est."

This says that in case of personal actions the _lungi temporis praescriptio_ shall not be held as legal.

THE COURT: By the mediaeval laws I think it was up to 30 years.

LORD STRICKLAND: But not by the Code of Justinian. When we talk of Roman law on this point we have to apply the Code of Justinian, otherwise we are wandering in all directions. As to the reply of Your Honour's question as to the extent to which obligations incurred by treaties may be subject to litigation....

THE COURT: Litigation before the Court?

LORD STRICKLAND: This is a very important question and the answer to that, as a matter of fact we have had Malta Marriages case, where of course _consuetudo abrogatoria_ came before a court of law. We have the English system of the Petition of Rights. By this the King although he is not obliged to be called to account in his own court, allows himself to be called to account when it is considered in the public interest so to do, and the Attorney General gives the _fiat justitia_.

THE COURT: In Malta we hold that when the Governor acts _jure imperii_ his actions cannot be challenged provided he had power to do it, and it was done in the proper form. That is the principle we have accepted. There is always of course, the question whether the Governor had the power to do a thing or not.

LORD STRICKLAND: In other parts of the Empire special statutes have been passed transferring to those colonies the procedure of the Petition of Rights. Here in Malta the King generally speaking can be sued and compelled. It is law that prescription is not to be taken into consideration by the Court unless it is pleaded by the party at the right time. Moreover, we have the _ultra vires_ case before the Privy Council which involved the illegality of a decision. It has been taken to mean in this Court that the Crown Lawyers have rightly been enjoined to enter an appearance in England.

THE COURT: It was said that it was a case which was to be adjudged by the Court of Appeal.

LORD STRICKLAND: As to the prescription of the powers of the _Consiglio Popolare_ - when it was said that this Council was only a municipal body, the reply is that it was only a municipal body during the last days of the regime of the Knights, but it was very different in former times. The Report of the Royal Commission printed in 1889, by admitting that it had legislative powers has set aside the argument that there has been any prescription of a hundred years. That the Maltese had powers

beyond those that are municipal is evidenced by the payment of 30,000 crowns to get rid of the feudal rights of Monroi.

As to Hardman's book, he wanted to support the Malta Marriages case against the Government, which contention is all based on 'conquest'. What he should have done was to produce the whole series of Minutes, written and otherwise, of the Consiglio Popolare, which record its functions and the way they took effect.

I trust the points raised by this Court at the last sitting have been answered, and I will be very grateful if asked, to answer any point I have left unanswered.

THE COURT: This case is left for January the 28th for judgment and power is given to Plaintiff to file notes of submission. I suggest brevity and especially that there should not be repetitions. You have ten days within which to file your submissions.

LORD STRICKLAND: I ask that I may be exempted from the responsibility of accepting the accuracy or inaccuracy of the shorthand writers by being allowed to give my own version.

THE COURT: The shorthand notes are not part of the record.

LORD STRICKLAND: I will avail myself of this advantage and decision of the Court.