VOL: VI. SEPT 1975

ID-DRITT

LAW JOURNAL

organu uffiċjali ta' l-għaqda studenti tal-liġi
official organ of the university law society

Printed at the M.U.P. – 1976

Nota Editorjali: Settembru, 1975

F'din il-ħarġa ta' ID-DRITT qegħdin nagħtu bidu għal ħaġa li nixtiequ li tibqa' permanenti: bl-għajnuna ta' l-Onor. Imħalleſ Reſalo, Dr. Joe Brincat, Dr. Wallace Gulia, u għadd ta' studenti, qegħdin nippublikaw l-ewwel parti ta' sinteżijiet tas-sentenzi tal-Qorti ta' l-Appell, mogħtija ſl-1974. Nisperaw li b'hekk, ID-DRITT isir iktar bżonnjuż għall-avukati prattikanti mingħajr ma jitleſ l-identità akkademika tiegħu.

Hija ħaġa tajba li nħass il-bżonn li l-ġurnal isir aktar prattiku: dan għaliex huwa essenzjali li wieħed isir midħla sew tal-lat prattiku tal-profeſſjoni. Huwa għalhekk ta' min iſaħħarhom dawk l-avukati li jgħallmu lil xi student il-ħajja ta' l-uffiċju u tal-Qrati. Din is-sistema ma tistax, però, tibqa' titħaddem kif sar s'issa, u dan minħabba n-numru dejjem jiżdied ta' studenti ſil-Fakultà. Diġà qiegħed jiġri li xi studenti jsibuha diffiċili jsibu uffiċju ta' avukat biex jipprattikaw ſih, mingħajr ma jsibuh mimli studenti sħabhom. Mhux ta' min jipprova jagħti soluzzjoni għal din il-problema f'editorjal qasir: tkun ħaġa tajba, però, li l-Fakultà, l-Għaqda Studenti tal-Liġi, u l-Kmamar ta' l-Avukati u Tan-Nutara jiltaqħħu u jippruvaw iſasslu sistema iktar raġonevoli u effiċjenti.

B'hekk biss jistgħu jersqu aktar lejn xulxin il-profeſſjoni u l-Fakultà, ſil-kuntest ta' żieda enormi ſin-numru ta' avukati u studenti tal-liġi.

CHARLES DEBATTISTA

Editorial Note: September, 1975

This issue of ID-DRITT starts a new line which we intend to be permanent: with the help of Mr. Justice Refalo, Dr. Joe Brincat and Dr. Wallace Gulia, and a number of students, we are publishing in two parts summaries of the 1974 judgements delivered by our Court of Appeal. The journal will thus, we hope, be of more practical utility to the practitioner, while not losing its primarily academic nature.

That the need was felt to make advances in this direction is only right: the importance of a tangible connection with the practical side of things can never be overstressed. The efforts made by those lawyers who train students in their offices and at the Courts are therefore to be praised. It is feared, however, that with the increased popularity of the Law Faculty among new-comers to the University, this system of training or office-practice is bound to burst at its seams. Already, one hears of difficulties encountered by some students in finding an office to practise in, not already burdened by a number of his colleagues. It would be presumptious to attempt a solution to what will soon become a thorny problem in a short editorial: it is suggested, however, that the Faculty, Law Society and chambers of Advocates and Notaries meet and try to work out some system which is at once more rational and efficient.

Only thus can a more thorough integration between University and the profession be achieved in the context of wildly increased numbers.

CHARLES DEBATTISTA

CONTENTS

EARNEST, DEPOSITS AND PENALTIES*

JOE BRINCAT

MOST preliminary agreements of sale of immovables contain a clause which makes provision for the case in which either party resiles from the obligation. It is necessary that the juridical nature and effects of such clauses should be examined, as they have already caused conflicts in interpretation. The Civil Code deals with earnest and with penalty clauses, but does not cover deposits currently paid on such agreements.

EARNEST

The Maltese Civil Code considers earnest in relation to promises of sale. Section 1409 states that where in any promise to sell, earnest has been given, each of the parties shall be at liberty to recede from the contract, the party giving the earnest forfeiting such earnest, and the party receiving the earnest returning double the amount thereof, saving any other usage in regard to the particular contract in respect of which earnest has been given.

In the opinion of James Mackintosh[1] this institute owes its origin to the Phoenicians, a commercial and maritime nation, whose subjects dispersed and settled over the whole Mediterranean basin, carrying with them this custom, and accidentally the name, to Greece and Italy. As a confirmation of the conclusion of a bargain, a sum of money or a valuable thing was given by one of the parties, generally the buyer, and as we read in the Digest, this often took the form of a ring.[2] Gaius says, 'Quod saepe arrae nomine preemptione datur, non eo pertinet, quasi sine arra conventio nihil proficiat, sed *ut evidentius probari* possit convenisse de pretio.' The texts emphasise that the giving of earnest was meant to prove the conclusion of the contract in a more tangible manner, not that this was required for the completion of the agreement.

During the classical period, earnest was a common accompaniment of the contract, and the idea of forfeiting the 'arra' to be re-

*This paper is taken from the LL.D. thesis presented by the writer.

[1] Mackintosh – The Roman Law of Sale, p.68.

[2] Digest 14.3.5, 15.

leased from the obligations was still unknown. It was also distinct from part-payment of the price, when the execution of the contract was postponed, although if money was given as earnest, it could be imputed to the price.[3] The buyer forfeited it to the seller if he availed himself of the 'lex commissoria'. This type of earnest called 'arra confirmatoria' was the only form recognised in the Pandects.

Justinian, while leaving the practice of 'arra confirmatoria' untouched, created another form in later legislation. In the Codex[4] we read: 'Illud etiam adicientes, ut et in posterum, si quae arrae super facienda emptione cuiuscumque rei datae sunt sive in scriptis sive sine scriptis, licet non sit specialiter adiectum, quid super isdem arris non procedente contractu fieri oporteat, tamen et qui vendere pollicitus est venditionem recusans in duplum eas reddere cogatur, et qui emere pactus est, ab emptione recedens datis a se arris cadat, repetitione earum deneganda.' Two views prevail regarding the interpretation of this passage. One opinion holds that this passage contemplates a sale in the making, and therefore the earnest referred to is the same as given in promises of sale under modern codes, the forfeiture of which gives the right to resile from the contract. The other opinion, referring to the passage of the Institutes quoted in Chapter One which reproduces with some variations the extract from the Codex, holds that the earnest refers to completed sales and that the forfeiture of the arra was meant to limit the damages for non-fulfilment of the obligation to that amount, or that this was an additional penalty on that which was due by way of damages.

Professor Jolowicz[5] states, 'In the classical law arra served purely evidentiary purposes; but as ... in Greek law, where the rule of consensual sale is not so fully developed as at Rome, its object was the much more important one of serving as a forfeit in case the giver (normally the buyer) failed to fulfil his contract, while the recipient, if he failed, had to restore the arra and as much again. The arra could thus be said to have a 'penitential' function i.e. either party could withdraw from the bargain, provided he was willing to lose the amount of arra. This penitential function Justinian tried to fuse with the Roman evidentiary function when he enacted what is precisely the common Greek rule that on failure

[3] ibid. 18.3.6, 2; ib. 8.
[4] Codex 4.21.17.2.
[5] Jolowicz – Historical Introduction to Roman Law, p. 525.
[6] Pothier – Opere Part VI ch. I, para. 498 et seq.

to fulfil the sale, the giver forfeits the arra and the recipient restores twice the amount.'

Pothier[6] opines that there are two types of earnest, that which is given on conclusion of the contract of sale, and that which is given at the time when a future contract is agreed to. The 'arra poenitentialis' is considered by him as a separate contract, with its particular physiognomy, which need not be stated in express terms, for as soon as one of the parties gives a thing to the other, the agreement as to earnest is concluded. This is a 'real' contract, because it postulates the delivery of the thing, of which the receiver becomes the owner, if and when the party giving it fails to conclude the sale. The receiver of earnest, if he resiles from the preliminary agreement, is bound to return double, or the thing and its value. In case the contract is no longer possible due to supervening causes, which are not imputable to either party, the receiver is bound only to restore the thing. If the sale is concluded, the party receiving is bound to return the thing, but if this is a sum of money, he should impute it to the price.

Regarding earnest which is given on conclusion of the contract, Pothier considers that these are given on account of the price and should be imputed to it. In cases of doubt whether the earnest has been given as proof of conclusion of the sale or of the projected sale, one should look to all attendant circumstances.

Earnest seems to be a legal multi-headed hydra, especially in modern legal doctrine. In Farrugia vs. Fenech[7] the Commercial Court stated that, in legal terminology, the word 'earnest' has different meanings, and distinguished the three cases of earnest given in promises of sale, in concluded sales, and as instalments of the purchase price. Clauses in promises of sale have evolved which create other shades of meaning, and one may meet with such expressions as 'earnest/deposit'.

In the above-quoted judgment, the Court of Appeal stated that the particular character of the agreement regarding earnest often resolves itself in an enquiry into the intention of the contracting parties. The Court of Appeal also found itself in difficulties to define a similar agreement in 'John Grima vs A.I.C. Arthur Cutugno et.'[8] The Commercial Hall excluded the possibility of a particular agreement being considered as earnest, and the Court of Appeal, disagreeing with the first judgment stated that *'it resembles in*

[7] Vol. XL, I, p. 515.
[8] Court of Appeal: 22.3.68.

some features an agreement regarding earnest'. The rather undefined locution of the Court of Appeal shows that this particular institute of law very often baffles pigeon-hole classification.

PENITENTIAL EARNEST

There can be no doubt that our Civil Code legislates on penitential earnest, and that the most important feature of Section 1409 is that it gives the parties the right to resile from the agreement, without being bound to the specific performance of the contract or damages and interests. Taken in this aspect, it represents damages assessed in anticipation. But this subsidiary aspect should not be allowed to predominate over the principal feature, that is the right to recede.

It, therefore, follows that the intention of the parties to grant each other the right to resile should be beyond doubt. If the agreement on the payment of a sum of money expressly or impliedly excludes the intention of allowing either party the power to recede, the payment cannot be considered as earnest. Furthermore, this right should be given to both parties, as from the wording of the law it appears clear that earnest operates bilaterally.

The question arises whether earnest should be stipulated in the written instrument, in promises of sale of immovables. The solution seems to depend on whether we consider earnest as a totally accessory or totally independent agreement. The Civil Code[9] lays down that such promises must be expressed on pain of nullity in a written instrument, and therefore if earnest is considered as a totally accessory agreement, it must also be expressed in writing, on the general principle of law 'accessorium sequitur principale'. In George Farrugia vs Alfred Vella[10] the plea was raised that the agreement about earnest was null as there was no written promise, and it was held that, 'a promise of this genre without a written instrument is null. Whereas earnest is an accessory obligation, and has no life or meaning except in relation to the principal obligation, it is evident in this case – where both parties agree that there was no written promise – that the stipulation regarding the earnest is null ... The argument brought forward by counsel for defendant, that the agreement regarding earnest should be considered independent from the promise, appears to be wholly unfounded.'

[9] Section 1277 (1)(a).
[10] First Hall 21.7.67.

A distinction should be made in this respect. If there is no written promise, then there can be no principal obligation from which to recede, and the giving of earnest is, therefore, to no effect. But if there is a written promise, and earnest has been agreed to verbally and actually given, the same reasoning, it is submitted, should not apply. Earnest is a 'real contract' consisting in the delivery of the thing. The written instrument is not necessary to cover such an agreement, and once the original obligation is valid, there can be no doubt that a 'real contract' regarding that obligation should be valid. The principle, 'accessorium sequitur principale', is not applicable to such a case, as the 'accessorium' is a real contract, while the 'principale' is a consensual contract.

The wording of Section 1409 seems to imply that the right to resile is invariably the consequence of the payment of any sum of money on the conclusion of the promise. This cannot be the rule, if the intention of the parties does not support it, in each particular case. As was stated in Alfonso Zammit vs. Antonio P. Abela[11] the intention of the parties must be examined specifically on the point whether the parties intended to grant each other the right to recede. In John Micallef vs. Giulia Briffa[12] the payment of a sum of money was declared to be an incentive to conclude the contract, rather than subject to forfeiture or payment of double the amount, as would be the case under Section 1409. The examination of the intention of the parties is the starting point in the enquiry of the juridical nature and effects of such payments.

DEPOSITS

This nomenclature has made its appearance recently, perhaps for the benefit of foreigners buying real property, who are not familiar with the institute of earnest. But the particular features which it has assumed have raised already important legal discussions, including two rather conflicting judgments as to their true juridical nature.

In Chetcuti vs. Thurston[13] the juridical nature of these deposits was examined in a very elaborate judgment. The facts of the case were as follows: the purchaser, on signing the preliminary agreement deposited the sum of three hundred pounds with a third party,

[11] Vol. XXI, I, p. 569.
[12] Vol. XL, I, p. 187.
[13] First Hall, 'in parte' 10.10.67. The case was ceded on the 14th March, 1968.

which was to be handed over to the prospective vendor, if he refused to appear on the deed of sale without a reason valid according to law. In the writ of summons the vendor asked for payment of the deposit, as the sale was not effected due to the unwillingness of the purchaser, which deposit was qualified as being 'earnest-money', though the nomenclature was not used in the preliminary agreement. The defendant purchaser pleaded that the 'causa petendi' was erroneous as the deposit could in no way be considered as earnest as this was a penalty clause. On the grounds that 'earnest' or 'arra' can have more than one meaning, the Civil Court held that the plaintiff was fully entitled to use the term 'Kapparra' (earnest) to give a 'nomen iuris' to this deposit, which term was then to attract its particular shade during the hearing of the case. The Court could in no way doubt that the plaintiff was certainly referring to the 'arra poenitentialis'.

'The essential difference', Caruana Curran J. said, 'between "arra poenitentialis" and a penalty clause is to be found in the fact that in the former there is *an anticipated or actual delivery* of the sum of money, while in the penalty clause there is *only a promise*.' Earnest implies immediate forfeiture, while a penalty clause postulates a future demand for the payment of the penalty.

In Dr. Remigio Zammit Pace vs. Joseph M. Galea, L.P.[14] the decision is diametrically opposed to Chetcuti vs. Thurston. A deposit of £M1260, ten per cent of the purchase price, was made on the signing of the preliminary agreement on account of the price, which amount the buyers were to forfeit in favour of the vendors in case they failed to appear on the deed of sale. The Court argued that, 'if the money was paid by way of earnest, this would have been expressly stated, as earnest has a *bilateral effect*, since according to Section 1409 its recipient has to refund twice the amount. Therefore, the plaintiff is right in asserting that this is only a penalty clause, and according to Section 1163(2) has the option to demand the execution of the contract.'

Such deposits are made by the consent of the parties, and as such they are free to regulate their internal relations, within the limits of the law. Some deposits are specifically contracted as being subject to forfeiture in favour of the vendor, if the purchaser recedes without being legally justified. The question to be answered is whether such deposits, without any express stipulation

[14] First Hall 26.6.69. An Appeal has been lodged.

as to their nature, are to be considered as earnest-money or not. 'Dr. Remigio Zammit Pace vs. Joseph Galea' makes it imperative that there should be an express agreement about earnest, and if the parties do not state that this is earnest money, then the rules of Section 1409 are not applicable.

That the intention of the parties should be clear is not challenged, but that it should be expressed by a particular 'nomen iuris' is not required, as it is rightly stated in Chetcuti vs. Thurston, especially in promises of sale of immovables which require simply a private writing, without the attendance of any legally qualified person.

Giorgi[15] distinguished three types of arra, and it is submitted that his classification solves the question regarding the juridical nature of deposits. He considers that 'arra' may be:

(a) Purely confirmatory, given as a symbolic proof of the conclusion of the contract (arra in signum consensus interpositi data), generally an object of small value;

(b) Penally confirmatory, given as an anticipated liquidation of damages, and has all the characteristics of a penalty clause, with the difference that it consists in the actual delivery of the earnest money rather than in a promise of future payment;

(c) Penitential, which gives the right to either party to resile.

Although the distinction between the first and the other two types is not difficult, he says, the boundary between penally confirmatory earnest and penitential earnest is not easy to trace. The penitential earnest is given on the understanding that either party may resile on forfeiting the earnest-money or on paying double the amount. The penally confirmatory type is a guarantee of the future payment of damages, in case of non-fulfilment. The party, still faithful to the obligation, may either ask for the forced execution of the contract, or retain the money, or ask for double the amount, if he had paid it.[16]

There is no doubt that Section 1409 deals with 'arra poenitentialis', as the law specifically lays down that it grants to either party the right to recede from the agreement. Studied in conjunction with Section 1407(1), earnest neutralises the rights to specific performance or to damages and interests, and when it is given, these remedies are not available to either side in a bilateral promise.

[15] Giorgi – Op. cit. Vol. IV, para. 466.

[16] Giorgi – op. cit. para. 469.

The insistence on the fact that penitential earnest affects bilateral promises is important. Although our legislator has considered the unilateral promise in Section 1407,[17] when dealing with the question of earnest, it cannot be doubted that the bilateral promise was held in view. This is supported by the consideration that our section faithfully reproduces the French provision.[18] Furthermore, as the right to resile is given to both contracting parties, the natural corollary is that the penitential earnest is possible only in bilateral promises. This is also the conclusion reached in Zammit Pace vs. Galea.

If earnest, in the sense just explained, is given, the non-guilty party has no alternative. The sum given in earnest is the measure of liability of the defaulting party, and twice the amount if he is the recipient.

A bilateral promise, it has been argued, can be resolved into two unilateral promises, and the obligations assumed by one party may not have corresponding obligations. In bilateral promises, either party may assume additional obligations, unless they are prohibited by law. Much depends on the bargaining powers of the parties, and the ability to heap duties on and to extract benefits from the other side.

The deposits which are currently being demanded on bilateral promises of sale of immovable property are essentially *unilateral*, binding the purchaser, in favour of the vendor, without a corresponding obligation on his part. The locution adopted, 'the *purchaser shall forfeit* ...' clearly implies that the vendor is not assuming any liability, except that which the law imposes regarding the execution of the contract, if he resiles. If one may investigate the intentions of the vendor in such stipulations, one has to concede that the seller, who is keeping the immovables to be transferred outside the market, wants to have a guarantee that this loss of other opportunities is not futile. These deposits are a development of the present boom in real estate, and a product of estate agency business. The demand for a deposit subject to forfeiture for change of intention relieves the estate agent of troublesome and expensive law-suits, as it binds the purchaser in stronger bonds. Suing the defaulting purchaser for specific performance is not a very attractive proposition to the agent, who prefers financial and psychological pressures, which have an immediate impact

[17] cfr. Chapter One.
[18] French Civil Code Art. 1590.

on the will, to legal remedies, which may be elusively unpredictable at times. If one considers these deposits from this angle, the classification of Giorgi, that they fall within the class of 'arra confirmatoria penale', is very applicable, for the following reasons:

(a) It is 'confirmatoria': The deposit is a 'real' confirmation of the obligation of the purchaser, who in his unilateral promise binds himself to buy. The payment is not made so that the purchaser may resile, if there is a change of mind. Moreover, there is an actual payment.

(b) It is 'penale': The forfeiture of the deposit may be one of the alternative remedies open to the vendor in case the purchaser defaults.

The availability of alternative remedies distinguishes the deposit from penitential earnest. The defaulting purchaser cannot force the vendor to choose, as would be the case if the deposit falls under Section 1409. The vendor has two alternatives: either to demand the execution of the contract or else to keep the deposit, in which latter case he need not action, unless the deposit is in the hands of third parties, as was the particular circumstance of Chetcuti vs. Thurston. The wording of such forfeiture clauses certainly does not bar the demand for the execution of the contract, especially since the deposit is usually *qualified as part of the price*. The action of the vendor would, indeed, amount to a demand for the remainder of the price. If the deposit were to be considered as penitential, it would be *imputed* to the price on *voluntary execution*.

The question arises about what action is competent to the purchaser if the vendor refuses to sell. The answer is that the purchaser has no option but to demand specific performance or damages and interests, as the case may be, as provided under Section 1407(1). If specific performance is still possible, he cannot demand damages and interests. If through loss of the immovable or alienation to third parties such a sale is no longer possible, then is the assessment of damages predetermined by the amount of the deposit? As has already been argued, the deposit is unilaterally binding, and therefore it cannot serve to calculate the damages caused by the party in favour of whom it is made, but whom it in no way binds. The purchaser, it is contended, would only have the ordinary remedies, and has to prove the damages suffered and their amount.

Penalty Clauses

It is not within the scope of this thesis to discuss penalty clauses in general, but only in so far as they affect promises of sale, and particularly the current clauses which are being inserted in preliminary agreements for the sale of immovable property. A penalty clause, as defined by Section 1161, is a clause by which a person, in order to secure the fulfilment of an obligation, binds himself to something in case of non-fulfilment. The function of a penalty clause is to fix damages for non-fulfilment by agreement. It is a coercive measure, to which one submits 'sponte sua'.

The sole judges of the penalty are the parties, for it represents the compensation for damages which the parties suffer from the non-fulfilment of the obligations assumed by the other party. Section 1165(1) expressly states that the Court cannot abate or mitigate the penalty, even if it is obviously excessive, as the judge cannot substitute his subjective discretion for the will of the parties.

The most important feature of this clause is that the creditor cannot demand the performance of the obligation and payment of the penalty, unless this has been expressly stipulated for mere delay (Section 1163). The choice of the remedy, however, is wholly in the hands of the creditor, who cannot be forced to demand either in preference of the other. The stipulation of a penalty together with specific performance is not incompatible, but the same cannot be said regarding a penalty and damages and interests. These may be demanded only for what the penalty clause does not cover.[19]

The juridical difference between this clause and earnest is to be found in that a penalty clause is *a promise of future payment*, while earnest consists in the *effective and actual delivery* of what shall be forfeited, as was stated in Chetcuti vs. Thurston. This aspect of a penalty clause makes it imperative for the creditor to demand the penalty, while in the case of earnest, if the creditor is the recipient, there is no need for such a judicial demand.

A recent practice, which resulted to the writer from an examination of preliminary agreements, tries to make the penalty exigible without judicial recognition. Where a penalty clause is to be stipulated, the preliminary agreement is made by public deed, on the belief that it would be considered as an executive title under Section 251(b) of the Code of Organisation and Civil Procedure,

[19] Giorgi – op. cit. para. 460.

which dispenses with the judicial recognition of claims which result from a contract received by a Notary Public. Although this case has not come before the Courts, it may be quite correctly stated that even if a penalty results from a public deed, it is still necessary that there should be a judgment ordering its payment. The penalty, is wholly different from earnest and deposits, is wholly dependent on the principal obligation, which is an obligation of doing, as has been argued in Chapter Two. Section 251(b) excludes a public deed as being an executive title when the obligation consists in the performance of an act. The distinction between personal and physical acts and other acts in general is not applicable to this case, as the provision clearly limits the public deed as an executive title only to debts which are certain, liquid and due, when the judicial recognition of the claim may be almost unnecessary. The penalty only becomes due in default of fulfilment of the principal obligation, which consists in the performance of an act, and therefore, it is submitted, it must be proved that the principal obligation was not performed, without good grounds at law, even if this clause has not been expressly stated in the preliminary agreement.

THE HISTORICAL DEVELOPMENT OF THE JURY IN MALTA AND ABROAD

CHARLES DEBATTISTA

This paper was delivered at a forum organised by the Għaqda Studenti tal-Liġi on March 12th., 1974.

Your Honour, Members of the Staff, and fellow students,

All of us here will be aware that perhaps the most popular parody of the legal profession is embodied in the expression, 'Ladies and gentlemen of the Jury...,' normally voiced with as stiff an upper lip as possible, and frequently accompanied by the notorious pose of hanging on to one's lapels for dear life. Among all legal fields, the criminal law is the most glamorous and the most sensational; and within that field, trial by jury, the most appealing to the public sentiment; for it is here that the proverbial ordinary man (or woman, now) in the street, is allowed to play a part – other than those terrible roles of plaintiff, defendant, accused or witness – in that impressively dramatic sanctum which are the law courts. It is through the institution of the jury that the ordinary people keep a watchful and effective eye on what goes on in the Court-room.

We shall attempt in the next few minutes to trace together the historical development of the jury in its mother country, England; then we shall examine its success there, the substitutes suggested in its stead, and its export abroad. We shall than examine the jury in our own history, which is mainly divided into periods roughly between 1811-1829, 1854-1934, 1934-1944 (the war years), and 1944-1972. Finally we shall examine some points of divergence between the Maltese jury and the English jury.

In its original prototype, the jury was only partially similar, and then only in form, to our modern panel of jurors. Just now, we referred to England as the 'mother country' of the jury: we must, however, qualify that reference by saying that England is the origin of the jury, *as we know it,* that is a panel of ordinary citizens who compliment the judge's task of adjudication. The jury's real origin, however, lies in the ancient inquisition of the Frankish kings, dating from the 9th century, whereby groups of disinterested

neighbours were required to declare under oath information that was used to establish royal rights.

This essentially Frankish institution was carried into the Duchy of Normandy, and thence to England, via the Norman Conquest of the Anglo Saxons in 1066. Twenty years later, in 1086 we find the jury being employed on a really grand scale – still solely for the Crown's benefit – in the compilation of that famous statistician's delight, the Domesday Book. We see therefore that throughout this earliest part of the jury's history it was essentially an instrument of the body politic, a fact finding commission, as it were, in the hands of the State.

Henry II, however, who reigned from 1154-1189, employed the jury for the first time in the determination of private rights; so that a jury of sworn men who knew the facts could decide where the boundary of an estate in dispute really lay. Moreover, during Henry's reign, we find the origin of the criminal jury, which is more at issue in this forum than the civil jury. In 1166, Henry required that a jury of 12 men should present to every county court session, the names of men as were notorious murderers or robbers, or receivers of such. These men, once names, would be sent to trial by ordeal, the real test of guilt or innocence. We see, therefore, that the jury was first merely a body to gather up information, – much like a modern Inquiry; and, after 1166, a body whose only task was accusatory, much like the office of the Crown Advocate General today.

But in 1215, Pope Innocent III disallowed any clerical participation in the ordeal, thus depriving that barborous travesty of justice of its heretofore divine justification. Henry III, therefore, because of what appeared to be a purely ecclesiastic measure, was constrained to do away with the already unpopular trial by ordeal, and substituted it by what until then had merely been its own prelude – trial by jury. So in that year, we find the body of 12 accusing men transforming itself into a body of 12 judging men. Quite obviously to all of us, this transformation created a lacuna, in that the accusatory body, could not continue to carry out any such function, in compliance with the *nemo iudex* principle. So another jury of 12 men was set up to carry out the accusatory functions of the original jury – thus you had two types of jury developing together. In 1367, the accusatory jury was increased to 24 in number, and hence the name Grand Jury; while the trial jury was left at 12 – hence Petty Jury.

A word here, about this dichotomy, of the Grand and Petty Jur-

ies, which is of particular relevance to American law, which still safeguards, in the 5th Amendment to the Constitution, the citizen's right to the Grand Jury. The best definition of the functions of a Grand Jury, I think, was given by Sir Thomas Maitland in his address to the 1st Grand Jury in Malta, where he stated that the Grand Jury had to answer the question:

> 'whether the evidence adduced before them was so relevant to the act stated in the indictments and induced such suspicion of the party indicted as to require, for the ends of public justice, that he should be called upon to answer the charge before a tribunal competent to proceed to further examination.'

The Grand Jury, therefore, indicts or accuses, while the Petty Jury decides guilt; and in fact, where Grand Juries are employed, they are usually rubber-stamps for the Public Prosecutor's Office.

The British, apparently, lay more trust in the Attorney-General's Office than the Americans, and they saw fit to abolish the Grand Jury completely in the Criminal Justice Act, 1948, (even though it had become a dead letter long before that date). They thus left all accusatory functions up to the Home Office and its subordinates.

Back now, however, to the general history of the Jury. Blackstone, who was most vociferous in his defence of the jury system, called it 'a barrier between the liberties of the people and the prerogative of the Crown'. (Comm. iii. 379) The history of the jury in England indicates, however, that the relation of parity between Judge, (as appointed by the Royal Prerogative), and Jury, (as representing the people) was not as sacrosanct a principle as it is nowadays. Regarding the question of unanimity in verdicts, for example, judges used to forbid food and drink during deliberation, ever since the 14th Century, when unanimous verdicts became compulsory. Incidentally, this is still the *de jure* situation under s. 483 of our own Criminal Code. Indeed, until 1640, English Judges actually fined or even imprisoned jurors who acquitted people whom the judges wished to be convicted. In the notorious case of Sir Nicholas Throckmorton, for example, the jury acquitted the accused, notwithstanding that they had not been allowed to hear the witnesses in his favour; for this they were imprisoned and ruinously fined, the foreman forfeiting £M2,000, which was an enormous sum in Tudor England. Moreover, this rigour was fatal to Sir John Throckmorton, who was found guilty on the same evidence on which his brother had been acquitted. Lest we run off with the wrong

idea, though, it is safe to remark that this sort of physical coercion of judges vis-a-vis the jury is obsolete: as we shall see later on this evening, the judge's influence on the jury today is subtler and more in the interests of Justice.

We have seen, therefore, the intimate historical connection between the jury as we know it and the British Isles. But how popular is the jury in its natural habitat today? A statistic as recent as 1970 indicated that only 5% of all indictable offences are actually tried by jury: the overwhelming majority of English criminals far prefer the robed professional to the civilian amateurs. The decline and abolition of the Grand Jury in England has already been accounted for. The decline of civil juries and criminal juries has been ascribed diversely to the rapid growth in the volume of litigation in civil cases, the even more rapid growth of summary jurisdiction in criminal cases, and a general appreciation that juries were both unpredictable and fallible. So even within its own birthplace, the jury has been decreasing in popularity. Let not this prejudice us, however, as to the merits of the jury system: Justice, as all of us in this room should be aware, is not to be measured merely, or even primarily, by the statistician's yardstick. In fact, the most recent Committee to report on the English Jury System, the Morris Committee of 1965, saw fit to state, despite this admitted drop in numbers:

> 'There is we think a fundamental conviction in the minds of the public, that a jury is in a real sense, a safeguard of our liberties.'

Leaving England now, how has the jury fared abroad? It is generally admitted that most exportation as there was, ran into serious difficulties. This mainly because the delineation between judge and jury is hard to draw in an environment which has not had Britain's historical background; and also – particularly on the Continent – rules of evidence regarding the character of the accused have not quite caught on. Particularly in the USA, jury trial is admitted to have worked badly, partly because of the over-vigorous use of the right of challenge, partly because of intimidation and racial problems, and partly because of lack of tactful control by presiding judges; also exemptions from jury service leave unskilled workers chiefly to qualify.

Dissatisfaction with the working of the jury system has given rise to various suggestions as to its substitution, among which

two deserve special mention: firstly, trial by three judges, giving reasons for their decisions and subject to correction on appeal. Secondly, the German *Schoeffengerichte,* which means literally a Jurors' Court, and involves precisely a Bench composed of professional judges and lay citizens, sitting together, with a two-thirds majority vote necessary for conviction. Discussion of these alternatives will be conducted later on this evening.

Before we leave the general development of the jury and start on the Maltese experience, I think it is appropriate here to make a short detour into the political geography of the jury system, and see whether we can draw some link between the Jury and Democracy. France, for example, introduced the Jury during the 1789 Revolution, and abolished it under the puppet Vichy Government. Franco's Spain has no jury at all, and neither does Portugal, even though both countries used to enjoy the institution before the accession of their respective totalitarian regimes. We must not, however, take this concurrence with democracy too far: it is interesting to note that even though it was Mussolini who did away with the Jury in Italy, it has never been restored in that country. Moreover, Germany abolished the jury long before Hitler came to power. Finally, the jury's popularity on the Continent is restricted to Austria, Belgium, Norway, and four of the Swiss cantons.

And this brings us finally to Malta. As I said earlier, the history of the Maltese jury conveniently falls within these periods: 1811-1829, that is from Maitland's rule and his Piracy Courts to Proclamation VI of 1829, under Ponsonby; from the 1854 Code to the 1934 suspension of our constitutional powers; from 1935 to 1944, the War Years; and 1944 to the present day.

The history of Trial by Jury in Malta finds its origin, quite naturally, in the British connection. In fact, in 1811, just 11 years after we had joined the Empire, Marquis Testaferrata was sent to London to press for the introduction of the jury system, which he described as the fundamental basis for the proper administration of Justice. The 1812 Royal Commission, however, while upholding the intrinsic value of the institution, were very unwilling to transplant this essentially English mechanism to Malta, mainly because of the miniscule size of the Island's manpower, which could not safely be further depleted by the introduction of Jury Service; and also because the close-knit interrelations of Maltese society could hardly make for the empanelling of an unbiassed jury.

However, in 1813, Maitland became very concerned about the

frequency of piracy on the surrounding seas, and asked for the setting up of a Commission of Piracy for Malta, which was, in fact, duly granted on the 1st February, 1815. Now, under a Statute passed by the British House of Commons under George III, Piracy Commissions were to be composed of Judge and Jury; and since the order setting up the Commission in 1815 required it to be governed 'according to the rules and practice of the British Courts', the introduction of the Piracy Commission meant, *ipso facto*, the introduction of the jury in Malta, albeit on a very limited scale. We see therefore, that the jury was introduced into Malta not *qua* a jury system, but as an addenda with regard to Piracy, made necessary by an English Statute. The system as introduced was still based on the Grand-Petty Jury dichotomy, and the Petty Jury could only convict on an unanimous verdict. Despite Maitland's trepidation, expressed bluntly in his opening speech to the Grand Jury, the experiment succeeded beyond all expectations. In fact, Maitland himself, in his report to the Secretary of State of 1816, was constrained to admit that, 'the jury, in every instance, found according to the evident Justice of the case submitted to them.'

Only six years later, however, in 1824, Sir John Richardson, in his report to H.M. Government, expressed himself to be against the introduction of the Jury in Malta, with the proviso, though, that once the English and Maltese sections of the population had been fully integrated, then the time would have arrived for the jury to be experimented with on a small scale.

The appropriate time, however, was to come far earlier than he expected, and it came about sooner more by reason of the appointment of a new Chief Justice, Sir John Stoddart, than because of any increased affinity the Maltese had acquired for their British masters. Sir John Stoddart, appointed as Chief Justice in 1826, immediately started working on various plans with regard to the introduction of the jury into Malta, and in this he was aided by Sir John Richardson, and an English-speaking Maltese judge, Dr. Ignazio Bonavita. These three legal reformers consulted each other throughout the better part of three years, and the two English jurists suggested and counter-suggested new plans to the Government, agreeing on broad lines but frequently disagreeing about various important points of detail, as, for example, whether the jury should be an appellate court, or one of first instance; and the question whether judge and jury should deliberate alone or together (cf. Schoeffengericht). These negotiations are, however, extremely

well dealt with in Dr. H. Harding's 'Maltese Legal History under British Rule', and it would, I feel, be superfluous to reproduce his detailed documentation here.

Be that as it may, all this planning between 1826 and 1829 led up to Proclamation VI of 1829, enacted on the 15th of October of that year, and this could indeed be said to be the real starting point of a Jury System in Malta which enjoyed almost universal application. Under this first Jury Law, a Court of Special Commission, composed of the Chief Justice, and three or more Commissioners who were Judges of the Superior Courts, was established to try *with a jury* crimes punishable by death or life imprisonment, and cases of complicity in such crimes, irrespective of their punishment. Its jurisdiction depended on annual commissions and could be extended. There was no longer a Grand Jury in the English tradition. The jury was composed of a foreman and six common jurors, three of whom were drawn from what was termed the Maltese class, and the other three from the British. A simple majority was in every case sufficient for the validity of a verdict. If the foreman disagreed with the verdict, he could say so, in a note attached to the verdict. But in capital cases, unless the accused persisted in pleading guilty, an unanimous verdict was essential for the passing of the death sentence. One final point which will become relevant towards the end of this paper: practising lawyers were among those exempted from jury service.

Barely eighteen months later, after the Court of Special Commission had dealt with six cases, of which only one was received with public disapproval, Chief Justice Stoddart deemed fit to applaud publicly the performance of these first few Maltese juries. He said:

> 'It is my conscientious opinion that every one of the verdicts in these five cases was as correct, as just and as legal as could have been given by any tribunal in the world... Upon the whole, the jurors who served upon these trials have, by their conduct, triumphantly refuted the false notion that the Maltese are unfit for trial by jury: they have shown that Malta is worthy of that great boon conferred on her by the ever memorable proclamation of the 15th October, 1829; and they have, honourably to themselves and to their country, fulfilled the confidence reposed in them by a liberal and enlightened government, and have fully justified, so far as they are concerned, the wisdom of the law.'

The system continued working well, so well in fact, that in 1845, thanks to the pressure brought to bear on Govemment by Andrew Jameson and Sir Antonio Micallef, Crown Advocate, the jurisdiction of the jury was extended to all crimes punishable by five years' imprisonment or upwards. Finally in 1854, when our first Criminal Code was promulgated, art. 435 specifically laid down that all criminal cases, except those tried by the Courts of Judicial Police, and appeals from those Courts, shall be tried by H.M. Criminal Court, with a jury.

The next interesting date as far as the history of our jury is concemed is 1934, when the British Govemment, after the suspension of our 1921 Constitution, and consequent return to gubernatorial autocracy, abolished the function of the jury in respect of crimes of sedition, an occurrence which harks back to the link I tried to describe earlier between the institution of the jury and the concept of democracy.

We come now to the War Years. The second time our predecessors were deprived of the right to trial by jury was during the war, for fairly obvious reasons of expediency and the strain on manpower. The restitution of the jury in 1944 was acclaimed in Malta, and not least among these acclamations was that expressed in that year's Journal of the Society under whose auspices we speak today, which called the restitution 'a judicious measure.'

Our present Code, finally, talks about the jury mainly in Title VI, Part II, of Book II, and also in other parts of the Code relating to procedure. I do not intend to go through today's law, which I am sure we can all peruse at greater leisure elsewhere. The papers before you may, however, be helpful when we come to differentiate between our law and English law, and also later on during discussion. One point, however, which I feel I ought to make specifically, out of deference to the ladies amongst the audience, is that women have been allowed voluntary jury service by Act XXXIII of 1972.

Having traced thus the history of the jury in Malta down to the present day, I shall now attempt to highlight some points of divergence between the English law and practice regarding juries and our own. The factors I will treat are by no means exclusive and the only reason for their choice is that they are amongst the most controversial. Moreover, here I will only state the divergencies, not discuss them. That, I hope, will be the task of the audience. To give a quick run-through of these points right now, they are: the

property qualification, the foreman and unanimity.

First, the property qualification. Time does not allow now to go into the quantity of property required; so I will dwell only on the more important question of the *existence* of this qualification. As far as Britain is concerned, the answer is quite simple: the law requires a property qualification. Under Maltese law, however, the qualification section, s. 597, has undergone some very interesting changes. Under the 1829 jury, a certain amount of property was absolutely necessary. Then the 1854 Code struck a very interesting balance between the rigid English property qualification and the practical realities of social life in Malta, in the context of which such a rigid qualification would exclude quite a lot of able people who owned neither houses nor lands. So in 579(4), that Code admitted to jury service any person who was competent to serve as a juror (e.g. age, nationality etc.,) but did not fulfil the property qualification. This slightly incongruous, but eminently practical, measure was repeated in the 1942 Code in s. 597(1)(d). The recent Act of 1972, referred to above with respect to women jurors, did away with the incongruity and upheld the practicability of the 1854 and 1942 provisions, and we now have no property qualification at all. This was, of course, easier to do in the context of Independence. Meanwhile, however, and this we must remember, Britain still bears a property qualification.

Now the foreman. The functions of the foreman are described in s. 480, and from that section it may appear that his function is purely mechanical. It is easy to realize, however, that in actual fact, his psychological position vis-a-vis the common jurors is far more important than that of a mere clerk. Now, notwithstanding this fairly obvious reality, the British method of choosing a foreman is highly unsatisfactory: the whole thing is meant to be done by election among the empanelled jurors, but in actual fact, in order to prevent embarassment in a group of people who are completely new to one another, it is the Marshall of the Court who suggests one of the panel, a suggestion more often than not grabbed at by the rest of the jurors. In Malta, the foreman has always been regarded with greater care and respect. The Proclamation of 1829, in Art. VII, required him to have been a juror at least once before; moreover, the importance which that Proclamation paid to the foreman is also obvious in Art. XXVII, where the foreman must add an apposite notification if he disagrees with the verdict of the majority of the jury. Both the 1854 and the 1942 Codes also stipulated that the *prim gurat* should

have acted at least once as a common juror. However, one could readily realize that this stipulation only makes sense if the person chosen is, in actual fact, competent enough to act as a foreman: once an ass, always an ass, and it makes no difference at all that one proves oneself an ass twice, rather than once! Now, I think it can safely be argued that one of the professions more suitably adapted to the office of foreman is, precisely, the legal profession. We come, therefore, to the rather surprising divergence between our law and English law, regarding the exemption of lawyers from jury service. Our own Courts act on the quite laudable custom that the *prim gurat* is, where possible, a lawyer. In England, on the contrary, lawyers are exempt from all jury service whatsoever. Our own Proclamation VI of 1829 – our first Jury Law – likewise exempted lawyers, and it is rather hard to reconcile this with the importance which that Proclamation attached to the office of foreman, as we saw above. Without meaning to advocate any professional snobbery, I think it is only in the interests of justice that the Courts pursue the usage as it has developed in this matter, in Malta. And I hope this will be one of the points treated in discussion.

Finally, we come to what is, perhaps the most important controversy regarding jury service, and that is the majority required in a verdict. Suffice it here to state the facts. In England, the Courts accepted a simple majority verdict before the 14th Cent. Then, from that time till very recently (1972) an unanimous verdict was required. Now, they have reverted to a majority verdict. In Scotland, they have long enjoyed an 8-7 majority, out of a 15-man jury. Malta also had a bare majority verdict, under Proclamation VI of 1829; However, even there, s. XXVII indicates the propensity which the law had towards unanimous verdicts in the English tradition, where it says:

> 'Such judgement of the majority... shall be the verdict of the jury. Provided that where a verdict is not unanimous, the number of the majority will be stated.'

The propensity, moreover, of the judges towards unanimous verdicts will also be recalled from Sir John Stoddart's satisfaction that the first five Maltese juries all came to unanimous decisions. He said, 'One very satisfactory consequence resulted from the dispassionate examination of the evidence, and that was that it led in every case to an unanimous verdict.' In the early stages of our jury development, therefore, we see this *de jure* sufficiency of a majo-

rity verdict, but a *de facto* tendency towards the belief that unanimity shows a greater value of justice.

The change of course towards a *via media* between unanimity and majority in Malta came in 1854, when s. 467 of that year's Code stipulated:

> 'For every declaration of the jury, whether in favour or against the accused, the concurrence of at least six votes shall be necessary.'

This two-thirds rule has been repeated in s. 479 of our present Code, and remains in force to the present day.

Incidentally, there remains one instance where the unanimous verdict retains its relevance, insofar as our law is concerned; and that is the contingency provided for under s. 504, whereby the presiding Judge may substitute a sentence of hard labour for life with a sentence of not less than twelve years, if the jury shall not have been unanimous. This certainly seems to imply that our Law admits that an unanimous verdict is a juster verdict. And this prompts one to comment that it is rather strange that the Code admits this ultimate justice only in the most stringent punishment; and that therefore, perhaps, our Law as it stands, looks at justice from the tail end, as it were, from the punishment's side of the scale; rather than from the point of view of the lesser criminal who can go to jail for any term shorter than life, if only six of his fellow citizens think he should. I think our legislators should take the bull by the horns and look into the very roots of this concept of majority. I hope we will, too, in discussion.

I hope that in this study, I have laid before you such facts as may be helpful to us while thinking about and discussing the institution of the jury. This aspiration of mine is, however, made subject to one very important, and very troubling qualification: and that is the oracular nature of the jury. I admit that the rule of INCOMMUNICADO, enshrined in our s. 482 is important in the interests of the particular accused. But once that accused has been tried, is it harmful to interview jurors about their time in the jury room, as has indeed been held in one English case? More boldly, would it be harmful to monitor the proceedings of the deliberations of a jury, always of course in the interests of scientific research and a better insight into the workings of justice? Two students in America were once refused such permission completely. This lack of research, and this lack of documentation can only lead to the worst type of

doubt about the workings of our Courts of Law: a doubt based on the fact that there are no recorded facts at all; based therefore on doubt itself. This sort of uncertainty, immediately unnoticeable as it is, gnaws into society, which lies at the very root of all justice. In our context, short of a scientific enquiry into the working of an actually operating jury, I think that mechanism ought to be created to facilitate the empanelling of law students as jurors during their student years. The whole rationale of this spirit of enquiry could, of course, be questioned on the ground that it is superflous, since what really matters is what the public thinks of the jury; and since there has been nothing but acclamation for the institution, *qua* institution, then we must assume that society is happy with the jury as it is. This again warrants lenghtier discussion later on this evening.

And on this note of acclamation I shall end. Earlier on, I referred to the Law Society's approval of the restoration of the jury in post-war years. I failed to mention then, and it is appropriate to mention now, that that same Editorial, in true student tradition, or rather anti-tradition, expressed very serious doubts as to the essential notions of jury trial. I can find no better way to end than to quote a relevant passage from that Editorial:

> 'As the correspondence columns of the Press have for months clamoured for the restitution (of the jury) and for months pictured it as an unmixed blessing, it is easy for many people to pass over the weaknesses and shortcomings of the institution. Most of the correspondents were laymen and it is the habit of laymen to be effusive and to ignore the opposite viewpoint.'

I make way now, for the second speaker to examine just these opposing viewpoints. Thank You.

WORKERS' PARTICIPATION IN ECONOMIC ENTERPRISES UNDER GERMAN LAW

FRITZ FABRICIUS

I. Introduction

In Germany, Switzerland usually is said to be the 'Musterländle der Demokratie', a pet form, that means model of democracy. Similarly it might be said that the Federal Republic is the 'Musterländle', the model country, for co-determination and participation of employees in private enterprises and public administration.

1. RESTRICTION OF SUBJECT

In the following, I intend to restrict myself only to economic enterprises which are operating in the form of a company with legal personality. This restriction seems to be expedient, as a reader of this periodical will hardly be interested in German public administration.

The restriction to companies is expedient, as in the Republic of Malta, participation has been introduced in enterprises with corporative and company structure only.[1] Besides this aspect, Maltese firms are cooperating with German companies. So the working structures of enterprises in Germany, especially companies, may be of interest.

Following these lines, we are going to deal with workers' participation in German companies. This means that the specialities of companies, concerned with workers' participation on Board levels are being considered. This starting point does not exclude a short consideration of workers' participation on plant level by works councils, as works councils are being constituted not only in enterprises run by a single natural person or a partnership but also in companies.

2. MEANING OF 'PARTICIPATION'

Participation in my statements in a broad sense means that the entrepreneur is by law not authorised to make an entrepreneurial

[1] See Gerard Kester, *Workers' Participation in Malta – Issues and Opinions,* Rotterdam 1974, and the book review, written on Kester's publication by Josef Micallef, in *Development and Change,* published by the Institute of Social Studies, The Hague, Vol. 6, number 3, July 1975.

decision without cooperating with workers' representatives. This *cooperation* may include *co-determination,* which means that the intended decision can only be made together with workers' representatives.

Further participation may materialise according to our law in a *discussion* of the object with workers' representatives before the decision has been made, or the entrepreneur may be obliged *only to hear* the views of workers' representatives. Finally the law may prescribe that the entrepreneur has to give notice of his decision being made. So participation means cooperation in different grades.[2]

Before I start to give you more detailed viewpoints, let me mention some aspects of the laws which are involved in the subject.

II. Main German Laws Involved

As regards economic enterprises in practice, the most important legal structures of company law in the Federal Republic of Germany are the Aktiengesellschaft (AG), that is a public stock company, and the Gesellschaft mit beschränkter Haftung (GmbH), which is a private company limited by shares. So I will restrict myself to these two types of companies.

The Acts concerned are the *Aktiengesetz 1965* and the *Gesetz betr. die GmbH of 1892.*

Relating to company boards in view of participation, the *Coal and Iron Industries Co-determination Act of 1951* and the *Coal and Iron Industries Co-determination Amendment Act of 1956* must be mentioned, as *special laws,* which deal with iron and coal producing companies, established by the occupational powers, especially Great Britain, after World War II.

General law, however, is contained in the Betriebsverfassungsgesetz 1972 (BetrVG 1972), which we shall call *Works Councils Act 1972,* and which is the successor of the Works Councils Acts 1952 and 1920. The Act of 1972 does not only regulate the competence of works councils at plant level, but also generally the participation of workers' representatives at company boards.

The mentioned Acts concerning participation reflect steps of a historical development which has not yet been concluded. German Trade Unions are urging further development of co-determination. And it must be seen as one step forward in that direction, that the

[2] For further view-points see J. Micallef, *The European company – A Comparative Study with English and Maltese Company Law,* Rotterdam, University Press, 1975, Chapter V, p. 1 ss.

German Parliament is discussing a new *Co-determination Bill* at the moment.

III. Basic Structures of German Companies

1. Aktiengesellschaft (AG): Public Stock Company

The structure of the German AG is especially marked by the *dual board system.* Beside an *executive board,* managing the company, the setting-up of a *supervisory board* is obligatory, which is to supervise the management of the executive board and to take part in fixing the broader lines of company policies. The *General Assembly* elects the supervisory board which in its turn appoints the executive board.

The *supervisory board* in a *AG* was created in the middle of the 19th century. Until then, the foundation of an AG as well as its management were under the control of the state. Under the influence of the liberal ideas of freedom, and the further fact that the state authorities felt their control over AG to be rather inefficient, it was abolished. (Being of the opinion that) a shareholders' assembly would be inefficient also to control the management of an AG, the State authorities created a supervisory board, elected by the shareholders.

2. Gesellschaft mit beschrankter Haftung (GmbH): Private Company Limited by Shares

As regards the GmbH the *GmbH Act* itself does not follow the dual board system. But in this respect the mentioned Acts concerning participation are of importance.

3. Influence of Works Councils Act and Co-determination Acts

The *Works Councils Act 1972* peremptorily demands the setting-up of a supervisory board for all GmbH with more than 500 employees; and the *Coal and Iron Industries Co-determination Act of 1951* and the *Amendment Act of 1956* prescribe the setting-up of a supervisory board for any GmbH coming under these Acts.

The mentioned Acts also define as obligatory the composition of the supervisory boards for the AG and the GmbH and restrict the traditional freedom of decision of the shareholders' assembly.

The *Coal and Iron Industries Co-determination Act 1951* as well as the *Amendment Act of 1956* further prescribe the obligatory composition of the *executive* or *managerial board* of the AG and the GmbH, coming under these Acts.

IV. Composition of Supervisory Councils

1. Works Councils Act

In companies coming under the *Works Councils Act*, the Supervisory Board consists of at least three members. If the articles of association provide for more members, their number must always be divisible by three. This regulation is necessary as the supervisory boards of AG and GmbH coming under the *Works Councils Act* must consist, in one third, of representatives of the employees who hold the same rights and duties as the members of the supervisory board representing the shareholders.

These workers' members are not elected by the shareholders' assemblies of the companies, as is the case with the shareholders' representatives in the supervisory boards, but they are elected by the employees of the plants of the enterprise.

2. Co-determination Act 1951

In the companies of the iron and coal producing industries coming under the *Co-determination Act 1951*, the supervisory boards are to consist of 11, 15 or 21 members. The supervisory board consisting of 11 members is to be made up of

(a) 4 representatives of the shareholders and one so-called further member,

(b) 4 representatives of the employees and one further member,

(c) one further member.

The *further members* must be independent personalities, that is they must neither have common interests with the shareholders nor with the employees. The *Co-determination Act* contains more detailed regulations as to this.

The *election* of the representatives of the shareholders does not raise any special questions.

The election of the representatives of the employees, on the other hand, is a rather complicated procedure.

Out of the 5 representatives of the employees of the supervisory board of 11 members, *one worker* and *one white-collar worker* of the enterprise are *elected by the works councils* of the plants of the enterprise by secret ballot, after consultation with the head organisations of the trade unions. They are nominated to the shareholders' assembly for election as the representatives of the employees. *Two members* are nominated by the head organisations of the trade unions after consultation with the trade unions represented in the enterprise concerned and the works' councils of the enterprise. The same applies to *the further member* who is to be no-

minated for the representatives of the employees.

The *11th member,* a so-called further member, is to be nominated to the shareholders' assembly by the 10 members of the supervisory board representing the shareholders and the employees.

A very complicated procedure is provided for, in case the shareholders' assembly does not elect the nominated persons, a case which fortunately so far has not happened yet in practice.

3. AMENDMENT ACT 1956

Referring to the *Coal and Iron Industries Amendment Act 1956,* I only want to state that after the Occupational Powers of World War II had given up their de-cartellisation policy in Germany and permitted again the setting-up of concerns for German firms, the *Co-determination Amendment Act 1956* was passed in order to secure the co-determination of employees in the supervisory boards of the concerns. I do not want to consider this further because of and executive boards of the concerns. I do not want to consider this further because of lack of space.

V. Composition of Executive Boards

Apart from the composition of a Supervisory Board in parity of shareholders and employees, one further decisive characteristic of co-determination in coal or iron producing enterprises coming under the *Coal and Iron Industries Co-determination Act* or the *Amendment Act* is the obligatory legal regulation that a *director for labour relations* must be appointed to the executive board as a member of equal rights and duties. The labour relations director cannot be appointed to the executive board against the votes of the majority of the employees' representatives in the supervisory board.

VI. Tasks of the Supervisory Board and the Executive Board

Let us now shortly deal with the tasks of the executive boards. The *executive board* of an AG has to manage the company in its own responsibility (§ 76 AktG); this means that they are neither bound by law to orders of the supervisory board nor to those of the general assembly. There does not exist a corresponding regulation for the management of the GmbH. The managers of the GmbH may be bound by conclusions of the shareholders (§ 37 GmbHG).

The *supervisory board* mainly has to supervise the management (§ 11 AktG). It holds the unlimited right of information, and the executive board is obliged to inform it on all essential occurrences in the company, especially so on the company's policy (§ 90 AktG). This enables the supervisory board to influence the mana-

gement's policy by recommendations, hints and suggestions. It is not bound to orders from the shareholders' assembly.

VII. Participation of Employees according to the Works Councils Act 1972

After having pointed out some basic ideas of participation and co-determination at company boards, I want to give you some short information on works councils, in order to complete the picture.

According to the works councils law, in plants with more than 5 regular employees works councils have to be formed which may consist of one to 35 persons according to the number of employees. These councils deal with various matters.

The works council has an actual and real *right of co-determination* as to *social affairs* (§ 87) and as regards *changes in the plant* which will be disadvantageous to the employees (§§ 111 ss.).

They also have a right for co-operation in *personal affairs* (§§ 92 ss.).

Further, in plants with more than 100 regular employees an economy-committee is to be formed which has a right of information by the employer (§§ 106 ss.).

All workers of a plant constitute the plants' assembly (§§ 43 ss.).

1. Social Affairs

As I mentioned, the works council has to co-decide in social questions, i.e. the employer cannot decide alone on these affairs; he must discuss them with the works council and must come to an agreement with them. The affairs which come under the co-determination of the works council are exactly stated in the law:

(a) questions of order in the works and the conduct of employees therein;

(b) beginning and ending of daily working time and recesses as well as the allocation of the working hours to the week days (including Saturdays);

(c) temporary shortening or extension of the usual working hours at the works;

(d) time, place and manner of payment of wages and salaries;

(e) establishment of general principles governing vacations and the scheduling thereof as well as fixing periods of vacation for individual employees, if no agreement can be reached between the employer and the employees concerned;

(f) introduction and application of technical apparatus serving to check the conduct or the efficiency of employees;

(g) regulations concerning the prevention of industrial accidents and occupational illnesses, and the protection of health within the scope of the legal provisions or the safety regulations;

(h) form, arrangement and administration of social welfare services that are limited to the operations of the works, the enterprise or the concern;

(i) allocation and termination of housing which is rented to the employees on the basis of the employment relationship as well as the general fixing of conditions for use;

(j) questions pertaining to the wage framework, especially the setting-up of principles of remuneration and the institution and application of new methods of remuneration as well as their alteration;

(k) fixing of piece-work pay and premiums and comparable performance-based remuneration including the financial factor;

(l) principles concerning the suggestions procedure.

The settling of questions between the employer and the works council will be carried out in each case by a *plant-bargaining.* These single plant-bargainings are rendered the same effects as the collective agreements of Trade Unions, i.e. these agreements are directly effective and obligatory for all employees (§ 77 subsec. (4)).

2. Personnel Matters

In questions of *personal affairs* the works council takes part in recruiting man power, change of working groups, change of working place and dismissals (§§ 99 ss.).

When, for instance, a new employee is taken on, the employer has to inform the works council of the new employment. The works council can raise objections against it. If no agreement can be reached the employer is entitled to engage the applicant provisionally and has to apply then to the Court of Labour for the replacement of the lacking consent of the works council by a decision of the court, which will examine whether the council had a justified reason for their refusal of approval. The same applies to changes of working groups and changes of working places.

Furthermore, the employer is obliged to hear the works council before dismissing an employee.

3. Plant Assembly

The plants' assembly will come together at least every quarter of a year. There will be given reports on current affairs by the works council and the employer only and questions will be discus-

sed, but no decisions are taken.

4. Economic Committee

The Committee of Economics, which, though not identical with the Works Council, must however, count at least one member of the works council among its members, and is intended to secure mutual information between the works council and the employer on economic affairs (§§ 106 ss.). This Committee is entitled to information on the economic affairs of the enterprise. The economic affairs include amongst others:

(a) the economic and financial situation of the enterprise;

(b) the production and sales situation;

(c) the production and investments program;

(d) manpower-saving plans;

(e) methods of work and production, particularly the instituting of new methods of work;

(f) cutbacks or closing down of works or of parts of works;

(g) the geographical transfer of works or parts of works;

(h) the amalgamation of works;

(i) any change in the organisation or the purpose of the works;

(j) other matters and ventures which could vitally concern the interests of the employees of the works.

VIII. Purpose and Basic Ideas of Participation

Until now, I have bombarded you with many complicated technical details, though I have only roughly described the contours. The field of participation is so very complicated because of the manifold conflicts of interests behind it, regarding economics, social and general politics. In order to help you understand the specific German problem of participation in spite of the complicated regulations, I will shortly deal, by way of keywords, so to say, with the connections to economic, social and general politics. Thus the deep-going differences to the regulations in other European countries will become more comprehensible.

1. Some Sentences of a famous British Author

In 1776 a famous British writer published the following sentences:

(i) Labour... is the real measure of the exchangeable value of all commodities.

(ii) Labour was the first price, the original purchase money that was paid for all things.

(iii) The produce of labour constitutes the natural recompense or wages of labour.

(iv) In that early and rude state of society which preceeds both the accumulation of stock and the appropriation of land, the *proportion between the quantities of labour necessary* for acquiring different objects seems to be the only circumstance which can afford any rule for exchanging them for one another.

(v) As soon as the land of any country has all become private property, the landlords, like all other men, *love to reap where they never sowed* and demand a rent even for its natural produce.

(vi) As soon as stock accumulated in the hands of particular persons, some of them will naturally employ it in setting to work industrious people, whom they will supply with materials and subsistence, in order to make a profit by the sale of their work or by what their labour adds to the value of the materials.

The author of these sentences was none other than Adam Smith, formerly Professor of Moral Philosophy in the University of Glasgow, later the High Tax Commissioner in Scotland, in his famous book 'An Inquiry into the Nature and Causes of the Wealth of Nations'.[3]

The reference has been made because I could imagine that you will realise the connection between those sentences and the background of the German approach to Participation, especially co-determination.

2. Background in German Legal History

Seen from the point of view of legal history, the present Co-determination Acts dealing with participation find their predecessors in the Weimar Constitution and in the *Works Councils Act of 1920* and some related laws.

Art. 165 of the Weimar Constitution provided for a programme of socialisation of industries suited for it, which were to be managed by a councils system e.g. works councils, regional labour and economic councils and a Reichs Labour Council and a Reichs Economic Council. Actually, only the works councils were established out of the number of councils of this system, these being organs of public law in view of the aim of socialisation. The *Works Councils Act of 1920* also provided for representation of employees in the supervisory boards by a third of the members.

[3] See the first edition of which I referred to, especially to p. 35, 36, 78, 58, 56, 59, 57.

3. Development after World War II

The efforts of reviving the programme of Art. 165 of the Weimar Constitution which then had not been realised, after World War II, especially that of achieving the socialisation of the key industries, failed above all because of the opposition of the USA as Occupational Power. Within the framework of the de-cartellisation of the coal-, iron- and steel-producing industries, the development went on to co-determination in parity instead. This came about under the *Iron and Coal Co-determination Acts* and the introduction of works councils – by the *Works Councils Act 1952* – as it was already known from the *Works Councils Act of 1920*. The German trade unions, by accepting the step towards co-determination in parity, gave up their claim for socialisation and recognised the capitalist economic system, with the consequence that the works councils were not anymore the employees' representations under public law but organs of the employees under private law.

4. Economic-, Social- and Legal-Political Backgrounds of the Demand for Co-determination in Parity of the Employees[4]

(a) In order to give more light to the background of the demand for co-determination in parity of the employees we may generally go back to the basic idea of *Art. 165 of the Weimar Constitution.* According to the official reasons for that Article, it was understood to mean that the worker was not to be only worker but producer as well. Its aim was 'to pave the way for the working masses to ascend to free human existence with moral dignity and responsibility'.

(b) Behind this basic idea and purpose we find the social fact, that the *employee's* relation to his employer is one of domination, that he is personally and usually also economically *dependent* on the employer. Participation is to give him more equality and freedom.

(c) The demand for co-determination, further, is based on the *change of structure* in the big industrial enterprises, which mark

[4]See as to these aspects for further information Fritz Fabricius, *Mitbestimmung in der Wirtschaft – Ein gesellschafts-, wirtschafts- und rechtspolitisches Problem, Athenäum Verlag,* Frankfurt am. Main, 1970; Fritz Fabricius, 'Co-determination in European Company Law,' in: *The Harmonisation of European Company Law,* edited by Clive M. Schmitthoff, United Kingdom Comparative Law Series, distributed by The British Institute of International and Comparative Law, London, p. 101-129; further Fritz Fabricius, 'A Theory of Co-determination', ibid, p. 138-156.

the picture of economy in our time. As John Kenneth Galbraith states in his book 'The Industrial State', it is marked by the fact that the management of the enterprise has become independent from the entrepreneur, who only appears as the giver of capital. And he also holds that the management's functions are influenced strongly by the so-called technostructure.

(d) Finally, the growing interdependence of industry and state is to be taken into account.

(e) From these facts, above all, the sociologist Hondrich concludes in his book 'Mitbestimmung in Europa', (1970), that the struggle for co-determination is being fought because the position of power of the entrepreneur has been shifted towards the employees in the course of the past 50 years, which shift was combined with the growth of political power of the employees. So, co-determination was to turn this *actual growth of power* into *legalised authority.*

(f) From the point of view of legal politics co-determination may be seen as a means to assist the working masses 'in attaining a human status, enjoying moral *dignity and responsibility'*, terms which are based upon the concepts of human *freedom and equality.* The demand for co-determination derived from a demand for more equality and equal legal rights. It is thus made on the basis of equal rights for labour and capital. So it may be understood as the demand for a further development of the *formally* liberal democratic legal state towards a *materially liberal democratic legal state.* This, above all, means a far-reaching realisation of the principle of equality.

(g) From a theoretical point of view it may be asked whether co-determination in parity can be introduced without answering the issue of *ownership in industrial property.*

Such co-determination would involve the representatives of the employees in decision-making with regard to the disposition of goods which they do not own, such as the property of the entrepreneur. In my personal view, it is necessary to make them co-owners of the production, not the means of production, based on the basic principle that labour aims at property. Besides, a certain amount of the share of the production-property must obligatorily be invested in shares of the company. Acknowledging these principles, socialisation or nationalisation of industrial property will be avoided, the free market economy will remain untouched and workers will become shareholders in the capitalist system.

As to further information I may refer to my publications, mentioned in footnote 4.

IX. Practical Experience

As regards practical experiences with co-determination in the Federal Republic so far, I would like to state that the results of respective investigations on the whole have shown *positive results*. There will only be mentioned here the Report of the Expert Commission of the Federal Government.

X. Aspects of Future Development

1. A New Statute in the Making

In its communique at the beginning of their legislative period on the 12th January 1972, the present German Government announced its intention to draft a new statute on co-determination of employees in enterprises developed from the principle of legal equality and equal weight of employees and shareholders. On the 22nd of February 1974, a draft called 'Entwurf eines Gesetzes über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz – MitbestG)' was submitted by the Federal Government to the Bundesrat. The draft proposed to introduce an equally balanced co-determination of employees into all AG and GmbH with 2000 employees. The complicated rules of the draft, put together in 34 sections, cannot be dealt with here. There are heated discussions about it at the moment, since a compromise, which would be endorsed by all political groups, does not seem to have been found.

2. An Evolution from the Concept of Company Law to a Law of Enterprise

Under the influence of the Co-determination Acts, traditional company law is developing new structures. In view of the fact that co-determination in the enterprises in the Federal Republic will be extended during the next years, the Federal Republic is on the way to a new law of enterprise, which will earlier or later absorb traditional company law.

But the main point, you may keep in mind, is that co-determination is an approach to materialise the basic democratic principles of freedom and equality.

I am therefore not inclined to translate the German word 'paritätische Mitbestimmung' into English by 'Co-deterioration on the basis of equal representation on the board of companies', as was done in a book review in the 'Guardian' of 18th December 1974 on the recently published new edition of Langenscheidt's Encyclopaedic Dictionary of the English and German Languages.

LEGISLATION AND ADMINISTRATIVE REFORM*

WALLACE PH. GULIA

IN the absence of special circumstances, legislation is not a factor determining Administrative Reform. Administrative Reform depends on the social climate of a country and it can come about as all other changes in the country can come about; legislation is only one such method. If the social climate of the country accepts peculiar standards, be they of bribery, corruption, inefficiency, economic wastage or what not, the legislation will naturally reflect those peculiar standards but the root of the evil will not be the legislation itself so much as the peculiar views on which it is based. Take away those views and the legislation will be swept away; maintain those views and the legislation may get entrenched and become stagnant. The remedy, however, is not to look askance at the law, but at the social climate which has provided for the existence of that legislation.

Legislation becomes necessary only if the social climate had led to an administrative framework based on the legislation and the administrative framework has to be swept away. Otherwise, legislation hardly comes into the picture at all. The significant administrative reforms relating to the recruitment of the British Public Services following the mid-19th century reports on recruitment into the Service as well as the current reforms in Civil Service Recruitment, the Government is currently giving effect to in this country, did not require any legislative complementary measures. The administration sets its house in order in accordance with its lights and within its own framework. If the legislation does not allow enough elbow-room, then legislation will be necessary to get the necessary elbow-room. But that is all.

Then too, legislation will be needed for administrative reforms involving the exercise of powers which were not contemplated before, but which the ruling authorities at any given moment of time consider desirable. Within the democratic framework of Government, as understood in Britain and in this country, Government may

* Paper presented to the Seminar on Administrative Reform organized by the University of Sussex and the University of Malta at a session held at the University, Msida on the 19th May, 1975.

not assume new powers unless it is authorized by Parliament, which in Britain is Sovereign, and in Malta is Sovereign within the Constitution. Thus, for example, the Parliamentary Commissioner came into being in Britain through the relevant Act of Parliament (The Parliamentary Commissioner Act, 1967) because the Parliamentary Commissioner (corresponding mutatis mutandis to the Ombudsman of other countries) required powers which Government did not have in its powers to confer.

On the other hand, since 'power corrupts and absolute power corrupts absolutely' parliament, in the enactment of legislation, should not confer powers on the administration too liberally. The administration should have enough power for the exercise of its functions and no more. If the power conferred is too wide, the citizen becomes faced not with the problem of administrative reform as such, but with the problem of the abuse of discretion which could itself be a factor leading to corruption. In such cases the law may fall into ill-repute but the ill-repute should be laid at the door of the Government of the day which delegated too much power through Parliament on the Administration, and on the Administration, during whose term of office the power is abused. Indeed, it would appear that on many such occasions it is not administrative reform which may be required but a tightening up of the controls over the way in which the power is to be exercised.

As administrative lawyers everywhere would phrase it: Parliament should not confer discretions in too wide a fashion. Where it is at all possible to be specific, then Parliament in evolving the law should try to be as specific as possible so that the exercise of the power will be carried out within the limits contemplated by Parliament, rather than by the bureaucrat who happens to be wielding power subject to the authorization of Parliament.

In the contemporary world it has become increasingly necessary for Parliament to confer powers on authorities in anticipation of problems which would arise administratively. On such occasions it is the duty of Parliament to spell out those powers and the circumstances of the contingency in as much detail as possible to ensure that the power will be exercised only in those situations where Parliament deems it essential that they be exercised.

Whilst this is recognised, it must also be recognized that the more progressive the system and the more sophisticated the need, the more difficult it becomes to evolve water-tight standards which can only be applied in specific and particular fact situations; especially as Parliament legislates for future rather than present-day needs. The more difficult the task, however, the more cautious

should Parliament be in conferring powers on authorities. Otherwise there will be large areas of administrative sectors where it would be possible for 'power to corrupt, etc.'.

In a small country, such as Malta, where the details of administrative control easily assume the semblance of policy, inasmuch as the demarcation between policy and administration is laid down as in other countries where Ministers choose 'to draw the line', explosive situations providing illustrations could easily be multifarious, incidious and frequently met with; will the public road cut across this property or that? Which area will be green and which will be a building site? Will the public street light be placed at this street corner or that? Which import licenses for consumer goods will be issued? Which foreign investments of local capital will be permitted? Which buildings will be requisitioned for public purposes?

In fact one of the supreme merits rightly claimed for the National Assistance Act, (Malta), when it was being enacted in 1956, was specifically this, that henceforth assistance would be payable in terms of law and not of administrative discretion as it had been payable theretofore, subject as that discretion had been to all sorts of sinister influences. If the principle applied in the field of National Assistance, is there any reason why it should not be extended likewise to all those fields where such extension is possible and where experience has indicated that such sinister motives can easily come into play? The task here, consequently, reduces itself to finding out those areas where such abuse of discretion has been taking place and thereafter the evolution of criteria which should be followed in the implementation of the discretion. This may be time-consuming but as it is a man-made problem, a man-made solution should be in sight.

That an effort should be made in the creation of the legislation itself rather than in the application of the legislation by the Courts seems clear in view of the limitations which the Courts both in Britain and in this country have evolved where the control of powers of the administration are concerned. These problems seem to have been overcome to a greater extent that they have been in the United Kingdom and in Malta by some continental countries which have evolved Administrative Courts within the administration in view of the peculiar interpretation given to the doctrine of the separation of powers in such countries. Two such countries are France and Italy; the former with its Conseil d'Etat, the latter with its Consiglio di Stato, where judicial control of administrative acts is not as inhibited as it seems to be in British Public Law systems.

THE NOTION OF 'CAUSA'

ANTHONY RUTTER GIAPPONE

INTRODUCTION

As a general doctrine 'causa' was not developed under Roman Law. It was only developed by the commentators of Roman Law in the nineteenth century. At most it was considered under the heading of 'object' which had to be possible and lawful. This close identification of 'causa' with object tended to obscure the development of 'causa' the doctrine of which was often confused with that of object.

This close identification of 'causa' with object is still to be found in the English Law of Contract. In fact, 'consideration' is defined by Morley and Whitley in their Law Dictionary as:

> 'a compensation, matter or inducement, or quid pro quo for something promised or done. A valuable consideration is necessary to make binding every contract not under seal. It need not be adequate consideration, but must be of some value in the age of the law and must be legal. It must also be present or future – it must not be past.'

Later on, Sutton and Shannon commenting on this definition, pointed out that a valuable consideration may consist either in some right, interest, project or benefit accruing to one party, or in some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Thus, the English notion of consideration is very similar to what we call the subject matter or object of the contract. In fact, our Section 1025 defines subject matter as:

> 'a thing which one of the contracting parties binds himself to give, or to do, or not to do'.

But there is no doubt that our Code, like the Italian Code, expressly requires in Section 1007 (art. 1325 of the Italian Civil Code) the element of 'causa' or 'consideration' as an essential element for the validity of a contract and this as a distinct element from that of subject matter. Moreover, neither our Civil Code, nor the Italian Code defines 'causa' and so for this purpose we must refer to commentators and textwriters.

First of all, we must be careful not to confuse the juridical

meaning of the word 'causa' with the meaning given to that word by common parlance.

Thus Torrente warns:

> 'Per ben comprendere il concetto di "causa", occorre anzitutto tener presente che l'espressione "causa" non è adoperata nel significato comune, per cui essa designa l'antecedente di un determinato evento (es. malattia causa della morte), ma nel significato di fine, scopo.'

It is important to keep this distinction in mind because the confusion of these meanings has tended to make even more difficult the understanding of the notion of 'causa'.

DEFINITION

Let us now look at some definitions of 'causa'. Pacifici Mazzoni teaches:

> 'Per causa..... s'intende il motivo giuridicamente sufficiente a determinare ambedue i contraenti od uno di essi ad obligarsi. Questa causa è ben distinta dal motivo di fatto che può avere indotto le parti a formare il contratto.'

Therefore, here, 'causa' is the consideration in view of which each of the parties binds himself. In an onerous contract, the consideration is the reciprocal performance of each of the contracting parties to the contract. As Pacifici Mazzoni puts it:

> 'A titolo oneroso è "causa" sufficiente dell'obbligazione il vantaggio che ciascuno dei contraenti intende procurarsi, per effetto diretto del contratto, avuto riguardo alla sua speciale natura.'

But a difficulty arises as regards the donee or the recipient in the case of a gratuitous contract. In gratuitous contracts the party who binds himself does not stipulate any consideration in his favour, and, therefore in such contracts the intention of performing an act of liberality or of bounty takes the place of the intention of obtaining such consideration. Indeed, the same writer goes on:

> 'A titolo gratuito è "causa" sufficiente dell'obbligazione l'intenzione di esercitare un'atto di liberalità o di rendere servizio.'

Pacifici Mazzoni's definition and notion of 'causa' is a clear illustration of the doctrine of 'causa' as it was generally understood in the early twentieth century. This doctrine had induced some writers to maintain that it is useless to talk of 'causa' in bilateral contracts, because whenever we refer to the inexistence or to the unlawfulness of cause, there is always at the same time the inexistence of the object or an unlawful object. So that if a thing sold

does not exist, the inexistence of the object is sufficient to explain the invalidity of the sale both as regards the seller, and as regards the purchaser. So these latter hold that object and 'causa' go together.

Pacifici Mazzoni, in fact, acknowledges this intimate relationship between the notion of 'causa' and that of object. But he says that the difference between them is brought about according to the attitude which is to be taken when considering the one and when considering the other. Thus, when considering the 'causa', one looks at both 'prestazioni' together, while when considering the subject matter, they are considered as two and distinct. Thus he writes:

> 'Nei contratti bilaterali la "causa" della obbligazione di una delle parti si confonde coll'oggetto della obbligazione dell'altra; dimodochè la teoria della "causa" di questi contratti è legata intimamente con quella dell'oggetto; v'ha soltanto differenza nel modo di considerarli; quando trattasi dell'oggetto, la prestazione dovuta da ciascuno delle parti è considerata in se medesima e isolatamente quando trattasi della "causa", le prestazioni reciprocamente dovute si consideranno l'una in opposizione dell'altra.'

Indeed from the point of view of subject matter there are two objects involved in a bilateral contract. In sale, for example, the price is the object of the purchaser, and the article to be bought is the object of the vendor; while, on the other hand, the 'causa' of this contract is the reciprocal performance of both obligations. Thus, if we accept the equiparation of 'causa' to object, if a thing sold does not exist, the inexistence of the object promised by one of the parties to the contract, does not imply that the obligation of the other party (which is separate and distinct from the former) is devoid of all the elements necessary for its validity, since the object of the obligation of the buyer is the price. Thus the buyer would still be bound to pay the price. But if 'causa' is the reciprocal performance, then this contract is invalid because one of its elements is lacking.

Moreover, the 'anti-causalistes' (i.e. those who maintain that the notion of 'causa' is redundant) try to support their theory by emphasising the connection between the obligations which arise from bilateral contracts, saying that each of the parties only binds himself in view of what he obtains in return. However, this so-called 'rule of correlatives' which can be equated to the English concept of the 'quid pro quo', is in fact nothing but the application of the theory of 'causa' itself.

On the other hand, in the case of unilateral contracts, as Pacifici Mazzoni says:

'l'oggetto e la "causa" dell'obbligazione sono distinti'.

MODERN NOTION

The notion of 'causa' has, during the last thirty or forty years, developed into something quite different. The 'causa' is in reality the ECONOMIC FUNCTION of the contract, or as Torrente puts it,

'la funzione economico-sociale del negozio'.

Thus, the contract of sale, for example, is a contract by means of which property is transferred on a commutative basis, and, in so doing, serves a social purpose. The Italian Corte di Cassazione in a judgement delivered in 1966, defined 'causa' in this way:

'la "causa" del negozio giuridico deve essere individuato nella finalità economico-sociale che il negozio stesso in concreto è destinato a realizzare e che l'ordinamento giuridico positivo riconosca degna di tutela ai propri fini'.

'Causa', therefore, is the 'fine, scopo' towards which the contract as a whole aims. In other words, 'causa' is the result which the contract aims to achieve and it is only in so far that the law considers this result to serve a social and economic function that the law extends its protection and sanctions that contract. In other words, it aims at producing a result which the law considers to be an economic-social function and as such it considers it worthy of extending its protection to such a contract. Indeed as Torrente says:

'Ogni negozio deve avere la sua "causa", perchè ogni negozio deve corrispondere ad uno scopo socialmente apprezzabile'.

This notion of 'causa' has also been accepted by Italian case law. In fact, the Corte di Cassazione in 1947 held:

'La "causa" di un negozio giuridico sta nella funzione economica-sociale del negozio stesso che è la sola rilevante e la sola tutelata dalla legge'.

From this we realise that

'Questo non concede riconoscemento e protezione agli atti posti in essere dall'autonomia privata, se la loro funzione o, se si vuole, il risultato a cui tendono, non corrisponde ad un'esigenza sociale' (Torrente).

Thus, in the Law of Persons and in the case of unilateral contracts, the law does not accept any legal effects produced by a

contract except for those contracts which fulfill a social function, and these particular contracts 'sono già fissate e prestabilite dall'ordinamente stesso'. On the other hand, in the field of patrimonial rights, contracts may be divided into two kinds, namely, nominate and innominate contracts. Now, the function to which the most important bilateral contract may adhere 'sono state considerati dal legislatore'. Thus, in the case of nominate contracts, their aim or 'causa' is regulated by the law itself. Thus, for instance, the 'causa' in every contract of sale is the transfer of a thing for a price. This, therefore, is considered to be an economic function worthy of protection. But in the case of innominate contracts, more individual liberty is allowed to the parties because 'esse possono anche concludere contratti che non appartengono ai tipi aventi disciplina particolare'. Therefore, as far as innominate contracts are concerned, their 'causa' is determined by the will of the parties so long as this 'causa' is lawful in terms of sections 1030 and 1033. Indeed, Torrente brings out clearly this distinction between nominate and innominate contracts:

> 'Si distingue, perciò, i contratti TIPICI, i quali sono già disciplinati dal legislatore (es. compravendita, mandato) ecc. e i contratti ATIPICI o innominati, che non sono stati contemplati dal legislatore, ma che pur sono diretti a soddisfare esigenze degni di protezione'.

Thus, to conclude on this point, we may refer to Messineo, who teaches that every contract has a particular economic-social function which the legal system considers relevant for its own purposes. It is this, the writer says, that is the sole reason for justifying the safeguard which the legal system extends to this private act.

> 'Ogni negozio giuridico assolve a una sua funzione economica e sociale caratteristica, che l'ordinamento giuridico riconosce rilevante ai suoi fini e che solo giustifica la tutela, dall'ordinamento stesso accordata all'autonomia privata'.

Messineo then goes on to explain what one should understand by 'funzione del negozio':

> 'la funzione del negozio sta nell'apprestare al singolo uno strumento, per la modificazione di una data situazione e per il conseguimento di dati risultati giuridici (leciti) in relazione agli svariatissimi bisogni della vita. Suol dirsi che nella detta funzione risiede la "CAUSA" in senso oggettivo, del negozio; la quale, oltre tutto, serve a individuare il dato tipo del negozio, di fronte a tutti gli altri tipi'.

As we have seen, 'causa' is the 'aim' or 'scope' of the contract. But this 'causa' – even in innominate contracts – is different and must be distinguished from the MOTIVE which induces the parties to enter into a contract. Thus, Pacifici Mazzoni writes:

'La "causa" dev'essere tenuta ben distinta dal motivo; questo è un elemento accidentale e variabile, quasi estraneo al contratto: quella invece ne è un'elemento essenziale, la ragione d'essere intrinsica'.

Torrente brings out this distinction by arguing that 'causa' is the scope of the contract taken from the objective point of view, so that the 'causa' or 'scope' is present in every contract of that type; while on the other hand, the motive is subjective and varies according to the individual parties in the contract:

'Causa è, dunque lo scopo a cui il negozio mira, ma questo scopo dev'essere inteso – secondo l'opinione prevalente – in senso oggettivo e dev'essere tenuto distinto dai motivi. I motivi sono rappresentazioni purchè individuale e variano, perciò, da caso a caso, da soggetto a soggetto.

Prendiamo per esempio la compravendità: il venditore vende perchè ha bisogno di denaro, o per fare una speculazione, o perchè la cosa non gli va più a genio; il compratore perchè vuol fare una speculazione, o perchè vuol regalarla ad un amico: tutti questi sono motivi individuali che la parte può non communicare alle persone con cui contratta, e che spesso, perciò restano nella sua sfera psichica interna e sfuggono alla cognizione delle altre persone. Però, in ogni compravendità, v'è peraltro sempre un dato costante comune; lo scambio di cosa contro il corrispettivo denaro. A questo scopo, a questo risultato costante, a questa funzione serve nella infinita varietà di casi concreti il negozio di compravendità.'

This distinction between 'causa' and motive is very important because while 'causa' is an essential requisite for the validity of any contract (sec. 1050), on the other hand, 'i moventi subbiettivi .... non hanno, di regola, rilevanza giuridica' (Cass. 1947).

Before proceeding to discuss the various theories which concern the doctrine of 'causa', we have to solve a preliminary difficulty. Whereas the Italian Code speaks of 'causa' of contracts, our Code speaks at times of 'causa' of contracts and at other times of 'causa' of the obligation. Thus, section 1007 enumerates 'causa' as one of the requisites for the validity of a contract. Section 1007 in fact reads as follows:

'The following are the conditions essential to the validity of the

contract:

(a) capacity of the parties to contract;

(b) consent of the party who binds himself;

(c) a certain thing which constitutes the subject matter of the contract;

(d)a lawful consideration.

The Code then goes on to take each of these conditions separately under their particular relevant title and states the provisions re-garding them. It must be noted that with regard to 'causa', the title the law gives to the preceding series of provisions is in line with s. 1007 and is entitled 'Of the consideration of conduct'. However the first provision under this subtitle instead refers to the 'causa' of the obligation, and in fact reads as follows:

'An obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect'.

This inconsistency cannot be justified by arguing that a contract and an obligation are synonymous, because though in unilateral contracts there is only one obligation, this is not so in the case of bilateral contracts or of multilateral contracts. This would therefore suggest that in our law, besides the notion of 'causa' of contracts, there is also the notion of the 'causa' of the obligation ut sic.

It has been rightly argued that to accept that the doctrine of 'causa' applies to the obligation taken separately would make such a doctrine useless because the 'causa' of one party would be the object of the other party, and vice-versa. Moreover, it would also follow that although the obligation of one of the parties has no effect because it lacks a 'causa', the obligation of the other party may be still due and this because every obligation in a contract is looked at separately and not as there being one 'causa' in a contract.

There is no doubt, however, that the Code refers to the 'causa' of the contract taken as a whole. Indeed, this can be clearly seen when we consider the modern notion of 'causa' which contemplates the function of that particular taken as one whole. Perhaps, the reason why the legislator speaks of an obligation in section 1030 is that he wants to make it clear that in bilateral contracts there may be an unlawful or false 'causa' only in regard to one of the contracting parties.

Though, as we have seen, every contract in order to be valid must have a 'causa', there are certain contracts – NEGOZI ASTRATTI – which produce their effect even though their 'causa' is

temporarily put aside. In regard to 'negozi astratti' Torrente teaches:

'Ciò non esclude che, in alcuni negozi, gli effetti si producono astraendosi o prescindendosi dalla "causa", la quale resta, per cosí dire, accantonata'.

In these cases, 'causa' is not relevant, but its effects are merely suspended – but they DO exist. Thus,

'Anche nei negozi astratti la "causa" ha la sua rilevanza, nel senso che la sua inesistenza o la sua illecità toglie efficacia all'attribuzione patrimoniale, ma la reazione dell'ordinamento giuridico è, per cosí dire, ad effetto ritardato.'

A typical illustration is a contract involving a Bill of Exchange. Thus, A buys an object and pays with a Bill of Exchange, which is in turn passed on to a third person. Now even if there is an unlawful 'causa' in the original contract of sale, A has to honour the Bill of Exchange, but he can then make an action to try and get back what he had paid – probably not from the person whom he had paid but from the vendor. Thus, Torrente goes on:

'il negozio produce i suoi effetti, ed occorre, pertanto, eseguire la prestazione che ne forma l'oggetto: si può peraltro, agire per la restituzione, se la "causa" non esisteva o era illecità'.

The reason why the law recognizes these 'negozi astratti' is because 'essi servono a facilitare l'acquisto e la circolazione dei diritti'.

Our Law

Section 1030 of our Civil Code reads as follows: 'An obligation without a consideration, or founded on a false or unlawful consideration, shall have no effect'.

In this short provision our law enunciates the whole doctrine of 'causa' (Smith vs Lawrence – XXVIII.ii.4). Indeed, this is why the notion of 'causa' is still very confused and ill-defined in our law. In order to examine this notion, we will discuss it according to the various concepts which emerge from this provision, namely:

(i) the inexistence of 'causa';

(ii) false causa

(iii) unlawful 'causa'.

The Inexistence of 'Causa'

'Skond 1030, l'obbligazzjoni mingħajr kawża m'għandha ebda effett....' (Pullicino vs Mifsud – XXXIV.iii.734).

The inexistence of the 'causa' may be of two types. As Torrente classifies them, these are:

(i) 'mancanza genetica della "causa"' and

(ii) 'mancanza funzionale della "causa"'

(i) *Mancanza genetica della 'causa'.*

Torrente defines this in the following terms: 'la "causa" può mancare fin dall'origine, dalla genesi del negozio'.

We must here distinguish between nominate and innominate contracts, when considering the inexistence of 'causa' in the light of modern development. Torrente explains that it is obvious that in the case of nominate contracts, we cannot, at least in theory, speak of the inexistence of 'causa', because the 'causa' of such a contract is pre-established by the law itself.

However,

> 'Essa può, peraltro, mancare nel caso concreto; ciò che avviene quando, per la situazione in cui dovrebbe operare il negozio non può esplicare la sua funzione'.

Thus, for instance, the contract of sale is regulated by the law and consists in the transfer of the ownership of a thing in return for a price. Now, suppose I buy a thing which is already mine (both parties being unaware of the fact until the contract is concluded). It is evident that the contract can never bring about the transfer of ownership, and therefore it can be said that, in practice, the contract is without a 'cause'.

On the other hand, in the case of innominate contracts, their 'causa' is regulated by the wills of the parties. Now in these contracts, the 'causa' is inexistent when the aim of the contract is not directed to produce any function, which the law considers worthy of its protection. 'Nei negozi atipici la causa manca, quando il negozio non è diretto a realizzare interessi meritevoli di tutela (se, per esempio, il negozio è diretto ad uno scopo futile)' (Torrente.)

It may happen that the 'causa', though lacking from the beginning, lacks only in part – this is called 'difetto genetico parziale della "causa"'. The above mentioned writer explains this:

> 'Il difetto parziale della "causa" consiste nella separazione tra gli interessi rispettivamente sacrificati con il contratto'.

For this notion to arise,

> 'basterebbe che le due prestazioni non siano equivalenti: ma per la sicurezza della contrattazione la legge attribuisce relevanza al difetto di 'causa' solo se lo squilibro tra la prestazione di

una parte e il corrispettivo assuma proporzioni iniqui o snaturali (oltre la metà: azione generale di rescissione per lesione)'.

Now while 'la mancanza originaria' of the 'causa' makes the contract null and void according to section 1030, 'il difetto parziale' of the 'causa' does not produce the nullity of the contract, but it gives the party suffering the damages the right to rescind the contract.

Therefore 'causa' is wanting from the very moment in which the contract is entered into when the particular thing promised by one of the contracting parties does not exist at that moment, or is 'extra commercium', or when the promiser binds himself not to perform a given act which had already been performed, or when the promiser binds himself to do something beyond human possibility, or when a person binds himself in view of a preference which he believes already to exist, whilst in fact there has been no such performance or no pre-existing obligation. In hazardous contracts there is lack of 'causa' when there is no risk in compromise, when there is no uncertainty with regard to the issue of the law suit. 'Causa' is related to some future event in the 'pacta de re sperata'; if the future thing does not come into existence, so that the party who has promised it cannot fulfill this obligation, the 'causa' of the obligation for the other party ceases to exist.

(ii) *Mancanza funzionale della causa*

Torrente defines this:

'Pur esistendo originariamente la "causa", per vicende successive, non sia più realizzabile il risultato a cui il negozio era diritto'.

Indeed, it may happen that though the 'causa' existed at the moment of conclusion of the contract, some new circumstances may supervene which make the execution of the contract, and therefore, the fulfilment of its function, impossible. Torrente calls this 'difetto sopravenuto o funzionale della "causa"'. In other words, certain circumstances may subsequently arise which prevent the 'causa' from functioning. Thus, for instance, in the contract of sale, the buyer may refuse to pay the price or a law may be subsequently enacted prohibiting the transfer to others of such a thing. The 'causa' is, therefore, again defective, and special provisions apply for the rescission of the contract or the recovery of anything which may have been given in anticipation of the corresponding obligation which is never fulfilled.

Therefore, 'causa' may also cease to exist after the conclusion

of the contract, in which case the contract cannot be regarded as null, but the fact that the obligation is not performed, which implies the inexistence of the consideration of one of the parties, must also entitle the creditor of such obligation not to fulfill his obligation, because justice demands equality between the parties; and good faith does not allow one party to demand the fulfilment of the obligation by the other, when he himself does not fulfill his own. This shows that, properly speaking 'causa' is not only the promisē of a performance, but also the fulfilment of that obligation.

'Causa' in the 'pacta de re sperata' may be related to some future event. Now, if the future event does not come into existence, so that the party who has promised it cannot fulfill this obligation, the 'causa' of the contract is considered to be inexistent and the general rules of contract apply. Thus, Giorgi writes

> 'una obligazione contrattuale è senza "causa" quando, essendo relativa al futuro, non siasi verificata....'

This principle was accepted in the case Axiaq vs Caruana (XL.i. 548). In this case, a person booked a car from a car agent, and later sold the right to that to another person. Now it happened that in the meantime, importation of that particular model was prohibited and so the Court held that

> 'dak il-bejgħ ma jistax ikollu effett, u dak li ċeda l-bejgħ ta' dik il-karozza huwa ritenut li jrodd liċ-ċessjonarju s-somma ta' flus li dan kien tah in konsiderazzjoni ta' dik iċ-ċessjoni'.

It must here be noted that impossibility of performance is equivalent to inexistence of 'causa'. This has been expressly stated in the above mentioned case Axiaq vs Caruana where it was held:

> 'Meta l-"kawża" t'obbligazzjoni hija impossibbli b'mod assolut il-kawża hija inesistenti u għalhekk l-obbligazzjoni m'għandha ebda effett għaliex hija mingħajr "causa".'

Finally we must note that section 1030, regarding the inexistence of 'causa', must be read in conjunction with section 1031. Thus, in the case Pullicino vs Mifsud (XXXIV.iii.734) the Court held:

> 'Għalkemm skond l-art. 1030 l-obbligazzjoni mingħajr "kawża" m'għandha ebda effett, oppure skond l-art. 1031 il-ftehim jibqa' jseħħ jekk jiġi pruvat li kien hemm kawża biżżejjed għalkemm mhux espressa. Hija biżżejjed għaldaqstant il-"causa sotto-intesa o presunta" kif isejħilha l-Giorgi'.

Now the question arises, is this 'causa' always presumed or must it be proved? Some writers like Duranton and Aubry et Rau

maintain that it is up to the person alleging to prove that the 'causa' though not expressed, in fact exists. On the other hand, Demolombe holds that unless the contrary is proved, the 'causa' must always be presumed. The Italian Civil Code accepted the latter doctrine in a specific provision which does not exist in our Code. The position accepted by our courts as can be seen from the last mentioned case is that:

> 'Il-prova li kien hemm "kawża" tmiss lill-attur fis-sistema tal-liġi Maltija .... l-art. 1031 juri biċ-ċar li meta ma hijiex espressa l-"kawża" ma hijiex preżunta, iżda għandha tiġi pruvata'.

Section 1031 reads:

> 'The agreement shall nevertheless be valid, if it is made to appear that such agreement was founded on a sufficient consideration, even though such consideration was not stated'.

This argument was also upheld in the case reported in XLII.iii.1207.

An interesting case regarding the inexistence of 'causa' occurred in 1947. A father transferred his property in favour of his four children in consideration of a life annuity in his favour. The father was about 74 years, and the amount transferred was about £70,000, and the annuity created was for £6000 a year. Now if calculated, it will be seen that property of £70,000 would always have an income of £3000/£4000, so that the father was only making a profit of £2000/£3000 and would have had to live for a very long time, so that there would be due element of risk involved on the part of the children. The court held that this contract was invalid because the 'causa' of a life annuity as a hazardous transaction is the risk, which did not exist in this case. Therefore, it was no life annuity because the parties did not stand to the risk of loss or gain, because one party was always gaining and the other always losing. Moreover, as the father was 74 years of age, there was neither a valid donation, because no person over 70 years can make a donation. Therefore, it could not even be said to be 'falsa causa'. Thus the contract of life annuity was held to be invalid

Finally, it must be remembered and emphasised that the English doctrine of consideration must not be equated to the continental doctrine of 'causa' – our legislator has been unwise in translating the Latin word 'causa' to the English word 'consideration' because the English doctrine is very much different. Thus for example, in a case in Malta when a yacht worth about £10,000 was sold for £1, an English lawyer held that there was consideration. From our point of view, we do not take such a mathematical view of 'consideration', because in our view 'causa' of the contract of

sale is the commutative character of the transaction and there must be some sort of proportion between the price and the thing sold. Of course, there is no remedy if the price is too low or too high, because except for immovable property, one cannot institute an action on 'laesio'. But if the price is not a serious price, then it will not be sale – it may of course be something else e.g. a donation.

There is another case which brings out the distinction between the English notion of consideration and our doctrine of 'causa'. Four English friends while in Malta hired a car to go on a picnic and on their way back they collided causing about £M350 worth of damages. All these went to the garage owner and signed a document stating that they ALL bind themselves to pay the damages by allotting £M20 per month from their salary to be paid to the garage owner on account of the damages. But some time afterwards, two of these cancelled this allotment. When the matter was taken up with solicitors in England in order to try and enforce payment it was held that the transaction was in fact null because though there is consideration on the part of the driver arguing out of tort, there is no consideration for the other three. But from our point of view, the consideration of the other three is the fact that they signed a document standing security and this out of friendship, just as in a donation.

Thus we can clearly see that the whole concept of consideration in English law is something which is too artificial and legalistic and which has nothing to do with our notion of 'causa'.

False 'Causa'

False 'causa' comes about when the 'causa' stipulated in the contract is not that intended by the parties that contract. Now, this inconsistency may be due either to error or to intentional deviation i.e. simulation. Thus the Court in the case Pullicino vs. Mifsud XXXIV.iii.734 held that a false 'causa' is equivalent to no 'causa' at all. Thus it said:

> 'Kawża falza hija daqs li kieku m'hemmx kawża. U kawża falza tfisser kawża erronea jew simulata'.

Pacifici Mazzoni also teaches that false 'causa' can be divided into two types and he goes on to define these two classes of false 'causa'.

> '"*Causa*" *Erronea:* quando una delle parti si è obbligata per una "causa" immaginaria che supponeva reale;
>
> "*Causa*" *simulata:* quando ambedue le parti hanno indicato una "causa" che sapevono non esistente.'

Now, when the 'causa' of a contract is false, the rule 'plus valet quod agitur quam quod simulati concipitur' is applied. So that in the case of absolute simulation of the 'causa' of the contract, the contract shall have no effect; in the case of a relative simulation section 1032 applies, namely, 'where the consideration stated is false, the agreement may, nevertheless, be upheld if another consideration is proved.'

Let us now consider this principle that if there is absolute simulation the contract is null while in the case of relative simulation the true 'causa' subsists.

In the case Abela vs Galdes (XVI pg.59) the defendant had been left part of an inheritance subject to the condition that before he takes possession of his quota he must pay £50 to plaintiff 'so that she may be compensated for the great expense which she and her family incurred in sending him (defendant) to be educated abroad.' Defendant alleged 'falsa causa' because neither the plaintiff nor her family had contributed in any way towards his education since for that purpose he had borrowed £M300 from his father which he had paid back. In this case the Court, per Debono J., held:

> 'Una disposizione testamentaria fondata sopra una "causa" falsa che solo l'abbia determinato il testatore non ha effetto'.

In the case, Sciberras Trigona vs Calleja Schembri (XIII.p. 101) it was held that when an obligation of 'mutuum' stipulates a sum of money higher than that which is in fact given in the 'mutuum', the 'causa' therein expressed must be held to be false. Nevertheless, one cannot conclude from this fact alone, that the same obligation ought not to produce any effect owing to this excess, for according to law, when the 'causa' expressed in an obligation is false (as in fact part of the 'causa' in the impugned obligation of this case), the contract may nevertheless be upheld on procuring the existence of another 'causa'. The other 'causa' was proven in this particular case, by the sale of a piano.

It must be noted that in case of relative simulation in order that the contract may subsist according to the true 'causa', this 'causa' must not be prohibited by the law in any way. This point has been clearly brought out by our case law. We can here refer to the already mentioned case where the father who was over 70 years of age granted a life annuity. Also, in the case Grech vs Zammit (XVI. p. 332) the Court, per G. Pullicino J., held:

> 'Trattandosi di simulazione relativa, e non assoluta, l'atto è valido se, simulati la "causa" ed il titolo del contratto i contraenti, intendono compiere un atto non riprovato dalla legge'.

An interesting point arising from the case Cachia Slythe vs. Cachia Zammit (XXIX) regarded the prescription of the 'causa' to annuli such a contract. The Court held that if the true 'causa' which was simulated was in fact an illicit 'causa', then the action to annull the contract must be brought within 2 years; while on the other hand if the true 'causa' is licit, then that contract is never null, and so the two year prescription is not applicable here. The Court said:

'Jekk il-"kawża" taparsi, li ssemmiet f'kuntratt dehret biex taħbi "kawża" illecita, dak il-kuntratt jista' jiġi mħassar sakemm ma tkunx għalqet il-preskrizzjoni ta'sentejn. Iżda jekk il-"kawża" taparsi kienet taħbi "kawża" lecita, m'hemm ebda nullità ta' dak il-kuntratt, u għalhekk fuq talba għal dikjarazzjoni mill-Qorti, tal-"kawża" tassew, il-preskrizzjoni ta' sentejn għalxejn tingieb 'l quddiem'.

An interesting case arose concerning the appointment of a player-coach of a local football club. Before the contract, the player made it clear that he wanted to be an amateur player, but wanted also to become the coach of the younger players of the club. The club agreed to register him as an amateur and employ him as a coach for the young players and this latter at a salary of £60 per month. But time passed and though he was called to play he was not asked to coach. Now, according to law, an amateur player cannot receive more than a certain amount which was much lower than £60 a month. He demanded that he should be called in to coach according to the contract, but the club reiterated that his employment as a coach was only a screen to evade the law. But it was quite clear that this devious design of the club was not shown by the other party, because in reality the player's intention was to be genuinely employed as a coach. He threatened to leave the club, but since he was being paid, he was a professional and could not leave without the club's consent.

In the meantime the club stopped paying him the £60 and so he instituted an action against the club. The club pleaded the nullity of that contract, because it was a violation of the rules concerning amateurs. Thus the question arose: was the contract genuine or was it simulated? If the contract was found to be simulated, it would have the effect of what it was really intended to be, unless the real intention is itself illicit, and therefore null. Now since no amateur player could legally be paid for his services as player, the club held that the genuine consideration of that contract was illicit and therefore the contract was null and void.

Ultimately, the matter was decided by the English Football As-

sociation, by way of appeal, and the player won his case, and it was accepted that he did not want to present a façade at all, but this was his genuine intention – i.e. to play as an amateur and to be employed as a coach. Thus, though it is true that the other party intended the simulation, this was regarded as an abuse of one party against the other.

Another interesting case decided by the Privy Council was the Formosa case, where an uncle made a transfer of a house to a nephew of his, in order to settle accounts between them. In point of fact, a dispute arose between them, and it resulted that there were no accounts to settle and the whole thing was all fiction and was only a way of how they wanted to donate property, without paying donation duty. This is a frequent abuse when donating property.

Therefore, to conclude the distinction which has been made by our Courts between absolute and relative simulation can be expressed as follows:

Absolute Simulation: when the parties apparently enter into a contract but in reality they do not create anything at all;

Relative Simulation: when the simulated contract is intended to produce some effects, but these intended effects are different from what is stated in the contract.

Therefore, falsity vitiates 'causa' and therefore also the contract, but this only in so far as there is no true 'causa'. This links up with the inexistence of 'causa'.

Unlawful Causa

'L'ordinamento giuridico non riconosce e non tutela l'autonomia privata, se essa è diretta a scopi contrari alla legge e alle concezioni morali comunemente accolta.'

This principle has been categorically accepted by our law and in fact in the case Pace et noe. vs. Agius et noe (1957) (XLI.iii. 689) the Court tells us when unlawful 'causa' exists:

> 'Skond l-art. 1030 hija bla effett kwalunkwe obbligazzjoni magħmula fuq "kawża" illecita u skond l-art. 1033 ġie dikjarat li l-"kawża" hija illecita meta hija projbita mill-liġi jew kuntrarja għall-għemil xieraq jew għall-ordni pubbliku; u konvenzjoni hija kontra l-ordni pubbliku meta hija kontra l-interess ġenerali'.

In considering unlawful 'causa' we must distinguish this notion from the notion of the inexistence of 'causa'. Indeed, in the latter case, 'causa' is the immediate result of the contract (lo scopo) taken as a whole; it is the economic function of the contract, so that as such 'causa' cannot ever be unlawful or immoral. However,

when considering the notion of unlawful 'causa', 'causa' is taken to refer to the aims or motive which the parties have in mind when contracting and which therefore can indeed be unlawful or immoral. In other words, for the notion of inexistence, 'causa' means the intended result or the aim of the contract; while for the notion of 'unlawfulness', 'causa' means the motive of the parties. Thus, for example, if a person contracts to buy a brothel, the 'causa' for the purpose of 'inexistence' is the transfer of the brothel for the corresponding price; but on the other hand, for the purposes of 'unlawfulness' the 'causa' is the intention of organising a brothel which is, no doubt, contrary to public policy. Therefore, solely because of this latter fact the contract is null (vide Mizzi vs. Cassar, infra).

There is no doubt that in examining unlawful 'causa', our Courts have looked at the motive of the contracting parties. This can be seen in a number of cases. Thus in the case Bajada vs. Lamb the Court held:

> 'Dak li hu importanti hu jekk il-"kawża" ta' l-għoti tal-flus jew oġġetti oħra, ikunu meta jkunu mogħtija, ikollhiex jew le rapport dirett mal-konkubinat, jew aħjar jekk il-konkubinat kienx il-"kawża" ta' l-obbligazzjoni jew kienx merament l-okkażżjoni; fl-ewwel każ, l-obbligazzjoni hi nulla, bħala illecita; fil-każ l-ieħor hi lecita'. An identical case which came before the Courts was

An identical case which came before the Courts was Borg vs Portelli (XXXIX).

Again in the case Scicluna vs. Chetcuti (XXXV.ii.513) the Court manifested this point clearly:

> 'Il-"kawża" jew motiv impellenti jew determinanti tal-kontraenti, sabiex waslu għall-konvenzjonijiet u obbligazzjonijiet... kienet "kawża" direttament kontra l-liġi... u kwindi illecita'.

Again, a more recent case dealing with unlawful 'causa', in which 'causa' was clearly equated to motive was the case decided by Magri J., Mizzi vs. Galea in 1959 (XLIII.ii.648)

> 'Il-ħlas ta' rigal bħala kondizzjoni għall-għoti ta' kiri ta' djar huwa projbit mill-liġi. Dan ir-rigal projbit mill-liġi jikkostitwixxi "kawża" u oġġett ta' l-obbligazzjoni bejn il-kontendenti, u għalhekk f'dan ir-rigward l-obbligazzjoni hija illecita u m'għandha ebda effett'.

Thus we can see that in order that the theory relating to unlawful 'causa' may have those effects which it should have in conformity with tradition and with the principles of positive law, it must be kept distinct from the modern theory relating to the inexistence

of 'causa'. This is a case in point where the wording of our provision is illogical, because we find the word 'consideration' in section 1030 being interpreted differently according to the adjectives which qualify it in the same notion itself. Though illogical, this is the position in Malta.

On this point, Maltese and Italian doctrine differ considerably because Italian doctrine does not distinguish between the notion of the inexistence of 'causa' and that of unlawful 'causa', as we do. In other words, in Italian Law they do not inquire into the motive which the parties had in mind. Thus, these look at the 'causa' of the contract as defined above – economic-social function of the contract – and examine whether this function is lawful or not. Therefore, in Italian law – unlike in our law – a nominate contract which has its 'causa' established by the law cannot have an unlawful 'causa'. Thus Torrente explains:

> 'S'intende che il problema dell'illecità della "causa" si pone soltanto per i negozi atipici o innominati: per quelli tipici la "causa" è gia riconosciuta dal legislatore che, appunto per questo li ha disciplinati'.

Section 1033 of the Civil Code tells us what unlawful 'consideration' is. This section reads:

> 'The consideration is unlawful if it is prohibited by the law or contrary to morality or public policy'.

Therefore, the 'causa' is unlawful in three circumstances, namely,

(i) when it is prohibited by the law;
(ii) when it is prohibited by public policy;
(iii) when it is prohibited by morality.

Let us consider these separately.

By Law

The 'causa' is considered to be unlawful because it is 'prohibited by the law' when the 'causa' goes against an express provision of the law; in other words, when the aim of the parties as expressed is contrary to a provision in the law. In this respect we have already mentioned the case Mizzi vs Galea concerning 'il-ħlas ta' rigal għall-għoti ta' kiri ta' dar' and also the case Scicluna vs. Chetcuti et 1951 – XXXV.ii.513. Another particular case in point is Borg vs. Caruana et (1950) (XXXIV.ii.637) where it was held:

> 'L-attur kien inkarika lill-konvenut biex iniżżillu l-art minn abbord somma ta' flus u jikkonsenjaha lill-persuna oħra Malta. Il-

konvenut ma kkonsenjahomx. Billi l-attur ried iniżżel dawk il-flus bi ksur ta' l-Finance Reg. 1942, il-Qorti żammet li l-iskop ta' l-inkariku kien illecitu u għalhekk ċaħdet it-talba ta' l-attur għar-restituzzjoni ta' dawk il-flus.'

In this respect, one could also mention the case reported in XXXIX.i. at p. 371, which held that interest over 6% is against the law; therefore a contract which is based on such a 'causa' is illicit:

'Skond l-art. 1949 tal-Kodiċi Ċivili, l-imgħax hu limitat għas-6% u skond id-dispożizzjonijiet kombinati ta' 1030 u 1033, l-obbligazzjoni għall-imgħax ogħla minn dik ir-rata ma jista' jkollha ebda effett u għalhekk hija ineżistenti u nulla b'mod assolut.'

By Public Policy and Morality

The question arises here, as to what are we to understand by public policy and morality. Now, Torrente explains this:

'La ragione di negozio immorale o contrario al buon costume comprende non soltanto i negozi contrari alle regole del pudore sessuale e della decenza, ma più in generale i negozi contrari a quei principi etici, che costituiscono la morale sociale in quanto ad essi uniforma il suo comportamento la generalità delle persone oneste, corrette, di buona fede e di sani principi in un determinato ambiente e in una determinata epoca.'

Indeed, the Corte di Cassazione 1950 also had occasion to explain this point:

'Diversi invece intendere per buon costume il complesso di quei principi etici che, suscettivi di venire universalmente adotti, costituiscono la morale sociale, perchè ad essi uniforma il suo comportamento la generalità delle persone oneste, corrette, di buona fede, e di sani principi, in un determinato ambiente e in una determinata epoca'.

All this seems to fit in the very general definition of public order given by our Courts in the case Pace et ne vs. Agius et ne (1957) – XLI.iii.659:

'konvenzjoni hija kontra l-ordni pubblika meta hija kontra l-interess ġenerali'.

As regards the notion of public order it was also stated by the Court of Appeal in the case Marmarà vs. Caruana ed altri (XXII.i. 193) that no passage of time or repetition of performance can justify a provision against public order. Thus the Court held:

'Nessun atto, per quanto liberamente consentito e talora ripetu-

to, e nessun periodo di tempo, pur tempo, che sia, possono valere a dare efficacia ad una obbligazione proibita per ragione di ordine publico'.

It is sometimes debated whether it is right that a judge should have such a wide discretion since the law does not specify any criterion the judge should use. But even in Roman Law there was the concept of 'contra bonos mores' without there being any written law stating what these 'bonos mores' were. Pacifici Mazzoni discusses this point and he says:

'S'obbietta che è lasciato al giudice un troppo vasto campo d'arbitrio; ma è a riflettere che in questa materia, e specialmente per ciò che riguarda il buon costume, è inevitabile che il giudice abbia libertà d'apprezzamento ad è meglio affidarsi all'equo criterio e all'onestà di esso, piuttostò di tentare di porgli un freno con formole più o meno scientifiche, ma sempre indeterminate, che nella pratica applicazione recono più danno che utile'.

Giorgi is also of this opinion. An interesting case which came before our Courts was Needham vs. Darmanin (XIII. p. 570). In this case the plaintiff had spent a sum of £34 owing to her not working during pregnancy, which eventually terminated in an abortion. She alleged that the defendant was the person responsible for the aborted foetus, in that she was being maintained by him, and at his expense.

The Court held that concubinage being against religion and social custom, any obligation which derives therefrom, is of no effect.

A great number of cases involving unlawful 'causa' are concerned with obligation arising out of concubinage. On this point our Courts have been very categorical and have left no doubt that this is against public policy and morality; thus in the case Muscat vs. Farrugia et (XXVII.ii-iv.250) the Court held:

'È radicalmente nulla l'obbligazione, che alcuno assume di pagare una certa somma di denaro ad una donna come prezzo della promessa che questa gli fa annodare e continuare con lui relazioni illeciti'.

Another case on this point is found in XXXII.ii.170.

The question now arises whether for a contract to be annulled on the ground of unlawful 'causa', both parties had to know about it or not. We must here distinguish between the following hypotheses:

(a) the party who aims at an unlawful object cannot refuse to fulfill his obligation to the detriment of the other party who is un-

aware and who is therefore in good faith. In this case the maxim applies 'nemo auditur propriam turpetudinem alligens';

(b) on the contrary, the right of demanding the nullity of the contract must be granted to the party who, after the conclusion of the contract becomes aware of the unlawful scope of the other party, because in such a way another obstacle is made to the realisation of an unlawful scope.

Therefore, if A takes on lease a house from B for £10 a month for the purpose of committing immoral acts therein, A cannot refuse to pay the £10 to B demanding the annulment of the contract of lease on the ground that he entered into the contract with an unlawful motive in mind, and this because 'nemo auditur propriam turpitudinem alligens'. On the other hand, if B, after the conclusion of the contract, comes to know of A's unlawful motive, he may or may not demand the annulment of the contract at his option.

Indeed, the principle underlying both hypotheses is expressly stated in section 1034(1) of our Civil Code:

'Where the consideration for which a thing has been promised is unlawful only in regard to the obligee, anything which may have been given for the performance of the contract may be recovered'.

It is important to note that together with the right to annull the contract the party in good faith to such a contract vitiated by an unlawful 'causa' has a right to demand the restitution of anything which he has paid or given in consideration of that contract. Thus, if I pay a sum of money for the release of a person held hostage by bandits, the unlawfulness lies only with the bandits and I may therefore recover the money so given. (Torrente).

According to section 1034(2):

'If the consideration is unlawful in regard to both contracting parties, neither of them, unless he is a minor, may recover the thing which he may have given to the other party...'

In this principle we find applied the rule 'in parti turpitudine melior est conditio possidentis'. Therefore, if both parties to the contract know of the unlawful 'causa', the contract is null and void for both parties and none of them can claim back what he has already given. So that even if one of the parties has executed his obligation vis-a-vis the other party, even though the other party does not perform his part of the contract, the former has no legal means to recover what he has already given to the other party in contemplation of the contract – vide the above-mentioned case Borg vs. Caruana (1950) – XXXIV.ii.637.

There are quite a number of local cases illustrating this point.

Thus in the case Zammit vs. Caruana Scicluna (XXI.i.534) the Court held:

'L'illecitudine della "causa" per parte di ambedue i contraenti, impedisce la repetizione di quanto fu pagato per l'esercizio del contratto'.

Again in the case Scicluna vs. Abela (XXXII.ii.574)

'Meta l-operazzjoni hija illecita għaż-żewġ naħiet, wieħed ma jistax jirrepeti minghand l-ieħor dak li jkun tah in konnessjoni ma' dik l-operazzjoni'.

An interesting case is the case Fenech vs. Newly (XXI.i.290) where it was held that the fact that one rents a house for prostitution makes the lessee also a party to the unlawful contract in that he speculates on the exercise of prostitution. Therefore, the contract can be annulled by both parties but none of them can demand the restitution of what has been given:

'La locazione di un fondo, quando..... ha per oggetto anche per parte del locatore una speculazione nell'esercizio della prostituzione, contiene una contrattazione immorale e quindi è nulla. E quantunque in simile contrattazioni la "causa" sia illecita per parte di ambedue i contraenti, pure ciascuno delle parti può domandare la resoluzione del contratto, salvo la irrepetibilità delle prestazioni eseguite'.

This provision of our law (section 1034)(2) is very similar to art. 1345 of the Italian Civil Code which says that a contract is unlawful when the parties are led to conclude it solely by an unlawful motive common to both.

'Il contratto è illecito quando le parti si sono determinate a concludere esclusivamente per un motivo illecito comune ad entrambe'.

This article is an exception to the above-mentioned Italian general rule that nominate contracts cannot be annulled on the ground of unlawful 'causa'. This provision brings the Italian concept of 'causa' close to ours, in that it considers the motive of the parties in both nominate and innominate contracts. However, this provision only applies when the same unlawful motive is the prime consideration of both parties in contracting. Torrente and Pescatore discuss this provision of Italian law:

'Questo articolo condiziona la nullità del contratto alla circostanza che il motivo illecito sia stato il solo a determinare la volontà delle parti e sia comune ad entrambe nel senso che tutti e due i contraenti devono aver avuto un identico motivo e cioè

devono esservi ispirati al perseguimento della stessa finalità illecita'.

The case Mizzi vs. Cassar

This recent case is interesting in that it pinpoints the various areas of difference between inexistence and unlawfulness of 'causa' in that the First Court found the first, and the Appeal Court, the second.

Facts: Mizzi, Cassar (Texas Garage) and Falzon (Express Garage) were faced with the possibility of a tourist boom after the war. The three garages agreed to form a sort of partnership, by formal agreement, whereby the three would contribute in some way to the common good, and each would reap the profits. Mizzi did in fact make some attempt to attract tourist agents to Malta, and Falzon did, at times, help Cassar with extra cars, for which the latter always paid him. After eight years without distribution of profits, Mizzi and Falzon sued Cassar for such distribution.

Commercial Court: The Court attempted to find out if the old contact of partnership was valid and so had to ask the question 'Is there a "Causa"'?

The Court held that the 'causa' was the desire of the three parties to prevent competition among them. The contract was therefore with a 'causa'.

Appeal Court: Appeal disagreed with the first Court on this same point, arguing:

(i) The desire to prevent competition may be a MOTIVE of a contract, but not a 'CAUSA', and this latter is what is required as an essential element for the existence of a contract.

(ii) Even if we say, as the First Court held, that this was the 'CAUSA' then it was an ILLICIT one, because trade should be free, and so should competition.

So we still remain with the question was there a 'CAUSA'? The facts show that although in the contract, Mizzi and Falzon had promised to contribute, they had in actual fact performed very feeble attempts at fulfilling their obligation. It was held, therefore, by this Court that

(a) as far as the CONTRACT is concerned, this had a 'causa', because here a promise is enough for a 'causa' to exist; but

(b) as far as the OBLIGATIONS are concerned, these (Cassar's) had no 'causa', because Mizzi and Falzon did not really perform their obligations: therefore, here a promise is not enough; there must be PERFORMANCE for a 'causa' of an obligation to exist.

Conclusion

The writer hopes that it is by now clear that it is very difficult to regulate clearly and effectively a complex notion as that of 'causa' in five short provisions as our Civil Code tries to do. So that one can suggest that the adoption 'in toto' of the Italian doctrine of 'causa' would not only eliminate the ambiguities created by the use of the word 'obligation' in lieu of the word 'contract' in section 1030, but would also ensure a better understanding of the notion of 'causa' in relation both to nominate and innominate contracts and a better distinction of motive from 'causa'.

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WORLD ORDER: CONSTITUTIONAL FRAMEWORKS

GEORG SCHWARZENBERGER

IN dealing with the problem of the constitutional frameworks of world order, it is advisable to clarify first the interdisciplinary location of the problem.

The issue is one which belongs to the field of the academic discipline of International Legislation. The problem is not one which is primarily a lawyer's problem (*lex lata*), but one of the law in the making or law to be (*lex ferenda*). It is one of social planning or social engineering.

This will explain why no lawyer has any particular claim to be consulted on such matters in a professional capacity. He can, however, assist policy-makers in two ways in which he can make use of his particular training. First, more clearly than non-lawyers, he may see the legal and constitutional implications of proposals for change (*primary criticism*). Secondly, he ought to be able to work out without undue difficulties the legal details of proposals *de lege ferenda* or criticise such proposals on the basis of the major assumptions made by any particular policy-maker.

There are a number of patterns from which decision-makers may take their choice. Before dealing with these, it is probably advisable to study exactly the major assumption on which concern *de lege ferenda* with any such patterns is based. This is dissatisfaction with the present state of world organisation, semi-organisation or anarchy. Such an attitude may be due to discontent with the position of the 'veto-Powers' in the Security Council of the United Nations, the purely optional character of the pacific settlement of international disputes, the lack of adequate provision for organised peaceful change, the imperfections of the machinery of collective security in the United Nations, the lack of provision for the limitation of armaments and disarmament or the weaknesses of the existing economic world organisation.

Assuming that this situation requires more or less drastic changes, the available patterns of reform can be classified under six major headings: (1) The United Nations Reform Model, (2) the One-Way Model, (3) the Good-Faith Model, (4) the Bad-Faith Model, (5) the Federal Model and (6) the Regional Model.

It must suffice to provide a few illustrations of primary criticism of each of these models.

(1) *The United Nations Reform Model.* The most drastic and comprehensive blueprint under this heading is Clark-Sohn's *World Peace through World Law.* This is instructive; for, on closer scrutiny, it becomes apparent that the realisation of this programme really presupposes the transformation of the United Nations into a world federation.

In other words, the issue is whether this – like any other – proposal *de lege ferenda* is necessary, acceptable and realistic. Like a long line of predecessors, the Clark-Sohn scheme certainly proves one thing. If it is desired, it is always possible, and not unduly difficult, to devise the requisite machinery for any type of international or supranational organisation.

(2) *The One-Way Model.* Under this heading fall attempts to solve the problem of international anarchy by advance on one of several fronts. All these proposals have in common one feature; they attempt to provide one single cure for all the world's evils.

For instance, there is a plethora of proposals for the 'compulsory' or more comprehensive automatic settlement of all international disputes by judicial or quasi-judicial international organs.

The real problems posed by these proposals are of the first order. In the first place, it has to be settled on which basis (law, morality or expediency) such issues are to be solved. Secondly, it has to be ascertained whether States, and which States, are willing to grant so wide a discretion to any third party.

It may also be mentioned that some of those in favour of such proposals probably have illusions about the certainty of international law. They also may be unaware of the fact that the border line between legal and non-legal disputes is rather subjective. It is true that, potentially, every political dispute is a legal dispute. This implies, however, that the converse proposition is equally true. It is that it entirely depends on the parties to any dispute whether they wish to solve it on the level of law, morality or expediency or not at all.

It is similar with proposals for an international police force. It is relatively easy to devise a command structure and satisfactory draft regulations on the manifold technical issues connected with its creation and maintenance. The crux of the matter is, however, to settle who is to give the orders to the police force to go into action. If this is left with political organs, we are faced again with all the deficiencies – and reasons for such deficiencies – of

organs such as the Security Council of the United Nations. If the matter is settled by reference to the device of standing orders, this merely means leaving political decisions with the General in charge of such a force. Yet, to entrust political decisions to the military, is probably the worst of all possible solutions.

Another panacea would be to proceed towards the goal of world order through disarmament. If the history of the evolution of law inside civilised communities is any guide, it is clear that disarmament is the consequence of the establishment of a strong central order with overriding power. In the international field, the present-day high level of armaments and the cosmic rearmament race proceeding in front of our eyes are evidence of the insecurity which exists in contemporary world society. This is the reason why conferences on disarmament, as distinct from conferences on the limitation of armaments on the basis of the present distribution of power, are predestined to be disappointing; for, in the absence of an overriding central order, disarmament can be only the consequence of existing confidence in an equilibrium between security and peaceful change that has already been attained.

(3) *The Good-Faith Model*. This model relies on the pledged word of States. It means accepting the signature and ratification of treaties and hoping for the best. The trouble with this model is that world history is littered with broken promises and treaties of non-aggression and eternal peace which have culminated in major wars.

In a politically and ideologically divided world, bills and covenants of Human Rights on a universalist level are further typical illustrations of this approach to the reform of international relations and organisation. The reason why, on a global level, there are bound to be failures in treaty observance is that they lack the necessary sanctions machinery, without which they are hardly different in kind from any other set of ethical propositions. As Plato stated in *The Laws*, most of us are inclined to abide most of the time by most laws. The essence of law, however, is to be effective when, occasionally, any of us may be tempted to stray beyond this border line.

This relation between the onerous character of certain legal norms and a correspondingly more pressing need for stronger sanctions behind the law, also explains why, in the relations between *homogeneous* States in one and the same world camp, it is so much easier for conventions on human rights to be effective. In the relations between such States, such commitments are largely declara-

tory of attitudes which are typical inside such communities. All that is needed to watch in a treaty such as the European Convention on Human Rights, are marginal contingencies when parties tend to fall short of standards which, on the whole, they are prepared to accept.

(4) *The Bad-Faith Model.* In this model it is taken for granted that the danger of a breach of an international commitment exists. Thus, provision is made for an array of sanctions which may range from diplomatic sanctions to economic and military sanctions.

The war between Italy and Ethiopia and the sanctions experiment against Rhodesia illustrate the lesson that the real issue is much more fundamental than advocates of the Bad-Faith pattern are likely to assume. It is the question of what will happen if limited sanctions of any type happen to prove ineffective.

Within the State this problem is solved because the physical force at the disposal of the State is so overwhelming that, normally, no need exists to evoke this ultimate means of pressure; for everybody concerned knows that resistance would be hopeless. Yet if, as in race riots in the United States of America and widespread terrorism in Ulster or, from time to time, in some of the new States as in the Lebanon, this order does break down, we are faced with a situation of semi-anarchy, not so different from that in international relations. If even within the State, the government is occasionally too weak to prevent a breakdown of the law, then it is even less likely that this pattern will be successful on a universal level.

(5) *The Federal Model.* In the abstract, this model solves effectively a good many of the issues which experience proves cannot adequately be coped with on a confederate level.

There are two variations of the federal model. The first is the model of territorial federation as it has been realised in the United States, Canada, Australia or post-1919 Germany. The second is that of functional federation as it has been attained in the supranational Communities of Western Europe. The two models merely differ in their starting point. Whereas in the territorial type of federation foreign policy and defence are unified, in the functional type of federation the process of unification commences in the economic or financial field. In either case, the end envisaged is the minimum of unity and subjection to majority rule that is required to achieve the common end, whether this lies in the political, military or economic field.

In a world in which more than half of mankind lives under author-

itarian or totalitarian governments and below the subsistence level, in which more than half of mankind consists of non-white populations, and in which more than half of mankind are not monotheistic even in name, but believe only in what Thomas Hobbes termed 'mortal gods', the realisation on a global scale of this model, too, is beset with formidable difficulties.

(6) *The Regional Pattern.* This needs mentioning merely for the sake of completeness. In a world in which any major war is likely to be a world war, this pattern is merely of minor interest in the field which matters most, that is, in that of international peace and security.

Conclusions

It will be seen from this survey that all the innumerable blueprints for world order that, from time to time, are being advanced are represented by relatively few models and, in substance, are distressingly repetitive.

The easier any of these schemes can be realised, the less it is likely to assist in attaining a true world order. Conversely, the more likely it is to achieve this purpose, the heavier is the price states will be asked to pay in terms of surrender of national sovereignty and cherished ways of life. Whatever the choice may be, specialists in the field of international legislation can safely be relied upon to provide any requisite constitutional moulds. If world order escapes our grasp, it will not be because legal planners have been found wanting.

WORK IN PENAL INSTITUTIONS

DAVID SCICLUNA

THE SIGNIFANCE OF WORK

'Il lavoro è un vero beneficio perchè è una distrazione che mitiga la noia e inganna la pena.

'La pena è una necessità sociale quanto la legge che la sanziona, ma la società ha diritto di aspettarsi meno infesto il malfattore al suo ritorno, e colla subizione d'un castigo reso migliore. Il che non è mai a sperare da una benchè lunga dimora in reclusori penali senza lavoro.

'La noia della reclusione porta essa stessa a desiderare un'occupazione: l'è un conforto.

'Il lavoro forzato è solamente una fatica imposta: perciò se accettato dall'angustia non può essere che rifiutato dall'infingardaggine. Una fatica sotto la verga dell'aguzzino è un avvilimento che toglie anzi che ispirare un'attrazione al lavoro: il lavoro è funzione propria della vita se libero, tortura se coatto. La spinta naturale del lavoro è la promessa d'un ricambio: toltagli questo stimolo l'arsenale che si meditasse levare sulle amarezze della schiavitù penale rimarrebbe sempre un progetto.'

Present-day prison reformers and penal administrators still echo these words written by Dr. Nikola Zammit M.D. in 1888.[1] Even before him, in the 1840s, Carlo Cattaneo had pointed out:[2]

'Il Parlamento (britannico) voleva che il lavoro costituisse pena, e fosse perciò quanto più si potesse ruvido e faticoso; il che corrisponde al vulgare principio del lavoro forzato. Ma nelle solitarie celle di Gloster si scoperse che il lavoro era mitigazione all'insopportabile tedio della solitudine e che i prigioneri lo imploravano come sollievo e beneficio. *Per tal modo era côlto il secreto di rendere accetto e prezioso il lavoro* a quelli sciagurati, che l'ozio aveva istradati al malfare.'

And, quoting Tocqueville and Beaumont:[3]

[1] *Pensieri d'un Retrogrado*, Chapter XXV entitled 'Lavoro e Pena', pp. 293-308 (Malta 1888).

[2] 'Delle Carceri', one of three papers in *Della Riforma Penale*, p. 17 (published 1906).

[3] ibidem, p. 23.

'Visitando il Penitenziale di Filadelfia andavamo trattenendoci con tutti i carcerati. Nessun d'essi che non parlasse del lavoro quasi con gratitudine, e non si palesasse persuaso che, senza il conforto d'una occupazione, non avrebbe potuto resistere al peso della vita. Che avrebbe del prigioniero nelle lunghe ore di solitudine, se fosse lasciato ai rimorsi e ai terrori della sua mente? Il lavoro affattica il corpo, ma conforta l'animo.'

The Quaker ideal of reforming the offender by placing him in solitary confinement where he could meditate, reflect and repent, has long been abandoned. And, though the Maltese Criminal Code (Chapter 12) still provides[4] for that measure as an aggravation of imprisonment, it is normally used only as a disciplinary measure for certain breaches of conduct as provided by the 1931 Corradino Prisons Regulations,[5] having given way to the principle of allowing prisoners time for association during which they are meant to participate in interesting and meaningful occupations designed to protect them from the otherwise degenerative effect which imprisonment may have, and to instil in them a sense of responsibility and self-respect. The basic argument outlined by the nineteenth century writers of work being a mitigation of the tedium and demoralisation of custody still holds water. However, the outlook towards the concept of work in penal institutions has undergone a further important change, viz. the therapeutic effect it has if correct attitudes are adopted, thus furthering the process of social reintegration or rehabilitation of the prisoner.

A Right to Work

The prisoner is considered to have a RIGHT to work as any member of the free community. The Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations in 1955 and, in a revised form, by the Council of Europe in 1973, regard penal labour as essentially similar in status to that possessed by free labour. The Rules of both documents state in this respect:

'The organisation and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.'

'Where prisoners are working for private contractors they shall always be under the supervision of the Penal Administration. The full normal wages for such work shall be paid by the per-

[4] s. 7(1d).
[5] Regs. 65 – 68.

sons to whom the labour is supplied, account being taken of the output of the prisoners.'

'Safety and health precautions for prisoners shall be similar to those enjoyed by workers outside.'

'Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to workers outside.'

'The maximum daily and weekly working hours of the prisoners shall be fixed in conformity with local rules or custom in regard to the employment of free workmen.'

Certain forms of integration with free labour have already been experimented with in several countries, though not entirely with the desired effectiveness owing to pressure of circumstances. Inadequate resources, prejudice and the incoherence of a variety of penal philosophies as well as operationally and politically inhibiting factors all contribute to this failure. The effective organisation and management of work in prison by competent persons ensured of receiving the administrative blessing would go a long way towards helping overcome these inhibitions.

'Hard Labour' and the Prisons Bill, 1975

At the time of writing, the Maltese penal system still incorporates the possibility of imposing a sentence of imprisonment with hard labour.[6] 'Hard labour', actually meaning 'forced labour',[7] is an additional sanction imposed by the Court in those cases prescribed by law on the fundamental punishment of depriving a person of his liberty.

With the recognised therapeutic value that work may have in a prison setting, it becomes ineffective as an additional sanction, the punishment lying in the imposition rather than in the work performance, and, conversely, having one's work taken away. Gone also are the days of the 'chain-gangs' who performed literally 'hard' work. Inmates at the Corradino are no longer set to perform such work as oakum picking or hardstone breaking. Work is now generally regarded as a normal process of the daily prison routine which can be used as a means of furthering the prisoner's rehabilitation through inculcating in him the habit of regular and purposeful work at a tempo and in conditions as close as possible to those of outside industry.

Section 9 of Bill No. 231, entitled the Prisons Act 1975,[8] is pro-

[6] s. 7(1b) Criminal Code (Chapter 12).

[7] The Maltese text speaks of 'lavuri furzati'.

posing the abolition of 'hard labour' from the Maltese penal system by:

(i) the construal of every law conferring power to pass a sentence of imprisonment with hard labour as conferring power to pass a sentence of imprisonment;

(ii) the prohibition on the Courts or any other competent authority to pass a sentence of imprisonment with hard labour; and

(iii) the subjection of every prisoner sentenced to imprisonment, whether with or without hard labour, to serve a sentence of imprisonment.

However, the same section also provides that 'every sentence of imprisonment, whether with or without hard labour, passed upon any convicted prisoner shall subject the prisoner during the term of such sentence... to perform such work as the Director may in accordance with regulations made under this Act direct.' The idea behind this clause is, as explained by the Honourable Minister of Justice on the 9th July 1975,[9] to prevent idleness and make prisoners perform such work as the Director may, on the advice of the prison doctor, direct. One cannot fail to notice the contradiction inherent in this section. In effect it means that while the jurisdiction of the Courts to decide whether to impose a sentence of imprisonment merely or, in the cases prescribed by law, of imprisonment with hard labour, is being abrogated, every sentence of imprisonment would henceforth be regarded as implying *both* the deprivation of liberty *and* the imposition of labour.

The Standard Minimum Rules mentioned above provide that 'prisoners under sentence may be required to work', and the European Convention on Human Rights, which protects individuals from 'forced or compulsory labour', provides in article 4 that such labour does not include 'any work required to be done in the ordinary course of detention'.[10] But, the Rules provide, 'prison labour must

[8] Objects and Reasons: 'to repeal the Prisons Ordinance (Chap. 44) and to replace that law by more up to date and more orderly provisions.'

[9] Parliamentary Debates (1975), pp. 1203-1215.

[10] Article 36 of the Maltese Constitution safeguards 'any labour required in consequence of the sentence or order of a Court'. But it protects specifically such 'labour required of any person while he is lawfully detained by sentence or order of a Court that, though not required in consequence of such sentence or order, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained or, if he is detained for the purpose of his care, treatment, education or welfare, is reasonably required for that purpose.'

not be of a punitive nature'. It is submitted that the contrary is the case in the proposed law since every sentence of imprisonment will henceforth carry with it the imposition of work. In the penological field, where rehabilitation is concemed primarily with attitudes, the correct attitude must originate from the law. Hence, the success or failure in using work as a therapeutic tool depends very much on the attitude that is adopted towards its function within the prison regime.

The Standard Minimum Rules describe very well what the correct attitude should be. 'Work' should constitute one of the means meant to establish in prisoners 'the will to lead law-abiding and self-supporting lives after their release and to fit them to do so', as well as to 'encourage their self-respect and develop their sense of responsibility'. The work performed must be 'useful' work which, so far as possible, will be 'such as will maintain or inincrease the prisoner's ability to eam a normal living after release'. To these ends vocational training in useful trades should be provided for prisoners able to profit thereby and especially for young prisoners. Moreover, within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, *prisoners shall be able to choose the type of work they wish to perform.* The proposed law goes nowhere near this desired approach to work in penal institutions but still considers it as something to be imposed.

It is true that a number of prisoners sentenced to imprisonment refrain from making use of the option to work allowed them by the 1931 Corradino Prisons Regulations[11] – an unfortunate choice because inactivity breeds boredom which breeds contempt. The alternative of imposing work, however, is none too commendable either. 'Offenders are sent to prison as a punishment, not for a punishment'.[12] The punishment which they suffer by being deprived of their freedom should not be increased by rendering their living conditions as irksome as possible. Once inside, the emphasis must move away from punishment towards constructive training for liberty. Work should thus be opted for by the prisoners themselves, if necessary at the instigation of a competent prison officer and made attractive by a number of incentives, meant to enlist the prisoners' interest and give them a sense of purpose, to afford them an opportunity to exercise their skill and gain confidence in their ability to work and to instil in them good working habits. As Dr.Grünhut says, the object of prison labour is 'training for work and training

[11] Regs. 139, 151.
[12] Paterson: *On Prisons,* p. 23.

by work'.[13] The degree of response could be used as a factor in assessing the feasibility or otherwise of allowing the prisoners remission of their sentence and, if introduced into the Maltese penal system, early release on parole.

Employment in prison may be the first steady work experienced by many prisoners. However, it is perhaps not too far-fetched to suggest that providing an offender with his first regular and rewarding work experience of appreciable duration, even if it is in prison, is a major step toward promoting in him the work habits and values necessary for a stable noncriminal life. Some motivation is required.

Incentives to Work

Under the Maltese penal system, prisoners serving sentences exceeding one month are entitled to a maximum remission of one-third of their whole sentence 'by special industry and good conduct',[14] the period of remission being determined by marks – four marks for every day of imprisonment, one additional mark for a fair day's labour and two additional marks for steady hard work and full performance of the task allotted for the day.[15] The prisoners' full co-operation can thus ensure his obtaining full remission of sentence; what should primarily be considered, it is suggested, are his response to treatment and his likely behaviour on release.

The award of equitable remuneration for work performed is a major incentive for prisoners to work or to train for jobs that they intend to or might obtain on release. Under the system envisaged by the Standard Minimum Rules, the prisoners should, moreover, be allowed to spend at least a part of their earnings on approved articles for their own use (preferably obtained, I submit, from a prison canteen) and to allocate a part to their family (though not at the expense of State social benefits) or for other approved uses, e.g. donations to charities. This enhances the prisoners' sense of responsibility and self-respect and helps to promote ties with the outside. Provision should also be made for savings to be accumulated for the prisoners' benefit on release.

The philosophical validity of this system rests partly on equity and partly on the belief that financial resources are of therapeutic value in the training of prisoners. In fairness, I do not believe that remuneration should be equal to or surpass the statutory minimum wage earned by free labourers. Nor, at least in the preliminary

[13] Grünhut, *Penal Reform*, p. 209.
[14] Regs. 138, 140, 1931 Corradino Prisons Regulations.
[15] Reg. 141, ibidem.

stages of reform, should the total annual income reach taxable proportions, lest several administrative complications arise. On the other hand, remuneration should not be as small as the absurdly low weekly gratuities paid in our Prisons until the reforms being heralded by the proposed new Prisons law: 10c0 for Lower Grade prisoners, 15c0 for Middle Grade and 20c0 for Upper Grade. The award of monthly payments known as 'meritorious service awards', as in the U.S.A., to selected prisoners on non-industrial jobs, and the payment of piece-rates, as in the U.K., for manufacturing work, would provide even greater incentives for carrying out good and efficient work; for it is well-established that increases in pay have resulted in higher productivity.

Some reforms on the lines above mentioned have now been officially announced in the Maltese House of Representatives.[16] Prisoners are to receive a remuneration of £M6 for a 30-hour working-week. Of that sum, £M1 will go to the prisoners as pocket-money and the remainder diverted to their family. If the family is receiving national assistance, they will receive £M2.50 and the remaining £M2.50 accumulated for the prisoners' benefit on release. Skilled workers are to receive 50c0 more as pocket-money for productive work. Increases in productivity would entitle prisoners to increases in remuneration. Gratuity rates for those prisoners unable to work are to be increased.

Significant increases in pay will not, of course, take us beyond a certain point. Much more is involved. Indeed, highly paid people in unsatisfactory roles are often found to perform badly. Conversely, modestly paid people whose morale is high as a result of enjoying desirable work, environmental and personal relationships are high performers. Thus, although material awards are important, it is necessary to aim at the creation of a general environment conducive to high motivation with a commensurate performance derived from the individual's acceptance of the usefulness of his activity and appreciation of the value placed upon it by those whose respect he needs, namely the staff, his fellow prisoners, family and, indeed, the society to which he must return. Proper management and prisoner participation (i.e. the association of prisoners with various aspects of life in the institution and particularly in the provision, organisation and operation of work regimes), coupled with a prison staff conscious of the rehabilitative, and not merely custodial, role it must play, can cultivate this atmosphere.

[16] 22nd October 1975, Parliamentary Debates, pp. 1485-1543.

The Nature of Work: Difficulties

The object of effective management is to harmonise the share of physical, financial and human resources and the way in which they are deployed and used to maximum advantage in pursuit of the policy objectives, individual needs and the statutory obligations of the penal authority. One cannot, however, ignore the several practical difficulties involved in providing suitable work for ALL prisoners.

The prison management has no control over the size of its labour force from year to year or even from month to month. Nor has it any control over the quality of its labour force, often of very low quality both as regards skill and aptitude. A high proportion of prisoners have never managed to hold down any kind of job, skilled or unskilled, for any length of time; which is probably why they are in prison. The physical and mental capacities of the prisoner must be taken into account when work is offered. Moreover, a high percentage of prisoners serve sentences of less than six months,[17] not time enough to teach them intricate methods of working, let alone teach them any skills. Consequently the only available and suitable work tends to be low both in quantity and quality.

In addition to these considerations, one must take into account the attitude of the outside world to prison labour. Demand tends to be low, the main or only source of work being contracts for government departments. Furthermore there is a natural hostility on the part of trade unions to what they consider unfair competition and sweated labour, while at the least sign of unemployment the principle of less eligibility begins to militate against the prisoner in this context above all. This is a problem which can only be solved when society as a whole accepts that prisoners do not work in an economic vacuum and that though temporarily safeguarded, they are not economic outcasts. There is, however, an obligation to provide some form of work for all prisoners.[18]

The prison work that is available to prisoners can be widely classified into productive and domestic. The former includes industrial, construction work and farming (including horticulture and forestry); the latter covers kitchen work, gardening and cleaning. Both from a penological and economic standpoint, the best work for

[17] According to the Report for the Prisons Department for 1973/74, 70% of prisoners were serving sentences of under six months, of whom 41% were serving sentences of under one month.

[18] 'Work for prisoners shall be assured by the Penal Administration in its own workshops and farms or with private contractors, where practicable' (Standard Minimum Rules, Council fo Europe, Rule 74(1)).

the majority of prisoners is that provided by building construction and, principally, in workshops,[19] generally the most relevant to the probable experience of a man after release.

Some stimulus to development and production is obviously necessary and, though an assured internal governmental market is valuable in this respect, it should not prevent prison industries from seeking new markets where prejudice to private industrial interests cannot be caused thus avoiding the arousal of adverse public opinion. The interests of the prisoners and of their vocational training should not, however, be subordinated to the purpose of making a financial profit. The workshops should also cater for those prisoners lacking even the minimum skills and who are incapable of anything but the simplest forms of mechanical work. Some of the latter category will find their way into domestic work, probably the best allocation for them. However, in order to prevent labour from gravitating to menial and undemanding roles, domestic work should be made the least attractive of employment options, thus also avoiding over-manned domestic parties. Farming too has its significance, providing the opportunity to learn a variety of skills, though it is normally available to those men who can be allowed to work outside under minimum supervision. Where practicable, work with private contractors or with Government departments should be found, the prisoners remaining under supervision but being paid the full normal wages for their work output.

Two innovations are suggested where the prisoner is allowed to work outside without being supervised. The first is a system of work release whereby the longtermer's reabsorbtion into society is facilitated. The prisoner serving three to four years or more is, in the last six months or so of his sentence, allowed to leave the prison daily in order to work. In this manner, the prisoner provides authorities with far better knowledge of his readiness for complete release than they could otherwise obtain from the prison setting. Besides, prisoners are made to see the contrast between freedom and imprisonment every day, making the deterrent effect of imprisonment more lasting. Work release also permits the prisoner to cope with his adjustment problems in the free community on a gradual basis rather than suddenly.

Another system is that of semi-liberty[20] which, however, stems

[19] Workshops at the Corradino Prisons provide training in bookbinding, matmaking, carpentry, tailoring and shoemaking. Inmates can also receive training in plumbing, welding, interior decorating and bakery work.

[20] See 'Short-Term Treatment of Adult Offenders' by the author *Vid-Dritt* 83-93

from the sentence of the Court. The semi-free offender can keep his job, remain out of continuous contact with other offenders but still subject to a certain degree of supervision and social guidance. Provided the offender has not committed a particularly heinous crime, and he shows to the satisfaction of the Court that he has a job or is attending a course of education or vocational training or is undergoing medical treatment, the Court may decide to pass a sentence of imprisonment to be served under the system of semi-liberty. The prisoner would be required to return to prison each day at the end of the period needed for the activity and to remain there on days when, for whatever reason, the activity does not take place.

The limitations imposed by penal regimes and the duties that prison administrations owe to society in general and the courts in particular will always inhibit the operation of work activities. Finance, physical capacity, staff and the diagnosed needs of prisoners too tend to be inimical to the pace and quality of industrial progress in penal establishments. But the policy and planning function of management can provide the context in which significant progress can be sought on a wide front. That progress, despite the difficulties involved, can and must be related to the well-defined penological objectives of the organisation. In that way work can contribute in a positive manner to the management process and operational situation in penal establishments, thus strengthening the penological performance of the prison system.

Finally, it would be opportune to mention that in Resolution (75) 25,[21] the Committee of Ministers of the Council of Europe emphasizes the value of work for training and rehabilitating prisoners and sets out the basic requirements for work management in penal institutions. Governments are recommended to:

(i) Grant a defined status and a defined priority to prison labour;

(ii) Make suitable resources available for the support of work programmes according to institutional needs;

(iii) Fully utilise to this end adequate and modern management systems, techniques and production processes;

(iv) Adapt conditions of work, performance objectives and remuneration as far as practicable and taking account of the special nature of work in prison with outside standards;

(v) Recognise the importance of work and its implications for

[21] Text published on the 6 November 1975.

management at all levels when staff are being selected and trained;

(vi) Co-ordinate the labour allocation system with the other aspects of the management of penal regimes.

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DEĊIŻJONIJIET TAL-QORTI TA' L-APPELL MIS-7 TA' JANNAR, 1974 SAS-16 TA' DIĊEMBRU 1974*

Seduta tas-7 ta' Jannar 1974.

(Awla Kummerċjali).

No. 1. Giorgina Xerri et vs Albino Saliba et.

L-atturi ppretendew li l-awtur tagħhom akkwista in enfitewsi mal-konvenuti u ma' ieħor biċċa art, kwarta parti indiviża kull wieħed, u li l-awtur tagħhom kien ħallas fuq dak l-att £M3840 fl-interess ta' l-erba' akkwirenti. L-atturi issa talbu li l-konvenuti jiġu ikkundannati jħallsu £M960 kull wieħed.

Il-Qorti tal-Kummerċ laqgħet it-talbiet bl-ispejjeż. Kwistjoni ta' kredibilità.

Seduta tal-14 ta' Jannar 1974.

(Awla Kummerċjali).

No. 2. Carmelo Seychell et vs Victor Camilleri.

Kien sar konvenju bejn il-partijiet fis-sens li l-konvenut kellu jikkonċedi fond in enfitewsi perpetwa lill-atturi, u l-attur kien avvanza lill-konvenut £M500. Il-konvenju skada. L-attur issa talab ir-restituzzjoni tal-£M500 indebitament trattenuti mill-konvenut.

Il-Qorti tal-Kummerċ ċaħdet l-eċċezzjoni tal-preskizzjoni u laqgħet it-talba.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż. Il-Qorti ddikjarat li l-preskrizzjoni kontemplata fl-art. 1070 Kod. Civ. ma kenitx applikabbili għal dan il-każ li ma kienx tal-"indebiti solutio".

Il-Qorti kienet ċaħdet ukoll it-talba tal-konvenuti għall-produzzjoni ta' xhud li ma kienx inġieb fl-ewwel istanza, għax ma kienx jirriżulta rilevanti għall-każ.

(Awla Ċivili).

*Din ir-rakkolta hija miġbura mill-Onor. Imħallef G.O. Refalo B.A., LL.D.

No. 3. P. Pace Asciak vs Brother Emle. Sciberras ne.

L-attur kien impjegat bħala "teacher" fil-kulleġġ tal-konvenut, u kien ġie sospiż. Issa l-attur talab il-ħlas tas-salarju dovut lilu.

Il-Prim'Awla irriteniet li d-direttur kien qal lill-attur li għalkemm sospiż l-istess jitħallas; u kkundannat lill-konvenut iħallas £M51.30 salarji sa l-aħħar tas-sena skolastika.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur li kien ippretenda li kellu jitħallas għal perijodu itwal.

Kwistjoni ta' provi.

No. 4. Mary Brincat vs Guido Muscat.

L-attriċi talbet dikjarazzjoni li l-konvenut irreselixxa mill-għerusija, u l-likwidazzjoni u l-ħlas tad-danni.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenut iħallas lill-attriċi £M547.25.

Il-Qorti ta' l-Appell irrespinġiet l-appell tal-konvenut u kkonfermat.

Il-parti l-kbira tad-danni kienet għal telf ta' pagi li sofriet l-attriċi li kienet impjegata bħala "nurse" u telqet mill-impjieg għax kienet se tiżżewweġ.

Kwistjoni ta' provi.

Seduta tas-16 ta' Jannar 1974.

(Sedi Inferjuri).

No. 5. George Casha vs Joseph Camilleri.

L-attur ippretenda li kien xtara mingħand il-konvenut magna li tinċana, u talab il-kundanna tal-konvenut għall-konsenja ta' dik il-magna f'terminu.

Il-Qorti tal-Maġistrati laqgħet it-talba u ordnat li l-ispejjeż tat-trasport tal-magna għand l-attur jitħallsu mill-attur. Spejjeż għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tat-18 ta' Jannar 1974.

(Awla Ċivili).

No. 6. Marianna, armla Camilleri vs Salvatore Sant.

L-attriċi kienet tikri dar mingħand il-konvenut u fil-ġardina ta'

din id-dar kien hemm bieb għall-fond tal-konvenut. L-attriċi talbet li l-konvenut jiġi kkundannat jagħlaq dak il-bieb, u fin-nuqqas, li tiġi awtoriżżata tagħlqu hi.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż, billi rritjeniet li dik il-ġardina ma kienetx mikrija kollha lill-attriċi.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi bl-ispejjeż.

Kwistjoni ta' provi.

No. 7. Doris Grech vs Anthony Grech.

B'digriet tal-Prim'Awla, il-konvenut ġie kkundannat iħallas lill-attriċi għaliha u għal bintha minuri pensjoni alimentarja provviżorja ta' £M3.50 fil-ġimgħa; spejjeż riservati.

Fuq appell tal-konvenut, il-Qorti ta' l-Appell ikkonfermat bl-ispejjeż.

Il-Qorti rritjeniet li l-alimenti provviżorji jistgħu jingħataw f' kawża magħmula mill-mara esklusivament għall-ħlas ta' l-alimenti.

Mhux meħtieġ li l-mara tagħmel kawża għas-separazzjoni personali biex tottjeni l-alimenti mingħand żewġha.

No. 8. Carmelo Ellul Sullivan et ne vs Anthony Callus et.

L-attur ne talab il-ħlas ta' £M264.88,5 talli ġarr l-għamara tal-konvenut mill-Awstralja għal Malta. Il-konvenut kien impjegat mall-Gvern u ppretenda li dak l-ammont kellu jitħallas mill-Gvern li ġie kjamat fil-kawża. Il-Gvern kien ħallas dak li kien dovut skond ir-regolamenti.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-konvenut appella u fil-kors ta' l-appell biddel id-difiża tiegħu u ppretenda li l-attur kien għamillu xi konċessjonijiet oħra. Il-Qorti ta' l-Appell irrespingiet l-appell u kkonfermat bl-ispejjeż, billi l-konvenut ma ppruvax it-teżi tiegħu.

No. 9. Antonio Micallef De Caro ne vs Giuseppe Gatt et.

L-attur talab lill-konvenuti jiġu kkundannati jiddemolixxu dak li huma bnew abusivament u klandestinament fl-għalqa tiegħu.

Il-Prim'Awla ċaħdet l-eċċezzjoni ta' użukapjoni u ġie dikjarat li l-art kienet ta' l-attur u laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti u kkonfermat bl-ispejjeż.

Ma kienx jirriżulta li l-konvenut kien jippossjedi "animo domini".

No. 10. Maria Portelli et vs Marcel Grima.

B'att notarili l-atturi biegħu lill-konvenut biċċa art kontra l-kor-

rispettiv li l-konvenut obbliga ruħu li jħallas nofs lira fis-sena u inperpetwa għal quddies.

L-atturi issa ppretendew li dak l-att kien rixindibbli minħabba leżjoni "ultra dimidium".

Il-Qorti tal-Maġistrati għal Għawdex (Superjuri Ċivili) laqgħet l-eċċezzjoni tal-konvenut u ddikjarat li dak l-att ma kienx bejgħ u għalhekk ma kienx rixindibbli minħabba leżjoni, u ċaħdet it-talbiet, spejjeż bla taxxa.

L-atturi appellaw; il-konvenut eccepixxa l-inkompetenza tal-Qorti ta' l-Appell.

Il-Qorti ta' l-Appell ċaħdet l-eċċezzjoni ta' inkompetenza bl-ispejjeż.

L-attriċi qabel ma introduċiet l-appell kienet otteniet stima talfond.

F'dan il-każ billi l-meritu jivverti fuq ħaġa indeterminata imma determinabili u l-liġi ma tipprovdi ebda mezz ieħor għad-determinazzjoni ħlief stima, il-proċedura segwita kienet dik regolari għax suġġerita mill-liġi.

Pero l-istima li saret isservi biss għall-fini tad-deċiżjoni ta' l-eċċezzjoni ta' l-inkompetenza u mhux għad-deċiżjoni tal-meritu talkawża.

Seduta tat-28 ta' Jannar 1974.

(Awla Kummerċjali).

No. 11. Emle. Lungaro Mifsud ne vs Fred Darmanin.

L-attur talab li l-konvenut jiġi kkundannat jikkonsenjalu 200 xkora għalf li kien selfu, jew alternativament li jħallas il-prezz. Il-konvenut eccepixxa li kien irritornhom.

Il-Qorti tal-Kummerċ ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Kwistjoni ta' kredibilità.

(Awla Ċivili).

No. 12. Frans Sammut vs Arthur Micallef.

L-attur talab li l-konvenut jiġi kkundannat iħallas £M425 prezz ta' materjal u xogħol ta' bini.

Il-Prim'Awla laqgħet it-talba limitatament għal £M324.60. bl-ispejjeż skond ir-rebħ u t-telf.

Il-konvenut appella u eccepixxa l-preskrizzjoni ta' sentejn (Art. 2254(a) Kod. Civ.)

Il-Qorti ta' l-Appell ċaħdet il-preskrizzjoni u ċaħdet l-appell u ikkonfermat bl-ispejjeż għall-konvenut.

Il-Qorti irriteniet li l-preskrizzjoni kienet ġiet interrotta; għall-kumplament, kienet kwistjoni ta' provi.

No. 13. Leonardo Abela et vs Giov. Cuschieri et.

L-atturi ppretendew li l-konvenut kien iddemolixxa ħajt ta' sqaq u reġa' bnieħ mhux fuq il-linja diviżorja iżda fuq in-naħa ta' l-isqaq u b'hekk okkupa parti mill-proprietà ta' l-atturi. Il-ħajt tassejjieħ qabel kien oħxon żewġ piedi u nofs, u reġa' ġie mibni talkantun singlu, u b'hekk il-konvenut rebaħ l-art ta' taħt il-ħajt.

Il-konvenut eċċepixxa li l-ħajt in kwistjoni kien proprietà esklusiva tiegħu.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż għall-atturi, ħlief l-ispejjeż dwar il-kjamata in kawża li kienet ġiet mitluba mill-konvenut li ġew akkollati lill-konvenut.

L-atturi appellaw, u l-konvenut appella inċidentalment mill-kap ta' l-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell prinċipali bl-ispejjeż kontra l-atturi u ċaħdet dak inċidentali bl-ispejjeż relativi bla taxxa, u ikkonfermat.

Kwistjoni ta' provi dwar il-proprietà tal-ħajt.

Dwar l-ispejjeż tal-kjamata in kawża, il-konvenut kien sejjaħ fil-kawża lill-min beġħlu l-fond, il-konvenut kien ġustifikat jagħmel hekk u għalhekk l-ispiża addizzjonali hekk provokata kienet neċessarja u kwindi kellha tipparteċipa, bħala aċċessorju, min-natura ta' l-ispejjeż tal-konvenut stess, u għalhekk kellhom jiġu akkollati lill-atturi. Pero minħabba iċ-ċirkostanzi tal-każ kien hemm lok għall-temperament tal-kap ta' l-ispejjeż.

No. 14. Michael Galea ne et vs Michael Galea.

Ir-rikorrenti talbu r-ripreża tal-fond mikri lill-intimat għax dan kien moruż fil-ħlas tal-kera.

Il-Bord tal-Kera għal Għawdex laqa' t-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimat bl-ispejjeż.

L-intimat ippretenda li l-interpellazzjonijiet għall-ħlas li saru mill-appellati għan-nom ta' ommhom meta din kienet "moħħa ħafif" ma kienux validi legalment. Din il-pretensjoni kienet ġiet respinta.

Seduta ta' l-1 ta' Frar 1974.

(Awla Ċivili).

No. 15. Avv. Leslie Grech ne vs Kummissarju Taxxi Interni.

Ir-rikorrent talab li l-Qorti tagħti l-istima ta' fond fil-Mosta li l-Kummissarju kien stmah £M4281 waqt li hu kien stmah £M3281.

Il-Qorti ta' l-Appell, wara li innominat perit, stmat il-fond £M2500, bl-ispejjeż għall-Kummissarju, u ffissat id-drittijiet ta' l-Avukati u tar-Reġistru.

No. 16. Guseppi Cumbo et vs Nazzareno Fenech et.

L-atturi talbu li l-kuntratt li bih il-konvenuti kienu assumew il-ħlas ta' dejn, jiġi dikjarat null minħabba nuqqas ta' kawża, minorità tal-partijiet u ta' wieħed mix-xhieda; u li jiġu revokati l-mandati ta' sekwestru u ta' qbid kontra tiegħu.

Il-Prim'Awla akkoljiet it-talba minħabba nuqqas ta' kawża. L-atturi kienu assumew id-dejn, għax favur tagħhom kellu jiġi trasferit bastiment tas-sajd, imma trasferiment fil-fatt ma sarx.

Il-Qorti ta' l-Appell irrespinġiet l-appell tal-konvenuti Fenech u ikkonfermat.

Seduta ta' l-4 ta' Frar, 1974.

(Awla Ċivili).

No. 17. Bartolomeo Aquilina vs Joseph Sacco et.

L-attur talab li l-konvenuti jiġu kkundannati jirrestitwulu s-somma ta' £M1320, l-għamara u l-oġġetti prezjużi li kien ħalla għandhom.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell fuq appell tal-konvenuti rriformat billi rriduċiet is-somma li l-konvenuti kellhom jirrestitwixxu għal £M960.

L-attur kien ħalla għand bintu mart il-konvenut il-flus u l-għamara meta mar joqgħod magħhom.

Meta l-attur ried il-flus u l-mobbli lura, il-konvenuti ppretendew li kienu nefqu dawk il-flus għall-bżonnijiet ta' l-attur.

Il-Qorti ta' l-Appell iffissat £M6 fix-xahar bħala kumpens għall-manteniment li l-konvenuti taw lill-attur, u dawn oltri flus oħra li kien tahom. Għalhekk is-somma ġiet ridotta għal £M960.

No. 18. Mary Falzon Sant Manduca vs Albert Agius Ferrante ne.

Ara Sentenza Appell 8.1.1971 (No. 1/1971). Fil-mori tal-kawża, il-meritu safa eżawrit.

Il-Qorti tat provediment dwar l-ispejjeż.

Seduta tas-6 ta' Frar 1974.

(Sedi Inferjuri).

No. 19. Carmelo Calleja vs Carmela Attard.

L-attur talab li l-konvenuta tiġi kkundannata tirrifondilu £M34 li hu ħallasha meta xtara mingħandha linfa li suppost kienet tal-bronż, imma rriżulta li ma kenitx tal-bronż.

Il-Qorti tal-Maġistrati ddikjarat vizzjat permezz ta' żball il-kunsens ta' l-attur, iddikjarat il-bejgħ null, u kkundannat lill-konvenuta tirrifondi l-prezz. Spejjeż bin-nofs.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuta u kkonfermat bl-ispejjeż.

Seduta tal-11 ta' Frar 1974.

(Awla Kummerċjali).

No. 20. Carmelo Calleja et vs John Micallef.

L-atturi kienu sensala fuq konvenju għall-bejgħ ta' raba mill-konvenut lil Schembri; u l-konvenut kien obbliga ruħu li jħallas £M300 lill-atturi bħala senserija; f'kawża oħra l-konvenut kien ottjena kundanna ta' Schembri biex jersaq għall-att ta' bejgħ, imma l-konvenut ma insistiex li jsir il-kuntratt.

L-attur issa talab il-kundanna tal-konvenut għall-ħlas ta' £M250 bilanċ tas-senserija, u l-Qorti tal-Kummerċ laqgħet it-talba bl-imgħax mid-data ta' l-iskrittura u bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat fis-sens li l-ħlas kellu jsir bħala kumpens għall-prestazzjonijiet li l-atturi rrindew u mhux bħala senserija, bl-ispejjeż.

Il-ġurisprudenza stabbiliet li meta sensal (mhux dak kontemplat mill-liġi kummerċjali li jeħtieġ rekwiżiti speċjali) ilaqqa' l-partijiet u jsir il-ftehim u dan wara għal xi raġuni jew oħra li ma tkunx it-tort jew il-fatt tiegħu nnifsu, ma jiġix effettivament esegwit u t-trasferiment ma jsirx, mhiex dovuta provviżjoni għall-medjazzjoni vera u proprja, imma fil-każijiet kongrui meta dan ikun ġustifikat fil-fattispecie jista' jkun dovut kompens li jiġi fissat mill-Qorti "arbitrio boni viri" u in bażi għaċ-ċirkustanzi kollha tal-każ għall-opra minnha prestata, u ġie ukoll ritenut, għalkemm mhux f'bosta każijiet, li l-ammont tal-kumpens hekk likwidabbli jista' f'ċerti każijiet partikulari jasal ukoll għall-ekwivalenza mas-somma li kienet tkun dovuta bħala senserija vera u proprja (Bezzina vs Mula App. Civ. 3.6.1968 u każijiet hemm citati). Ġie ukoll diversi drabi ritenut li kumpens tali jista' jingħata fuq l-istess ċitazzjoni għad li f'din tkun ġiet mitluba senserija u mhux kumpens, salva l-kwistjoni ta' l-ispejjeż (Vol. XXXIX. i. 389. XVIII. ii. 261).

No. 21. Elizabeth Vassalo et vs Francoise Sultana et.

Il-konvenuti kellhom "estate agency", u l-attriċi talbet il-kundanna tal-konvenuti għall-ħlas ta' somma li kellha tiġi likwidata għas-serviġi li rrenditilhom.

Il-Qorti tal-Kummerċ laqgħet it-talba u kkundannat lill-konvenuta tħallas £M104 u l-ispejjeż.

Fuq appell tal-konvenuta, il-Qorti ta' l-Appell irriformat billi ikkundannat lill-konvenuta tħallas £M84; l-ispejjeż kollha jitħallsu 1/5 mill-attriċi u 4/5 mill-konvenuta.

Il-konvenuta ppretendiet li l-attriċi kellha titħallas biss kummissjoni fuq il-bejgħ u mhux tas-serviġi. Din il-pretensjoni tal-konvenuta ġiet respinta mill-Qorti.

(Awla Ċivili).

No. 22. Avv. Dr. Carmelo Caruana vs Jos. Attard Kingswell.

L-attur ippretenda li ġie inġurjat minn foljet stampat mill-istamperija li tagħha l-konvenut kien stampatur, u talab il-likwidazzjoni u ħlas tad-danni fit-termini ta' l-art. 31 tal-liġi ta' l-Istampa.

Il-Prim'Awla ċaħdet l-eċċezzjonijiet tal-konvenut u cioè (i) li billi hu kien impjegat ma kienx tenut personalment għad-danni, u (ii) li l-istampatur ma kienx passibbli ta' l-azzjoni ċivili a bażi ta' l-imsemmi art. 31. Bl-ispejjeż għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut, bl-ispejjeż.

No. 23. George Scerri vs Carmela Ellul et.

L-attur ippretenda li hu kien ittollera lill-missier il-konvenuti jużа parti mill-bejt tal-fond tiegħu u issa talab li l-konvenuti jiġu ikkundannati jagħtu lura lilu dak il-bejt u jneħħu minn fuqu l-affarijiet li għamlu u dan f'termini, billi jekk huma jonqsu hu jiġi awtoriżżat jagħmel ix-xogħol taħt direzzjoni ta' perit.

Il-Prim'Awla ċaħdet it-talba ta' l-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Il-bejt inkwistjoni kien sovrappost għall-proprietà tal-konvenuti u għalhekk dawn kellhom favur tagħhom il-presunzjoni tal-liġi (Art. 360 Kod. Civ). Biex tiġi spustata l-presunzjoni jeħtieġu provi preponderanti u mhux ekwivoċi jew konġetturali (App. Kum. Fenech vs Salomone 1 ta' Frar 1971); il-prova kuntrarja trid tkun konkludenti (App. Civ. 25 ta' Marzu 1968 Borg vs Schembri, u App. Civ. 20 ta' Lulju 1970 Galea vs Tanti. Ara ukoll App. Civ. 6 ta' Diċembru 1968 Jos. Camilleri vs Espedito Farrugia.)

Seduta tal-15 ta' Frar 1974.

(Awla Kummerċjali).

No. 24. Gio Batta Camilleri et vs Joseph M. Briffa.

Il-konvenut kien ħa fond in enfitewsi għal 17-il sena u wara li spiċċat l-enfitewsi żamm il-fond b'kera. L-atturi ppretendew li l-konvenut qatt ma ħallihom jidħlu jaraw il-fond u talbu li l-Qorti tordna li jsiru t-tiswijiet meħtieġa fil-fond, u jekk il-konvenut jonqos li huma jiġu awtoriżżati jagħmlu x-xogħlijiet a spejjeż tal-konvenut.

Il-Prim'Awla laqgħet it-talba fis-sens li ordnat lill-konvenut isewwi l-aperturi, l-gallarija, balavostri tal-bejt, u s-shutter.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

(Awla Ċivili).

No. 25. Helen Farrugia et vs Rosette Ripard et.

Kawża dwar danni kaġunati minn kolliżżjoni ta' karozzi.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi bl-ispejjeż.

Il-kolliżżjoni ġrat billi l-attriċi qalgħet il-karozza minn "parking place" f'Salini Road, biex tmur għan-naħa opposta tat-triq, u ħabtet ma' karozza tal-konvenuta li kienet għaddejja mill-"main road".

Seduta tat-18 ta' Frar 1974.

(Awla Kummerċjali).

No. 26. Calcedonio Ciantar vs Thomas C.E. Campbell Preston ne.

L-attur kellu stabbiliment għall-bejgħ tal-petrol u ppretenda li skond il-ftehim, il-konvenut ne kellu jħallsu għall-petrol u żejt fornut lilu, sold fil-gallun oltre l-basic profit li soltu jitħallas lill-rivendituri, u għalhekk l-attur talab li l-konvenut ne jiġi kkundannat jħallas lilu £M2061.14.2. kalkulati fuq il-bejgħ magħmul mill-attur mill-1962 sal-1969 bħala "special rebate" kalkolat fuq dak il-ftehim.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut nomine il-Qorti ta' l-Appell irrevokat u ċaħdet it-talbiet, salv favur l-attur kull dritt ieħor lilu spettanti; l-ispejjeż kollha bla taxxa, dritt tar-reġistru kontra l-attur.

Kwistjoni dwar interpretazzjoni ta' klawsola ta' kuntratt.

(Awla Ċivili).

No. 27. Carmelo Scerri vs Emle. Portelli et.

B'kawża preċedenti Emm. Portelli kien ottjena l-kundanna ta'

Clo. Scerri u martu għall-ħlas ta' £M142 lilhom mislufa, u dan fil-kontumaċja tal-konvenuti.

L-attur issa b'libell talab ir-ritrattazzjoni ta' dik il-kawża u ippretenda li n-notifika lilu ta' dik iċ-ċitazzjoni kienet irrita għax (a) l-attur ma kienx indika fuq l-att li kopja waħda kellha sservi biex tinnotifika aktar minn persuna waħda, u (b) għax il-persuna li għandha tħalla l-att, ma tagħtux l-att.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-libellant bl-ispejjeż.

In-notifika kienet saret lil Maria Scerri għaliha u għal żewġha f' darhom, u hi ma wrietx dak l-att lil żewġha. (Ara Kollez. Vol. IX p. 323/324 "Rosario Leonardini vs Enrico Cauchi et")

Il-Qorti iddistingwiet bejn każ ta' purgazzjoni tal-kontumċja (li tippostula notifika proċeduralment valida), u każ ta' notifika irregolari u għalhekk nulla.

No. 28. Ganni Gauci vs Salv. Mangion ne.

L-attur ippretenda li fix-xogħlijiet ta' drenaġġ magħmula mill-Public Works, kienu ġew kaġunati danni f'ġiebja tiegħu, u għalhekk talab (i) li l-konvenut jagħmel ix-xogħlijiet neċessarji biex jiġu evitati danni ulterjuri lill-attur, u (ii) il-likwidazzjoni u kundanna għall-ħlas tad-danni sofferti mill-attur.

Il-Prim'Awla ċaħdet it-talbiet ta' l-attur għax ma ġewx pruvati.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur, u kkonfermat bl-ispejjeż.

Kwistjoni ta' fatti.

No. 29. John Azzopardi vs Antonio Attard.

Appell minn degriet tal-Prim'Awla li kienet innominat perit legali f'kawża li kienet ġiet appuntata bl-urġenza.

Il-Qorti ta' l-Appell irrevokat id-degriet u rrinvjat l-atti lill-Prim'Awla.

"Una volta akkordata l-urġenza u kkunsidrat il-konċett ta' din fil-liġi u l-ġurisprudenza tagħna, il-Qorti ma tantx tara' kif dan seta' jwassal għall-provvediment mogħti fit-termini li fih ġie mogħti li fih innifsu jxejjen din l-urġenza." (Il-Prim'Awla kienet iddifferiet il-kawża għal tlett xhur għall-preżentata tar-relazzjoni).

No. 30. AIC L.C. Spiteri vs Charles Galea et ne.

L-attur talab il-ħlas ta' £M560 bilanċ ta' drittijiet għall-xogħlijiet professjonali.

Il-Prim'Awla ddikjarat ruħha nkompetenti "ratione materiae".

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u irrinvjat l-atti lil dik il-Qorti.

No. 31. Giuseppa Bonnici vs Ewan Pace.

L-attriċi talbet li l-konvenut jiġi kkundannat jikkonsenja lilha l-flus u oġġetti mħollija lilha b'legat minn oħtha mart il-konvenut.

Il-Prim'Awla rriteniet li l-flus, titoli u stocks imħollija lill-attriċi kienu dawk li jifformaw parti mid-dota tat-testatriċi u li sehem it-testatriċi mill-komunjoni ta' l-akkwisti ma kienx inkluż fil-legat. Il-Qorti ordnat lill-konvenut jikkonsenja lill-attriċi tlett kutri. Spejjeż 9/10 għall-attriċi.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attriċi u kkonfermat bl-ispejjeż.

No. 32. Victor Fava vs Michele Peresso.

L-attur talab li l-konvenut jiġi kkundannat iħallas lill-attur £M199.30,8 bl-interessi.

Il-Prim'Awla rrespinġiet it-talba bl-ispejjeż.

Il-kwistjoni kienet tinvolvi interpretazzjoni ta' sentenza.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Seduta tal-20 ta' Frar 1974.

(Sedi Inferjuri).

No. 33. Clo. Bartolo ne vs Henry Bellizzi ne.

L-attur talab il-kundanna tal-konvenut ne għar-rifużjoni ta' £M8.20 minnu mħallsa indebitament bħala dazju.

Il-Qorti tal-Maġistrati ċaħdet it-talba, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Interpretazzjoni tal-kelma "jinkludi".

No. 34. Lorenzo Mangion vs Guzeppi Farrugia.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M30 għal 3 xhur kera ta' ħanut.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat, spejjeż bla taxxa.

Il-konvenut kien jikri mingħand l-attur b'£M40 fix-xahar; u l-attur jgħid li ftehmu li billi l-konvenut kien ser iħalli l-ħanut, hu jħallas bl-£M10 fix-xahar. Il-Qorti rriteniet li f'dan il-każ ma kienx hemm novazzjoni.

Seduta tat-22 ta' Frar 1974.

(Awla Kummerċjali).

No. 35. Avv. Dr. P. Mallia ne vs Kontrollur tal-Proprieta Industrijali.

Appell minn deċiżjoni tal-kontrollur li ċaħad it-talba għar-reġistrazzjoni ta' "M.R. Pox" bħala Trade Mark għall-farmaċewteċi.

Il-Qorti ta' l-Appell ċaħdet l-appell bl-ispejjeż.

Seduta tal-25 ta' Frar 1974.

(Awla Kummerċjali).

No. 36. Charles Debono vs James Sawyer et.

L-attur talab il-ħlas ta' £M63.13,2 bilanċ ta' self ta' flus, u in linea ta' danni l-ħlas ta' somma li tiġi likwidata għall-kera jew storage ta' l-altezzi tal-konvenut fl-istore tal-attur.

Fil-kors tal-kawża, il-konvenut ħallas £M50.

Il-Qorti tal-Kummerċ ċaħdet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet fil-meritu l-appell ta' l-attur u kkonfermat, bl-ispejjeż ta' l-appell għall-attur, pero ordnat li l-ispejjeż tal-prim'istanza jitħallas skond ir-rebħ u telf rispettiv.

Kwistjoni ta' provi.

No. 37. Leslie Friedman ne vs George Gatt Mangion pro et ne.

L-attur talab il-ħlas ta' £M37.15. prezz ta' "coat" ordnat mill-konvenut u konsenjat lilu. Il-konvenut ippretenda li l-attur kien irregala dak il-coat għall-Miss Malta.

Il-Qorti tal-Kummerċ laqgħet it-talba, bl-imgħax kummerċjali mill-konsenja u bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż.

Kwistjoni ta' provi.

(Awla Ċivili).

No. 38. Amabile Falzon et vs Antonio Viola et.

Il-kontendenti kienu qasmu bejniethom biċċa raba; il-konvenuti riedu jibnu garage fuq ir-raba tagħhom u talbu lill-atturi biex jibnu il-ħajt diviżorju fuq iż-żewġ fondi, u l-atturi rrifjutaw. Fil-fatt, il-konvenuti bnew dan il-garage, u bnew il-ħajt fuq tat-tmejn.

L-atturi issa talbu (i) li jiġi prefiss terminu biex il-konvenuti jiddemolixxu dak il-ħajt li għamlu fuq il-proprietà tagħhom, u jiġi dikjarat li l-konvenuti kkommettew spoll, u l-atturi jiġu awtoriżża-

ti jagħmlu x-xogħol meħtieġ a spejjeż tal-konvenut jekk dan jonqos.

Il-Prim'Awla laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti u kkonfermat bl-ispejjeż.

Min jibni fond, għandu jibni l-ħajt fuq il-linja medjana tal-konfini tal-fond tiegħu, u mhux nofsu fuq tiegħu u nofsu fuq tal-ġirien.

(Art. 471, 455, 362, 363, 608, 472, 446 (3) u 457 Kodiċi Ċivili.)

No. 39. Clotilde Psaila vs Direttur tas-Servizzi Soċjali.

Appell mid-deċiżjoni ta' l-Arbitru.

Il-Qorti ta' l-Appell laqgħet l-appell, irrevokat id-deċiżjoni ta' l-Arbitru u dik tad-Direttur u ddikjarat li l-appellanti kellha dritt għall-"unemployment benefit" mid-19 ta' Ġunju 1972; bl-ispejjeż għad-Direttur.

Psaila kienet impjegata mal-Militar f'St. Andrews bħala "part-time dinner helper," u ġiet liċenzjata għax l-impjieg tagħha spiċċa minħabba l-vakanzi tas-sajf. Fil-fatt kull Ottubru kienet terġa' tiġi impjegata mill-ġdid.

L-Art. 12 (4)(d) ta' l-Att VI tal-1956 ma kenitx applikabbli għax kien ġie pruvat li l-impjieg ta' l-appellanti kien spiċċa.

No. 40. Emle Buttigieg et vs Charles Mizzi et.

F'Għawdex ġrat kolliżżjoni bejn van misjuqa minn Manwel Mizzi, awtur tal-konvenuti, u motor cycle misjuq minn Victor Galea, li fuqu kien riekeb bħala pillion rider it-tifel Eukaristico Buttigieg, bin u hu l-atturi. Tant Manwel Mizzi kemm Eukaristico Buttigieg sfaw mejtin.

L-atturi issa talbu (i) li Mizzi jiġi dikjarat responsabbli għall-mewt ta' Buttigieg, u konsegwentement għad-danni sofferti mill-atturi; (ii) il-likwidazzjoni tad-danni, u (iii) il-kundanna tal-konvenuti għall-ħlas.

Fil-kors tal-kawża ġew imsejħin fil-kawża kuraturi "de jure" tal-wirt ta' l-imsemmi Victor Galea.

Wara li nnominat perit u periti perizjori, il-Qorti ta' Għawdex, Superjuri Ċivili laqgħet it-talbiet u ddikjarat responsabbli tal-kolliżżjoni lil Mizzi fi 3/5 u lil Galea fi 2/5, illikwidat id-danni fi £M71.48 għad-"damnum emergens" u £M3175 għall-"lucrum cessans" u kkundannat lill-konvenuti Mizzi jħallsu £M1947.78.8, u lill-kuraturi tal-wirt ta' Galea jħallsu £M1298.59.2, bl-ispejjeż a proporzjon.

L-atturi appellaw kwantu għall-kwantum tal-lucrum cessans, u l-

Qorti ta' l-Appell ċaħdet l-appell u kkonfermat, spejjeż t'appell bla taxxa, dritt tar-Reġistru għall-appellanti.

"Il-ġurisprudenza teskludi enfatikament li f'każ ta' mewt minn fatt illeċitu l-grad ta' dipendenza hu fattur essenzjali u 'sine qua non' biex l-eredi jiġġustifikaw għad-danni taħt l-art. 1089 Kod. Civ." (Ara Appell Petrie vs Ciappara 22.6.1964)

"Dana pero ma jfissirx l-invers, cioè li f'kull każ il-grad ta' dipendenza ta' l-eredi ma għandux u ma jistax jiġi meħud inkonsiderazzjoni fl-istima tas-somma lilhom risarċibili;" (Ara ukoll Appell Bonnici vs Felice 15/1/71)

F'dan il-każ wara żmien li t-tifel Buttigieg kien ġie midfun, niesu akkwistaw qabar u reġgħu difnuh fih. Dawn l-ispejjeż tattieni difna kienu ġew ammessi mill-ewwel Qorti.

Seduta ta' l-1 ta' Marzu 1974.

(Awla Kummerċjali).

No. 41. Victor Vassallo ne vs Avv. Dr. Ian Refalo et ne.

L-attur talab il-kundanna tal-konvenut ne għall-ħlas ta' £M347 prezz ta' merkanzija spedita lid-ditta konvenuta.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenuti ne, il-Qorti ta' l-Appell ċaħdet it-talba bl-ispejjeż.

Il-kawża kienet ġiet maqtugħa qabel ma l-kuratur irċieva l-informazzjoni meħtieġa minn għand il-konvenuti. Kien ovvju li lill-kuraturi riedet tingħata l-opportunità li jġibu l-provi tagħhom.

Fil-meritu rriżulta l-konvenuti kienu "Sales agents" ta' l-attur u huma kienu jġibu dik l-ordni minn għand ditta oħra, u kienet din id-ditta li kellha tħallas għall-merkanzija.

(Awla Ċivili).

No. 42. Mons. Clo. Xuereb vs Lino Cassar.

L-attur ippretenda li ġie inġurjat b'artikolu ta' gażżetta u talab li l-konvenut jiġi kkundannat iħallas l-ammont ta' mhux aktar minn £M400, li jiġi likwidat bħala riparazzjoni ta' l-inġurja u risarċiment tad-danni.

Il-Prim'Awla laqgħet it-talba, iddikjarat l-artikolu nġurjuż u ikkundannat lill-konvenut iħallas £M30.

Il-konvenut appella, u l-attur appella inċidentalment dwar iddanni. Il-Qorti ta' l-Appell ċaħdet iż-żewġ appelli, dak prinċipali bl-ispejjeż għall-konvenut, dak inċidentali bl-ispejjeż bla taxxa.

Il-Qorti kienet taħseb li l-ammont likwidat kien pjuttost baxx iżda fil-kompless ma dehrilhiex li tiddisturba d-diskrezzjoni użata mill-ewwel Qorti.

Seduta ta' l-4 ta' Marzu 1974.

(Awla Ċivili).

No. 43. Gaetano Mallia vs Charles Brincat.

L-attur kien kompropjetarju ta' garage, u l-konvenut kien jokkupa l-fond attigwu. L-attur ippretenda li l-konvenut għamel xi xogħlijiet fil-fond tiegħu, u ostakola t-tieqa tal-garage, u talab li l-konvenut jiġi kkundannat ineħħilu kull xogħol li għamel, f'terminu, u fin-nuqqas, l-attur jiġi awtoriżżat jagħmel ix-xogħol hu.

L-attur talab il-kjamata in kawża tal-kompropjetarju l-ieħor tal-garage.

Il-Prim'Awla ċaħdet it-talba għall-kjamata in kawża, u lliberat lill-konvenut mill-osservanza tal-ġudizzju għax l-attur ma kienx l-uniku propjetarju tal-garage, bl-ispejjeż għall-attur.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur bl-ispejjeż irrevokat, u rrinvjat il-proċess lill-ewwel Qorti għall-kontinwazzjoni.

Fil-kors ta' l-appell l-attur kien sar uniku propjetarju tal-garage b'xiri mill-kompropjetarju l-ieħor.

F'dan il-każ il-kjamata in kawża messha ngħatat (Ara App. Inf. 26.4.71 Vincenzina Cassar vs Ant Vella).

Inoltri, l-attur seta' jagixxi indipendentement mill-kompropjetarji l-oħra (Ara App. Civ. Fred. Ciappara vs Clo. Caruana, XLV. i. 13, u App. Civ. Scicluna vs Azzopardi 3.4.64).

Seduta tas-6 ta' Marzu 1974.

(Sedi Inferjuri).

No. 44. Paolo Casha et vs Gpe. Meli.

L-attur talab li l-konvenut jiġi kkundannat jisgombra minn fond minnu okkupat bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut bl-ispejjeż.

Il-konvenut kellu in enfitewsi temporanju dan il-fond; wara li għalqet l-enfitewsi, l-Housing Secretary irreqwiżizjona l-fond, u l-konvenut tħalla jokkupa l-fond, u hu ħallas il-kera lill-Housing Secretary. Wara l-fond ġie "deriquisitioned". L-atturi qatt ma kienu irrikonexxew lill-konvenut bħala inkwilin.

Skond l-art. 46(1) u (2) Kap. 109 is-sinjifikat tal-kelma "kiri" ma japplikax "to accomodation provided by the Govemment in requisitioned premises". Ir-rapport li nħoloq bejn l-appellant u s-Segretarju tad-Djar, meta l-appellant ġie akkomodat fil-fond in forza tar-reqwiżizzjoni ma kienx rapport ta' lokazzjoni vera u propja iżda rapport "sui generis" regolat mill-Housing Act, u minn disposizzjonijiet amministrativi talvolta applikabbili inkluż il-ftehim (Ara ukoll App. Civ. Maġġur Ch. Vella vs Henry Brincat 23.5.69).

Seduta tat-8 ta' Marzu 1974.

(Sedi Inferjuri).

No. 45. John Hall vs P.C. 976 Alf. Falzon.

Kawża dwar kolliżżjoni.

Il-Qorti tal-Maġistrati ddikjarat iż-żewġ kontendenti responsabili nofs kull wieħed, u kkundannat lill-konvenut iħallas £M17.10. lill-attur, spejjeż bin-nofs.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur, spejjeż bla taxxa, dritt tar-Reġistru għall-appellant.

Seduta tal-15 ta' Marzu 1974.

(Awla Ċivili).

No. 46. Jos. Runza vs Accountant General.

Il-konvenut kien ordna lill-attur 50 par "illuminated pedestrian crossing signs" u "floodlights" u wara li kienu ġew imwaħħla xi signs, ħassar il-kuntratt.

L-attur talab li jiġi prefiss terminu biex il-konvenut jawtoriżża lill-attur jikkompleta l-istallazzjoni ta' l-apparat għat-terminu tal-kuntratt, u indifett il-konvenut jiġi kkundannat iħallas lill-attur £M5275.75 valur miftiehem ta' l-appalt.

Il-Prim'Awla laqgħet it-talba alternativa u kkundannat lill-konvenut iħallas lill-attur £M4707.59 b'dan li l-attur kellu jikkonsenja lill-konvenut is-"signs" mhux imwaħħla; bl-ispejjeż skond ir-rebħ u telf.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-konvenut kien ippretenda li s-"signs" ma sarux skond l-ispecifications ordnati; din il-pretensjoni ġiet riġettata għax irriżulta li t-tibdil sar bl-approvazzjoni tal-perit tal-Public Works inkarigat minn dawn ix-xogħlijiet. Il-Prim'Awla wara li semgħet il-provi kien-

et ċaħdet it-talba tal-konvenut għan-nomina ta' perit tekniku biex tirrelata fuq il-mod kif l-attur kien iffabbrika dawn is-signs.

Kwistjoni ta' provi.

No. 47. Onor. Perit Carm. Lino Spiteri vs Direttur tax-Xogħlijiet Pubbliċi.

L-attur talab li jiġi likwidat l-ammont dovut lilu għax-xogħol li għamel ta' "consultant to survey and design the sewage scheme for Qawra, Bugibba", u li l-konvenut jiġi kkundannat iħallas l-ammont hekk likwidat.

Il-Prim'Awla fil-kontumaċja tal-konvenut ikkundannatu jħallas lill-attur £M2,000, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut li kien ippretenda li l-ewwel Qorti messa nnominat perit.

No. 48. M.A. Axiak vs Rev. P. Alb. Borg ne et.

L-attur talab li jiġi deċiż (i) li ċerta kamra kienet inkluża fil-lokazzjoni magħmula lilha mill-konvenut P.A. Borg ne u għalhekk il-lokazzjoni magħmula lill-konvenut Briffa kienet nulla;
(ii) il-kundanna tal-konvenut Briffa biex jisgombra mill-istess kamra.

Il-Prim'Awla laqgħet it-talbiet, l-ispejjeż jitħallsu 1/4 mill-konvenut Padre Borg u 3/4 mill-konvenut Briffa.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Padre Borg u kkonfermat bl-ispejjeż.

Il-Konvenut Briffa kien appella wkoll, imma l-appell tiegħu ġie dikjarat deżert.

Kwistjoni ta' fatti.

Seduta tat-18 ta' Marzu 1974.

(Awla Ċivili).

No. 49. Antonio Ellul et vs Leonardo Sacco et.

Azzjoni negatorja.

L-attur talab li jiġi ddikjarat li l-konvenuti ma kellhomx dritt jgħaddu minn fuq ir-raba tiegħu għar-raba tagħhom la bir-riġel u lanqas bil-karozza, u talab li l-konvenuti jiġu inibiti milli jgħaddu minn dik il-mogħdija.

Il-Prim'Awla laqgħet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-konvenuti ppretendew li billi l-fond tagħhom kien interkjuż huma akkwistaw id-dritt tal-passaġġ bil-preskrizzjoni ta' tletin sena. Huma ppretendew li anki jekk ikun hemm passaġġ li jkun pratikabbili pero minħabba l-wisa' limitata tiegħu ma jippermettix it-transitu minnu ta' inġenji moderni xorta l-fond għandu jitqies interkjuż.

Dan il-pont ma ġiex investit għax ma kienux jirriżultaw ir-rekwiżiti tal-preskrizzjoni, billi l-passaġġ pratikat kien b'tolleranza biss.

(Dwar l-art. 506 u 484 Kod. Civ. Ara Appell 18 t'Ottubru 1921 Sammut utrinque Vol XXIV. i. 875).

No. 50. Yolanda Camilleri vs Fr. S. Fava.

Ir-rikorrenta talbet ir-ripreża tal-fond mikri lill-intimat, għax reditu għaliha u offriet "alternative accomodation."

Il-Bord tal-kera ċaħad it-talba billi rritjena li r-rikorrenta ma kellhiex bżonn il-fond, għax l'"alternative accomodation" kienet tajba għaliha, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrenta, spejjeż kollha bla taxxa.

Il-Qorti rriteniet li l-fond offert ma kienx "suitable" la għar-rikorrenta u lanqas għall-intimat. Pero rriteniet li l-"hardship" ta' l-intimat kien akbar.

No. 51. Joseph Peralta et vs Kap. Edward Peralta.

Kawża dwar diviżjoni.

B'sentenza tal-14 ta' Novembru 1969 il-Prim'Awla ddikjarat li il-konvenut kellu dritt li jeżerċita l-azzjoni msemmija fin-nota ta' l-eċċezzjonijiet tiegħu dwar fond urban billi kien kompropjetarju tal-fond viċin.

B'sentenza tas-26 t'April 1972 il-Prim'Awla laqgħet it-talbiet u ordnat id-diviżjoni.

L-atturi appellaw miż-żewġ sentenzi u talbu dikjarazzjoni li d-dritt t'azzjoni f'dan il-każ ma kienx ammissibbli.

Il-Qorti ta' l-Appell, laqgħet l-appell, irrevokat l-ewwel sentenza iddikjarat li fiċ-ċirkostanzi tal-każ il-konvenut ma kellux, dritt li jeżerċita l-azzjoni msemmija bl-ispejjeż relativi għaż-żewġ stanzi kontra l-konvenut; u ddifferit il-kawża għall-kontinwazzjoni;

F'dan il-każ ma kienx hemm għad-diviżjoni fondi oħra urbani ta' valur ugwali li l-konvenut ried jieħu b'azzjoni.

(Art. 540 Kod. Civ-derivata mill-Paragrafu VI ta' Kap III talktieb IV tal-Kodiċi Muniċipali, u jirriproduċi l-art. 316 Ord IV tal-

1864, u Art. 199 Ord VII/1868.)

Id-dritt t'azzjoni huwa dritt eċċezzjonali ħafna u li jidderoga għall-prinċipju ġenerali tas-sorteġġ tal-porzjonijiet minħabba l-ugwaljanza li għandu jkun hemm bejn il-partijiet u għalhekk f'materja eċċezzjonali u odjuża ma tistax issir interpretazzjoni estensiva għax fil-"jus-singolare exceptiones sunt strictissimae interpretationis" (Vol XXXI.i.325).

"Per la legalità della detta assegnazione è necessario che i beni rimasti di un valore uguale sieno anche della stessa natura dei beni dei quali si voglia l'assegnazione, perchè nella divisione, se è praticabile, i beni urbani, ed i migliori beni urbani non devono darsi all'uno e lasciarsi all'altro i soli beni rustici, ed anche dei beni urbani, i quali sieno di un valore notabilmente inferiore a quello dei beni urbani dati all'altro condividente" (Vol III pag 508) (Ara wkoll Vol XXXII.ii.291.)

Seduta tal-20 ta' Marzu 1974.

(Sedi Inferjuri).

No. 52. Frank Vella vs Saviour Agius.

Kawża dwar kolliżżjoni u ħlas ta' danni.

Il-Qorti tal-Maġistrati ddikjarat li l-kolliżżjoni saret tort tat-tmejn u kkundannat lill-konvenut iħallas £M6.83.7 għax ġew konsiderati d-danni sofferti mill-konvenut; spejjeż bin-nofs.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

No. 53. Domenico Pantalleresco vs Thomas Aquilina.

L-attur talab il-kundanna tal-konvenut biex jikkonsenja lura l-oġġetti li hu kien xtara mingħand mart l-attur li ma kellhiex il-kunsens ta' żewġha biex tbiegħhom, u li l-konvenut kien ikkonsenta li jirrestitwixxi.

Il-Qorti tal-Maġistrati laqgħet it-talbiet prevju l-pagament da parti ta' l-attur ta' £M35, spejjeż għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Seduta tat-22 ta' Marzu 1974.

(Awla Kummerċjali).

No. 54. Carlo Vella vs George Xuereb.

Ara Sentenza Appell tat-22 ta' Marzu 1973 (No. 45/73).

Il-Qorti ta' l-Appell wara li nnominat tlett periti, laqgħet parzjalment l-appell u rriduċiet għal £M807.55. ammont bilanċjali dovut lill-appellat, l-ispejjeż ġew imqassma.

(Awla Ċivili).

No. 55. Ant. Degiorgio vs Ant. Camilleri.

L-attur ippretenda li l-gallarija tal-fond tal-konvenut ma kienetx fid-distanza legali mill-ħajt diviżorju; u talab li l-konvenut jiġi ikkundannat jikkonforma ruħu mal-liġi f'terminu.

Il-Prim'Awla laqgħet l-eċċezzjoni u ddikjarat li l-fond tal-konvenut kien igawdi servitu fuq il-fond ta' l-attur, u ċaħdet it-talba bl-ispejjeż. Il-Qorti rriteniet li s-servitu ġiet stabilita per destinazzjoni ta' missier il-familja, billi ż-żewġ fondi issa maqsuma, kienu ta' sid wieħed, u kien hu li ħalla l-ħaġa f'dak l-istat.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Kwistjoni ta' provi dwar meta saret il-gallarija.

Seduta tad-29 ta' Marzu 1974.

(Awla Kummerċjali).

No. 56. John Pullicino vs Emle. Scicluna.

Il-kontendenti kienu għamlu xi xogħol bi sħab. L-attur talab li l-konvenut jiġi kkundannat jirrendi kont lill-attur tax-xogħol li għamel bi sħab ma' l-attur, u dana f'terminu.

Il-Qorti tal-Kummerċ illiberat lill-konvenut mill-osservanza tal-ġudizzju billi laqgħet l-eċċezzjoni li l-konvenut ma kienx persuna leġittima li joqgħod f'ġudizzju, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

L-attur kien ikkontratta mhux mal-konvenut personalment imma bħala "managing director" tal-kumpanija.

(Awla Kummerċjali).

No. 57. Mariella Ellul vs Espedito Coleiro ne.

In-nannu ta' l-attriċi, xtara nofs indiviż ta' dar f'tas-Sliema. L-attriċi talbet li jiġi deċiż (i) li dak in-nofs tad-dar kien jappartjeni lill-assi soċjali ta' dak in-nannu u martu (ii) li l-konvenut jirrifondi il-kera inkassat, (iii) li l-konvenut jiġi inibit milli jkompli jinkassa il-kera.

Il-konvenut eccepixxa li Giov. Coleiro kien xtara dak in-nofs għan-nom u fl-interess ta' Coleiro Brothers Limited.

Il-Prim'Awla laqgħet l-ewwel u t-tielet talba.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut u rrevokat u ċaħdet it-talbiet ta' l-attriċi, bl-ispejjeż taż-żewġ stanzi kontra l-attriċi.

Mill-provi kien jirriżulta li Giov. Coleiro kien xtara dak is-sehem tal-fond bi flus u fl-interess tad-ditta u mhux tiegħu personali.

"Bil-mod li hija formulata l-istanza attriċi, din għandha bħala presuppost tagħha, in tema legali, il-possibilità li nonostante l-fatt li l-att ta' l-akkwist kien f'isem l-awtur ta' l-attriċi, il-pretensjoni tad-ditta konvenuta li l-propjetà akkwistata kienet tagħha, għax akkwistata fl-interess u bi flus tagħha, kienet sostenibili. Altrimenti l-istanza kienet tkun konċepita differentement". L-attriċi ma setgħetx tbiddel in-natura ta' l-azzjoni eżerċitata.

No. 58. A. Zahra vs N. Spiteri ne et.

L-attur akkwista b'enfitewsi temporanja terran mingħajr l-arja tiegħu u ġie miftiehem li fuq dak it-terran ma setax jinbena ħlief sular wieħed. Il-konvenuti akkwistaw l-arja ta' dak it-terran u bdew jibnu fuqu.

L-attur issa talab li (i) il-konvenuti jiġu inibiti milli jibnu iktar minn sular wieħed, (ii) li jħottu dak li bnew iktar minn sular wieħed, (iii) li l-attur jiġi awtoriżżat jagħmel ix-xogħol hu a spejjeż konvenuti, fil-każ li dawn jonqsu.

Il-Qorti tal-Kummerċ ċaħdet it-talbiet, spejjeż bla taxxa, għax il-patt li ma setax isir bini iktar minn sular wieħed fuq dak it-terran, ma kienx ġie insinwat.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-appellant.

Dik ir-restrizzjoni ta' bini fuq dak it-terran kienet tikkostitwixxi servitu.

L-iskrizzjoni fir-Reġistru Pubbliku, tikkostitwixxi forma ta' pubbliċità essenzjali.

L-effettiva konnoxxenza da parti tat-terz tal-kostituzzjoni ta' servitu mhiex opponibbli lill-istess terz in sostituzzjoni ta' l-iskrizzjoni li ma ġietx esegwita, ħlief fil-każ li jkun hemm deduzzjoni pattizja ta' l-eżistenza tas-servitu fl-att tal-aljenazzjoni lit-terz.

(Ara Koll. Vol. X. p. 589).

(Awla Ċivili).

No. 59. Giuseppa Bugeja vs Kummissarju ta' l-Art.

Il-kwistjoni devoluta lill-Prim'Awla kienet jekk il-fond espropr-

jat, kwantu għan-natura tiegħu, kellux jiġi konsiderat riferibilment għall-epoka li saret id-dikjarazzjoni tal-Gvern, jew inkella għal dik tal-ħruġ ta' l-Avviż għall-ftehim. L-attriċi kienet tippretendi li kellha tiġi kkunsidrata fiż-żmien li saret id-dikjarazzjoni tal-Gvern.

Il-Prim'Awla ċaħdet it-talba ta' l-attur bl-ispejjeż.

Il-Qorti ta' l-Appell fuq l-appell ta' l-attriċi rrevokat u lliberat lill-konvenut mill-osservanza tal-ġudizzju, spejjeż kollha bin-nofs.

Bejn il-kontendenti kien hemm malintiż li ġie kjarat fil-verbali, u il-partijiet ma kellhomx aktar interess fil-kawża.

Seduta ta' l-1 t'April 1974.

(Awla Ċivili).

No. 60. Giuseppe Ferrero ne vs Kontrollur tad-Dwana.

Il-Prim'Awla b'digriet iddikjarat in-notifika tal-konvenut biċ-ċitazzjoni nulla, u awtoriżżatu jippreżenta n-nota ta' l-eċċezzjonijiet.

L-attur appella b'rikors minn dak id-digriet.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-appellant.

F'dan il-każ il-konvenut kien sar jaf li saret ċitazzjoni kontra tiegħu u bagħat uffiċjal il-Qorti ħalli jieħu kopja; meta dak mar għall-kopja qalulu biex imur għaliha erbat ijiem oħra; u meta reġa' mar tawhielu. Meta l-messaġġier tahielu, huwa għamel ir-riferta tan-notifika fis-sens li l-konsenja saret lill-Uffiċjal tad-Dwana u fid-Dwana. Il-konvenut ma kienx jaf li hu ġie notifikat b'dak il-mod, u stenna li ssir in-notifika.

Il-kontumaċja tippostula notifika regolari. Dan ma kienx każ ta' notifika regolari. Ir-referta bil-mod li saret ma kenitx tirrispekkja il-fatti veri dwar fejn saret il-konsenja tal-kopja, u għalhekk in-notifika kienet irregolari, u għalhekk il-konvenut ma kienx kontumaċi.

Seduta tat-8 t'April 1974.

(Awla Kummerċjali).

No. 61. John Fernandez ne vs Clo. Muscat ne.

L-attur (il-Malta Landing & Shipping Co. Ltd) talab il-kundanna tal-konvenut għall-ħlas ta' £M444.99.1. għall-ammont ugwali mħallas mill-attur bħala "overtime charges" billi l-konvenut kien żbarka "refrigerated cargo" wara l-ħinijiet normali tax-xogħol.

Il-Qorti tal-Kummerċ ċaħdet it-talba, spejjeż mingħajr taxxa dritt tar-reġistru għall-attur.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur, irrevokat, u laqgħet it-talba, spejjeż kollha bla taxxa, dritt tar-reġistru għall-konvenut.

Il-konvenut, li kien l-importatur ta' dik il-merkanzija, kien jippretendi li dik l-ispiża kellha tiġi mħallsa mill-vapur li skarika l-merkanzija.

L-oġġezzjoni tal-konvenut kienet bażata fuq il-prattika antečedenti għad-dħul fis-seħħ tal-Port Regulations 1966.

Dwar il-fatt li l-konvenut ma kienx għamel "request" għall-overtime, il-Qorti osservat li dan m'għamlux sempliċement biex ma jippreġudikax ruħu, u mhux għax ma riedx li x-xogħol tal-konsenja isir wara l-ħin, anzi l-konvenut jgħid li hekk isir.

No. 62. Peter Darmanin ne vs Steward Pearce pro et ne.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M129 bilanċ ta' prezz ta' reklam.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront tal-kjamat in kawża.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-imsejħin fil-kawża u ikkonfermat bl-ispejjeż ta' l-appell.

Ma jistax ikun hemm dubbju skond il-liġi li l-kjamat in kawża jista' jiġi wkoll ikkundannat (Art. 961 Proc). Il-kjamati in kawża b' kuntratt kienu akkwistaw l-"assets u liabilities" tal-Melita Hotel. Irriżulta li l-kjamati in kawża kienu jafu b'dan id-dejn minn qabel il-kuntratt.

No. 63. Brian Mizzi et ne vs Ant. G. Sammut ne.

L-atturi kienu krew "concrete mixer" lill-konvenut bit-£M8 kuljum u meta talbuhulu, il-konvenut iddepożitah il-Qorti. L-atturi talbu li jiġi deċiż li dak id-depożitu kien null, li l-konvenut jiġi kkundannat jirritornah, u fin-nuqqas iħallas il-valur tiegħu, u li jiġi kkundannat iħallas il-kera li jiġi likwidat.

Il-Qorti tal-Kummerċ iddikjarat id-depożitu null u kkundannat lill-konvenut jirritornah fi żmien jumejn, bl-ispejjeż għall-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat, spejjeż kollha bla taxxa dritt tar-reġistru għall-konvenut.

Il-Qorti tal-Kummerċ kienet iddikjarat id-depożitu null għax ma saritx qabel l-offerta u ma kienx hemm rifjut ta' dik l-offerta.

Il-Qorti ta' l-attur osservat: li billi l-konvenut ma setax jissekwestra l-"mixer" f'idejh stess, "skond il-prattika li ilha aċċettata minn żmien, hu seta' jgħaddi għad-depożitu ġudizzjarju tal-'mixer' preordinatament għal dana s-sekwestru. Basta f'dan ir-rigward tiġi

ċitata l-frażi użata fis-sentenza reportata fil-Vol. XXXV.iii.670 fejn tissemma "l-proċedura tad-depożitu liberu u sekwestru susseg-wenti kif isir is-soltu."

(Awla Ċivili)

No. 64. Ant. Abela ne vs Dr. Lino Agius et ne.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M1003 bilanċ ta' somma akbar għall-xogħol u materjal.

Il-Prim'Awla laqgħet it-talba.

Il-Qorti ta' l-Appell fuq appell tal-konvenut annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti għad-deċiżżjoni. Spejjeż ta' l-ewwel stanza riservati għad-deċiżżjoni finali, dawk ta' l-appell bla taxxa, dritt tar-Reġistru għall-attur ne.

Fid-data meta ngħatat is-sentenza, il-kawża ma kenitx differita għas-sentenza.

F'ċirkostanzi simili hu naturalment mistenni li tingħata ċerta latitudini u li tiġi aċċertata sew il-pożizzjoni dwar il-kontestazzjoni tal-kuraturi qabel ma l-kawża tiġi deċiża.

No. 65. Giuseppe Farrugia et vs Carmelo Zarb et.

B'sentenza preċedenti kien ġie deċiż li l-konvenut kellu titolu ta' lokazzjoni għall-parti mill-fond. L-atturi talbu li jiġi deċiż liema partijiet mill-fond il-konvenut kellu dritt jokkupa.

Il-Prim'Awla ddikjarat li l-konvenut kellu dritt jokkupa l-fond kollu ħlief tlett ikmamar fil-pjanterren, bl-ispejjeż għall-atturi.

Fuq appell ta' l-attur il-Qorti ta' l-Appell irriformat billi eskludiet ukoll "garage". L-ispejjeż kollha jitħallsu 5/6 mill-atturi u 1/6 mill-konvenut.

Kwistjoni ta' provi.

No. 66. Frans Cremona et. vs Teresa Micallef et.

L-atturi talbu li l-konvenuti jiġu kkundannati jisgumbraw millflat mikri lill-konvenuta, għax din kienet qegħda tużah għall-prostituzzjoni.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż, għax l-atturi ma pprovawx l-allegazzjonijiet minnhom magħmula.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

"Mhux biżżejjed li jiġu murija ċirkustanzi u anki diversi ċirkustanzi biex talvolta in generale jixħtu ċerta ombra fuq il-kostumi ta' l-appellata, iżda jeħtieġ li jiġi speċifikatament u konvinċente-

ment muri li l-appellata qegħda tuża l-flat in kwistjoni għall-prostituzzjoni."

No. 67. Joseph Bonanno vs Joseph Scerri.

L-attur talab l-isgumbrament tal-konvenut minn fond mikri lilu li kien dekontrollat, għax l-attur ma riedx iġġedded il-lokazzjoni.

Il-Prim'Awla ċaħdet it-talba għax il-fond kien mikri lill-konvenut minn qabel ma ġie dekontrollat.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Ara Sentenza "Mary Mallia vs. Jos. Xuereb" App. Civ. 8 ta' Marzu 1968; Concetta Galea vs George Borg Myatt App. Inf. 25 ta' Marzu 1966 u Mary Gallo vs. Ant. Attard App. Civ. 8 ta' Jannar 1971.

No. 68. Maria Assunta Scorfna et. vs. Madalena Schembri et.

L-attriċi ppretendiet li l-konvenuta ħadet £M400 flus u mobbli li jiswew £M70 minn għand l-awtur tagħha, u talbet ir-restituzzjoni ta' l-istess.

Il-Prim'Awla kkundannat lill-konvenuta tħallas lill-attriċi £M108.85 bl-imgħax legali; spejjeż 4/5 l-attriċi, u 1/5 il-konvenuta.

Il-Qorti ta' l-Appell fuq appell tal-konvenuta rriformat, billi riduċiet l-ammont dovut mill-konvenuta għall-£M103.85; Spejjeż ta' l-appell 19/20 konvenuta, u 1/20 attriċi.

Kwistjoni ta' provi.

No. 69. John Saliba vs Maria Concetta Micallef.

L-attur kien xtara dar mingħand il-konvenuta; u wara skopra li fil-fond kien hemm żbokk għall-"inspection chamber" mid-drenaġġ tal-"garage" kontigwu tal-konvenuta, u ppretenda li dan kien jikkostitwixxi servitu u kien difett latenti. L-attur għalhekk talab (i) biex il-konvenuta tneħħi dik il-konnessjoni fid-drenaġġ f'terminu, (ii) li jekk tonqos, il-konvenuta tirrifondi somma ammontanti għall-ispiża neċessarja biex titneħħa dik il-konnessjoni, prevja dikjarazzjoni li dik il-konnessjoni kienet vizju latenti skopert mill-attur li jintitolah jitlob nuqqas tal-prezz.

Il-Prim'Awla ddikjarat l-ewwel talba inammissibili, u t-tieni talba perenta bl-ispejjeż għall-attur.

Fuq appell ta' l-attur irrevokat, u laqgħet l-ewwel talba u ffissat terminu, spejjeż bin-nofs, u ddefferiet il-kawża għall-kontinwazzjoni.

Il-Qorti kkonsidrat il-fatt lamentat bħala li jikkostitwixxi servi-

tu, u l-attur kien xtara dak il-fond bħala liberu minn servitu. Dan ma kienx każ ta' vizzji redibitorji.

No. 70. Ant. Calleja vs Carmela Calleja.

Provvediment dwar il-kura tat-tfal. Il-Prim'Awla ordnat li t-tifla komuni tinżamm mill-attur.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenuta, irrevokat u ordnat li t-tifla (ta' taħt 3 snin) provviżorjament tibqa' għand l-omm. Spejjeż ta' l-appell bla taxxa, dritt tar-Reġistru għall-attur.

L-interess suprem tat-tfal.

No. 71. Grace Vassallo vs Joseph Borg.

L-attriċi talbet li l-konvenut jiġi ddikjarat missier naturali tat-tarbija li kellha, u li jiġi kkundannat jissomministra pensjoni alimentarja lit-tifla u jħallas in linea ta' danni l-ispejjeż li ħallset l-attriċi fl-okkażżjoni tat-twelid tat-tarbija.

Il-Prim'Awla laqgħet l-ewwel żewġ talbiet (it-tielet kienet ġiet ċeduta) u ffissat il-pensjoni f'£M9 fix-xahar.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

(Awla Ċivili).

No. 72. Victor A.G. Mallia vs Fedele Dalli.

Omm il-konvenut b'kuntratt kienet innominat lill-attur biex jamministralha xi flats ammobiliti. Il-konvenut kien ħa ċ-ċwievet ta' dawn il-flats mid-dar ta' l-attur.

L-attur ippretenda li l-konvenut ikkommetta spoll, u li hu jiġi reintegrat fid-detenzjoni ta' dawk iċ-ċwievet.

Il-Prim'Awla laqgħet it-talba u tat lill-konvenut tmint ijiem żmien biex iqiegħed lill-attur fil-pożizzjoni li kien fiha qabel.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Ma hemmx irritwalità jew nullità tal-petizzjoni billi titħalla xi parti in bjank; f'dan il-każ fil-petizzjoni ta' l-appellant id-data tax-xahar tan-nota ta' l-appell tħalliet in bjank.

Ir-Reġistratur m'għandux jaċċetta atti li fihom ikun hemm spazji vojta.

Seduta tad-9 t'April 1974.

(Sedi Inferjuri).

No. 73. Emle. Schembri vs. Joseph Schembri.

L-attur talab li l-konvenut jirritomalu l-oġġetti kollha li hu kellu għandu fiż-żmien li kien joqgħod miegħu.

Il-Qorti tal-Maġistrati laqgħet it-talba limitatament għall-ħadida tal-mogħdija, spejjeż bla taxxa.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur u kkonfermat, spejjeż bla taxxa.

Seduta tat-22 t'April 1974.

(Awla Ċivili).

No. 74. Anna Paris vs Emle. Mifsud.

Il-Prim'Awla ddikjarat ruħha inkompetenti "ratione materiae." Il-konvenut kien neguzjant. Kien fumar u kellu minn tnejn sa erbgħa min nies impjegati regolarment miegħu.

Il-Qorti ta' l-Appell iddikjarat definitivament li l-Qorti kompetenti kienet il-Qorti tal-Kummerċ, u rrinvjat l-atti lil dik il-Qorti.

Seduta tas-17 ta' Mejju 1974.

(Awla Ċivili).

No. 75. Giuseppe Attard et vs Giuseppe Buhagiar.

Il-Prim'Awla laqgħet l-eċċezzjoni t'inkompetenza "ratione materiae", għaliex il-konvenut kien kummerċjant u kawża li kienet tivverti fuq l-usurpazzjoni ta' propjeta mmobiljari magħmula in konnessjoni ma' l-eżerċizzju ta' kummerċ kienet ta' kompetenza tal-Qorti tal-Kummerċ. (P.A. 26.6.54 Soler vs Gambin, Vol XXXVIII. ii.523. Appell 10.1.1955).

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ.

No. 76. Antonia, armla Bonnici vs Lorenzo Attard.

Ir-rikorrenta talbet quddiem il-Bord tal-Kontrollur tal-Qbejjel għall-Għawdex, li tiġi awtoriżżata tittermina l-lokazzjoni għax riedet ir-raba għall-użu tal-familja tagħha, u li jiġi likwidat il-kumpens li seta' kien dovut lill-intimat.

Il-Bord laqa' t-talba u ffissa l-kumpens fi £M17.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-intimat u kkonfermat bl-ispejjeż.

Kwistjoni ta' "bżonn" u ta' "hardship".

Dwar il-kap ta' l-ispejjeż il-Qorti osservat li ma ntaxxatx għa-

liex it-titolari ta' dritt għandu jiġi b'xi mod penalizzat sempliċiment għax jiddeċidi li jesperih.

Seduta tat-22 ta' Mejju 1974.

(Sedi Inferjuri).

No. 77. Maria Schembri vs Andrea Schembri.

L-attriċi talbet l-iżgumbrament tal-konvenut mill-kumditajiet tarrazzet mikri lilha.

Il-Qorti tal-Maġistrati ċaħdet it-talba, billi favur il-konvenut kien hemm sullokkażżjoni, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attrici bl-ispejjeż.

Kwistjoni ta' kredibilità.

No. 78. Jos. Calleja vs Gwenn Mark et.

L-attur talab il-kundanna għall-ħlas ta' £M23.93.9 prezz ta' "groceries" mibjugħa lill-konvenuta.

Il-Qorti tal-Maġistrati laqgħet it-talba u rriservat favur il-konvenuta kull azzjoni lilha kompetenti rigward il-bilanċ minnha prezż kontra l-kjamat in kawża.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi u kkonfermat bl-istess riserva.

Seduta tal-24 ta' Mejju 1974.

(Awla Ċivili).

No. 79. Violet Demanuele vs Emmanuele Demanuele.

L-attriċi talbet li l-konvenut żewġha jiġi kkundannat iħallas l-alimenti lilha u l-uliedha.

Il-Prim'Awla laqgħet it-talba u kkundannat lill-konvenut iħallas £M9 fil-ġimgħa, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

No. 80. Anna Attard vs Katerina Attard et.

L-attriċi talbet li biċċa art li kienet komuni għat-tlett kontendenti tiġi maqsuma bejniethom.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż, billi rriteniet li l-art kienet ta' waħda mill-konvenuti.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attriċi, irrevokat u

rrinvjat l-atti lill-ewwel Qorti, spejjeż kollha bla taxxa.

Kwistjoni dwar interpretazzjoni ta' testment.

Seduta tas-27 ta' Mejju 1974.

(Awla Ċivili).

No. 81. Louis Galea vs Joseph Seguna.

L-attur talab il-kundanna tal-konvenut għall-ħlas tas-somma likwidabbli għall-ħsara kaġunata f'"car" li l-attur kien kera lill-konvenut.

Il-Prim'Awla kkundannat lill-konvenut iħallas lill-attur £M35.97.5, spejjeż 4/5 għall-konvenut.

Il-Qorti ta' l-Appell fuq appell tal-konvenut irriduċiet l-ammont likwidat għal £M30.97.5. Spejjeż ta' l-appell 6/7 għall-appellant.

No. 82. Simeone Chetcuti vs Grace Hubback.

L-attur talab l-iżgumbrament tal-konvenuta minn ħanut minħabba inadempjenza tal-ftehim.

Il-Prim'Awla ddikjarat ruħha inkompetenti ratione materiae.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ u irrinvjat l-atti lil dik il-Qorti.

Seduta tal-31 ta' Mejju 1974.

(Awla Kummerċjali).

No. 83. Lawrence J. Manche vs Louis Galea ne.

Il-Qorti tal-Kummerċ ċaħdet it-talba ta' l-attur f'rikors sabiex jinġungi xhieda għall-esibizzjoni ta' dokumenti u għall-mistoqsijiet addizzjonali, wara li l-kawża kienet tħalliet għall-finali trattazzjoni.

Il-Qorti ta' l-Appell ċaħdet l-appell b'rikors ta' l-attur u kkonfermat bl-ispejjeż.

Hu prinċipju li l-Qorti ta' l-Appell ma tindaħalx in linea ta' massima fl-eżerċizzju tad-diskrezzjoni tal-Qorti ta' l-ewwel stanza dwar l-ammissjoni u regolament tal-provi ħlief meta dik id-diskrezzjoni tkun ġiet eżerċitata ħażin, jew għal xi motiv ieħor gravi.

(Awla Ċivili).

No. 84. Anthony Panzavecchia vs Emle. Spiteri.

Kawża dwar kolliżżjoni stradali.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż billi rriteniet lill-attur unikament responsabbli ta' l-inċident.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Il-Qorti għandha toqgħod fil-limiti tal-kawżali kif dedotta fiċ-ċitazzjoni.

L-attur kellu ħtija għax ħareġ minn triq sekondarja u nvada l-karreġġjata tal-konvenut. L-eċċess marġinali ta' l-ispeed limit da parti tal-konvenut fiċ-ċirkostanzi ma jikkontribwix għall-event dannuż u lanqas għall-entità tad-danni fil-karozza ta' l-attur.

No. 85. Luigi Picci vs Salv. Caruana.

Kawża dwar kolliżżjoni bejn karozzi.

Il-Prim'Awla ddikjarat lill-konvenut unikament responsabbli, u ikkundannatu jħallas id-danni likwidati fi £M671.20, b'dan li l-konvenut kien intitolat li jieħu l-karozza ta' l-attur fl-istat li kienet.

Il-Qorti ta' l-Appell fuq appell tal-konvenut irriformat billi rreteniet lill-konvenut responsabbli fi 3/4, u l-kjamat in kawża fi 1/4 u llikwidat id-danni risarċibbli lill-attur fi £M621.20.0. Spejjeż 3/4 mill-appellant u 1/4 mill-kjamat in kawża.

L-imsejjaħ fil-kawża kien għaddej minn Valletta Rd, u beda jikser għal fuq il-lemin tiegħu biex jidħol f'ta' Qali; il-konvenut kien ġej warajh u kien beda jipprova jissorpassa lill-kjamat in kawża, iż-żewġ karozzi ħabbtu, il-konvenut tilef il-kontroll u l-car tiegħu investa lill-car ta' l-attur provenjenti mid-direzzjoni opposta; l-attur bħala "evasive action" kien kiser malajr lejn il-lemin tiegħu.

Il-ħtija tal-kjamat in kawża kienet li hu ma tax "well in advance" sinjal li kien ser idur.

No. 86. Frank Diss ne vs Alb. Agius Ferrante L.P. ne.

L-attur talab li jiġi deċiż li l-braken ma kienux suġġetti għal taxxa tal-boll taħt l-art. 57 ta' l-Istamp Duty Ordinance (Kap 68) u ir-rifużjoni ta' £M286.18. minnu mħallsa indebitament.

Il-Prim'Awla ċaħdet l-ewwel talba, u laqgħet it-tieni limitatament għal £M33, spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur u kkonfermat, spejjeż tat-tieni stanza bħal ta' l-ewwel.

Il-Qorti rriteniet li barkun kien bastiment għall-fini ta' dik il-liġi.

No. 87. Joseph Genovese et vs Peter Bellizzi.

Kawża dwar kolliżżjoni bejn cars.

Il-Prim'Awla rriteniet li l-attur u l-konvenut kienu ugwalment

responsabbli, ikkundannat lill-konvenut iħallas lill-attur, £M1 għall-nofs id-danni, l-ispejjeż nofs mill-attur, kwart mill-attriċi, u 1/4 mill-konvenut.

Fuq appell ta' l-attur il-Qorti ta' l-Appell irrifformat u ddikjarat l-attur responsabbli fi 1/4, u l-konvenut, fi 3/4, u kkundannat lill-konvenut iħallas lill-attur £M41.66.4 u lill-attriċi £M1.50. spejjeż kollha 3/4 għall-konvenut, u 1/4 għall-atturi bejniethom.

Il-kolliżżjoni ġrat fi triq tal-kampanja dejqa u serpeġġjanti, u f' liwja fejn ma jgħaddux żewġ karozzi.

Seduta tat-3 ta' Ġunju 1974.

(Awla Ċivili).

No. 88. Hermann Coppola vs Ewan Vella.

L-attur talab li jiġi deċiż li r-reġistrazzjoni ta' post bħala "decontrolled" ma jkollhiex effett għax saret wara li l-post kien mikri lilu.

Il-Prim'Awla ddikjarat ruħha inkompetenti għax il-konvenut kien neguzjant u kien jinnegozzja fil-bini ta' djar, u għalhekk l-att kien att tal-kummerċ għalih.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Qorti tal-Kummerċ.

Seduta tal-10 ta' Ġunju 1974.

(Awla Ċivili).

No. 89. Emmanuela sive Lilian Adey Birch vs Dione Aquilina.

L-attriċi talbet li jiġi ddikjarat li l-konvenut kien il-missier naturali ta' binha Ivan u li l-konvenut jiġi kkundannat iħallas lilha rata ta' manteniment għall-minuri.

Il-Prim'Awla laqgħet it-talbiet u ffissat £M3 fil-ġimgħa għall-manteniment tal-minuri; wara li ċaħdet b'degriet it-talba tal-konvenut biex isir "blood test."

Il-konvenut appella tant mid-degriet kemm mis-sentenza.

Fil-kors ta' l-appell, bil-kunsens tal-kontendenti, kien sar il-"blood test" u t-tabib ikkonkluda li ma kienx hemm kontra l-possibilità li l-appellant kien il-missier naturali tat-tarbija.

Il-Qorti ta' l-Appell iddikjarat eżawrit l-appell mid-degriet, u ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż. Il-Qorti osservat li l-prova ta' l-eżami tad-demm sabiex tiġi assodata l-paternità ta' tifel, tista' ssir meta l-partijiet jakkonsentu għaliha (Koll, Vol. XXXVI.i.297).

Seduta tat-12 ta' Ġunju 1974.

(Sedi Inferjuri)

No. 90. Joseph Demicoli vs Ronald Borg.

Kawża dwar kolliżżjoni bejn cars.

Il-Qorti tal-Maġistrati sabet lill-konvenut responsabili f'2/3 u ikkundannatu jħallas £M10.66.6.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat. Il-konvenut kien għaddej "wrong side."

Seduta tas-17 ta' Ġunju 1974.

(Awla Kummerċjali).

No. 91. Sidney Gatt ne vs Alf. Zammit Cutajar ne et.

L-attur ħarrek lill-aġenti tal-vapur, u lill-Malta Landing & Shipping Co Ltd, biex jiġu kkundannati jħallsu £M190.7. valur ta' merkanzija li ma ġietx konsenjata.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront ta' l-aġent tal-vapur, u lliberat lill-konvenut l-ieħor bl-ispejjeż għall-konvenut Zammit Cutajar ne.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Zammit Cutajar ne u kkonfermat bl-ispejjeż.

Il-vapur biex jeżimi ruħu mir-responsabilità għall-merkanzija għandu juri li wassalhom l-art jew fuq il-barkun, għaliex huwa f' dan is-sens li għandha tiftiehem, fiċ-ċirkostanzi, il-kelma "discharge" użata fil-polza ta' kariku.

"Altru huwa li jiġi konstatat li sar it-'tally' fl-istiva u altru li jiġi pruvat li dak li ġie 'tallied' fl-istiva ġie fil-fatt imtella minnha u 'discharged' mill-vapur."

Seduta tal-24 ta' Ġunju 1974.

(Awla Kummerċjali).

No. 92. Emanuele Tabone vs Nazzareno Barbara.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M181.15. prezz ta' 43 vjaġġ ġebel erba' tyres u differential lilu mibjugħa u konsenjati.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 93. Avv. Dr. G.G. Gatt ne vs Paul Mifsud ne.

L-attur fittex lill-aġent tal-vapur u lill-Malta Landing & Shipping Co. għal £M489 danni mħallsa mill-kumpanija assikuratriċi lid-destinatarju tal-merkanzija talli ma rċeviex erba' kaxxi merkanzija.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront ta' l-aġent tal-vapur bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Mifsud bl-ispejjeż u osservat li għalkemm il-proċess ta' l-iskarikazzjoni jibda tassew bl-imbraġas, huwa ma jieqafx hemm. Tinħtieġ il-prova ta' l-iskarikazzjoni la ma tridx tkun ġenerika u nkompleta.

(Awla Ċivili).

No. 94. Joseph Vella vs Joan Antida Xuereb.

L-attur talab li l-konvenuta tiġi kkundannata tħallas id-danni kaġunati lilu, għax hi kienet il-kaġun tal-ksur ta' l-għerusija ta' bejniethom.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

L-azzjoni eżerċitata kienet dik kontrattwali ordinarja bażata fuq il-prinċipju ġenerali tal-obbligazzjonijiet, bħala distinta minn dik speċjali akkordata bil-Proklama No. VI tal-20 ta' Ġunju 1834 (Kap. 7) għall-konsegwiment ta' kumpens fi flus għall-inġurja patwita f' każ ta' resiliment inġust minn wieħed mill-kontraenti u li għaliha hemm bżonn li l-promessa tkun saret b'att pubbliku jew skrittura privata skond l'art. 1277(1)(g) tal-Kodiċi Ċivili (Ara Vol XXIV.i. 291 u 945 u Vol XXV.ii.114).

Għall-kumplament kwistjoni ta' provi.

No. 95. Salvatore Zammit et vs Neriku Sammut.

Il-kontendenti kienu propjetarji ta' bini kontigwu u l-konvenut għamel xi xogħlijiet f'setaħ u taraġ li kienu komuni għall-kontendenti. L-atturi issa talbu li l-konvenut jiġi kkundannat ineħħi f' terminu dak li għamel, għax dak kien sar mingħajr il-kunsens ta' l-atturi, u in difett li l-atturi jiġu awtoriżżati jagħmlu x-xogħol huma.

Il-Prim'Awla laqgħet it-talbiet ta' l-atturi bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-konvenut kien ippretenda li s-setaħ fejn kien għamel ix-xogħol, kien propjetà esklużiva tiegħu, il-Qorti rriteniet li dak kien komuni. Kwistjoni t'interpretazzjoni t'att ta' diviżjoni.

Seduta tas-26 ta' Ġunju 1974.

(Sedi Inferjuri).

No. 96. Stella Baldacchino vs Lukardu Borg.

L-attriċi talbet l-iżgumbrament tal-konvenut minn għalqa minnu okkupata bla titolu.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Seduta tat-28 ta' Ġunju 1974.

(Awla Ċivili).

No. 97. Baruni F. Manduca Azzopardi et vs Arturo Buttigieg et.

L-attur talab (i) ix-xoljiment ta' l-enfitewsi għax il-fond kien iddeterjora u għax il-konvenuti m'għamlux il-manutenzjoni tal-fond kif kienu obbligaw ruħhom, (ii) id-divoluzzjoni tal-fond u (iii) li l-konvenuti jiġu kkundannati jħallsu s-somma li tiġi likwidata għaddanni fil-fond.

Il-Prim'Awla ddikjarat li l-atturi kellhom dritt jipproponu dik il-kawża, għalkemm fil-kuntratt ma kienx ġie stipulat il-patt tar-riżoluzzjoni għar-rigward ta' tagħriq tal-fond. B'sentenza oħra, il-Prim'Awla laqgħet it-talbiet.

Il-konvenuti appellaw, u fil-kors ta' l-appell il-partijiet ittransiġew il-kawża, u l-Qorti tat sentenza skond il-ftehim. L-enfitewsi ġiet riżoluta b'effett minn dik inhar.

No. 98. Godwin Grech vs Anthony Zammit.

Kawża dwar kolliżżjoni. L-attur ippretenda ħlas talli kera karozza oħra għal 117 jum sakemm issewwiet il-karozza tiegħu, għaddepreciation fil-car tiegħu għall-ispejjeż ta' tobba.

Il-Prim'Awla laqgħet it-talba u kkundannat il-konvenut iħallas £M406.45 li minnhom £M250 kienu għall-deprezzament.

Il-konvenut appella mill-ammont iffissat għall-kiri ta' car u għaddeprezzament, u l-Qorti ta' l-Appell irriformat billi rriduċiet issomma tad-deprezzament, għal £M150.

F'materja ta' danni f'kolliżżjonijiet stradali, ir-regola hi tar-restitutio in integrum, pero din hi kwalifikata minn oħra li timponi fuq l-attur id-dmir li jieħu dawk il-passi li huma raġonevoli fiċ-ċirkostanzi li jimmitigaw id-danni konsegwenti għall-fatt illeċitu, b'mod li jista' jiġi eskluż fil-każijiet kongrui min riżarċiment ta' dik il-

parti tad-danni dovuta għan-nuqqas tiegħu li jieħu dawk il-passi.

F'dan il-każ il-karozza damet biex tissewwa għax riedu jinġiebu l-ispare parts minn Sweden, u l-attur ma kellu ebda tort f'dan.

Dwar id-deprezzament, il-Qorti osservat li biex din tingħata jrid ikun hemm ħsara serja u rilevanti, u li l-każ ikun jittratta minn karozza ta' ċerta kwalita u finezza u kważi ġdida, u li jkun faċli li l-"market value" tal-karozza jitbaxxa.

No. 99. Giuseppe Falzon et. vs. Nutar G. Bonello du Puis ne. et.

L-attur kien issulloka fond għall-każin lill-konvenuti, u dawn għamlu alterazzjonijiet strutturali fil-fond mingħajr il-permess ta' l-atturi, u b'hekk ikkaġunaw ix-xoljiment tal-lokazzjoni ta' l-atturi, li għalhekk talbu (i) li l-konvenuti jiġu ddikjarati responsabbli tad-danni, (ii) li jiġu kkundannati jħallsu d-danni li jiġu likwidati.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenuti jħallsu £M1,585 danni, daqs kieku l-lokazzjoni kellha ddum għaxar snin oħra.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenuti bl-ispejjeż.

No. 100. Paolo Gauci vs Francis Frendo.

Kawża dwar kolliżżjoni bejn karozza u "truck".

Il-Prim'Awla rriteniet lill-konvenut unikament responsabbli u ikkundannatu jħallas £M53.75 danni li ġew likwidati bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Il-konvenut kien issorpassa l-linja medjana tat-triq, għamel "overtaking" mingħajr ma żamm "a proper look out" u kien għaddej b' velocità superjuri għal dik permessa mir-regolamenti.

No. 101. Mary Bezzina et vs Emmanuele Vella.

Il-Qorti ċaħdet it-talba ta' l-appellanti għas-soprassessjoni għax hi kienet ippreżentat kawża għall-annullament tas-sentenza. L-appellat kien oppona ruħu.

Ara Vol XXXII.ii.197, App. 10.3.67 Caterina Gerada vs. Dr. Jos. Caruana, u App. 27.1.1967 Caterina Gerada vs. Avv. Ant. Caruana.

(Sedi Inferjuri).

No. 102. Ant. Schembri vs Joseph Cassar.

L-attur talab li l-konvenut jiġi kkundannat jiżgombra minn għalqa minnu okkupata bla titolu.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-attur, irrevokat u laqgħet it-talba, spejjeż bla taxxa.

Il-konvenut kien jiddetjeni bi qbiela għalqa li kien krielu missieru; wara l-mewt ta' missieru dik l-għalqa nqasmet bejn il-konvenut, oħtu mart l-attur u ħuh ieħor. L-attur ippretenda li meta qasmu, il-konvenut irrinunzja għall-lokazzjoni. Il-Qorti rriteniet li l-konvenut kien irrinunzja.

No. 103. Andrew Psaila vs Michael Fava sive Busuttil.

L-attur talab li jiġi deċiż li hu kien jiddetieni b'lokazzjoni ċerta għalqa.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell fuq appell tal-konvenut annullat is-sentenza u rrinvjat l-atti lill-ewwel Qorti għad-deċiżżjoni, spejjeż ta' l-appell bla taxxa, dritt tar-Reġistru għall-appellat.

L-ewwel Qorti ma kenitx iddeċidiet l-eċċezzjoni dwar l-integrità tal-ġudizzju, u dik l-eċċezzjoni kienet timporta l-possibilità ta' xi kjamata in kawża, li fi kwalunkwe każ setgħet tingħata biss fl-ewwel stanza.

No. 104. Vincenzina Vella vs Edward Borg.

L-attriċi talbet l-iżgumbrament tal-konvenut minn parti ta' fond minnu okkupat bla titolu, u billi l-koabitazzjoni bejniethom kienet inkompatibili.

Il-Qorti tal-Maġistrati ddeċidiet li l-konvenut kellu titolu ta' komodat biex jabita fil-post, pero l-attriċi kellha dritt tittermina dak il-komodat, u ordnat lill-konvenut jiżgombra fi żmien ħmistax.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat. Il-Qorti osservat li meta l-korrispettiv tal-godiment tal-ħaġa ma jkunx jikkonsisti fi flus, fi kwantita ta' derrati, jew f'sehem tal-frottijiet li l-ħaġa tipproduċi, m'hemmx lokazzjoni (Clo. Xuereb vs Salv. Camenzuli App Civ. 12.12.1969, Joseph Schembri vs Ant. Briffa App. Inf. 10.12.1971 u Vol XX.i.96). Il-Qorti osservatukoll li f'dan il-każ lanqas kien hemm komodat.

Seduta tal-15 ta' Lulju 1974.

(Awla Ċivili).

No. 105. Giovanna Zahra vs Mary Caruana.

Ir-rikorrent talab ir-ripreża tal-fond mikri lill-intimata, għax din ma kinetx qiegħda tabita, u hu kellu bżonnu għan-neputija tiegħu.

Il-Bord tal-Kera laqa' t-talba bl-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell ta' l-intimata, irrevokat u ċaħdet it-talba bl-ispejjeż kollha bla taxxa.

Fil-kors ta' l-appell, ir-rikorrent ma kellux bżonn iktar tal-fond; infatti hu ried il-fond għan-neputija, però din kienet ħassret l-għerusija.

Seduta tas-6 ta' Awissu 1974.

(Awla Ċivili).

No. 106. Benedetto Attard et Giuseppa Attard et.

L-atturi talbu dikjarazzjoni ta' nullità ta' donazzjoni magħmula minn Lorenzo Attard lill-konvenuti ta' dar, u dan għaliex il-konvenuti ma kenux aċċettaw dik id-donazzjoni, u għax Lorenzo Attard ma setax jiddisponi minn dak il-fond.

Il-Prim'Awla ċaħdet it-talba bl-ispejjeż.

Lorenzo Attard kien miżżewweġ darbtejn. L-atturi kienu dixxendenti mill-ewwel żwieġ, il-konvenuti kienu uliedu mit-tieni. Il-fond in kwistjoni Lorenzo Attard kien akkwistah fil-kors tal-komunjoni ta' l-akkwisti ta' l-ewwel żwieġ; u wara l-mewt ta' l-ewwel mara dik il-komunjoni ma kinetx għiet diviża.

Fuq appell ta' l-atturi l-Qorti ta' l-Appell issoprasjediet sa kemm tiġi likwidata u maqsuma l-komunjoni ta' l-akkwisti ġa eżistenti bejn Lorenzo Attard u l-ewwel mara u pprefiġġiet lill-atturi, terminu biex jipproponu l-azzjoni opportuna fil-Qorti kompetenti. Spejjeż riservati, u osservat: Mal-mewt ta' wieħed mill-konjuġi jinħoloq stat ieħor ta' komunjoni bejn il-konjuġi superstiti u l-eredi tal-predefunt.

Id-disposizzjoni ta' l-art. 1369 li tipprovdi li r-raġel jista' jiddisponi mill-beni tal-komunjoni, salvo li jikkompensa lill-mara, ma tapplikax għall-perijodu ta' wara x-xoljiment tal-komunjoni.

Il-konsorti għandu dritt jaljena l-kwota intellettwali tiegħu imma mhux dak li jiddisponi minn ħaġa determinata appartenenti għall-patrimonju komuni, għax sad-divisjoni jibqa' nċert lil min dik il-ħaġa tista' tmiss.

Seduta tas-6 ta' Settembru 1974.

(Awla Ċivili).

No. 107. Mary Dolores Baker et vs Kenneth Buckingham.

Il-konvenut kien ottjena mandat ta' impediment tas-safar tal-

persuna ta' iben adottiv ta' l-atturi. L-attriċi qabel kienet miżżewġa mal-konvenut u t-tifel kien binhom.

L-atturi talbu (i) li dak il-mandat kien null, (ii) li jiġi maħruġ kontromandat, (iii) li l-konvenut jiġi dikjarat responsabbli għaddanni.

Il-Prim'Awla laqgħet l-ewwel żewġ talbiet u ċaħdet it-tielet; spejjeż bla taxxa, dritt tar-Reġistru bin-nofs.

Il-konvenut appella u l-atturi appellaw inċidentalment dwar it-tielet talba.

Il-Qorti ta' l-Appell irrespinġiet l-appell prinċipali u laqgħet dak inċidentali. Spejjeż 1/6 l-atturi u 5/6 konvenut.

"Bil-mandat in kwistjoni kien ġie impedut milli jsiefer il-minuri li mhux il-persuna li kontra tagħha inħareġ il-mandat, kuntrarjament għal dak li jirrikiedi l-art. 858 Kod. Proċedura Ċivili."

Seduta tas-16 ta' Settembru 1974.

(Awla Ċivili).

No. 108. Josephine Bonello et vs Kummissarju ta' l-Art.

L-atturi talbu li jiġi deċiż (i) li r-rilokazzjoni tal-Kjosk ma tispiċċax fit-30 ta' Ġunju 1974 imma fil-11 ta' Diċembru 1974, (ii) li l-atturi kellhom dritt tal-preferenza.

Il-Prim'Awla ċaħdet l-ewwel talba u laqgħet it-tieni.

Il-konvenut appella u l-atturi appellaw inċidentalment.

Il-Qorti ta' l-Appell dwar l-appell tal-konvenut illimitat ruħha għas-sempliċi dikjarazzjoni li lill-atturi jikkompeti d-dritt tal-preferenza, u laqgħet l-appell peress li t-tieni talba kienet intempestiva u għalhekk illiberat lill-konvenut mill-osservanza talġudizzju għal dawk l-aspetti l-oħra ta' dik id-domanda, u rrespinġiet l-appell ta' l-atturi. Spejjeż kollha bla taxxa, dritt tar-Reġistru għall-atturi.

Seduta tat-18 ta' Ottubru 1974.

(Awla Kummerċjali).

No. 109. Elizabeth Vassallo vs Bartolomeo Xuereb.

L-attriċi talbet il-kundanna tal-konvenut għall-ħlas ta' £M57 għas-senserija.

Il-Qorti tal-Kummerċ ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attriċi u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tal-21 ta' Ottubru 1974.

(Awla Ċivili).

No. 110. Bartolomeo Xuereb vs Victor Gauci.

Ir-rikorrent talab ir-ripreża tal-ħanut mikri lill-intimat għax dan ma kienx jifthu, u b'hekk biddel id-destinazzjoni tal-fond.

Il-Bord tal-Kera ċaħad it-talba, bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tar-rikorrent, u kkonfermat, spejjeż bla taxxa, dritt tar-reġistru għall-appellant.

F'dan il-każ il-ħanut kien jinfetaħ f'ċerti ħinijiet u dan minħabba mard serju fil-familja ta' min kien jiftaħ il-ħanut.

Seduta tal-25 ta' Ottubru 1974.

(Awla Kummerċjali).

No. 111. Joseph Vella ne vs John Ripard ne et.

Il-kumpanija assikuratriċi attriċi kienet ħalset £M438 lid-destinatarju, valur ta' merkanzija importata, li ma ġietx konsenjata lilu, u talbet li l-konvenuti jew min minnhom jiġi kkundannat iħallas £M420 valur ta' dik il-merkanzija.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront tal-konvenut Ripard u lliberat lill-Malta Landing & Shipping Co. Ltd. mit-talba, spejjeż għall-konvenut Ripard.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Ripard, bl-ispejjeż.

Jeħtieġ li ssir il-prova ta' l-iskrizzjoni ta' dik il-merkanzija u din il-prova trid tkun tali li skond il-liġi tissoddisfa lil min għandu jiġġudika.

No. 112. Joseph Vella ne vs John Ripard ne et.

Identika bħal ta' qabel.

No. 113. Joseph Vella ne vs John Ripard ne et.

Bħal ta' qabel.

(Awla Ċivili).

No. 114. Albert Salomone et vs Silvio Campbell.

L-attur talab li (i) l-konvenut jiġi dikjarat responsabbli ta' kol-

liżżjoni, (ii) l-likwidazzjoni tad-danni, (iii) u l-kundanna għall-ħlas.

Il-Prim'Awla ċaħdet it-talbiet bl-ispejjeż mingħajr taxxa.

Dan kien każ fortuwitu. Il-Qorti irriteniet li l-konvenut tilef il-bilanċ tal-"motorcycle" u l-kontroll tiegħu, billi inkisret l-għajn tal-molla li żżomm il-"prop stand" stirat f'postu, b'mod li din waqgħet u mbuttat il-"motorcycle" la ġenba u l-konvenut ma kienx responsabbli għall-ksur ta' dik il-molla.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi u kkonfermat, spejjeż bla taxxa, dritt tar-Reġistru għall-atturi.

Il-konvenut għandu l-piż li jipprova l-każ fortuwitu, però jibqa' dejjem dmir ta' l-attur jipprova n-negliġenza tal-konvenut.

L-ebda wieħed mid-"drivers" ma għandu presunzjoni kontra tiegħu, imma kull wieħed hu preżunt li saq tajjeb sakemm l-ieħor ma jippruvalux in-nuqqas ta' diliġenza ordinarja, traskuraġni, imperizja jew inosservanza tar-regolamenti.

Jekk ikun hemm dubbju fuq il-ħtija tal-konvenut dak id-dubbju jibqa' jimmilita favur tiegħu.

No. 115. Kummissarju tat-Taxxi Interni vs Salvino Schembri.

Ir-rikorrent talab li għat-tenur ta' l-art. 32 Kap. 70 il-Qorti ta' l-Appell tagħti l-istima ta' ċerti fondi.

Il-Qorti ta' l-Appell ċaħdet it-talba bl-ispejjeż għax il-Kummissarju kien preklużż milli jagixxi bis-saħħa ta' l-art. 32 għax il-valur tal-propjetà in kwistjoni ma kienx dak denunzjat imma kien ġie determinat bi ftehim bejn il-kontendenti.

Seduta tat-28 ta' Ottubru 1974.

(Awla Kummerċjali).

No. 116. Michael Butler vs Francis Deguara.

L-attur kien inkariga lill-konvenut jarma li "spare parts" talmagna tal-car tiegħu u ppretenda li l-konvenut ikkaġunalu ħsara kbira.

L-attur talab li l-konvenut jiġi kundannat iħallas id-danni li jiġu likwidati għal din il-ħsara.

Il-Prim'Awla iddikjarat ruħha inkompetenti għax il-konvenut kien "teacher" u kien jagħmel xi xogħol ta' "mechanic" fl-"ispare time" tiegħu u għalhekk ma kienx kommerċjant.

Il-Qorti ta' l-Appell iddikjarat kompetenti l-Prim'Awla, u irrinvjat l-atti lil dik il-Qorti.

No. 117. Avv. Dr. G.G. Gatt ne vs Paul Mifsud ne et.

L-attur (kumpanija assikuratriċi) kien irrifonda £M338 lid-destinatarju ta' merkanzija għan-nuqqas fil-merkanzija importata, u talab li l-konvenut jew min minnhom jiġi kkundannat iħalsu £M338 u l-interessi.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront tal-konvenut Mifsud ne u lliberat lill-Caruana nomine, bl-ispejjeż għal Mifsud ne.

Il-Qorti ta' l-Appell irrispinġiet l-appell tal-konvenut Mifsud u kkonfermat bl-ispejjeż.

Ma kienx jista' jingħad li ġie konvinċentement pruvat li l-merkanzija li ġiet "tallied" fl-istiva ġiet effettivament imwassla barra mill-vapur.

Il-konvenut Mifsud kellu jbati wkoll l-ispejjeż tal-konvenut l-ieħor, għax hu kien sostna li l-merkanzija ġiet sbarkata kollha, u għalhekk il-kawża kellha ssir fil-konfront tal-konvenut l-ieħor ukoll.

No. 118. Avv. Dr. G.G. Gatt ne vs Paul Mifsud ne et.

Każ identiku għal preċedenti.

No. 119. Avv. Dr. G.G. Gatt ne vs Paul Mifsud ne et.

Identiku għal ta' qabel.

(Awla Ċivili).

No. 120. Joseph Desira vs Dr. J. Filletti ne et.

L-attur talab ir-risoluzzjoni ta' enfitewsi minħabba morożità.

Il-Prim'Awla iddikjarat ruħha inkompetenti "ratione materiae".

Il-Qorti ta' l-Appell iddikjarat kompetenti il-Qorti tal-Kummerċ u irrinvjat l-atti lil dik il-Qorti.

Il-fatt li b'verbal il-partijiet jaqblu li l-Qorti tkun inkompetenti ma jiddispensax lill-Qorti milli tidħol biex tara jekk in applikazzjoni tal-liġi għal fatti hijiex kompetenti jew le.

No. 121. Joseph Paris vs John Symes et.

L-attur talab li l-konvenut jiġi kkundannat jikkonsenjalu ċ-ċavetta ta' "pram shed" propjetà ta' l-attur, mislufa lill-konvenut 'favur u temporaneament.

Il-Prim'Awla lliberat lill-konvenut mill-osservanza tal-ġudizzju,

spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat billi ċaħdet it-talba kif magħmula għall-konsenja taċ-ċavetta mingħajr preġudizzju ta' kull dritt ieħor spettanti lill-partijiet. Spejjeż ta' l-Appell mingħajr taxxa.

Il-Qorti kienet marbuta mit-termini taċ-ċitazzjoni. Il-konvenut fil-fatt kien ikkonsenja lill-attur dik iċ-ċavetta li kien silfu l-attur, u kien għamel oħrajn bħalha.

Seduta tat-30 ta' Ottubru 1974.

(Sedi Inferjuri).

No. 122. Joseph Abela vs John Vella.

Kawża dwar kolliżżjoni.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż billi l-attur ma ppruvax il-ħtija tal-konvenut.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

No. 123. Joseph Azzopardi vs Francesco Borg.

L-attur talab li l-konvenut jiġi kkundannat ineħħi l-għoġġiela li abusivament kien iżomm fil-kamra rurali, għax din kellha sservi għall-kenn tal-gabillotti.

Il-Qorti tal-Maġistrati irrispinġiet l-eċċezzjoni li kellhom jiġu msejħa fil-kawża il-konsorti l-oħra fl-użu tal-kamra. Sussegwentement laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

No. 124. Coronato Sare ne vs John C. Ripard.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M44.54.4 prezz ta' xogħol ta' rħam.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat.

No. 125. Pawla Vassallo et vs Toni Vassallo.

L-attriċi talbet li l-konvenut jiġi kkundannat jisgombra mir-remissa mikrija lilha, u minnu okkupata bla titolu.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Kwistjoni ta' provi.

No. 126. Charles Spiteri vs Lino Cassar.

Kawża dwar kollizzjoni.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

L-attur ma ppruvax, kif kien kompitu tiegħu li jagħmel, li l-kollizzjoni kienet dovuta għal ħtija tal-konvenut.

Seduta tat-8 ta' Novembru 1974.

(Awla Kummerċjali).

No. 127. Philip Grech ne vs John Caruana ne et.

L-attur talab li jiġi deċiż li l-"cargo receipts" rilaxxati mill-konvenut ne ma jirrispekkjawx il-kwantità effettivament skarikati minn abbord, u li l-merkanzija kollha kienet ġiet skarikata.

Il-Qorti tal-Kummerċ iddikjarat li l-attur iddekada mid-dritt ta' l-azzjoni peress li għaddew iktar minn tnax-il xahar minn meta l-merkanzija ġiet f'idejn il-konvenut, (Art. 45 Ord. XIII 1962).

Il-Qorti ta' l-Appell ċaħdet l-appell u kkonfermat bl-ispejjeż.

(Awla Ċivili).

No. 128. Joseph Ebejer vs Alf. Cassano et.

L-attur talab ħlas għal xogħol ta' dekorazzjoni minnu magħmul f'lukanda.

Il-Prim'Awla iddikjarat ruħha inkompetenti.

Il-Qorti ta' l-Appell iddikjarat kompetenti il-Qorti tal-Kummerċ.

Seduta tal-15 ta' Novembru 1974.

(Awla Ċivili).

No. 129. John Scicluna ne vs Mary Micallef.

Il-konvenuta investiet b'car lill-iben minuri ta' l-attur, li sofra debilitazzjoni permanenti. L-attur talab li l-konvenuta tiġi dikjarata responsabbli tad-danni, u l-likwidazzjoni u kundanna għall-ħlas ta' l-istess.

Il-Prim'Awla laqgħet it-talbiet u kkundannat lill-konvenuta għall-ħlas ta' £M4407.50 bl-ispejjeż.

Fuq appell tal-konvenuta il-Qorti ta' l-Appell irriformat u adottat il-ftehim milħuq mill-partijiet. Id-danni ġew ridotti għal £M2907.

No. 130. James Satariano vs Clo. Micallef.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M399 bilanċ ta' prezz ta' merċi lilu mibjugħa u konsenjati.

Il-Prim'Awla iddikjarat ruħha inkompetenti.

Il-Qorti ta' l-Appell iddikjarat kompetenti il-Qorti tal-Kummerċ. Il-konvenut kien kummerċjant u l-att kien kummerċjali għalih.

No. 131. Alfred Grech vs Carmelo Agius et.

L-attur talab li (i) l-konvenut jiġi dikjarat responsabbili għaddanni minnu sofferti meta l-konvenuti aggredewh, (ii) il-likwidazzjoni u kundanna għall-ħlas tad-danni.

Il-Prim'Awla ċaħdet it-talbiet.

Fuq appell ta' l-attur il-Qorti ta' l-Appell irriformat billi laqgħet l-ewwel talba u ddikjarat lill-konvenut Spiteri responsabbli taddanni li l-attur sofra, u rrinvjat l-atti lill-ewwel Qorti għal likwidazzjoni tad-danni. L-ispejjeż għall-konvenut Spiteri.

Kwistjoni ta' provi.

No. 132. George Grech vs Lonzu Zammit.

L-attur kien inkariga lill-konvenut jagħmillu x-xogħol ta' bejt ta' fond.

L-attur talab li l-konvenut jiġi kkundannat jirripara u jirranġa l-bejt għax ix-xogħol kien sar ħażin, u in difett l-attur jiġi awtorizzat jagħmel ix-xogħol hu a spejjeż tal-konvenut.

Il-Prim'Awla laqgħet it-talbiet, spejjeż bin-nofs.

Il-konvenut appella u fil-kors ta' l-appell il-partijiet ittranseġew il-kawża.

Seduta tal-20 ta' Novembru 1974.

(Sedi Inferjuri).

No. 133. Emanuel Vento vs Joseph Cardona.

L-attur talab li l-konvenut jiġi kkundannat itih sehmu minn senserija li kien daħħal.

Il-Qorti tal-Maġistrati laqgħet it-talba u kkundannat lill-konvenut iħallas lill-attur £M32.50. bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

Seduta tat-22 ta' Novembru 1974.

(Awla Kummerċjali).

No. 134. Edw. Zammit Tabone ne vs AIC Jos. Xuereb ne.

Il-Qorti tal-Kummerċ ċaħdet it-talba biex issir prova teknika.

Il-Qorti ta' l-Appell ċaħdet l-appell b'rikors tal-konvenut.

Il-Qorti ta' l-Appell bħala prinċipju, f'materja ta' regolament tal-provi ma tiddisturbax faċilment id-diskrezzjoni ta' l-ewwel Qorti, jekk mhux għal raġuni serja.

Seduta tal-25 ta' Novembru 1974.

(Awla Ċivili).

No. 135. Emle. V. Cutajar et ve Saviour Hales et.

L-attur talab li l-konvenut jiġi kkundannat jixtri post ta' l-atturi fit-termini ta' konvenju.

Il-Prim'Awla laqgħet it-talba u interpretat patt tal-konvenju fis-sens li żewġt ikmamar kienu propjetà tal-konvenut Pulis, detenuti b'lokazzjoni mill-konvenut Hales; bl-ispejjeż nofshom għall-atturi u nofshom għall-konvenut Pulis.

Il-konvenut Pulis appella u l-atturi appellaw inċidentalment mill-kap ta' l-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell ta' Pulis u rriformat fis-sens li dak il-patt kellu jiġi nterpretat li malli jsir il-kuntratt tal-bejgħ kienet tispiċċa l-lokazzjoni ta' Hales. L-ispejjeż tal-Prim'istanza jitħalsu minn Hales, dawk ta' l-appell nofs mill-attur u nofs minn Hales.

Seduta tad-29 ta' Novembru 1974.

(Awla Kummercjali).

No. 136. Giov. Muscat vs Joseph Scerri.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M510 bilanċ, għal xogħol minnu esegwit fl-interess tal-konvenut.

Il-Qorti tal-Kummerċ laqgħet it-talba limitatament għal £M410.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat fis-sens li rriduċiet għal £M100 l-ammont li l-konvenut kellu jħallas. Spejjeż kollha skond ir-rebħ u telf rispettiv.

Kwistjoni ta' fatti.

No. 137. Jos. Demanuele vs Fr. E. Spiteri et.

L-attur talab li l-konvenut jiġi kkundannat biex f'termini ineħħi l-materjal u ġebel li tefa' fil-ġnien ta' l-attur u jagħlaq l-apertura li fetaħ fil-ħajt divisorju.

Il-Qorti tal-Kummerċ laqgħet it-talba fil-konfront tal-konvenut nomine, u lliberat lill-konvenut f'ismu proprju.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut nomine u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 138. Carmena Chircop vs Thomas Abela.

L-attriċi talbet il-ħlas ta' £M150 għal medjazzjoni jew serviġi li hi rrendiet lill-konvenut fix-xiri ta' villa.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

No. 139. Avv. Dr. G.G. Gatt ne vs Paul Mifsud ne et.

Kawża dwar merkanzija li waslet mill-esteru.

L-attur, kumpanija assikuratriċi, talbet li l-konvenuti jew min minnhom jiġi kkundannat iħallas £M412.15.5 li hi ħalset lid-destinatarju tal-merkanzija għal merkanzija li dan ma rċevix.

Il-Qorti tal-Kummerċ ikkundannat lill-konvenut Mifsud ne iħallas £M376.92.9 u lill-konvenut Caruana ne £M35.84.2.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut Mifsud ne.

"Huwa neċessarju li xi ħadd ikun jissorvelja u jikkonstata li l-merkanzija in kwistjoni jew il-merkanzija in ġenerali tkun segwiet il-proċess kollu li jwassal minn l-istiva għall-moll jew għal barkun, sija pure mingħajr in-neċessità li kull partita ta' merkanzija terġa' tiġi kontrollata u identifikata wara li tkun niżlet mill-vapur" (Ara App. Kumm. 17.6.1974 Sidney Gatt vs Alf Zammit Cutajar; 17.11.72 Kapt. R. Aquilina vs Ed. Gatt ne; 24.1.1969 Degiorgio vs Laurenti; 15.11.68 Frendo vs Mifsud).

Il-Qorti ta' l-Appell ċaħdet ukoll l-appell tal-konvenut Mifsud li hu ma kellux iħallas l-ispejjeż tal-konvenut l-ieħor.

(Awla Ċivili).

No. 140. Mary Bezzina vs Emle. Vella.

Sentenza tal-Qorti ta' l-Appell tas-27/11/72 (No. 154/1972) ik-

konfermat dik tal-Prim'Awla li kkundannat il-konvenut jagħmel xi xogħol f'terminu, u fin-nuqqas awtorizzat lill-attriċi tagħmlu a spejjeż tal-konvenut. It-terminu mogħti lill-konvenut skada, u l-Prim'Awla ċaħdet it-talba tal-konvenut biex jagħmel ix-xogħol hu. Il-konvenut beda dawn ix-xogħlijiet.

L-attriċi talbet li jiġi deċiż (i) li l-konvenut ma kellux dritt jagħmel ix-xogħol hu, (ii) li l-konvenut jiġi inibit milli jagħmel ix-xogħol, (iii) li l-konvenut jiddemolixxi dak li beda jagħmel, (iv) li l-pjanta esibita mill-konvenut tilledi d-drittijiet tagħha.

Il-Prim'Awla ċaħdet it-raba' talba, u laqgħet it-talbiet l-oħra.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

"Ma jistax ikun hemm dubbju li fl-obbligazzjonijiet 'di fare' li mhumiex suscettibbli ta' esekuzzjoni speċifika mid-debitur meta l-kreditur ta' l-obbligazzjoni li ma jkunx ġie soddisfatt bl-esekuzzjoni volontarja ta' l-obbligat, jitlob il-kundanna t a' dan biex jagħmel dak li għandu jagħmel fi żmien prefiġġendi, u indifett, jiġi awtoriżżat jagħmilhom hu stess a spejjeż ta' l-obbligat, jekk dana d-debitur, iħalli t-terminu għaddej inutilment mingħajr ma jitlob u jottieni d-debita proroga mill-Qorti kompetenti, id-dritt ta' l-esekuzzjoni tax-xogħlijiet jew obbligazzjonijiet oħra formanti l-oġġett tal-kundanna jgħaddi inderogabilment għand l-attur li jkun, infatti, ġie awtoriżżat bis-sentenza li fin-nuqqas ta' l-obbligat, jagħmilhom hu stess a spejjeż ta' dana."

No. 141. Giov. Farrugia vs Giuseppa Baldacchino.

L-attur talab li l-konvenuta tiġi kkundannata tikkonsenjalu l-ktieb ta' l-irċecuti tal-kera, b'sitt riċevuti.

Il-Prim'Awla ċaħdet it-talba.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż.

Kwistjoni ta' provi.

Seduta ta' l-4 ta' Diċembru 1974.

(Sedi Inferjuri).

No. 142. Lewis Pisani vs Avv. Dr. V. Borg Costanzi ne et.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M14.11 somma rtirita indebitament mir-Reġistru, fejn kienet ġiet depositata wara l-mandat ta' qbid kawtelatorju.

Il-Qorti tal-Maġistrati laqgħet it-talba bl-i spejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut nomine u kkonfermat.

Fl-esekuzzjoni ta' mandat il-Marixxal irċieva "cheque", li hu sarraf, u ddepożita l-flus. Wara l-Bank talab il-flus 'l ura għax iċ-"cheque" ma ġiex onorat, u l-Marixxal sbanka id-depożitu u rritorna l-flus lill-Bank.

Il-Qorti irriteniet li l-isbank magħmul mill-Marixxal kien null, għax id-depositu kien sar "per rimanere".

No. 143. Polly Mizzi et vs Ant. Vella.

L-atturi talbu li l-konvenut jivvaka u jirrilaxxa għalqa minnu miżmuma b'titolu prekarju.

Il-Qorti tal-Maġistrati ċaħdet it-talba bl-ispejjeż, għax il-konvenut kellu titolu ta' lokazzjoni.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi, bl-ispejjeż.

Kwistjoni ta' kredibilità.

No. 144. Wilfred Manro ne vs Vincent Arnaud.

L-attur talab li l-konvenut iħallas £M39.50 li l-attur ħallas għat-tiswija ta' car kaġunata b'tort tal-konvenut f'kolliżżjoni.

Il-Qorti tal-Maġistrati laqgħet it-talba għax il-kolliżżjoni ġrat b'tort tal-konvenut.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat u rriteniet li l-konvenut kien responsabbli għall-kolliżżjoni ta' nofs biss u irriduċiet l-ammont għal £M19.75; spejjeż kollha bin-nofs.

Seduta tas-6 ta' Diċembru 1974.

(Awla Kummerċjali).

No. 145. Angiolina Cauchi et vs Stanislaw Azzopardi.

L-atturi talbu r-rexissjoni ta' kuntratt ta' dejn.

Il-Prim'Awla laqgħet l-eċċezzjoni tal-preskrizzjoni ta' sentejn (art. 1266 Kod. Ċivili).

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi. L-azzjoni ma kenitx dik ta' simulazzjoni.

(Awla Ċivili).

No. 146. Joseph Rizzo vs Paul Micallef.

Kawża dwar kolliżżjoni.

Il-Prim'Awla irriteniet lill-konvenut responsabbli f'4/5 u llikwidat id-danni.

Fuq appell ta' l-konvenut il-Qorti ta' l-Appell irriteniet lill-konvenut responsabbli fi kwint biss.

Seduta tat-13 ta' Diċembru 1974.

(Awla Kummerċjali).

No. 147. John Zammit vs Carmelo Bugeja.

L-attur talab ir-rifużjoni ta' £M200 minnu mħallsa żejda lill-konvenut.

Il-Qorti tal-Kummerċ laqgħet it-talba.

Il-Qorti ta' l-Appell ċaħdet l-appell tal-konvenut u kkonfermat bl-ispejjeż.

Kwistjoni ta' provi.

(Awla Ċivili).

No. 148. Anna Galea et vs Kummissarju tat-Taxxi Interni.

B'att notarili, l-atturi xtraw minn għand ommhom diversi fondi, u l-konvenut ippretenda li dak l-att kien donazzjoni parzjali u esiġa li l-atturi jagħtu avviż ta' "chargeable transmission" u ried jispezzjona l-fondi. Il-konvenut għamel assessment ex officio.

L-atturi talbu li jiġi dikjarat li dak li kuntratt kien jimporta trasferiment oneruż, u li għalhekk il-konvenut ma setax jikkunsidra l-att bħala donazzjoni parzjali, u li l-ex officio assessment kien null.

Il-Prim'Awla innominat Perit biex jistma' l-fondi, biex hekk jirriżulta jekk verament il-kuntratt kienx wieħed ta' bejgħ.

L-atturi appellaw tant b'rikors, kemm b'nota u petizzjoni.

Il-Qorti ta' l-Appell iddikjarat l-appell b'rikors irritu u null, spejjeż bla taxxa, għax għalkemm l-ewwel Qorti ma għamlet ebda dikjarazzjoni "expressis verbis" però bin-nomina ta' perit ġie aċċettat li l-konvenut seta' fiċ-ċirkostanzi tal-każ jagħmel il-likwidazzjoni "ex officio". Il-Qorti ta' l-Appell dehrilha li dan il-każ hu każ tipiku fejn dak li hu anteċedenti neċessarju tad-dispositiv u li hu ovvjament u ta' bil-fors deduċibbli minnu għandu jitqies neċessarjament involut fl-istess dispositiv u parti minnu fis-sens li fil-każ in ispecie kieku ma ġiex "deċiż" li l-konvenut seta' jagħmel l-assessment "ex officio" ma setax fid-dispositiv jiġi nominat perit.

Il-Qorti ta' l-Appell laqgħet l-appell b'nota u petizzjoni, irrivokat u laqgħet it-talbiet, bl-ispejjeż kollha għall-konvenut.

Il-Qorti ta' l-Appell irriteniet li l-konvenut ma setax jagixxi unilateralment u jiddikjara hu stess wahdu l-att donazzjoni parzjali biex imbaghad jghaddi biex jintaxxah "ex officio" bhala tali, izda dan seta' u kellu jistabbilieh permezz ta' apposita citazzjoni quddiem il-Qrati ordinarji.

(Ara Vol. XXV.i.181; XXXI.i.97; XXXII.i.138) (F'dan il-kaz il-Qorti ta' l-Appell tat zewg sentenzi separati wahda ghal kull appell.)

Seduta tas-16 ta' Dicembru 1974.

(Awla Kummercjali).

No. 149. Luke V. Gauci ne vs Jos. Aquilina.

L-attur kien kera hanut b'avvjament lill-X u dan cedih lill-konvenut li gie rikonoxxut mill-attur. L-attur avza lill-konvenut li ma riedx igeddidlu l-lokazzjoni.

L-attur talab li (i) jigi decizz li l-konvenut kien jokkupa l-fond bla titolu; (ii) li jisgombra mill-fond; (iii) l-konvenut ihallas danni talli baqa' jokkupa l-fond.

Il-Qorti tal-Kummerc laqghet l-eccezzjoni u ddikjarat li l-lokazzjoni kienet ta' hanut u iddikjarat ruhha inkompetenti li tiehu konjizzjoni tat-tieni talba, u cahdet it-talbiet l-ohra, bl-ispejjez.

Il-Qorti ta' l-Appell laqghet l-appell ta' l-attur, irrevokat, cahdet l-eccezzjoni, laqghet l-ewwel u t-tieni talba, u tat lill-konvenut erba' xhur zmien biex jisgombra, u rrinvjat l-atti lill-ewwel Qorti bl-ispejjez ghall-konvenut.

"Wiehed irid ihares lejn dak li kien fl-intendiment tal-kontraenti l-oggett veru u sostanzjali tal-kuntratt u jekk hux cioè il-bini fih innifsu bhala lokal jew inkella principalment l-azjenda kummercjali bhala tali gestita fih (App. Kum. 16.10.72 Emle. Camilleri vs Ant. Deguara u App. Kum. 17.5.1968 Clo. Mallia vs Giov. Falzon).

It-test hu jekk fil-lokazzjoni huwiex kompriz "a business concern".

No. 150. C. Pace vs Rowey Portanier.

L-attur talab il-hlas ta' prezz ta' materjal ta' kostruzzjoni.

Il-Qorti tal-Kummerc laqghet it-talba bl-ispejjez.

Il-konvenut appella. Il-konvenut ma kienx xehed u ried jixhed, u hu u l-avukat tieghu ma setghux jattendu l-Qorti meta ingħatat is-sentenza.

Il-Qorti ta' l-Appell cahdet l-appell u kkonfermat bl-ispejjez.

Il-Qorti irriteniet li fiċ-ċirkostanzi ma setax jingħad li hemm raġuni valida ta' ġustifikazzjoni għal li fis-seduta in kwistjoni ma dehrux la l-appellant u lanqas ebda avukat. (App. Reginald Orwell Jackson vs Ph. Hynes 26.5.69, u App. Salv. Ciangura vs Jos. Mallia 16.4.72). (F'dan il-każ il-konvenut kien marid u l-avukat tiegħu imsiefer).

No. 151. Carmelo Brincat vs Anthony Borg.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M1200 prezz ta' kompressur u gaffa, bl-imgħax kummerċjali. Il-konvenut kien għamel xi xogħol ta' bini għall-attur, liema xogħol ġie stmat minn Perit li sewa £M859.79.

Il-Qorti tal-Kummerċ ikkundannat lill-konvenut iħallas £M340.21.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-attur bl-ispejjeż. L-attur ippretenda li hu kellu jieħu wkoll minn għand il-konvenut £M800 għall-prezz ta' "truck"; u għalhekk mill-£M859.79 tax-xogħol, £M800 kellhom jiġu kompensati għall-prezz tat-"truck", u għalhekk kien fadallu jieħu £M800 oħra. Il-Qorti irriservat lill-attur kull dritt talvolta lilu spettanti in konnessjoni mal-kwistjoni tat-"truck". Il-prezz tat-"truck" ma kienx kompriż fiċ-ċitazzjoni.

No. 152. Conti F. Sant Cassia ne vs Joseph Manro ne.

L-attur kien xtara van minn għand il-konvenut. Il-van kellu xi difetti, u l-konvenut irranġa dawk id-difetti li kienu koperti minnu b'garanzija.

L-attur talab il-kundanna tal-konvenut għall-ħlas tad-danni, billi l-attur kellu jikri van ieħor sakemm l-ewwel wieħed issewwa.

Il-Qorti tal-Kummerċ laqgħet it-talba u kkundannat lill-konvenut iħallas £M120 u l-ispejjeż.

Il-Qorti ta' l-Appell laqgħet l-appell tal-konvenut, irrevokat u ċaħdet it-talba, spejjeż kollha bla taxxa, dritt tar-reġistru għall-attur.

L-azzjoni ta' l-attur kienet bażata fuq id-dewmien tal-konvenut fl-eżekuzzjoni ta' obbligazzjonijiet tiegħu bħala venditur taħt il-klawsola ta' garanzija; din il-garanzija kienet tikkomprendi d-danni reklamati. L-inadempjenza tal-konvenut ma tistax skond il-liġi tirriżulta ħlief mill-kostituzzjoni tiegħu in mora permezz ta' att ġudizzjarju ta' l-attur skond ma jiddisponi l-art. 1173(2) tal-Kodiċi Ċivili. F'dan il-każ il-konvenut ma ġiex kostitwit in mora, u għalhekk kwalunkwe indaġini oħra dwar il-grad tad-diliġenza adoperata mill-konvenut fl-eżekuzzjoni tal-garanzija jew dwar fat-

turi estranei li għalihom l-allegat dewmien tiegħu jista' talvolta jkun attribwibbli tirriżulta superfluwa. (Kollez. Vol. XXXIX.ii.585).

No. 153. Salvatore Spiteri vs Paolo Borg.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M1450.50 prezz ta' ġebel u materjal mibjugħ u konsenjat lill-konvenut.

Il-Qorti tal-Kummerċ laqgħet it-talba bl-ispejjeż.

Fuq appell tal-konvenut il-Qorti ta' l-Appell irriformat billi irriduċiet is-somma għal £M14.14. Spejjeż kollha skond ir-rebħ u telf rispettiv.

Il-Qorti irriduċiet il-prezz tal-ġebel għall-pedamenti.

(Awla Ċivili).

No. 154. Dr. George Degiorgio et ne vs Danny Cremona et ne.

Il-Malta Electricity Board kien aċċetta tender ta' l-attur nomine għas-"supply ta' distiller" u "pumping plant" u l-atturi kienu bagħtu xi materjal Malta. Wara l-elezzjoni, il-Gvern ma riedx ikompli bil-proġett.

L-atturi issa talbu l-ħlas tad-danni, konsistenti fit-telf ta' profitti li kienu jagħmlu.

Il-Prim'Awla laqgħet l-eċċezzjoni u ddikjarat ruħha inkompetenti mħabba nuqqas ta' ġurisdizzjoni, għax skond il-kuntratt kull kwistjoni bejn il-partijiet kellha tiġi riferita lill-arbitru. Spejjeż għall-atturi nomine.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi nomine u kkonfermat bl-ispejjeż u dan in kwantu il-vertenza partikolari li tifforma mertu ta' din il-kawża taqa' fl-ambitu ta' l-imsemmija klawsola arbitrali bħala konoxxibbli mill-arbitru. (Ara wkoll Nutar Dr. Gius. Sammut ne vs. Jos. Preca ne. App. 18.10.71).

No. 155. Helen Zammit et vs Dr. Alf. Cauchi M.D.

L-atturi ippretendew li l-konvenut ikkommetta spoll billi għamel "fence" f'parti tar-raba tagħhom, u talbu dikjarazzjoni f'dan issens, u li l-konvenut jirreintegra lill-atturi fil-possess tal-parti tal-għalqa li minnha il-konvenut spossesshom.

Il-Qorti ta' Għawdex (Superjuri, Ċivili) ċaħdet it-talbiet bl-ispejjeż.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi u kkonfermat bl-ispejjeż.

L-atturi ma ppruvawx li kellhom il-possess tal-parti ta' l-art li minnha ippretendew li ġew spoljati.

No. 156. Francis Coleiro vs Anthony Stellini.

B'sentenza tal-Qorti ta' l-Appell Coleiro ġie kkundannat jisgombra minn fond, u ġie mogħti fond ieħor fejn Stellini kellu jagħmel alterazzjonijiet strutturali u xi xogħol ieħor.

L-attur issa talab li jiġi deċiż li x-xogħol ordnat b'dik is-sentenza kien għadu ma sarx, u fejn sar ma sarx kif kellu jsir.

Il-Prim'Awla ċaħdet it-talbiet ta' l-attur bl-ispejjeż.

Il-Qorti ta' l-Appell irrespinġiet l-appell ta' l-attur u kkonfermat bl-ispejjeż.

Fil-kors ta' l-appell l-attur ippretenda li jressaq bħala xhud lill-perit li kien ġie nnominat mill-ewwel Qorti. Din il-pretensjoni tiegħu ġiet miċħuda.

No. 157. Rev. Fenech D.C. ne vs Katherine Jackson.

L-attur talab li l-konvenuta tiġi kkundannata tneħħi grada, ħwat u pjanti li hi kienet għamlet fi sqaq privat fl-Imdina.

Il-Prim'Awla laqgħet it-talba limitatament għall-ħawt li kien jinsab fil-fond ta' l-isqaq u l-pjanti ta' ġo fih, spejjeż bla taxxa, dritt tar-Reġistru għall-attur.

Il-Qorti ta' l-Appell ċaħdet l-appell ta' l-atturi bl-ispejjeż. Millprovi ma kienx jirriżulta li l-konvenuta għamlet il-grada u l-ħwat lamentati; hija kienet poġġiet ħawt wieħed biss.

No. 158. AIC. Clo. Falzon vs Fr. Pace.

L-attur talab il-kundanna tal-konvenut għall-ħlas ta' £M90 għaddrittijiet professjonali.

Il-Prim'Awla laqgħet it-talba bl-ispejjeż.

Il-konvenut appella u fil-kors ta' l-appell il-partijiet ftehmu li l-konvenut iħallas £M45 per sald.

Il-Qorti ta' l-Appell tat sentenza fit-termini tal-ftehim.

Fil-ħarġa li jmiss, nippublikaw l-indiċijiet ta' din il-ġabra, kif ukoll ġabriet u indiċijiet tal-Qorti ta' l-Appell Kriminali, Superjuri u Inferjuri.

LAW SOCIETY FORUMS

DEVELOPMENTS IN THE RELATIONS BETWEEN EMPLOYERS AND EMPLOYEES

This forum was held on Thursday 20th. of February, 1975 in the Science Lecture Theatre at the University, Msida. The Chairman, Dr. Wallace Ph. Gulia LL.D., B.A., B.Sc., Ph.C., M.S.(Admin.) (Manch.), D.P.A.(Lond.), opened the proceedings at 6.00 p.m. by introducing the panel of speakers: Dr. Carmelo Mifsud Bonnici B.A., LL.D., Dr. Joseph Micallef LL.D., Prof. Salvino Busuttil Ph.D.(Ang.), Ph.D.(Manch.), Mr. George Agius Dip. Pol.Econ.(Oxon.) and Mr. A. Curmi, a very obliging last minute substitute for Mr. E.T.C. Calascione who could not attend the forum. The forum was conducted in Maltese.

The first speaker was Dr. Carmelo Mifsud Bonnici who gave a brief exposition of the legal situation in Malta. He explained in synthesis the main provisions of the Trade Unions and Trade Disputes Ordinance 1945, which deals basically with the law of industrial conflicts; the Conciliation and Arbitration Act 1948, which attempts to prevent or settle such conflicts; the Conditions of Employment (Regulation) Act (1952) which deals with the legal intricacies of a contract of service. Dr. Mifsud Bonnici also made reference to several special laws referring to specific classes of employment. The speaker went on to point out that industrial practices were, perhaps, more important than industrial laws, and ended by commenting on the lack of any legislation regulating Collective Agreements.

Dr. J. Micallef, speaking on trends in Europe, started off from the premise that the company should be run both by Management and by employees. This would lead, he said, to arguing for representation on Boards of Directors. He then went on to point out the significance of Works Councils in harmonious industrial relations. Dr. Micallef urged that the Works Councils should also comprise representatives from outside the plant itself, from consumer societies for instance. The speaker ended by stressing the importance of greater information to the workers, since they do, after all, have an almost equal interest in the plant as the proprietors.

Prof. S. Busuttil, speaking of the economic implications of Industrial Relations, pointed out that the days of conflict between entrepreneur and employee are numbered. Proprietor and worker

are today being forced into the same front, directing their powers against a common enemy – the multinational company.

Mr. A. Curmi dwelt on the need for dialogue between capital and labour as the natural background within which industrial legislation can be truly effective.

Mr. G. Agius traced the history of Maltese Industrial Conflict from 1945 to the present day. While laying stress on the strength of a trade union and the pressure it can bring to bear on enterprise, Mr. Agius maintained that industrial disputes can be reduced, if not altogether avoided, by improving the general relations between employer and employee. Mr. Agius ended by urging the adoption of a sound credit-system backed by the state, on the West German and Japanese style, because this would ensure the stability of private enterprise, and, therefore, of labour.

After questions, the Chairman closed the forum by thanking the speakers and audience for their participation.

THE ADVERSARY SYSTEM

This forum was held on Wednesday, 26th February, 1975 in the Science Lecture Theatre at the University. The Chairman, Professor J.M. Ganado B.A. Ph.D.(Lond.) LL.D., started the evening off at 6.30. by briefly introducing the subject and the speakers: Dr. Victor Borg Costanzi LL.D., Dr. Hugh Harding B.A., LL.D., F.S.A., F.R.Hist.S, and Dr. J.L. Grech Ph.C., M.D., D.C.P.(Lond.), D.M.J., M.C.Path. In delimiting the area of discussion, Prof. Ganado postulated the following three questions: should experts be appointed by the courts, what control should the court have on the production of evidence, and should it ever take the initiative in the latter field?

After defining the adversary system as that system of procedure whereby the parties are allowed to produce any evidence in their favour to the exclusion of any competing initiative on the part of the court, Dr. Borg Costanzi pointed out that our own law adopts the inquisitorial system which grants much more control to the presiding judge or magistrate. This inquisitorial element is present not only in the obvious instance of an inquiring magistrate at the stage of the compilation of evidence, but all through the judicial process, right up to the court of appeal. Concentrating on criminal justice, Dr. Borg Costanzi dwelt at length on the point that this power of judicial initiative is a safeguard of true justice, in that the Court sweep corners unswept by counsel for defence or for prosecution.

Dr. Harding spoke first of the power granted to the Court in sec-

tion 644 of the Criminal Code of producing witnesses itself. This inquisitorial element in our law is preferable to the adversary system because, the speaker said, it ensures a greater amount of impartiality and prevents the sorry spectacle of two men brilliant in their field giving diametrically opposed evidence in open court. Dr. Harding put some useful suggestions which might render the application of our law less cumbersome: the courts should increase their control on experts; the courts should limit themselves to appointing truly technical experts, and do away with the practice of appointing legal experts; and finally, the appointment of additional experts should further be curbed. As far as initiative in the production of evidence is concerned, Dr. Harding concentrated on the power of the Court of Appeal to call in witnesses who had not given evidence at first instance. Dr. Harding approved of the wide application given to this rule by our courts in the interests of justice.

The last speaker, Dr. Grech, dwelt on the point that an application of the adversary system could lead to the loss of a good reputation because it is humanly impossible for an *ex parte* expert witness not to become involved in the particular case. The inquisitorial system does away with this problem. Dr. Grech then went on to make some practical points about expert evidence in general: the courts should be very careful to choose an expert precisely relevant to the point which stands to be decided; every witness should admit to himself and to others the insufficiencies of the natural sciences, and he should take care to distinguish between fact and opinion; on the other hand, counsel on either side of the fence should never expect a straight 'yes' or 'no' from an expert witness, precisely because of the imprecision of science; and finally, it is imperative that the various professions intermingle in order better to realise the limitations of each discipline which may come up in a court case.

After adding his own personal comment in favour of an eclectic system enjoying the best of both worlds, Professor Ganado opened the discussion to the floor, an invitation taken up wholeheartedly, as appeared from the number of interesting questions put to the panel. The Chairman put an end to the evening by thanking panel and audience for their participation.

CORRESPONDENCE

Sir,

Every year historical Schloss Leopoldskron, built in 1736 by the Archbishop of Salzburg, and its adjoining Meierhof (the recently renovated rustic building adjacent to the Schloss), provide a venue for seven different sessions, lasting either three or four weeks, each on a different subject. The sessions are designed to bring together potential leaders of Western and Eastern European countries as well as American authorities, thus providing a unique and open forum for the mutual exchange of information and international opinion.

The Salzburg Seminar was established in 1947 by the student council of Harvard University. It is an independent, privately-financed, non-profit corporation, responsible only to the spirit of free inquiry. It has its own Board of Directors and a European Advisory Council composed of Seminar alumni. Most of the funds supporting the Salzburg Seminar are gifts and grants from individuals, corporations, and foundations.

Each summer, a session on 'American Law and Legal Institutions' is held, lasting four weeks. The aims of this session are threefold:

(i) to provide a panoramic view of the most important aspects of the American legal system,

(ii) to impart an understanding of the patterns of legal reasoning used by American lawyers, and

(iii) to give Fellows an opportunity to go more deeply into a particular legal area of their own expertise or choosing.

These aims are accomplished partly by morning lectures followed by discussion for the entire group of Fellows, averaging 50, with small group seminar meetings in the afternoons intended for specialisation, and partly by the amiability and complete freedom of expressing opinions that characterise the session, as well as the comparative work that is facilitated by a library supplemented by texts made available by the Faculty members – distinguished American judges, professors and practising lawyers.

The topics normally dealt with in the legal session cover the judicial process and the role of the judge in the American legal

system; remedies against the government, raising issues of administrative and constitutional law; criminal law, including the functions of police agencies and sentencing and treatment practices; public interest law, with reference to selected controversial issues; and anti-trust laws, including the measurement of monopoly power, the limits on collaboration among competitors, the limitations on permissible mergers and joint ventures, and the extra-territorial application of American anti-trust law.

Though the work done at the Schloss is intensive, this is carried out in a thoroughly relaxing atmosphere that is enhanced by the natural beauty of the surrounding countryside and by an intermingling of cultural and social activities sponsored by the Seminar, including classical candlelight concerts and excursions to the Alps. Besides, the Schloss contains its own Bierstübe, and lies only a twenty minute walk from the centre of Old Salzburg. The staff and Faculty themselves play no small part in maintaining this informal atmosphere throughont the respective sessions.

At the completion of each session, the Fellows become Alumni of the Salzburg Seminar and, inter alia, participate in Alumni Reunions at the Schloss.

From my attendance at session 163 on 'American Law and Legal Institutions' the past summer, I cannot but agree with Dr. Thomas H. Eliot's, president of the Seminar, description of the Salzburg Seminar, description of the Salzburg Seminar as a focal point for a better understanding among people of many nations. It truly provides a continuing voice of 'sanity and friendship' amidst worldly strife, acting as a small but significant binding force bringing and KEEPING poeple together.

(David Scicluna)
Alumnus of
the Salzburg Seminar
in American Studies
(1975)

We would like to thank Maria Cordina, Adrian Borg Cardona, George Hyzler, Andrew Borg Cardona and Tanya Vella for their help in the publication of this issue.

 All contributions, advertisements or inquiries should be addressed to the *Editor, c/o Faculty of Laws, University of Malta.* It would be appreciated if articles are forwarded in double-spaced typescript. Original works will be given preference.