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18：
PGGR ：7，pary ：
P4c9：7－9p－章： ..... 207

 h＋6．：11cy＂： ..... 272
 hecas． ..... 307
  ..... 417
  ..... 456

h马7\％A：弓R月 ..... 524
  ..... 538
 
hes－Cus ：Hatepg ：nct： ..... 549
  ..... 568
TABLE OF CONTENTS CASE REPORTS
Case Reports ..... 207
ARTICLES：
＂Desire，＂＂Knowledge of Certainty，＂and Dolus Eventualis
by Ronald Sklar ..... 373
Void and Voidable Marriages in Ethiopian Law by Katherine C＇Donovan ..... 439
An Introduction to the Law of Business Organizations by Everett F．Goldberg ..... 495
Penal and Civil Law Aspects of Dismissal Withont Cause．
by Daniel Haile ..... 532
Some Observations on Art． 1922 （3）of the Civil Code by Brwt Otto Bryde ..... 544
Compliance with Legal Obligations by Businesses in the Mercato by Jolth Ross and Zemariam Berhe ..... 560
A Problem on Family Law by Katherine O＇Donovan ..... 570
JOURNAL OF ETHIOPIAN LAW

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7\% :
рясе : тяра-7:
Pfac:rg-7: ..... 207 ..... 207

 n+九. : Alcy = ..... 272
 hegaf : onnc ..... 307
  ..... 417
  ..... 456
  ..... 524
  ..... 538
 atntrl:
 ..... 549
  ..... 568
TABLE OF CONTENTS
CASE REPORTS
Case Reports ..... 207
"Desire," "Knowledge of Certainty," and Dolus Eventualis by Ronald Sklar ..... 373
Void and Voidable Marriages in Ethiopian Law by Katherine O'Donovan ..... 439
An Introduction to the Law of Business Organizations by Everett F. Goldberg ..... 495
Penal and Civil Law Aspects of Dismissal Without Cause. by Daniel Haile ..... 532
Some Observations on Art. 1922 (3) of the Civil Code by Brun Oto Bryde ..... 544
Compliance with Legal Obligations by Businesses in the Mercato by John Ross and Zemariam Berhe ..... 560
A Problem on Family Law
by Katherine O'Donovan ..... 570

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 ..... 208
 
 ..... 216
 ก알:
 ..... 429
  ..... 238
 
 ..... 247
 anan: $\mathrm{O}^{6} \mathrm{E}:$  ..... 266
TABLE OF CASES REPORTED
High Court
Laketch Tessema v. Kefaye Abebe (Guardian of Asrat Aemro Sellassie) Civil Case No. 662/60) ..... 212
Ato Abebayehu Deneke v. 1) Mulu Agricultural Partnership, 2) Mr. Depra Francois, 3) Ato Chaneyalew Teshome
Civil Case No. 95/63 ..... 223
Asegedetch Indaylalu v. Imperial Insurance Co.
Civil Case No. 195/57 ..... 234
Fratelli Biga and Company v. Marsha Trading Company Civil Case No. 281/63 ..... 243
Commercial Bank of Ethiopia v. Usman Zakir Abdela Mohammed Seif Civil Case No. 30/60-34/60 ..... 258
Chartered Bank of London v. Mason of Livenrato Ethiopia Ltd. (Civil Case No. 1995/59) ..... 269

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& \text { nヶtrom: cce }
\end{aligned}
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## HIGH COURT

## Addis Ababa, Commercial Division

Judges:

## Ato Nigussie Fitawake

Ato Mohammed Berhan Nurhussen
Ato Zelleke Desta
LAKETCH TESSEMA v. KEFAYE ABEBE (GUARDIAN OF"ASRAT AEMRO SELLASSIE)

Civil Case No. 662/60
Succession-form of a will - marriage contract - Arts. 881 and 882 of the Civil C.
The plaintiff applied in the name of herself and others claiming that the will left by the deceased be recognized by court and that they be declared as legal successors. The respondent contested that the will was not made in accordance with the law and prayed the court to invalidate it .

Held: Action dismissed.

1) A will not made in accordance with either Art. 881 or Art. 882 of the Civil C. is invalid.
2) The court has a duty not to execute a will which does not foltow the formalities required by law.
3) A wife may, however, share property, if there is any, with har husband according to the marriage contract that she had with her husband.

## DECISION

The facts leading to this decision are as follows:
Balambaras Gebremedhin Gosa died on September 21, 1967 (G. C.). It has been said that the deceased has left a will specifying the partition of his property. The wife of the deceased applied in the name of herself and her two children from the deceased, Woizerit Medaye Gebremedhn and Teshay Gebremedhin and in the name of Asrat Aemero Sellassie, the deceased's grandson born from his daughter, Woizero Imaye Gebremedhin, the present respondent. She submitted probate and administration file bearing No. 543/60 to the Awraja Court of Addis Ababa on Nov. 14, 1967 (G. C.) stating that they are the beneficiaries of the will and prayed the court to recognize the will and their status as legal heirs as being valid. To know if there are any other clamants, a notice was published in a newspaper. After this, the guardian of the respondent, through her pleader, claiming that the deceased has not left a will done in accordance with law, submitted probate and administration file No. $622 / 60$ on Nov. 21, 1967 G. C. in order to ascertain the status of the above mentioned two children, of the deceased and his grandson as the legal successors of the deceased by law. A notice was then published in a newspaper to know if there were other claimants. The respondent contended that the Awraja

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## LAKETCH TESSEMA v. KEFAYE ABEBE

Court's order to call the witness listed in the plaintiffs file $543 / 60$ before deciding the issue of whether the deceased has left a will in accordance with the law or not was illegal and would prejudice her rights. She further contended that since the case involves basic question of law, the case should be transfered from the Awraja to the High Court in accordance with Art. 31 of the Civil Proc. C. Due to these reasons, the High Court accepted the pleading presented by respondent's attorney and has accordingly ordered in file No. 662/60 that the case be transfered and be heard by the High Court.

The basic legai issue to be considered is, whether the public will made by the deceased was made in accordance with either Arts. 881 or 882 of the Civil C.

The plaintiff's attorney contention that the will was made in accordance with the law and that there were witnesses who signed the will attesting that the words contained in it were those of the deceased and that the witnesses be produced before the court since the witnesses mentioned are of age and are not legally interdicted pursuant to Arts. 1729-1730, 2001-2002 and 2003 of the Civil C. has no legal reason to back it. Since the central issue in the case is whether four witnesses have signed the public will made by the deceased and since this can be checked easily by seeing the original copy of the will, we find it unnecessary to call the witnesses. Thus, the plaintiff's attorney request is rejected.

Let us now analyze the code articles cited. The cited articles of the CivI C., Arts. 881, 882 and 883 provide as follows: Art. 881 states, (1) "A public will shall be written by the testator himself or by any person under the dictation of the testator." (2) 'It shall be of no effect unless it is read in the presence of the testator and of four witnesses and mentioned the fulfilment of this formality and of its date is made therein. (3) "It shall be of no effect unless the testator and the witnesses immediately sign the will or fix their thumb mark thercon."

Art 882 states, "A public will shall be valid where it is made in the presence of two witnesses one of whom is a registrar or a notary acting in the discharge of his duties." We have not mentioned Art. 883 for there is no argument based on it.

Let us now relate the facts of the case with the law. The original copy of the public will of the deceased made on July 26,1966 was presented as evidence and we have seen that three witnesses have signed on it. These are Ato Zeleke Tatch Bele, Ato Araia Worota and Ato Seifu Demissie. Art. 881 (2) (3) of the Civil C. clearly state that a will not signed by four witnesses shall be of no effect. One may argue that if it can be shown that the will is actually made by the deceased the non-fulfillment of the above formalities should not deprive the will of its legal effect, as was done in the past. Fulfilment of procedures or formalities required by law have advantages and disadvantages. On the one hand it is to the advantage of every individual to be in a position of making a will without requiring assistance from the notary or without seeking ratification by court authorities. On the other hand a will not fulfilling the procedures (formalities) required by law is of no legal effect. Where the provisions of a will are ambiguous and require interpretation, obviously we have to seek the common intention of the testator. However, if procedures required by law are not fulfilled by the will, this is not a question of interpreting the words of the will but a mistake or fault of not following the procedures required by law. The imposition of the requirement of the presence of four witnesses and the affixing of their signature is to make sure that the will is actually made by the testator. Unless the court is serious to see to it that all the
formal requirements of making a will are met, it will encourage people to engage in litigation by providing them with another source for disputes.

The new Civil Code, in particular Art. 881 (2) (3) revitalizing our customary law, in unequivocal manner provide that public will must be signed by four witnesses and unless this is met, the will shall have no legal effect. The Fitha Negast in chapter 41 , section 1 provides for a signature of a will by a certain specified number of witnesses. Though this number may be greater or lesser than that provided in the Civil Code undoubtedly the signature of witnesses in a will is a customarily required formality. The new law, by clearly stating that not less than four witnesses should sign a will makes the formal requirements more stringent. It is the duty of the courts to see to it that the law, enacted to meet the needs of a developing society be executed. Otherwise, security and order of society cannot be maintained and progress of society would be hampered.

A glance at the original copy of the will left by the deceased, which was submitted to us as an evidence, shows that only three witnesses have signed it. According to Art. 881 of the Civil C. the will should have been signed by four witnesses. Art 882 of the Civil C. provides that if one of the witnesses is a judge or a notary and if the will was made at a place where such authorities carry on their duties, presence of two witnesses suffices to make the will valid. We are not presented with evidence to show that one of the three witnesses who signed on the will was either a judge or a notary and that the will was made at the working place of either the judge or notary. Although such an allegation was orally made by the plaintiff's attorney, he did not back it by producing evidence. Since the public will made by Balambaras Gebremedhin Gosa on July 26, 1966 G.C. was neither signed by four witnesses as required by Art. 881 nor made according to Art. 882 of the Civil C. we declare it to be invalid. The Awraja Court of Addis Ababa, after accepting the claims filed by both parties in probate and administration file No. $543 / 60$ and $662 / 60$, ordered a notice to be published in a newspaper to know if there were other claimants. Accordingly, a notice calling upon any claimant, was published on 27 th year No. 887 of Addis Zemen on Nov. 30, 1967 G.C. and 27th year No. 888 on Dec. 1, 1967 G.C. Evidence showing that it was published is attached to the file. Since no other claimant appeared, we have ascertained, and decided that only the children born from Woizero Laketch Tessema, the plaintiff, and Woizerit Medaye Gebremedhin and Woizerit Teshai Gebremedhin, and the son born from the daughter of the deceased, Woizero Imayu, i.e., the deceased's grandson, Asrat Aemro Selassie, are the legal successors.

If not by a will, a wife is not a legal successor according to Art. 842 and subsequent. If there is any property that the plaintiff is entitled to share with her husband, it should be done according to the marriage contract. We thus hold that she can assert her right basing on the marriage contract.

Since the will is invalidated, the appointment of Woizero Laketch as executor of the will and the appointment of Ato Sahlu Yeshenew as an accountant are cancelled. Until the time when the property of the deceased be shared among the lawful heirs and other beneficiaries, we feel that it is essential that someone be appointed to manage the property. We, hereby, order that both parties elect, and notify the court as soon as possible, an honest man with acceptable guarantee, who would work for the interest and good of the family. In case they fail to agree, the court shall appoint one. We als 6 order that the outgoing manager, Woizero Laketch

## LAKETCH TESSEMA v. KEFAYE ABEBE

draw an inventory showing the details of the property to be inherited and a balance showng the income and costs incurred, to the person to be appointed as liquidator. We believe that this is her obligation.

We order both parties to pay court fees and their own lawyer's fees.
This judgment is given, today 26th of September 1968 G.C. in the presence of both the parties.

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## HIGH COURT

## Addis Ababa, Commercial Division

Judges: Ato Assefa Liben<br>Ato Mohammed Berhan Nurhussein<br>Tibebu Abraham<br>Plaintiff: ATO ABEBAYEHU DENEKE<br>Defendants: 1. MULU AGRICULTURAL PARTNERSHIP<br>2. Mr. DEPRA FRANCOIS<br>3. ATO CHANEYALEW TESHOME

Civil Case No. 95/63
The judgment of this case rendered by the court is as follows:
The action was brought by the plaintiff against the defendants to recover a dcbt of Eth. $\$ 31,250$.
Commercial Law-Business Organizations-powers and duties of a manager Arts. 2203-2206 Civ. C., Arts. $271,272,276$ Comm. C.

The plaintiff brought a suit against the three defendants to recover a debt of Eth. $\$ 31,250$ The contract of loan was concluded between the plaintiff and the second defendant (Mr. Depra Francois) who was the manager of the first defendant (Mulu Agricultural Business Organization) established by the second and third defendants. The plaintiff alleged that the loan was contracted on behalf of the business organization which he claimed to be a partnership and that all the three were liable for the debt. The third defendant (Ato Chaneyalew Teshome) stated that the debt was the second defendant's personal debt.

Held: Only the second defendant is liable.

1. If a joint venture is made known to a third party, it shail be regarded as an actual partnership as regards such third party.
2. Acts of management do not embody the act to borrow money from third parties on behalf of a business organization.
3. A manager of a partnership, unless special power is vested to him under the partnership agreement, is authorized to perform only acts of management.

## JUDGMENT

The plaintiff alleged that the Mulu Agricultural Partnership, the first defendant in this case, was established on the basis of Art. 280(1) of the Commercial Code by the second and third defendants. The second defendant Mr. Depra Francois, who is the manager of the business organization concluded a contract of loan with the plaintiff and a promissory note was drawn up to effect the loan. The contract of loan was concluded by the second defendant on behalf of the Mulu partnership. The plaintiff requested the court that the partnership pay him the debt in accordance with Art. 255(1) of the Commercial Code. However, if the partnership is unable to pay the debt he requested the court to make the partners severally and jointly


Liable to the plaintiff for the obligetion of the partnership pursuant to Art. 255/2 of the Commercial Code and Art. 1897 of the Civil Code.

The second defendant in his statement of defence admitted that he borrowed the said amount from the plaintiff. But he said that he used this loan for the purposes of tho agricultural undertaking of the partnership.

The third defendant, Ato Chaneyalew Teshome, presented the following defence. He contended that the rule of Art. 280, cited by the plaintiff, is irrelevant in this case, because the agreement between the second defendant and him was to form a joint venture as laid down under the provisions of Arts. 271-279 of the Commercial Code. The second defendant having been appointed as a manager on the basis of the memorandum of association of the Mulu Agricultural joint venture, the third defendant argued that he cannot be held liable for a laon which the second defendant concluded on his own behalf pursuant to Art. 276 of the Commercial Code. The second defendant was conferred the authority to become the agent of the third defendant in accordance with Arts. 2203-2206 of the Civil Code, thus authorized to perform only acts of management. The Mulu Agricultural joint venturewhich is a business organization carrying out the activity of breeding cattle-appointed the second defendant to work solely as a manager. Neither the joint venture agreement nor the scope of his agency empower the second defendant to conclude a contract of loan with a third party on behalf of the joint venture or on the third defendant's behalf. On the basis of these arguments, the third defendant prayed the court to allow him to withdraw from the suit parsuant to Art. 1910 of the Civil Code.

The third defendant produced before the court two documents: the memorandum of association of the joint venture and a document showing the authority of management conferred upon the second defendant.

The plaintiff, in his reply to the statement of defence argued that the contention of the third defendant, that Art. 280 of the Commercial Code could not be applied in the present case is not a proper defence. The reason given was that the evidence adduced by the third defendant clearly showed that the second and third defendants agreed to form a general partnership and not a joint venture. Moreover, although the defendants alleged that the said business organization is a joint venture, since it was made known to a third party in this case to the plaintiffaccording to Art. 272(4) of the Commercial Code, it shall be regarded as a partnership. Furthermore the plaintiff stated that it was very improper on the part of the third defendant to admit that the second defendant was appointed as a manager of the partnership, and they try to escape from liability by invoking Art. 276(2) of the Commercial Code. But this defence is untenable because pursuant to Arts. 6 and 12(3) of the memorandum of association of the partnership profits and losses are to be shared equally and partners who are not managers are also made liable. Thus, Art. 276(2) of the Commercial Code cannot exonerate the third defendant from liabilty. In addition, the plaintiff argued that the contention of the third defendant, that he cannot be jointly and severally liable pursuant to Arts. 2023-2026 and Art. 1910 of the Civil Code on the ground that the manager was appointed only to perform acts of managment, is irrelevant here because the second defendant was appointed as a manager of the partnership on the basis of Arts. 287-289 and 293 of the Commercial Code and in this conferred the authority to draw up a negotiable instrument as stipulated in Art. $35(1)$ of the Commercial Code. Besides the plaintiff added, the memorandum of association of the partnership vests full
powers on the second defendant to act as a manager. The plaintiff concluded his argument by pointing out that Arts. 7 and 14 of the memorandum of association of the partnership permit the organization to borrow money to the extent of Eth. $\$ 80,000$.

June 8, 1971 (G. C.), the plaintiff submitted an amended application of the statement of claim. The amendment related to (1) matters which were not previously included in the reply of the plaintff and (2) a proof evidencing a special agency conferred upon the second defendant by the third defendant dated 25/9/69 (G.C.) and bearing ref, number 5/62.

The third defendant objected to the proof presented to the court on the ground that the special agency, which the document purported to confer on the second defendant empowered the latter to borrow money from the Development Bank of Ethiopia and not from the plaintiff.

After stating the arguments of the parties the court framed the following issue on March $26 / 1971$ (G.C.). (1) Whether the Mulu Agricutural business organizaion is a joint venture or another type of business organization. (2) Should the manager, the second defendant, be regarded as an agent within the meaning of Arts. 2203 to 2206 the of Civil Code. (3) Is the third defendant liable to pay the loan concluded by the second defendant on behalf of the business organization.

This court has examined the Amharic text of the agreement signed by both the second and third defendants on April $19 / 1971$ and its English translation. The document evidencing the agreenent shows that the type of business organization formed by the partners is a joint venture. The provisions of the agreement relate to the kind of organization known as a jont venture. This, no doubt can be entertained, on the basis of the agrement, as to the nature of the business organization that the second and third defendants formed-it is a joint venture. The two partners established the joint venture for the purpose of breeding cattle and carrying on other agricultural activities. Under Arts. 6 and 7 of the Commercial Code, persons who carry on activities relating to breeding cattle and agricutlure shall not be deemed to be traders even where they sell the products from such activities. Persons who engage in the occupation of breeding cattle or agriculture shall be regarded as traders only if such persons establish share companies or private limited companies to carry on their activities as specified in Art. 190 of the Commercial Code. Thus the type of organization the defendants formed if it is not a business organization it can only be a joint venture which has no legal personality and no other form of business organization which has a legal personality. As can be seen from the agreement concluded between the two respondents and from its functions the MuIn Agricutural Association is thus a joint venture.

The plaintiff in his argument pointed out that even if the Mulu Agricultural Association was to be regarded as a joint venture since the joint venture was made known to the plaintiff a third party-it should be deemed to be an actual partnership pursuant to Art. 272(4) of the Commercial Code. The sub-article cited by the plaintiff truly states as he had pointed out in his argument. Thus let us regard the association as a partnership. This argument is also supported by the provision of Art. 271 which stipulates that a joint venture will be subject to the general principles of law relating to partnership. But, what would be the outcome if the joint venture was to be regarded as a partnership? This question leads to the consideration of the power of a manager - the second and third issues.

The plaintiff in his argument concerning the powers of a manager invoked Art. 35 of the Commercial Code. The type of managers that are envisaged by

Commercial Code Arts. 33-36 are those who are appointed by private traders and not by business organization. But even if we interpret these code provisions to make them applicable to managers of busidess organizations as well they merely state that such manager will have the power to perform acts of management. We will discuss later as to what is meant by acts of management.

Let us then consider the power of a manager in relation to the different kinds of partnership. The law recognizes three types of partnerships. The first type is called "ordinary partnership". Under provision of Art. 239 of the Commercial Code, the manager of an ordinary partnership has the power to perform all acts of management. Managers do not have any other additional authority unless specifically granted in the partnership agreement. The second type of partnership is called "general partnership". The manager of a general partnership, unless a special power is vested to him under the partnership agreement, is authorized to perform only acts of management pursuant to Art. 288 of the Commercial Code. The third kind of partnership is known as "limited partnership". Art. 303 of the Commercial Code explicitly points out that as regards the powers of a manager of a limited partnership, the provisions of ordinary and general partnership which relate to the powers of a manager shall apply by analogy. Thus, the manager of a limited partnership is also authorized to perform only acts of management, unless pursuant to the memorandum of association of the limited partnership, he is vested with additional special powers.

As the discussion above reveals the manager of a private trader or of the three different kinds of partnerships, according to the Commetcial Code has the power only to do acts of management unless special powers are conferred upon the manager by agreement. Although the code states that a manager can perform acts of management, it does not define what is meant by acts of management. Since no definition is provided in the Commercial Code, we have to look in the Civil Code for a definition.

The relevant Civil Code provisions are those dealing with agency-Art. 2199 to Art: 2233. Art. 2202 provides that agency may be either general or special. Art. 2204 defines acts of management as "Acts done for the preservation or maintenance of property, Ieases for terms not exceeding three years, the collection of debts, the investment of income and the discharge of debts . . .Sub-article (2) is also similar to sub-article (1). The reading of Art. 2204(1) shows that borrowing of money from a third party by an agent is not regarded as an act of management.

Art. 2205(1) of the Civil Code states that "special authority shall be requried where the agent is called upon to perform acts other than acts of management" Sub-article(2) stipulates that "the agent may not without special authority alienate or mortgage real estate, invest capitals, sign bills of exchange, effect a settlement, cons ent to arbitration, make donations or bring or defend an action". As the above cited provisions show, a manager authorized in general terms can perform only acts of management and has no power to borrow money from a third party on behalf of a business organization he is authorized to manage. Special authority will be required where the manager is to peform acts other than acts of management, such as borrowing of money, mortgaging real estate and other related acts.

In this case, the document evidencing the joint venture agreement adduced by the plaintiff contains no provision to show that Mr. Depra Francois is authorized to perform acts other than acts of management. Thus since the power conferred upon the second defendant is to perform acts of management, on the basis of this
authorization alone he is not empowered to conclude a contract of loan with a third party. Special power is required for such purpose. The second document, written on April 21/69 merely states that the second defendant is the manager and does not grant him additional special powers. This additional statement is unnecessary since it is merely a duplication of the joint venture agreement. Thus, even under this document the stcord defendant is not authorized to conclude a contract of loan with the plaintiff on behalf of the business organization.

The third defendant, to support his claim, produced a document dated September 15, 1969 (G.C.) and bearing ref. number $5 / 62$. This document, however, authorizes the second defendant to borrow a sum of Eth. $\$ 80,000$ from the Development Bank of Ethiopia afier depositing as securities land located at Adama Tulu and another found in the town of Addis Ababa and not from other third parties. Thus the second defendant is not authorized to borrow money from the plaintiff on behalf of the business organization on the basis of this power of attorney.

Althoug the joint venture agreement, which was signed by the second and third defendants, on April 19, 1969 (G.C.), provides in Art. 7, "The two partners have accepted the commencement of the planned project on a loan of Eth. $\$ 80,000^{\circ}$, this provision cannot be interpreted as giving power to the second defendant to make a contract of loan with third parties in the name of the joint venture.

As explained hereinabove the second defendant is authorized to perform only acts of management by law as well as by the joint venture agreement. Since acts of management by definition does not include the act to make a contract of loan with a third party by a manager on bchalf of the business organization and we could not find evidence to show that the second defendant has been authorized by a special insirument to conclude a contract of loan with the plaintiff on behalf of the joint venture the loan which the second defendant secured from the plaintiff without authorization is his own personal debt and cannot be considered as a debt of the joint venture or that of the third defendant.

Basically the type of business orgatization established by the two defendants is a joint venture. A joint venture, according to Ari. 210(2) of the Commercial Code has no legal porsonality. In the absence of a legal personality every partner of a joint venture owns his contribution unless of course otherwise agreed. This is explicitly stipulated in Art. 273 of the Commercial Code. Besides Art. 5 of the agreement expressly re-affirms the third defendant's exclusive ownership of his land. The joint venture thus does not have any properiy which it owns nor does it possess a legal personality by law and it cannot be sued or no judgment can be passed against it. But as has already been mentioned if a joint venture is made known to a third party it shall be regarded as an actual partnership as regards such third party and the general provisions of law relating to partnership are applied to it. However even if we regard a joint venture as an actual partnership under certain circumstances, the business organization can only be made liable for a debt contracted by a manager who is conferred such special powers. In the present case the second defendant was never given a special power to conclude a contract of loan with the plaintiff in the name of the organization, thus the organization cannot be made liable for a debt which had been incurred by the second defendant without any authorization. Since we have held that this debt is not a debt of the business organization even if the business organization fails to pay the debt the third defendant as a partner is not liable to pay out of his private property.

For the above stated reasons we hold that the second defendant, Mr. Depra Francois, is liable to pay to the paintiff the debt stated in the statement of claim,

Eth. $\$ 31,250$ (Thirty one thousand two hundred and fifty Ethiopian dollars), and legal interest of $9 \%$ from the date the action was brought until the time the debt is completely paid. Since the suit was instituted in forma paperis by the plaintiff, we rule that the second defendant pay all the costs and expenses incurred in the suit. Furthermore, since the joint venture has not been made liable for the debt which the second defendant borrowed without authorization the third defendant is fully exonerated from any liability. If there is any personal property which the second defendant contributed to the joint venture such property will be attached to make sure that the debt is wholly paid. The plaintiff is entitled to obtain the costs he has incurred in the suit from the second defendant. When the plaintiff produces before this court an itemised bill of costs showing the expenses he incurred in the suit, pursuant to the provision of Arts. 463 and 464 , the court shall pass a decree on the payment of the costs.

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## HIGH COURT

Addis Ababa, Commercial Division

## Judges:

Ato Nigussie Fitawake
Ato Mohammed Berhan Nurhussen
Ato Zeleke Desta

## ASEGEDETCH INDAYLALU v. IMPERTAL INSURANCE Co.

Civil Case No. 195/57
Insurance Contact-time for conclusion of an insurance contract-consent, deceit-Com.C. Arts. 657 and 659. Civil C. Arts. 1696, 1697, 1705.

In appeal, the Supreme Imperial court reversed the decision of the High Court and remanded the case to it. The plaintif argues that her deceased husband has entered into an insurance contract with the defendant and that she be paid according to the contract. She prayed the court to invalidate the contract which she argucs was concluded by deceit. The defendant Company argues that no insurance contract was concluded betwecn the plaintiff and itself. It also prayed the court to uphold the contract entered into by the plaintiff and relieving the Company from the said \$ 10,000 .

Held: Action dismissed.

1) Once the insured gets a provisional guarantee from the insurer it would be presumed that there is a contractual relationship batween the parties.
2) The burden of producing cvidence showing duress or deceit falls on the party who so alleges.
3) Presence of a literate relative during the formation of a contract shows knowledge and consent to the contents of the contract.

## JUDGMENT

Plaintiff in a suit brought in the High Court on Nov. 4, 1964 G. C. claimed that deceased, her husband Capt. Assefa G. Mariam, entered into a life insurance with defendant company. Although the sum specified in the contract was Eth. $\$ 10,000$ in cases of accidental death the amount due to the subscriber or beneficiary was to be doubled. The deceased paid the first premium on receipt No. 2099 which was entered into insurance register No. 2690; and signed by the manager of the company. After he was told that the main contract would be sent to him, the deceased left for home. The subscriber then died as a result of a car accident and the plaintiff, went to the Company with the receipt in hand and asked for payment. The plaintiff alleges that the defendant Company at first refused to make payment by claiming that they did not accept the contract properly but after they realised that this position was untenable paid her $\$ 10,000$ only, and then made her sign a document written in a language she does not understand. She prayed the court to order the defendants to pay the remaining $\$ 10,000$ in accordance with Art. 657 Com. C. and Art. 1679 Civil C.

In his statement of defence of Nov. 30, $1964 \mathrm{G}, \mathrm{C}$. respondent claimed that no insurance policy was concluded, that the said receipt No. 2099 was only a temporary one and therefore the suit must be struck out by virtue of Art. 659 of the Com. C. In addition respondent argued that not only did the plaintiff, when she received the $\$ 10,000$ from the company, sign an agreement relieving the respondent of any liability but the agreement clearly states that the respondent made the payment to help deceased's family. Furthermore, plaintiff cannot claim that she was made to sign a document written in a language she does not know because the notice that she wrote on the 23 rd day of her husband's death requesting payment pursuant to Art. 670 of the Com. C. was in English and when she received the $\$ 10,000$, the contents of the agreement were read and explained to her by the persons who accompanied her.

Plaintiff in her reply of March 23, 1965 G.C. stated that defendant's obligation was based on the contract-Art. 692 Com. C. She argued that the contract that the respondent made her sign relieving him of further liability was concluded through deceit and bad faith on the part of the respondent and that she gave her consent by mistake and is thus invalid pursuant to Civil C. Arts. 1696, 1697, 1705.

Respondent in his application of May 10,1965 G. C. after reiterating his original grounds of defence, further argued that since the document signed by the plaintiff is conclusive proof of the existence of the contract in accordance with Art. 2005 Cvil C. the contract cannot be invalidated. Besides fer contention that the contract is invalid cannot stand by virtue of article 2148 Civil C. after she had signed the contract and taken the money. Plaintiff in her reply of June 11, 1965 G. C. stated that defendat's contention that they made the payment out of benevolence without any obligations is untrue and one merely designed to pay her less than what she deserves. She added Art. 2005 and 2148 apply to agreements which are made in good faith and to valid document (written instrument) and not to cases such as these where the contract is signed through deceit and bad faith of one of the parties.

As the record shows the High Court's decision of Oct. 4, 1964 G.C. stated that since plaintiff willingly and by taking her brother as a witness signed on the contract agreeing not to ask for more than the $\$ 10,000$ she has already recieved, her present action claiming the aditional $\$ 10.000$ is groundless and the suit must be struck out.

After plaintiff appealed to the Supreme Court the court in its decision of March 28, 1967 G. C. reversed the decision of the High Court, and remanded the case to this court ordering it to render its decision after examining the evidence produced by both parties and the contract between deceased and the Insurance Company.

After this, the plaintiff in her application of Nov. 19, 1967 G. C. said that the deceased was not a new subscriber but that he had been a subscriber for a long period of time and the document (receipt) presented to the court shows that defendant had entered into an obligation in accordance with Art. 657(3) Com. C. Plaintiff prayed the court to order the manager of the Company to produce before the court the form of the Insurance contract showing the Company's obligation to pay $\$ 20,000$ in cases of accidental death and to give his testimony under oath.

Defendant in his reply of Dec. 7, 1967 G.C argued that the court has ordered plaintiff to present the insurance contract and prove her claim but the receipt
(document) produced by plaintiff is merely a temporary proposal receipt (document) presented for examination and camot be considered as the insurance contract itself. In her reply of Dec. 11, 1967 G. C. the plaintiff argued that the receipt she produced clearly shows that the respondent received payment after analyzing the statements contained in insurance register No. 2696 (deceased's file) and finding them to be satisfactory. Since the respondent received payment and gave a receipt, the respondent's argument that the instrument cannot be regarded as an insurance contract should not be given any consideration.

In its hearing of Feb. 28, 1968 G. C. the court ordered the manager of the insurance company to appear before the court and give his testimony. The manager testified that Captain Assefa did not go through all the formalities required before an insurance contract can be concluded. He added, although the Captain had signed a draft of the contract and paid Eth. $\$ 32.90$ this payment was made prior to ratification (acceptance) of the contract. Thus Capt. Assefa has accomplished two necessary formalities - filling the draft form and going through a medical check-upwhat remained was for the contract to be sent abroad for acceptance. After the court ordered the manager to bring the draft of the contract on its next hearing, the draft was presented by the manager. In reply to questions asked by the court, the manager said that the deceased has delayed in making payment after the contract was signed although he was notified to pay, It is not after we give a provisional receipt (document) that the contract becomes binding.

After examining the arguments of both sides we find that there are two issues to be decided (1) whether or not there is a contract of insurance (2) if it can be said that there is an insurance contract, to determine the validity of the contract by which plaintiff agreed not to request for more than the $\$ 10,000$ she already received.

First let us examine the arguments on the first issue.
Plaintiff contends that even if an insurance policy was not signed, since the deceased filled and presented the medical questionaire to respondent company, and the defendant company received the first premium and gave a provisional receipt, it has entered into an obligation in accordance with Arts. 657(3) Com. C.

On the other hand, respondent argues that since an insurance policy was not signed in accordance with Art. 659 Com. C., the suit must be struck out.

Art. 659 Com. C. provides that unless otherwise specified in the contract, an insurance policy shall come into force on the day when the policy is signed. This means that the premium can be demanded on the basis of the contract only if the policy is signed. But article $657(3)$ lays down that where prior to the signature of the policy the insurer hands to the insured a provisional guarantee until the policy is signed, the insurer and the beneficiary shall be considered as having entered into an obligation. In the case before us the plaintiff besides failing to produce the insurance policy did not explicitly claim that there was an insurance policy. Her argument was that the receipt presented to the court was a provisional guarantee until the policy was signed and, since the respondent company had paid her $\$ 10,000$, in acknowledgement of this fact it can be considered as having entered into an obligation and must therefore be liable to pay the remaining $\$ 10,000$. As can be seen from the case that the insurance company had given a provisional receipt after the deceased filled temporary form, was medically examined and it received the result of the medical examination. The respondent company argued that the life insurance (contract) had to be sent abroad and ratified before it can be signed.

But since the Insurance company is engaged in Ethiopia and working under Ethiopian law we do not accept the contention that it must be sent abroad and accepted. The defendant company has not only received payment and given a receipt, it has also paid $\$ 10,000$ to plaintiff after the death of her husband. Taking all these circumstances into consideration we find that the receipt (document) given by defendant company is a provisional guarantee and this means that the defendant company has entered into an obligation. This therefore proves the existence of a contractual obligation between plaintiff and defendant.

However, when we proceed to examine the second issue we see that plaintiff has entered into a written agreement not to ask for more than the $\$ 10,000$ that was already paid to her. The plaintiff alleged that she entered into this agreement because at that time she did not know that she had a right to more money, the contract was written in the language she did not understand and signed it because of the bad faith and deceit of respondent company, and thus argued that the agreement is invalid on the basis of Arts. 1696, 1697 and 1705. Indeed by virtue of the provisions cited if the consent of the plaintiff was made by mistake, under deceit or duress the contract could be invalidated. However, the burdern of proving these circumstances is on the party alleging them but plaintiff only claimed that they have made her sign by improper means and did not produce evidence to prove her allegations. Plaintiff did not even deny respondent company's argument that plaintiff willingly, without deceit or duress, accompanied by a male signed the contract after the statements contained therein were read to her. Since she should not have signed a legal document whose contents she did not understand and could have refrained from signing it but despite all these she signed the document willingly and received $\$ 10,000$, her present argument that she signed it unknowingly and under deceit is invalid and cannot invalidate the contract she signed while accompanied by a male relative knowingly and willingly. We therefore dismiss the claim of plaintiff for an additional Eth. $\$ 10,000$.

Since plaintiff brought a baseless claim we order her to pay to the respondent damages and counsel's fees.

The amount of damages shall be assessed in accordance with Art. 463, 464 of the Civil Proc. C.

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## HIGH COURT

## Addis Ababa, Commercial Division

Judges: Ato Negussie Fetawoke

Ato Mohammed Berhan Nurhussen
Ato Tibebu Abraham
FRATELLI BIGA AND COMPANY V. MARSHA TRADING COMPANY
Civil Case No. 281/63
Commercial law-Promissory notes-effect of endorsing unlawful enrichment-Commercial Code articles 799(1), 799(3), Civil Code articles 2023, 2024, 1976, 1977.

Action brought by plaintiff to recover compensation on grounds of unlawful enrichment, because it failed to get money from three promissory notes which were endorsed by defendant due to limitation of action:

Held: For defendant on the following grounds.

1. Proceeding of unlawful enrichment could be brought only against the drawer and the acceptor and not against a third party who endorses the instrument (799 (1) (3)).
2. Eventhough the creditor's right over the original debtor is protected, he must first demand satisfaction from the delegated debtor before demanding satisfaction from the oringinal debtor.

## JUDGMENT

The action wes brought by plaintiff, Fratelli Biga and Co., to recover the sum of Eth. $\$ 9213.39$ from the defendant Marsha Trading Co.

In brief, the main points of the arguments are as follows.
The defendant company in order to pay the amount he is sued upon, sent three promissory notes worth $\$ 9,000$ to the plaintiff; which it received from Dimitry Popontonyos; by endorsing them. The plaintiff having failed to get the money from these three promissory notes brought an action under Civil Case number 147/ 60. However, the court rejected the claims of the plaintiff on the grounds of limitation.

After his claim on the promissory notes were rejected. the plaintiff alleged that;

1. Because the defendant was set free from his obligation on the promissory notes on the grounds of limitation he has enriched himself unlawfully under article 799 of the Commercial Code and,
2. Since according to the agreement that was made on Gunbot 25, 1957 (E.C.) with Dimitry Popontonyos, the defendant can't be free from paying the said sum of money, the plaintff brought this action on Yekatit 28, 1962, to recover the money.

The defendant presented his statement of defense on Tahsas 1, 1963. The main points of his defence are:

1. That the plaintiff had sued him on the same cause of action under file No. $147 / 60$ and that it was decided by the court, and therefore the present case is res-judicata under article 5 of the Civil Procedure Code.
2. According to Civil Code articles 2023 and 2024 the present action is restricted by limitation.

Therefore, this action should be rejected on the same grounds as the first one.
This court on deciding the two preliminary objections of the defendant stated;
" 1 . On the first Objection:- From our study of the file, the first case decided under file No. $147 / 60$ was brought, requesting for payment under the promissory notes; while the present case is based on the unlawful enrichment of the defendant or not having paid, the promissory notes. Therefore the present case and the case decided under file No. 147/60 are not the same.
2. On the Second Objection:- The articles cited by defendant, that is, articles 2023 and 2024 are not related to the present case. Article 2023(a) of the Civil Code concerns salaries while article 2024(d) is addressing itself to interests and money to be paid annually. Therefore, the court has rejected the objections presented by defendant as they do not have any basis in law. Defendant is ordered to present his defence on the merits of the case.

Due to the order given on Megabit 1, 1963 (E.C.) concerning the objections the defendant brought his defence on the merits on Megabit 22, 1963 (E.C.). The contents of his defences are:- 1. The plaintiff's claim that, due to the decision given under case No. 147/69, the defendant has been enriched unlawfully and should give the plaintiff his money back under article 799 of the Commercial Code could be sound only if the requirement of article $799(3) \mathrm{had}$ been fulfilled, and not on promissory notes which had been endorsed. 2. The claim of plaintiff that he has a contract signed on Gunbot 25,1957 is false. The document brought by plaintiff to prove this claim is a contract signed between the defendant and a third person, and the plaintiff could not benefit from this, and it could not make the defendant indzbted to the plaintiff 3. Because the three promissory notes had been decided upon under case No. $147 / 60$ due to limitation, and have been renderred ineffective, they cannot be brought as evidence in this case.

After having seen the points raised by both parties, the issues to be decided are:-

1. Whether a person, like the defendant in this case, could be sued for unlawful enrichment under article 799 of the Commercial Code when he had endorsed the promissory notes he has received from another.
2. Whether the agreement made by the defendant with a third party on Gunbot 25, 1957 concerning the money to be paid could be said to benefit the plaintiff.

## FIRST ISSUE

Under the title of "proceedings for unlawful enrichment" article 799 sub. 1, states;
"The drawer and the acceptor shall be liable to the holder up to the amount of the sum by which they have unlawfully enriched themselves at his expense even where their obligations under the bill of exchange have terminated by reason of extinctive prescription or limitation of action."

According to the above stated article proceedings for unlawful enrichment can be brought only between the "drawer and the acceptor" only. The defendant company obligated itself to the plaintiff by endorsing the promissory notes it got from a third party, and not as drawer or acceptor. This, then makes it clear that the plaintiff could not bring an action against the defendant based on the article cited.

Furthermore, proceeding for unlawful enrichment cannot be brought against people who endorse, as is clear from reading the sub-article cited by the defendant, that is, article 799(3). Therefore the claim brought by plaintiff based on article 799 is rejected.

## SECOND ISSUE

Plaintiff has brought as evidence the contract signed between defendant and a third party. The contract shows, that the defendant Marsha Trading Company delegated Dimitry Popontonyos to fulfill his obligation to the plaintiff. The contract states:
"Please pay Eth. \$ 9,213.39 directly to Biga Company in our name according to the above account .... Have a receipt for us for safety reasons." The remaining portion of the contract shows that Dimitry Popontonyos has agreed to do as requested in the agreement.

The defendant argued that basically this agreement is between a third party and the defendant, and the plaintiff cannot bring a claim based on an agreement to which he was not a party.

As to the principle of delegation and assignment of obligations to pay, Civil Code article 1976 states, "A debtor may with the consent of the creditor, or without such consent ... delegate to another the performance of his obligation". In such case, eventhough the creditor has accepted the delegation of the debtor's obligation to pay, he still retains his right to claim from his original debtor as stated in article 1977(1).

Therefore, the argument presented by the defendant that the agreement made between him and a third party does not concern the plaintiff is not supported by law.

Eventhough the creditor's right over the original debtor is protected under article 1977(1), this article in its sub-article 2 states, that, "He may not demand satisfaction from the original debtor before demanding it from the delegated debtor. Therefore, the plaintiff should have first sued Dimitry Popontonyos before suing the original debtor, Marsha Trading Company. Since the present action is contuary to article 1977(2), the claim based on this ground is rejected.

Due to the legel reasons presented above, the actions brought by the plaintiff are not based on law and are, therefore rejected. The plaintiff is ordered to pay
the defendant the expenses he spent for this proceeding. The cost will be determined when presented according to article 463 and 464 of the Civi! Procedure Code.

This judgment was given on Sene 11, 1963 E.C. on the Commercial Division.

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## HIGH COURT

Addis Ababa, Commercial Division

## Judges:

Ato Nigussio Fitaweke
" Mohammed Birhan Nur Hussein
" Tibebu Abraham

## COMMERCIAL BANK OF ETHIOPIA V. USMAN ZAKIR ABDELA MOHAMMED SEIF

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\text { Civil Case } 30 / 60-34 / 60
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Commercial Law-promissory notes-relationship between negotiable instrument and bills of exchange Com. Code Arts. 789, 817, 825, 790, 732, 716, 715, 788, 735, 823, 791, 776, 796, 774, 781.

Plaintiff (Commercial Bank of Ethiopia) instituted this suit to recover money due to from two promissory notes given originally by the defendants to a third party who then endorsed and gave them to the Bank. The defendants argued that they were not liable to pay on the ground that they had paid the money to the third party after the transfer of the promissory notes.

Held: For the plaintiff on the following grounds:

1. It is at his own risk that debtor pays before or on maturity without taking hold of the promissory notes as the promissory notes could have been transferred to third parties (endorsed) and that those third parties would be the holders of such a right.
2. Even though, the person who issued the promissory note and a bill of exchange, are for lack of Amharic terminology given the same name "wachi", they are called "maker" and "drawer" respectively in the English and have different legal obligations, under Art. 796(1) and 826(1).
3. Since a notice of non-payment is to be given under the instrument which requires publicity protest and as the parties in this case had agreed by the provision "Sans protêt" not to require publicity protest the plaintiff is not required to give notice.
4. Although defendants have agreed to pay "Sans protett", since Art. 789(2) requires plaintiff to give notice, plantiff has failed to give notice for a month, but this does not make the plaintiff lose his right to sue irerspective of whether he gave notice or not under Art. 788(2).

## JUDGEMNT

The plaintiff in his statement of claim of Tahsas 4, 1960 and then on his amended claim of Meskerem 27/1961 alleges that defendants gave two promissory notes worth $\$ 6,000$ (six thousand dollars) and $\$ 4,000$ (four thousand dollars) to Ato Abdel Kerim Almed, a Jimma trader on Hamle 17 and 18 of 1960 (July 28 and 29 of 1967 G.C.). Ato Abdel Kerim Ahmed was paid the full amount after transferring the promissory notes by means of endorsement in accordance with Art. 941 of the Commercial Code on July $3 / 1967$ to the plaintiff. Although,
the plaintiff had demanded payment on the 28th of Hidar 1960, he was not paid either by the defendants or Ato Abdel Kerim Ahmed.

Since defendants had promised to pay the amount indicated in the promissory notes by virtue of Art. 789(1) through their signature "sans protet" plaintiff was not obliged to draw a publicity protest. Art. $825(1)$ (d) provides that Art. 789(1) may apply to promissory notes. And since defendants did not perform their obligations since Tekemt 18 and 19 of 1960, plaintiff is not, by virtue of Art. 817(1) and $825(1)(\mathrm{i})$ affected by limitation of actions. Plaintiff requests that defendants be ordered to pay for the promissory notes in addition a $9 \%$ annual interest on the sum, beginning on Tekemt 18 and 19 of 1960 until it is fully paid.

This case was originally filed in the High Court in Jimma. The Supreme Imperiai Court, accepting the plaintiff's claim that the case has a question of law of unusual difficulty has decided to change the venue of the case upon plaintiff's request in accordance with Art. 31(2) of the Civil Procedure Code. As the issues in this case are identical wth that in case No. $34 / 69$, we hereby decided to treat them at the same time.

Plaintiff has presented as evidence 1) the two promissory notes and 2) notice No. JB $1038 / 67$ written to both defendants and Ato Abdel Kerim Ahmed on Hidar 28/1960, requesting payment on the two promissory notes.

The defense counsel in his statement of defense, written on Tekemt 12, 1961 E.C. alleges that (1) as seen from the presentation of the statemeni of claim the plaintiff could not institute this action by virtue of Art. 244(2) (d) of the Civil Proce dure Code. Although defendants have given these promissory notes here presented as evidence by plaintiff to Ato Abdel Kerim Mohammed Ahmed, Plaintiff. evidence no. 1 and 2 show that defendants have paid Ato Abdel Kerim Ahmed Secondly, defendants have no idea how plaintiff could acquire these promissory notes. Moreover, defendants are not aware whether (a) the promissory notes have been transferred to the Bank and (b) whether the Bank when paying the sum to Ato Abdel Kerim Ahmed, had not in accordance with Art. 947, taken the promissory notes as Securities. Thirdly the Bank's allegation that the promissory notes have been transferred being unsupported by evidence, and since defendants have paid these promissory notes to Ato Abdel Kerim Ahmed, his allegation is false. Fourthly, since the main debtor has not been sued, this case should be dismissed and the plaintiff should be ordered to pay the court expenses and costs incurred by defendant.

Defendants have presented a photocopy of a receipt they received from Ato Abdel Kerim Ahmed attesting that the promissory notes have been paid.

The Counsel for plaintiff, in his statement of claim of Tahsas 15, 1961 E.C. argued that as these instruments in issue are negotiable instruments and as these promissory notes which were transferred by means of endorsement to the plaintiff in accordance with Arts. 724 and 726 by Ato Abdel Kerim Ahmed, and as the instruments are in the possession of the plaintiff, the plaintiff has the right to receive the value by presenting the instruments to defendants. Defendants being unwilling to pay, the plaintif has brought action against them in accordance with Art. 790 of the Commercial Code. Since Art. 790 is applicable to promissory notes by virtue of Art. 825 (a) and (c), the defendant's contention that the plaintiff has no right to bring this action is invalid.

As the instruments which defendants gave to Ato Abdel Kerim Abmed are commercial instruments within the meaning of Art. 732(1) and (2) the debtor-defendants must pay the amount indicated in the instrument to the bearer thereof in accordance with Art. 716(2) of the Commercial Code.

The above stated Art. is a rule which cannot be changed or amended by the will of the debtor. Therefore, even if the defendants can prove that they have paid the said sum of money to Ato Abdel Kerim Ahmed, their payment will be of no effect as provided in Art. 716(2) of the Commercial Code. Since a right based on a negotiable instrument is transferred along with the instrument according to Art. 715 of the Commercial Code, Ato Abdel Kerim Abmed has transferred the right to the plaintiff by means of endorsement. A debtor's permission isn't necessary to transfer a right from a negotiable instrument. These promissory notes far from being, as the defense counsel would have us believe, securities for credit that the plaintiff issued or instruments which were transferred to him for which he gave credit, are instruments for which he paid; and therefore are in his possession as is required by Art. 716(1) of the Commercial Code.

As the bank is the holder of these instruments Art. 788(1) of the Commercial Code applies. Although article 788 applies to promissory notes, by virtue of Art. 825 (1) (c), and as shown by the preamble to Art. 825, the rules relating to bills of exchange apply to promissory notes insofar as they are not inconsistent with the nature of these instruments. Therefore, it is imperatvie to examine whether the provisions of Art. 788 of the Commercial Code are consistent with the nature of the promissory notes. By virtue of Art. 788(1), the holder must notify whether he has accepted or paid the sum to the endorser or drawer or not. In this case, since the endorser is Ato Abdel Kerim Ahmed and not the defendants, their argument which says that they should have been notified is inadmissible. Due to either an error in translation or lack of a suitable word the person who issues the bill in Art. 735 (h) and the person obliged to pay the sum indicated in promissory note are worded alike (in the Amharic) as "Awchi" (drawer). The person called "Awchi" in the bill of exchange and the person called "Awchi" in the promissory note do not have the same obligations. The one called "Awchi" in Art. 735 (h) drawer in the English-is only one who orders that a third party debtor-the drawee-pay the sum indicated in a bill of exchange, and not the primary debtor, who promises to pay the sum indicated in a promissory note called "awchi" "maker" in the English - in Art 823(1).

It is imperative to carefully understand that the obligations of the "awchi" of Bills of exchange (drawer) and the "awchi" of promissory notes (maker) are different.

Article $826(1)$ of the Commercial Code points out that it is the maker's obligation that is similar with the acceptor of a bill of exchange.

Therefore, if we accept that the defendant's obligation is similar to that of the acceptor of a Bill of exchange by virtue of Art. 826(1); and if Art. 796(1) of the Commercial Code applies to promissory notes by virtue of Art. 825(1) (c), the plaintiff's right to demand payment from defendants is unimpaired.

Here, suffice to stress the phrase, .... "With the exception of the acceptor" ... in Art. $791(1)$ of the Commercial Code. As it is the defendants in this case, who have signed to pay the amount indicated in the promissory notes, they are the main debtors and not Ato Abdel Kerim Ahmed, who endersed these instruments.

For the reasons enumerated above, it is in contravention of Art. 716(2) that defendants paid the sum without receiving the promissory notes. Moreover, the receipt presented as evidence shows that although the dates of maturity were 28/10/67 and 29/10/67, the dates of payment were, in the one case before the date of maturity-on $30 / 7 / 1967$-and in the other later than maturity. Art. 776(2) of the Commercial Code says that it is at his own risk that the drawee pays before maturity. Plaintiff argued that, since these instruments are not ordinary instruments but like negotiable instruments which can legally be transferred easily from the person to another the defendants cannot defend themselves against parties in good faith Jike, the bank, except by defenses of form, those based on the text of the instrument and the like is clear from Art. 717 of the Commercial Code. Therefore, plaintiff goes on to argue, that defendants should pay the sum indicated in the instrument in addition to legal interest and the costs incurred.

The defense counsel in his statement of defense of Ter 9 alleges that they are not aware how these promisosry notes came into the possession of plaintifi. Moreover, since the signature at the back of the instrument is not substantiated by a seal, it is not at all certain whether the signature is Ato Abdel Kerim Ahmed's nor is it known at which date it was signed. Plaintiff has deliberately ommitted to cite sub-article 3 of Art. 716 when citing Art. 716(2). Dfendants deny that the bank's contention that it has received the promissory notes properly signed. The bank (a) has not presented the promissory notes in time as required by Art. 774 (b) it did not demand payment on maturity as required by Art. 781 (4) and (c) did not give notice to defendants on maturity as required by Art. 788. Therefore, this case must be dismissed, with the imposition of payment of costs on plaintiff. Moreover, since it has been said that Ato Abdel Kerim Ahmed has borrowed from the bank using the promissory notes as security, the plaintiff should file a new case, in accordance with Art. 947, making Ato Abdel Kerim Ahmed the lst defendant.

In his reply to the statement of defense, the plaintiff on Miazia 7, 1961 E.C. in addition to writing in the manner of his previous statement of claim of Tahsas 15, 1961, argued that a seal was not necessary to endorse an instrument according to Art. 748,825 and $825(1)(a)$. The dates when plaintiff received the promissory notes is shown at the back of these instruments. The dates are August 3, 1967 G.C. and Hamle 27, 1959 E.C. the provision of Art. 716(3) applies when the possessor of a negotiable instrument (even if he is not the holder of the right) presents the instrument for payment to the debtor whereby the debtor is released from his obligations, except when he commits fraud or is grossly negligent. Art. 774 applies only to Bills of Exchange and not to promissory notes. Those rules on Bills of Exchange which apply to promissory notes are those enumerated in Arts. 825 and 826. And as Art. 774 is not one of the rules cited this article is irrelevant to this case. Since defendants had signed saying "I will pay without need for publicity protest on the instrument, plaintiff had been freed from writing publicity protest required by Art. 781(1) of the Commercial Code. It is important to note Art. $789(1)$ in this respect. As to the defendants argument which says that the bank had not notified the defendants in time as required by Art. 788, plaintiff has already in his reply of Tahsas $15 / 1961$ E.C. explained in detail the provision in Art. 788. The counsel for plaintiff has concluded by saying that defendants arguments are, for the preceding reasons, unsupported by law.

As to the request of defendants that Abdel Kerim should be included in the case, it is not necessary to rule on it now as the motion had already been denied
on Sene $17 / 1961$ E.C., on the grounds that we cannot order and force the plaintiff to sue him.

According to our examination of the arguments of the parties, the issues which need to be resolved are the following:

1. To ascertain whether defendants would be rejeased from their obligation to pay due to the fact that they had paid the sum due from the promissory notes before or on maturity to Ato Abdel Kerim Ahmed as could be seen from defendant's evidence No. 1 and 2. (Commercial Code Art. $716(2), \quad 776(2))$.
2. (a) whether plaintiff loses his right to be paid for failing to demand payment on maturity by virtue of Art. 774 and whether 774 applies to promissory notes;
(b) whether plaintiff loses his right to be paid for failing to demand payment on maturity; (Commercial Code Arts. 781, 789(1), 796(1) and 826(1);
(c) to ascertain whether plaintiff's failure to make public protest because of non-payment according to 788 disqualifies him from availing himself of such right (Commercial Code Art. 825(1), 826(1) and 796(1).
Let us now examine the arguments raised in the first issue: whether defendants obligation to pay the value of the two promissory notos worth $\$ 6000$ and $\$ 4,000$ has been extinguished because they have already paid Ato Abdel Kerim Ahmed before or on maturity. The first receipt states that "I have been paid the sum which was due to me through a promissory note and the promissory note is henceforth invalid". And the second says "that since I have lost the promissory note dated from July $29 / 67$ to October $29 / 67$ and have received the sum instead today, I ascertain that the promissory note is consequently invalid."

The fact that these two promissory notes have been endorsed by Ato Abdel Kerim Ahmed has not been denied. It has been ascertained that the bank paid the sum after receiving the instruments on August $3 / 67$. Although, the defense counsel contends that these instruments have been held as securities he has not produced any evidence as proofs. Therefore this argument cannot stand.

It is advisable to discover whether defendants can be released of their debt by virtue of paying their debt to Ato Abdel Kerim Ahmed through an ordinary receipt after Ato Abdel Kerim Ahmed had already transferred the promissory notes by means of endorsement in the bank. Art. 716(2) which relates to negotiable instruments says that the debtor "shall only pay against delivery of the instrument."

This Art. shows that, any one who has to pay a debt arising from a promissory note should pay only after receiving the instrument. The promissory note takes the place of a receipt. The defense counsel has cited Art. 716(3) in his defense. This Art. says that "Except in cases of fraud or gross negligence on his part the debtor shall be released by payment at maturity to the person to whom the instrument gives the capacity of creditor, notwithstanding that the said person is not the holder of the right." We should see to whom it is referring when it says: "to whom the instrument gives the capacity of creditor, notwithstanding that the said person is not the holder of the right". It must be referring to the holder of the instrument. When a holder of a negotiable instrument, even if he is not the holder of a right, demands payment from the debtor by presenting the instrument, the debtor is released from his obligation unless there is fraud or gross
negligence committed on his part. However, in this case defendants paid not to the holder of the promissory notes but to Ato Abdel Kerim Ahmed who had no possession of the instrument as he had already transferred them to the bank. He cannot therefore be called the holder according to the Commercial Code. Since the fact that Ato Abdel Kerim had duly transferred the promissory notes and that the bank had paid their worth in return has not been denied, the bank is deemed to be the holder of the right.

We have been able to understand from the circumstances that, it was to defraud the bank that Ato Abdel Kerim Ahmed gave the receipt to the defendants. We hold that plaintiff's right as a third party in good faith is not affected by the fact of payment by Ato Abdel Kerim Ahmed to defendants, as the promissory notes having been duly transferred created a new obligation. It is at his own risk that debtor pays before or on maturity without taking hold of the promissory notes. Defendants should have known that the promissory notes could have been transferred to third parties and that those third parties would be the holders of such a right. They would have known, had they received the promissory notes on payment. Since upon endorsement, Ato Abdel Kerim Ahmed should have put down the date on the instrument as required by Art. 748 of the Commercial Code, the defense's argument cannot stand.

We do not find it necessary to write a dictum on Art. 776(2), cited by the defense as it is not cited in Art. 825 declaring it applicable to promissory notes.

Since the second issue comprises three points, one must treat them in turn.
a) Eventhough Art. 774 requires that the holder should present the promissory notes for payment on the day on which it is payable; this article is not cited in Art. 825 the provision relating to promissory notes, hence not applying to promissory notes, no dictum is hereby called forth.
b) Defendants have argued that, as plaintiff did not draw up a protest as required by Art. 781(4) of the Commercial Code on the days of payment indicated on the promissory notes, the action is inadmissible. The sub-article says that protest for non-payment of promissory notes payable on a fixed day or within a fixed period after sight shall be drawn on the two working days, following the day of payment. However, we have found, plaintiffs argument which says that, since defendants have signed not to require that a protest be drawn up, plaintiff need not comply with this rule by virtue of Art. 789(1) of the Commercial Code, as valid. Since defendants (drawer) have entered an obligation in writing not to require publicity protest and as plaintiff need not draw up the protest by virtue of Art. $789(1)$, defendants argument which states that plaintiff's rights are extinguished for not showing up a protest as required by Art. $781(4)$ is consequently dismissed.
c) Let us now examine the final legal argument which says that plawiff loses his right as he had not notified defendants that the amount indicated in the promissory notes was not paid as required by Art. 788 of the Commercial Code. Art. 788 (1) says that "the holder shall give notice of non-acceptance or non-payent to his endorser and to the drawer within the four working days which follow the day of protest ..." Counsel for plaintiff in his reply asserted that eventhough the said Art. applies to promissory notes, Art. 825 (1) (c) says that the provisons relating to bills of exchange apply insofar as they are not inconsistent with the promissory notes. Moreover the provisions of Art. 788 may not apply if they are not consistent with the promissory note. Even though, the person who issued
the promissory note under his signature and the one who issued a bill of exchange are, for lack of amharic terminology given the same name ("awchi"), they are called "maker" and "drawer" respectively in the English. And their legal obligations differ. Art. 826(1) states that the person issuing the promissory note has the same duties as the one issuing a bill of exchange. And as Art. 796(1) states that except for the acceptor the holder shall lose his right against the endorsers, the drawer and other liable parties if the time limit fixed for payment expires. Therefore, plaintiff argues, that he does not lose his right.

The person who signs a promissory note is the one who promises to pay the sum. The person who signs a bill of exchange is the one who orders that a sum be paid. Although both are called "awchi" in the amharic they are termed "maker" and "drawer" in the English. Art $826(1)$ states that the drawer is obliged to fulfill his obligations in the same manner as the acceptor of a bill of exchange and the maker resembles the endorser of a promissory note. In this sense the "drawer" must be Ato Abdel Kerim Ahmed, the one who transferred it to the bank by means of endorsement. And since the defendants are considered like acceptors of a bill of exchange, Art. 796(1) applies to this case. According to Art. 796(1), if the day for drawing notice of acceptance or a protest for promissory note payable at a fixed date expires, except for the acceptor, the holder shall lose his right against the endorsers, drawer and other parties liable. Since defendants are considered as acceptors it means plaintiff has not lost the right to bring action.

Although, the Commercial Code Art. 796(1) does not say when notice of nonacceptance or non-payment should be made, according to Art. 788(1); a protest should be drawn within the following four working days. It is clear that the holder should give notice of non-acceptance or non-payment to the drawer and the endorser. Here another question arises. Here the notice which should be given in the following four working days is given under the instrument which requires publicity protest. In the promissory notes under consideration it is agreed that defendants will pay without this requirement of protest. However, it does not state as from when the notics is to be given. As Art. $789(1)$ says that "the holder, the endorser or the acceptor for honour may by the provision ..." sans protest "or any other similar words written on an instrument ard signed, release the holder from having a protest of non-acceptance or non-payment drawn up in order to exercise his right of recourse", and since plaintiff need not give notice to deferdants hi right to bring action stands inviolate. Even though both sides failed to cite Art. 789(2), we deem it to merit a legal dictum. Since sub-article 2 of this Art. says that "this provision shall not release the holder from presenting the bill within the prescribed time, nor from the notice he is required to give, the holder (plaintiff the bank) is required to present the promissory notes and to give notice despite defendants signature which accepts a condition to the contrary.

The promissory note worth $\$ 6,000$ (six thousand dollars) is payable on October $28 / 1967$ and the instruments worth $\$ 4,000$ (four thousand dollars) is payable on October 29/1967. Plaintiff received both instruments on August 3/1967. Plaintiff demanded payment from defendants on Hidar 28/1960 (February 8/1967). This shows that plaintiff demanded payment a month after the expiry of the preseribed period.

Although defendants have agrecd to pay "sans protest", since Art. 789(2) says that noitce should be given to defendant at a prescribed period without specifying the time for notice, plaintiff has delayed from giving notice. Though one can say plaintiff did not give notice in time, since $788(2)$ says "a person who does not
give notice within the prescribed time shall not forfeit his rights, the plaintiff has not lost his right to sue irrespective of whether he gave notice or not.

In accordance with above, we hold that defendants should pay the amount indicated in the promissory notes. The defendant in case No. 30-60, Ato Usman Zekir should pay the $\$ 6,000$ (six thousand dollars) and, the other defendant in case No. 34/60, Ato Abdela Mohammed Seif the $\$ 4,000$ (four thousannd dollars) in addition, they must pay court expenses, and costs incurred, and the legal interest of $9 \%$ until all the sum beginning from the time when the promissory notes should have began to be paid until the final day of payment.

We will decide on the costs when the bill of costs has been presented to the court in accordance with Art. 463 and 464 of the Civil Procedure Code.

This judgment has been delivered in open court, this day, the 27 th of Tikemt 1962, in the presence of both parties.

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## HIGH COURT

## Addis Ababa, Commercial Division.

Judges:
Ato Negussie Fitawake
Ato Mohammed Berhan Nurhussen
Ato Tibebu Abraham

## CHARTERED BANK OF LONDON v MAISON F. LIVIERATO ETHIOPIA Ltd.

Civil Case No. 1995/59
Civil Procedure-withdrawal from a suit with court's permission-costs-Arts. 278,279 Civ Pro. C.

The Applicant instituted a suit against the Respondent, in the High Court. The suit was appealed to the Supreme Court and then to the Chilot which remanded the case to the High Court. When the High Court granted the Applicant's request to withdraw from the suit and dismissed the suit, the Respondent field an application requesting the court to order the applicant to refund him the cost, which he has incurred as a result of the litigation.

Held: Respondent's application was rejected.
(1) If a plaintiff withdraws from a suit with the court's permission, he does not have to pay costs at the time of the withdrawal of the suit.
(2) The plaintiff would have to pay costs when he institutes a fresh suit.

## DECREE

The reasons for the present decision will be stated hereunder. The counsel for the Respondent presented an application to this court on June 29, 1970 (G. C.). In the application it is stated that the Applicant, the Chartered Bank of London, brought a suit, file No. 1225/59, against the Respondent. The case after being instituted in the first instance, in the High Court, and after a recourse to Supreme Court reached His Imperial Majesty's Chilot. The case after revision in the Chilot was remanded to the High Court. When the High Court was about to finally dispose of the case, the Applicant requested the Court to withdraw from the suit. Upon the request of the Applicant the Court dismissed the suit. The Respondent in his application points out that he has incurred costs amounting to Eth. $\$ 16,500$ (sixteen thousand and five hundred Ethiopian dollars) because of the present dispute. The Respondent requests the Court to pass a decree which would entitle him to the said costs from the Applicant.

The counsel for the Applicant presented his contention to the claim made-by the Respondent on July 15, 1970 (G. C.). In the contention the Applicant stated that the Bank petitioned the High Court in 1967 (G. C.) relying on good fatth and valid evidence to declare the Respondent bankrupt by law. But, the Respond-
ent through various types of dilatory tactics caused the suit to linger in the different courts for 24 months. Finally, when the case was remanded to the High Court, after a lapse of 34 months, the Applicant felt that the purpose for which the petition was submitted cannot be realized. As a result, on the basis of Art. 278 of the Civil Pro. C, the Applicant petitioned the court to permit him to withdraw from the suit. Pursuant to the application, the court dismissed the case. Since the Respondent did not object to the dismissal of the suit he did not request that he be paid costs of suit and lawyer's fee the applicant argued that the application of the Respondent for payment of costs incurred by him is groundless.

The argaments of both sides are as stated above. Now, the issue that has to be decided in this case is whether a party who has been granted the permission to withdraw from a suit by this Court should pay costs to the other party. Art. 278 (2) (b) of the Civil Pro. C. states, where the court is satisfied "that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matier of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim, with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.", The Code in Art. 279 (1) further provides "Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in Art. 278 (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim." If a party withdraws from a suit without the permission of the court he will be liable for costs as the court may order, pursuant to Art. 279 of the Code. However, Art. 278 of the Code does not say that costs shall be awarded to the other party where the plaintiff withdraws from a suit with the permission of the court. Now what we have to consider in this case is that where a plaintiff withdraws from a suit pursuant to Art. 278, upon the permission of the Court, does he have the liberty to institute a fresh suit in respect of the subject-matter of such suit. If a plaintiff is given such right should a defendant also be awarded costs where he has incurred expenses from the institution of the suit until the time of withdrawal by a plaintiff?

The answer to this question seems to depend on the close examination of the phrase " . . . on such terms as it thinks fit, . . . " stipulated in Art. 278 (2) (b) of the Civil Pro. C. It appears that such phrase is not a precondition for withdrawal from a suit. This can be observed from the previous, ". . it, may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or to abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim." The rights of the defendant under Art. 279 of the Code are, the court shall award him costs and the plaintiff shall not bring a fresh suit on the same subject-matter. However, when the court grants to the plaintiff the permission to withdraw, his righis to be awarded costs and institute a fresh suit are protected. The right to institute a fresh suit is embodied in the provisions of Art. 278 of the Code. As to the phrase ". . . on such terms as it thinks fit . . "we have to construe it to include the power to order costs by the court. It would not be in the interest of justice to deprive the defendant of the tight to be awarded costs, while we respect and enforce the right of the plaintiff to bring a fresh suit. However, we have to carefully examine the situations as to when the court may award costs to the defendant. On the basis of Art. 278 one may ask as to when the court may award costs to the defendant. Should it be when the plaintiff withdraws from the suit
or at the time when the plaintiff institutes a fresh suit in respect of the subjectmatter of the suit? If we choose the latter alternative, then the awarding of costs to the defendant may not be realized unless a fresh suit is instituted by the plaintiff. However, if a fresh suit is not brought by the plaintiff, the defendant will not incur costs. On the other hand, if costs are to be awarded at the time when the plaintiff withdraws from a suit, the whole purpose of granting permission to the plaintiff to withdraw from a suit by the court will be defeated. In principle, the question of costs should be decided only after a final judgment has been rendered by the court, and should be levied from the unsuccessful party. But in the present case there is neither a successful party nor a one that has lost.

This case suffered delay as a result of an appeal made by the defendant on erroneous grounds. Furthermore, the appellate court without a proper examination of the grounds of appeal decided in favour of the defendant by a majority vote. Thereafter the plaintiff submitted a petition to His Imperial Majesty's Chilot for revision of the case. The case was remanded to this court from the Chilot. However, the plaintiff was tired of the prolonged litigation concerning the question of bankruptcy that he applied to this Court to withdraw from the suit. The plaintiff requested this court to grant him permission to withdraw from the suit on the basis of Art. 278, without prejudicing his right to institute a fresh suit. This court, after examining the adequacy of the grounds for withdrawal permitted the plaintiff to withdraw without prejudice to his right to institute a fresh suit in respect of the subject-matter of the suit. Since the withdrawal of the plaintiff is advantageous to the defendant because the action brought against him would be discontinued, it would be just fair to exonerate the plaintiff from payment of the costs to the defendant as this would make the two parties on equal footing. The question of costs can be raised only when a fresh suit is instituted by the plaintiff in respect of the subject matter of the suit. It may be argued that the right of a plaintiff to withdraw from a suit at any time he wishes would be prejudicial to a defendant. So, it may be further argued, why should we not award the defendant costs when the plaintiff withdraws even with permission from the court in order to compensate the defendant for the costs he incurred as a result of the litigation. This argument is untenable because, when the plaintiff requested the court to grant him permission to withdraw from the suit, this court before granting the permission examined whether there were sufficient grounds for allowing withdrawal. This court found that there was adequate reason to permit the plaintiff to withdraw, implying that the rights of the defendant have not been infringed. Thus, since the plaintiff has not instituted a fresh suit in respect of the subject-matter of the suit from which he withdrew, we have rejected the claim of the defendant to obtain costs from the plaintiff.

This opinion has been delivered, this 7th day of April, 1971 (G. C.).

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# LEGAL ETHICS 

## (Englih Summary)

by Teferi Berhane
The author deplores that by there are no recognized rules for the professional behaviour of lawyers in Ethiopia. He also regrets the non-existence of bar associations like those existing in other countries. Being a practitioner himself he discusses the problems of lawyers and the legal profession in Ethiopia.

He strongly advocates the promulgation of rules for professional behaviour and makes suggestions as to their content. He also urges the formation of bar associations which, in his opinion, should be modelled with regard to foreign experiences.




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159. Id. İ: XI.


















































# "DESIRE," "KNOWLEDGE OF CERTAINTY," AND DOLUS EVENTUALIS: Intention Under the Ethiopian Penal Code <br> by Ronald Sklar* 

Within its description of criminal "guilt" or "fault"" the 1957 Ethiopian Penal Code defines two mental elements, intention and negligence. ${ }^{1}$ The prosecution must prove one of these two mental elements existed in the mind of an individual charged with an offence under the Code before a court may punish the individual. ${ }^{2}$ When neither intention nor negligence is proved, the individual's act and any resultant harm, such as another person's death or the destruction of property, are an "accident"3 and civil liability rather than criminal liability is the only possible legal consequence. ${ }^{4}$

This requirement of a guilty mind is central to the 1957 Ethiopian Penal Code, ${ }^{5}$ to the European codes that served as its models, ${ }^{6}$ and is also "in conformity with the tradition of the Fetha Nagast." ${ }^{7}$ It marks Ethiopia's penal law off from

* Associate Professor of Law, Haile Sellassic I University, Faculty of Law. The writer wishes to express his thanks to Mr. Williarn Ewing, formerly a colleaguc on the Faculty of Law and now practicing law in Philadelphia, iPennsylvania, for his valuable suggestions in the writing of this articie.

1. Pen. C., Arts, 57, 58 and 59. Art. 23 (2) refers to this guilt or fault as the "moral ingredient" of the criminal offence.
2. Pen. C., Art. 57: "(1) No one can be punished for an offence unless he has been found guilty thereof under the law.
"A person is guilty if, being responsible for his acts, he commits an offence either intentionally or by negligence.
"(2) No one can be convicted under criminal law for an act penalised by the law if it was performed or occurred without there being any guilt on his part, . . "
3. Pen. C., Art. 57 (2).
4. Liability under the Civil Code often is imposed for damage caused without any proof of fault. Important instances of this are found in the Title on "Extra-Contractual Liability and Unlawful Enrichment," and include Art. 2069, liability for dangerous activities; Art. 2071, liability for animals; Art. 2081, liability for machines and motor vehicles; and Art. 2085, liability for manufactured goods. For the case of liability without fault in civil trespass actions, see the quote from the Atsede Habte Sellassie case, cited below at note 37.
5. J. Graven, "The Penal Code of the Empire of Ethiopia," J. Eth. L., vol. 1 (1964), p. 284. See also the quote from the Expose des Motifs, quoted below at note 75.
6. See, e.g., 1930 Italian Penal Code, Arts. 42, 45, translated (into French) in Les Codes Pénaux Europeans (Paris, Le Centre Français de droit comparé), vol. 2, pp. 880, 881; 1942 Swiss Penal Code, Art. 18 (3rd ed., Panchaud, Lausanne, Librairie Payot, 1967); P. Bouzat \& J. Pinatel, Traité de Droit Pénal et de Criminologie (Paris, Librairie Dalloz, 1963), vol. 1, pp. 181, 187.
7. Exposé des Motifs to Art. 23, quoted in P. Graven, An Introduction to Ethiopian Penal Law (Arts. 1-84 Penal Code) (Addis Ababa, Faculty of Law, 1965), p. 59. The drafter's statement is quoted in its entirety below at note 75 .
Support for the drafter's view is contained in such passages as the following on arson from Chapter 50, Scction 6, of the Fetha Nagast:
"One who puts fire to a city or to the countryside with the purpose of causing damage to its inhabitants shall be burned. . . If it is known that a certain person has burned a dwelling place knowingly and voluntarily, he shall be punished. If someone burns a ficld
the penal law of some western countries, most notably England and the United States, where, for claimed reasons of protecting the public from certain kinds of harm, acts causing or threatening those harms are liable to punishment in the absence of a guilty mind. ${ }^{8}$

Of these two mental elements required for criminal liability, intention is the more important in the Penal Code if only because "a person who intentionally commits an offence is always liable to punishment," whereas the person who negli-


#### Abstract

entirely, and the fire burns the houses around it, the one to burn first has no fault. If one puts fire to his fields, and it spreads and burns the harvest of his neighbour, they shall examine whether he was as carefuil as possible lest the first spread to other ptaces. [If he was not carefuil he shall draw the judgment accorded to the negligent. But if he was careful in everything, and the wind overcame him and spread the fire, the person who lit the fire is not liable." The Fetha Nagast (The Law of the Kings) (Translation from the Ge'ez, Abba Paulos Tzadua, ed. by P. Strauss, Addis Ababa, Faculty of Law, 1968), pp. 305-306 (brackets in original).


8. An American writer has described this phenomenon, what he calls "public welfare offences," as follows:
". . We are witnessing today a steadily growing stream of offences punishable without any criminal intent [or negligence] whatsoever. Convictions may be had for the sales of adulterated or impure food, violations of the liquor laws, infractions of antinarcotic acts, and many other offences based upon conduct alone without regard to the mind or intent of the actor.. All criminal law is a compromise between two fundamentally conflicting interests, that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference. We are thinking today more of the protection of sociai and public interests; . . . As a direct result of this new emphasis upon public and social, as contrasted with individual interests, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt.. [The new emphasis being laid upon the protection of social interests fostered the growth of a specialized type of regulatory offence involving a social injury so direct and widespread and a penalty so light [usually only a fine, sometimes a short term of imprisonment] that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent," F. Sayre, "Public Welfare Offences," Columbia L. Rev., vol. 33 (1933), pp. 55, 68.
The Ethiopian Penal Code, it can be said, has continued to "think more" of the protection of the interests of the individual. It requires a "guilty mind" even for Petty Offences (see Art. 697), which roughly correspond to the "regulatory offences" described above by Sayre. The phenomenon of the "public welfare offence," said to be based upon "the growing conplexities of twentieth century life [which demand! an increasing social regulation" (id., p. 68), has been attacked by many on the basic ground that it does not achieve its purported goal, that of deterring through the threat of criminal sanctions these "social injuries." The threat of slight criminal punisiment, it is argued, at least in the case of the legitimate businessman to whom many of these regulatory offences are directed, adds little by way of deterrence to the already existing controls, e.g., the possibility of civil actions for damages, the risk of loss of business and goodwill following upon a publicized instance of inefficiency, and the business' own pride in its product. See e.g., J. Hall, General Principles of Criminal Law (2d ed., Indianapolis, Bobbs-Merriil Co., Inc., 1960), pp. 346-47. And to the extent a criminal sanction might deter such offences, it is further argued that the punishment of the morally innocent "contributes to the dilution of the criminal law's moral impact. The ends of the criminal sanction are disserved if the notion becomes widespread that being convicted of a crime is no worse than coming down with a bad cold." H. Packer, The Limits of the Criminal Sanction (Stanford, Stanford University Press, 1968), p. 261. As this last quote suggests, the question ultimately boils down to one of selecting what purpose of the criminal law we wish to promote, its "expression of a community's moral indignation" or its "social aims and effects in protecting society and reforming the criminal." H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (Oxford, Clarendon Press, 1968), pp. 176-77.
gently commits an offence is "not punishable unless the law makes specific provision to this effect." This means in the case of negligence that "the word 'negligence' must be used someplace in a statute if negligent offences are to be punished under it', ${ }^{10}$ something occurring infrequently in the Code and generally only in statutes dealing with actual or threatened harm of a quite substantial nature. ${ }^{11}$ It also means that on the relatively few occasions where a statute fails to specify whether
9. Pen. C., Arts. 58 (2), 59 (2); Graven, work cited above at note 7, pp. 158, 161. Liability for an intentional offence is excluded of course "in cases of justification or excuse expressly provided by law (Art. 64-78)." Art. 58 (2).
10. P. Strauss, "On Interpreting the Ethiopian Penal Code," J. Eth. L., vol. 5 (1968), p. 396. The very opposite rule obtains under the Code of Petty Offences. There it is presamed that negligence is punishable under a statute unless that statute expressly excludes negligence from its coverage. Art. 697 (2). This reversal of the rule in the Penal Code is obviously inspired by the same thinking that in Anglo-American countries leads to criminal liability without any fault whatsoever. See above at note 8 .
11. E. g., negligent homicide (Art. 526), negligent bodily injury (Art. 543), negligent arson (Art. 492), negligent "economic treason" (Art. 263 (2)), negligent spread or transmitting of communicable diseases (Art. 503 (3)), negligent manufacture or sale of food unfit for human consumption (Art. $511(3)$ ).
The case for thus limiting the scope of negligent offences is that negligence involves much less moral guilt than does intention (see discussion below at pages 386-388) and is less susceptible to the deterrent effect of threatened punishment. The second point seems plain enough, but there is considerable controversy over how much less susceptible negligence is to the operation of deterrence. There is, in fact, a great deal of heated controversy over how effective the threat of criminal punishment is in deterring any undesirable conduct, with the battleground almost entirely the realm of theory. "It is a deplorable fact," the Norwegian jurist, Johannes Andenaes, has written, "that practically no empirical research is being carried out on the subject. In both current criminological debates and the literature of criminology, statements about general prevention are often dogmatic and cmotional." J. Andenaes, "The General Preventive Effects of Punishment," Univ. Pennsylvania L. Rev., vol. 114 (1966), p. 953. One reason for this is the number of different factors which influence the efficacy of punishment as a deterrent: the nature of the offence involved, the known effectiveness of the law enforcement agencies (j. e., the "risk of detection and apprehension"), the extent to which the prohibitions and the impositions of punishment are known by the persons to whom they are directed, and the differences that exist between persons, to name perhaps the most important. Id., pp. 957-58, 960-64, 970. Yet to the extent the criminal sanction deters based upon the desire of persons to avoid punishment, it operates on the principle that men are rational, "that a potential offender weighs the advantage of his course of conduct against the evil of the sanction, and refrains on grounds of self-interest." Hall, work cited above at note 8, p. 137; and see Andenaes, work cited above, po. 950-51; J. Michael \& H. Wechsler, Criminal Law and Its Administration (Chicago, The Foundation Press, Inc., 1940), pp. 12-13. The negligent actor, it is submitted, is much less likely to engage in this kind of "weighing" process than the intentional actor. In one form of negligente, "advertent negligence," he foresees the possibility of harm resulting from his action and thus may weigh this possibility against the object of his conduct. Yet, since the essence of his negligence is in not believing the harm will occur, the weight given to this possibility and to the further fear of being punished for causing that harm has to be minimal. In the other form of negligence, "inadvertent negligence," the actor is not even aware of the possibility of the harm occurring. The fear of being punished can hardly play any role at all in the thinking of such an actor except, perhaps, where he has been punished once before for inadvertently causing harm, to make him more careful in the future. Compare in this connection the views of $\mathbf{H}$. Wechsler and J. Michael, "A Rationale on the Law of Homicide," Columbia L. Rev., voI, 37 (1937), pp. 749-51 and G. Williams, Criminal Law: The General Part (2nd ed., London, Stevens \& Sons, Ltd., 1961), pp. 123-24, with the contrary view of Hall, work cited above at note 8, pp. 13741.
intention or negligence is needed, ${ }^{12}$ a person can be punished under that statute only if he acted intentionally. ${ }^{13}$

The present article examines and seeks to explain intention. As will be seen shortly, the Penal Code recognizes not one but three separate states of mind under intention. They are "desire," "knowledge of certainty or near certainty," and dolus eventualis (also called "indirect intention" ${ }^{14}$ ). The first two are found in Art. 58 (1), first paragraph of the Penal Code, and will be considered in Part I of this article. Dolus eventualis is found in Art. 58 (1), second paragraph, and will be considered in Part II.

Part II dealing with dolus eventualis will be considerably longer, first, because dolus eventualis, unlike the two states of mind considered in Part I, was unknown in Ethiopia prior to its introduction in the 1957 Penal Code and, second, because dolus eventualis, although declared a form of intention, has more in common with "advertent negligence" defined in Art. 59 (1) and hence needs careful delineation lest it be confused with this lower state of mind.

## "Desire."

This first kind of intention is the most familiar. The actor desires, that is, it is his conscious purpose in acting, ${ }^{15}$ to produce the particular resuit (e.g., somebody's death, some property's destruction) or to engage in the particular conduct (e.g., falsely executing a legal document, falsely testifying in court) forbidden by a
12. E.g., Art. 523: "Whosoever commits homicide .;" Art. 530 (1): "Whosocver performs an abortion on another,. . .;" Art. 557 (1): "Whosoever, contrary to law or without lawful order, arrests, confines or detains or otherwise restrains the frecdom of another, . . ." Art. 487 (1) (b): "Whosoever: . . (b) violates or profanes the resting place of a dead person,.
13. Graven, work cited above at note 7, p. 162. Though this rule of interpretation follows naturally enough from the requirement that the word "negligence" must appear in a statute in order for negligent offences to be punished under it, it would have avoided unnecessary confusion had the drafter, rather than leaving the matter to rules of interpretation, inserted the word "intentionally" or words of similar import in all statutes punishing only intentional action. Under Artictes tike Art. 523 , for instance, it is possible for a court to overlook the vital fact that it is applicable only to intentional homicide and by mistake apply it also to negligent homicide. Sce bejow at note 124 and accompanying text.
14. See Graven, id., at pp. 156, 157.
15. Modern psychology quite matter-of-factly informs us that unconscious urges, desires and purposes, as well as conscious oncs, can be responsible for our visible behaviour, but the penal law has as yet taken no account of this phenomenon in formulating its definition of intention. The law, in the words of Oliver W. Holmes, Jr., "does not attempt to see men as God sees them." O.W. Holmes, The Common Law (Boston, Little, Brown \& Co., 1881), p. 108. Glanville Williams adds: "Probably unconscious intention is to be ignored for legal purposes (1) because it is difficult to prove satisfactorily. (2) because we have little knowledge of how far the threat of a sanction can influence the unconscious." Williams, work cited above at note 11, p. 37. The unconscious is ignored only to the extent that a person is not punished for intention when an outwardly innocent act satisfies some criminal urge or desire (the soldier who faints or becomes genuinely hysterical because of a repressed wish to run away from the danger of battle is not punished for desertion even though his "neurotic symptom" in fact enables him to achieve his repressed criminal wish. Id., p. 37). The unconscious is of course not ignored, however, when outwardly criminal acts are produced by unconscious conditions which render the actor irresponsible under Arts. 48 or 49 of the Penal Code.
statute in the Penal Code. Thus, taking homicide as an example, there is intention for the purpose of Arts: 522 to 524 of the Code when the actor acts (shoots a gun, stabs with a knife, clubs with a stick, etc.) with the desire or conscious purpose of killing another person. There is intention under Art. 653, damage to property, when the actor acts with the desire or conscious purpose of damaging or destroying property belonging to another person. There is intention under Art. 447, false testimony, when the actor, testifying as a witness in a judicial or quasi-judicial proceeding, desires, that is, it is his conscious purpose, to make a false statement. The essence of this kind of intention, thus, is goal-directed behaviour.

For that major category of criminal offences such as homicide, property destruction, fraudulent misrepresentation, theft and the like where a specific result is included in the definition of the offence, care must be exercised in distinguishing between the desire to perform the act and the desire to cause the specific result. The first can often be present without the second, especially where homicide is is concerned. A person, for example, may. strike another a blow with his fist intentionally, that is, he desires to strike the blow. Should the person struck fall to the ground, hit his head and fracture his skull and die, it cannot be said that his death, the result required for homicide, was also desired. ${ }^{16}$

The basic distinction between intended acts and intended. results has not always been observed by Ethiopia's courts. For instance, in Public Prosecutor v. Assefa Bekele, decided by the Addis Ababa High Court in 1964 and reported in this Journal, ${ }^{17}$ a conviction for intentional homicide under Art. 523 was based only on testimony that the deceased, who had a prior injury on his head, ${ }^{18}$ had been seen chasing the accused, that the deceased then fell or was knocked down by the accused and that the accused then "hit [the] deceased repeatedly with his fist on the back of neck." Death resulted, according to the medical witness, from a combination of over-accumulation of blood in the brain, and tetanus. The court acknowledged that "the fight was only accidental and it [was] not proved that the defendant had any revengeful motives." ${ }^{19}$ lits finding of intentional homicide,
16. Williams offers this second example: "A motorist presses the accelerator of his car. He wishes to go faster, and his act is then intentional as to going faster. But if it should happen that through going faster he hits a pedestrian, it obviously cannot be deduced that his act is intentional as to this consequence. It is so only if he desired to hit the pedestrian. Otherwise his act is unintentional or accidental as to the impact." Williams, id., p. 35. Another example involving the same point in the context of property destruction is discussed below at note 34 and accompanying text.
17. Addis Ababa High Court, 1964, Crim. Case No. 87/57, J. Eth. L., vol. 5 (1968), p. 466.
18. There was no cvidence in the case connecting the accused with this earlier head injuryNeither eye-witness to the fight between the accused and the deceased testified to seeing how this earlicr injury was sustained. The doctor who performed the autopsy stated that it "could have been caused by a stone or a stick." Since it cannot be inferred that the accused caused this head injury, that injury can have no bearing upon the accused's intention.
19. The dispute between the accused and the deceased apparently concerned a new piece of cloth the deceased was selling, and the court was correct in holding that this was no motive for the accused to kill the deceased. The importance of lack of motive to the question of intention was stressed by the Supreme Imperial Court in the case of Public Prosecutor v. X, 1964, Crim. App. No. 8/57, translated in P. Strauss, Supplementary Materials on Penal Law (196768, unpublished, Library, Faculty of Law, Haile Sellassie I University) (unpaginated). In ordering the dismissal of a charge of attempt to kill, the court said: "Now, from the examination of the evidence produced by the prosecution, there is none which may show any homicidal intent, above all because the motive for which X might have fired shots at his wife [has] not been proved." (Emphasis by court.)
therefore, was erroneous. The proof showed only an intentionally administered beating and not desire on the part of the accused to cause the deceased's death. ${ }^{20}$

## "Knowledge of certainty or near certainty."

Intention can also exist when the actor is certain or nearly certain that circumstances exist which make his act criminal (a girl with whom he is having sexual intercourse is certainly or nearly certainly below the age of fifteen, testimony he is giving in court is certainly or nearly certainly false, etc.) or that a result forbidden by law will occur (a person is certain or nearly certain to die because of his act). This knowledge of certainty or near certainty "is considered equivalent" 21 to desire and it does not matter that the actor hoped that the circumstance did not exist or that the result would not occur.

A series of simple examples will help to explain this second kind of -intention. One, offered by Dr. P. Graven, is: "If A, with a view of hitting B, throws a stone through the window of B's bedroom, the two consequences he brings about (bodily injury and damage to property) must be regarded as having been intentionally produced." ${ }^{22}$ The bodily injury in Graven's example is what A "desired," and hence is intentionally produced on that ground. The breaking of the window, assuming A had seen that the window was closed, is the result A knows to be "certain," and hence is intentionally produced on that ground. The Norwegian jurist, Johannes Andenaes, offers this example: "A person who sets fire to his house in order to collect the insurance is an intentional murderer if he thought it certain or preponderantly probable ${ }^{23}$ that the tenant would burn to death. The fact that he may regret the death does not free him from full liability, since he foresaw what would occur as a result of his act." ${ }^{24}$ A third example can easily be imagined under Art. 594, sexual outrage on infants or young persons. A man has sexual intercourse with a girl below the age of fifteen. Because of her appearance or other facts he knows about her, he is certain or nearly certain she is below that age. This knowledge renders his violation of Art. 594 intentional. A last example can be offered in connection with Art. 649, damage to property of another caused by herds or flocks, A person knows his cattle have knocked down a wooden fence that stood between his property and the property of his neighbor, but out of laziness he does nothing about it, neither informing his neighbor nor reconstructing the fence. The next day bis cattle stray on to his neighbor's property. He is guilty
20. Strauss cites a number of cases decided under Art. 523 in which Ethiopian courts appear to have made this error. Strauss, work cited above at note 10, p. 396 , n. 10.
21. H. Silving, Constituent Elements of Crime (Springfield, Illinois, Charles C. Thomas, 1967) p. 222.
22. Graven, work cited above at note 7, p. 156.
23. Various phrases are used to indicate some point on the scale of probability close to certainty. This writer has used the term "nearly certain," The term Andenaes uses is "preponderantly probable." Williams uses the terms "substantially certain" in one place in his treatise and "such a high degree of probability that common sense would pronounce it certain" in another. Williams, work cited above at note 11, pp. 38, 40. All these seem to mean roughly the sarne, though Andenaes' term might fall slightly lower on the scale. The main point is not so much the phrase used, but rather the recognition that absolute certanty is such a rare phenomenon-perhaps, in the philosophical sense, an impossibility (id., p. 39)-that allowance must be made for a level of probability somewhat below absolute certainty.
24. J. Andenaes, The General Part of the Criminal Law of Norway (London, Sweet \& Maxwell, Ltd., 1965), p. 211.
of intentionally violating Art. 649. He did not desire his cattle to stray as they did, but he knew to the point of certainty or near certainty that with the fence gone, his cattle, as cattle are wont to do, would stray on to his neighbor's property.

It is of course possible that the person who throws a rock at another standing behind his bedroom window might miss everything, the window as well as his human target. Similarly, the man who sets fire to a house might not succeed in burning down the house, much less in causing a person's death inside the house, because the fire department arrives to put out the fire or because the fire goes out by itself. This uncertainty as to success existing at the time the act is committed does not prevent the secondary result, the breaking of the window or the death of the tenant, from being intended. The actor knows that should he succeed in achieving his desired objective, hitting his target with the rock or burning down the house, the secondary result will certainly or nearly certainly occur. This secondary result "is a necessary feature of the desired goal" and is held to be intended along with that goal. ${ }^{25}$

## Article 58 (1) first paragraph.

Common sense, the source of much of any country's sound laws, implies that no distinction be made for purposes of punishment between what a person desires to occur as a consequence of his voluntary action and what he knows is certain
25. The quoted phrase comes from this illuminating example offered by Andenaes: "A situation may be assumed where it is uncertain whether a result will cecur, but the actor knows that it will occur if he attains his goal. During an inflamed political situation there is a plan to derail a train in order to assassinate a prominent politician who is travelling on that train. The would-be assassin thinks it highly improbable that the plot will succeed at all, since he expects that the train crew will discover the attempt and prevent the accident. But he knows that if he succeeds, many other passengers will also be killed. In other words, this is a necessary feature of the desired goal. Here there is intent to kill not only the politician but also the other passengers." Id., p. 212. (Emphasis in text.)
If he did not succeed, the assassin in Andenaes' example would clearly be guilty of an attempt to kill the politician (Art. 27/522), assuming his acts had gone far enough towards his goal to constitute an attempt. The rock-thrower who missed everything would clearly be guilty of an attempt to injure the man standing behind the window (Arts. 27/538 or 27/539). The home-owner whose fire was put out or went out would clearly be guilty of an attempt to defraud his insurance company (Art. $27 / 659$ (a)). A further and more interesting question is whether there would also be attempts to kill the other passengers on the train with the politician, or to break the window, or to kill the tenant in the house; in other words, whether there can also be an attempt for those results the actor knows is certain or nearly certain to occur. The particular language used in Art. 27 and the ordinary uaderstanding of "attempt" suggest a negative answer. They suggest that the offence of attempt should be limited to the failure to achieve one's desired end and not applied to the failure to bring about foreseen, but not necessarily desired, secondary consequences. Art. 27 (1) refers to "pursuing" (Amharic: $P A+h \boldsymbol{\gamma}+\boldsymbol{A}$ French: "poursuivre") one's activity "to its end" (Amharic: Xih anarlitar French: "jusqu'au bout"). Foreseen secondary consequences are not, in the ordinary sense of the term, "pursued" by the actor. They "happen," and are not opposed by the actor, but in the course of "pursuing" another, primary, end. If such cases are to come under the offence of attempt, different language would have to be used in defining attempt, as, for example, was done in the American Model Penal Code's defnition of attempt. That definition, in addition to covering the normal case of desire, specifically includes the person who "does or omits to do anything ... with the belief it will cause such result without further conduct on his part." Model Penal Code, Proposed Official Draft, (American Law Institute, 1962), Sec. 5,01.
or nearly certain to occur. This is probably why both the continental European and Anglo-American systems of Penal Law treat these two states of mind under intention or some equivalent label, ${ }_{2}{ }^{26}$ often in the absence of statutes on the subject. ${ }^{27}$ It also means that the language chosen by a statutory provision to define intention should be deemed to include both of these states of mind unless that language clearly excludes one or the other from its coverage. ${ }^{28}$

The English version of Art. 58 (1), first paragraph, of the Ethiopian Penal Code reads: "A person intentionally commits an offence when he performs an unlawful and punishable act with full knowledge and intent." This definition admittedly says very little, either by way of inclusion or exclusion. Part of the trouble, the circularity of defining intention by the term "intent," can be ascribed to faulty translation. The French text of the Article reads "avec la conscience et la volonté," "with awareness and will. ${ }^{\prime 29}$ More basically, however, the fault lies in the drafting. The drafter borrowed the phrase "avec la conscience et la volonté" from Art. 18 of the Swiss Penal Code where it, in particular the psychic concept of "volonte" or "will," had over the years been interpreted by Swiss courts and theorists to include the two states of mind of desire and knowledge of certainty or near certainty. ${ }^{30}$ For Ethiopia, embarking on a modern and comprehensive Penal Code for the first time, ${ }^{31}$ a more explicit provision was needed, one in which the notion of what constitutes intention would not depend upon interpretation. Such a provision is Art. 16 of the German Draft Penal Code of 1962: 'A person acts intentionally when he is bent on [i.e. he desires to] materializing the facts of crime as described in a statute or when he knows or foresees as certain that he is materializing the facts of crime as described in a statute." ${ }^{32}$ The ambiguity of Art. 58 (1), first paragraph, poses no serious problem, however. Neither state of mind is excluded by that definition and, as pointed out in the preceding paragraph, both therefore, can be taken as included thereunder.
26. The American Model Penai Code, for instance, calls the first "purposely" and the second "knowingly." The American Model Penal Code, id., Sec. 2.02 (2) (a) and (b).
27. See, e.g., Andenaes, work cited above at note 24, pp. 209-12; Silving, work cited above at note 21, pp. 221-22; Williams, work cited above at note 11, pp. 34-36, 38-42; German Draft Penal Code E 1962, Art. 16, translated in The American Series of Foreign Penal Codes (G. Mueller, ed., South Hackensack, New Jersey, Fred B. Rothman \& Co., 1966), vol. 11, p. 30; The American Model Penal Code, work cited above at note 26.
28 Cf. Elsasser c. Procureur Général du Canton de Berne (Trib. féd., Switz., May 21, 1943), $J$. des trib. (Droit pénal), pp. 76-77.
 is closer in meaning to the French.
30. P. Logoz, Commentaire du Code Pénal Suisse: Partie Général Neuchatel, Editions Delachaux \& Niestlé, 1939), pp. 62-65, excerpts thereof translated in S. Lowenstein, Materials for the Study of the Penal Law of Ethiopia (Addis Ababa, Faculty of Law, 1965), p. 136; of. Elsasser c. Procurcur Général du Canton de Berne, cited above at note 28.
31. The 1930 Penal Code, as the drafter of the 1957 Code has observed, "did not suit modern requirements. It presented still too many vestiges of the ancient system which were both formalistic and rigid according to the ancient universal tradition. "It further lacked the "systematically [formulated] general rules which conform to the present day legislative technique "J. Graven, work cited above at note 5, pp. 275, 276.
32. The translation above is from Silving, work cited above at note 21, p. 222. To the best knowledge of the writer, this definition was recently enacted into law in Germany. The writer, however, did not have access to the new German Penal Code.

## The requirement of "awareness."

"Full knowledge" in Art. 58 (1), first paragraph ("awareness," i.e., "conscience," in the French text), refers to a basic principle repeated in Art. 76 of the Code, "mistake of fact." A person cannot commit homicide intentionally under the first paragraph of Art. 58 (1), if at the time of acting (e.g., shooting a rifle) he believes that his target is not a human being. He cannot commit the offence of sexual outrage on infants or young persons intentionally if he believes the girl with whom he is having sexual intercourse is above the age of fifteen. ${ }^{33}$ He cannot commit the offence of bigamy intentionally if when marrying for a second time he is not aware that his first wife is still alive and legally still married to him. He cannot commit the offence of aggravated damage to property intentionally if at the time of destroying a valuable original object of art belonging to another person (see Art. 654 (b) ) he thought that what be was destroying was only an inexpensive copy. ${ }^{34}$

Many such examples could be presented. The principle is a simple one: intention presupposes awareness. A person who is not aware he is shooting at a human being cannot thereby be seeking to kill that human being or know that his death is certain or nearly certain to occur. A person who marries for a second time without being aware his first wife is still alive and legally still married to him cannot thereby be seeking to have two wives at the same time or know that such a dual state of matrimony is certain or nearly certain to occur. Because the element of "awareness" is so implicity a part of intention, most definitions of intention in fact do not bother to state that awareness is necessary, as, for example, one sees in Art. 16 of the German Draft Penal Code quoted above.

The principle has especial application in Ethiopia to land offences since lack of awareness as to such matters as title and boundary lines is so widespread. The principle was correctly applied in Public Prosecutor v. Captain Kebede Tesema, a case involving Art. 652 , displacing and removal of boundary marks. ${ }^{35}$ The accused had been convicted in the Woreda Court. Although agreeing with the lower court that the punishable act of removing the boundary marks had been committed as charged, the Awraja Court reversed the conviction because the accused had "remov-
33. Because Art. 595 restricts the age of the minor to "from fifteen (per the Amharic; "more than fifteen," per the French and English) to less than eighteen," the accused who believes the girl is aged sixteen when in fact she is only aged fourteen does not violate Art. 595 because the girl is not between the ages of fifteen and eighteen and does not violate Art. 594 because as stated above he lacks awareness she was below fifteen. His criminal offence is "impossible attempt" (Art. 29) to violate Art. 595, for which, however, his punishment can equal that provided for Art. 595. See below at note 75 .
34. Since the last actor "intended" to destroy the property of another, he is criminally hiable under Art. 653, damage to property, as is provided by Art. 76 (2). His lack of awareness as to the value of the object, however, does prevent his conviction for aggravated damage to property. In effect, what we have here is the same as the distinction drawn before between the intention (i.e., desire) to perform the act and the intention to cause the specific result. The actor desires to destroy the property, and can be convicted for that desire and his act, but he does not desire to cause the specific result required for conviction under Art. 654 (b), the destruction of a valuable object of art. See above at page 377. Art. 76 (3) which tules out the defence of mistake of fact where there is "a mistake as to ... the object of the offence" is not applicable to a case where the object is a specific ingredient of the offence charged, as is so with aggravated damage to property under Art. 654 (b). See Graven, work cited above at note 7, pp. 232-33.
35. Addis Ababa High Court, 1968, Crim. Case No. 107/60 (unpublished).
ed the boundary marks not with the intention of committing an offence but in the belief that the land belongs to him." This decision was affirmed by the Addis Ababa High Court. ${ }^{36}$ In another case, Public Prosecutor v. Woz. Atsede Habte Sellassie, the Addis Ababa High Court wrote:
"To have a criminal case of trespass [Art. 649-651], there must be the intention of depriving a person of his property unlawfully with the knowledge that the land from which that person is deprived belongs to that person. If a person in the honest belief that a piece of land belongs to him, takes his cattle to graze on that land or cuts trees growing on that land, that does not amount to criminal trespass; such acts may amount to civil trespass for which a civil action for damages may lie." ${ }^{37}$

## Awareness of unlawfulness.

Does the requirement of "awareness" just discussed include the actor's awareness that his act is unlawful? Can the actor, to phrase the question another way, be held guilty of committing an intentional offence if he was unaware at the time he acted that his act was unlawful?

Awareness of the factual circumstances which make an act unlawful, which is needed for liability for intention, is not the same as awareness that the act is unlawful. The question under the former, to refer to an earlier example, is whether the actor is aware that the girl with whom he is having sexual intercourse is below the age of fifteen; the question under the latter is whether the actor, who knows that the girl is below the age of fifteen, also knows that it is against the law to have consensual sexual intercourse with a girl below the age of fifteen. ${ }^{38}$

For many offences within the Ethiopian Penal Code, the question of knowledge of unlawfulness can hardly arise. It would be nearly impossible for any sane person in Ethiopia to claim that he was unaware that it is unlawful to commit homicide or theft or robbery or to burn down another person's property. ${ }^{39}$ Society judges these
36. The High Court, though affirming the Awraja Court's decision, observed that the real issue in the case was one of who lawfully possessed the land in question, an issue that should have been tried in the Civil, not the Criminal, courts.
37. Addis Ababa High Court, 1959, Crim. App. No. 618/51, translated in Lowenstein, work cited above at note 30 , p. 32-33.
38. There is an important distinction between being aware of the unlawfulness of one's act, i.e., that it is legally prohibited, and being aware of the reprehensibility of one's act. A person may realize that his act is reprehensible according to some internally applied standard of good behaviour yet be unaware that that act is viclative of some penal provision, since not everything that it wrong or bad is legally prohibited. In those codes that deal with the matter, including apparently Art. 78 of the Ethiopian Penal Code (see Graven, work cited above note 7, pp. 154-55), the relevant awareness pertains to the existence of the legai prohibition, although quite clearly the more reprehensible the act is to the average man, the easter it is to infer that the act is also legally prohibited and that the actor was aware of this. See below at notes 39 and 40, and accompanying text. For a careful discussion of this difficult issue that "few Codes settle specifically" (id., p. 154), see P. Ryu \& H. Silving, "Error Juris: A Comparative Study," Univ. Chicago L. Rev., vol. 24 (1957), at pages 458-66.
39. In fact, in the one situation in the Penal Code where awareness of unlawfulness is made a requirement for conviction, the case of a subordinate who has carried out an illegal order from his superior (Art. 70), the Code in effect creates a presumption that the subordinate was aware of the unlawfuness of the order, if the order was to commit "homicide, arson or any other grave offence against persons or property, essential public interests or international law."
and many other acts to be immoral, apart from their being prohibited by penal law, and we can and do expect that a sane offender is aware of these community judgments of morality and hence equally aware that his act is immoral. ${ }^{40}$

However, it is quite possible for a sane person in Ethiopia to be unaware that it is a crime to have consensual sexual intercourse with a female below the age of fifteen (Art. 594) or between the ages of fifteen and eighteen (Art. 595), or that it is a crime to fail to register the birth of an infant (Art. 623), or that it is a crime, under specified circumstances, to fail to lend aid to another person "in imminent and grave peril of his life, person or health" (Art. 547), or even that it is a crime to contract a second marriage before one's first marriage has been legally dissolved (Art. 616). These and many other prohibitions can be traced to no clear society-wide judgment of immorality of which the offender ought to be aware. Some of these forms of conduct may even be entirely in agreement with the prevailing moral norms of some segments of Ethiopian society. It is with respect to these offences, as well as others like the offences in the Code of Petty Offences, which are on the outer edges of criminality, that the claim of lack of awareness of unlawfulness causes the greatest difficulty.

Legal opinion is seriously divided on the question. On the one hand, it cannot be denied that the chief aim of any penal code, "the prevention of offences by giving due notice of the offences and penalties prescribed by law" (Art. I of the Ethiopian Penal Code), cannot be achieved with the offender who is honestly unaware of the existence of the offence and the penalty. On the other hand, there is the view of the American jurist and legal philosopher, Oliver W. Holmes, Jr, that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey" ${ }^{\prime 4}$ and the further argument that the claim of ignorance of the law could too easily be made while the honesty of the claim "could scarcely be determined by any evidence accessible to others." ${ }^{42}$ In
40. H. Hart, "The Aims of the Criminal Law," Law \& Contemporary Problems, vol. 23 (1958), pp. 413, 419. And see discussion above at note 38 .
41. The full passage is: "Public policy sacrifices the individual to the general good. .. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scale." Holmes, work cited above at note 15, p. 48. Holmes' wiew has come under increasing attack from modern American theorists on the ground that punishing those who are ignorant of legal provisions not contrary to the community's moral values is punishing persons who are not in any sense of the term blameworthy. See, e.g., Hart, work cited above at note 40 , pp. 418-22; Packer, work cited above at note 8, pp. 129-30. It has also been argued forcefully that such punishment imposes an unreasonable restraint upon freedom of action and is "offensive to human dignity." "Subjection of man to sanctions under a law which is unknown and unknowable to him and which he has no opportunity to accept or reject expresses the view that he is a mere object of the Iaw." Ryu \& Silving, work cited above at note 38, p. 471. The question is complicated, however, by the considerable variety of ofiences to which the claim of ignorance can be made and the considerable variety of reasons for such ignorance the accused can offer, both variables affecting the acceptability of the claim. This aspect of the problem is treated at length by Hall, work cited above at note 8, pp. 386-414.
42. J. Austin, Lectures on Jurisprudence (4th ed., 1879), vol. 1, p. 498, quoted in Hall, work cited above at note 8, p. 378. Holmes, however, "doubted whether a man's knowledge of the law is any harder to investigate than many questions which arc gone into. The diffculty, such as it is, would be met by throwing the burden of proving ignorance on the law-breaker," Hoimes, work cited above at note 15 , p. 48. See the discussion in Hall, id., pp. 378-83.
accordance with these and similar policy-type arguments, the Anglo-American Penal Law system has adhered to the principle, ignorantia legis neminem excusat, "ignorance of the law excuses no man." In this view, which has the support in Europe of France, ${ }^{43}$ a person can be punished for committing an offence intentionally although he was unaware that his act was or might have been unlawful. All the actor need know is the factual circumstances that objectively make his act a crime.

The opposite view is maintained in Germany. Decisive weight is accorded there to the factor of blameworthiness, more specifically, to its absence from the case of the actor who is honestly ignorant of the unlawfulness of his act ${ }^{44}$ In the leading German court decision on the subject, ${ }^{45}$ a lawyer was prosecuted for the crime of "Coercion" (Art. 554 of the Ethiopian Penal Code is the equivalent offence) in that he had pressured his client to make an advance payment of his fees by threatening on the eve of the trial to withdraw from the case if she did not pay. His paradoxical defence was that he did not know his act was unlawful. The German Federal Supreme Court, observing that "penalty presupposes guilt" and "guilt is blameworthiness," ruled that awareness of unlawfulness is a prerequisite to a finding of guilt. The actor is liable to punishment only if he was either aware his act was unlawful, or if he, as perhaps the lawyer-accused could have done, "with a requisite searching of his conscience" could have been aware his act was unlawful. Only then "can blame attach." 46

The middle position between these two views is taken by Switzerland ${ }^{47}$ and in Arts. 78 of the Ethiopian Penal Code and 700 of the Code of Petty Offences ${ }^{48}$

[^25]Art. 78 (1) states the basic principle, similar to the Anglo-American approach, that "Ignorance of the law is no defence." It then goes on to say, however, that the person "who in good faith believed he had a right to act and had definite and adequate reasons for holding this erroneous belief," though remaining liable to punishment for acting intentionally, "shall" be granted a reduction of his punishment under Art. 185 (i.c., "without restriction"). ${ }^{49}$ Complete exemption of punishment may be granted 'in exceptional cases of absolute and justifiable ignorance and good faith and where criminal intent is not apparent." ${ }^{50}$

The competing realities that moved the Codification Commission to adopt this compromise are recorded by Dr. Graven:
". . it would be unrealistic to lay down a conclusive presumption that all citizens know the law while the law so far has been almost entirely unwritten [one might add to this the fact of "the complexities of modern life and consequent increase in the volume of laws," noted in the Emperor's Preface to the 1957 Penal Code] as it would in all respects be detrimental to the interests of a nation in full development always to let go free persons who do not take 'due notice of the offences and penalties prescribed by law'. . . ." ${ }^{51}$
This compromise solution, as Graven also notes, had been adopted earlier in the 1930 Penal Code: "The man who offends after learning and knowing the law of the Government, and after reading the law or hearing the proclamation with his own ears, is a wilful offender and shall receive full punishment" (Art. 12), while those who were unaware of the law through some form of excusable ignorance (the stranger; "the countryman . who has not seen with his own eyes how the [law] work is done but only hears by report the law and ordinance of the Government;" "the poor man who is unable to attend and hear what goes on in any kind of court and is unable to know the law;" "the woman who has not learned the law and ordinances and does not go out to the courts;" etc.) were entitled to have from one-tenth to nine-tenths of their punishment remitted (Arts. 13 to 21). Though the 1930 Code provisions and Art. 78 of the 1957 Code do not appear to be completely parallel (e.g., "definite and adequate reasons" under Art. 78 implies more than ignorance due to one's poverty, local or sex), yet it seems likely that the statutes specified in the 1930 Code will continue to be taken into account under Art. 78. A 1961 decision of the Eritrean High Court in fact did just that. It took

[^26]into account, among other things, "the extreme poverty of the accused [and] the fact that he is an ignorant shepard" in reducing the accused's punishment for failure to pay the Federal Salt Tax under the relevant Proclamation and Amending Decree ${ }^{52}$ to that of a fine of $\$ 15$ or, in default of payment, imprisonment for seven days. ${ }^{53}$

## II -

Introduction to the concept of dolus eventualis.
Art. 58 (1) describes a third state of mind included under "intention." It is best known by its Latin name, dolus eventualis, which literally means "intent directed toward a possible event." Dolus eventualis is defined in the second paragraph of Art. 58 (1) as existing "when the offender being aware that his act may cause illegal and punishable consequences, commits the act regardless that such consequences may follow." Despite its Latin name, the concept is German in origin ${ }^{54}$ and accordingly has received its most detailed treatment from German theorists. ${ }^{55}$ It is applied throughout continental Europe and in many countries, including Ethiopia, which have borrowed their penal law from continental Europe. ${ }^{56}$ It is not recognized as such in the other major penal law system, the Anglo-American. ${ }^{57}$ As already noted at the outset of this article, it is entirely new to Ethiopia and, if not delineated with care, can be confused with advertent negligence defined in Art. 59 (1).

The justification for the classification of dolus eventualis under intention, rather than under negligence as could have been done, ${ }^{58}$ must be the moral reprehensibility
52. By virtue of Art. 3 of the 1957 Penal Code, "special laws of a penal nature," which includes taxing provisions imposing a penalty upon violators (Graven, p. 12), are subject to the general principles of the Code (which would include Art. 78), "except as otherwise expressly provided [in such special law]."
53. The Crown y. Faid Mahmoud Abdel Kader, Federal High Court of Eritrea, 1961, Crim. Case No. $710 / 53$, translated in Lowenstein, work cited above at note 30, p. 239. For further treatment of Art. 78, see Graven, work cited above at note 7, pp. 235-39, in particular 237-39.
54. The term was coined by the German theorist, von Weber, in the nineteenth century. As a state of mind it was recognized earlier under the ferms dolus indirectus and dolus indeterminatus by the German theorists J.S.F. Bohmer and Paul Feuerbach. K. Warnke, Die Entstehung und Behandlung der Dolusatten (The Origin and the Treatment of the kinds of Dolus) (1965, unpublished thesis, Berlin) pp. 34-37. This thesis, which provided the writer with the approach of the German theorists to dolus eventualis, was kindly supplied by Dr. Klaus Warnke of the Center for Comparative Criminal Law, New York University School of Law. It was translated intc English for the writer by Professor Hans Schweisthal of the German language department of the Haile Seilassic I University.
55. The prime concern of German theorists has been to identify and describe the mental elements that justify the inclusion of dolus eventualis within the concept of intention. Warnke, work cited above at note 54 , pp. 38, 55-57.
56. Dolus eventualis may be specifically defined in the Penal Codes of these countries (see representative Code provisions quoted below at note 76) or it may be implied by judicial decision based upon history or upon scholarly writings, as, for example, in Switzerland and Germany. See below at notes 85 and 110 .
57. Dolus eventualis appears in Anglo-American penal law theory, though not by name, as an aggravated form of "recklessness," a state of mind in that system lying between intention and inadvertent negligence. Hall, work cited above at note 8, pp. 115, 116-17; G. Mueller, "The German Draft Criminal Code- An Evaluation in Terms of American Criminal Law," Illinois L. Forum (1961), pp. 46-47.
58. See below at note 76 .
of the attitude in dolus eventualis. ${ }^{59}$ Negligence is the state of mind which justifies the least punishment or no punishment at all because, as noted before, ${ }^{60}$ it is less morally reprehensible than intention, as well as less deterrable. The negligent actor does not desire the harm. On the contrary, he opposes the occurrence of the harm and if he believed his action would bring about the harm, he would desist. He only continues his action either because he mistakenly believes the harm foreseen will not come about (e.g., aware that his brakes are faulty, he continues to drive believing that they will hold sufficiently in an emergency), a case of "poor judgment" or "advertent negligence," or because he is not aware even of the possbility the harm might come about (e.g., he is not aware his brakes are faulty), a case of "inattentiveness" or "inadvertent negligence." ${ }^{61}$

The moral reprehensibility of dolus eventualis is greater than that of negligence. In one important sense, it is equal to that of "knowledge of certainty or near certainty," the second state of mind discussed in Part I. In knowledge of certainty or near certainty, the actor does not desire or seek the harm, but neither does he oppose its occurring. He is too concerned with his own action and the end he has in sight (hitting the person behind the window with the rock, collecting fire insurance on his house, enjoying sexual satisfaction, etc.) to be concerned about his action also causing harm to some other interest. This willingness to bring about harm rather than to give up what one is doing is the morally reprehensible aspect of this actor's conduct.

Dolus eventualis involves the same kind of willingness as does this second kind of intention. The key difference between the two is found in the element of knowledge. The dolus eventualis actor is aware not of certain or nearly certain harm, but of the possibility that his action will bring about harm. To quote Art. 58 (1), second paragraph, again: the offender is aware "that his act may cause illegal and punishable consequences."

## Dolus eventualis and adyertent negligence.

It is the strength of dolus eventualis that it identifies a category of moral conduct deserving greater community condemnation in the form of greater criminal punishment than either of the two forms of negligence. ${ }^{62}$ It is its weakness that in
59. In German theory, this is known as the "guilt content" (Schuldgehalt) of dolus eventualis. Warnke, work cited above at note 54, pp. 34, 56, 75.
60. See above at note 11 .
61. Negligence, of course, involves more than just "advertence" or "inadvertence." A person might understandably take the risk of driving with faulty brakes because be has no choice in the matter. His child, for example, could be desperately ill with no other means of reaching a hospital available. A person might not be aware his brakes are faulty because they had worked properly the last time he drove his car. Numerous lawful activities present an inherent risk of harm. "Life in modern society," as Andenaes bas written, "is based on the fact that a certain causation of danger is legal." There is an area of "permissible risk." Andenaes, work cited above at note 24 , p. 151. The test for criminal liability is always whether the person who caused harm through "advertence" or "inadvertence" failfed] to take such precautions as might reasonably be expected in the circumstances of the case...." Pen. C., Art. 59 (1), second paragraph. See generally Graven's commentary on Art. 59 , work cited above at note 7, pp. 159-63; Wechsler \& Michael, work cited above at note 11, pp. 742-46; Andenaes, id., pp. 151, 217-24; Williams, work cited above at note 11, pp. 58-59, 103-105.
62. Warnke, work cited above at note 54, p. 33; Graven, work cited above at note 7, p. 157.
many situations it will be difficult to ascertain whether the actor's state of mind was dolus eventualis or the advertent form of negligence.

There is much about dolus eventualis that is similar to advertent negligence. ${ }^{63}$ The knowledge element is the same in both. Both states of mind, that is, include an awareness on the part of the actor that his action may bring about a forbidden harm. And, though several writers have referred to "selfishness" as the identifying characteristic of dolus eventualis, ${ }^{64}$ in truth, both dolus eventualis and advertent negligence include this element. It is seen in the decision each actor makes to continue his action despite the possibility of that action causing harm. ${ }^{65}$ The advertently negligent actor does, it is true, believe that the harm will not occur and is mentally opposed to its occurrence. But that does not alter the fact that he has, for whatever end he has in mind, taken the risk of being mistaken concerning his belief that the harm will not occur. "He has chosen," as one writer has said, "to increase the existing chances that a proscribed barm will occur." 66 The dolus eventualis actor takes no mental stand against the harm's occurrence and, therefore, does more than take the risk of causing harm. He is, again for whatever end he has in mind, selfishly willing to let the harm occur.

The qualitative difference between these two kinds of selfishness is clear. The problem, however, is equally clear. How in a particular fact situation will a court be able to determine whether the actor selfishly continued his action because he mistakenly believed the harm would not occur, or because he did not care whether it would occur? We cannot expect the actor to admit to the authorities the latter attitude, especially when, as will be developed more fully later, ${ }^{67}$ the Criminal Procedure Code allows him to consult a lawyer before he is questioned. This at present is an empty right, but as the supply of Ethiopia's lawyers increases it will not remain so. The Criminal Procedure Code in addition greatly restricts the power of the police to question the accused concerning his alleged offence. Proof that the actor was willing to bring about the harm will, for the vast majority of cases in the future, have to come from other, less direct, sources, in particular from the objective facts surrounding his action.

The closeness of dolus eventualis and advertent negligence, made worse by the unlikelihood of obtaining direct proof that the characteristic attitude of one or the other was present when the actor caused some forbidden harm, requires the court to exercise extraordinary care in examining the evidence. The minimum and maxi-
63. A good deal of the German theoretical writings on the subject of dolus eventualis have been concerned with this fact and the consequent problem of justifying the higher punishment authorized for dolus eventualis. Warnke, work cited above at note 54, pp. 55-57, 66-75.
64. "Egoism . is the essence of dolus eventualis." von Hipple, quoted in Warnke, id., p. 51 . "The [dolus eventualis] actor shows by his indifference a feeling to the effect that he places his ends at the same level, or even higher, as the ones protected by the law." Id., p. 75 . "In the case of dolus eventualis, the inhibiting, negative value of the harm envisaged by the offender . . . is weaker than the positive value that he attaches to accomplishment of the act . . . . One is thus able to definitely say that, in the case of dolus eventualis, it is selfishness which motivates his action despite the consequences." (Emphasis in original) Logoz, work cited above at note 30 , p. 66, translated in Lowenstein, work cited above at note 30, p. 142.
65. Graven, work cited above at note 7, p. 157.
66. Hall, work cited above at note 8, p. 112. "The advertently negligent actor has not been prevented from acting by the foresight of the possible result." Warnke, work cited above at note 54, p. 67.
67. See below at pages 412-414.
mum punishment authorized for a dolus eventualis offence will in all cases be much greater than that authorized for an advertent negligence offence. For those offences where negligence is not punishable, the court's choice of dolus eventualis or advertent negligence will mean conviction or acquittal.

It is partly for this reason that some commentators, most notably in Germany, have argued for an interpretation of dolus eventualis based not upon the attitude of the actor toward the foreseen harm, but upon the probability of harm he foresaw, ${ }^{68}$ According to this argument, known in Germany as the "theory of probability" (Die Wahrscheinlichkeitstheorie), dolus eventualis exists "when the actor had foreseen the [harmful] result as probable, advertent negligence when he had only said to himself that the result is possible." ${ }^{\text {6 }}$ This approach presents the obvious difficulty of "drawing the line" between the probable and the possible and the gradations thereof, but, it is argued by the main proponents of the theory, Grossmann and Grünhut, this difficulty is only "quantitative": the judge has before him certain objective facts, such as, taking an automobile homicide case as an example, the speed at which the car was being driven, the number of pedestrians on the roadway, the road conditions, etc., and he has only to make a judgment from these proven facts as to the degree of harm the situation presented. This, so the argument continues, is the ordinary task of the judge requiring no special insight or knowledge of human nature. It is far more manageable, therefore, than inquiring into the attitude (the "psychic process") of the actor toward the foreseen harm."

The American writer, Helen Silving, has argued further that the prevailing European conception of dolus eventualis, by "its disregard of the degree of objective probability . . . that the consequence will occur," produces results that are "absurd." 71 She supposes the case of two motorists, one who engages in extremely dangerous conduct (driving at the excessive speed of 190 kms . per hour) trusting that he will not hit anyone and the other who engages in much less dangerous conduct (driving at 65 kms . per hour, assuming this also to be excessive) but not caring about killing another person. If both motorists should hit and kill someone, then, according to the European conception of dolus eventualis, the latter is guilty of dolus eventualis (and hence intentional) homicide, while the former is guilty only of negligent homicide. This is the result she considers "absurd," apparently because it fails to take into account the relative dangerousness of each actor's conduct. ${ }^{72}$

Whatever the merit of these two arguments for the theory of probability, ${ }^{73}$ the fact remains that the explicit language of Art. 58 (1), second paragraph, that the offender "commits the act regardless that such consequences may follow," 74 precludes

[^27]an interpretation of dolus eventualis based solely upon the high degree of harm foreseen by the actor. It is the actor's attitude toward that foreseen harm, his willingness to bring it about, that under the Penal Code is the indispensible element of dolus eventualis. The high degree of the harm foreseen is assigned the important but secondary role of aiding in the proving of that attitude. This weighting is consistent with the overall theme of the Code to prefer subjective factors, what Art. 23 terms "the moral element," to objective factors as the basis for punishing offenders. ${ }^{75}$

## How dolus eventualis fits in the 1957 Penal Code.

When the drafter and the Codification Commission decided to include the definition of dolus eventualis in the basic Penal Code article that defines criminal intention instead of treating it as a form of advertent negligence or as an entirely separate state of mind, ${ }^{76}$ they made a decision that is crucial for those . who must
75. "The Code must make it clear at the outset that it is chiefly concerned, not with the art and the result as such, but with the wrongdoer, for judgment is not given with respect to an act, but with respect to the human being who performed it. This subjective conception of criminal law should inspire the Code, the more so since it is in conformity with the tradition of the Fetha Nagast.'" Exposé des Morifs, quoted in Graven, work cited above at note 7, p. 59. Perhaps the clearest example of this orientation is the Code's provision on the punishment prescribed for an attempt. The offender "is liable to the punishment attaching to the offence he intended to commit," Art. 27 (3). The Code draws short of totally ignoring the factor of objective harm by authorizing mitigation of punishment for an attempt "if circumstances so justify." Ibid. Another concession is made for the death penalty which under Art. 116 (1) is limited to offences "which are completed."
76. Dolus eventualis is treated in most continental European countries and in countries whose penal taw is derived from continental Europe as a form of intention. This is often done by statutory provision: "Anybody .. who considers [effectuation of the definitional elements of the act] possible and does not mind it, acts intentionally." German Draft Penal Code E 1962, Art. 16, translated in the American Series of Foreign Penal Codes, work cited above at note 27. "Whosoever willingly effectuates those facts which according to statutory definition are the elements of the crime, or whosoever realizes that by his conduct he may effectuate them and, in that case, would approve thereof, acts intentionally." Penal Code of Greece of 1950, Art. 27 (1), translated in Lowenstein, work cited above at note 30, p. 146.
"A criminal offence is committed with intent when the offender, . was conscious that a prohibited consequence might result from his activity or omission and had consented to its occurring." Yugoslav Criminal Code of 1951, Art. 7 (2), translated in M. Acimovic, "Conceptions of Culpability in Contemporary American Criminal Law," Louisiana L. Rev., vol. 26 (1965), p. 31.
"An act is considered to have been committed intentionally if the actor foresaw that the act would accomplish the constituent element of an offence and such accomplishment was not contrary to his will." Republic of China (now Taiwan) Criminal Code of 1935, Art. 13 (II), translated in L. Fuller \& H. Fishcr, The Criminal Code of the Republic of China (Taipei, Sino-American Legal Series, 1960), p. 5.
In some countries, the most notable examples being Switzerland and Germany, the courts, on the basis of history or scholarly writings on the subject, have accomplished the same thing by interpreting the concept of intention to include dolus eventualis, though the Penal Codes are silent on the subject. See below at notes 85 and 110 ,
Not every continental European country views dolus eventualis as a kind of intention. In France, for example, it is included within the state of mind of advertent negligence. Graven, work cited above at note 7, pp. 156-57; Bouzat \& Pinatel, work cited above at note 6, p. 189. This is also the approach in England and the United States. See above at note 57. The German theorist, won Soden, proposed that dolus eventurlis be viewed as a separate state of mind category falling in between intention and advertent negligence (Die Dreiteilungstheorie). Warnke, work cited above at note 54 , p. 57. This proposal has not met with acceptance in Germany or elsewhere one reason being, as Warnke says, the ineritia of a penal law "that, until now, knows only intention and negligence." (Ibid.)
apply the Code. As a form of intention, dolus eventualis is a state of mind justifying punishment for practically all offencts in the Code. The only exceptions are (1) when the Code article makes punishable only negligent conduct, or (2) when the Code article specifies some special element for which dolus eventualis is insufficient. The applier of the Code accordingly must pay strict attention to the words used to define the particular offence.

Most statutes in the Code specify only those objective circumstances which must exist and the specific consequence which must occur before criminal liability under that statute is established. For example, the girl must be below the age of fifteen for sexual outrage under Art. 594 or be between the ages of fifteen and eighteen for sexual outrage under Art. 595, the property taken by the offender must be "the property of another" for theft under Art. 630, a fact imputed to another must be "such as to injure his honour or reputation" for defamation under Art. 580 (1), etc. For all such offences, dolus eventualis under Art. 58 (1), second paragraph, no less than "full knowledge and intent" (i.e., "will") under Art. 58 (1), first paragraph, is sufficient for criminal liability. In other words, a person who violates these objective elements of the offence, as by having sexual intercourse with a girl below the age of fifteen or by imputing to another a fact that injures that other's honour or reputation, is punishable if he was aware the girl was below the age of fifteen or the fact was injurious to the other's honour or reputation (Art. 58 (1), first paragraph ${ }^{77}$ or if he was aware the girl might be below the age of fifteen or the fact might be injurious to the other's honour or reputation, and he did not care (Art. 58 (1), second paragraph).

There are, however, some Code articles which, with respect to one or more specified objective circumstances, require more than that these objective circumstances exist; the person is required to have actual knowledge of their existence before he becomes criminally liable. For these offences, the person's awareness that such circumstance or circumstances might exist and his indifference towards their existence is not the equivalent of knowing they exist, and hence for these offences only "full knowledge and intent" and not dolus eventualis, will suffice for criminal liability. Thus, the offence of calumny, Art. 580 (2) of the Code, is defined so as to require that the offender utter or spread false and defamatory statements "with knowledge of their falsity." Such actual knowledge is indispensible to guilt under that provision. For this offence, being aware the statements might be false and being indifferent towards that fact would not be enough. False denunciation, Art. 441 (a), likewise requires that the offender denounce to the authorities as the perpetrator of an offence "a person he knows to be innocent" and thus, as a Swiss case dealing with an identical provision in the Swiss Penal Code has held, cannot be committed unless the offender actually knew the person to be innocent, and not merely was aware he might be and did not care. ${ }^{78}$ A third example is Art. 373 (1) (b) of the Code which punishes the person who "knowingly uses . . false or counterfeit

[^28][official] marks [e.g., seals, rubber stamps, labels] as genuine or unused." The offender, to be punished under this article, would have to know that the official mark he is using is false or counterfeit. Here, too, his awareness that it might be false or counterfeit and his indifference toward that fact would not suffice for criminal liability. ${ }^{79}$

This decisive role played by the words of a Code article is well illustrated by Art. 50 (1) of the Code. Art. 50 (1) deals with "intentional or culpable irresponsibility," and reads: "The provisions excluding or reducing liability to panishment shall not apply to the person who in order to commit an offence intentionally put himself into a condition of irresponsibility or of limited responsibility by means of alcohol or drugs or by any other means ...." (Emphasis supplied.) Addressing himself to the term, "intentionally," in Art. 50 (1) and relying upon the fact that dolus eventualis is a form of intention, Dr. Graven, in his commentary on Art. 50 (1), makes the following observation: "Under sub-art. (1), [the accused remains fully liable when he] drinks either in order to do wrong or when he knows and accepts the possibility of doing wrong (e.g., he knows he must drive and, being aware that he might run a pedestrian down if he drinks too much, tells himself that it is late at night so that nobody will see him if he runs a pedestrian down)."80 Graven's example accurately describes an attitude of indifference toward the safety of pedestrians on the road and, thus, accurately describes a dolus eventualis state of mind. However, what Graven has done is to include dolus eventualis in Art. 50 (1) when it is specifically excluded by the phrase, "in order to commit on offence." The person in Graven's example may have shown deplorable indifference toward the safety of others, but he hardly can be said to have drunk alcohol and become irresponsible "in order to" run a pedestrian down. His purpose in drinking was only to enjoy himself. The phrase "in order to" used in Art. 50 (i) and phrases of similar import such as "for the purpose of" and "with the object of" demand more than a dolus eventualis state of mind. ${ }^{81}$
79. If the actor's actual knowledge can be proved, other elements of the offence can be established with dolus eventualis. Thus, in Art. 580 (2), it is provided that the imputations or allegations known to be false must constitute an "injury to honour or reputation." A person who knowingly utters false statements and who is indifferent to whether they are injurious to the other party's honour or reputation violates Art. 580 (2).
80. Graven, work cited above at note 7, p. 139.
81. It could be that Graven is relying upon Swiss decisions which hold that for a person's "desigu," as for his intention, dolus eventualis is a sufficient state of mind. Thus, for example, in Meierhofer c. Ministère public du canton de Zurich (Tib. féd., Switz., July 8, 1954), J. des trib. (Droit pénal), p. 54, the offender knew that he was denouncing an innocent man to the authorities. It was held by the Swiss court that the Article's requirement that the denouncement be "with a view to having penal proceedings instituted against the person" was satisfied by proof that the offender was willing to have such proceedings instituted. That the offender's purpose in denouncing the man might have been to clear himself of charges was held irrelevant. According to such reasoning, it is possible to argue that in Graven's example the person's purpose in drinking alcohol, i. e., "in order to commit an offence," could also be established by evidence of his willingness to have an offence occur, even though his actual purpose was onfy to drink and enjoy himself. With such a view of dolus eventualis the writer must disagree. Language in a Code article such as "in order to," as in Art. 50 (1), or "for the purpose of," as in Art. 261 (b), or "with the object of," as in Art. 450, and other similar phrases denoting a specific purpose for acting, clearly mean that the actor must have desired that particular goal when he was acting. To say instead that a specific purpose to bring about a particular result can be established by showing that the actor was, through indifference or some other reason willing to have that result occur, stretches words beyond their ordinary meaning, and thus is prohibited by Art. 2 (1) of the Penal Code, the

In the pages that follow, we will identify the characteristic attitude of dolus eventualis using cases from Switzerland whose Code served as the principal foreign source of the 1957 Penal Code. ${ }^{82}$ This will be followed by general rules on when to apply dolus eventualis. Next, three homicide cases, one from Germany and two from Ethiopia, will be examined in considerable detail. This examination has two purposes: first, to illustrate the operation of these general rules in a very serious yet common type of criminal offence, and, second, to demonstrate the sort of painstaking analysis of the facts needed before a court can be satisfied beyond a reasonable doubt that the dolus eventualis attitude was in the mind of the actor. Lastly, and as a ground for the concluding section, we will examine the problem of proving dolus eventualis to see why this problem is even more acute in Ethiopia than in continental Europe.

## The characteristic attitude of dolus eventualis: two Swiss decisions.

The leading Swiss case on dolus eventualis is Elsasser c. Procureur général du Canton de Berne, decided in $1943,{ }^{83}$ a case of fraudulent misrepresentation in violation of Art. 148 of the Swiss Penal Code, the model for Art. 656 of the Ethiopian Penal Code. ${ }^{34}$

The prosecution's evidence showed that during World War II one Ennest Hertig, a chemical manufacturer, had received large quantities of sugar, a food commodity in short supply due to the war, from the Swiss Federal War Office for Food. The sugar was allocated to Hertig specifically for the purpose of manufacturing chemicals. In violation of this condition, Hertig sold part of the sugar to bakers
so-called "principle of legality." See Strauss, work cited above at note 10 , pp. 419, 429, 440. If the drafter of the Code, by including the definition of dolus eventualis in Art. 58 , meant to make dolus eventualis a sufficient state of mind even for language in a Code article that appears on its face to exclude such a state of mind, then he did not make his purpose clear enough.
82. Graven, work cited above at note 7, pp. 2-3; S. Lowenstein, "The Penal System of Ethiopia," J. Eth. L., vol. 2 (1965), pp. $385-87$. Dr. Graven in his commentary on Art. 58 (1), second paragraph, draws heavily on Swiss case decisions. Graven, work cited above at note 7 , pp. 156-58. Other European Codes were consulted by the drafter. Graven mentions the Italian, Greek and Yugoslav, in particular. Id., p. 2.
83. Trib. féd., Switz., May 21, 1943, J. des trib. (Droit pénal), p. 73. The case was translated for the writer by Miss Marta Rozankowskyj (see note 78 above). Swiss decisions are written in either French, German or Italian, depending upon the language spoken by the accused. Elsasser's tongue was German. The court's decision thus was written in German and then translated into French for publication in the Journal des Tributaux. The translation for the writer into English is from this French version.
84. Art. 148 of the Swiss Penal Code reads in part: "Any person who, with intent to make an unlawful profit for himself or another, shall fraudulently mislead another person by falsely representing or concealing facts or shall fraudulently use the error of another and thus cause the deceived person to act detrimentally against his own or another person's property, shall be confined in the penitentiary...." Translation, Friedlander \& Goldberg, "The Swiss Federal Criminal Code," J. Crim. L., Criminol., \& Pol. Sci., vol. 30 (Supp., 1939), p. 53. Art. 656 of the Ethiopian Penal Code reads in part: "Whosoever, with intent to obtain or to procure to a third person an unlawful (sic: enrichment), fraudulently causes a person to act in a manner prejudicial to his rights in property, or those of a third person, whether such acts are of commission or omission,
a) either by misleading statements, or by misrepresenting his status or situation, or by concealing facts which he had a duty to reveal; or
b) by taking advantage of the person's erroneous beliefs, is punishable . . . ."
on the so-called "black market." Hertig, not satisfied, decided to sell to bakers quantities of sugar much greater than the quantity he actually had in his possession or he could expect to receive from the War Office for Food. Warner Elsasser, the accused, was enlisted by Hertig to locate potential buyers for the sugar. In late 1941 and early 1942, Elsasser, as Hertig's agent, sold a total of seven tons of sugar to two bakers, receiving payment for the sugar in advance of delivery. Elsasser promised to deliver the sugar to both bakers within a very short time. The sugar was never delivered. In 1943, Elsasser and Hertig were arrested and prosecuted, as stated above, for obtaining money fraudulently.

The two men were alleged to have committed fraud by obtaining money for sugar which they never intended to deliver. Hertig, having dealt directly with the Food Office, took the buyers' money knowing that the sugar would never be delivered. However, since Elsasser had never dealt with the Food Office, it would have been quite difficult to prove that he knew that no additional sugar was going to be allocated to Hertig and, therefore, that delivery of the sugar could never be made to the buyers. Therefore, the prosecution attempted to prove Elsasser's intention to defraud the buyers by showing that he had acted with dolus eventualis (in French, le dol éventuel), a form of intention in Swiss law as it is in Ethiopian law. ${ }^{85}$

It could easily be proved that Elsasser was aware, when he made the sale to the buyers and promised delivery, that Hertig did not bave the sugar in stock at that time. In addition, he must have been aware that sugar was a "restricted commodity." It could be proved, in other words, that Elsasser was aware of the risk of not being able to deliver the sugar as promised and yet, despite this awareness, he accepted the buyers' money. This, as the Swiss federal Cour de Cassation (appellate court) pointed out, was not enough to prove dolus eventualis. If Elsasser, though aware of this risk, nevertheless believed that the sugar would be delivered (perhaps because of what Hertig had told him), and, more important, was unwilling to keep the money if it were not delivered, then, no matter how mistaken or even naive his belief was, he would be guilty of no more than advertent negligence and could not be convicted under the Swiss (or Ethiopian) provision.

What had to be proved for dolus eventualis was stated by the Swiss appellate court in the following language: that Elsasser '"was aware from the beginning that he might find it impossible to deliver the sugar and [that] he had the idea of keeping the money received in advance anyway should such a case arise."86 This nicely spells out the selfish attitude involved in dohus eventualis.

The question remained as to how to prove that such an attitude had existed in Elsasser's mind. Elsasser had not admitted that he had had such an attitude. On the contrary, he had denied its existence and claimed, instead, that he had believed all along that the sugar would be delivered. There were no positive acts on Elsasser's part showing otherwise. Despite this lack of direct evidence, the attitude

[^29]86. Id., p. 78.
amounting to dolus eventualis could be inferred from his action, the court said, if the possibility of the harmful result occurring "would have imposed itself on the mind of the actor in such a way that his act could not be interpreted in any other way than the acceptance of this result"; if, in other words, the probability of not being able to deliver the sugar had been objectively so high that it would have had to have been clear to Elsasser, and that therefore, he must have been willing to have such a result occur when he accepted the buyers' money. There was no proof in the case that the probability was this high. The evidence produced by the prosecution, therefore, failed to establish a dolus eventualis fraud beyond a reasonable doubt. ${ }^{87}$

The later Swiss case of Cretenoud c. Procureur général du Canton de Vaud, decided by the federal Cour de Cassation in $1960 .{ }^{88}$ further explains the meaning of dolus eventualis. ${ }^{89}$ Cretenoud was the manager of a kiosque, a small retail shop that sells newspapers, cigarettes, chocolates and the fike. His duties were to take care of the kiosque, sell the merchandise provided to him by his employer and turn over all sales revenues to his employer. For this he received a fixed salary.

From the beginning, Cretenoud seemed more interested in enjoying himself than in working. He opened the store late. He frequented cafes or went to watch sporting events, leaving care of the store at these times to other persons, sometimes children. He neglected his bookkeeping, often returning unsold newspapers to his employer too late for his employer to receive reimbursement from the publisher. At the time he left his job, about one year after he was hired, he was keeping no records at all and was unable to account for Sw. fr. $7,826.50$ (roughly Eth. $\$ 4,800$ ).

Cretenoud was prosecuted for "unfaithful management" under Art. 159 of the Swiss Penal Code, the model for Art. 663 of the Ethiopian Penal Code ("Mismanagement of private interests") ${ }^{90}$ Both provisions punish the person who intentionally causes harm to another's property with which he was legally or contractually entrusted.

Cretenoud was convicted on the theory that he had harmed his employer's property interests with dolus eventualis. His state of mind in this regard could easily be proved. He could not have been opposed to injuring his employer's financial interests to have behaved the way he did. The probability of causing harm to his
87. The trial court and, apparently, the prosecutor had mistakenly believed that awareness of the possibility of the harm's occurring might alone allow an inference of dolus eventualis. Other relevant evidence on the issue of dolus eventualis may have existed but was not produced or considered at the trial. Therefore, the case was returned to the trial court for reconsideration.
88. Trib. féd., Switz., Jan. 13, 1960, J. des trib. (Droit pénal), p. 74. The translation of this case appears in Lowenstein, work cited above at note 30, p. 143. The double translation problem mentioned above at note 83 does not exist in the Cretenoud case since Cretenoud's torgue was French and heace the opinion was written in French.
89. The case is considered a significant one within Switzerland. See comment on case by $\mathbf{C}$. Bonnard, J. des trib., cited above at note 88, p. 79, also translated in Lowenstein, work cited above at note 30 , p. 145.
90. Art. 159 of the Swiss Penai Code reads in part: "Whoever dissipates the resources of another person entrusted to him by law or contract shall be confined in prison. "Translation, Friedlander \& Goldberg, work cited above at note 84, p. 54.
Art. 663 of the Ethiopian Penal Code reads in part: "(1) Whosoever is legally or contractually bound to watch over the property rights of another, and who intentionally causes prejudice thereto by misusing his powers or by failing in his duties, is punishable with simple imprisonment or fine."
employer by his behaviour (not keeping records, leaving the store in the care of others, sometimes children, failing to return newspapers in time for his employer to get reimbursement from the publisher) was unmistakably clear. Accordingly, the inference of dolus eventualis that could not be drawn in Elsasser's case because the probability of harm to the buyers was not proved to be high enough, could be drawn in Cretenoud's case. ${ }^{91}$

Nor did the prosecutor have to rely on inference alone. There was separate, more direct, evidence of Cretenoud's state of mind. A friend of his, who was also a kiosque manager, had warned him of the probable consequences of his behaviour. His response had been to laugh at her. A subordinate had quit over the way he was managing the kiosque, yet Cretenoud had made no change in his behaviour. Plainly, he was not interested in working but wanted only to enjoy himself even if it resulted in harm to his employer's interests: the selfish attitude which is the hallmark of dolus eventualis. ${ }^{92}$

What is also interesting about the Cretenoud case is the Swiss court's attempt to distinguish dolus eventualis from advertent negligence. The court observed what has been pointed out before: that there is a danger of confusing the two because each involves (1) the person's awareness that his action may produce a harm forbidden by law and (2) his continued action in the face of that awareness. The point "which catches the decisive difference" between the two states of mind, according to the court, is that the dolus eventualis offender "consents" to the production of the harm, i.e., is willing to have it come about, whereas the advertently negligent offender "far from consenting to the eventual result of his acts, on the contrary rejects it and expects that it will not come about." ${ }^{93}$
91. The probability of the harm's occurring might have been high enough in the Cretenoud case to constitute knowledge of certainty or near certainty, the second kind of intention considered in Part I. The trial court, in fact, had found this intention. The cantonal and federal appellate courts did not feel it necessary to "go that far." It may have been that the appellate courts wanted this opportunity to clarify the dolus eventualis standard within Switzerland in view of some confusion as to that standard in earlier decisions. See comment on case by C. Bonnard, cited above at note 89.
92. The reference to Cretenoud's dolus eventualis attitode of wanting 'to enjoy himself" even at the expense of his employer's interests does not conflict with the earlier analysis of the person in Graven's example who drank alcohol "in order to enjoy himself" knowing that he had to drive and not caring about hitting a pedestrian. See above at note 81 , and accompanying text. The writer acknowledged there that the attitude of the person in Graven's example constituted a dolus eventualis attitude. What was pointed out there is that Art. 50 (1) of the Ethiopian Penal Code specifically requires that the purpose of drinking be to commit a criminal offence and hence a dolus eventualis attitude is not sufficient under that Article. In the case of both the Swiss and Ethiopian provisions on "mismanagement of private interests," there is no specific requirement as to the purpose of the offender's action (see the articles quoted above at note 90 ) and, therefore, dolus eventualis is a sufficient state of mind for gailt.
93. The court's opinion reads: ". . l'auteur, loin de consentir au resultat eventuel de ses actes, le refuse au contraire et compte qu'il ne se produira pas." ( $J$. des trib., cited above at note $88, \mathrm{pp}$. 77-78), incorrectly rendered in Lowenstein's translation of the case as: ". the offender, far from consenting to the eventual result of his acts, on the contraty refuses to believe that it, in fact, will come about." Lowenstein, work cited above at note 30 , p. 144.

Other Swiss cases illustrating further the types of offences in which dolus eventualis may be present follow. The first reference is to the Ethiopian Penal Code (E.P.C.) article that corresponds to the Swiss Penal Code offence involved in the case. The Swiss Penal Code (S.P.C.) article and citation to the Journal des Tribunaux follow. Titles of the Swiss Penal Code articles have been taken from Friedlander \& Goldberg, work cited above at note 84. Translations of the cases were done for the writer by Miss Marta Rozankowskyj (see note 78 above).

## General rules for applying dolus eventualis.

These two Swiss cases show that the dolus eventualis actor's attitude of willingness is a decision he makes to accept causing harm "as part of the bargain," ${ }^{24}$
E.P.C., Art. 400. Uttering false or adulterated goods. (S.P.C., Art. 154. Selling adulterated goods.) Probst c. Ministère public du canton de Zurich (Trib. féd., Switz., May I, 1963), J. des trib. (Droit pénal), p. 74. "The intention of cheating third parties in business relations is . . not excluded by the fact that the firm . . has sold the coins to the appellant expressly declaring that they were imitations. Even he who informs the first buyer could have imitated the merchandise with a view to cheating third parties, especially if he has the direct idea or even only the possible idea of seeing subsequent buyers cheated.. . . At the very least, the possibility of leading subsequent buyers into erroneous conclusions could be so evident to the manufacturer that his act should be interpreted as an approval of cheating."
E.P.C., Art. 539. Common wilful injury. (S. P. C., Art. 123. Simple assault.) Anner c. Ministère public du canton de Vaud (Trib. féd., Switz, May 15, 1959), J. des trib. (Droit pénal), p. 99. Father abused his right of correction by striking his eleven year old son with a leather belt because the son had stolen money from his wallet; "From the fact that Annen let himself be seized by a fit of anger, grabbed a leather belt and lashed his son a good number of times on various regions of the body, one must conclude that he voluntarily caused the bodily injuries. Indeed, he must have known that his action would necessarily bring them about, and even if he did not exactly want this result, he at least accepted it as such." (Query, however, whether this is not "knowledge of certainty or near certainty," rather than dolus eventualis.)
E. P. C., Art. 594. Sexual outrage on infants or young persons. (S. P. C., Art. 191. Immorality with chiddren.) Langenegger et consorts c. Ministere public du canton de Schwyz (Trib. fed., Switz., February 11, 1949), J. des trib. (Droit pénal), p. 6. Accused had sexual intercourse with two girls below the prescribed age (16, in the Swiss provision); if the accused 'acted with the idea that the girl could have bsen 16 or even older, but that they also held that it was possible that she was younger [and] were determined to act even in the latter case," then they acted with dolus eventualis.
E. P. C., Art. 656. Fraudulent misrepresentation (S. P. C. Art. 148, Fraud.) Schmid c. Ministère public du canton de Bale-Ville (Trib. féd., Switz., Sept. 13, 1946), J. des trib. (Droit pénal), p. 18. The offence of fraudulent misrepresentation is committed by making misstatements in applying for a loan when the lender "must have considered it, if not certain, at least very probable that he would not be able to pay off in time" and he accepted that result.
E. P.C.,Art.686. Unjustifiable preference (S.P.C., Art. 167. Privilege to one creditor.) Schodler et Hagenbucher c. Ministère public du canton d'Argovie (Trib. féd., Switz., March 24, 1948), $J$. des trib. (Droit pénal), p. 143. The debtor, Schodler, knowing he was insolvent (such knowledge is sufficient for the Swiss provision whereas the Ethiopian provision also requires the debtor to be "bankrupt or [have] given a declaration of default"), gave his creditor, Hagenbucher, a mortgage as security for a loan when he was not required to do so; dolus eventualis if Schodler "positively foresaw" that he was favoring one creditor to the harm of the others "with enough scriousness so that the guarantee by means of the mortgage could not reasonably be interpreted in any other way than the acceptance of this result."
E. P. C., Art. 744, Code of Petty Offences. Violation of provisions regarding lotteries, gambling and betting. (Arts. 4 and 6 , Swiss Federal law on gaming establishments. Prohibition against gaming establishments.) Stierli et consorts c. Ministère public du canton de Zoug (Trib. fed., Switz., June 17, 1955), J. des trib. (Droit penal), p. 21. Proprietor of a tavern tried to stop gambling from going on when he was present in the tavern, however did nothing to stop it from going on in his absence. "If he had disapproved of gambling going on when he was not there, he would have done something to prevent it, since, after they had tried to continue playing illegally in his presence in spite of his opposition, he could infer that this would happen even more in his absence. This contlusion was so clearly obvious to him that the [trial couri] ...c could interpret his passivity as approval of the gambling going on in his establishment." (Note that on the same facts Art. 744 of the Code of Petty Offences would not be violated because it specifes that the offender must "organizc" the gambling, etc. "for profit.")
94. The actor's "taking-the-consequence-into-the-bargain" (Inkaufnalme) is the term for the actor's state of mind commonly applied in Germany, although often with the idea of "approving" the consequences (billigende Inkaufnahme). Warnke, work cited above at note 54 , p. 47; Silving, work cited above at note 21, pp. 226-27.
the price he is ready to pay for the accomplishment of the end he has in mind. Cretenoud weighed the loss of sales revenue to his employer against his own personal enjoyment, and decided to accept the harm to his employer. Elsasser weighed causing harm-not delivering sugar that the bakers had paid for-against his own desire for money, and, although the evidence produced was insufficient to prove it, may have decided to accept the harm to the bakers.

Cretenoud and Elsasser are representative of those cases which most societies view as not particularly harmful. In such cases it is easy to see that the actor was willing to accept the harm "as part of the bargain." Contrasted with Cretenoud and Elsasser are cases where the gravity of the harm caused by the actor is great, such as when the harm is another person's death. In cases of great harm, it is difficult to find that the actor would be willing to accept the harm "as part of the bargain."

What is being suggested here is the first consideration for judging cases of dolus eventualis: the gravity of the harm caused by the actor. Where that harm is great, the court must presume the actor was not willing to accept it, that instead he opposed the occurrence of the harm and continued the action which created a risk of that harm only because he believed the harm would not occur. This "presumption" in great harm cases will have the effect that all presumptions have, that of alerting the judge to the greater than normal need for clear and convincing evidence of the existence of the dolus eventualis attitude.

In all cases of dolus eventualis, the second consideration will be to determine whether the actor when he acted was aware of the possibility of the harm's occurring. The court can infer his awareness from the circumstances of the case; if an ordinary and reasonable man, knowing the same facts as the actor, would have been aware of the particular risk of harm, the court may assume that the actor was aware. This inference, like all inferences, can be rebutted by any evidence showing that, despite what an ordinary and reasonable man would have been aware of, the actor was in actual fact not aware of the risk of harm. It must be remembered that this element of awareness is common to both dolus eventualis and advertent negligence and hence by itself cannot constitute proof of dolus eventualis. Awareness of the possibility of harm was all that was proved in the Elsasser case, and the prosecution for that reason failed.

The third consideration, the most difficult for the court, is to determine whether the actor possessed the attitude required for dolus eventualis. In making this determination, the court must be on the lookout for certain categories of evidence from which this attitude may be established. These categories are:
(a) The significance to the actor of the end he was seeking or the motive for which be acted. Since the dolus eventualis attitude has been described as "the price [the actor] is ready to pay for the accomplishment of the end he has in mind," it follows that the more significant that end the more willing the actor will be to 'pay the price' of causing harm. The motive is the reason for the actor's action, that which caused him to act. For example, in Elsasser the end sought was money. If it had also been shown that Elsasser was motivated by a special need for money, e.g., to pay off some pressing debts or to pay for an operation necded by his child, how much easier it would have been to conclude that he was willing to cause pecuniary harm to the bakers as a consequence of getting that money.
(b) Any acts or statements of the actor tending to demonstrate his willingness to have the harm occur. A good example of this category of evidence is Cretenoud's
laughter when warned by a friend of the probable consequences of his behaviour. Special care will be needed in determining the relevance of this kind of evidence to the actor's attitude. In this section, we will see several examples of acts or statements that appear relevant but, upon analysis, are seen to be ambiguous or wholly irrelevant.
(c) The accused's own admissions. The clear admission or confession by the actor that he was willing to have the harm come about will be rare. More frequent will be cases where the actor admits to the authorities some fact or disposition from which the court may infer his willingness. Here, again, the court must be careful. An admission by the actor that he was aware of the possibility of his action causing harm will bave no bearing upon his attitude toward that foreseen harm. It is relevant only to the second consideration described above. In the three homicide cases to be analyzed later in this section, we will examine a number of admissions, some helpful and some not helpful in determining the existence of the dolus eventualis attitude.
(d) The probability of the harm's occurring. This particularly valuable category of evidence resembles the second consideration above, except that instead of awareness of possibility, we deal here with awareness of probability. Objective probability of harm has been considered earlier as a separate theory of dolus eventualis. 95 Its evidentiary role in proving the existence of the dolus eventualis attitude has also been considered earlier, in connection with the Elsasser and Cretenoud cases. In those cases it was shown that the more probable the harm appeared to the actors the more likely it is that he was willing to have the harm occur when he acted. Its value as evidence will increase as the degree of probability increases.

Analysis of a hypothetical case offered by Dr. P. Graven will show how these considerations and categories of evidence interact.
> "A is driving a car and $B$, his passenger, points to him that he drives too fast and might hit someone. To which A replies: 'You needn't worry. I'm a good driver and nothing is going to happen." A moment later, B again insists that $A$ should slow down. A then answers: 'I've told you before I'm a good driver. Anyway, it's two o'clock in the morning, the police are asleep and nobody will see us if something should happen.' Thereupon, A runs down a pedestrian who dies. ${ }^{59}$

A's response to B's first warning confirms A's awareness of the possibility of striking someone, the second consideration above. As Graven says, it also indicates his attitude of having "rejected" this possibility, another way of saying that he was opposed to such a result and only continned driving at an excessive rate of speed because he believed he was a good driver and so would not strike anyone-the attitude of advertent negligence. Graven then says that after the second statement to B, "it is virtually certain that [A] had accepted the possibility of causing a result against which $B$ had warned him twice and that he is, therefore, gulity of fa dolus eventualis] homicide, for it is improbable that he again changed his mind after making this second statement." ${ }^{97}$

[^30]Graven does not provide A's "motive" for driving at an excessive rate of speed and we must assume, therefore, that no special motive existed. According to the facts, the only "end" A could have had in mind was that of driving his automobile at a fast rate of speed. Graven also does not give facts from which to determine the degree of probability that a person would be struck, such as the actual speed of the car, the driving conditions, the number of persons on the roadway, etc. However, the time stated is $2: 00$ in the morning when the streets, even in the capital city, are normally empty. The probability of anybody being struck, therefore, must be measured as slight, no matter what the speed of A's car and the driving conditions. ${ }^{98}$

The only evidence to estabish the existence of the dolus eventualis attitude is A's statement to B that he "is a good driver" and that "anyway, it's two o'clock in the morning, the police are asleep and nobody will see us if something should happen." This statement appears to be evidence, under category (b), of A's willingness to strike pedestrians rather than slow down the speed of his car. However, measured against the first consideration, namely, the presumption against an actor's willingness to cause great harm and the need, therefore, for particularly clear and convincing evidence of such an attitude, the evidence of A's statement is not sufficient to prove A's dolus eventualis state of mind. This first consideration and the complete lack of any other evidence in the case-no significant end or motive, no admissions, no probability of the harm's occurring-force a judge to view the statement very skeptically. It is possible, of course, that A meant what he said, that driving his car at a high rate of speed was so important to him (perhaps as it gave him a feeling of power) that he was willing to run a pedestrian down rather than slow his car down. But it seems just as possible that $A$ did not mean what he said. Indeed, coming after A's first statement to $B$ that nothing would happen because A is a good driver and B's insistence for the second time that "A should slow down," it is possible that A, annoyed at B's second interruption, said what he said just to shut $B$ up. It is also possible that $A$ at that time of night uttered the statement due to tiredness and not seriously. This statement, in other words, is too ambiguous to be the basis for a conviction of an offence as grave as dolus eventualis homicide.

If we compare $A$ 's statement to $B$ with the laughter of the accused in the Cretenoud case, the interaction of these considerations and categories of evidence becomes even clearer. Cretenoud's laughter could also be interpreted in an innocent way-for example, a person may laugh as much from nervousness as from mirth-but it is instead "evidence of the highest probative value" ${ }^{99}$ because of the relatively low harm involved in the case and the very high probability of that harm's occurring. Another way of viewing this, in particular the key role of the gravity of the harm in judging cases of dolus eventualis, is to ask whether we would hesitate to rely upon A's statement to $B$ if it were a matter of running over a chicken.

[^31]A class of great harm cases where dolus eventualis is more likely to exist is that of the actor who causes someone's death while in the course of carrying out or escaping from a criminal offence itself dangerous to life. These are offences like robbery or aggravated robbery (Arts. 636 and 637 of the Penal Code), rape (Art. 589), arson (Art. 488), aggravated illegal restraint or "kidnapping" (Art. 561 (1) (b)), etc. These types of cases always include two categories of evidence from which dolus eventualis can be implied: the significance of the end the actor is seeking and his motive for acting (category (a)) and the dangerous means or acts employed (category (b)).

A similarity exists between this class of potential dolus eventualis cases and the so-called "felony-murder" rule developed in England ${ }^{100}$ and applied in the United States. This rule as generally stated deems the actor guilty of the equivalent of intentional homicide, what is called in these countries a "killing with malice" or "with malice aforethought," whenever he causes a person's death in the course of committing or attempting to commit an offence dangerous to life. ${ }^{101}$ The rationale for this rule is supplied by the American writer, Perkins: "Certain crimes such as arson, rape, robbery and burglary, have been found to involve such an unreasonable element of human risk, even if the wrongdoer had no such thought in mind at the start, that one perpetrating or attempting such an offence is held to have a state of mind which also falls under the label of 'malice aforethought' so that if homicide is caused thereby it is murder, however unintendod the killing may be." ${ }^{102}$

The extraordinary aspect of the Anglo-American "felony-murder" rule is disclosed by the last phrase in Perkins" statement, "however unintended the killing may be." Any killing caused by an actor who was engaged in the commission of an offence dangerous to life is treated as if it were intentional and is punishable as such. ${ }^{103}$ This is more a matter of social policy than legal theory: the offender is warned that he will be liable to a charge of intentional homicide should he even accidentally cause another person's death while engaged in committing an offence dangerous
100. The Homicide Act of 1957 "purports to have abolished" the "felony-murder" rule in England, but the language of the Act is not conclusive. W. Russell, Russell on Crime (12th ed. by J. W. C. Turner, I-ondon, Stevens \& Sons, 1964), pp. 467, 500-501, 503.
101. This is the more modern statement of the "felony-murder" rule. In the early British common law it was stated as a homicide resulting from an "unlawful act" not necessarily dangerous to life. Perkins, work cited above at note 98, p. 33.
102. Id., p. 713. A British author has suggested that the Homicide Act of 1957 be interpreted to make a killing in furtherance of a felony, "murder," only if "the subjective attitude of mind in the prisoner revealed by evidence [is] that when acting as he did he realised that he was endangerims the other man's life; or, in other words, that he consciously took the risk of killing the man." (Emphasis in original.) Russell, work cited above at note 100 , p. 504.
103. This approach has on occasion led in the United States to astounding results; for example in one case, one of two robbers was held guilly of "felony-murder" where the victim of the robbery shot and killed the other robber. In another case, an arsonist was held guitty of "felony-murder" where his accomplice, while perpetrating the arson carelessly, killed himself. Commonwealth v. Thomas (Sup. Ct. Pennsylvania, 1955), Pa. Rep., vol. 382, p. 639, Atlantic Rep. (2nd Series), vol. 117, p. 204, printed in A. Harno, Cases and Materials on Criminal Law \& Procedure (4th ed., Chicago, Callaghan \& Co., 1957), p. 330; Commonwealth v. Bolish (Sup. Ct. PennsyIvania, 1958), Pa. Rep., vol. 391, p. 550, Atlantic Rep. (2nd Series), vol. 138, p. 447. These and similar types of cases are discussed in $\mathbf{S}$. Kadish and M. Paulsen, Criminal Law and Its Processes (2nd ed., Boston Little, Brown \& Co., 1969), pp. 347-48. The decision in Thomas was overruled by a subsequent Pennsylvania Supreme Court decision, Commonwealth v. Redline, printed id., pp. 342-47.
to life. Through this warning it is hoped to deter him from committing that particular offence or, at least, to induce him to commit it in a less dangerous manner (e.g., to induce the robber to commit robbery with an empty rather than a loaded gun. ${ }^{104}$

The Anglo-American "felony-murder" rule, in dolus eventualis terms, can be said to presume conclusively that the offender was willing to cause another person's death as the price of furthering his illegal objective. The "felony-murder" rule, therefore, differs in a critical aspect from the dolus eventualis rule for such situations. In dolus eventualis, the actor's commission or attempt to commit an offence dangerous to life is only evidence from which his dolus eventualis attitude may be implied.

This difference is illustrated in a famous "felony-murder" case from England, Director of Public Prosecutions v. Beard. ${ }^{105}$ The accused was convicted of a "felonymurder" for causing the death of a thirteen year old girl during a rape. The girl had struggled to escape and, in order to overcome her struggles, the accused had "placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation." 106 Beard was guilty of "felony-murder" regardless of the actual state of his mind when he put his hand over her mouth and thumb on her throat. It would have made no difference whether he meant only to quiet her so as to complete the rape and whether, in addition, he would have abandoned his attempt to rape her had he known that his action would cause her death.

Had the same case occurred in Ethiopia, Beard's guilt of a dolus eventualis homicide would not have been clear. As stated, his goal of raping the girl and the inherent dangerousness of the acts involved would be relevant evidence of his willingness to cause her death in the event she resisted. So would be the high probability of death from his acts to stop her struggling. However, all evidence in the case needs to be examined to determine the existence of dolus eventualis. For example, there was evidence in the case that Beard was intoxicated when be committed the act of raping the girl. The British House of Lords dismissed this evidence of intoxication with the words: "There was certainly no evidence that [Beard] was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in the furtherance of the felony of rape. Such a killing is by the law of England murder." ${ }^{107}$ The evidence of intoxication, held by the court to be irrelevant to the question of "felony-murder," would be relevant to the question of probability and hence to that of Beard's guilt of dolus eventualis homicide. If he were drunk, he might have been unaware of how much force he was using on the girl's mouth and throat and thus have been unaware of the high probability of her death. ${ }^{108}$
104. This policy approach has been criticized: ". where it is sought to increase the deterrent force of a punishment, it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him; that is to say, . ., to increase penalties on felonies-particularly armed felonies-whenever retaliatory force can be foreseen, rather than on the relatively rarer occasions when the greater harm eventuates." N. Morris, "The Felon's Responsibility for the Lethal Acts of Others," Univ. Pennsylvania L. Rev., vol. 105 (1956), p. 67.
105. House of Lords, Eng., 1920, All Eng. L. Rep. Reprint, 1920, p. 21.
106. Id., p. 23.
107. Id., p. 31.
108. Which of Beard's two acts caused the girl's death was not clearly indicated by the court because it was not material to the issue of "felony-murder." It appeared to be the combined effect of the two acts, although there was a mark on the girl's throat indicating "considerable pressure" from the accused's thumb. Id., p. 22.

For further study of the general rules for applying dolus eventualis, let us turn now to three more homicide cases, one from Germany and two from Ethiopia.

The German case is the leading one in that country on the subject of dolus eventualis. It was decided in 1955 by the German Federal Supreme Court (the Bundesgerichtshof). ${ }^{109}$ The facts of the case are as follows: the two accused, $\mathbf{J}$ and K , plotted together to assault an acquaintance of theirs, one M (German criminal cases omit the names of the accused and other involved parties), and take his money and clothing. Their scheme was to render $M$ unconscious and while he was unconscious to take the money and clothing they wanted. They thought of three separate methods of making $M$ unconscious. The first was to put sleeping pills in his coffee. This they actually tried, but the pills did not put M to sleep. The second idea they had was to overcome M by force, fasten a leather belt around his neck and tighten it until he lost consciousness. However, when they had an opportunity to use this plan, they did not take it. They subsequently decided to abandon this plan, as they apparently told the authorities, for the significant reason that they did not want to risk choking $M$ to death. Their third plan, chosen to avoid endangering $M$ 's life, was to knock him out by hitting him over the head with a small sandbag.

One evening when $J$ and $K$ were staying in M's flat, they decided to put their sandbag plan into operation. When $M$ was asleep, J hit him over the head with the sandbag. The effect was not to render $M$ unconscious, but rather to wake him up. Worse for $J$ and $K$, the sandbag split open on the third blow. In the ensuing confusion and excitement, and while $J$ and $M$ were grappling, $K$ ran out of the room and came back with a leather belt. He threw it over M's head. He was able after some fumbling to tighten it around M's neck while J held M's arms. M quieted, and $J$ and $K$ began to tie him up. Before they could finish, M regained consciousness and again began to struggle with $J$ and $K$. K tightened the belt again. When J noticed that $M$ had stopped struggling and was again quiet, he told K to stop, which K did. The belt this time was left tightened around M 's neck, the end through the buckle. J and $K$ then finished tying $M$ up and went about the flat taking a number of items of clothing and linen. When they were finished, M's appearance alerted them to the fact that he might be dead. They both tried to revive him, but in vain. They thereupon left the flat. $M$ was, as they had suspected, dead.

The German Supreme Court acknowledged that the actions of J and $K$ did not show an attitude of indifference toward the life of M, but, on the contrary, showed "a feeling of resistance and repugnance" toward causing his death. The court nevertheless found that $J$ and $K$ had committed homicide with dolus eventualis and hence could be punished for intentional homicide. The view of the court was that they were willing to bring about M's death in spite of their earlier opposition to such a result because they were more interested in M's property than his life. The reasoning of the court in this regard follows:
"Even in the case of dolus eventualis [in German, bedingten Vorsatz], the occurrence of the result might be undesired by the perpetrator. This

[^32]is so in all cases in which somebody in order to achieve a certain goal reluctantly applies an expedient, because he knows that he can achieve his desired goal only by this expedient . . . The perpetrator who acts with dolus eventualis puts up with [the harmful result] feeling that if he can not achieve his goal otherwise, he will use the undesired expedient. The accused wanted under any circumstances to take possession of the articles that were in M's ownership. . After [the attempt to do so by less dangerous means] failed, they decided to strangle M , although they had before recognized and discussed its perilous nature. They did this not because they now, contrary to before, believed that the possible result would not occur, but because they did not want to give up their objective under any circumstances, even in the event that the strangling would lead to the death of M." ${ }^{\prime \prime}$
This statement accurately describes the dolus eventualis attitude of willingness. The critical question, though, is whether there was proof of this attitude beyond a reasonable doubt. All four categories of evidence were present. First, their end of robbing M of his property was a significant one, though their need for his property, which would have supplied them further with a motive for their action, does not appear in the case. Second, the acts they performed with the leather belt did tend to demonstrate a willingness to have his death occur. Third, they apparently admitted to the authorities, since the evidence could not have come from any other source, that they knew that the use of the leather belt would endanger M's life. Fourth, and perhaps most important, their act of tightening the belt around M's neck and leaving it buckled tight while they went about his flat gathering his property created a very high probability of M's choking to death.

The German appellate court's decision thus was an understandable one. There was, however, other evidence in the case that seems to raise doubts as to J and K's attitude. They had taken considerable precautions not to kill M, right up to the moment of panic when $K$ went for the leather belt. Even during those confused moments, they seemed to show opposition to M's death. J told K to stop tightening the belt when $M$ had again become quiet, and $K$ did as he was told. They then tied M up, indicating that they believed he was still alive and that he might again regain consciousness and cause them trouble. When they realized he might be dead, they made efforts to revive him, evidence pointing away from a willingness to have him dead. Even the strongest evidence against them, that they left the belt buckled around M's neck while they went about the flat, might be explained by the confusion and excitement of the moment - they might not have realized that the belt was buckled. That they took the trouble of tying him up seems to support this possibility.

The case is a close one. The writer feels, however, that the evidence was not "clear and convincing" enough, the standard for great harm cases, ${ }^{111}$ to justify conviction of dolus eventualis homicide. A reasonable doubt exists, at least in the mind of this writer, and therefore he would have convicted J and K of homicide through

[^33]111. See the frrs consideration discussed above at p. 398.
"DESIRE," "KNOWLEDGE OF CERTAINTY," AND DOLUS EVENTUALIS
adverts nt negligence (in addition, of course, to robbery). ${ }^{112}$ The case is a particularly suitable one for the following admonition by the Swiss writer, Logoz:
"If the judge remains in doubt after careful examination of the mental process of the offender, he must resolve such doubt in conformity with the principle in dubio pro reo [when in doubt favour the accused], that is to decide in favour of [advertent] negligence rather than dolus eventualis." ${ }^{113}$
The next case for discussion is Public Prosecutor v. Bekele Ghebre Michael, decided by the Addis Ababa High Court in 1965 G.C. ${ }^{114}$ The case began as a negligent homicide charged under Art. 526 (1) of the Penal Code, but during the trial the High Court ordered the prosecutor to alter the charge to one of intentional homicide under Art. 523, exercising a power the court apparently is given by Art. 119 (1) of the 1961 Criminal Procedure Code. ${ }^{115}$

The facts upon which the court relied were supplied by two witnesses, both policemen. The accused was a taxi driver. He was driving his taxi in Addis Ababa on the street near the Coca-Cola factory at $8: 30 \mathrm{p} . \mathrm{m}$. on a rainy night when he ran over a man lying in the roadway. The body was dragged by the car for approximately five kilometers. It was discovered when the accused stopped at a gas station to refuel his car. The car (a Fiat 1100) had to be lifted in order to extricate the body from the underpart of the car. The body was so mutilated that at first it was impossible to determine its sex.

The accused admitted to the police witnesses, once at the gas station and once at the police precinct station, that he had seen the man lying on the street and that he had not stopped his car, but "had to run over him." He "feared that if he stopped he would be charged with killing the man." He further admitted that he heard "a noise" undorneath his car after he ran over him. To the first witness, he said that he thought that the noise was due to the rough road so he did not stop. To the second witness, at the police station, he said that he 'could not stop because it was raining" and besides, he thought the reason for the noise was that "something was wrong with his tire."

A third witness, also a police officer, testified that the accused had told him "he had knocked the man down." As to the noise under his car, the accused allegedly stated that he thought it was due to the rough road and the fact that
112. A robbery in which a death occurs is treated in Germany as an aggravated robbery. German Penal Code of 1871, Art. 251, translated in The American Series of Foreign Penal Codes, work cited above at note 27, vol. 4, p. 130. (The adoption of the new German Code, to the knowledge of the writer, has not proceeded to the Special Part.) It would also be an aggravated robbery under the Ethiopian Penal Code, Art. 637 (2).
113. P. Logoz, work cited above at note 30, p. 66, translated in Lowenstein, work cited above at note $30, \mathrm{p} .143$.
114. Addis Ababa High Court, 1965, Crim. Case No. 553/56 (unpublished). The case was translated for the writer from Amharic by two Law IV students, Ato Paulos Tesfa Giorgis and Ato Abdul Wasie Yusuf, independently of each other. No substantial differences were noted between the two translations. The case was located in the files of the Addis Ababa High Court by Ato Paulos. It is in the Law Faculty library.
115. The trial court is given the power in Art. 119 (1) to alter a charge on its own motion "where the accused is brought to trial on a charge containing essential error or omissions - "The only qualification of this power appears to be Art. 120 (3) which requires the court to order an adjournment "if proceeding immediately with the trial is likely .to prejudice the accused in his defence..
"he had hit a stone." The accused made a statement in court denying almost everything. He said that he ran over nobody and heard no noise under his car. He admitted that a body had been found under his car at the gas station, but he claimed that it had not been attached to his car, but had been lying on the ground. The court rejected this version and credited the accused's alleged statement that he had run over a man lying in the street, and not that he had knocked someone down.

Bekele was convicted of intentional homicide under Art. 523. Quite aside from the dolus eventualis question, there is a serious defect in this conviction. No evidence was presented that the person who was lying in the road was alive when he was run over by the accused. Any one of the massive wounds described by the medical expert would have caused the death of the deceased and any one of them could have been inflicted by some other person or car before the accused ran over and dragged the deceased. The deceased might even have been clubbed and murdered and left in the road. Thus, the prosecutor failed to prove that the act of the accused caused the death of the victim, as required by Art. 24 of the Code. ${ }^{116}$ Based upon the evidence produced in court, the only charge that could properly have been brought against the accused was under Art. 487, "outrage on the repose and dignity of the dead;" there is no doubt that the dragging amounted to "mutilation" under sub. art. (I) (b) of that article. ${ }^{117}$ For his conviction under Art. 523, Bekele was sentenced to eight years of rigorous imprisonment.

We can, however, for the purpose of our discussion here assume that such missing evidence had been introduced, and proceed to consider the question of the accused's state of mind. The prosecutor's only argument on this question was that the accused was negligent and that his negligence was "gross." The High Court was more explicit: "It is a grave fault," the court said, for a person "to run over a body for fear that he would be blamed for the act if he stopped." It was also "a grave fault," the court continued, when the accused "knowing that he had driven over a body lying in the road and hearing a noise under his car, ... did not stop to look under his car."

Since the court convicted the accused of intentional homicide under Art. 523, without saying that the accused actually intended the death, it probably had Art. 58 (1), second paragraph (the dolus eventualis provision) in mind. ${ }^{1 t 8}$ But, if so, the court misapplied that provision. The accused's admission that he had seen the man lying in the street before he ran over him did furnish proof of one of the mental elements of dolus eventualis: the accused's awareness, in the words of Art. 58 (1),
116. Evidence that the person was alive when he was run over by the accused would have had to come from witnesses who had seen the person move or make a sound before being run over by the accused, or who had heard a sound come from the person at the moment he was actualiy rue over by the accused.
117. Art. 487 of the Penal Code reads in part: "(1) Whosoever: . . . (b) violates or profanes the resting place of a dead person, degrades or defiles a funeral monument, or profanes or multilates a dead person, whether buried or not; . . is punishable with simple imprisonment or fine." As pointed out earlier (see above at notes 12 and 13), this article punishes intentional action only, even though the word "intention" does not appear therein.
118. It is also possible that the court in the Bekele case, like the court in the next case to be discussed, the Mekeria case, applied Art. 523 not realizing that it only punishes intention. This does not seem likely, however, both because of the language of the court quoted above and because the court expressly ordered the charge increased to Art, 523 from negligent homicide under Art. 526.
second paragraph, "that his act may cause illegal and punishable consequences." Having seen the man lying in the roadway, the accused must have been aware that he might be alive and that driving over him might cause his death, the second consideration in a dolus eventualis case. However, was there sufficient evidence of the third consideration, that the accused had driven over the man willing to kill him?

The evidence produced in the case does not prove this attitude. The probability that the man in the roadway was alive was high enough, evidentiary category (d), to be evidence that the accused when he drove over the man was willing to cause his death. However, this can only be true if Bekele had been able to avoid the man, yet drove over him anyway. His statement to the police that he "had to run over him" raises a substantial doubt on this crucial issue in the case. It seems to suggest that the accused was unable to avoid the person. Since it was dark ( $8: 30 \mathrm{p} . \mathrm{m}$.) and raining "rather heavily," this is not implausible. What was needed was an admission from the accused, category (c), that he could have avoided the body but did not bother to. In the absence of such an admission, no conviction for dolus eventualis homicide is possible. ${ }^{119}$

Furthermore, what could have been Bekele's end or motive? To answer this question we have only his statement that he "feared that if he stopped he would be charged with killing the man." While this is not a praiseworthy attitude, is it a signficant motive for causing someone's death? Rather, it seems like a motive for not stopping after having run over somebody, an interpretation that seems confirmed by his preceding statement that he "had to run over him."

Finally, there is the evidence that the accused had continued to drive, dragging the victim, although he could hear "a noise" under his car. This appears to fall under evidentiary category (b), namely, an act "tending to demonstrate [the actor's] willingness to have [death] occur." However, upon analysis, the evidence is ambiguous. There is, first of all, the accused's claim that he thought the noise was due to such things as "the rough road," a defective tire or the fact that he "had hit a stone." His offering of three separate explanations to three separate witnesses raises some doubts as to the truthfulness of the explanations, but not enough, this writer believes, to discredit this claim. Contradictions and the doubts they raise do not replace actual proof. ${ }^{120}$ Moreover, would Bekele have driven his car into a gasoline station if he had thought there was any likelihood it was dragging a dead body?

Even if Bekele had actually known he was dragging a body or had accepted that fact, would this have shown a willingness to cause death? The very high probability would have been that the person being dragged already was dead by the time the noise was heard and that Bekele would have known that. Therefore, his continuing to drive for five kilometers, perhaps in the hope that the body would become disengaged, would have shown only a willingness to muti-
119. Depending upon the evidence as to the speed at which Bekele was driving, how bad the road conditions were, whether the road was lighted or not, etc, it might even have been difficult to convict him of homicide through advertent negligence.
120. This is true at least under the common law where falsehoods, fabrications, etc. are given only the auxiliary role of adversely affecting the credit to be given to other evidence of fered by the falsifier or fabricator. J. H. Wigmore, Evidence (3rd ed., Boston, Little, Brown \& Co., 1940), vol. 2, pp. 120-25; S. Sarkar, Law of Evidence (11th ed., Calcutta, S. C. Sarkar \& Sons, 1965), pp. 49-50.
late someone already run over and believed dead-not the attitude of dolus eventualis homicide. ${ }^{121}$

The evidence produced thus falls far short of the high standard of proof required in a case of dolus eventualis homicide. The most that Bekele could have been convicted of, again assuming there had been proof that his act had caused the deceased's death, was homicide through advertent negligence. ${ }^{122}$

The third homicide case for discussion is Public Prosecutor $\nu$. Mekeria Yabo, ${ }^{123}$ decided by the Jimma High Court in 1965 G.C. The undisputed evidence in this case was that the accused threw his spear at the deceased piercing him and causing his death. At the time, the deceased was removing beans from the accused's bean field. The evidence as to the accused's state of mind when he killed the deceased was as follows: the accused was in his house when he heard a cry from a woman named Wassie Bayou. According to the accused's statement to the police, she called out "that something had got into the bean field, but she did not know whether it was an animal or some other thing." The accused further stated to the police that following the cry of Wassie Bayou he ran out with his spear to the field. To the poltce, he said that "he could not distinguish" whether the thing at which he threw his spear "was an animal or a human being." In court, he said that he pierced the deceased "because he mistook him for an animal." Later in his court statement, however, he said that "as it was dark he could not distinguish whether the rusting was made by an animal or a human being," thus repeating what he had said to the police. To the police, he addcd that before throwing his spear he had seen whatever it was "on the point of carrying away a bundle of beans." Further evidence was that the accused and deceased were neighbors and that they had had no previous quarrel.

The High Court convicted the accused of homicide under Art. 523, but on a theory of negligence, apparently overlooking the fact that Art. 523 is an offence requiring intention. ${ }^{124}$ The court said that the accused had caused the death of the deceased "by his failure to exercise due care." Elsewhere in the opinion, in fact, the court charitably labeled the act as "somewhat accidental." Conviction under Art. 523 was thus incompatible with the court's own assessment of the facts. According to that assessment, Art. 526, negligent homicide, was the appropriate provision.

There was ample evidence, however, to establish the accused's dolus eventualis state of mind and, hence, properly to convict him under Ait. 523. The accused admitted both to the police and in open court that when he threw the spear he was uncertain whether the thing at which he was throwing was an animal or a human being. This admission, coupled with the rest of the evidence in the case, convicts Mekeria.

[^34]"DESIRE," "KNOWLEDGE OF CERTAINTY," AND DOLUS EVENTUALIS

Mekeria's admission furnishes conclusive evidence of the element of awareness, the second consideration, and is strong evidence of his willingness to bring about the harm, the third consideration. Throwing a spear at a target one knows might be a human being is clear evidence of a willingness to cause that human being's death. In addition, Mekeria's second admission that he could see the thing "on the point of carrying away a bundle of beans' makes it probable that the creature in his field was a human being, further evidence, under category (d), that when Mekeria threw the spear he was willing to kill a human being.

Finally, we have evidence of a significant end-the protection of the accused's bean crop and his fields from an intruder. The Ethiopian reader of this article is a better judge of just how significant such an end might be to a person like Mekeria, but it would seem important enough to be substantial evidence under category (a) of Mekeria's willingness to kill even should the intruder turn out to be human. ${ }^{125}$

The evidence, therefore, is 'clear and convincing" enough to prove Mekeria's guilt of a dolus eventualis homicide under Art. 523 beyond a reasonable doubt. ${ }^{126}$

## The obstacle to obtaining admissions.

Writers on the subject of dolus eventualis have been pessimistic concerning its practical value. Dr. Philippe Graven has written: "Natural as the distinction [between dolus eventualis and advertent negligence] may be, it entails difficulties with regard to evidence since it lies in the doer's state of mind and the "acceptance' or rejection of the consequences of the act may be almost impossible to prove,..."'127 The American commentator, Gerhard Mueller, has stated that "ihe perpetuation of the distinction between [advertent negligence] and dolus eventualis is questionable for practical reasons." 128 The Norwegian jurist, Johannes Andenaes, has gone even further: "Dolus eventualis... is of no great practical signifcance, since it rarely will be possible to prove the thought of the perpetrator.' ${ }^{129}$

Andenaes' statement goes too far. We have seen in the preceding section of this article that "the thought of the perpetrator" can be established from such factors as the significance to him of his end or motive for acting, the acts he may perform or statements he may make, the probability of the harm's occurring, and from his own admissions on the matter.
125. The deceased's wife had also testified that she ran out to the field on hearing a shout and found her husband wounded. He then told her that the accused had pierced him and then had "pulled the spear out . . and went away with it." This, if it was true, was further evidence of indifference toward the life of the deceased, either on the ground that it showed that Mekeria indeed did not care what creature he had hit with bis spear or on the ground that in order to avoid being identified as the person who had wounded the deceased he was willing to leave him behind to bleed to death.
126. Mekeria could not claim legitimate defence under Art. 74 as a defence to the charge of homicide. As Strauss has pointed out, Art. 74, in conjunction with Art. 524 (a), "fixes and emphasizes a moral norm-that killing in the defence merely of property is not justified." Strauss, work cited above at note 10, p. 399; Graven, work cited above at note 7, p. 227. However, as what Mekeria did is use "disproportionate means" in repelling the unlawful trespass on his property and theft of his beans, he would be entitled under Art. 75 (1) to unrestricted mitigation of the penalty imposed under Art. 523. His sentence of three years of risorous imprisonment, when Art. 5235 minimum is five years, indicates he received mitisation.
127. Graven, work cited above at note 7, p. 157.
128. Mueller, work cited above at note 57, p. 47.
129. Andenaes, work cited above at note 24, p. 213.

It is this last, the actor's own admissions, that prompts and justifies the above pessimism. It was the absence of admissions in the Elsasser case that made it impossible to prove dolus eventualis. It was mainly the presence of admissions in the Mekeria case that allowed us to conclude that Mekeria had acted with dolus eventualis. In the Bekele case, there were some admissions, but the key one concerning Bekele's ability to avoid the person in the roadway was lacking. Key admissions were also lacking in the German case of $\mathbf{J}$ and K , at least according to this writer's analysis of the facts. Only in the Cretenoud case were admissions unnecessary because the probability of the harm's occurring was so very high.

The question being raised by the above witters and the one we must consider at this point is how likely is it that the accused will provide the police or the court with the admissions usually needed to prove that he acted with dolus eventualis. The answer will depend first and foremost upon the system of criminal procedure in force. Ethiopia's system is poorly designed for obtaining admissions. In fact, it is correct to say that it is purposely designed to discourage resorting to admissions to prove guilt. A comparison of Ethiopia's system of criminal procedure with continental Europe's will illuminate this point.

A key figure in continental Europe's system is the "investigating magistrate," the juge d'instruction, in France, and the Untersuchungsrichter, in German-speaking countries. ${ }^{130} \mathrm{He}$ is a member of the judiciary completely independent of the prosecutor's office. ${ }^{131}$ He thus is expected to conduct an impartial examination of the case and to decide, on the basis of the evidence collected, whether the accused should be discharged from custody or his case sent to the prosecutor for decision whether to prosecute. His jurisdiction varies from country to country. In all countries, his investigative powers are extensive. They include the power to summon and interrogate "witnesses," which at this stage of the case will include the person accused of the offence. The interrogation of the person accused may take place with or without his consent and, depending upon the seriousness of the case, over a period of days, weeks or even months. The accused can have his lawyer present and need not answer the questions of the magistrate. The effect of his refusal to
130. The principal sources for this very brief description of continental European criminal procedure, all written in English, are as follows: A. Anton, "L'Instruction Criminelle," American J. Comp. L., vol. 9 (1960), p. 441; S. Bedford, The Faces of Justice, A Traveller's Report (New York, Simon \& Schuster, 1961); HI. Hammelmann, "The Evidence of the Prisoner at His Trial; A Comparative Analysis," Canadian Bar Rev., vol. 27 (1949), p. 652; H.-H. Jescheck, "German Criminal Procedure," in The Accused, A Comparative Study (J. Coutts, ed., London, Stevens \& Sons, 1966), p. 246; G. Kock, Lhtroduction, The French Code of Criminal Procedure (American Series of Foreign Penal Codes, G. Mueller, ed., South Hackensack, New Jersey, Fred B. Rothman \& Co., 1964); M. Pieck, "The Accused's Privilege Against Self-incrimination in the Civil Law," American J. Comp. L., vol. 11 (1962), p. 585; E. Schmidt, Introduction, The German Code of Criminal Procedure (American Scries of Foreign Penai Codes, G. Mueller, ed., South Hackensack, New Jersey, Frcd. B. Rothman \& Co., 1965); F. Sullivan, "A Comparative Survey of Problems in Criminal Procedure," St. Louis Univ. L. J., vol. 6 (1961), p. 386, excerpted in S. Fisher, Ethiopian Criminal Procedure: A Sourcebook (Addis Ababa, Facalty of Law, 1969), p. 195; R. Vouin, "The Protection of the Accused in French Criminal Procedure," Int'l Comp. L. Quart., vol. 5, (1956), pp. 1, 157 (in two parts).
131. An exception to this is in the Soviet Union, at least in the largest of the 15 union republics, the Russian Soviet Fedcrated Socialist Republic (RSFSR). There the "investigating magistrate" is in the office and under the supervision of the prosecutor ("procurator"). H. Berman, Soviet Criminal Law and Procedure: The RSFSR Codes (Cambridge, Mass., Harvard Univ. Press, 1966), pp. 75-78.

## "DESIRE," "KNOWLEDGE OF CERTAINTY," AND DOLUS EVENTUALIS

answer, in France, is that the magistrate can "deduce such consequences as [he chooses] from a refusal to answer." ${ }^{132}$ In West Germany, this practice of drawing unfavourable inferences from the accused's silence is being abandoned. ${ }^{133}$ In practice, it is unusual for the accused to remain silent through the entire interrogation, particularly since both at this stage and at the trial there is no sanction for lying. ${ }^{134}$

The interrogation of the accused need not end here. At his trial, he will be asked if he wishes to make a statement. ${ }^{355}$ Should he make a statement, he will be questioned by the presiding judge. The judge is aided in his questioning of the accused by the dossier, the file compiled by the investigating magistrate, which the judge will have examined before the beginning of the triai. ${ }^{136}$ Though, again, there is no obligation to make a statement or to answer the questions of the judge, in Germany "the court can increase a sentence where it is convinced that persistent denial by the defendant of the facts is an indication of his unwillingness to admit the wrong he has done (BGHSt 1,104). ${ }^{1137}$

Th* extensive interrogation of the accused by judicial officers allowed in the continental system tends to produce greater evidence of what was in his mind before and during the commission of the act charged against him. This is illustrated by the German case of J and K . The detailed evidence of the various plans they devised to take M's property, their fear that the leather belt would endanger his life, and all that happened in M's flat, must have come from the accused themselves.

Even in such a procedural system, however, there is little that can be done in a dolus eventualis prosecution should the accused deny the existence of the necessary mental attitude. It is quite difficult, unless there is objective evidence that the
132. Anton, work cited above at note 130, p. 449.
133. This trend is visible both in scholarly writings and in recent decisions of the German Federal Supreme Court. Schwarz \& Kleinknecht, Strafprozessordnug (27th ed., Munchen, C. H. Beck's, 1967), p. 555.
134. The accused is not placed under oath and hence no charge of perjury can be lodged against him for lies that may be discovered. Schmidt, work cited above at note 130 , p. 18; W. Clemens, "The Privilege Against Self-Incrimination-Germany," J. Crim. L., Criminol, \& Poi. Sci,, vol. 51 (1960), pp. 172, 173; R. Vouin, "The Privilege Against Self-IncriminationFrance," J. Crim. L., Criminol. \& Pol. Sci., vol. 51 (1960), p. 170.
135. This is the practice in Germany. Schmidt, work cited above at note 130, p. 18. It is different in France. Art. 328 of the French Crimina! Procedure Code reads: "The president shall interrogate the accused and receive his statement." French Code of Criminal Procedure, work cited above at note 130 .
136. The practice of the continental Eutopean judge of informing himself of the facts of the case before the trial is controversial, being opposite to the attempt in Anglo-American countries (and in Ethiopia) to shield the judge (and, in Anglo-American countries, the jury) as much as possible from the facts of the case before the trial begins. Regarding France, one French writer has characterized the trial as more a trial of "a dossier" than a trial of "a man." Anton, work cited above at note 130, p. 456. A defence of the practice has been offered by the German writer, H-H. Jescheck: ". the presiding judge should have prior knowledge of the file. Only in this way can he inform himself of the fiature of the case involved and decide accordingly how to plan and direct his own conduct of the trial There is a danger of a judge being biased, a risk inherent in his having prior knowledge of the fle of the case. This danger is abated by the fact that German judges are encouraged to view the charge, and the evidence upon which it is based, as a merely provisional and preparatory compilation of the material forming the basis of the proceedings. The final judgment must be the result not of a preliminary investigation, but solely the outcome of the main trial (s. 261, StPO)." Jescheck, work cited above at note 130, pp. 246, 247. Id., p. 250.
harm which occurred had been highly probable, to contradict the accused's claim that he had trusted the harmi would not occur and had continued to act only for that reason. Continued questioning is unlikety to shake him from that claim, especially if he has the benefit of the advice of counsel. It is this fact that explains the pessimism even of European writers towards the practicality of the dolus eventualis concept.

Ethiopia's criminal procedure resembles the Anglo-American system. This is especially so where the interrogation of the accused is concerned. The Anglo-American system is said to be "accusatorial," rather than "inquisitorial," a catchword for a system in which, theoretically at least, interrogation opportunities are strictly limited. Under this system, a United States Supreme Court justice once wrote, "society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation." ${ }^{138}$ There is, accordingly, no provision in the 1961 Ethopian Criminal Procedure Code that authorizes judicial interrogation, either at the investigation stage or the trial stage. ${ }^{139}$ It is entirely up to the accused and his lawyer whether he will or will not give testimony. Even should he decide to testify, the court, whether it be at his preliminary inquiry or at his trial, is restricted simply to recording his statement. ${ }^{140}$ Cross-examination of the accused, one of the most dramatic episodes in an Anglo-American trial and a time-tested way of getting at the inner thoughts of the accused, is forbidden in Ethiopia. The trial court judges may put questions to the accused but only "for the purpose of clarifying any part of his statement."14،

Interrogation opportunties do exist in Ethiopia, as they do in all countries-at the police station. It is undoubtedly true, as numerous observers have pointed out, that unrestricted police interrogation can be most effective in eliciting incriminating admissions from an accused, even without resort to physical brutality. ${ }^{142}$ For this very reason, the Anglo-American system and the Ethiopian Criminal Procedure Code
138. Watts v. Indiana (Sup. Ct., U.S., 1949), U.S. SUP. CT. REP. (Lawyers' ed.), vol. 93, p. 1806 (Frankfurter, J.).
139. The appearance of the arrested person before a judge under Art. 29 of the Criminal Procedure Code clearly is not for the purpose of interrogation. It is only to decide the question of bail versus continued custody. S. Fisher, Ethiopian Criminal Procedure: A Sourcebook (Addis Ababa, Faculty of Law, 1969), pp. 144-46. There is a little-used power given by Art. 35 of the Code to "any court" to "record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial." This refers only to recording statements or confessions the accused has indicated he wishes to volunteer. It does not authorize questioning of the accused by the court. Art. 35 is essentialiy a device to avoid coercive questioning of an arrested person by the police. S. Fisher, "Involuntary Confessions and Article 35, Criminal Procedure Code," J. Eth. L., vol. 3 (1966), p. 330.
140. At the preliminary inquiry, the accused is asked "whether he wishes to make a statement in answer to the charge." Art. 85 (1). He is "informed that he is not bound to say anything and that any statement he may wish to make. . . may be put in at his trial." Art. 85 (3). If he elects to make a statement, "such statement shall be taken down in writing, read over to him, signed by the accused and kept in the file." Art. 86 (2).
141. Art. 142 (3). On the unresolved question of whether the accused can be put under oath before he makes his statement and thus be liable under Art. 447 (2) of the Penal Code to a charge of aggravated perjury should it subsequently be established that he lied, see Fisher, Sourcebook, cited above at note 139, pp. 315-16.
142. See, e.g., discussion by United States Supreme Court in Miranda v. Arizona (Sup. Ct., U.S., 1966), U.S. SUP CT. REP. (Lawyers' ed., 2nd Series), vol. 16, pp. 708-13.
place substantial obstacles in the way of such "unrestricted" police interrogation. The most important of these in the Criminal Procedure Code is Art. 27 (1) and (2). This provision imposes upon the police the obligation to inform the arrested person, either just before or just after they ask him to answer the accusation against him, "that he has the right not to answer and that any statement he may make may be used in evidence." While it is impossible to determine exactly how effective this warning is "in overcoming the inherent pressures of the interrogation atmosphere," ${ }^{143}$ since its effectiveness will depend upon such factors as the way in which it is stated by the police questioner and the age, education, etc. of the arrested person, it seems safe to assume that a warning of this sort, by relieving some of the arrested person's fears, increases the difficulty of obtaining incriminating statements from him. This certainly is the assumption upon which the Anglo-American system operates, and is probably the reason that in the continental European system, which relies so heavily on interrogation as a means of establishing guilt, the arrested person is not so warned. ${ }^{144}$ Moreover, once the arrested person has decided not to answer their questions, it is very doubtful whether the police in Ethiopia may question him further in the hope he will change his mind. ${ }^{145}$

A second obstacle to unrestricted questioning of the accused in Ethiopia is Art. 61 of the Criminal Procedure Code, which provides that "Any person detained on arrest or remand shall be permitted forthwith to call and interview his advocate .. "As the number of trained lawyers increases in Ethiopia, and this right becomes more widely known, ${ }^{146}$ it will almost certainly add to the difficulty of obtaining admissions from arrested persons. The average lawyer, before leaving his

## 143. Id., p. 720.

144. Pieck, work cited above at note 130, pp. 596-98.
145. Art. 27 (2) states that the accused 'shall not be compelled to answer" the accusation or complaint. This, admittedly, is ambiguous and could be taken to mean that the police, after warning the accused, may not resort to force, threat or other improper inducement to make the accused answer their questions, but that they may otherwise continue to ques tion him. However, the police are specifically forbidden to use such improper inducements by Art. 31 of the Code. It seems unlikely that the language in Art. 27 (2) that the arrested person "shall not be compelled to answer" was meant only to repeat the prohibition against improper inducements contained in Art. 31 or to remind the police of such prohibition. Each provision in a Code is "intended to have some unique function. [The draftsman] would not knowingly include some superfluous provision or repeat something already provided for, since the only effect of this would be to confuse." Strauss, work cited above at note 10, p. 393. It could also be argued that an incriminating statement is not given "of the arrested person's own free will" (the standard applied in at least two cases, Leggesse Tumtu \& Argaw Mametcha v. Attorney General (Sup. Imp. Ct., 1964), Crim. App. No. 634/55; Public Prosecutor v. Sintayehu Makonen (A. A. High Court, 1966), Crim. Case No. 1092;58; both in Fisher, Sourcebook, cited above at note 139, pp. 41, 43), when it has to be coaxed out of the reluctant arrestee. In this connection, the United States Supreme Court has maintained that "any statement taken after the person invokes his privilege [to remain silent] cannot be other than the product of compulsion, subtle or otherwise." Miranda v. Arizona, cited above at note 142, p. 743.
146. There is no requirement in Art. 61 that the arrested person be advised of his right to consult with counsel, an omission that undoubtedly will inhibit exercise of the right. The right, however, might be enforced in other ways. In one case reported by Fisher, a lawyer obtained an ex parte order from the High Court ordering the police, among other things, to permit hims to consult with his two arrested clients. Fisher, Sourcebook, cited above at note 139, p. 86.
client alone with the police, ${ }^{147}$ can be expected to advise him to say nothing to police and to inform his client that he has a right to remain silent and that the consequence of foregoing that right will probably be conviction.

The value of the warning and the right to consult with one's lawyer depend initially upon whether the police comply with these two articles and, if they fail to comply, upon the measures taken by the courts to enforce compliance. In England, the "Judges" Rules" ${ }^{148}$ provide directions to the police and the courts on the warning procedure and access to a lawyer. ${ }^{149}$ British courts are given the discretion to exclude from the trial of the accused any admission or confession obtained in violation of the "Rules." ${ }^{50}$ In the United States, exclusion of an admission or confession obtained without a proper warning or without access to counsel is mandatory. ${ }^{151}$ Two 1966 decisions of the Addis Ababa High Court implied that a rule of exclusion with respect to Art. 27 wonld be adopted by that court. ${ }^{152}$

It seems likely that Ethiopian courts will have decreasing patience with failures on the part of the police to comply with Arts. 27 and 61. It also seems likely that voluntary compliance by the police will, with time, occur with greater frequency. The consequence will be fewer admissions than can be expected at present.

## Conclusion.

Judges thus will have to decide whether or not a person had acted with dolus eventualis too often without benefit of one of the major categories of relevant evidence and too often, therefore, on the basis of inference and potentially ambiguous items of proof. An error by the court in deciding this question-a finding that
147. Art. 61 does not grant the lawyer the right to be present during police interrogation, nor does it requite the police or any other agency to appoint a lawyer for an arrested person who cannot afford his own. In this sense, it falls far short of the most controversial part of the holding in the American Miranda case. Appointing lawyers for the indigent at the police investigation stage would clearly be impractical for the present in Ethiopia. See comments in Fisher, id., pp. 270-71.
148. The "Judges" Rules" are summarized in Fisher, id., pp. 68-69.
149. The "Rules" on access to a lawyer are less stringent than Art. 61. They provide: "7. .
(a) A person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably tikely to be caused to the processes of investigation, or the administration of justice by his doing so." "The Judges' Rules and Administrative Directions to the Police," 1964 Crim. L. Rev., p. 173.
150. Fisher, Sourcebook, cited above at note 139, pp. 68, 69.
151. Miranda v. Arizona, cited above at note 142.
152. Public Prosecutor v. Sintayehu Makonen, cited above at note 145, Fisher, Sourcebook, cited above at note 139, p. 43; Public Prosecutor v. X (A. A. High Court, 1966), Crim. Case No. 1339/58, Fisher, id., p. 45. In the latter case, the High Court said: "Evidence of a confession taken without first informing the accused of his rights is valueless." In 1963 , the Supreme Imperial Court had implied the opposite, that a statement made to the police without a proper warning would not be excluded as long as it was otherwise obtained lawfully. Teshome Gebre v. Attorney General (Sup. Imp. Ct., 1963), Crim. App. No. 237/56, Fisher, id., p. 45. Exclusion is not the only measure of enforcement available. Art. 416 of the Penal Code provides "Any public servant who arrests or detains another except in accordance with the law, or who disregards the forms and safeguards prescribed by law, is punishable with rigorous imprisonment not exceeding five years, and fine." A civil suit against the offending police officer and against the state is also possible. Civil Ccde, Arts. 2031, 2035, 2126-27; Rev. Const., Art 62 (b).
dolus eventualis was present when the evidence does not support such a finding-in turn risks serious injustice to the accused. An erroneous finding of dolus eventualis in a prosecution for homicide would bring the case under Art. 523 of the Penal Code or, perhaps, even under Art. 522 (1) (c) if it is found that the homicide was committed "to further or to conceal another crime" (the situation in the German case of J and K ). The punishment provided in Art. 523 is rigorous imprisonment for a minimum of five years and a maximum of twenty years. Under Art. 522 (1) (c), the punishment authorized is "rigorous imprisonment for life, or death." If the finding in the same case were advertent negligence, the case would come under Art. 526 of the Penal Code and the punishment could be no more than three years of simple imprisonment. ${ }^{153}$ In a property offence, e.g., Art. 656, fraudulent misrepresentation, an incorrect finding of dolus eventualis would result in a conviction and perhaps a sentence of rigorous imprisonment as high as five years. If the finding were advertent negligence, the person would be entitled to his complete freedom, since most property offences, fraudulent misrepresentation included, if committed with advertent negligence are not punishable. ${ }^{154}$

The subjective orientation of the Penal Code, ${ }^{155}$ and of the Fetha Nagast, as well, ${ }^{156}$ justifies, if not requires, higher punishment for persons who act with selfish willingness to cause harm. However, that state of mind must first be proved. It is regrettable in this respect that the Criminal Procedure Code, enacted four years after the Penal Code, did not take into account the subjective orientation of the Code it was supposed to implement. ${ }^{157}$ The Avant-Projet of the Criminal Procedure
153. If the negligent homicide were caused "by a person who has a special professional duty to safeguard life," the maximum punishment would be five years of simple imprisonment instead of three. Art. 526 (2).
154. Negligent offences, as was pointed out at the outset of this paper (see above at notes 9 to 13 , and accompanying text), are not as a general rule punishable under the Penal Code. The major exception in the case of property offences are those offences against property that also constitute a danger to the public safety. Arts. 492, 493, 495 and 496.
155. See above at notes 5 to 8, and accompanying text, and at note 75.
156. See quote from the Fetha Nagast above at note 7.
157. A further consequence of this mis-matching of Codes can be seen in the important area of "attempt," Art. 27 of the Penal Code. The test laid down for when an attempt begins and therefore, for most cases, when criminal liability begins, is "when the act performed ciearly aims by way of direct consequence, at [the offence's] completion." Art. 27 (1), second paragraph. Dr. Graven, in his commentary on Art. 27, has argued, probably correctly, that this language, together with the overall approach of the Code to the question of attempt, establishes a subjective or "mental proximity" test for when an attempt begins. "A person begins to [attempt] an offence when he does something such as to show that he is determined to cause harm.. [T]he Ethiopian Code adopts the criterion of the unequivocal nature of the act, manifesting the doer's firm, irrevocable intent to achieve by way of direct consequence the result he seeks to achreve.' "Graven, work cited above at note 7, pp. 72, 74. The nature of this test is such that it will frequently iavolve an mvestigation of the "character and antecedents of the accused. ., for an habitual offender may overcome the crisis of the imminent act' and reach the point of no return earlier than a person who has no previous convictions." Id., p. 73. It is at this point that the Criminal Procedure Code intrudes. Art. 138, entitled "Antecedents of accused," states: "(1) Unless otherwise expressly provided by law, the previous convictions of an accused person shall not be diselosed to the court until after he has been convicted." This is a basic principle of the common law designed to avoid the prejudice that can accrue to an accused person during his trial if the jury finds out that he has one or more prior convictions. G. Williams, The Proof of Guilt (3rd ed., Stevens \& Sons, 1963), pp. 213-16. It is not the wisdom of this common law principle that is in question. The point, rather, is that it is rejected in the continental

Code, drafted by Jean Graven in 1956, had been 'an evenly 'mixed' continentalcommon law procedure, but this was subsequently abandoned for an overall design more substantially adversary." ${ }^{\text {is }}$ Fisher suggests as a reason for this that "the Ethiopian courts had British-influenced adversary procedures since 1941 at least; substantial alterations ini procedure might have caused confusion to Ethiopia's judges and advocates." ${ }^{159}$

Unless "inquisitorial" procedures which allow more extensive questioning of the accused are introduced, or until dolus eventualis is removed from the definition of intention in the Penal Code, ${ }^{160}$ judges will have to be very sparing in their use of dolus eventualis. The general rules presented in this article, even if unswervingly applied by Ethiopia's courts, cannot eliminate the possibility of error. To further protect against such error and the injustice it can cause, the judge must also exercise self-restraint. A finding of dolus eventualis must be the exception, especially in homicide and other "great harm" cases. If, after carefully examining all of the evidence on the question, the judge is left with any doubt as to whether the person had acted with dolus eventualis, he must follow the counsel of the Swiss jurist, Logoz, and "resolve such doubt in conformity with the principle in dubio pro reo [when in doubt favour the accused],' that is he must rule the case one of advertent negligence.


#### Abstract

European non-jury system where proof of prior convictions is regularly considered by judges on the issue of guilt as part of a greater freedom allowed them in the evaluation of evidence (for a graphic illustration of this, see Bedford, work cited above at note 130, pp. 177-80), and the Swiss drafter of the Ethiopian Penal Code quite apparently believed it would likewise be rejected in Ethiopia's non-jury system. It was not, and the substantive doctrine of attempt is thus deprived of one of the major categories of evidence needed for its proving.


158. Fisher, Sourcebook, cited above at note 139, pp. x-xi,
159. Id., p. xi.
160. Dolus eventualis could be removed from intention and treated as it is in France and the Anglo-American countries as an "aggravated form" of advertent negligence. See above at notes 57 and 76 . If this were done, the task of the judge and, more importantly, the consequence of error, would be greatly reduced. Whether the judge found dolus eventualis or advertent negligence to be present, he would have to choose only an appropriate punishment within the single range of punishment for advertent negligence, and would not have to choose between two widely disparate ranges of punishment, one range for intention and the other for advertent negligence, or between punishment and freedom. The difficulty with thus removing dolus eventualis from intention is that it would have to be preceded by a major revision of the Penal Code. An enlargement of advertent negligence to include dolus eventualis would first require some increase in the maximum penalty for offences committed with advertent negigence. Few judges or members of the community, it is believed, would be satisfied, for instance, with a maximum of three years of simple imprisonment for a person who was proved to have committed homicide with the attitude of willingness involved in dolus eventualis. Inclusion of dolus eventuclis within advertent negligence would next require a considerable increase in the number of offences for which advertent negligence is punishable. Again, property damage or fraud committed with the indifference characteristic of dolus eventualis would probably give rise to demands of punishment that could not be met under the present system that makes advertent negligence an exceptional state of mind for criminal liability. Advertent negligence would have to take on the character of "recklessness" in Anglo-American penal law, which, rather than being an exceptional form of liability in that system, is generally as panishable a state of mind as is intention, both comprising what that system terms mens rea or "culpability." See, e.g., the American Model Penal Code, work cited above at note 25 , Sec. 2.02 (3), and the drafters' comments thereto printed in Kadish \& Paulsen, work cited above at note 103, p. 222; Williams, work cited above at note 11 , pp. $30-31$. The only exceptional form of criminal liability remaining in the Ethiopian Penal Code would then be inadvertent negligence. Such a revision of the Penal Code entails problems and policy considerations requiring further study.

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# VOID AND YOIDABEE MARRLAGES IN ETHIOPLAN LAW 

by Katherime O'Donovan*

## INTRODUCTION

Is there a distinction in Ethiopian law between void and voidable marnages? The writer will argue that the Civil Code when dealing with defective marriages, ${ }^{1}$ foresces and regulates only voidable marriages of different degrees, but that the concept of a marriage void ab inito may be profitably introduced to assist structuring thought about Ethiopian marriage law and deal with certain problem cases not specifically dealt with by the Code-

The terms "woid" and "fooidable" are found in the Common Law system. They have their counterparts in the laws of Continental European countries. In both legal systems the terms used lack a clearly defined meaning and the transposition of a terns from one system to another is virtually impossible. In the Amharic version of the Civil Code there is no exact term to convey the concept "void" or "voidable". Nevertheless these terms will be used since they are the most apt terms available for elucidating the law, as will be shown.

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1. An objection conld be made that marriages which are defective and can therefore be dissolved should be called "dissolvable". Put all marriages are ultimately dissolvable, by death, by diworce or because they are defective under Civ. C., Art. 6 6l.
2. Temminology is a problem. The French version of the Civil Cods is fairly onnsistent in the use of languages but the English and Amharic translations are imconsistent and occasionally positively unhelpful. Where the French version declares ocrtain aets "sans waleur an regard de la loi civile", the English translation is "pf no effeet under the civil law", and the Ambaric is "9 2 : fondor"- Ci4. C.. Arts. 18 and 44. In other cases where the French declares an act "dul" the English remeins "of no effect" and the Amharic is "docifis" in Arts, 313, 387, $639(2), 640(3)$ and 638 .
 Amharic jn Art. 707.
"La nollite" in Arts. 314(1); (2) and 369(3) is translated into English as "nullity" and

"L" annulation" in Art. 623(1), (2) and (3) is translated into English as "the annulment" and into Ambaric as "onecation in (1) and "ron'tce $z^{\prime \prime}$ in (2) and (3).

But in connection with the law of contracts "anmule", "annulation" and "nullite" are


 and in Art. 1801 "couditi $="$ The author ackrowledges the help of Ato Tadesse Tecleab with the Amharic text.

A void act is an empty act. It does not achieve what it set out to do. It does not achieve its intended legal consequences. "Quod nullum est, mullum producit effectum." ${ }^{3}$ An act is void due to a defect therein which is so fundamental as to deprive the act of its very existence. "A defect may make a juristic act either woid or voidable. If the defect is such that the act is devoid of the legal results contemplated, then the act is said to be void."A The eonventional pisdom concerning the void act is that it has no legad effect, but this is not strictly so as the act may have effects unforesen by the actor, such as those of criminal prosecution because of the illegality of the act. The point about the void act is that it achieves no part of its intended legal consequences and insofar as these are concerned it has no effect and can be ignored.

A voidable act is an act which, although it contains a defect, has its intended legal effect. The defect in the voidable act is not so serious as to prevent it from coming into effect.
*An act that is incapable of taking effect according to its apparent purport is said to be void. One which may take effoct but is liable to be deprived of effect at the option of some or one of the parties is said to be voidable."5

The defect contained in the voidable act is sufficiently serious to enable the act to be subsequently attacked by one of the parties and declared void by the courts. If, however, it is not avoided the act will take effect as a valid juristic act. ${ }^{6}$ One learned writer has suggested that the correct way to view the voidable act is as "an ayt which gives rise to the intended legal consequences, but at the same time gives rise to a counteractive right which may neutralise those consequences in so far as one of the parties is concerned. ${ }^{\prime \prime}$

A void marriage, if such exists in Ethiopian law, is one to which there is such a serious objection in Jaw because of a grave defect that, should its existence be in question, it will be regarded as acver having taken place and can be so treated by all affected or interested parties. Any court declaration made pould merely have the purpose of affirming that the marriage never existed and of clarifying the status of the parties as never having been married. ${ }^{\text {s }}$ Any person hawing an interest therein could petition for a declaration of nod-existence of the marriage at any time, even after the death of the parties. Since the parties never had the status of husband and wife none of the normal legal consequences of marriage would follow. For
3. G. Ripert and J. Boulanger, Tralte de droit civil, (Paris, Libraitie générale de droit et de jurisprudence, 1956), vol. 1, no. 1369.
4. G. W. Patron, Jurtsputdence, (3rd, Ed. by D. P. Derham) (Oxford University Press, 196\%), p. 281.
5. F. Pollock, Jurtaprudemce and Esags, (London, Macmilian, 1961) D. 89.
6. For example. Civil Code Arts. 313 and 314 give the rinior (or his representative) the right to apply for nullification of an act performed in excess of his powers. If the minor does not pellify the att it remains valid.
7. F. H. Newark, "The Operarion of Nulliy Decrees", Mod. L. Rev., vol. \&, (1945) p. 203 at p- 205
8. Aft 724 of the Civil Code provides: "Only the court is competent to deride whether a martiage has been contracted and whether such marriage is walid." This seems to suggest that all cases even those of woid murriage, must be referred to the court for clarification of the position.
instance there would be no community of property, so the surwiving spouse could not claim his or her share after the death of the other spouse. Any marriage contract made prior to the void marriage would not come into effect. The wifc would retain her own domicile. The children would not be the children of the marriage although they could no doubt prove their filiation as deriving from an irregular union. And the matter could be raised as a defence in other legal actions since all interested parties may concern themselves with a void marriage.

A voidable matiage is quite different from a void marriage. The marriage will be regarded as a valid subsisting marriage unless and until it is attacked. As to the effects of a voidable marriage a distinction must be drawn between a marriage which, atthough voidable, is never attacked ${ }^{19}$ and therefore never avoided, and a marriage which is avoided. In the fomer cage the marriage will be valid and all the nomal legal consequences of martiage will follow. In the latter case a further distinction must be made between those marriages which are declared woid retrospectively and those marriages which are given effect up to the day of avoidance. It is here that the use of the word "woidatle" may be criticised. It fails to distinguish between the act which is not void ab initio but is declared woid retroactively by a court, and the act which is deprived of all future effect by the court but which retains such effect as it has had up to avoidance. ${ }^{11}$

Three categories then emerge. The marriage which is woid ab initio, that is which never came into being or had any effect; the matriage which is void retroactively, (ex tunc), that is which came into being, would have been valid had it not been found out, but is now depriwed of all effect; and the marriage which is void ex mume, that is which is deprived of effect for the future but which holds good for the past. The only category into which the Ethiopian marriage law clearly falls is that of yoid ex nunc.

The Ethiopian law relating to defective marriages does not use the term "nullity" in reference to such marriages. ${ }^{2}$ Defects are classified along with death and divorce as a cause for the dissolution of marriage. ${ }^{13}$ The words "application for dissolution" as "a sanction of the conditions of marriage" 14 are used in the Civil Code for what is traditionally called nullification. The significance of the Civil Code terminology is most important. Dissolution of defoctive matriages has much the same
9. Even if no marriage took place the court must be given the opportanity of clanifying the situation. See G. Ripert and J. Boulanger, cited above at note 3, wol. 1. n no. 1319.
10. The right to attack a voidable marriage is generally limited to those closely involyed. The question of who has the right forms the basis in French law for the distinction between nulitit absolue and uullite yelative. The reason is that where the defect is not serious only the parties have the right to atoid the marriage
11. Writers on void and voidable marriages are aware of the ambiguity. See Newark cited above at note 7 , and the letter it inspired by Latey, M.L.R., wol. 11, (1948) p. 70. See also the remarks by D. Lasok, D. "Approbarton of Martage in Euglish Law and the Doctrine of Yalidation", Mod. Rev., Vol. 26 (1963) p. 249.
12. Exceptions to this are Art. $369(3)$ which uses the word "ftullity" in reference to marriage; Art. 707 which uses the word "null"; and Art. 623 which deals with the "anoulment" of a religions mariage by the meligious authorities.
13. Civ. C., Act 663.
14. Id., Sub-art. (2).
consequences as divorce. ${ }^{15}$ This has the advantage of avoiding the problems which arise in French law through the concept of nullite. According to Ripert and Boulanger:
"When a marriage is declared null or annuled, it can no longer produce any effect; and all those which it has produced up to then disappenear, since it is reputed never to have existed. The appearance of legitimacy which the fact of celebration has given to the union of these persons is retroactively destroyed by the judicial pronouncement of nullity. Quod nullum est nulfum producit effectum. ${ }^{\text {196 }}$
The French law would seem to fit into the category of mariages wid retroactively. In order to get around this difficulty a theory of putative marriage was introduced for those marriages where one or both of the spouses had acted in good faith. The effect of the theory is to render the putative matriage void exnunc wis à vis the partner in good faith. Such a theory is not necessary in Ethiopian law. A deliberate decision was taken by the draftsman to "leave out all the theory of nullity of marriage, which gives rise to many difficulties, and which in any case is rarely applied because of the exceptional effect of the theory of putative marriage. In speaking of dissolution, and not of oullity, it has been possible to avoid the theory of plitative marriage."17 Good faith is relevant to Ethiopian law not in determining when the dissolution will have effect but only in determining the consequences of dissolution. ${ }^{18}$

## II

## THE CIVL CODE PROVLSIONS ON INVALID MARRLAGES

Invalid manriages regulated by the Civil Code are those which have been cedebrated despite some obstacle or impediment to the union. Such impediments were known to the Ferha Nagas! and covered obstacles to the union arising from prior relationships, from previous marriage, or from age. Also included were defects arising from the ceremony itself. ${ }^{19}$ Such marriages were prohibited and in some cages gave rise to penal sanctions. ${ }^{20}$ Many of the impediments found in the Fetha Nagast have been retained in the Civil Code ${ }^{2 t}$ But those relating specifically only to the rules of religion have beem dropped. ${ }^{2}$
15. Id., Art. 69f(2) orders the court to be guided by the rulet for divorce in dissolving a defeetive marriage.
16. G. Ripart and J. Boulanger, cited above at note 3, vol. 1, no. 1369.
17. R, Davit, Le droit de la famille dias le code clvil ethioplen. (Mano, Guifrè, 1967), p. 57 Translations of French texts are rade by the writer.
18. Civ. C., Art. 696(3).
19. Fetha Nagasf, (translation, Abba Pawlos Tradius 196B), pp. 134-144. The yarious impediments were: relationship by consancerinity or aftinity; other relationships, such as that between foster children, godparent and godrhild, guatilan and ward, master and slave; lack of Christian belicf of one party; impotetce; bigamy; disease; one party marrice thres times previously; one party a nun; worman aged over sisty; period of widowhood; lack of consent; not-age (woman to be over twelve yeats, man to be over twenty): lack of form required by the eilaurch.
20. Jd. pp. 297-299.
21. It was the intention of the draftsman to conserve as far as possible the Fetha Nagast. See R. David, cited above at note $1 T_{,}$p. 5 .
22. Forms of marriage under the Civil Code (Art 577) fre: civil, relipious and customary. An error as to the religion of one's spopse is a ground for an application for dissolution under Art. 618.

Impediments to marriage in the Civil Code fall into three categories. Firstly there is the impediment to the celebration of the marriage which does not affect its subsequent validity; this type of impediment is merely prohibitory. Contained in this group are marriages celebrated despite opposition ${ }^{23}$ and marriages celebrated within the period of widowhood. ${ }^{4}$ In both of these cases the obstacle to the marriage (opposition by family, marriage dissolved less than six months previously), should prevent the marriage from taking place; if however it does take place, then the marriage will be valid, despite the impediment. ${ }^{2}$ A criminal sanction may be applied to the authority responsible for the celebration and to the spouses and other parties involved in the marriage. ${ }^{26}$ But the marriage cannot be avoided because of a prohibitory impediment. It is valid after celebration.

The second group of impediments contains those which ought to prevent the marriage from taking place and which render it voidable ${ }^{37}$ if it does These are relative impediments. The distinguishing aspect of this group is that the marriage, although woidable after celebration and thus open to dissolution, can be subsequently validated. This means that the marriage which is voidable after its celebration due to a defect therein can subsequently become valid through the ex post facto removal of the impediment or by the passage of time. This process is known as validation.

Those marriages which are initially voidable but capable of validation are those invalid for non-age, ${ }^{27}$ bigamous matriages, ${ }^{23}$ marriages of incapacitated persons, ${ }^{30}$ marriages contracted ander duress, ${ }^{31}$ and marriages contracted in error. ${ }^{32}$

The concept of validation comes from Canon law 33 Where a marriage contained a defect but the defect was later cured by cessation or dispensation, if the parties renewed their consent to the marriage it became valid. In practical terms the continuance of the couple in living together was often sufficient to cure the defect if the impediment was not publicly known. The reason for permitting validation was the desire to give stability to marriage where the parties had shown their constancy. In secular law one can observe validation in operation in European countries and in Ethiopia. ${ }^{34}$

The Civil Code provides that a marriage which is voidable for non-age ${ }^{35}$ can be dissolved on the application of any interested person or the public prosecutor. ${ }^{36}$
23. Civ. C., Art. 592. See R. David, cited abowe at note 17, p. 57.
24. Id., Art. 596.
25. Id., Arts. 619(3) and 620 (3). See F.C. epoux B. (Cour d'apped de Douai, Fra, Dec. 28, 1908) Dalloz, 1909, pt. 2, p. 102, for an example from French law.
26. Id. Atts. $619(1)$ and (2); 620(1) and (2).
27. "Yoidable" is used here in the state of "capable of betng dissolwed" at the option of certain persons.
25. Civ. C. Art. 581.
29. Id. Art. 585 .
30. Id., Arts. 587 and 589.
31. Id. Adt 589.
32. Jd, Art. 590.
33. F, J. Shetd, The Nuility of Marriage (Now York, Sherd and Ward, 1959) p. 30. D. Lasok cited above at mote 11 . p. 257.
34. For example France, Poland and Switatiand, The doctines of approbation and singerity in Common Law have partially the same effict.
35. Under Article 581, the age of marriage is eighteen for a man and fiftern for a woman.
36. Civ. C., Art. 600(1).

But this application can no longer be brought once the defect has been removed by the passage of time. ${ }^{37}$ The marriage is validated by the removal of the defect.

Similarly in the case of an incapacitated person who is married without the appropriate consent, ${ }^{38}$ once the disability has termineted the incapacitated person has the right to apply for dissolution for six months after the termination only. ${ }^{39}$ The person who should have consented to the marriage ${ }^{40}$ may apply for dissolution within six months of learning of it only, and in no case after the disability has ceased. ${ }^{4}$

In the case of duress ${ }^{42}$ and error ${ }^{43}$ the right to apply for dissolution is iimited to the victim, and he or she has a two year maximum period in which to make the application which must be made within six months of the cessation of the violence ${ }^{44}$ or the discovery of the error. ${ }^{45}$ The limitation of time recognises that the marriage has lasted despite the impediments and suggests that the defect is srued or aceepted over tims.

The biganous ${ }^{46}$ marriage is voidable at the instance of the consorts of the bigamous spouse or the public prosecutor. ${ }^{47}$ It is validated on the day when the former spouse dies. ${ }^{43}$

In these cases of voidable yet validatable marriages criminal sanctions are applicable to these persons who knowingly celebrated or took part in a marriage cere-

[^43]mony to which there was an impediment. ${ }^{49}$ Despite the criminal sanction the matriages can be validated for the sake of ensuring their stability by enabling them to become valid when the defect has disappeared or is no longer significant.

Absolute impediments form the third category. These obstacles are so grave that they can never be cured and thercfore the mariage can never be validated. Only one impediment is absolute; that which prevents the marriage of those who are related by consanguinity or affinty.sp If a couple are married despite this impediment their marriage remains woidable. It is open to an application for dissolution by any interested person or the public prosecutor. ${ }^{3}$ Since the impediment can never be removed, ${ }^{52}$ it is impossible for the marriage to be validated. Here too there is a criminal sanction for those who knew or should have known of the impediment and who assisted at the marriage. ${ }^{53}$

Both the matriage to which there is a relative impediment and that to which there is an absolute impadiment are voidable under Ethiopiaft law. The former is woidable until validated, the latter is always voidable. If a marriage in either of these categories is dissolwed its prior effects are retained and it is void only exntme. The consequences of dissolution for invalidity are wery similar to those of divorce. The regulation of the matter is left to the courts who are exhorted to regulate the dissolution according to equity, to be guided by the rules for divorce, and to take into account the good or bad faith of the parties, whether the marriage has been consummated, the interest of the children and of third parties in good faith. 54 Since the voidable marriage is treated as valid until it is dissolved and since the effects are similar to divorce the dissolution is purely prospective, Even in the case of a bigamous or incestuous union the marriage retains its prior presumption of walidity after dissolution. There is no example that we could discover of a marriage which is voidable and if dissolved retrospectively void. The policy seems a simple and sensible one, since questions of prior status are avoided.

## III

## THE §TATUS OF THE BIGAMOUS MARRLAGE

The biganous marriage, as prewously discussed, falls into the category of mariages which are voidable yet validatable. To these martiages a presumption of
49. Id., Arts. 607, 61I, 614, 616. The case of error is an expeption sinces this is a persoral matters. The criminal sanctions referred to in the Civil Code are those laid down in Pen. C. Ants. 614 and 615. But the Penal Code does pot provide for all cases foreseen in the Civil Code. It is possibic that in some cascs where the Civil Code says that a penal sanction will be applied that the Penal Code makes po prowision for such sanction. The policy of providing such sanctions is a curious one as it will deter the parties involved from bringing an application for dissolution.
50. Id., Arts, 582, 583 and 584, Compare the three versions of the Civil Code. The English and the Ambatic give effect to the bond of consanguinity to the seventh generation whereas the French version says "degre". The bond of affinity bas effeet to the third degrec.
51. Id., Art. 609.
52. The original draft of the Civil Code contained a provision whereby the relationsbip by affrity would cease upon the dissolution of a marnage. This provision was changed in Parliament resulting in Art. 555. See R. David, cited above at note 17 , p. 51 , f. m. 1 and $G$. Krzeczuncowič, Twenty-Fur Problems im Fambly Law, (1970, unpublished. Library, Faculy of Law, Haile Selassie I University), problent 2, and "Quizest". I+ Exh L., yol. VIII, (1972) p. 203
53. Civ., C. Art. 610.
54. Id., Art. $696(1)$, (2) and (3). In Swiss law, the consequences of mullity are those of diworce; code civile suisse, Art. 134.
validity is attached until avoided by dissolution. Nevertheless the bigamous marriage is unique in that its validation does not come about automatically after a lapse of time; its validation occurs upon the death of the first spouse. Certain problems are raised by this peculiarity. They turn on the question: What is the status of the bigamous marriage in Ethiopian law? Does it also benefit from the presumption of validity?

Article 585 states: "A person may not contract marriage so long as he is bound by the bonds of a preceding marriage." Nevertheless some persons already married go through a ceremony of marriage while still bound to another spouse. If this happens it is an offence under the Penal Code for one who "being tied by the bond of a valid marriage, intentionally contracts another marriage before the first union has been dissolved or anmuled."35 Both parties to the bigamous union are punishable. An exception to this rule in the Penal Code is "cases where polygamy is recognised under civil law in conformity with tradition or moral usage." ${ }^{\text {sh }}$ Since no such exception was made in the Civil Code Article 585 holds sway. It was the intention of the drafter to make such an exception for the Muslim population in Tille XXII but due to the overwork of the translators the draft of this title was never translated, never discussed and never proposed to Parliament. ${ }^{57}$ Thus the law of Ethiopia recognises only monogamous marriage. ${ }^{58}$

If a couple are married bigamously either of the consorts of the bigamist or the public prosecutor may apply for dissolution of the marriage. ${ }^{59}$ The burden of proof is on the applicant to show that the first consort was alive on the day of celebration of the second marriage. ${ }^{60}$ The language of the Civil Code is wery imprecise here. Firstly the proof required on an application for dissolution should be that the former spouse is alive at the time of application for dissolution, not at the time of the bigamous marriage. This is because Article 613 provides: "The marriage contracted by the bigamous spouse shall become valid on the day when the former spouse dies." Thus the former spouse could be alive at the time of celebration of the bigamous martiage, yet dead at the time of application for dissolution and the marriage would have become valid in the interval. If dissolution of the second marriage then takes place, it is by divorce. Secondly the wording of Article 613, although quite clear, raises the question of what happens when the for* mer marriage is dissolved not by the death of the former spouse as foreseen by Article 613 but by divorce or as a sanction of the conditions of marriage. Will this have the effect of validating the bigamous mamiage? The logical answer would

[^44]seem to be yes, since the impediment having been removed there is no obstacie in the way of the marriage. The Polish law which is closest to the Ethiopian law on the matter of validation of bigamous marriages permits validation regardless of the cause of termination of the previous marriage. ${ }^{61}$ It may be that the Ethiopian law does not go the whole way with the Polish law because of the criticism which followed the latter. Validation where the previous marriage had ended in divorce was regarded by Polish critics as particularly repugnant because st was thought to encourage divorce. ${ }^{6}$

Looking at the law on voidable marriages as a whole the validation of the bigamous union fits into the picture very well. Yet the law is fairly revolutionary. Bigamy is a critne and the bigamous marriage is a nullity in most countries. The policy reasons for validation of stability and remrard for constancy are less obvionsly present when there is not even a requirement of good faith. Swiss law will permit validation, where the non-bigamous party acted in good faith, ${ }^{63}$ In French law a bigamous marriage can never be validated, ${ }^{64}$ although the marriage may be putative as regards the party in good faith. Neither Polish nor Ethiopian lap look to bona fides before validating the marriage,

It is the bigamous marriage which is neither fish nor flesh, not having been validated, nor yet annuled which raises problems of personal status. If the second spouse of the bigamist leaves him and marries again, will the second marriage be also bigamous? Other countries with similar laws generally allow the invalidity of the first marriage as a defence to a charge of bigamy. ${ }^{6}$. If the bigamous spouse dies while the bigamous marriage still subsists can the marriage be subsequently attacked or will both surviving spouses be legitimate? Fortunately there is no problem concerning the status of the children of the second marriage who can prowe their filiation without difficulty. ${ }^{66}$
61. The Polish Family and Guardianship Code (translation 3. Gorecki, in D. Lasot, Pollah Fanily Law, Lerder, A.W Sjithoff, 1968), p. 266, Art. 13 provides; "S. 3. A marriage cannot be anmulled on the ground that one of the spouses is a party to a subsisting marriage if the provious union has cone to an end or has been annulled, uniess the previous unton has cone to an cnd by the death of the person who had contracted the bigamous marringe."
62. D. Lasok cited above at mote 61, p. 262.
63. Code tivil suisst, Art. 122, provides:

There is no nullity in the case of bigany, where the preceding martiage has been distolved in the meantime and where the consort of the bigamist acted in good faith."
64. An application for nullity can be made after the dissolution of the first marriape. There is no analdey with the validation of other defective marriages: bigany is considered too serious a defett to allow the situation to be regularised. M. Planiol et G. Ripert. Traite pratlque de droit civil, (2nd ed. 1962, by A. Rotast, Paris, Libwaife genérale de droit et de jurisprudence) wol, 2, no, 266.
65. In French taw the bigamist can raise the nullity of the first marriage as a defence under Art. 189 of the French Civil Code which provides: "If the new spouses oppose the rullity of the first marriage, the validity or the nullity of this marriage must first be decided". Art. 124 of the Italian Civil Code is similar.
66. The children can claim to be the chidiren of a marriage under Civ. C. Art. 740 . Alterthatively they can claim to be the children of an irregular union under Civ. C., Art, 708 cum Art. 745(i). The writer favours the former solotion because even if the bigamous marriage is attacked it will be valid as regards the past, and because Giv. C., Art. 708 definer an irregular union as "the state of fact created when a man and a woman live together as hustand and wife without havigg contracted marriage". The biganous marriage is a case where marriage has been contracted.

In the original draft of the Civil Code there was no doubt as to the statur of the bigamous union. It was to have the status of an irregular union. ${ }^{67}$ If the article so providing had been retained there would be an easy answer to questions concerning the tights of the second consort. As it is the question is left oper.

A recent case brought a typical problem to light. . $_{6}$ The facts were as follows: A probate file having been opened in the Awraja court two parties appeared claining to be the wife of the deceased. The plaintiff produced two documents of which one was a marriage certificate dated 1940 (Eth. Cal.) in support of her claim. The defendant also claimed to be the wife of the deceased with her five children as heirs. The venue having been changed to the High Court, ${ }^{* 9}$ the Court held that the plaintiff was the legal wife of the deceased on the basis of the marriage record and the evidence of witnesses. The Court discounted evidence that the plaintifi had declared herself a divorce to the Ministry of Foreign Affairs when applying for a passport to go to Ghana with another man, that it was alleged that the plaintiff had married in Ghana and the fact that the plaintiff had run a bar in Jimma.

None of these facts in itself was held to constitute a divorce. The Court said:70
"As can be gathered from the Civil Code Arts 666 et seq., an act of divorce, like that of marriage must follow certain legal procedures. Art. 665(3) states that divorce would take place unless it is done in accordance with the rules laid down by the Code. If the plaintiff entered into a marriage with another person before having dissolved her first marriage with the deceased, then she would be held liable for bigany; the second martiage, however, cannot invalidate the first one. Moreover, Civil Code Art. 585 provides that no marriage can be entered into as long as the bonds of a preceding marriage are intact. The fact that the plaintifl had owned and was engaged in running a bar cannot be deemed either a procedure for or evidence of a divorce, although it is admittedly a disreputable and antisocial trade.

What the plaintiff wrote to the Ministry of Foreign Affairs (declaring herself a divorce) cannot by itself constitute a divorce either, since under the law the unitaterial repudiation of the husband by the wife or the wife by the husbend is of no effect. In fact, under Art. 665(1) of the Civil Code, even divorce by mutual consent is not permitted. For all these reaspns, the plaintiff's marriage was valid until the death fo her tusband; there was no legal divorce at all."
The Court then declared the plaintiff the legitimate wife of the deceaged, and gave her permission to bring an action to claim her share of common property.

[^45]68. Beletshachew Benti $v$, Wolde Aregay Megente, (Addis Ababa, High Court, Civil Case No. 1584/60) (unipublished).
69. Under Civ, Pro. C., Art. 31,
70. Translation by Ato Ayanew Wassie.

On appeal to the Supreme Court, ${ }^{\text {Th }}$ the Conrt held that since the plaintiff (now respondent) had ${ }^{72}$
'sabandoned her conjugal residence and lived like a prostitute, applied for a passport saying she was divorced, said she was divorced to members of her community in edirs and mouming housts, never objected to the bigamous marriage of her husband ${ }^{\text {T}}$,
she could not be considered the legal wife of the deceased. In dealing with the judgment of the High Court, the Surpreme Court said that the plaintiff's evidence
"does not in any way tend to prove that she was not divorced and that she had lived with the deceased until the time of his death ... It is obvious that marriage and divorce have legal procedures. But, it must be known that, in accordance with the law, in the absence of the instrument pronouncing the divorce, it may well be proved by introducing circumstantial evidence. In wiew of the fact of respondent's way of life, conduct, and actions we have not found the statement of the High Court that there was no divoree according to legal procedure, to be appropriate."

The Supreme Court was satisfied that the defendant (now appellant) had been married to the deceased in 1957 (Eth. Cal.) and declared her the legal wife.

It is subnitted with due respect that both courts wert wrong. Both took the view that there could be only one legal wife. But if the wiew of the High Court that the first marriage was not dissolved is taken, then the second marriage, benefiting from the presumption of validity since it was newer attacked, is also valid. There are three modes of dissolution of marriage, of which dissolution for invalidity is one ${ }^{\text {T3 }}$ Both marriages now having been dissolved by death, both wives have an equal claim to the common property. ${ }^{74}$ Even if the first wife could attack the second marriage after the death of the bigamist the effect of dissolution for invalidity would be an award of common property to the second wife. ${ }^{75}$ In any case it is extremely doubtful that an application for dissolution for invalidity can be brought after the death of one of the spouses. If the first consort dies the second marriage is validated under Atticle 613; if the bigamist or the second consort dies the second marriage is dissolved by death. Polish law makes a specific exception in allowing nullification where the bigamist has died. ${ }^{76}$ No such exception is made in Ethiopian law where the causes of dissolution are treated equally.

The criticism of the Supreme Court decision is that the burden of proof has shifted to the plaintiff to prove that she was not divorced a yirtually impossible task under the circumstances. ${ }^{\text {T }}$ This is a discordant with Article 707 which provides:

[^46]"The person who alleges that a marriage is null or has been dissolved shall prove such allegation."

What is being suggested here is probably starting. Two or even more consorts can claim to be the legal spouses of a bigarnist, Two or more spouses can claim a share of common property. Why not Etbiopian law takes a liberal atimude to the tights of children regardless of whether they are bom to the wife or the concubine of the father, ${ }^{32}$ children of a marriage have to share with children outside marriage. Why should this not also be true of spouses? The objection may be made that a bigamous marriage is an irregular union, as intended by the draftsman. A glance at the provisions on the dissolution of invalid marriage should be sufficient to answer that objection and the suggestion that the bigamous marriage has no legal status. Dissolution for invalidity is much the same as divorce and the effects are purely prospective. ${ }^{79}$ The marriage, such as it was, is valid for as long as it lasted. Termination of irregular union is quite a different matter. No common property was created ${ }^{30}$ and the highest expectation is maintenance for the woman for six months. ${ }^{\text {. }}$

Two serious objections may be made to this conclusion. In practical terms it mai be difficult to allocate common property between two spouses of a bigannist or to apportion a pension between them. Community of property starts from the day of marriage ${ }^{32}$ and so the common property would have to be apportioned according to length of marriage. Numerous diftculties and arguments would follow from this. One can inagine only too well the claims that would be made concerning the time of acquisition of the more valuable propenty, the allegations that would be made concerning personal property. It is also doubtful whether the section on pecuniary effects of marriage had such a situation in view when drafted. The second objection is that the policy of the Civil Code as laid down in Article 585 is against bigamy. Although the draftsman recognised that there was frequent bigamy in Ethiopia and attempted to deal with the situation by giving it the status of an irregular union, ${ }^{83}$ this solution was rejected or dropped by the Codification Commission probably because there was a desire not to recognise bigamy at all. If this is so then the last situation is worse than the first. ${ }^{54}$
78. Howeyer the author does not agree with the view often exprested that there is no iffegitimacy in Ethiopian law. Article 721 (3) is quite clear that children bern outside relationshipt provided for by the law such as marriage or irregular union and who have not been acknowledged or adopted have a juridical bond only with their mother. It is possfble under Ciw, ce, Art. 770 for a child to prove his filiation by possession of status. On prool of filiation see G. Krzecrudowich, "The Law of Filation mider the Clvil Code", J. Eth. L., vol. II, (1966) p. 511 .
79. See p. 14 above.
80. Civ. Ce, Art, 712.
81. Id., Art. 717(1). The Amharic version of the Civil Code gays "threc months."
83. R. David, cited above at note $1 \Gamma_{1}$ p. 57 .
84. There is a curious reluctance on the part of Ethioplan courts to deal with the probiem of bigany. In three cases of crimiral prosecution in the Awraja Court in Addis Ababa none resulted in conviction. In crim. case $453 / 61$ (unpublished) the court held that there was no evidence thet the first marriage ever took place. In crim, case $30 / 62$ (umpublished) the first wife dropped the case, In crim. case 218/61 unpublished it was erroneously held by the court that Pen. C. Art. 220 barred the complaint with its three month period of limitation. But in Prosecutor y. Haile T/Merhin, (Supreme Imperial Court, Criminal Appeal No. 179/52) (umpublished) a sentence of three months imprisonment for bigamy was confirmed.

## VOID MARRLAGE

Many legal systems contain a concept of void marriage generally referred to as inexistent. An inexistent marriage like a void marriage is empty of effect. Both, in theory, have no need of a court decision to render them completely ineffective. They are themselves void ab initio. However, as has been said, there is always a title or an appearance to be destroyed by the court in confirming the incxistence of the act ${ }^{85}$ Not all writers would agree that the act void ab imitio is the same as the inexistent act. Many witers consider that the distinction between void and voidable marriage is the same as the distinction between nullité absolue and nullite relative in French or Swiss law or that between nichtige Ehe and aufhebbare Ehe in German law. ${ }^{\text {g6 }}$ But in its true and original sense a marriage void ab-inifio is no marriage at all. ${ }^{8 T}$

In French law there is a concept of "marriage inexistant"; in German law "Nichtehe" is ipso jure void and produces no legal consequences; in Polish law, in Italian law and in Swiss law "non-marriage" can be observed.

The French were obliged to introduce the notion of marriage inexistant to deal with cases "where the law does not declare a marriage to be mull, and where on the other hand it is logically impossible to admit that it is productive of efiect," ${ }^{\text {as }}$ The theory comes to the rescue in cases of identity of sex and want of form. ${ }^{\text {s9 }}$ Planiol, while critical of some applications of the theory, finds that it is justified in those cases "where there is not even the appearance of marriage." ${ }^{\text {wh }}$ Cases of inexistent marriage are not regulated in the French Civil Code, and the theory is the product of jurisprwdence.

Polish law, which is similar to Ethiopian law, makes a distinction between voidable marriage and non-marriage, the latter being reserved for marriages "absolutely void for lack of a civil ceremony, that is a marriage celebrated solely according to religious rites or in the absence of a registrar. Also a civil ceremony in which
85. Tronchet, in the discussions of the French Civil Code before its enactment said-: "Jamais un marriage n'Est nut de plein droit; il y a toujours un titte et une apparente qu'il faut détruife". Fenet, IX, D. 53, eited in M. Platiol et G. Ripert, cited above at note 64, vol. 1 No .256
86. D. Lasok, cited above at note 61, p. 53. E.J. Cohn, "The Nwhty of marrlage", L. Quatt Rev, wol 64, (1948) p. 324. The distinction between nullité absolue and nullite relative is based on the right to petition for nullity. The distinction betwecn nictige Ehe and aufhebbare Ehe is that in the former case the effects of pulity can be retroactive, whereas in the latter the effects ant ex nume and the same as divorce. W. Mullei-Freinfels, "Family Law and the Law of Swecession in Germay", Int"l and Comp. L. Quart., wil. 16, (1967) p. 409 at 432 .
87. English law and Continental European law has got itself into difticulties with the warious categories due to the influenoe of cenlesiastical law and the realities of life. Ethiopian Law baving had the benefit of these experiences has simplified the matter admirably by baving only one category; that of voidable marriage, in the Civil Code. The recognition that a marriage cat also be woid ab initio is a purely logical addition.
88: M, Platniol and G. Ripert, Treafise on the Civil Law (12th ed. 1939) (translationt, Louisiana State L. Inst., 1959), vol. 1 pt. $\mathrm{J}_{4}$ to 1004.
89. Ibid.
90. Pbid
persons of the same sex masqueraded as mati and woman would presumably be a non-martiage." ${ }^{1}$

In most of the systems that recognise a concept of non-marriage, lack of a civil ceremony or of proper legal formalities is a case of non-marriage. ${ }^{92}$ This would not be the case in Ethiopia where formalities for marriage have a very minor place in the law. If the officer of civil status responsible for a civil marriage does not follow the legal formalities required, he will be liable to a criminal sanction but the marriage will be valid. ${ }^{93}$ If a religions martiage is annuled by the religious authorities for lack of form or due to some impediment this will constitute a serious caust for divorce but the marriage will be valid in the eyes of the law. ${ }^{94}$ No legal tfect will be given to an annulment of a customary marriage by the customary authorities. 95

It seems likely that a marriage where both parties were of the same sex would be considered void by the Ethopian courts. Although this may be considered a purely academic proposition cases of this kind hate arisen in other countries. Planiol says:
"But judicial records show that the difficulty could arise in practice... It is indisputable that mannage assumes that there is a difference of sex between the two persons joined in wedlock. It is radically null when a mistake has been made regarding the sex of one of them, or, what amounts to the same thing, wher one of them is not of a specific sex. If there be incontestible identity of sex there is not even the appearance of marriage."96
In France a marriage has been declared null because it did not unite a man and a woman, ${ }^{, 9}$ but care must be taken not to confuse this with impotence or errot on the person. ${ }^{98}$

While it is true that the case of identity of sex would seem to be covered by the Civil Code, an examination of the relevant article will show that this is not so
91. D. Lasok, citcd above at note 61, p. 53.
92. In France, Germady, Switzerlard ${ }_{t}$ Poland.
93. Givil C., Arts. 621 and 622 , provided that the defintional requirements of Civ. C., Art. 578 are satisficd.
94. Id., Art. 623(1) and (2). The word "some" in Civ, C., Art. 623, is intended to finfude "any* in the seftese of inobservance of any religipus condition or formality.
95. Id., Art. 623(3).
96. M. Flariol et G. Ripert, cited above at note 64, wol. 2 no. 1005.
97. Darbousse e. Datbousse (Cour trappel, Montpelier, Fra., May 8, 1872, Dalloz, 1872 pt. 2 p. 48. In this case the wife had no intermal sex organs and was said by the cour to be more like a mant than a woman. The court satd that since marriage is a union of a man and a womad it cannot be valid where the wife is not a woman. But see per confra, Dame G. C., G. (Cout de cassation, Fra., April 6. 1903), Dathoz, lo(4, pt. 1, p. 395 which held the absence of sertain sex organs in the wife to be a case of impotence. The pourt admicted that mariage can be contracted only between two persons of the opposite sex, but hetd that in this cast the wife was recognisably a woman.
98. The French authorities seem to agre that a mere absence of scx oreans or one sex does not make a person a member of the other sex, Something more positive is required.

Article $591\left(c^{99}\right.$ deals with the case where an error bas been made by one of the spouses on "the bodily conformation" of the other "who does not have the requisite organs for the consummation of the marriage". Although the effect of marriage is in no way dependent on consummation, ${ }^{\text {Do }}$ the person who was married under the influence of such error can apply for fissotution on the theory that his consent was vitiated in that he would not hawe married had he known the truth. ${ }^{101}$ But if the parties ate of the same sex there is obviously no maniage, whether a mistake has been made or not, and the so-called marriage is void. ${ }^{102}$

German law considers it a case of Nichtehe or matrimonium non existens where no agreement takes place at all, ${ }^{103}$ It seems probable that such a marriage would be considered woid in Ethiopia. Article 586 (1) requires that "each of the spouses shall personally consent to the marriage at the time of celebrationi." Marriage by proxy is not permitted ${ }^{\text {º4 }}$ Related to the question of consent are the cases of voidable marriage which we have seen earlier, namely marriage of incapacitated persons, duress and error. But in all of these cases specific provision is made for application for dissolntion of the matriage. No provision is made for the caso where a person had absolutely no intention whatsover of being married, as for instance where one of the parties did not understand the nature of the ceremony. 103 The laek of understanding might be due to lack of acquaintance with the ceremony or to a befuddled state induced by drink or trugs. Also included in a case of complete absence of consent would be cases where one of the parties answered 'no' at the ceremony or did not answer at all. It was the intention of the draftsman to deal with this question by including a provision making invalid a consent to marriage given by a person ignorant of its meaning, however this provision disappeared. ${ }^{106}$

The consequences of a void marriage have been outjned above. Since there is no marriage there are no effects.
99. Article 591 makes a restrictive coumeration of errors, 59t(c) covers ${ }^{\text {feerror }}$ on the state of health or bodily conformation of the spouse, who is affected by leprosy or who does not have the reguisie orgatns for conoumnation of the marriage". This dors not cover wilful refusal to consummate, But the Ambaric text use the words tor is umable to consummate the marrisge", which words cover cases of impotence and possibly, wilful refusal to consummat.
100. Civ. C. Art. 626 prowides: "The effects of marriage shall in no way depend on the real or presumed consummation of the marriage."
101. Id., Arts. 590 and 618. In Xc.X, (Tribural civil de Grenoble Fra., March 13 and Nov. 20 , 195B) Dalloz, 1959, p. 495 , impotento was beld to constitute an error as to the person qitiating consent.
102. The matriage will be woid because it does not have the appearance of marriage. If the appearance of thatriase is present, i.e., the parties stem to be of opposite sexs, then the marriage will not be void.
103. E.J. Chr, Manwtr of Germon Law, (2nd Ed. London, British Imst. of Inti. and Comp. Law, 1966) vol. 1. no 488. W. Muller-Freienfels, cited aboue at note 82 , p., 431.
104. Giv. C., Art. $586(2)$. Dispeasation can be given for good cause.
105. See Kelly (orse. Hyman) v. Kclly (High Court, Eng., 1932), T.L.R. wol. 149, p. 99, where the bride thought the wedding ceremony was a betrothal ofteminoy, The manriage was held woid ab initio by an English court. Yalier v. Valier (orse Davis) High Court, Eng., 1925), L.T. vol. 133 , $p$ 830, was a casc where the bridegroom a fortigher did not realise that a ceremony of roartiage was being performed. This marriage was alse held void ab fnitio by an English court.
106. R. R. David cited above at note 17, p. 54, f. n. 21 . See also G. Kizeczunowicz, ciced above at note 52, problem 4, and "Quizes" J. Eth. L., Vol. VIII, (1972) p. 204

Void marriage was known in Ethiopia prior to the coming into force of the Civil Code. In a case decided by the Addis Ababa High Court ${ }^{107}$ a marriage was held void $a b$ initio. The facts were these: a civil marriage was celebrated between the partics at the Municipality of Addts Ababa. The parties, who were nor-Ethopians had met abroad and had subsequently agreed by letter to marry. The respondent arrived in Addis Ababa to be matried to the petitioner who was working in Ethiopia. From the moment of her arrival the respondent was nervous and, at first, refused to go through with the marriage as arranged. However due to the situation in which she found herself and the pressure of friends she dia get married to the petitioner. On the honeymoon she refused to consummate the marriage which was never consummated thereafter. Three weeks later she left Ethiopia hawing sent a fetter of "declaration of divorce" to her embassy.

The High Court held the marriage void $a b$ infio saying: "the respondent did not have the intention to consummate the marriage at the time of celebration. This being so one of the essential elements of marriage was lacking."

If this case were to occur today the court would have to look to the Civil Code in order to deal with it. Since consummation has no bearing on the effects of marriage ${ }^{109}$ and this is not a case of inability to consummate but of wifut refusal ${ }^{109}$ the prowisions of the Civil Code would not provide an 日nswer, except possibly to hold the marriage valid for lack of a text declaring it defective. In that case the marriage would have to be dissolved by divorce. It is also possible that the marriage could be held woid ab intio for lack of intention to mary, which, however, would have to amount to complete lack of consent.

## $\mathbf{V}$

## CONCLUSION

Only voidable marriages are prowided for in the Civil Code of Ethiopia. Where a marriage contains a defect and it can be dissolved on these grounds, it is widable. But unless and until it is avoided such a marriage is valid. If it is avoided the marriage will cease to have effect on the day it is declared void. But it will retain all the eflects it prewiously had. The court declaration will be purely prospective.

Void marriages are not directly alluded to in the Civil Code. It is logical to introduce the concept to deal with cases wher there is no mannage because of a fundamental defect in the union. The concept must be limited to cases where the
107. Therson v. Grayson, (High Court, Addi Ababa, Civil Case No. 151/51, Commereial Division) (unpublished).
108. Civ. C. Art. 626, text giver above at rote 100.
109. Inability to consummate due to a lack of sexual organs is covered by Civ C, Art, 591 (c) where an etror has been made text given above at note 99. The case where a spouse could consummate the marriage but refuses to do so is not directly covered. However, since the Ambaric text refers to inability to consummate, refusal might be held to constitute imability, cf. G. Krzeczunowicz, cited above at note 52 , problem 's, and "Quizzes", J. Efh L. yol. VIII, (1972) p- 230
nature and purpose of marriage are frustrated, for example where there is no consent to marry or no appearance of marriage. The void marriage has no effect since it never came into being.

The law, in regulating defective marriages, must limit itself to these two cases. There is no reason to introdtce the notion of voidable marriages which can be retroactively declared woid. Such a concept puts personal rights in jeopardy and is undesirable for this reason.











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# AN INTRODUCTION TO THE LAW OF BUSINESS ORGANDAFONG 

by Everett F. Goldberg

The Commercial Code of 1960 created a new and comprehensive law of business onganizations for Ethiopia. It is the purpose of this article to describe the general provisions and principles concerning business organizations, their relation to other laws and some of the problems they create. After an introductory discussion, matters considered are the classification of busidess organizations, legal personality (including the concepts of limited liability and capital), and the partnership agreement. ${ }^{1}$ General formation formalities, dissolution, and operational rales, such as those pertaining to management and accounting, are not examided.

## 1. In General

Definition. Article 210 of The Commercial Code defines a business organization as "any association arising out of a partnership agreement." A partarship agreement is "a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses anising out thereof if any." ${ }^{31}$

Whenever a valid partnership agreement is made and other required formalities, if any, are performed, a business organization exists. The agreement is at the heart of the organization. But the organization is more than the agreement. The law contains numerous provisions which regulate business organizations, many of which may not be modified by the agreement. Also, except for joint ventures, all business organizations have legal personality. Thus, a business organization has an institutional aspect with an existence dependent upon, bat separate from, the partnership agreement.

Like any other organization or association of persons, the business organization enables people to do things which would be difficult or impossible for them to do alone. What is unique about the business organization is that its object is the making of profits. By "prefis" is meant pecuniary gain, not spiritual or intelitectual benefit. It includes satisfaction of the financial interests of the organization's nembers "by placing them in a position to save money." ${ }^{3}$

Business organizations are governed primarily by Book II of the Commercial Code. Articles $210-226$ of Book II contain general provisions applicable to all, and

[^65]2. Comme., Art. 211.
3. Civ. C. Art. 405(2).
the subsequent articles contain special rules concerning the rarious kinds of business organizations, conversion and amalgamation, and forcign business organzations.

Associntiens Distinguished. An association is "a grouping formed between two or more persons with a wew to obtaiding a result other than the securing or sharing of profits." ${ }^{34}$ Assciations may be formed for a variety of non-profit purposes; examples are a sports organization, a debatiog club, a literary group, a charitable organization, etc. Religious groups other than the Ethiopian Orthodox Church, and organizations formed to defend their members' financial jeterests or to represent a particular calling, are treated as associations, except to the extent they are governed by special laws.

Associations are governed by Articles $408-482$ of the Civil Code. These provisions and Book II of the Conmercial Code are independent of each other. One toes not contain general or special rules of the other. This is true despite the fact that Article 2tO(1) of the Commercial Code defines a business organization as an "association" based on a partmership agreement. It means' a "gronping," a more accurate iranslation of the term uned in the origina French text. ${ }^{6}$

Because associations do not have an object of making profits and business organizations do; they are subject to different schemes of regulation. Thus, assoclations are stupervised by the office of associations of the Ministry of Interior. ${ }^{7}$ Business organizations generally fall under the Ministry of Commerce and Industry."

What if a gronping is formed for a non-profit purpose, but in fact regularly carries on profit-inaking activities? This would be a ground for judicial dissolution of the association, on the application of the association's board of management of one-fifth of the members of of the office of associations of the Ministry of Interior., The Commercial Code expressly prohibits an association from carrying on a irade, one of those proft-making activities listed in Article 5 of the Commercial Code. If an association does carry on a trade, it is subject to dissolution under Article 461 of the Civil Code. ${ }^{10}$

Even if an association carries on a profit-making activity, it may find it difficult legally to get those profits to its members. The money and other property owned by an association may not be distributed to its members when it is dissolved: ${ }^{\text {it }}$ No provision states whether or not such profits may be distributed to
4. Civ, C. Art. 404
5. Cis. C., Arts, 406, 407,
6. References to the French text of the Comniercial Code are to Code de commerce de $L^{\text {- }}$ Emire d'Ethopie de 1960 (Paris, LGDJ, 1965); of the Civil Code, Code chyl de l'Emiree d' Ethlopfe de 1960 (Paris, LGDJ, 1962). References to the Ambaric texts ance based on assistance provided by Ato Kebede Kassa and Ato Shibru Seifu.
7. Ciw. C. Arts. 468-482. See also the Associations Reqistration Regulations, 1966, Leg. Not. No. 321, Neg. Gaz, year 26, no. 1.
8. The powers of the two ministries differ. See, for example, Giv C., Art. 473, recuirimy the office of associations to be notifed of the seneral meecings of an association and enablint it to prescribe measures to ensure the "goed furctionime's of the meeting and to send an observer to it. The Ministry of Commeriee und Industry is not given such powers.
9. Civ. C., Art 461(c).
10. Cornit. C. Art 25.
11. Civ. C. Art. 467.
members during the life of the association, but it seems inconsistent with the spirit of Articles 407, 467, and related provisions, to do so. Of course, an association may carry on particular activitics from time to time in order to acquire money to help it obtain its nomal non-profit objects. But it may mot engage in profit-making activities on a regular basis.

Cooperatives Article 4 of the Co-operative Societies Proclamation of $1966^{12}$ defines a cooperative society as one which has as its "principal purposes and objects".
the promotion, in accordance with co-operative principles and the requirements of social justice, of better living, better business and better methods of production by such means as:
(1) reducing the cost of credit;
(2) reducing the cost of goods and services for production and consumption; minimizing and reducing the individual impact of risks and uncertainties: spreading knowledge of practical technical iruprovements; or
may othervise contribute to achieve the above-mentioned purposes and objects.
Before the adoption of the Co-operative Societies Proclamation, a co-operative would theoretically have had to be formed either as an association or as a business organization, according to its activity. It would have to be formed as a business organization if it tended to "satisfy the financial interests of their members by placing them in a position to save money." ${ }^{3}$ This would oceur in particular with those activites specified in paragraphs (I) and (2) of Article 4 of the Cooperative Societies Proclamation; reducing the cost of credit, goods or services.

One way in which the members of a co-operative might cut costs and save money is by working for the organization or acquiring items from or selling them to the organtzation. This eliminates the separate employer and the "middleman" in the buying and selling process.

For example assume that a person could buy beans for fifty cents per kilo in any vegetable store in Addis Ababa. Assume also that the owner of the store paid the farmer thirty cents for that kilo of beans, and out of the twenty cents remaining uses ten cents to pay for the expenses of operating his store and keeps ten aents as profit. If under these circumstances many bean consumers got together and agreed to form a cooperative to buy and sell beans, they could each save ten cents on each kilo of beans. The cooperative would buy beans from the farmer at thirty cents per kilo. It would probably have expenses similar to those of the owner of the vegetable store; say, ten cents per kilo. But since there is to store owner (the "middleman.") to take a profit, the members of the cooperative cat acquire the beans for forty cents per kilo instead of fifty cents. Or, the cooperative may sell at fifty cents per kilo, and divide up the surplus (representing ten cents

[^66]on each bag of beans) among the members at the end of the year. The net result is the same. As another example, consider one kind of credit cooperative. The purpose of a credit cooperative is to lend money to its members at a rate of interest lower than that charged by the bank or other lending institutions. (It may also requite less security.) Say the bank nomaly charges individual borrowers nine per cent interest. The credit cooperative may be able to borrow from the bank at a lower rate because it is borrowing a much latger sum of money (the sum all its members would have borrowed individual combined) and con probably offer better over-all security. Let us assume that lower rate is seven per cent. The credit cooperative can then lend money to its members at, say, eight per cent. The cooperative uses the difference between the seven per cent it owes the bank and the cight per cent it teceives from its borrowing members to cover its expenses. The borrowing member has saved one per cent for himself, since he only must pay eight per cent interest for an amount on which he would have had to pay. nine per cent interest if he borrowed from a bank.

Any cooperative which has the purposes and objects specified in Article 4 of the Co-operative Societies Proclamation may be formed acoording to that proclamation. ${ }^{14}$ A cooperative formed under the proclarmation would be registered with the Registrar of Co-operative Societies of the Ministry of National Communty Development and Social Affairs and become subject to the regulatory scheme of the proclamation and that Ministry. According to Article 59 of the proclamation, the provisions of the Commercial Codo would not apply to such a copperativo:
> except in so far as such provisions are consistent with the purposes and provisions of this Proclamation, and, in particular, but without limitation, [cooperative] societies shall not be subject to any fequirement of organiza: tion, registration or internal management otherwise applicable to trades or business organizations under the Commercial Code.

It should be noted, however, that registration undor the Co-operative Societies Proclamation is optional. Persons forming a cooperative which enable its members to savo money may still create it in one of the forms of business organization provided by the Commercial Code if they wish.

Other Orgenizations. If two or more persons form a group with a wiww to securing or sharing profits, their group is subject to tho prowisions of the Cornmercial Code concening business organizations. If their group is formed with any other purpose in mind, it is subject to the provisions of the Civil Code concersing associations. ${ }^{15}$ However, special laws may create groups other than associations and business organizations. Some of these laws provide rules for the formation of particular tepes of groups. Others are charters of specific organizations. In the Civil Code itself, we find provisions regulating syndicates of joint owners, where parts of of building are individually owned and parts jointly owned (Arts. 1293-1308); agricultural communities (Arts. 1489-1590), and official associations of landowners (Arts. 1501-1534). ${ }^{16}$ Outside the Civil Code, there are the Co-operative Speieties Proclana
14. Comin. C., Art. 212(2).
15. Civ. C., Arts. 404, 405 .
16. Compare the Civil Code provisions on property with a specife destination, endowments and trusts: Tite III, Chap. 3.
tion and the Imperial Savings and Home Ownership Public Association Proclamation. ${ }^{17}$ In addition, there are several non-profit organizations chartered by His Imperial Majesty before the adoption of the Civil Code. ${ }^{13}$

Some authors have suggested that the codes leave a "gap" for customary cooperative organizations such as ikub, and that they exist outside the rogulation of the codes. ${ }^{19}$ In the opimion of the present author, this is not true. As stated above, Articles 404 and 405 of the Cuil Code provide rales governing every kind of "grouping." A cooperative organization, customary or not, is a grouping. Pursuant to Aticle $\$ 347(1)$, any custornary rules pertaining to such an organzation have been roplaced by the Code, except as they may survive for previously created rights and situations under Articles 3348-3351. Such an organization falls under Articles 404 and 405 and, at least in contemplation of the code, is either an association or business organization, umless formed pursuant to the Co-operative Societies Proclamation of 1966 or some other law. Even if a customary cooperative is wewed merely as a contract, it would be governed by the Civil Code provisions on contracts and not by customary law.

## 2. Clessification of Business Organizations

The Commercial Code classifes business organizations in two different ways: first, according to the particular form of organization; second, according to whether it is commercial or non-commertial. It may also be helpful to distinguish organizations according to how much they emphasize the role of particular individuals.

Form of Organization. The Code recognizes six forms of business organization: ordinary partnership, joint wenture, general partnership, limited partnership, share company and private limited company. The following paragraphs summarize the basic characteristics of each.
(1) Ordinary Partnership (Arts. 227-270). This is an organization ustally of a relatively small number of persons. It may not be a commercial business organization; that is, it may not carry out any of the activities specified in Article 5 of the Cormercial Code. Since Article 5 mentions most profit-making activities, the use of the ondinary partnership form is extremely limited. The members do not have limited liability. Membership interests are not freely transferable.
(2) Joint Venture (Arts. 271-279). This organization is usually formed with a relatively small number of persons for a limited purpose or short period of time. Unlike all the other forms of business organization, the joint venture is not a legal perspn and its existence may not be disclosed to third persons. Membership is not freely transferable. The liability of the members depends on the memorandurn of association.
17. 1962, Proc. No 188, Neg. Gaz; year 2i, po. 11.
18. For example, the Chamber of Commerce, Gen. Not. No. 90 of 1947, Neg. Gaz., year 6 . no- 8; Ethiopian Red Cross Socisty, Gen. Nol. No. 99 of 1947, Neg. Gaz., ycar 7, no. 2; Ethippian Horse Racing Club, Gen Not. Ne. 230 of 1957, Neg. Gaz., ycar 17, no. 6.
19. G. Krzeczunowicz "A New Legislative Approach to Customary Law' The Reptals Provision of the Ethiopian Civil Code of 1960,"J. Eff. Studies, vol. 1, no. 1 (1963); J, Yadderlinden, "An Introduction to the Soutes of Ethiopian Law," J. EdA. $L_{3}$ vol, 3 (1966), p 244. For a description of ikub, see Asfaw Damts "Ekub" Bulleth of the Ethrologital Soctety+
(3) General Partnership (Arts. 280-295). This organization usually is formed with a relatively small number of persons. Mexnbership is not freely transferable. Its members do not have limited liability. It is the most common form of business organization without limited liability. It is governed by a substantial number of the provisions conctaing ordinary partnership, as well as Articles 280-295.
(4) Limited Partnership (Arts. 296-303). The Limited partuership is basically the same as the general partnership, with one exception: one or more (but not all) of its members have limited liability. Membership is not fteely transferable. It is governed by a substantial number of the rules on general partnership and ordinary partnership. Articles $296-303$ add to these rules modifications which are required by the presence of memEers with limited liability.
(5) Share Company (Arts. 304-509). The share company is fundamentally different from the forms previonsly discussed, that all of its members enjoy limited liability. It may, although not necessarily, consist of many menbers. Membership is freely trantferable. Share company is the form usually chosen to operate enterprises which require vast sums of money.
(6) Private Limited Company (Art 510-543). This organization is a mixture of the share company and the parmership. It is like the share company in that ail fts members enjoy limited liability. It is like the partnership in that if usually has a srall number of members and its membership interests are not freely transferable.

According to an unofficial compilation of statistjes, there wore about 389 business organizations registered at the Miristry of Commerce and Industry in 1965. About 108 of these were general partnership, on general pattnerships and limited partnerships. (It is unclear wheiner limited partnerships were included or whether there were just nono registered.) The total declared capital of these organizations was Eth. $\$ 7,324,000$. About 106 of the registered organizations were share companies, with a total declared capital of Eth. $\$ 218,781,000$. About 175 were private limited companies, with a total declared capital of Eth. $\$ 34,775,000,25$

It should be noted that the word "partmership" is used in the names of business organizations in Article 212(1) in a manner different from that in which it is used in Atticle 405 of the Civi Code and Article 21I of the Commercial Code When it is used in the name of a busimess organizations, it is used either for want of a better word or becarige the form of business prganization being described is closest to the type of business organization in the English-language Common Law which has that name. When it is used in Article 405 of the Civil Code and in Article 211 of the Commercial Code, it has the same meaning as the general phraso "cbusiness organization." ${ }^{24}$

Commercial Business Organizatious Article 10 of the Commercial Code defines a commercial business organization as one in which the 'robjects under the memorandum of association or in fact are to carry on any of the activities specified in Article 5 of this Code." Share companies and private limited companties are always commercial "whatever their objects." This definition is supplemented by Article 213 ,

[^67]which provides that any of the six organizational forms specified in Article 212 may be a commercial business organization except for an ordinary partnership. The net effect of Articles 10 and 213 is that an ordinary partnership may not bo a commercial business organization (and thus may not carry on any of the activities specifed in Article 5); share companies and private limited companies aro always commercial, whether or not their objects include any of the activities specified in Article 5; general partnerships, limited partnerships and joint ventures may or may not be commercial, depending on whether or not one of their objects according to the memorandum of association or in fact is to carry on any of the activities specified in Atticle 5.

If a commercial business organization is created in the form of an ordinary partnership, or if a commercial business organization is created and its forth is not specified, the organization is deemed to be a commercial general partnership. ${ }^{22}$

The distinction between commercial and non-commercial business organizations is very important in the French version of the Commercial Code. It is less important in the English version. It is ever less important in the Amharic version.

In the French version, only commercial business organizations are required to keep accounts and to register and be publicized. Only commercial business organizations may go through bankruptcy and only commercial business organizations are generally subject to the provisions governing traders. ${ }^{33}$

In the Erglish version, only commercial business organizations are required to keep accounts and only they may go through bankruptcy. But all business organizations other than joint ventures must register and be publicized and all business organizations are subject to the provisions governing traders.

In the Amharic version, only commercial business organizations are requited to keep accounts. But all business organizations other than joint ventures rinust register, all other than joint ventures may go through bankruptcy and all are subject to the provisions governing traders.

The Role of the Individual Member. In some business organizations, the participation and identity of a particular member are typicatly more important to the other members than they are in other business organzations. This helps explain some of the business organization provisions.

In the ordinary partnership, general partnership, limited partnership and joint venture, there are usually a relatively small number of members and the importance of a particular member is great. Except for limited partoers in a limited partnership, the members nomally work in or for the organization. They must get along well together if the organization is to function properly. In addition, in each of these organizations there are persons without limited liability. A person without limited liability is much more concerned about the qualifications and character of

[^68]his fellow members than the person with limited liabilty. The importance of the inditidual member is feflected in such rules is those making it difficult to transfer mombership interests, presuming a requirement of unanimous approval of the members for major decisions, and presuming dissolution of the organization when a member dies, becomes incapable or goes bankrupt. ${ }^{24}$

A share company may have just a few members. On the other hand, it may also sell "shares" to the public and acquits many members. In the latter situation, the identity of any member is often unimportant to the others; noost members join the organization chiefly as a means of investiog their money and take little or no part in the management of the organization. All members have timited liability for the company's debts. Mary of the share compary prowisions in the Code reflect this situation. Thus, death, incapacity or bankruptcy of a member does not result in dissolution, atd membersbip interests are freely transferable. ${ }^{25}$

The private limited company has some aspects of each type of organization. It normally has relatively few mernbers, Monbership interests are not freely transferable. But all menbers have limited liability and death, incapacity or bankruptcy of a member is not presumed to result in dissolution. ${ }^{26}$

The diflerent rofe of the individual is reflected not only in the different rules which govert these organizations, but also in the different role the partnership agrement plays in them. The parthership agrement is very tmportant in establishing the internal rules of an organization such as the general partnership. There are relatively few code provisions, and many of the provisions which do oxist may be over-ruled by different provisions in the partnership agrement. This is so because the individual is so important, and becauso he can be relied on to protect his own interests. Also, creditors of the organization do not qeed extensive protection because they usually have one or more members whom they can sue if the organization does not pay its debts. On the other hand, the code provides many rulos governing share companies, only a few of which may be modifed by the partmership agrement. In comparies with a large number of menbers, the individuat member may have difficrlty exercising control. Since all members have limited liability, more provisions are needed to protect creditors. And, finally, since share comparies may ratse huge amounts of capital, they may become more influential in the economy than the organization of persons; it becomes all the more important for the law to assure proper functioning of the organization.

## 3. Legal Persomality

Defintion Persons are the subjects of rights and obligations. They may be compared with goods, which ate objects of rights and obigations. For example, a chair may be owned or sold by a person. It cannot itself own something else; ownership is a right, which only a person may enjoy. Neither can it make a contract, a type of obligation, which only a person may incur.

[^69]Article 1 of the Civil Code provides: "The human person is the subject of rights from its birth to its death." In a number of situations, the law attributes personality to a thing or a group. Thus, Articlo 210(2) of the Commercial Code provides that "any business organization other than a joint ventare shall be decmed to be a legal person." This is a way of enabling the organzation to become the subject of rights and obligations. ${ }^{27}$

A business organization is chiefly a collection of physical persons and of property. If the organization is not treated as a person, the members would noramily be joint owners of the property. Any obligations incurred in the course of operating the business would noramlly be made in the name of one or more of the mernbers, and those members would beconte subject to such obligations. When the law provides that the organization is a legal person, the organization itself may own the property and obligations may be made in the name of the organizution. In the eyes of the aw, it is like a physical person, distinct from the persons who are its members. For example, say $A, B$ and $C$ are all physical persons, and that $A$ owns land and $B$ and $C$ have no interest in that land. The positions of the three parties with regard to the land are clear. If the situation is changed so that $A$ is a business organization with legal personality, and $B$ and $C$ are members, the result is the same. A, a legal person, owns the land. $B$ and $C$ do not. It may be that $B$ and $C$ are agents of $A$, and as such deal with the land; but if so, they do it on behalf of A. As members, B and C may participate in decisions which affect the land; but if so, their rights are of participation in the organization and not ownership of the land. The organization pays the taxes on the land, if any. It may sell the land, and does so in its own name when it does. A similar analysis coutd be applied to contractual and oxtra-contractual obligations, and to juridical acts in general.

The principle was applied by the High Court in Addis Ababa in the case of Delbourgo v. The Inland Revente Department. ${ }^{23}$ The petitioners were a share company and three members of the company. The Inland Reverue Department, in assessing the income tax of the compary, had ordered the three members to produce the pass books and statements of their private bank accounts. The court held that the department had no power to make such an order, because the tax being assessed was only that of the company, and 'the principle remains that a company has a completely different legal personality from the itdividual members or shareholders. ${ }^{29}$

The concept of the legal person is used in many areas other than business organizations...for example, it is applied to the State and its subdivisions, the Ethiopian Orthodox Church and associations. ${ }^{30}$

[^70]Attributes of the Legal Person. The following paragraphs discuss some of the characteristics of legal persons, with reference to business organizations. Any reference to business organizations does not include joint ventares, of course, since they do not enjoy legal personality.

Capaclity. The extent to which the law permits a person to possess and exercise rights is called his capacity. (The term "rights" when used in this sense includes its converse, the incurring of obligations). When the lew deprives him of rights or of the permission to exercise rights for himself, he is said to have an incapacity.

The distinction betwern the enjoyment of rights and thetr exercise should be noted. When we speak of the capacity of a legal person, we are only concerned with its enjoyment of rights. A legal person cannot by its very nature exercise any rights by itself; it must act through agents.

Incapacities normally ane imposed for one of two purposes: protection of an individual against his own indiscretion, as in the case of minors and insane and infinm persons, and protection of society against a person it distrusts or suspects, as in the ease of criminals legally interdicted and foreigners. ${ }^{31}$

According to Article 192 of the Civil Code, a physical person "is capable of performing all the acts of civil life untess he is declared incapable by the law." The capacity of a legal person, adds Article 197, is to be regulated by the particular provisions applicable to it.

Article 22 of the Commercial Cole enables a business organization "to carry on any trade," subject to legal prohibitions, valid agreements prohibiting competition and any legal prowisions regulating that trade. ${ }^{32}$ But no law deals with the capacity of a business organization to engage in activities generally (as trade is only one of those activities Listed in Article 5 of the Commencial Code), to make contracts and perform other civil acts.

In this situation, the general rale provided for physical persons should bo adopted for business organizations by analogy. A business organization should be capable of performing all the acts of civil life consistent with its nature unless declared incapable by law. It is a sound rule, since one to the contrary, by making the existence of capacity depend on specific laws or the content of the memorandum of association, would create uncertainty and inhibit commercial activity. Specific incapacities if desired can always be created by law, as they are in the case of physical persons. This is the basic rufe regarding associations. "An association may perform all civil acts which are consistent with its nature. ${ }^{33}$
31. See ememaly, Civ C., Arts 192-393.
32. The English phrase in Article 22, ssubjext to guch prohibitions or lawful megtrictions regarding unfair competition as may be prescribed" is slightly itacourate. The French and Amharic speak of legal prohibitions and legitimate agrements profibiting competition. The typical unfair pompetition zgreements of thits nature are governet by Comm. C, Arts. 30, 158, 159, and Civ, Arts. 2589-2592
33. Giv. C., Art 454(1). This also is the general mule for business orgonirations in France. G. Ripert Trate dhotentaite de drolt commertial (5th ed. by R. Roblot, Faris, LGDJ; 1963-64); wol. 1, no. 680. For a description of a more restrictive rule and the problems it creates, set I. Egcarta, "Some Points of Comparison Between the Compraies Act., 1948, and the French Lav of Companies,* Carbitige LJ, vol. 11 (1953) p. 24; Great Britaib, Eoard of Tride, Report of the Company Lam Committee (Cmnd. 1749) (London, HMSO, 1962), pp. 10-13. Ses also Ghanta, Commission of Enquity into the Working and Admimistration of the Pectent Company Law of Ghana, Finnd Repori (Accra, Govtriment Printer, 1961)r Pp. 36, 4i, 42.

Assuming this is the general rule, a business organization has the capacity to make contracts, to sue and be sued to receive gifts, and generally to perform any civil act, subject to physical limtations imposed by its abstract nature and to restrictions imposed by law.

Naturally, a business organization, like any legal person, camot do the things physical persons can do which depend on the human nature of the physeal person. On the other hand, it is not subject to incapacities which depend on human chav racteristics of physical persons; for example, those based on minority, insanity, and infirmity.

Rights and Liabilities Many attributes are directly conuected with the capacity of a legal person to enjoy rights. Those include, particularly with regard to -business organizations, the following: ${ }^{34}$
(a) The organization may sue or be sued.
(b) The property of the organization is not available to satisfy judgments against its members on their personal debts. A personal creditor of a member who obtains a judgment against him may not have it executed on the property belonging to the organization, even if the property was contributed to the organization by that member. The member is not the owner of such property, either alone or jointly. On the other hand, the personal creditor may proceed against the membership interest of the member If a creditor obtains a judgment against the organization, he may have that judgment executed on property belonging to the organization. He may proceed against property belonging to an individual momber only if that member does not enjoy limited liability for the debts of the organization, and he may be required to satisfy his judgment from the property belonging to the orginization. A personal creditor of a member who obtains a judgment against the member may not have it executed on the property belonging to the organization, even if the property was contributed to the orgatization by that member. The member is not the owner of such property, either alone or jointly. On the other hand, the judgment of the personal creditor may be executed on the membership interest of the member.
(c) There is no set-off between debts owed to third parties by the organization and debts owed by third parties to individual members (or in the converse situation).
(d) When a menber dies, his heirs inherit no rights of ownership over the property belonging to the organization. Their rights only involve the mentership interest of the deceased. Depending on the type of organization and the provisions of the memorandum of association, they might inherit the membership interest or be paid its value by the organization. Even if the organization is dissolved upon a member's death, the heirs do not inherit its property; they are paid the value of the proportionate share of the deceased menber jast as if dissolution occurred while the member lived. An important result of this is that if the law or the memoran dum of association so provides, an organization may have a "life" which survives that of. its members.
34. See. G. Ripert, cited above at pote 33, no. 679
(e) A business organization may be put into barkraptcy or employ a scheme of arrangement. ${ }^{35}$
(f) The business organization is primarily liable to pay tho taxes on its property, income and taxable activities.

Representation and Clvil Liability Since a legal person cannot act by itself, Article 216 of the Commercial Code provides that "a business organization shal] acquire rights and incur liabilities by its agents in accordance with the provisions relating to agency." Title XIV of the Civil Code contains the general rules of agency in Ethiopia. Particular rules regarding busincss organzations are provided in the parts of the Commercial Code dealing with each organization. These rules deal chiefly with managers. Each organization has one or more managers, who have general powers to represent the organizution. In share companies, the management function is split between a board of directors and a general manager. Articles 28-62 of the Commercial Code, which contain particular rules dealing with commercial employees, managers of traders, commercial travellers and representatives, comtoercial agents, commercial brokers and commission agents, also apply to business ofganizations, except to the extent they are expressly or impliedly modified by the provisions on business organizations. ${ }^{36}$

In general pursuant to the ruics of agcocy, a business organization is bound by any contracts or other act made in its name by an agent acting within the scope of his powers. ${ }^{37}$ [t may also be bound in certain other circumstances; for example, in a general partnership, when a manager acts in his own name but for the benefit of tbe partnership. ${ }^{33}$

A business organization is subject to extra-contractual liability when one of its agents or employees incurs a liability in the discharge of his duties. ln such a case, the organization and the agent or employee are jointly and severally liable. ${ }^{39}$ The organization will not be liable if the person who incurs the Hability is not subject to its control or is deemed to have retained his independence. The liability is presumed to have occured in the discharge of duties if the damage is caused at the place where or during the time when the agent or employee is normally employed; this presumption is rebuttable by evidence to the contrary. ${ }^{40}$

Penal Lablity. It is unclear whether a legai person is subject to penal liability, in the absence of an express provision making it liabe. ${ }^{41}$ Doubt as to liability

[^71]arises fromi at least four sources. First, being withoun nund or imbs, a legal person cannot have the intent or negligence in action which must exist for a person to be guilty of a crime. ${ }^{42}$ Second, there, is no provision in the Penal Code similar to Artiele 2129 of the Civil Code, which makes legal persons civilly liable for the àcts of their agents and employees. Third, Article 689 of the Penal Code states that if an economic or commercial offense defined in Article 671-688 is conimited in the management of a body corporate, punishment is imposed on the managers, agents, members, directors, auditors or liquidators who committed the offonse. ${ }^{3}$ Fonmin, punishments such as death and restriction of liberty cannot be imposed on a legal person. Yet a punishment such as a fine can be imposed on a legal person. And restricting liability to physical persons would ignore the reality that the facilities of an organization may be used in, or benefit from, the perpetration of a crime; punishing the organization may be the best way to deter the crime.

The Penal Code does provide that a court may order closed or suspended any "undertaking or establishment" used to commit or further the commission of an offense which endangers public secturity, 4 . If the offender has been punished with sentence of tigorous imprisonment exceeding one year, the undertaking or establishment may be dissolved and wound up. ${ }^{4}$ Sinco legal persons engage in undertaking and have establishments, these artieles in effect impose liability on them. But they do not completely solve the problem of liability of legal persons In the fitst place, they only contemplate cimes where a nataral person is also liable: Article 147 expressly provides that it applies in addition to the penalty imposed on the offender. In the second place, closing the undertaking may be ordered only after crimes endangening public secunity. Finally, an order under Article 147 is a drastie remedy, even if limited in time and place. In many situations, a fine may be more appropriate.

Whatever the case in gensral, a legal person may be deemed to have committed a crime where expresely so stated. Onty one Ponat Code provision appears to do this. ${ }^{46}$ Article 576 provides for the levying of a fine on a legal person committing an offense against honor or reputation. Closing or dissolution ander Atticle 147 may also be ordered, and the oficers and other natural persons who commited the offense may be punished as well.

- Name- A legal person tunally has a name. The name of a business organization is chosen by the members, subject to any legal requirements. There are no specific requirements for the name of an ordinary partarship. The name of any the other types of business organization must contain the type of organization it is - "General Partnership", "Share Company," etc. Ir addition, the name of a general partnership must consist of the names of at least two partners and the name of a limited partnership may only consist of the names of general partmers. The names of a share company and private limited company may be frety chosen:

42. Pen, C., Arts, 23, 57.
43. This also applies to petty offences. Pen. C. Art. 820.
44. Pen. C., Art. 147. The scope of offences for which an order may be made under Article 147 is vague However, some prowisions, such as Aricle 689, expresfly prowide for its application. Some others, such as Article 364, provide for the pnoishment of colosing or suspersion without mentionimg Article 147.
45. Pen C. Art5. $147,148$.
46. P. Grayen, cited above at note 41, p. 58 .
for example, with the names of one or more members, a term of fantasy, an indication of the purpose of the business, or a combination of these. ${ }^{47}$

Article 305 of the Commercial Code prohibits the choice of a chate company name which offends public policy or the rights of third parties. This is the only place a specific requirement of this natare is established, but the principle would seen applicable to cevery business organization. In-sofar as public policy is concerned, it is embodied in Article 2030 of the Civil Code, which prohibits anyone from acting in a mananer which offends morality or public order.

Various provisions deal with specific rights of third parties, or wrongs which may be done by the use of a name. In general, a name may not be chosen for a business organization which would tend to create confusion among customers with the name of a competitg business organization of trader. If such a name is chosen, the rules concerning unfair competition would apply. ${ }^{43}$ In this sense, the name of a business organization is like a trade name, which is the "rname under which a [trader] operates his buriness and which cleary desiguates the business."中"

A physical person may not wase his own name in the name of a business organization comected with his occupation if it has "the object of effect of cassing prejudice, by means of a harmful confusion, to the credit or to the reputation of a third person." The offender is subject to an action in unfair competition of defamation. ${ }^{30}$ A business organization may not usurp the name of any physical person in such manner that he suffers harm thereby ${ }^{\text {s }}$

Head Office. The place of its head office has consequences for the legal person similar to those of domicile for the physical person. The term "head office" is not defined in the codes. In French law, it means the place where the principal organs of administration and management of the organization are found. ${ }^{53}$

The location of the head office is important in procedural matters, particularly insofar as court jurisdiction and service of process aie concerned. 3 . It also is important in matters related to nationality.

Nationality. One may hear business organizations, particularly share companies, referred to as "Ethicpian" or "foreign." In a way, it is inaccurate to speak of nationality in this situation, since a legal person cannot feel the sense of allegiance and does not enjoy certain rights of citizenship (such as the right to wote) which are usually connected with nationality. But some laws do speak of legal persons or business organizations wbich are "foreign" or have "nationality," and the rights and obligations of an organization may be different if it is connected in soms way with a foreign country. Particularly important are the laws governing the formation

[^72]and operation of a business organization, the nght generally to carry on activities in Ethiopia and specific.rights reserved to Ethiopan citizens. ${ }^{54}$

In principle, a legal person with its head office in a foreign country has such nationality as is given to it by the laws of that countryss it follows that a legal person with its head office in Ethiopia is of Ethiopian nationality, although no kaw expressly so provides. This abstract prinerple is limited by concrete rules concerning the enjoyment of rights in Ethiopia of legal persons in general and the formation and operation of business organizations in particular. ${ }^{36}$ To summarize: Insofar as the formation and operation of a business organization and its enjoyment of rigats in Efhiopia are concerned, three factors are taken into account: the location of its head office, the place of its principal object of business and the country under whose law it is formed. A business organization with its head office in Ethiopia is subject to Ethiopian law with respect to its formation and operation. An organization with its head office abroad is subject to Ethiopian law if it is formed in accordanco with Ethiopian law or if its principal object of business is in Ethiopie. ${ }^{57}$ An organization formed abroad (and, presumably, with its head office and principal object of business abroad) must register in Ethiopia and is subject to Ethiopian law with respect to its Ethiopian offices. ${ }^{s 9}$ Wherever its head office is, a business organization is defined as "foreign" under the Business Enterprises Registration Proclamation if it is "organized or existing under" the law of another country. Such organizations are required to register before engaging in activities in Ethiopia, with somewhat different requirements from those imposed on "domestic" organizations. ${ }^{59}$ In addition to the factors mentioned above, the existence of forefgn interests (for example, in membership or management) may be taken into accont by special layrs.

[^73]55. Civ C. Art 547(2)
56. Ciy. C. Arts. 545-549; Comm. C., Arts. 555-560. These articles ane srbstantielly more detailed then the summary in the text.
57. Comm. C., Art. 455, states in the English wersion that firms incorporated abroad art subjet to the Code if their head office or primcipal phace of business is in Ethiopia The French and Anharic speak of the primeipal puipose of the business, tot the place. Rtegarding the capacity of forcigners to join Ethiopian business or ganizaticnts, tee netes 100-107 below and accotrpatying text.
58. Articles' $545-549$ of the Cinil Code requine "bodies corporate" with their bead offices abroad to obtain the approval of the Ministry of Interior before etredejing In any activities in Ethiopia. Once goeb approval is obtained, it endoys civil If hits of if it wete of Ethiopian nationaJity, except that ihe Ministry of Interior may inpose restrittont on its activities and it cannot own inmovabie property in Ethliepia without an Itmperial Order. It is unciear whether these provitions apply to beftress organizations. Rusiness organizations ape boties corporate, and the Connmercial Cofe contaills no provisions dealfog with such matters as ownership of immovabie property by foreigners. On the other hard, Civ. Cr, Art. 405(1), provides that business organizations are generally subject to the Commercial Code, and that code does not speak of such approval. Also, foreign business organizations doing business in fithiopia ars required to reqister with the Ministry of Commerce and Industry, pursuant to the Business Enterprises Registration Proclamation (see note 59 below) and Comm. C, Arts 556, 559.
59. Art. I(2), Proc. No. 184 of 1961, Neg. Gaz, year 21; no. 3.

Limited Liability. Sippose a business organization incurs a contracnal or oxtracontractual obligation, and the organization does not have suffieient funds to perform its obligation. May the members be made to fofill it?

In some business organizations, the members may be held liable for a debt of the organization, if the organization fails to pay the debt ftgerf. This is true for all members of the general partnership, for the general partners in a limited partnership and normally (but not necessarily) for all members of an ondinary partnership. In other business organizations, the mernbers are not liatie. Greditors may sut the organization and seeic paymert from the assets of the organization. The members may be made to pay the organization any amount of their contributions remaining uupaid, but they may not be asked to pay more. The liability of the members for debts of the organization is limited to the amount of their contributipns. They are said to have limited liability. This is true for all mernbers in a share company and private limited company and for the limited pertitens in a limited partnership.

Limited fiability is a great advantage to a businessman. He may operate his business without the foar of losing all his personal property if the business fails. In such a casc, he will lose only wher he contributed to the business organization. It also makes it easier for him to obtain more money to run the business, by obtaining new members who make conerbutions. Such new members may not be willing to invest their money if they themse'ves will become liable for debts of the business.

Limited liability entains obvious dangers for encditors of business organizations and the law contains a variety of provisions to protect them. Organizations in which the members enjoy limited liability eithes mus: have, a specifed minjmury capital (share companies and private limited conmanies.) or must have at leas! ont member without limited liability (isuted partnerstip). The share company is subject to a large number of rules imposed for the protection of cretitors, such as limitation on distri* bution of corporate assets to shareholders. The prinate limited company has fewer such rules, but may find it more difficult to obtain oredit without the personal grarantee of one or more members.

Capital. The concept of capital plays a large rofe in the law of business organizations, particularly those with limited liability. Its ramifications are complex and require greater discussion, but a brief explanation is appropriate here. ${ }^{60}$

Article $80(1)$ of the Commercial Code defines capital as "the original value of the elements put at the disposal of the undertaking by the . . . partners by way of contributions in cash or in kind." Every business organization is formed with contributions. Each member must transfer to the organization something of valie, be it money, land, other corporeal or incorporeal property, or services. For example, assume five men wish to form a business organization with cast contributions, They draw up the necessary documents, complete whatever registration and publicity is necessary, and transfer the money to the organization. The money will usuafy be put in a bank account in the name of the organization. Assume cach member
60. Regarding the fineaning of capital, see G. Ripert, cited above at note 33, no. 718; I. Escarra, Cowrs de droit commercial (Nouvelle ed.; Paris, Sirey, 1952), no. 514.
contributed Eth. $\$ 10,000$. The organization will have in the bank on the day it is formed Eth. $\$ 50,000$. This is its capital.

What if only four members contributed money and the fifth contributed land worth Eth. $\$ 10,000$ ? The same result occurs. The total value of the contributions of the members is Eth. $\$ 50,000$. The capital of the organization is Eth. $\$ 50,000$.

Certain parts of the defintion of capital should be noted. First, when we speak of capital, we do not speak of cash or property as such, but of its value. The capital of an organiztion is the same whether it is made up of Eth. $\$ 50,000$ in cash, or Eth. $\$ 50,000$ in land, or Eth. $\$ 50,000$ in a combination of things. Likewise, it makes no difference if property originaily contributed by a member is sold by the organization. The capital remains the same-in the above example, Eth. $\$ 50,000$. Second, in the case of property which fluctuates in value, the calculation of capital is made on the basis of the value when contributed to the organization. This is called its "original value", For example, say we wish to calculate the capital of an organization formed one year ago, in which one of the contributions was land, That land was worth Eth. $\$ 10,000$ when the organization was formed, and Eth. $\$ 12,000$ today. The calculation of the capital is made on the basis of land worth Eth. $\$ 10,000$, its value when contributed. Third, only contributions in cash or kind (property, debts, etc.) are taken into account in calculating capital. In the ordinary, general and limited partnerships the contribution may be made in the form of services to be rendered to the organization. ${ }^{61}$ Rut such contributions do not form part of the capital. Only contributions in cash or kind do.

The capital must be distinguished from the assets of the organization. The term "assets" normally means the value of all the cash, corporeal and incorporeal property and rights which the organization, in a general sense, "towns." (The term is defined more techaically in Articles $74-85$ of the Code.) The capital may be more or less than the assets. Say the organization begins with a capital of Eth. $\$ 50,000$ and that this also is its beginning assets. Assume that after the first year of operation, the organization has a net profit of Eth $\$ 2,000$. That money or the property purchased with it is part of its assets, which would now be Eth. $\$ 52,000$. But it is not part of its capital, since capital only represents the value of contributions by the mombers. That value remains Eth $\$ 50,000$. On the other hand, if there was a net loss of Eth. $\$ 2,000$, the assets would only be Eth. $\$ 48,000$; but again the capital would remain Eth, $\$ 50,000$.

The capital of an organization may be increased during its life time by addl tional contributions by the members. In certain circumstances it may be increased or reduced by other means. This is particularly important with regard to share companies, for which specific rules are provided in this regard.

The capital of an organization is deemed to be a general security for the payment of the debts of the organization. No legal provision expressly states this. It is reflected it two typos of rules. The first is that which prohibits fictitions dividends. Generally speaking, a fictitious dividend is a distribution by the organization to the members of money or other property which does not represent profits from the operation of the organization. It is called "fictitious" because dividends normally should only be paid out of profits. The second kind of rule is that which enables

[^74]creditors or liquidators of the organization to require members to pay up any amount of their contributions remaining unpaid.

Any money or property distributed by an organization to its members reduces the amount of its assets available to pay its creditors. But the law cannot require all the assots of the organization to be reserved for croditors. The reason people form an organization is to make profits. They would not form one if they could not receive distributions of the profits made by the organization. Therefore, a compromise is reached. Genuine profits may be distributed. But an amount of money or property equal to the capital must be retained by the organization and not be distributed to the members while the organization is in existence (of course, the organization may lose the money or property equivalent to its capital as a result of normal busiress operations. This is a risk of the business which must be accepted by members and creditors alike).

The principle is extremely important in the organization in which all the members have limited liability: the share company and private limited company. The property of the organization is the only place a creditor may look to satisfy an unpaid debt of the organization. Complex rules are provided for these organizations concerning distributions of dividends to menbers. Additional rules are provided enabing creditors or liquidators to maintain actions to require a member who has not yet fully paid in his contribution to the organization to do so. ${ }^{62}$

If the members do not bave limited liability, the principle is not very important since an unpriid creditor can always sue the members. This is truc, for example, of the mombers of a goneral partnership and the general partners in a limited partnership. Even here, howover, the principle is given some recognition in Article 294, which enables an action by a creditor to be brought directly against the members without the necessity for a demand on the partnerstip if it is an action to force the members to repay fictitious dividends to the partnership. Normally, a creditor must make a demand against the partnership before proceding against a member for an upaid debt of the partnership.

The principle aiso has some importance for the limited partners in the limited partnership. They may be complelled by a creditor of the firm to pay their contributions if not yet fully paid in. They also may be required to repay fictitious dividends, unless accepted by them in good faith after approval of the partnerships' balance sheet ${ }^{63}$

## 4. The Partnership Agreement.

At the heart of every business organization is a partnership agreement, which is a contract. ${ }^{64}$ This means:
(1) A business organization is not created unless the partios have a contract which fulfills the elements of the definition of the partnership agreement in Article 211 . Even a grouping "formed with a view to securing or sharing profits" which, under Article 405 of the Cvil Code, is subject to the provisions of the Commercial

[^75]Code relating to business organizations, is not a business organization unless it is formed out of a valid partnership agreement. ${ }^{65}$
(2) The rules of the Commercal Code dealing with the partnership agreement art special applications of the general rules of contract set out in Title XII of the Civil Code.

As sugested above, the rules of contract are much more important in parnerships, joint ventures and private limited companies than in share companies. Tho rules governing the formation, operation and dissolution of a general partnership are more related to the general rules of contract than are the rules governing the formation, operation and dissolution of a share company, particularly a company with many members. For oxample, in a share company of one hundred members, it is difficult thinking of the individual shareholder as a party to the fundarnental contract of the organization. He probably became a member by subscribiŭg to an offer to sell shares by the founders of the organization or by buying someone else's shares, and his rights are governed much more by the provisions of law concerning share companies than by the fundamental contract. Yet even in a share company, there must be a partnership agreement at its base, and the agreement performs many of the same functions which are performed by the agreement at the heart of any other organization.

Several provisions of the Commercial Code speak of a "memorandum of association." The terms "memorandum of association" and "partnership agreement" refer to the same thing: the fundamental contrace at the heart of a business organization. There is no substantive distinction. One does not make a separate partnership agreement and menorandum of association when creating a business organio zation. The term "memorandurn of association" is used by the code in reference to the fundamental contract underlying any business organization other than an ordinary partnership. ${ }^{66}$ The term "partnership agreement" is used in two ways: in reference to the basic contract underlying an ordinary partnership and in reference generally to the contract at the heart of any business organization. ${ }^{67}$

Some provisions of the Commercial Code speak of "articles of association." The Code uses this term to denote the detailed regulations governing the operation of a share company or private limited company. The articles of association are drawn up in essontially the same manner as the memorandum of association, and are deemed to form part of the memorandum of association. ${ }^{63}$

## Elements of the Partmership Agreement

According to Article 211:
A partnership agreement is a contract whereby two or more persons who
65. Rut see P. McCarthy, "De Facto ath customary Parthership in Ethiopian Law" J. Eeh. Lu, woil. 5 (1965), p. 105.
66. Comm. C., Arts. $275(4), 284,298,313,517$. It also denotes the basie contract of a civil association. Civ. C. Art. 408.
67. Comm. C., Arts. 211, 233, Articies 221(2) and 224 speak only of the memorandum of as50ciation as the contract to be deposited in the conemercial rcgistry: bat this is probably because only commercial business organizations, all of which have mernorandum of asteciation, were originally intended to be subject to the registration requirement. See note 23 above and acompanying text.
68. Comm. C, Arts. 314, 518.
intond to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any.

The elements of this definition are discussed in the following paragraphs.


#### Abstract

Tro or More Persons. At least two persons must be parties to a partaership agreenent. This is true for all business organizations except the share company, for which there must be at least five. ${ }^{69}$


Tho minimum requitement of two persons means that one person cannot form a business organization by himself. The idea of a one-man organization may seem illogical anyway, but some adyentages of organizations with legal personality may be very desinable to the individual businessman. This is particularly true of Himited liability and the ability of the business to survive his death. ${ }^{70}$ In order for a businossman to obtain these benofits, he must secure at least one associate. A businessman might obtain an associate only to fulfill the minimum membership requirenent, with the associate taking littlo part in the operation of the business. However, if the organization formed is one in which the primary businessman has limited hability, he must be cautious. If he operates tho organization as if it were his own, without due regard for the appropriate operational rules, and if the organization goes bankrupt he may lose the benefit of limited liability."

There is no limit on the number of persons who may be members of a business organization, except in the private limited company where the number of members may not exceed fifty. ${ }^{72}$ As a practical metter, the number of members in a partaership of joint vonture will normally be small, because of the close personal relationship involved. On the other hand, the number of members of a share company may be huge.

Intent to Join Together and Cocperate. In order for a contract to be a valid partnership agreement, the parties to it must have intended "to join togetheer and to cooparate." In a sense, this means that they intend to form business organization. More specifically, however, they must have a community of interest and an

[^76]71. Comm, C. Arts. 531, 1160 .
72. Comm. C., Att. 510(2).
intent to collaborate on an equal footing. ${ }^{33}$ This is normally reffected in their right of control which each party has over the operation of the organization.

The collaboration intended by the parties need not be active in the sense that they all intend to work in or for the business organization. This would not account for those limited partners of a limited partnership or shareholders of a share company or private limited company who beome members only for the purpose of investing money. Also, the collaboration need not be equal in an absolute sense, since that would not account for legitimate schemes of control in some organizations, particularly share companies, wherein different groups of members have different rights. It must be equal, subject to regimes of control permitted by law.

The requirement exists shiefly because of its aid in distingujshing contracts which contain the other elements of the partnership agrement. ${ }^{74}$ Examples are the contract of employment in which the employee is paid a share of the profits, if any, and not a fixcd salary or wage; the contract of loan in which the lender is paid a share of the profis, if any, rather than a fixed amount of interest; and the contract of sale of a business in which the seller agrees to take a share of the future profits of the business, if any, instead of a fixed sum. Missing from these contracts is the intent to join together and to cooperate. The employec is subject to the control of the employer in making decisions affecting the business. The lender and the seller of the business usually take no part in the operation of the business.

Contrinutions. In onder to have a valid partnership agreement, each party must undertake to make a contribution to the busiress organization. Contributions are those things put at the disposal of the organization for its use in carrying out its activities, in returs for which the contributor receives a membership interest in the organization. Each contribution must be something of value. In the case of any business organization other than a share company and private linited company, the contribution may consist of cash, kind or services. ${ }^{75}$ Contributions to a shate company or private limited company may only be in cash or kind. ${ }^{76}$

Contributions in kind are contributions of corporeal or incorporeal property, including dobts owed to the contributor, or the use of property. Examples are immovable property, movable property, ights of ifterary or artistic ownership, industrial property (trademarks, patents, designs or modets), a business, lease of movable or immovable property, etc. The Code contains special rules governing the transfer of such property to the organization. See, for example Arts, $229-232$ (contributions to ordinary, general and limited partnersinps) and Arts. 206-209 (contribution of a business to any business organization).

The value of each contribution in kind is as agreed upon by the parties and written in the partnership agreement. In the share company and private linited company, where all members have limited liability, creditors of the organization

[^77]need additional protection to assure that the value of the contributions in kind is reasonably acourate. This protection is also peeded by shareholders in a share company formed by public subsciption, since they may not have easy personal aocess to the property or its contributor. In the case of a contribution in kind to a share company, the Code provides a special procedure for evaluation. ${ }^{77}$ In a private limited company, all the members of the organization are guarantors to third persons of the valuation fixed in the partnership agreement. ${ }^{78}$

The person who contributes his services or skill works for the organization, but is not paid a fixed salary or wage for the services he contributes. Instead, he receives a share in the profits. He is more than an "employer," since he has rights of control over the organization employees do not have.

Contribution in cash or kind are owned by the business organization; unless the organization does not have legal personality or only the use of the property is contributed. In the case of a joint venture, each partner owns his own contribution untess otherwise provided." (Provisions "otherwise" would include joint ownership by the mombers or ownership by the manager of the joint ventare.)

Purpose: Economic Activfites The parties to a valid partnership agreement must intend to carry out "activities of an economic nature". This phrase is quite broad and would seem to cover almost any activity which is or might be profitable. The activities which the parties to a partnership agreement intend the organi zation to carry out constitute the business purposes of the organization. Generally, a business organization may bave as its purpose any activity which is possible of achievement and which is not walawful or immoral. ${ }^{80}$

Purpose: Profits and Losses. The parties to the agreement must also intend to participate in profits and losses, 话 any. Of course, when the agreement is being formed, the parties usually think only of profits; not losses. By an intent to share losses, the Code really requires an intent to share the risks of the enterprise. ${ }^{\text {B1 }}$

The shares of the members in profits and losses need not be equal. There may be inequality not only between members, but also between one member's share in the profits and his share int the losses. However, the partnership agreement may not award all the prospective profits to one partner, or relieve one or more partners of their shate in the losses. Any stipulation in the agtecment providing for this is null and void. ${ }^{92}$

General Contract Requirements. As a contract the partnership agreement is subject to the general provisions of Title XII of the Civil Code. Insofar as formation of the contract is concerned, this means that the parties to it must be capable of contracting and give their consent free of defects, that the object of the contract is sufficiently defined and is possible and lawful, and that the contract is made

[^78]in the form presctibed by law. The following sections describe these elements, insofar as special problems may be posed concerring business organizations.

Parties and Capacity. In general, the following persons may not enter into contrats: minors, notonously insane persons, persons with notorious infirmities affecting thoir ability to consent, persons judicially interdicted and persons interdicted by law. A contract made by such a person is null and woid. However, this nallity may only be declared by a court at the request of the incapable person or his representative or heirs. (A contract made by a person interdicted by taw may be invalidated at the request of the incapable, the other contracting party or the public prosecutor. ${ }^{\text {aj }}$

These incapacities deprive the persons concerned of the right to make contracts or thomselves, but not the right to have contracts made jin their rames by their representatives. Thus, the tutor of an incapable may enter into a contract in the name of the incapable. If the tutor has acted within the scope of bis powers, the contract will not be affected by the incapacity of the person in whose name it was made. ${ }^{54}$

The validity of a partnership agrement is affected by the incapacity of a party to it in the same manner as any other contract. The Commercial Code adds some rules. These atise out of the provisions of the Code prohibiting incapables from becoming traders. The provisions dealing with the incapacity to become a trader also apply to the incapacity to become a member of a business organization in which one has the status of a trader. A general partner in a commercial general partnership or commercial limited partorerhip is deemed to be a trader.s The manager of a commercial joint venture also would have the status of a trader.

Article 11 is the first article in the chapter of the Code dealing with the problem. It does nothing more than re-state the basic rules stated above: a person incapable under the Civil Code may not carry on a trade; if he does, any of his acts, presumably, related to the trade may be invalidated pursuant to the provisions of the Civil Code described at the beginaing of this section.

Article 12 prohibits the tator of a minor or interdicted person from carrying on a trade in the name and on behalf of the minor or interdicted person, except in the cases provided in Article 288 of the Cwil Code. This would prohibit the tutor from entering, in the rame of a minor of interdicted person, a business organization which would make the minor or interdicted person a trader. Under Article 288 of the Civil Code, a tutor may carry on commercial, industrial or other enterpises forming part of the estate of the incapable if he is so instructed by the family council. The family council must instruct him whether to carry on the enterprise or to liquidate it, taking into account the time for which the tutorship is to last, the abilities and potentialities of the utor and the interests of the incapable. It seems clear from this article that the family council may not authorize a tutor to enter into a trade (and, therefore, a partnership agreement whereby the incapable will become a trader). It may only authorise hin to retain or to liquidate a trade already part of the estate of the incapable. For example, in the

[^79]case of membership in a business organization a trade might become part of the estate of an incapable if: a general partner in a commercial partnership dies, the partrership agreement provides that his son shall take his place and his son is a minor. Also, Article 288 specifies that the authorization of the family council is required where the titor is "not the father or mother of the chitd." If the tutor is the father or mother, it would appear that he has complete authority to retain or liqudate enterprises forming part of the estate of the incapable. However, it would seem that the prohibtion against entering into a new enterprise would apply to a tutor who is the mother or father as well as to one who is not, although this is less clear. A tutor who enters into a partnership agreenent in violation of these provisions exceeds his power ${ }^{85}$

Article 13 adds a restriction to the normal rules coneerning emancipated minors. It prohibits an emancipated minor from carrying on a trade unless authorized to do so in writing by the family council. This added restriction prohibits an emancipated minor without such written authorization from becoming a party to a partnership agreenent forming a business organization whereby he becomes a trader. Any partnership agrement to which an emancipated minor becomes a party without the necessary authorization is subject to the same nullity for incapacity of a party as if the minor were not emancipated.

The rules concerning incapacity are designed chiefly to protect the incapable. This is why generally only the incapable may have his contracts invalidated. However the security of commercial transactions requires that third parties receive legal protection against the hazards of dealing with incapabies. Artictes 14 and 15 of the Commercial Code give some protection, utilizing the device of the commercial registry. Under Article 14, if a minor who carries on a trade has himseff entered in the commercial register as though be were of age, his minority does not affect third parties. Thus, the minor may not have his contracts annulled under these circumstances. Article 15 contains a similar rule for judicially interdicted persons. Their incapacity does not affect third persons unless notice of the incapacity is entered in the commercial registry. ${ }^{\text {T }}$

Parties: Hushand aud Wife. It semms clear that husband and wife may be members of a business organization as if they were not married. This general proposition must be modified in two respects, however. First, one spouse may object "in the interest of the household" to the other spouse becoming a member of an organization which imposes upon the latter the status of trader. The effect of this objection is to restrict the liability for the business debts of the trader spouse to his personal property; normally, such debts are deemed to be of the maniage, and recoverable against the personal property of each spouse and common property. (The objection does not prevent the trader spouse from becoming a member of the organization). An objection is effective against third parties only if entered in the commercial register. If the trader spouse believes the objection is unjustified, he

[^80]may apply to the family arbitrators to bave it set aside; if it is set aside, a notich to this effect must be registerect ${ }^{\text {b4 }}$

The second respect in which the general proposition concerning spouse must be modified concerns the situation in which both spouses are parties to the same partiership agreement. The Civil Code permits spouses, before marriage, to establish by contract the personal and pecuniary effects of their marriage. If no 'contract of matriage," as it is called, is made, the code provides rules to govern their personal and pecuniary relations. During marriage, no contract concerning their pecaniary relations may be made by the spouses without the approval of the family arbitrators of a court. ${ }^{39}$

If the spouses are parties to the same partnership agreement, the approval of the contract by the family arbitrators or by a mourt may be necossary for it to be valid. Arguably, Article 633 does not cover the partnership agreemerit at all; or, if it does, only agreements between the two spouses alone or partnership agredments forming certain types of business organizations. Such approval should not be required for any agreement where the relationship between the spouses in the business organization is not in serious conflict with their relationship under the marital regime established by the Civil Code. ${ }^{90}$ The solution to the question is not without doubt, however. ${ }^{91}$

Parties: Legal Persons. Whether or not a legal person may become a member of a business organization depends to some extent on what kind of legal person it is and what kind of business organization it intends to become a member of.

In general, nothing prohibits a business organization from becoming a member of another business organization. ${ }^{92}$ An association may not become a general partner of a commercial general partnership or commercial limited partnership, since it "may not carry on any trade. ${ }^{\text {n3 }}$ Whether it may become a member of another business organization depends on whether it thereby acquites as one of its purposes the making of profits. If it does, it may not become such a member. However, there would seem to be nothing to prohibit an association from joining a share company or private limited company as a means of investing extra funds or of acquiring more funds to carry out its legitimate purposes.

[^81]Whether an endowment may become a member of a business organization would also seem to depend on whether it acquires thereby the purpose of making profits. In general. the endowment has the same capacity as an association (although no law expressiy probibits it from carrying on a trade). ${ }^{94}$ As a practical matter, shares inl share companies and private linited companies can be expected to make up part of the "property" out of which an endowment is formed. There seems to be no limitation on whether or not a trust may beome a member of a business organization. Like an endowment, the property out of which a trust is formed may very weil, contain shares in share companies and private limited companies.

As a general rule, the State has the right to enter into a partnership agresment and become a member of a business organization, to the extent that this is consistent with its nature. ${ }^{\text {gs }}$ This is subject to certain limitations, howewer. First territorial subdivsions of the State, the Ministrits of the Imperial Ethiopian Government, and pubit administrative authorities and establishments have only such rights as are "vested in them by the administracive law." This also is true of the Ethiopian Orthodox Church and its dioceses, parishes and monasteries. ${ }^{96}$ This means that the right of thesc bodies to enter into a partnership agrement and to become a member of a business organization must be derived from some right granted by an administrative law. Presumably, the right does not lave to be expressly granted, bus riay te taken as included in a general grant of the capacity of a physical person, or as an implied right with relation to the carrying out of rights or powers expressly granted. Theoretically, the matter is unclear; as a practical matter, public administrative authorities, ministries, etc., do become members of business organizations particularly share companies, in furtherance of their purposes. The second limitation is found in Article 27 of the Commertial Code: an administrative or Feligious institution or any other public undertaking may only carry on a trade in the cases prescribed by special laws. 97 Even if an administrative or religious institution or any other public undertaking does carry on a trade, it does not thereby ineur the status of trader. ${ }^{98}$

A business organization organized under the Commercial Code does not become a body corporate under publio lew merely because the government or one of its agencies is a member of it even if the government has wirtually ald of the mernbership interest. It remains regulated by the prowisions of the Commercial Code, and the government or agency is a member like any other member. There is no law at this time dealing specifically with government participation in business organizations organized under the Commercial Code.g
94. Civ, C. Arts. 483, 501.
95. See Civ. C. Art. 394.
96. Civ. C., Arts. 395-397.
97. The English wersion omits the words "by special laws". It merely states that the cases "sigal! be prescribed." The term "by special laws" is in the French and Armbaric.
98. Comm. C. Art. 4.
99. Compare Cif. C. Title XIX, which governs administrative contracts. Compare elso Conm C., Art. 352, which provides that in share companits comprising "several groups of shareholders with a different legal status," each group must have the right to eloct at least one representative to the boatd of directors." This presumably assures that companies with both governmental and nopr-governmental shareholders have at least one director represebting each. For a description of the special problems and their solutions of governimental participation in business pryanizations in France, where such participation has been subslantial. See A. de Laubaderc, Traité elementalre de droit adninisiarall (Paris, LGDJ, 1966) vol. 3, nos. 939-956.

Parties: Forelgners- Physical persons of foreign nationality generally enjoy and may exercise civil rights as if they were Ethiopian. The term "civil rights" embraces all rights of which the exercise does not imply participation in the government. ${ }^{100}$ Thus, a foreigoer may enter into a partnership agrement as if he were an Ethiopian.

Bodies corporate whose head office is in a foreign country and endowments, thusts and committers constituted in a foreign conntry possess and may exercise civil rights as if they were bodies corporate, endownents, trusts or committees "established in Ethiopia," if they hawe been authorized by the Ministry of Interior to carry out activities in Ethiopia. ${ }^{101}$ Thus, if authorized to carry put activties, these bodies corporate, endomments, trusts and committees have the same right to enter into a partnership agreement that they would have if they were established in Ethiopia. However, the Ministry of Interior may prohibit or regulate the carrying out of regular activities in Ethiopia by particular foreign bodies corporate, endowments, trusts or committees, or by classes of them. ${ }^{102}$ Also, an authorization to carry out activities in Ethiopia may be revoked for good cause. ${ }^{101}$

The position of the foreign body, which wishes merely to become a member of a business organization in Ethiopia without carrying out other activities is unclear. Is entering into a partnership agreement the carrying out of "activities," such that Ministry approval is required? Must there be something more, such as active participation in the aftairs of the organization? Does it depend on the kind of business organization formed? As a practical matter, these questions may not be too important at this stage since forsign investors are likely to participate in controlling the activities of organizations it which they invest. But the situation conceivably could arise where an Ethiopian share company sells shares to fortigners who lake little part in its activilies, otber than voting at annual membership meetings and receiving profits.

Some laws impose restrictions on the right of foreigners, whether physical or legal persons to engage in specific activities in Ethiopia. These do not necessarily restrict the right to enter into a partnerghip agreement but may be important to a forelgier if he does so. For example, even if he is a member of a business organization, a foreigner presumably may not be an employee of that organization mnless he has a work permit. ${ }^{104}$ A foreigner may not own land in Ethiopia unless permitted to do so by Imperial Order or by the terms of special laws, such as the Invesiment Proclamation of 1966 res $^{\text {ms }}$ A business organization may not be licensed to operate a bank in Ethiopia unless it is of Ethiopian nationality and unless at least fifty-one per cent of its capital is owned by Ethiopians. ${ }^{106}$
100. Civ. C., Art. 389.
101. Civ, C. Arts. 545-547. See also note 58 above and anompanying text. These provisiont specify that approval for bodies corporate is to be given by the offce of associations and appoval for the other institutions by the Ministry of Interior. The office of astociations is part of the Miaistry of Intirior. According to Arts $545(2)$ and $546(2)$ authorization may be withheld if the proposed activities are "contrary to the law or morals." It is umelear whether authorization may be withheld on other grounds.
102. Civ. C., Art. $548(1)$. The French version attributes this power to "imperial decres," not the Ministry.
103. Civ. C. Art. 549. Such a dexision is expressly made subjent to cout review.
104. See Civ. C, Art. 389(3); Public Employment Admitistration Order, 1962. Art. 15, Order No., 26. Neg. Gaz, year 21, no. 18 . See also the Fofeign Nationals Employment Regulations, 1964, Leg. Not. No. 295, Neg. Gux., year 23, no 25 ,
105. Civ. C., Arts. 390-393, 548(2), Investment Decree, 1963, Art 10, Decree No. 51, Neg. Gaz. year 23, no. 1; Investment Proclanation. 1966, Proc. No. 242, Neg. Gazr, year 26, mo. 2 ,
106. Monetary and Banking Proclamation, 1963, Art. 32, Proc. No. 206, Neg. Gaz., year 23, no 6.

Finally, a foreigner wishing to become a member of an Eihiopian business organization must take into account exchange control regulations, which restrict his rights to take profits, property on dissolution, etc., out of Ethiopia. ${ }^{107}$

Consent. Each party to a contracl must give his consent free of defects; that is, without mistake, fraud or duress. These defects may arise in various ways in the formation of a business organization. For example, a party may be mistaken as to the type of organization being formed, or he may be deceived as to the busioess to be carried on by the organization. If a partnership agreement is substantially less favorable to one party than to the others and the consent of this party was obtained by taking advantage of his want, simplicity of mind, senility or manifest business inexperience, the agreement may be invalidated as an triconscionable contract if justice requires. A contract which is affectod by a defect in the consent of a party may be invalidated only at his request. ${ }^{106}$

Object. Like any contract, the partnership agreement must have a sufficiently defined, possible and lawful object. In discussing "object," the Civil Code talks primarily of the reciprocal obligations of the partics. ${ }^{\text {bog }}$ In a partnership agreement, these consist chiefly of the undertakings of the parties to make contributions and other obligations regarding the performance of the agreement. Bat the object of a partnership agreement also may be interpreted to include the purposes of the business organization. thus requiring that such purposes be defined, possible and lawful. ${ }^{110}$

The object of a contract is distinguished from the motive of the parties who make it. By "mocive" is meant the reason why or purpose for which the parties enter into the contract. Arguably, in a partnership agreement, this too could be interpreted to include the organization's business purposes. The Civil Code prohibits a court from investigating the parties' motives in order to determine whether the object of the contract is unlawful or immoral. However, if the motive of one or all the parties is unlawful or immoral, and the contract or some other document shows this, the contract may be invalidated at the request of any contracting party or interested third party. ${ }^{\text {t1 }}$ The distinction between object and motive probably is made to assure that the stability of contracts will not depend on the uncertainties of judicial investigation into the state of mind of the contracting parties. These
107. Sce the Foreign Exchange Proctamation. 1963, Proc. No 2t1, Neg. Gaxt, year 23, no. 6; Investment Dectee, 1963, Art. 8, Decree No. 51, Neg. Gaz., yeat 23, no 1; Investment Proclamation, 1966, Proc No. 242, Neg, Gaz, year 26, no. 2.
108. Civ. C, Art. Iso8(1). In general, regarding consent, see Arts. 1696-1710. 1808-18t8. Note that in a share company fomed by public subscription, a defect in the consent of a subscriber is more directly related to the validity of the subscription agreetment thath to the memorandum of assectiation.
109. See Civ. C., Arts. 1711-1716.
110. G. Ripert, cited above at note 33, ne. 711 (Freneh Lawi). The problent is somewhat different in Ethiopia because the business organization is defined as a grouping arising out of a contract, rather then a contract per se (as in Frande), ard because the Civil Code provisions concerming object of contracts emphasize the recipresal obligations of the parties. It docs not secm that the object provisions should be so limited however, at leass where business organizations are concerned.
111. Civ, C., Arts. $1717,1718,1808(2)$. Article $1808(2)$ in the English wersion speaks orly of invalidation for an unlawful or inmoral object, or for absence of the prescribed form. It does not mention motive. However, the Amharic and French versions reffer to both. Their effect is to pernit invalidation for unlawful or immoral motive in the same mander as for unlawful or immural object.
difficulties are eliminated when the motives are reflected in the terms of the contract or some document, as they normally would in the case of business purposes.

Some Code provisions deal specifically with activities which may or may not be carried out by business organizations. Articles 22 and 26 of the Commercial Code provide that a business organization may carry on any of the activities specified in Article 5 of the Code as long as it complies with any spectal requirements for carrying on that trade and is not prohibited from carrying it on. ${ }^{112}$ Private limited companies are expressly forbidden by Article 513 of the Code to "undertake banking, insurance or any business of a similar nature." Ordinary partnerships may not have as their object any of the activities specified in Article 5 of the Commercial Code. However, the sanction for violating this prohibition is not nullity of the organization, but treatment of the organization as a general partnership rather than an ondinary partnership. ${ }^{19}$ (Nullity of the organization may still result if the partnership agrement does not satisfy tho roquirements of Article 284 , or if the necessary registration and publicity has not been made.) Other prohibitions may be prosided by special laws.

Form. In general, no special form is required for the formation of a valid contract unless expressly providsd by law or by stipulation of the parties. If a special form is required, a valid contract is not made unless that form is observed. ${ }^{1 / 4}$

Technically, no special form is required for the formation of a partnership agrement. However, the Commercial Code requires that the formation of a bustness organization (other than a joint venture) be in writing and publicized in newspapers and by registration. Failute to comply with these formalities renders the business organization nuil and void; it does not come into existence. ${ }^{\text {lis }}$

The abscace of the required writing or publicity in the formation of a busitess organization has the same effect as the absence of a required contract form: invaljdation of the organization or contract sought to be formed. There are no provisions stating what happens when a business organization is declaned intalid. However, the effect of invalidity of a business organization in many ways is like the effect of irvalidity of a long-term contract. Thus, it would sem appropriate to apply the Civil Code prowisions dealing with invalidation of contracts to the invalidation of business organization for lack of form, at least when there is no meaningful distinction between invalidation of the orgavization and invalidation of the partnership agrement.

## CONCLUSION

The provisions described above are only a legal skeleton which will be fleshed out over time with commercial and admmistrative practice, judicial decision and scholarly interpretation before becoming a liwing, truly Ethiopian law. This article has been written in the hope that a preliminary description of some general principles will facilitate this process.

[^82]114. Civ. Cu, Arts, 1719, 1720(1), 1726.
115. Comm. C., Aprs, 214, 219, 223.

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## PENAL AND CIYL LAW ASPECTS OF DISMISSAL WTTHOUT CAUSE

## GETACHEW BERHANE v. THE COMMERCIAL BANK OF ETHIOPIA (S.C.)

by Daniel Haile*

The plaintiff was dismissed from his job on October 28, 1964, by the respondent Hank on the ground that he and other employees of the Bank allegedly cashed and misappropriated a cheque of Eth. $\$ 12,000$. In addition, the public prosecutor charged them under Articles 36 and $656(a)$ ) (b) of the Penal Code and instituted criminal proceedings against them. ${ }^{7}$ Twenty-mine months after the criminal case was instituted, the Court deeded that no case was established against the presemt Plaintiff and dismissed the case on the basis of Article I41 of the Criminal Procedure Code and acquitted him.

The Plaintiff then instituted this civil suit in the High Court and claimed a total of Eth. $\$ 11,468.50$ as damages for less of his back-pay for the whole period that he was dismissed, his annual leawe, the moral damage he suffered and the legal costs be incurted. In addition, he petitioned the Court to order the respondent to reinstate him to his former post and to counteract publicly the defamatory effects of its allegations. Afler finding that the Plaintiff was dismissed without good cause, the court awarded him damages amounting to Eth. $\$ 1550$, but rejected his claim for reinstatement.

The irony of this case leades us to two fundamental questions.
I. whether the Criminal Procedure Code provides sufficient pretrial remedies to protect people, like the present plaintif, from undergoing the ordeal of a criminal proceeding?
II. Whether the labour laws of this country duly safeguard the rights of an aggrieved employee in cases of dismissal without good cause?

## I. Pre-trial screening process under the Criminal Procedare Code

"The immediate efficiency and utility of any system of Criminal Procedure must be measured according to two goals, each equally important to society: The extent to which the system facititates the enforcement of the penal law by bringing offenders to speedy justice by lawful means, and the extent which innocent citizens are left undisturbed. ${ }^{3}$ Criminal procedure as a whole is basically a continuous process of reconciling these two apparently conflicting interests. In wiew of the fact that the present plaintiff was acquitted twenty-nine months after the case had been instituted

[^88]against him, the theme of our comment will be the second goal of the systom: The extent to which innocent citizens aro left vadisturbed.

A public prosecutor has the duty to institute proceedingsi excopt when he is of the opinion that there is insufficient evidence to jastify a conviction. ${ }^{5}$. In principio, we do not disagree with the theory of granting somo discietionary powers to public prosecutors or even to the police offictrs who prepare the diary of investigation in the decision of who should or should not be prosecuted. But once we grant them such authority the devising of a mechanism by which abuses can be curtailed becomes a must. Under our Criminal Procedure Code the opinion of the public prosecutor is the only criterion on the basis of which the decision to prosecute or not is made. Once the prosecutor decides to prosecute, his decision to prosecute and commit the suspected person immediately to trial is finat except where the crime involved is first degree homicide or aggravated robbery. ${ }^{6}$ But evon here, since the preliminary or committing court does not have the right to discharge the accused, ${ }^{7}$ the opinion of the public prosecutor is sufficient to commit the accused to trial. If the publie prossentor finds it to be befitting, aven for purely sadistic motives, and decides to prosecute, the accused has no other remedy but to wait until the prosecutor's case is fully heard and the court dismisses the case on the ground that no case against the accused has been mades. ${ }^{\text {s }}$ Depending on the nature of the charges, the point in time when such a decision is made may or may not be at the early stages of the trial.

An examination of the record of the present case shows that the public prosocutor had insufficient evidence to prosecure the defendants. The crux of the prosecution's case was the cheque itself,', on the back of which appeared the following marks: "known to me," "Seyoum," " $559 / 3$ " and a signature. At the request of the public prosecutor, the criminal investigations department administered a handwriting test to the defendants in 1964. However, the results of the test were not annexed as evidence in the charge that the public prosecutor filed alniost nine months afterwards and when the handwriting expert finally testified on January 17, 1957 he stated that there was no resemblance between the handwriting of the defendants and the handwritings on the back of the cheque. Without showing a link between the handwritings, the prosecution did not have even a prima facie case agninst the defendants and defendeats should not bve been forced to undergo the ritual of a criminal proceedings.

The fact that no other mechanism less than a full-fledged trial exists for the vindication of the rights of an innocent citizen who is improperly accused is a serious faw in our pre-trial screening procedure.

This inequity becomes even more apparent when one looks at the other side of the coin - the public prosecutor's refusal to prosecule. The refusal by a public

[^89]prosecutor entitles ${ }^{10}$ the private complainant in complaint offences to conduct a private prosecution and in cases of non-complaint offences to challenge the prosecutor's decision in court.

Our Criminal Procedure Code, by adequately providing for pietrial remedies in cases where the public prosecutor fails to prosecute, (Negative Abuses), does facilitate the enforcement of the penal law but the complete absence of such remedies in cases whers the public prosecutor decides to prosecute without sufficient evidence (Positiye Abuses) makes the innocent citizen susceptible to undue harassment when one notes the fact that the public prosecutor's rofusal to prosecute merely shifts the burder of prosecuting from the state to the private complainant and does not terminate the suit, while his decision to prosecute commits an individual to a criminal proceeding with all the social stigma sssociated with it and the atfendant psychological effects the one-sided approach adopted by the Criminal Procagure Code becomes even more palpable.

True if the accused is under "restraint" he can file an application for habeas corpus in adcordance to Articles 177-179 of the Civil Procedure Code. As the Amharic text of Art. 177(a) shows, the application of this remedy is limited to cases where the ind vidual's right of movement is curtailed or where he is arrested or imprisoned. Since this may not always be the oase the arguments for the right to challenge the prosecutor's decision still romain valid.

The absence of pretnial remedies does not, of course, preclude other remedies If a public prosecutor proceeds to prosecute when he should not have, the aggribwed party is certainly entitled to institute either a criminal case in accordance with Article 414 of the Penal Code or a cival suit on the basis of the extra-contractual liability provisions of the Ciwil Code. ${ }^{11}$ A court proceeding by its very nature tends to be an andupus process and one can visualize how arduous it can turn out to be when the party to be judged is Mr. Prosecutor himself. Besides, the mere fact that the accused is found not guility is not in itsoff sufficient to establish a case of abuse of powers. In addition one has to show beyond reasonable doubt or, in a civil suit; by preponderance of evidence that the public prosecutor acted with intent to procure an unlawful advantage or to do injury. These factors combined make such a remedy practically unenfonceable.

In our opinion the Criminal Procedure Code should have provided a remedy that is prventive in orientation. Within the framework of the Criminal Procedure Code this could have been satisfied by making the right to challenge the public prosecutor"s decision applicabie not only in cases of fefusal to prosecute but to cases whore he decider to prosecute on insufficient ground.

We are fully aware of the problems that such a remedy may create-delay of justice and the harassment of the public prosecitor. However, such results can be

[^90]avoided if the right to challenge the decision to prosecute is not granted automatically but after the accused first creates reasonable doubt that he is beng prosecuted without serious grounds. In addition, the public prosecutor, at this stage, should be required to establist only a prima facie case and not to prove his case beyond a reasonable doubt. Once the court is satisfied of the existence of a sufficient ground it should permit the proceeding to continue in the normal fashion.

## II. Dismissal Fithont good canse: Sufficiency of remedies.

As already stated, once acquitted of the criminal charges against him, the plaintiff petitioned the High Court, inter alig, to order the respondent to pay him backpay for the period during which he was dismissed and to reinstate hfo in his former post. The Court, basing its reasoning on Arts. 2570-74 of the Civil Code, stated that "the employee who is dismissed without good calase is entitled to three months salaty as compensation but thone is no legal ground that entitles lim to be reinstated, ${ }^{3 / 12}$ and awarded the plaintiff damages amounting to Eth. $\$ 1,550$.

Shocking as it may sound, this statement is not far from the correct statement of the law. Article 2573 of the Ciwil Code grants to an employtr the right to dismiss an employee without good cause. In such case, the employe is कntitied to fair compensation which under any circumstances cannot exceed one hundred and eighty (180) times the average daily wages. ${ }^{13}$

One may afgete that a contract of employment being a special contract the remedies envisaged by the contracts section in general the remedy of specific performance in particular are available to an employee dismissed without cause. In order for specific performanco to be granted, however, two elements must be fulfilled: The contract must be of special interest to the party requiring its performance and it must be one that can be enforced without affecting the personal liberty of the creditor. ${ }^{14}$ An order of reinstatement undoubtedly affects the personal liberty of an employer and thus the argument fails on the facts. ${ }^{15}$

Of course, as long as the law through other moans can duly and efficaciously protect the rights of the dismissed omployec there is nothing sacred about the right of reinstatement. But when the remedy provided payment of a very low severance pay happens to be nothing but a token remedy, then it is a tragedy.

The rationale for requiring that the employer pay severance pay where he dismisses an employe without good cause is to deter the employer from engaging in such a practice. It is common knowledge that the cost of labour in Ethiopia, as in most other developing countries, is cheap. This situation is aggravated even more in this country by the total absence of legislation fixing minimum wages. This

[^91]being the naked fouth, would then payment of a six month salary the maximum provided by law suffice to deter an employer from dismissing an employee without good cause? We are of the opinion that it will not. The very low wages coupled with the large labour reserve to replace a dismissed pmployee reduce the deterrence power of the remedy to a mere farce.

A review of labour laws of other developing countries will better illustrate our point. In Tran, for example, "A worker who believes he has beep unfairly discharged and who has worked for the mimployer for 3 continuous months or intermittently for 6 months, may protest within 15 days of the discharge to the Factory Council. If he wins his case at this level, or by appeal to the Board for the settlement of Disputes, ho may be awarded an amount up to three years wages in addition to the regular severance pay. Howewer, the employer has the option of paying the compensation or reinstating the worker with pay for the days he was suspended froni work." ${ }^{16}$ (emphasis added).

Similarly in Mexico, "An employer who discharges a worker without just cause is obligated at tho option of the worker to fulfil the contract or to pay him three months wage as compensation as well as full wages from the date of dismissal until a final decision is reached". ${ }^{\prime 7}$

Let alone by foreign standards even by our own Civil Code standards we find the remedy to be unsatisfactory. The employee who is dismissed without good cause is entiterd to the meagre compensation presumably on the theory that the employer has failed to perform his contractual obligations. If this is so, should not the employee at leasc be entitled to danages equal to the damage which the non-performance would normally cause to him in the efys of a reasonabie pesorn, ${ }^{18}$ as is generally the case in contracts? Unless one is to make the urirealistic proposition that in the gef of a reasonable person the maxinum length of time that 3 dismissed employes needs to find an equivalent job is one hundred and eighty (180) days, the remedy fails to meet even this lest.

The primary aim of our labour-laws presumably is to maintain a harmoniaos relationship between the employer and the employee 50 as to facilitate economic growth. Thus the balance mast be struck to achieve an optimum between the interests of the two parties. But as this case clearly demonstrates, the balance seems to have swayed in favour of the employer to the detriment of the employee. To abolish this imbalance the legislator should eitler almays require a good cause for dismissires an employee, the solution preferred by us and recommended by the International Labour Organization ${ }^{19}$ or should enact higher maximum limits of compensation for dismissal without good cause to be assessed in light of factors such as the bargaining powfer of the two partics, the leve of ingustrial development, non-existence of unemployment insirance or benefits, otc.

[^92]It is worthy to note, however, that both the Labour Relations Proclamation ${ }^{20}$ and the Minimum Labour Conditions Regulations ${ }^{21}$ explicitly provide that where terms more favourable to the employed(s) than the ones provided by law art stipulated in an individual contrate of employment, staff rule, collective agreement or any othor legal arrangement the terms of the latter shall prevail over the law. Until the law catches up with the realities of life this can be used to serve as a stop-gap measure to minimize the existing imbalance. As a matter of fact, there is already a noticeable tendency, in some of the recently conciuded collective agreements, to utilize this device to achiere the above-stated goals. For example, the collective agreement concluded between the Ethiopian Petroleum Refinery workers union provides that, "An employee shall not be dismissed, suspended, or transformed withour good cause." 22 Similarly, in cases of dismissal without cause, the colloctive agreement concluded between the Ethopian Airlines (S.C.) and the Ethiopian Airlines Employees Association, provides for the payment of severance pay that is higher than that provided by law". ${ }^{23}$

## CONCLUSION

Within the framework of the case we have attempted to critically analyze our pre-trial sereening methods and our labour laws dealing with termination of a contract of employment without good cause. The pre-trial serenting methods we found to be adequate to facilitate the enforcement of the Penal Law but deficient when measured by the other equally important yardstick: The extent to which itnocent citizens are left undisturbed. As a remedy we proposed that the right to challenge the pubic prosecutor's decision granted in cases of refusal to prosecute be made applicable also to cases where he improperly decides to prosecute.

Our labour laws dealing with termination without good cause we found to be lopsided in that they empower the employer to digmiss an employee at minimat expense. To sway back the balanct of justice we proposed preferably to make the requirement of good cause a sine qua non for every termintion. But failing that, if the laws purpose is to deter an employer from dismissing his employees without good cause and enhance the security and stability of the enmployet's position it should provide a more sewere and stringent remedy than the six month's maximurg sevelanoe pay that it grants. We do not ventare to propose a specific figure because this would require a careful study of all the factors that affect the labour conditions in the country - a study that is so wide and so complen as to be beyond the coverage of this short case comment.

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# SOME OBSERVATIONS ON Art. 1922(3) OF THE CIVIL CODE COMMENT ON 

GEBRE MARLAM AMENTE y. TELECOMMUNICATIONS

by Brun-Otto Bryde*

Suretyship - a contract by which a guarantor (surety) promises to a creditor to guarantee the obligation of a debtor (of. Art. 1920 Civil Code) - is a very common device for securing a debt in Ethiopia. The application and interpretation of Articles 1920-1951 of the Ethiopian Civil Code are therefore of great practical importance. A provision which has created many problems in the past is Article 1922(3) of the Civil Code. It requires for a valid suretyship that the maximum amount for which the guarantee is given be specified in the document) ${ }^{1}$ of guarantee). ${ }^{2}$ The problems which arise are not primatily problems of interpretation the language of the Code on this point is not ambigious - but they arise because the Code contradicts Ethiopian practice. It not only requires a form not previously necessary but what is more important endangers one of the main social functions of suretyship. Guarantors in Ethiopia are not only used to secure a specific debt (the "wass" of Ethiopian tradition) but also to guarantee the good behaviour of a person, especially an employee ("teyain"). ${ }^{3}$ In the latter case it is nearly impossible to tell upon entering into a contract of suretyship what damages the person guaranteed for may cause in the future. So the application of Article 1922(3) requiring a specification of the maximum amount of the guarantee, to this kind of guarantee makes it, if not obsolete, at least of doubtful value). ${ }^{4}$

Given the widespread use of suretyship to secure an employee's loyalty it is hardly astonishing that there have been attempts to avoid this result of the new Code.

The fact that Article 1922(3) is not well suited for a guarantee for a person led to the argument that the lawmaker in the Civil Code provisions on suretyship had only intended to regulate guarantes for specified debts (the traditional "wastna"). The guarantee for a person ("teyajinet") according to this theory was still governed by customary rules. The High Court of Addis Ababa followed this argument. Therefore the Supreme Imperial Court had twice to reverse decisions by the High Court of Addis Abeba which had confirmed the obligation of a "teayji" to pay for the damage caused by unfaithful employees though the maximurn amount of

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1. A contract of sucetyship has to be in writing (Ciw. Code 1725) and be attested by two witnesses (Civ. Code Art. 1727).
2. "The contract of guarantee shall be of no effect unless it specifies the maximum amount for which the guarantee is given."
3. One mey easily find job adwertisements in the Addis Ababa newspapers in which the applicant is asked to supply a guarantor, in one recent example even for an appointment as a Radio Ttebritician
4. Problems arising out of this situation for public agencies are diseussed in detail in a research paper by Hizkias Assefa, "Guarantee for Fidelity of Employen in the Govenoment Machinery of Ethiopia, (unpublishod. Archives, Fatulty of Law,
the guarantor's liability had not been specified).'s both cases the Supreme Court makes it clear that there is no way to evade the words of the Code which makes no distinction as to the kind of obligation the guarantor undertakes to guarantee. Its second decision) in this matter might well end the discussion as the Court in this very lucid judgoent seeks to answer every possible argament to support the High Court's decision.

But the fact that the Supreme Imperial Court had twice to overturn the High Court's decisions with nearly the same arguments is in itself interesting enough to justify some further examination of the problem.

Article 1922 of the Civil Code is headed "form of suretyship" and (although the importance of Art 1922(3) is by no means restricted to that of a form requirement as will be shown shortly) the High Court's persistence in disregarding this provision can be taken as a further example of the reluctance of part- of the Ethiopian judiciary to decide a case on the basis of technical prowisions of the new codes. The most prominent of the cases illustrating this tendency was $A$ wakian $v$. Avakiart. ${ }^{7}$ More rccent examples are a decision granting succession to a child adopted after promilgation of the Civil Code though the requirements of the Code (Art. 804) had not been complied with) ${ }^{8}$ and a judguent of the Supreme Imperial Court in Asmara enforcing a contract for the sale of land not concluded in the prescribed form). ${ }^{9}$ Those cases are intersting for various reasons. First, they show that distegard of Code prowisions is not confined to one court or a category of courts (e.g. the lower courts): in the Avaklan case the positions were exactly con+ trary to the "teyaj" cases, there the High Court defended the Code-provisions)" while the Supreme Imperial Court disregarded them. Secondy, they may not be simply dismissed as examples of ignorance of the law or insufficient training on part of the judges: on the contrary the courts were lully aware of the retevant Code-provisions and the arguments used to get around them demonstrate a high quality of legal reasoning) ${ }^{11}$ (perhaps more so than many cases decided correctly in the final analysis).

The basic rationale behind all these decisions was obviously the feeling that adherance to formalities would lead to iniustice. This feeling is easy to understand. Not only the layman but also the lawyer has diffoulties coping with the idea that a will or a contract should be held invalid for failure to follow formalities despite clearty and undoubtedly expressing the intention of the parties. This attitude

[^97]is by no means restricted to Ethiopia or to Africa; or oven to "developing countries". Also in other countries courts try to avoid harsh consequences to which the application of form-provision might lead in individial cases. ${ }^{2 / 2}$ But there are many reasons making the problem more acute in Ethopia. Here the Codes are new, their provisions not well known and legal counsel is rate. The case of Article 1922(3) of the Civil Code shows that unfamiliarity with the codes is not limited to the uneducated: both contracts of suretyship theld invalid by the Supreme Inperial Court were concluded with public authorities and even one of the major banks in Addis Ababa uses form-contracts for loans not complying with Art. 1922(3) in So ignorance of the law - while in principle no excuse - is understandable in the Ethiopian set-up. This may tempt the judges to try to help those who came in difficulties by not observing forms prescribed in the Code.

This attitude is probably supported by additional factors. In a fudy developed legal system the highly professionalized class of lawyers has its own values and its own concept of justice. These are not necessarily identical with those of the layman, because the lawyer's idea of justice includes values like certainty of the law and speed and efficiency of the legal process-values which might not be easily understood without explanation by people not connected professionatly with the administration of justice. A lawyer in such a systern will have no difficulty believing it "just" to decide a case on the mere basis of form, date or to give an expartejudgment when the parties fail to appear, ${ }^{14}$ while a layman's idea of justice might will be hurt by those decisions. Most likely, in Ethiopia the differentiation between the popular and the laywer's concept of justice has not yet progressed so far and so many lawyers agree with the popular judgment, e.g. that a guarartor should stand by his word and not be allowed to sneak out with the help of some obscure Code-provision...

If this is true it will hardly be sufficient to scold the courts for not complying with the Code-provisions. Even if they do so in the future in order not to have their decisions repealed (or critieized in scholarly journals) their conversion will be only superficial. What seems to be necessary on the contrary is to explain the rationale behind the provisions.

Even form-provisions which have no other purpose than to evidence a legal relation beyond doubt and therby to enhance the speed of legal proceetings are supportable berause those are important aims in their own right. But many provisions which seem to be only technical on the first glance have rather substantive functions. (In other words, they not only serve the certainty and expediency of the legal process but are also intended to do justice between the parties). Ore such substantive function is that of warning: the person undertaking an obligation shall be adwised that he is doing something serious, and it is a matter of
12. Thus in Gerrnany Art. 313 of the BGB (Civil Code) which asks for a valid contract of sale of immovables to be attested by a court or a notary has become partly obsolete because of the refusal of the courts to enforce it if the result would be contrary to equily.
13. The guarantor for a loan also has to gusrantee the possible interest for default and no maximber smpunt for this obligation is stated.
14. Concerning the failure of the Courts to apply the provisions of the Civil Procedure Code for cases of non-appearance of the parties see Daniel Gebrekidan, "Causes of Delay in Court" 1971 (unpublished Archives, Faculty of Law, F. S. I. U), p. 8-41, and Ghelcb Dafla, "Causes and Mechanisms of Delay in Courts ${ }^{+} 1971$ (unpublished, Archives, Faculty of Law. HSIU), P. 48 .
experience that persons are more likely to promise something by word of mouth than to sign a document in the presence of witnesses. It is for this reason that the Civil Code prescribes a witten contract for the sale of land as the good of the greatest economic importance, $)^{15}$ and for contracts creating long lasting obligations. $)^{16}$

This warning function is also of special importance in the case of suretyship. ${ }^{17}$ The danger of a contract of suretyship lies in the fact that it is a guaratitee for the debt of another person. The extent of the guarantors liability depends on the way the primary debtor performs his obligations and therefore in facts which are beyond the guarantor's control. So the Code requires a written contract to prevent the guarantor form entering into it carelessly. But it is doubtful whether this protection would be sufficient. Someone who guarantets a contract involving an obliggtion of Eth. $\$ 5,000$. Will normally expect this sum to be the maximum risk he can possibly incur. But this need not be so: the original debt can be increased by interest or damages and so occasionatly a guarantor would have to bear a much bigger liability than he expected, if his obligation would correspond to that of the debtor without limitations. The guarantor therefore would run a risk he can neither forset nor control.

It is exactiy this danger the Ethiopian Ciwil Code wants to awoid in Article 1922(3). By making the specification of the maximum amount a requirement for a valid contract of suretyship, the Code ensures that the guarantor only undertakes a calculable risk. By doing this the Code thetefore is not just introducing a technim cal requirement for a contract of suretyship which whas not asked for by the pre-Code law. On the contrary it substantially revises the concept of suretyship which can no longer be entered into without limitation, and this for sound reasons,

This being the policy behind Article 1922(3), the High Court violates not just the words but also the logic of the Code by trying to limit the application of this Article to guarantees for a specified debt, excluding the guarantec for a person ("teyaji'). Obwiously it is even more important to protect the "teyafi" from entering into an uncalculated risk.

The amount of an ordinary debt (eg. a credit or an obligation from a contract of sale) will only in exceptional cases be exceeded considerably by interest or damages. Therefore this amount can be taken as guideline by the guarantor to judge the risk he incurs. On the other hand, in a contract of employment there is very often no basis at all for guessing what damage the ernployee might possibly cause to his employer in the future: the employee's duties may perhaps not have financial aspects at all - and still he might burn the firm's premises down by smoking in a forbidden place.

Without the protection of Article 1922(3) Civil Code a guarantee for the behaviour of a person would be an extremely dangerous venture indeed. The promise to act as guarantor for a person is easily given in the abstract without really sensing the danger, and in addition there is a strong social pressure to stand as a gurantor for a relative or friend who is seeking employment.

[^98]In this situation the Code is sensible in asking for an explicit statement of the sum involved and thus warning the guarantor and enabling him to calculate exactly his possible future liability.

Therefore it is to be welcomed what the Supreme Imperial Court upheld this provision so clearly in Gebre Mariam Amente w. Telecommunicarions). ${ }^{14}$

That the use of suretyship as a means of securing against the disloyalty of an employee becomes very impractical because of the Cout's decision may be regretted by employers who think they need to protect themselves against such losses. But they can protect themselves by taking out a fidelity insurance for their employees). ${ }^{19}$ This is a much more sensible way to reach this aim in the interest of all parties concerned: the employer is more certain to get his money from an insurance company than from a guarantor who might well be as unreliable as the employee, the employee is no longer forced to look for guarantors when applying for a job (an obligation which might well create an undue advantage for those job-applicants with better connections), and if a damage arises it is borne by an insurance company (and therby by the community of those exposed to the same risk) and not by one guarantor who undertook his obligation without the professional expertise of an insurer to evaluate a sisk and perhaps even under social pressure.
18. Cf. supra, note 5.
19. The same solution is advocated by Hizkias Asscfa, cited abowe at note 4), supra.










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# COMPLAANCE WITH LEGAL OBLIGATIONS <br> by businesses in the addis ababa mercato 

by John Ross and Zemariam Berhes

The Law imposes certain obligations on all persons who, being traders as defined by Article 5 of the Commercial Code, engage in commerce. Among the most important of these are the duties to register with the Ministry of Commerce, Industry and Tourism and to keep accounts of all business transactions. Also, in the event of failure of a besiness there may be a duty to file a statement of bankruptcy with the High Court if all commercial obligations cannot be met. In our curvey of business practices in the Mercato ${ }^{1}$ questions were asked to determint to what extent these duties are being fulfilled by traders in the Mercato.

## a. Business Registration Requirements.

The Commercial Register. Prior to the enactment of the Commercial Code registration of businesses mas required under the Business Enterprises Registration Decree ${ }^{2}$ Tre Code includes provisions for a Commersial Register but aliows the prior law to mernain in effect until an order is published in the Negarit Gazeta revoking it. ${ }^{4}$ This order has noi been published yct, but the Decree has been replaced by the Business Enterprises Registration Proclamation of 1961.5 Under the Commercial Code only those businessmen classed as "traders" and organizations classed as "commercial" would be required to register, but every company and every person engaged in business for proft is required to register under the Proclamation. While failure to register wnder the Commercial Code will only prevent

- J.D., 1971, Northwestern Liniversity and LLB.. 1972, Hails Selassie I University, cespectively; members of the Northwestera Uniwersity-Haile Sellassie I University Research Project, 1971.

1. This Survey was undertaken primarily to nncover information concerning the extent to which the refatively sophisticated business law concepts importeí into Ethiopia by the Commercial Code and various other codes, proctamations, and regulations jute been absorbed by the averege Ethiopian merchant and authorities charged with enforcement. The Survey was conducted by analyzing a selectipn of ches files from watious courts which it pas thought would contain representative samples of all kinds of conimercial cases now being litigated and by intervewing a selection of menchants and rades in the Meratio, Addis Ababa's principal market arca. With the time and resources available it was calculated that about 150 interiews couid be conducted. Therefore, for most types of busigess, interiews were sought in one out of 30 establishments while larger percentages were solight of importers, exporters and some retail businesses which, though small in numbs, appeared so signifeant that they should be represented in tioe surucy, Altogether, 166 intervicws were conducted but cight of these werc disreparded because of their incompleteness. All of the interizws were with the owners or part owners of business establisimentis except in the case of a few braneh outlets for indnstrial shate companies where the manabers were interiewed. A more complete report of the results of this survey is conthited in the authors" paper "Legzl Aspects of Doing Business in Addis Ababa: A Profile of Mempato Butinessien and their Reception of New Laws" publisined in January 1972 as Ocossimpal Paper No. 1 of the Journal of Ethiopiar Law.
2. Business Enterprises Registration Decrec, 1957, Decres Xis. 27 , Xeg. Gar, year 17, no. 4.
3. Comm. C., ATt5. 86-123.
4. Id., AT. 1174.
5. Busithesf Enterpriges Registration Proclamation, 19§1, Proc. No. 184, Neg, Gaz., year 21, no. 3.
someone from holding himself out to be a 'trader" to third parties in addition to being subject to criminal punishment under the Penal Code, ${ }^{6}$ the Proclamation provides that "no company or individual enterptiser shall be entitled to maintain any action in Ethiopia upon any contract made by it in Ethiopia unless before the making of such contract the company or individual enterpriser shall have registered in the Ministry of Commerce and Industry as provided in this Proclamation."7 In addition, no municipality may license a non-registered business and any company or individual who carried on business without registering or engages in a business that is not authorized by his registration is punishable in accordance with the provisions of the Peral Code of 1957." Thus, although the provisions of the Proclamation are more simple cecause they eliminate the necessity for making the subtle legal distinctions between "traders" and "non-traders" and requite every business enterprise to be registered, the practical effects of failure to register may be much more harsh than those of the Commercial Code. Under the Code the only civil legal effects of non-registration of an individual trader seem to be that the trade name and distinguishing marks of his business are not protected, ${ }^{9}$ he is not able to voluntarily enter a scheme of arrangement instead of being declared barkrupt, ${ }^{10}$ and his account books are not admissible as evidence in his favor, ${ }^{11}$ None of these sanctions are likely to ever be felt by the average snnall businessman. If the provisions of the Proclamation were literally applied by the courts, however, they would prohibit the enforcement of any contract made by any unregistered businessman.

Registration of Basinesses Interviewed in the Mercato. The major purpose of Commercial Registers is publicity of the legal status and financial condition of persons and organizations registered. ${ }^{12}$ Questions were asked, therefore, to find out if the people interviewed had registered and if they ever used the Commercial Register to obtain information about other businesses.

Forty-seven per cent of the people intervievied said that they where not registered with the Ministry of Commerce and Industry, but two of those not registered said that they looked at files of other businesses to get information. Forty per cent were registered but only four of these said they looked at other files to get information. Thirteen per cent did not answer the questions pertaining to registration. Among the retail businesses about 40 per cent of the clothing and textiles shops, 40 per cent of the hardware and atensil dealers, twenty per cent of those dealing in food products, and orily one of the thirteen miscellaneous goods shops were registered. About 65 per cent of the bars, restaurants, and hotels were registered and 40 per cent of the handicraftsmen aud people providing personal services. ${ }^{13}$ Among
6. Pén, C., Art, 428.
7. Business Enterprises Registration Proclamation, 1961, cited above at note 5, Att. 5.
8. Peñ. C, Ast. 746.
9. See Comin. C, Arts. IIg, 12T-141.
10. Ia., Art. 1120.
11. Id. Art. 71.
12. Id., Art. 88; A. Jauffret, Manvel de droit commercial (Paris, Librairie Genéral de droit et de jurisprudence, 1957), p. 69.
13. These may not be required to register under the Commercial Code bscause they are not "traders" or "commercial business organizations" but they are so required under the Business Enterprises Registration Proclamation, 1961, cited above at note 5.
the importing and wholesele businesses 70 per cent of the textile and clothing merchants and 65 percent of the hardware and appliance dealers said they were registered.

By type of business organization it was found that only 37 per cent of the individual enterprisers and 22 per cent of the partherships without written agreements were registered ${ }^{14}$ Of the partnerships with written agreements 63 per cent were registered, however, as well as five or the eight priwate limited companies, the one limited partnership, and one share company. Two of the six who said that they used the Commerial Register to investigate other businesses were private limited companies and the other four were indiwidual enterprises.

There are several reasons which may account for the lack of enthusiasm for use of the Commercial Register. Although the Proclamation says that the owner of a business which is not registered cannot bting an action on any contract in any court in the Empire and that no Mumicipality can grant any license to do business culess the business is registered, in practice these sanctions appear to be completely ignoted. Practically all of the permanent businesses in the Mercato are licensed by the Muncipality and it in fact owns many of the major buildings. The Commercial Register was mentioned only once in all of the cases examined in the Survey and that was in connection with whether or not a party could legitimately claim to be president of a share company because his name was not entered as such in the Register. If the registration law had been enforced many of the cases examined would probably have been disnissed because the plaintiff were not registered. Many of those who were registered said that they received practically no benefit from having done so, but some said that it is easier to engage in forcign trade and to get loans and guarantees from the banks. A few bankers interviewed said that they check to see if a borrower is registered, but most bankers accept a valid license from the Municipality as sufficient evidence that he has a legitimate business. Among those merchants who were aware that the Commercial Register exists and that they might have some obligation to register but had not, there seemed to be a feeling that registration would insure an increase in their taxes since they would have to state the amount of capital invested in their busizesses and to pay fees for registration itself. The fear regarding taxes may not be entirely unfounded. As will be discussed in the following section, taxes, although supposedly based on income ot turnover are in many cases actually based on the amount of capital in the business.

In effect, therefore, there are two registration systems, that of the Ministry of Commerde, Industry, and Tourism and the other of the Municipality, and since actual penaltics seem to be applied by the latter for non-registration and registering with the former is often feared to cause an increase in taxes, many businessmen in the Mercsto consider the procurement of a license from the Municipality all the formality required for legitimately doing business.

## b. Obligations to Keep Accondits and Their Use for Assessment of Taxes.

Requirements of the Commercial Code. Prowisiors are made regarding the kinds of accounts to be kept by afl traders and commercial business organizations
14. For a discussion of the Itegal status of non-registered partrerships and thoge without written agrement see P. McCarthy, "De Facto" and Customary Partearships in Ethiopian Law," J. Efh. $L_{\text {r, }}$ wol. 5 (1968), p. 105.

## COMPLIANCE WITH LEGAL OBLIGATIONS IN THE MERCATO

in the Commercial Code. ${ }^{15}$ Generally any person ${ }^{16}$ or business organization carrying on trade must keep such books as are required in accordance with business practice and regulations, having regard to the mature and importance of the trade carried on. ${ }^{17}$ Petty traders may be exempted from kceping accounts under special regulations, ${ }^{\text {ri }}$ but such regulations have not yet been issiued and no defintion of petty trader is found in the Commercial Code or elsewhere. Presumably then even the smallest trader is subject to the requirements being discussed.

As a minimum the Code requires that every trader and every business organization keep a journal where daily entries must be made of his or its dealings regardless of their nature. The book-keeper may, however, at least once a month balance the proceeds of such dealings but must preserve all documents necessary for checking these daily transactions. ${ }^{19}$ Every trader and business organization must also prepare an inventory and balance sheet, both when they begin to carry on trade and at the end of each financial year when they must also prepare a profit and loss account. ${ }^{20}$ Anyone who fails or neglects to keep books and accounts-regularly and in good order and to keep his correspondence, invoices, and other business papers for the prescribed time as required by law, regulation, or articles of association is punishable under the Peral Code with fine or arrest not exceding one month. ${ }^{21}$

Accountiag Requirements of the Income Tax Proclamation and Regulations. In addition to the requirements of the Commercial Code, people in business have obligations to keep accounts under the Income Tax Proclamation ${ }^{22}$ and Regulations. ${ }^{23}$ These laws exempt small busimesses from kecping accounts. The Minister of Finance may make regulations requiring taxpayers to keep certain books of account in certain forms ${ }^{24}$ but he may prescribe regulations for certain taxpayers who are not required to keep records and books of accounts if their taxable income as estimated by the Tax Authority does not normally exceed E. $\$ 6,000{ }^{25}$ The Income Tax Regulations do provide for a category of taxpayers who do not have to keep accounts if the tax authority estimates their income to be below E. $\$ 6,000{ }^{26}$ Fifteen classes are provided within the category based on the amount of income which is estimated, and the amount of tax to be paid is prescribed for each category.

If no records and books of account are maintained by a taxpayer, if for any reason the records and books of account are unacceptable to the Income Tax Authority, or if a taxpayer fails to declare his or its income within the prescribed time, the Income Tax Authority may assess the tax, by estimation. ${ }^{27}$
15. Cormin C, Arts 63-85.
16. French version nads, "toute personnc physique ayant la qualite de commetçant,"
17. Comm. C. Art. 63.
18. Id, Art. 64; see also the discutstion of the Commertial Law Codification Sub-Commission on Oct. 20, 1954, Proces-rerbaux du sowe-commitrion des bois commerciales (1954, unpublished, Archives, Faculty of Law, Haile Sellassic I University), p. 58.
19. Comm. C., Art. 66.
20. Id., Art. 67.
21. Pen. C., Art. 817.
22. Income Tax Proclamation, 1961, Proe. No. 173. Neg. Gar., year 20, 170. 13.
23. Income Tax Regilations, 1962, Leg. Not. No. 258, Neg. Gax., year 22, no. 1.
24. Income Tax Proclamation, 1961, cited above at nete 22, Art. 42.
25. Id, Art. 43.
26. Income Tax Regulations, 1962, cited sbove at note 23, Reg 30.
27. Income Tax Proclamation, 1961, cited above at note 22, Art. 40.

Accountige Practices Among the Businesses Interviewed in the Mercato. In order to obtain some idea of how the acounting requirements of the Commercial Code and Income Tax Proclamation are being followed and what effect they may have on business practices, the people interviewed were asked a series of questions about what kind of account books they keep, if any, and to what extent they ane used for determination of the amount of tax they pay. The latter question seens particalarly important because of the number of people who cited the arbitrary mantier of tax assessment as the greatest problem faced by traders in the Mereato at present. Out of the 158 interviews all but eight people responded to these questions. Fifty-six of them said that they keep no books at all and that their taxes are assessed entirely by estimation. Five, however, said that they kept no books at all but paid no tax either. They failed to explain clearly why not. Fifty-one others said that they keep some kind of account books but that taxes are still assessed entirely on the basis of estimation. In most cases these books are only note-books or "exercise books" in which they record credit sales and purchases and keep some kind of basic inventory but are not complete enough to be used for an accurate evaluation of their profits and losses.

Some appeared to keep adequate account books but for warious teasons they are not used for taxes. One merchant had had a coursc in accounting and kept all the appropriate books, but said that the tax assessors will not look at them but only estimate on the basis of invoices and their guess at the number of sales per year. Auother also said he had been keeping accounts for a year but that the revenue service will not accept them. He had once gone to court to have the amount of his tax reduced. Still another said that he keeps all the joumals and ledgers required and he had conjes of the Commercial Code in both English and Amhanic which he showed the interviewer, but he said his bools are not used for tax assessment because they are not audited. Eleven said they keep some kind of accounts or at least receipts and invoices which are considered by the tan assessors but that the assessors supplement them with their own estimation.

Only one-sixth of those answering the questions said that they keep journals and ledgers which are used for assessment of theit taxcs without estimation on the part of the assessors. Three others said they keep joumals and ledgers also but that their taxes had not been assessed yet because they had only recently begun business.

Accounts were not kept or those kept were not used for tax assessment by any of the miscellaneous goods dealers interviewed, by 90 per cent of the retail hardware and utensil dealers, 85 percent of the personal services businesses and handicraftsmen, 280 per cent of the food produce dealers, 75 percent of the bars, hotels, and restaurants, and 67 per cent of the retail clothing and textile merchants. Accounts which were the basis of tax assessment or were considered along with estination were kept, however, by 75 per cent of the importers and wholesale dealers in hardware, machinery and utensils, and by 70 per cent of the whporters and wholesale dealers in clothing and textiles.

From the viewpoint of business organizational strueture, 75 per cent of the individual enterprisers and 80 per cent of the partnerships without written agreements did not keep accounts which were used for tax assessment, while 65 per cent of

[^107]the private limited companies, and 70 per cent of the partnerships with written agreements did. Therefore, although most of the businesses which do not use any or adequate accounting practices are the smaller retail shops which are rum by individual owners or an informal partnership, a significant number of larger import and wholesale businesses with more advanced forms of business organization seem to be lacking in this respect also.

The problen of inadequale acoounting methods is not one which can be solved easily or guickly because a strict enforcement of the Commercial Code provisions would simply drive out of business many people who lack the education and ability to keep accounts and whose businesses are not large enough to justify luining employees to do it for them. There is some effort being made by the tax authority to encourage traders to keep proper accounts sinde one person interwiewed said that he had not kept accounts in the past, but would in the future because last year he had to pay a thenty per eent penalty for not having thenn. However, another trader noced that although he had to pay E. $\$ 150$ a year as a penalty for not keeping accounts, he would have to pay an employce more than E. $\$ 150$ a month to keep accounts for him. Therefore he naturally preferred the former. The lack of proper accounts is a scrious threat to the stability of many businesses not only' because it is needed to establish profitable prices and make wise investment decisions but because of the arbicrariness and inequity with which taxes may be assessed. There is an obvious temptation for tax assessors to demand and accept bribes when the tax assessed is based entirely on their estimation of how much the business appears to be earning and the taxpayer has no documentary bvidence with which to challenge the estimation. Practically all of the businessment who complained about tax problems said that most people it the Mercato who did not want to pay exorbitant taxes bribed the tax assessros and several even adnitted that they bribed them themselves. An effort needs to be made, therefore, to encourage business owners to learn how to keep the accounts required by law, but it seems that an attempt suddenly to cnforce the laws woutd probably have undesirable results.

## c. Bankruptey.

Code Provisions, Under the codes, when a non-trader does not have enough assets to meet all of his financial obligations his crefitors may seize, upon proper cxceution of a court judgment, what property he has other than that deemed essential to his and his lamity's survival ${ }^{29}$ Those who come first may take what they find but the debts owed to those who find nothing are not extinguished and may be reasserted at any tine. That is to say, a "non-trader" debtor apparently may not be legally excused from his debts under any codified procedure - he cannot be declared "bankrupt". The debtor may not be imprisoned for refusal to obey a court judgment for payment of money if he is unable to do so. ${ }^{31}$ On the other hand, a trader or commercial business organization may be put into bankruptcy by a suit initiated by his creditors or himself.

[^108]Regardless of whe intiates a bankruptcy action or when it is begun, a trader or commercial business organization which fails to meet payments must file a notice to this effect with the registrar of the bankruptcy court including the firm's balance sheet, its profit and loss account, and a list of its commercial credits and debts ${ }^{32}$ Complex bankruptcy proceedings then begin in which the debtor either works out an agreement with his creditors for partial payment of his debts and remains in business, of the business is wound up and all of the remaining assets ate distributed to them. If the debtor's assets do not exceed E. $\$ 1,000$ or cannot amount to more than one tenth of the liabilities, a summary procedure is available in whick many of the normal steps are shortened or eliminated ${ }^{33}$ Rather thati entering into bankruptey proceedings, a debtor who is about to cease mecting obligations may voluntarily apply for a "scheme of arrangernent" by which he works out a compromise agreement with his creditors. ${ }^{34}$ To do so, however, he must file the same documents required for a notice of bankruptcy and show that he has been properly registered for the past two years since the opening of business. ${ }^{35}$

Customary bankruptey practice in the Mercato. As should be evident from the findings reported above these bankruptcy and scheme of arrangement provisions would be difficult to apply to most businesses in the Mercato because they often are not registered and rarely keep the atcounts necessary for the provisions to apply. Only one bankruptcy case was found in the High Court and it involved the winding-up of a share company.

Bankruptcy is an institution recogrized by custom among the businessmen in the Mercato, however, and as already mentioned the results of arbitration and conciliation proceedings often have the equivalent effect of adjudication in bankruptcy. One such proceeding was related by an Arab importer who held E. $\$ 1,000$ promissory note from another trader who was "bankrupt." The bankrupt had taken E. $\$ 20,000$ of goods from ten different people and had only E. $\$ 10,000$ remaining. Six elders were chosen whom all the parties knew well and all agreed on. The conciliation agreement was not written and the proceedings were only an attempt to bring the parties to a voluntary reconciliation. Four meetings were held, one every week. At first the debtor was unwilling to give up his last possessions, but finally he agreed under pressure from the elders and, after paying his taxes, the elders and the creditors discussed how to share his goods. A decision was reached by the elders that the creditors tear up their promissory notes and accept half the amount owed. The decision was not written but since the notes were torn up in front of the elders, it seems anlikely that a future dispute would arise from it. Everyone accepted the decision. The interviewee said he did not know what would have been done to any patty who did not comply.

Another elder interviewed said that when traders become bankrupt it is customary for them to circulate notes among their acquaintances explaining why they are bankrupt and asking for contributions to pay off their debts. The elder had in his pocket one of these notes from someone whose shop had burned recently and he

[^109]said that most people felt socialify obliged to make these contributions. The Idir associations also function in some cases as a form of bankruptcy insurance so that if a member is honestly bankrupt the association will pay his debts.

It is conceivable that the customary procedures used in cases of bankruptcy do not include all of the protections for both debtors and creditors which the bankruptcy law is designed to provide. It seems likely, however, that the elders who conduct these proceedings inquire into all outstanding debts and by knowing the bankrupt personally are familat with his assels. Also, since the agreements reached usually have the legal effect of a "compromise,"36 creditors should be unable to reassert their claim later in court.

In general therefore the bankruptcy provisions, because of their complexity and lack of correlation with many business practices, are among the least "received" of the foreign institutions of the Commerciat Code, but the need of bankruptcy as an institution has produced customary practices which in most cases are legally recognizable.

## Conclusion

The resuits of this survey have shown some major conflicts in the Mercato between law and practice. These conficts appear to be due to lack of education or knowledge on the part of merchants with respect to accounting practices and registration requirements and reluctance on the part of authorities to enforce strictly many harsh legal provisions. However we detected little, if any, evidence of resistance to these laws on the basis that they are "foreign" to the customary way of doing things. It seems likely therefore that with a growing awareness on the part of businessmen these laws can be fully implemented and used.
36. Ender the Jas, parties are not bound by the terms of a conpromise arrived at through conciliation unless they have expressly so agreed in writing. Ciw. C., Arc 32232). If they have so agreed the concilistor's docision has the force of res fudicara without appeal and may not be contested by the parties on the ground of a mistake concerning the fights on which they haye compromised, id, Art. 3312, but there are certain grounds upon which a compromise agreement may be inqalidated. Id., Ats. 3313-15.

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## A PROBLEM ON FAMILY LAW

By Kafherine O'Donowan*

Readers of the Jowrnal of Ethopian Law are invited to test their knowledge of the law and their skil in formulating answers to legal quizzes by submitting to the Journal written answers to the following problem. The best written ansmer submitted to the Journal in either Amharic or English will be printed in wolume 9-2 of the Journal. Answers should be submitted before May 15, 1973. The particpant whose answer is selected for publication will receive a frec copy of the Joumal issue in whish his answer appears plus five off-prints of his answers.

## Problem

In titic 1 of the Ethiopian Civil Gode there is a chapter on absence. If a person dixapptars and is not heard of for at least two years a declaration of absence may be given by a court. The effect of such a declaration on the marriage of the absentee will be its dissolution, acconding to Article 163(1). However Article 163 also contains the following sub-articles:
r(2) The marriage contracted by the spouse after the day on which the last news of the absentee was received may be impugned only by the absentee.
(3) Notwithstanding the provisions of sub-art. (2) it may also be impugned by the public prosecutor if he proves in an indisputable manner that the absentee is alice on the day on which the ection is instituted."
Dr. Yanderlincon interprets sub-article (2) to mean that the marriage dissolved by the judgment of absence is ahmys open to resuscitation by the return of the absentee eren when the spouse has re-married. Thus the validity of the second mariage is atways left in doubt, and the spouse of the absentee is always a potential bigamist. This wiew acconds with that of French law in which the return of the absentee causes the seconq marriage to become mull. ${ }^{2}$ One difficulty with the Ethiopian law is that Article $163(2)$ uses the words "after the day on which the last news of the absentee was received" instead of the words "the judement declaring the absence which are used in subarticle (I).

But an even grater difficulty is caused by Artieles 669 and 670 which deal with divorce. Under Article 669 (b) there is serious cawse for divorce due to one of the spouses "when one of the spouses has deserted the conjugal residence and when, since at least two years the other spouse does not know whele he is." The financial consequences of such a divorce may be the award to the remaining spouse of the whole of the common property of the spouses and up to one third of personal property of the absentee. Unden Article 670 (b) there is serious cause for divorce without fault "when the absence of one of the spouses has been judicially declared". The consequences of such divorce will be the equal division of common property. ${ }^{3}$

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## QUESTIONS:

1) Is a divorse obtained under Article 670 (b) open to attack under Article 163(2) and (3)?
2) How is the court to decide whether it is dealing with a case of absence or desertion when faced with a petition under Article 699 (b)" [And would not all sensible spouses opt for a divorce or desertion, given the advantageous financial provisions?
3) If Article $163(2)$ is referring to a case in which no judgment declaring absence has beer obtained, is this question not adequately covered by Article 612 (despite the defect in sub-article (2) in referring to "the time when the marriage was celebrated" instead of "the time when the action is instituted"?
4) Note that in Soviet law the return of the absentee will not affect a subsequent marriage of his spouse. ${ }^{4}$ Would this not be the approach the Ethiopian Law should take?
4. See Revue Internationale de Droit Compare (1950), p. 349.

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[^25]:    43. "Application of the law cannot be subordinated to the greater or lesser zeal which those subject to its jurisdiction may exert in order to acquaint themselves with it." Donnedieu de Vabres, Traité de Droit Criminal et de Légistation Pénale Comparée, p. 86, quoted in Ryu \& Silving, work cited above at note 38 , p. 432, n. 68.
    44. Id., pp. 442-43, 450-53. See discussion above at note 41.
    45. Decision of March 18, 1952 (Fed. Sup. Ct., Ger, Fed. Republic), Entscheidungen des Bundesgerichtshofes in Strafsachen, vol. 2, p. 194, translated in part in Lowenstein, work cited above at note 30, p. 242.
    46. Id., p. 243. This decision and the German theory of ignorantia legis in general is analyzed at Iength by Ryu and Silving, work cited above at note 38. The German Federal Supreme Court decided on'y the question of law involved. The lawyer's guilt or innocence, i.e., whether he "could have been aware," was left to the trial court.
    47. See Graven, work cited above at note $7 \mathrm{pp} .236-37$; X c. Ministère public du Canton d’Argovie (Trib. féd., Switz., 1961) J. des Trib. (Droit pénal), p. 82, translated in Lowenstein, work cited above at note 30, p. 240.
    48. As Dr. Graven has pointed out, Art. 58 (1), the provision that defines intention, fails in all three language versions to indicate the relevance of awareness of unlawfulness. Resort must therefore be had to Arts. 78 and 700 . Graven, work cited above at note 7, pp. 154-55, 236-37. Art. 700 is ambiguous on a key point. Art. 78, as is explained in the text above, declares that "Ignorance of the law is no defence," but does nonetheless provide for both reduction and total exemption of punishment if certain conditions are met. Art. 700, first paragraph, simply states: "He who committed a petty offence may not plead as justification ignorance of the law or a mistake as to right (Art. 78)." The ambiguity is whether the cross-reference to Art. 78. takes in all of Art. 78, including the reduction and exemption provisos, or, as seems more likely since the penalties in the Code of Petty Offences are so small to begin with, takes in only the part of Art. 78 that bars the defence of ignorance of the law. The question is important because the claim of ignorance of the law is more likely to be raised in the context of "petty offences," many of which are of a regulatory or esoteric nature. (See discussion above at page 383). The writer is not aware of any Ethiopian decision that has considered this ambiguity.
[^26]:    49. Art. 79 (1) does not spectify the factors the court is to consider in determining whether the actor "had definite and adequate reasons" for believing he had a right to act. The jssue is left to the court's discretion. In this regard, the 1957 Penal Code differs from the 1930 Penal Code where the relevant factors were enumerated in considerable detail. See discussion below this page. One factor that will be very relevant, of course, is the nature of the prohibition violated. It will be casier for the accused to claim excusable ignorance where the prohibition violated is a new addition to Ethiopia's law (in the sense that it was not an offence under the Fetha Nagast, the 1930 Penal Code or relevant custonary rules) or is not altogether clearly defined in the 1957 Code or is not considered particularly reprehensible by the segment of Ethiopian society to which the accused belongs.
    50. The reference to "criminal intent" is misleading as it implies that awareness of unlawfulness is somehow a part of intention in Ethiopia as it is in Germany. The trouble, again, arises from a translation error. The French text reads "et lorsque la criminalité de l'acte n'etait pas apparente," "and when the criminality of the act was not apparent."
    51. Graven, work cited above at note 7, p. 237. The second consideration referred to by the Codification Commission resembles Holmes' viewpoint quoted above at note 41.
[^27]:    68. Warnke, work cited above at note 54, pp. 59-61. The second reason lies in the theoretical controversy in Germany on which mental elements jastify dolus eventualis' classification as a form of intention. See above at note 55 .
    69. Id., p. 59.
    70. Id., pp. 60-61.
    71. Silving, work cited above at note 21, pp. 227-28.
    72. Silving refers also to "the practical impossibility of differentiating" the two mental states. Id.. p. 228.
    73. The second motorist who drives slower, it can be argued, displays, in his not caring about killing another person, a subjective dangerousness or "dangerous disposition." See Graven, work cited above at note 7, p. 157.
    74. The French version of Art. 58 (1), second paragraph, is still more explicit: ". lorsque l'auteur, . . . l'accomplit néanomoins en acceptant celles-ci pour l'éventualité ou elles se produiraient. "The Amharic text is closer in meaning to the French: ". . Th-T冖ion-...
    
[^28]:    77. See above at pages 378-379.
    78. Ministère public du canton d'Argovie c. Morgenthaler (Trib. féd, Switz., Dec. 1, 1950), J. des trib. (Droit penal), p. 146, where the Swiss court said: "By using the terms "that he knew to be innocent' the legislator wanted to require that the offender be aware of the inaccuracy of his denunciation. . . . He who restricts himself to knowing that an accusation is perhaps false does not make it against a person he knows to be innocent." Translated for the writer by Miss Marta Rozankowskyj, Licence en droit, licensed translator, Geneva, Switzerland.
[^29]:    85. Dolus eventualis was not explicitly included in Art. 18 of the 1942 Swiss Penal Code, the article defining intention. In view of the history in Switzerland of including dolus eventualis under intention, the Swiss court implied its presence in Art. 18, reasoning: "Art. 18... must be considered to include [ $l e$ dol éventuel] as long as the text of this provision does not in the least exclude this interpretation." J. des trib., p. 77.
[^30]:    95. See above at pages 389-390.
    96. Graven, work cited above at note 7, p. 158.
    97. Ibid.
[^31]:    98. The circumstances make it doubtful whether A could even be convicted of homicide with advertent negligence. Judging from the way most people drive at that time of the night, A's conduct does not appear unreasonable enough to constitute criminal negligence under Art. 59 (1) of the Code. It has generally been held in the United States that excessive speed alone does not make a person liable for negligent homicide should he strike and kill somebody, although, admittedly, the standard for criminal negligence, at least where homicide is concerned, is stricter in the United States. R. Perkins, Criminal Law (Brooklyn, The Foundation Press, 1957), pp. 667-68, 671.
    99. J. des trib., cited above at note 88, p. 78.
[^32]:    109. Decision of April 22, 1955 (Fed. Sup. Ct., Ger. Fed. Republic) Entscheidutgen des Bundesgerichtshofes in Strafsachen, vol. 7, p. 363. This case was kindly supplied to the writer by Dr. Klaus Warnke of the Center for Comparative Criminal Law, New York University School of Law. It was translated for the writer by Mrs. Ruth Grunfeld, LL.B., researcher in the Haile Sellassie I University, Faculty of Law.
[^33]:    110. Id., p. 369-70. In 1955, when this case was decided, there was no definition of either dolus eventualis or intention in the German Penal Code. The German court was relying upon scholarly writings on the subject. A definition of these state of mind concepts appears in the new German Penal Code. See above at note 76.
[^34]:    121. If it could have been proved that Bekele knew he was dragging a body or had accepted that fact, his continuing to drive in the hope the body would become disengaged from his car would establish the intention to "multilate" under Art. 487 (t) (b) (see above at note 117). Bekele could hardly argue that he was not aware of the effects on the deceased of dragging him for five kilometers.
    122. On the facts, a conviction for advertently negligent homicide would have been difficult. See above at note 119 .
    123. Jimma High Court, 1965, Crim. Case No. $151 / 57$, translated in P. Strauss, work cited above at note 19.
    124. Although Art. 523 says only "Whosoever commits homicide," it must be read as requiring intention. See above at notes 12 and 13 .
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[^43]:    37. Id., Art. 60E(2).
    38. A minor needs the consent of his guardian to be married as prowided in Art. 309. This requirement would stem to apply only to female minors as a male minor (under the age of eightena) cannot be married except in the very unusual case of a dispensation under Art. $581(2)$. A judicially interdicted person is required by Art. 369(1) to have the consent of the court.
    39. Civ. C., Art. 615(1) and (2),
    40. Id. Art, 615(i) and (3).
    41. Id., Art. 61\%(1) and (3). There is a complete discrepancy here between Art 615 and Art. $369(3)$ on the invalidation of the mantiage of a person who is judicially interedicted. Art. $369(3)$ provides that any interested person may apply for a declaration of nullity of the marriage at any time. Art. 615 seems to be the correct version as it is in line with the other provisions in the section on invalid marriage.
    42. Duress invadidates consent, and is deemed to exist, where consent is given in order to protect the victiot or his immediate family "from a menace of a grave and imminent crij" under Art. 589(1) and (2). For an example in Fretnch law sec the decision in Pietroni Mathilde c. Serpagy (Cour d’appel de Bastia, Fra., June 27, 1949) Dalloz, 1949, p. 417,
    43. Error invalidates consent where an error of substance as to the person of the other spouse is made. Art. 59] limits these errors to mistakes as to identity. religion, health and "bordily conformation". It is not clear what is covered and what is not. French law which is sinitar has been interpreted to cover cases of mistakes as to nationality and past history, impotence and gentine mistakes of identity. See the note by P. Esmein, Dailoz, 1955 p. 242.
    44. Civ. C., Art. 617(1) and (2).
    45. Id., Art. 618(1) and (2).
    46. "Bigamous" in the Civil Code is undoubtedly intended to include "polygamous". However there is room for the objection that polygany has not been foreseen in the draftitg of Arts. 612 and 613.
    47. Civ. C, Art. 612(1).
    48. Jd., Art. 613 .
[^44]:    55. Pen. C., Art. 616.
    56. Id., Art. 617.
    57. R. David, aited above at note 17. p. 8. The proposed Articte on bigamy read as followa: "Art. 3487. Bigumy. (1) where the husband is of the Mustim relligion the dissolution of the mariage may be pronomiced only at the request of the public prosecutor.
    (2) The public prosecutor may not make an application until the date fixed by law, except where the Minister for Justice has maide a special request."
    58. Hut since the Muslinn population continues to be governed in personal matters by the Kadis and Sharia Courts under the Kadis and Naibas Councils Proelarnation, 1944, Proc. No. 62, Neg. Gaz., Year 3, no. 9t monogany is not entirely the rule, in fact, despite the repeal of Muslim Law implied by the general repeals prowision of in Art. 3347.
    59. Civ. C. Art. 612(1). The bigamist is left in the awkward position of having no right to apply for dissolution of the biramous marriage. He could bring the matter to the attention of the public prosecutor and risk a criminal prosecution.
    60. Id., Art. 616(2).
[^45]:    67. R. David cited above at note 17, p. 57, f.n.37. The artick was: "The mariape contracted by the bigamous spouse produces the effects of irregular union. On the termination of the union the judges will award damages to the new spowtes, if be was in good faith, for the naterial hardship he has suffered." Set alse G. Kizecmuntwios, cittd abeve at note 52, proben 6 and "Quizzes", J. Eth. $L$, vel, VII, (1972) p. 204.
[^46]:    71. Wolete Actgay Megente w. Betetshatew Benti, (Supitme Imperial Conrt, Civil Appeal No. 62-62) ( ${ }^{\text {(mapublishtht). }}$
    72. Translation by Ato Asfaw Seife.
    73. Civ., C., Art. 663.
    74. Id. Art. 699.
    75. Id, Att. 696 .
    76. The Polish Family and Guardianship Code, eited above at note 6官, Art. 13, is s.
    77. Although it is intended to require registration of marriage at some time in the future this will be of limited usefulness unless homologation of divorce is edso required. See R. Dawd, cited above at note 24 , p. 53.
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[^65]:    1. Although the drafters of the Code drew upon many sountes in preparing the text, the owerall pattern of tice business organization provisions resembles most closely Book 5, Tithe 5, of the Italian Civil Code: Ste fialion Law of Compronies. Labowr Enterprive ard Ecapomic Orgomization (trans. V. Wenturini; Deventer, Holland; Kluwer, 1967) :.
[^66]:    12. Prot No. 241, Neg. Gaz-s, year 25, no. 24. See also the Cooperative Societics Regulations, 1969. Leg. Not. No. 337. Neg. GaE., year 27, No. 11.
    13. Civ. Cu, Art. 405(2).
[^67]:    20, Selamu Eckele, Private Commercial Companies umder Ethiopian Law: Their Legal and Practical Significance (1966, unpublished, Archives, Faculty of Law, Haile Selassie I University).
    21. The word consistently used in the French version for busimess organization, is soctete.

[^68]:    22. Comm. C., $213(2)$. The French version contains the phrase "expressly or implicitly" before the word "specified." The Amharic and English versions omit it. Sound interpretation woulo read it in, howewer.
    23. Comm. C., Arts. 63, 73 (accounts); 100, 219, 223 (tyeristration and publicity); 969 (bankruptcy); 3 '(provisions governing traders).
[^69]:    24. See Comins. C. Arts. 233, 250, 260,283 .
    25. Comm. C., Arts. 333(3), 495.
    26. Comra. C., Arts. 510(2), 523, 542(3)
[^70]:    27. Battles have long raget as to the nature of Ietal personality. For a discussion of the various theories, see R. Pound, Juripprudence (St. Pail, Minn, West, 1959, wol. 4, pp. 191-261.
    28. High Ct., Addis Ababs, 1961, Civil Case No. $166-53$ (unpublished). The caste arose before the Commercial code canter into effect, but the reasoning of the court applites as well to companies formed under the code.
    29. It should be noted that since legal personality is a crature of the law, the law may in some circumstances distegard or piece through it, perticularly where it ts uged to perpetrate fraud or other unlawful activitics.
    30. Civ. C., Ats. 394403 , 451-458. Different names are sometimes used-for example, "body corporate," sfuridical person," artifcitil persons," or "corporationt" Generally, when thesp words are used the group to which teferences is made is deemed by the law to te a pervon, capable of having rights and obligations.
[^71]:    35. Comm. C., Art. 968(1). But sce note 23 above and accomparying text.
    36. Comm. C, Art. 3.
    37. Comm. C, Art. 216(1); Cv. C. Art. 2189(t). See W. Church, "A Commentary on the Law of Agcercy-Representation in Ethiopia" J. Ech. L., vol. 3 (1966), p. 303.
    38. Conm. C., Art. 299(2).
    39. The English version of Civ. C. Art, $213(2)$ says "ujointy liable" The Fremeh and Atrharic are more accurately translated as "jointly and severally liable" The distinction and its imporf tance are discussed in W. Church, cited above at note 37, p. 315.
    40. Civ. C., Arts. 2129-2134, 2136.
    41. P. Graven, An Introduction to Ethopian Penal Lat (Addis Ababa, Haile Sellassie I Univ., Faculty of Law, 1965) p. 58.
[^72]:    47. Commi. C. Arts. 281(1), 297(2), 305, 514.
    48. Conm. C., Art. 133(2) (a),
    49. Comm. C., Art. 135, 137(2), 138(2). See also Cly. C., Art. 2057, and Pen. C., Art. 673r. dealing with civil and peral unfair corupetition.
    50. Civ. C., Art. 45.
    51. Civ. C. Art 46.
    52. G. Ripert cited abowe at note 33. no. 676; L. Becker, "The Societt Anonyme and the Socitte a Responsabilite Limitte in Franoe," New York Unir. L. Rer., vol. 38 (1963), p. 842.
    53. Ses, for example, Civ. Pro. C., Arts. 22, 97; Comm, C., Art. 216(3).
[^73]:    54. For brief difocussions of nationality, see H., 1. and J. Mazeaud, Lecons de droit civil (3d ed, Paris, Editions Montchrestien, 1963), wol. 1. no. 617; E. Church, Ausiness Associadions Heder Frethef Law (London, Sweet \& Maxweli, 19f0), no. 677. As to the capacity of fotelgners to join Ethiopian business organizations, see notes $100-107$ and acoompanying text, belour.
[^74]:    61. Comm, C., Arts. 229(1), 295, 303.
[^75]:    62. See Comm. C., Arts. 452, 456-459, 499(4), 501, 540, 541. 1162.
    63. Compm. C., Arts, 294. 301, 303.
    64. Comm. C., Arts. 210(1), 211.
[^76]:    69. Comin. C., Art. 307(1).
    70. Since a business is a type of incorporeal property which may be sold and. presumably, inherited, it may appear that there is no need to create a business organization in order that the business will surwive the trader's death. A besiness organization has certain advantages in this regand that the business alone does not, however. For exanple, a trader may fear that when he diss, the parts of the business may be sold separately without taking the goodwill into account. This is particutarly a danger if persons inexperienced in commercial affairs are handling the suitestion. The goodwifl may be testroyed, resulting in a smaller amount of procests going to the heirs and the loss to the economy of the value of the goodwill. This may also happen if the business is operated by a business organization, but is less likely. Since there must be at least two members of a busincss organization, the other is there even if the organization is distolved at the dath of one to be sure the value of the business is protected. Artangements may be made in ths partncrship agreement to assure that the organization contiaues even if one member dits, his share perhaps being taken by an heir. (This will automatically osent in a share Coripany and private limited company even if no prosision is made for it in the partuersbip dereement.) Sec Ghana, Commission of Enquiry, cited above at note 33, p. 7; LC.B. Gower, "Compaty Law Refom," Malaya L. Rev., vol. 4 (1962), p. 39.
[^77]:    73. See G. Ripert, cited above at note 33, nos. 700, 701; J. Escarra, cited abowe at note 60, nos. 506-512.
    T4. See the diseussion on this point of the Commission of Reform of the French Commercial Code: Travesx de la Commission de Reforme du Code de Commerce at du droir des sacletes (Paris, LGDJ, 1950-58), vol. 3. pp. 393, 394; also, the discussion of the sub-commission vol. 2 , p. 114.
    74. Conam. C., Arts. 229, 271, 295, 309.
    75. Comm. C., Arts 206, 312, 338, 339, 512.
[^78]:    77. Comm. C. Art. 315.
    78. Cormm Cri Art. 519.
    79. Conmi, C., Azt. 273.
    80. See Conm. C. Art. $217(2)$; Civ. C., Arts, 1718 180g(2), 1809; notet 109-113 below and acrompanying text.
    81. Travalux, cited abowe at note 74, wol. 7s p. 8.
    82. Comm. C. Art. 215.
[^79]:    83. Civ, C. Arts, 199(3), 313-319, 343-349, 373, 381, 387, 1808,
    84. Civ. C., Arts. 319, 358, 381.
    85. Comm. C., Arts. 280(2), 300.
[^80]:    86. See Civ. C., Aft. 320.
    87. May a third party who is nod in good faith (that is, who knows of the incapacity or inter diction) take advantage of Antieles 14 or 15 ? Those articles make clear they are applications of Article 121, in which ouly third partios in good faith remain unsffected by facts not entered in the register. That is in the English version The French wersion of Article 121 omits the words "in good faith"
[^81]:    88. Comm. C., Arts. 16-20, 280(2), 300; Civ. C., Arts. 645, 659.
    89. Comm C. Arts. 16-20, 280(2), 300: Civ, C., Att. 645, 659.
    90. Civ. C., Arts. 627, 632-634.
    91. See Civ, C., Arts. 647-661.
    92. In France there has been much controversy as to whether iwo spouses may be members of the same business ongasization. See E. Church, Business Associations under French Law (London. Sweet \& Marwell, 1960), no 62; Travate cited above at note 74, wol. 2, pp. 131-136, 397. wol. 7. pp. 27, 23, 282. The maior question has been whetber or not the marital reyime is modified by the partuership agreement.

    Note that Art. 633 in somewhat different in the English than in the French version of the Ethiopian code. A more accurate translation of the French would be:
    (1) Contracts condening their pectuniary relations made between spouses during marriage shall be of no effect under the law, unless they have been approved by the family arbitrators of by the court.
    (2) Nothung in this Article shail affect the contracts enpressly provided in this Code,
    92. As to the ceparity of business deganizationts and associations generally see poted 31 r 33 above and accompanying text.
    93. Comm C., Art. 25.

[^82]:    112. The English version of Article 26 says little more than Article 22. The French version states that a business organization which carries on a trade prohibited to it or for which it has not futfilded the legal requirements is null. Thus, iike Articles 23 and 24 for physical persons and Article 25 for associations, it prowides a sanction. The Ambarit version is closer to the English. It is somewhat ambiguous, but clearly prowides no sanction.
    113. Comul. C., Arts. 10, 213. Compare Art, V(2) of the Business Enterpriges Registration Proclamation, 1961, Proc. No. 184, Neg. Gas., year 21, no. 3, which prolibits tegistered business organizations from engaging in "山nazthorized business."
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[^88]:    - Faculty of Law, Haile Seflassie I University, Addis Ababa The author is indebted to Professor Rofiald \$klar for his very waluable and constructeve crisicisms of the draft.

    1. Getachew Berhare y. The Comnarcial Bank of Ethippia (S, C) (High Court, Addis Ababa. 196T, Civel case 1604-59) (unpublished).
    2. Public Proseputor v. Seppurn Dagne ed of (High Court, Addis Ababa, 1967 criminal case 111257) (unpublished). Article 656 deals with fraudulent miserpresentation, while Article 36 talks about actomplices.
    3. Standey Z Fisher, Effippian Criminal Procedure (1969), p. 1.
[^89]:    4. Cr. Pro. C, Art. 40
    5. Ce. Pro. C., Art. 42(1)
    6. Ce. Pro. C., Aft. $\mathrm{SO}_{4}$
    7. Cri Pro. Cu, Art 89
    8. Cr. Pro. C. Art. 141
    9. The prosecution oond also produce five witnesses but their testimony only established that the cheque reached the Bank.
[^90]:    10. Art. 44-Effect of refusal (1) Whero the public prosecutor refuses to institute proceedings under Art. $42(\mathrm{I}$ ) (a) in relation to an offence punishable on complaint only, he sfarl authorise in writing the appropriate person mentioned in Art. 47 to conduct a private prosecotion. A copy of such authorisation shall be sent to the court having jurisdiction. (emphasis added) (2) Where the public prosecutor refures to institute proceedings under Art, 42(1) (a) in reletion to an offence which is not punishable on complant only, the appropriate person mentioned in Art. 47 may, within thrity days ftom having received the decision of the public prosecutor, apply for an order that the puble prosecutor institute proceedings
    11. Civ, Cen Arts, 2032, 2033.
[^91]:    12. But in cates involving discrimination by the employer under Art. 30 of the Labour Relations Proclamation (Proclamation No. 210 of 1963, Neg. Gaz., year 23, No. 3), the Labour Relations Board had ondered reinstatement and its order was affimed by the Supreme Imperial Court. See, Sera Mikael Brick Factory v. The Association of Demissie Eshete et al (Sup. imp. Ct., 1964), J. Eh. L., wol 3, p. 13.
    13. Minimum Labour Conditions Regutations, 1964, Art. 9, Legal Notice No. 302, Neg. Gaz-, year 24, No. 5.
    14. Civ* C. Art. 1776
    15. R. Devid, Explanationt and Commentary Ethopian Civil Cade Titie XI (1968, Kindred translation unpublished, Library, Faculty of Law, Haile Sellassie I Uniwersity). p. 71.
[^92]:    16. U.S. Department of Labour, Labour Laws and Practice in (ran (1964), p. 42,
    17. U. S. Department of Labour, Labour Laws and Practice in Mexico (1963), p. 65.
    18. Civ. C., Art. 1799.
    19. Article 2(1) of Intemational Labour Organication, Recommendation Concerning Termination of Employment at the initianje of the Employer (Recommerdation No. 119 of June 5, 1963) prowides that, "Tertiration of emploument should not take place urlests there is a vald reason for such terrination connected witi the capacity or conduct of the worker or based on the operational requirentents of the undertaking, establisiment or service."
[^93]:    20. Labour Relations Proclamation, 1963, cited above at note 12, Art. 35.
    21. Minimen Labour Conditions Requlations, 1944. cited above at note 12, Art. 10.
    22. Collective Agrocment concluded betwicen the Ethiopian Petroleum Refinery (S. C.) and the Ethiopian Petroleum Refinery Workers' Union, January 1, 1971, Art. 4(a).
    23. Collective Agresment concluded betwen the Ethiopian Airlins (S.C.) and the Ethiopidn Airlines Employees Association, January 1, 1971, Art. X(e).
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[^97]:    5. Ketema Haile v, EELPA 6 J. of Erh. L. (1969) p. 38 et seq. Gebre Mariam Amente y. Telecommunications Department, 8 J. of Eth. L. (1972) p. 30 ef. seq.
    6. Gebre Mariam Amente w . Telecommunication, cited above at note 5).
    7. 1.J. of Exh. L. (1964) p. 23 ef seg. This case has been widely discussed and publicised, е. ह. J. Vanderlinden, Introduction au droit de ('Ephiopie moderne (Paris 1971)s p. 73 and by the same author: "Civi Law and Common Law Influences on the Deweloping Law of Ethiopia", 16 Buffols L. Rev., (1966). p. 250 ef. seq. at p. 264, and "Qutlques espects fondamentaux du development juridique Ethiopici", Verfassung wad Recht in "Ubersee Vol. 3 (1970) p. 167 et seg- p. 174.
    8. High Court Addis Ababa, Emet Jejeb v. Dessic Abdecho, Civil Appeal 1307-60 (umpublished).
    9. Supreme Imperial Court Asmara, Berhaike Haile v. Asmerom Tedla, Civil Appeal No. 94-61 (unpunlishedi).
    10. CP. supra note 7.
    11. This is eqpecially true of the Supteme Court desision of Avakian v. Avakian and of the High Court decision in the "teyeji" cases.
[^98]:    15. Civ. C. 2877 and also CTw. C. Art. 1723.
    16. Civ. C. Art 1725
    17. C. Civ. C. Att. $1725(\mathrm{a})$.
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[^107]:    28. Most of these are not required to keep accounts under the Commercial Code, because of their "non-trader" status.
[^108]:    29. Civ. Pro, C, Ants. 404-455.
    30. IS, Aft. 392(2): exterstion of tankruptry prowisions to non-traders was disscussed by the sub-commission but rejectei at the instance of the Draftaman.
    Proces Yerbatat, cited above at note 18 , p. 78.
    31. Civ. Pro. C., Art. 389 , Rew. Const., Art. 58.
[^109]:    32, Comin, C., Atts. 972-973.
    33. Id., Art. 1166.
    34. Id. Arts. 1119-53.
    35. Id., Art. 1120.

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[^112]:    * Faculty of Law; H. S.I. U.

    1. J. Yanderlinden, The Law of Physical Persons, p. 128.
    2. M. Planiol and G. Ripert, Traite Pratique de Droit Civil Fratheais, vot, i, p. 55 ,
    3. Arts. 692-94 thm 689(1).
