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CONTENTS

THE CONCEPT OF RETROACTIVITY:

Its variations in the different branches of law.

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THE concept of retroactivity has a deceptively theoretical content. The most irresistible temptation is to treat it as merely designating a particular mode of operation of the legal norm, i.e. the process whereby such norm can be made to apply to *past* situations, which are properly regulated by earlier norms dealing with the same subject-matter. This outlook, in its insistence on limiting a theory of retroactivity to a study of the relation between static, consecutive norms within a legal system, with reference merely to a given juridical situation or fact, tends to overlook the truth that the real core of the theory is NOT the legal system, but LAW ITSELF, viewed as a dynamic structure which is capable of determining the course of social and economic progress within society. The purely theoretical content is reflected in the analogy drawn by Savigny, according to which retroactivity explores the juridical line of communication between two consecutive laws, just as private international law explores the points of intersection between contemporaneous legal systems. But, such an approach is insufficient: it still needs to be complemented by the sociological and personal background, which animates the concept under analysis. Indeed, the very *raison d'être* of a theory of retroactivity is to ensure a smooth evolution of social progress, free from any 'juridical leaps' that could impair rights acquired under old laws, enacted by the proper state-organ or authority. This implies that the underlying principles of a general theory of retroactivity are:

(i) Laws introducing brand-new institutions, as The Emergency Labour Corps Act (1972), are excluded by the theory because they stand in no special relation to the past.

(ii) Laws effecting substantial reforms in existing institutions should, as far as possible, avoid impairing rights acquired under the old law.

(iii) Laws which abolish completely existing institutions or rights should, as Gabba rightly maintains, operate only for the future, thus leaving intact the rights or institutions validly constituted under the old law. This refutes the theory of retroactive operation of so-called prohibitive laws, proposed by Lasalle.

The above 3 principles show that the theory of retroactivity *naturally*, and paradoxically at the same time, approves of the Latin maxim *lex non habet oculos retro*. Indeed, some writers, among them Clementine and de la Grassaye, have exalted this principle of non-retroactivity of law to the status of a *Grundnorm*, which unifies all fields of law, whether private or public. Even some modern codes have found it convenient to insert an article providing for the non-retroactive operation of law in general. In Italy, for example, Section II of the Preliminary Title to the Civil Code provides:

> 'La legge non dispone che per l'avvenire: essa non ha effetto retroattivo.'

Attempts have been made before the Italian Constitutional Court to attribute a constitutional significance to this provision. But, the said Court has repeatedly declared that no law can be declared invalid on the grounds that it contravenes Section II, for the principle of non-retroactivity has received constitutional protection only in the criminal law field. Along these lines, the Italian Court of Appeal on the 7th May, 1966, argued as follows:

> 'La irretroattività delle leggi è costituzionalmente garantita con esclusivo riferimento alle norme penali e non anche alle norme civili, amministrattive e tributarie, rispetto alle quali, l'irretroattività non è stabilita in modo vincolante, neanche dall'art. 11 poichè questa disposizione, avendo valore di legge ordinaria, può essere derogata da altra norma di pari efficacia.'

What, therefore, is the legal force of Section II? A number of Italian judgments in the 1960s concur in the view that the principle of non-retroactivity of laws, with the exception of criminal law, is merely 'un principio generale del (nostro) ordinamento giuridico'; and therefore, 'il legislatore conserva piena facoltà di derogarvi quando eccezionalmente lo ritenga opportuno. Accordingly Section II prescribes merely a rule of construction, to be followed by the Court, when no transitory provision exists in a repealing or amending Act. The same situation prevails in France, in virtue of the identical provision contained in Section2 of the Preliminary Title to the Civil Code.

In Malta, the general provision relating to retroactivity is con-

tained in section 12 of the Interpretation Act of 1975. It is more detailed than the sweeping article of the two said Codes, but its sphere of application is equally far-reaching and permeates into all fields of law. In sub-section (1), which deals with *Repealing Acts passed after commencement of the 1975 Act*, it enunciates, and unlike the French and Italian provision, even gives substance to the principle of non-retroactivity, by making it binding upon Maltese Courts to apply the doctrine of vested rights, whenever no transitory provision exists in a legal instrument. Accordingly it provides that the said Acts shall not – unless the contrary intention appears:

> ... (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any law so repealed.
>
> (c) affect any right, privilege, or liability acquired, or accrued, or incurred under any law so repealed.

The same principle is made to apply to *Amending Acts*, irrespective of the date when passed, by sub-section (2). The word 'Acts' used in Sub-Sections prima facie limits its application to laws enacted by Parliament. This, however, is not the case, for section 2 provides that 'Act' as used in the 1975 law itself includes any instrument having the force of law, excepting only such instruments as may be subject to the provisions of the Interpretation Act 1889, passed by the U.K. Parliament, e.g. the 1964 Constitution. Accordingly, subject to this exception, the doctrine of vested rights *must* be applied by our Courts even when the repealing or amending instrument is some particular type of subsidiary legislation. Another important feature of the Interpretation Act is that it distinguishes between a repealing and an amending Act from a purely theoretical angle, and not from the point of view of their effects. This is implied from the definition of 'amendment', given in sub-section (3) of section 12, which includes also substitution and replacement. Bearing in mind that the latter two processes can effect the prohibition of certain rights or institutions, it can be stated that *abolition, as opposed to mere reform of existing rights, does not really characterize the notion of repeal under section 12 of the 1975 law. What really distinguishes repeal from amendment is the fact that the legislator has decided to efface a legal norm without inserting a new one in its place.* Such an approach is definitely recommendable because it provides a criterion which is absolute, and is, of its very legal nature, easily discernible.

Having examined the approach adopted by our Interpretation

Act in the field of retroactivity, it is worthwhile to examine whether section 12 does in fact succeed in achieving some constitutive effect or in eliminating some of the vagueness surrounding the theories of retroactivity, previously relied upon by Maltese Courts, i.e. the theory of Gabba and Pacifici Mazzoni. Any idea that section 12 is binding on the legislator until he decides to repeal it is untenable. The phrase 'until the contrary intention appears' implies that the legislator is still free to insert a transitory provision which is in complete defiance of the doctrine of vested rights. The fact acknowledged by the Civil Court, in *Azzopardi Zammit vs Formosa* (1931) that 'la giurisprudenza ha sempre riconosciuto questa facoltà nel legislatore di rendere retroattiva una legge indipendentemente del fatto che tale legge lederebbe diritti quesiti' is still juridically valid. Moreover, the principle that, in absence of an express provision prescribing retroactivity, operation for the future is to be presumed, had been repeatedly asserted by our Courts. Accordingly, in *Mizzi vs Farrell* (1945), the Court of Appeal annulled a Rent-Board's decision on the grounds that the said Board had applied retroactively a law regulating increase of rent. It explained that 'ma hemmx fl-Ordinanza 16 tal-1944 l-ebda dispożizzjoni li tagħti lill-istess Ordinanza forza retroattiva; u għalhekk hija ma tistax tiġi applikata ħlief għal żmien wara d-data tal-promulgazzjoni tagħha.' Indeed, neither does section 12 resolve any problem concerning the application of the doctrine of non-retroactivity, for the Courts will still find difficulty in determining the point at which a 'right, privilege or liability' has been 'acquired, accrued, or incurred' under the repealed law. Indeed, far from subverting the present state of law, section 12 may be said to constitute mere formulation of the judicial trend that has till now prevailed in Malta.

The doctrine of vested rights, as expounded by Gabba, therefore, still retains its former juridical importance. As a starting point of his definition of a vested right or 'diritto acquisito', he criticizes the definitions brought forward by other jurists in determining which elements to include within his own definition. The elements he arrives at are the following:

(i) Vested rights must have entered the '*patrimonio*' (property) of the subject. This idea he borrowed from Meyer, who defined them as 'diritti che diventarono proprietà di colui che li esercita, cosicchè costui può goderne e dispome nel modo più assoluto.' Similarly Merlin had said that vested rights are 'quelli che sono entrati nel nostro dominio'. Savigny, too, maintained that such rights 'costituiscono un oggetto della signoria individuale'. All

these interchangeable terms mean to establish the truth that a vested right is one which, at the moment of its acquisition, enters within the patrimony of the acquiring subject. Accordingly, not all the rights possessed by an individual are vested rights, e.g. rights of capacity are not rights in the proper sense, because they lack the element of enforceability; there is no person against whom I can enforce my right of citizenship. If the State refuses to recognize me as citizen in its law, I must remain without my legal remedy.

(ii) Vested rights must necessarily be differentiated from the so-called 'diritti consumati'. This idea Gabba took over from Reinhardt's and Spangenburg's definitions, themselves improved upon by Savigny who said that a vested right 'è ogni diritto fondato su di un fatto giuridico accaduto *ma che non venne ancora fatto valere.*' A consummated right, therefore, is one which has not only gained access into the 'patrimonio' of the individual, but has actually become at one with it, thus making it impossible for any new law, *even if made expressly retroactive by the legislator*, to be applicable in its regard. Gabba maintains that these rights can be either those sealed by an inappealable Court judgement or by compromise.

(iii) Vested rights are not necessarily created voluntarily by the individual; they may also accrue to the individual, by operation of the law. Bearing in mind these three elements, Gabba formulates the following definition: '*È acquisito ogni diritto che (a) è conseguenza di un fatto idoneo a produrlo, in virtù della legge del tempo in cui il fatto venne compiuto, benchè l'occasione di farlo valere non siasi presentata prima dell'attuazione di una legge nuova intorno al medesimo e che (b) a termini della legge sotto l'impero della quale accade il fatto da cui trae origine, entrò immediatamente a far parte del patrimonio di chi lo ha acquistato.*' Accordingly, the acquisition of a vested right is marked by the point of intersection between a juridical situation and the law which regulates it. 'La dottrina del diritto quesito,' says Gabba, 'è in sostanza il risultato di una sintesi dei principi concernanti ciascuno dei suoi due elementi componenti che sono: il diritto obiettivamente considerato, e il fatto acquisitivo che trasforma quello da obiettivo in subiettivo o individuale.' A legal norm, on its own, therefore, cannot be productive of a vested right. It is only when the juridical situation contemplated by it comes into existence, that it acts upon the said norm and in accordance with it produces a vested right in the individual. It is precisely this element of bilateralism that characterizes the notion of a vested

right, and gives rise to the *four requisites, which a juridical fact must satisfy before it can act through the legal norm to convert it into a concrete, vested, and individual right:*

(1) The fact capable of grounding acquisition must have been fully accomplished in terms of law. Thus, if the period of acquisitive prescription is of 30 years, and on the date of commencement of a new law increasing the said period, it is still in its 28th year, it cannot be claimed that ownership has been acquired. On the other hand, if the 30 years have elapsed before the commencement of the new Act, the new prescriptive period cannot apply, for the acquisitive fact has been fully accomplished.

(2) The fact allegedly grounding the acquisition of a vested right must be posterior to, or at least contemporaneous with, the law in virtue of which such right is generated.

(3) The parties must have the required legal capacity.

(4) And they must have observed all the formalities prescribed by law.

The *first* requisite, relating to the *fait accompli* gives rise to many legal difficulties. Accordingly, bearing in mind the truth that some juridical transactions can only be accomplished in separate stages, as a contract which requires a proposal and an acceptance, Gabba determines the three cases in which we can really say that such a transaction qualifies as a *fait accompli*, *even though there is some fact which still needs to occur:*

(i) When it is certain that such fact will happen. E.g. I promise to give B £M10 on Monday. B acquires the right to enforce my promise before the day on which payment is due.

(ii) When the fact is uncertain, but forms a suspensive condition of the transaction. E.g. I promise to lend B £M1000 within 2 years, if by then my business profits will have exceeded £M5000. If a new law on contracts is passed during the course of those two years, it cannot impair B's right to enforce my promise, when the condition comes true. 'I diritti condizionali' (whether contractual or testamentary), says Gabba, 'posti in essere vigendo una legge anteriore, non possono mai trovare ostacolo all'effettuazione loro nella legge nuova sotto il cui impero la condizione si avveri.' This principle has been expounded by our Courts, outside the context of transitory law, in *Cilia vs Farrugia*. In that case, the tenements occupied by plaintiff and defendant had a common well. Defendant, however, had promised plaintiff to block the well as soon as he would become owner. The Court, relying on the principle that 'l-adempiment tal-kondizzjoni għandu effett retroattiv

għall-epoka meta jkun sar il-kuntratt,' held that once the plaintiff did become owner, he was bound to fulfil his obligation, in accordance with the terms agreed upon at the moment of conclusion of the contract.

(iii) When the missing fact constitutes a mere evolution of the vested right in which it is rooted. E.g. the right of action. Outside these three hypotheses, the juridical transaction cannot be productive of a vested right; it is still a '*fatto acquisitivo incompleto*', which gives rise to mere '*aspettative*' or expectations of true rights. E.g. the expectation of a person who is in the course of acquiring through prescription.

An important feature of Gabba's doctrine is the three-graded hierarchy which envisages these categories of rights: (i) consummated rights; (ii) vested rights and (iii) the so-called *facoltà di legge*, which are mere pseudo-rights, incapable, by their own nature, of gaining access to the juridical notion of 'diritto acquisito'.

While dealing with the notion of facoltà, Gabba points out that, having regard to the facultative element virtually characterizing all rights, it is only with great difficulty that a juridical distinction between 'facoltà' and 'diritto acquisito' can be formulated. Indeed, there exists no substantial distinction between them; the only difference being that 'facoltà' mark the point of origin of vested rights: most vested rights have, at some point prior to their acquisition, subsisted in the form of a faculty conferred by law. 'Le facoltà non possono venir contrapposte ai veri e propri diritti, se non intendendole anteriori ai medesimi ... *Codestà anteriorità ad ogni e qualsi voglia diritto è il solo criterio sicuro e assoluto onde contraddistinguere le facoltà dai diritti quesiti.* The *facoltà*, therefore, always precedes the vested right. It is only when the individual actually utilizes such faculty that he *ipso facto* converts it into a vested right, and forestalls the operation of a new law in his regard. *Until* he does utilize it, however, any new law can take it away from him; and he has no grounds upon which to raise any complaint. E.g. If a new law is to the effect that persons formerly capable of making a will are now rendered incapable, no one of them, who has not made a will under the old law, can claim the capacity taken away from him; on the other hand, wills validly made under the old law remain valid.

Another distinguishing feature of a 'facoltà' is that, in virtue of equity, the mere commencement of its execution suffices to effect the conversion into a vested right. This principle, however, must be applied with moderation, having regard always to the acuteness

of the individual benefit derived from the alleged vested right. E.g. A new law which abolishes divorce should not be allowed to affect pending divorce proceedings.

A third feature relates to the process whereby the attribute of 'facoltà' is denied to all those faculties arising out of true vested rights, e.g. the faculties which accrue to the parties in virtue of a contract between them. In such cases, the faculties are deemed to be juridically unified with the vested right from which they flow, i.e. they are true vested rights.

The application of the distinction between a faculty and a vested right is occasionally subject to juridical controversy. The right of action, for example, has been treated by writers like Weber as a mere faculty which can be taken away retroactively by a new law, provided it has not been exercised. Gabba, however, rightly enough, recognizes the dependance of a vested right upon the action which protects it, and maintains *that actions which protect vested rights are themselves, in virtue of that fact, vested rights* which cannot be removed by a new law. Accordingly, if I have a right of action under a particular law, I can utilize such right even *after* its abrogation, provided the causes of action arose before such abrogation. This was the line followed by English Courts in the *Smithies and National Association of Operative Plasterers case* (1909), where they declared that section 4 of the Trade Disputes Act, which granted immunity to specified trade unions, was *not* retrospective. Therefore, since the causes of action against the Association, itself a registered trade union, had arisen before the commencement of the said Act, the action had to be maintained. It is also the line followed by section 12 of the 1975 Interpretation Act, which provides that a repealing Act shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as has been acquired, accrued, or incurred under the repealed law. Moreover, 'any such investigation, legal proceeding or remedy may be *instituted*, continued or enforced.' This shows that under our law a right of action is a vested right, and is enforceable even *after* the abrogation of the law which grants it. The doubt which arises is whether our Courts will apply the above provision to ALL actions, or as Gabba maintains, only to actions which protect vested rights and not mere faculties. The answer lies in the interpretation which the Courts will give to the words (12(1)(c)) 'any right privilege or liability acquired, accrued, or incurred under the repealed law'. If they will accept Gabba's doctrine that, say, rights of capacity, rights regulating

status, and perpetual rights are mere faculties, *not* falling under sub-paragraph (c), they will also have to accept that actions protecting such rights, as actions for disavowal, are also faculties and the principle of non-retroactivity does not apply in their regard. A second doubt arises, in the case of *amending* Acts, in respect of which, there exists no provision similar to sub-paragraph (c) of sub-section (1), relating to legal proceedings. Does the absence of such a provision mean to imply that when a right of action is lost in virtue of an amending act, it is not enforceable, after the commencement of the said Act, even in respect of causes of action arising before commencement? The issue will eventually depend on Court interpretation.

It is now possible to apply the doctrine of vested rights to civil relations. The law of persons will serve as an appropriate and intriguing starting-point. Most of the legal norms in this field of law are concerned with the regulation of personal status, whether viewed from the point of view of the family, as legitimacy, illegitimacy, paternity, adoption, or from the point of view of society, as citizenship, tutorship, curatorship. Gabba maintains that all such 'rights' fall under the category of 'facoltà', and once the legislator takes them away or reforms them, no person who has not made use of them under the old law can claim them back. E.g. If a new law provides that nationals of State X cannot become citizens of Malta, none of the said nationals who has *not* acquired citizenship under the old law can allege violation of a vested right. This example shows that the *raison d'être* of the principle of retroactivity of laws regulating status is that status is creative of durable effects, in respect of which the State reserve its right to legislate. To expect that State legislation on citizenship or marriage will apply only to persons who have not yet acquired citizenship or entered into matrimony would be to discard all considerations of smooth evolution of social progress. Even the individual cannot legitimately expect that his citizenship and matrimonial rights will remain unaltered. Indeed, all rights accruing from status are of their own nature elementary, or to use Gabba's term – *'fondamentali' – because they represent the sine qua non conditions which must be fulfilled before all other rights can be acquired.* And 'queste condizioni o premesse fondamentàli dei veri diritti', says the same author, 'sono date dalla civile convenienza e dalla legge che la governa, e per natura loro, devono restare in potere della società e della legge senza mai diventare diritti quesiti, inviolabili dell'individuo.' This, however, does *not* mean that there exist no vested rights in the field of personal

status: the basic principle which is in force declares that *once a status which is favourable to the individual has been acquired, e.g. legitimacy, it cannot be lost, in virtue of a new law.* This principle applies also to the status of husband and wife created through the contract of marriage; to citizenship acquired by reason of place of birth, through registration, or automatically in the circumstances required by law; and to the status of a legitimated, adopted or acknowledged child or of a legally separated spouse.

In so far as each of the above conditions are favourable to the individual they cannot be terminated by a new law. *Acquisition of status must be exclusively governed by the law which is in force when the acquisition is perfected.* This can be translated in the following three rules:

(i) *A law introducing new grounds of loss of status should never be construed retrospectively.* But if the cause of the new grounds is of a permanent nature, it gets caught by the new law, under which it continues to subsist. Therefore, if a law enacts that all nationals of State X must lose their citizenship, it should receive immediate application, and the said nationals lose their citizenship.

(ii) *The formalities of the juridical act constituting the acquisition of a new status must be regulated by the law in force at the time of acquisition.* A law dealing with the formalities for marriage can never apply to marriages celebrated before its commencement.

(iii) *The validity or invalidity of the acquisition of status must be judged in terms of the law in force at the moment of the acquisition.* Accordingly, the validity of a marriage ought always to be regulated by the law in force at the time of its celebration. A marriage should not become null, as a result of the commencement of a new law, nor should a marriage, invalid when celebrated, become automatically valid in virtue of a new law which takes away certain grounds of nullity allowed under the old law. This principle has unfortunately been drastically violated by the Maltese Marriage Act of 1975, which applies the section relating to nullity to all marriages whether contracted before or after the commencement of the Marriage Act, including marriages in respect of which nullity proceedings were still pending, on the date of commencement, before the Ecclesiastical Courts. Only a judgment having effect as *res judicata* on or before July 15th, 1975, continued to be operative. Under our law, therefore, the action for annulment of marriage is deemed to be a mere faculty, that can be taken away by a new law. It does not even make Gabba's equitable conces-

sion, regarding the commencement of execution of the 'facoltà' because the 1975 law is made to affect also pending proceedings. An additional problem is created by the prescription periods barring the action. Thus, in the case of infirmity of mind, if annulment proceedings are not instituted within one year after the cessation of the mental disease, the action is barred. Under canon law, infirmity of mind was held to imply absence of consent, i.e. an absolute nullity, in respect of which a Court declaration could be sought by the parties, unhindered by any prescription periods. Thus a marriage invalid under the canon law provisions of insanity could automatically become valid under section 20(b), if the one year cohabitation had already elapsed before the commencement of the 1975 law. Indeed, this is only one of the examples showing how retroactivity can result in the automatic validation of a marriage that was null under the law in force at the time of its celebration. As a result of revolutionizing the concept of nullity, the 1975 law impairs the vested rights of those who could annull under canon law but are no longer able to do so. On the other hand, it also negates the rights of that person who validly contracted marriage under canon law, and now finds that it is open to attack by the other spouse, e.g. on the ground of sterility, formerly unknown but now available to the non-sterile party. This state of law, which has Lasalle's approval in his theory of 'convalescenza', is opposed to that enunciated by Gabba, viz. 'La legge nuova, come non può togliere effetto ai rapporti giuridici validamente conchiusi sotto l'impero di una legge precedente cosí non può neppure attribuirlo ai rapporti giuridici invalidi in virtù della legge sotto cui vennero conchiusi.' This principle has also been curiously modified by the transitory provision of the 1973 Civil Code (Amendment) Act, which guaranteed that it would not by itself validate any act which was null at the time it was done, but at the same time barred for the future the action for annulment in respect of any such act.

Annulment must not be confused with dissolubility. A law abolishing divorce is made to apply even to marriages celebrated before its commencement; those persons who had not obtained a divorce under the old law cannot allege violation of their vested rights. Such an approach has *not* been accepted in English law. In the case *Blyth vs Blyth* (1966) – a case where plaintiff sought a divorce on the basis of the wife's adultery, decided by the House of Lords, it was implied that if the section being dealt with had been of a substantive nature, no retroactive effect could be given to it. Having regard to the fact that our Courts have gener-

ally followed continental law, however, it is difficult to believe how they can ever accept the English legal standpoint.

The law of persons involves the consideration of certain juridical conditions of persons, apparently capable of being treated under personal status. These are paternal authority, emancipation, tutorship, curatorship, and capacity of the married woman. Such conditions, however, are by no means creative of vested rights; they represent merely the machinery, exclusively contrived by the law, in view of ensuring the smoothest running of family life in accordance with the principles of child education and custody accepted in the community. They are just legal institutes that determine the juridical aspects of family life. It is not surprising, therefore, that cessation of any of the above conditions can occur in virtue of a new law, which thus legitimately receives immediate application. This was the line taken by the 1973 (Amendment) Act, in terms of which minors could become automatically subject to paternal authority and the 'status' of tutor, immediately lost and substituted by that of paternal authority. For the sake of continuity, it further provided that, if the tutrix was the mother, there was no obligation of rendering an account of her administration.

When we speak of the retroactivity of laws regulating status, therefore, we are including *only* those which deal with such status as is not capable of becoming a vested right of the individual. This substantial distinction between different kinds of status is made only in respect of laws regulating their *acquisition* or *loss*. In so far as their EFFECTS are concerned, no such distinction is made. This gives rise to the rule that a new law regulating the effects of status, irrespective of whether the latter constitutes a vested right or not, must receive immediate application. Accordingly, Pacifici Mazzoni says, 'Come gli effetti della filiazione legittima cosí quelli della filiazione naturale, riconosciuta e dichiarata, vengono immediatamente regolati dalla nuova legge.' Civil effects of marriage, effects of legal separation, adoption, legitimation, acknowledgement and even citizenship are regulated by the new law, even though their acquisition constitutes a vested right in the acquiring subject.

Another rule postulating retroactivity applies to laws governing capacity, itself defined as '*those preliminary conditions to be satisfied by the individual before a juridical act can be validly performed*'. Gabba treats capacity as signifying merely a modality of the right of citizenship, i.e. as implying the ways in which the individual can manifest his citizenship rights in the different

fields of law. Pacifici Mazzoni agrees with this view and says, 'La capacità invera è una facoltà che la legge riconosce e attribuisce ai cittadini ... questi sono dunque di nulla privati dalla legge che loro toglie o restringe la capacità di cui, al suo attuarsi, godevano mercè la legge anteriore.' Accordingly, laws governing the capacity to contract, to transfer real rights, or to acquire a particular status always receive immediate application. This, however, operates in such a way that vested rights actually acquired in terms of the rules of capacity prescribed by the old law remain unimpaired. Therefore, if a new law introduces the civil incapacity of the married woman, no such woman can claim that a vested right has been taken away from her; but she *can* claim that all the juridical acts performed by her under the old law retain their validity. Similarly, a law which determines what rights can be acquired in respect of things, according to their juridical status (e.g. what things can be privately owned) must receive immediate application, without impairing rights validly acquired under the old law.

Laws regulating the capacity to make wills, or to acquire an inheritance, present a more complex problem. The fact that they confer only 'facultative rights' is undoubted: a person who was capable of making a will *can* become incapable in virtue of a new law. What is less clear is what law will apply when a will has actually been made and *when the law in force at the moment when the testator made his will is eventually altered before his death.* The generally accepted view is that a will is juridically perfected only at the time of the testator's death, a principle which has induced legal writers as Lasalle to conclude that the juridical capacity to make a will is regulated *exclusively* by the law in force when the said death occurs. Gabba rejects this view because it contemplates the possibility of validating a will which was null when made. To prevent this automatic healing of a legally null act, therefore, he establishes the principle, also accepted by Pacifici Mazzoni, that the testator must be juridically capable both at the moment when he makes the will and at the time of his death.

An application of the doctrine of vested rights to the law of succession centres around the rule that a will cannot be creative of vested rights before the *decuius'* death. Accordingly, we find that, in transitory law, *devolution of inheritances is mainly regulated by the law in force when such death occurs.* This especially refers to:

(i) Laws which limit a person's liberty of disposing his pro-

perty by will, e.g. a law which increases the right of legitim.

(ii) Laws prescribing or prohibiting the juridical modes of effecting transfers *causa mortis*: e.g. a law which prohibits the institution of an *herede fiduciarius.*

(iii) Laws regulating devolution of inheritance, in intestate successions, taken as including the right of representation, and the apportionment of the deceased's estate.

On the other hand, *the law in force at time when the will is made regulates only such testamentary matters as are directly dependent upon the state of fact prevailing at the moment when the testator made his will*, namely:

(i) the form of the will, which is completely unrelated to the juridical possibility of revocation;

(ii) physical capacity, which is essentially geared to the testator's state of body or mind.

The law of obligations presents a fairly unified ground in its confrontation with transitory law. 'Il principio che regge tutta questa materia,' says Pacifici Mazzoni, 'è che le obbligazioni sono regolate dalla legge vigente al tempo in cui nacquero.' The same principle is enunciated by Gabba and has been repeatedly applied by our Courts. In Borg vs Borg (1907) it was decided that 'Fil-materja tal-kuntratti, il-ligi applikabbli hija dik ta' meta saret l-obbligazzjoni u meta seħħ il-kuntratt; u mhux dik ta' meta għandha tiġi deċiża xi kontroversja relativa, jekk fl-intervall il-liġi tkun tbiddlet, għaliex ... huwa preżumibbli illi ... forsi l-partijiet, kieku kienu jafu li l-liġi mhijiex il-qadima, ma kenux jagħmlu dak il-kuntratt.' The principle virtually encompasses the entire field of obligations within its sphere of operation. Accordingly, *the law in force at the time of formation of the obligation regulates:*

(i) The validity or invalidity of the obligation, including capacity of the parties and vitiation of their consent on the grounds of error, violence or fraud.

(ii) The juridical aptness of the object of the obligation and the cause of such obligation.

(iii) The juridical character of the obligation, e.g. whether it is *in solidum* or not, or whether it is civil or natural.

(iv) The effects of the obligation, even if peculiar to a special type of obligation, e.g. the effects of sale.

(v) The effects of obligation, vis-à-vis third parties, though subject to some minor exceptions.

(vi) Extinction or dissolution of the obligation, including dis-

solution of the community of acquests. This principle has been violated by the 1975 Civil Code (Amendment) Act, which retroactively abolished the juridical possibility of rescinding a sale or a partition on the grounds of lesion.

The law of property, viewed in the light of transitory law, gives rise to a great deal of complexities. The reason for this is that its underlying principle is reflected in the legislator's faculty of regulating the juridical condition of things, of introducing new real rights or abolishing already existing ones, and of modifying their effects. This has induced Gabba to affirm that laws regulating status include also those which govern the juridical condition of things. Status, therefore, can be personal or real; and, in both cases, it is productive of the same consequences in transitory law. This explains why a law which prescribes new distances to be observed in the construction of buildings must receive immediate application. No person who has *not* constructed buildings under the old law can allege the violation of this 'vested right' to build at a closer distance. Accordingly, real rights just like 'rights' regulating personal status are only mediately productive of vested rights: in other words their conversion into vested rights requires their actual exercise by the acquiring subject. This position radically differs from that prevailing under the law of obligations, the reason being, as Pacifici Mazzoni puts it, 'che i singoli effetti del diritto reale non si possono, come quelli delle obbligazioni, considerarsi propriamente svolgimenti o trasformazioni del diritto quesito; perchè è in piena balia del legislatore il prestabilire i modi e i limiti nei quali i cittadini possono disporre ed usare di ... cose materiali, e quindi nessun cittadino può accampare di fronte al legislatore in diritto quesito e un dato uso di quelle cose.' Society's interest in the regulation of real rights is juridically reflected in the fact that such rights are enforceable, not against determinate individuals, but against everybody.

A special feature of real rights which does *not* arise in the case of personal status, however, results from the possibility that certain effects of real rights can be guaranteed by the constitutive contract, as, for instance, emphyteusis, pledge, and conventional hypothec, which are, by their own nature, contractual. It is only too natural that those effects of real rights which are guaranteed in the contract cannot be modified by the new law. The extent to which this principle has been rejected by the 1976 amendments on emphyteusis will be dealt with later.

The two features of real rights so far dealt with account for the rule enunciated by Gabba whereby '*gli effetti dei diritti reali pos-*

sono bensì venire tolti o immutati da una legge nuova con retroattivo o immediato effetto, finchè non siano esercitati o dedotti in una convenzione, ma diventano veri e propri diritti quesiti intangibili in virtù di quei fatti.' Here, therefore, we see how in the law of property the general principle, that a vested right comprises also its effects, is modified in so far as the vested real right comprises only such effects as have in fact been put into execution or drawn up in the constitutive agreement.

By way of a precautionary measure, Gabba rightly indicates the danger of confusing 'i veri e propri effetti del diritto reale' and 'quelli che piuttosto sono effetti del titolo su cui il diritto medesimo in ogni singolo caso riposa'. This implies that whereas the truly real effects are liable to be immediately regulated by the new law, *those effects which necessarily result from TITLE are, of their own nature, acquired at the moment when the real right is constituted.* Gabba, for example, holds that the right of the creditor to retain the pledged *res* in special circumstances is one such effect, which, if permissible under the law in force when the constitutive contract came into being, should not fall subject to the provisions of a new law abolishing such right. The 1975 amendments, effected to the institute of pledge, were applied retroactively by our legislator; but, having regard to their trend of *conferring* new rights, it may be said that they could not have impaired any vested rights. As to hypothecs, the same author points out that the right of priority of a hypothecated debt, the extension of such debt, and the determination of the object of the hypothec, must be regulated by the law in force when the hypothec is constituted. In emphyteusis, the theoretical position is that the relations between the direct owner and the emphyteuta are regulated by the law in force at the moment of conclusion of the constitutive contract. In practice, however, the trend of modern legislators to facilitate the free transfer of immovable property has induced them to extend, in the public interest, the real as opposed to the contractual element in emphyteusis, with the result of enacting that ANY effects, subjected to amendment, are to be regulated by the new law. This is more or less the line taken by the 1976 amendments, which, besides reducing the contractual liberty of the parties, are made to apply to all emphyteuses constituted before January 1976, except those terminated before that date, or those determined or dissolved by agreement, by operation of the law, or by a judgment that had become *res judicata.* Indeed, this provision runs counter to the principle that a contract is regulated by the law in force at the moment of its conclusion, for it has the effect

of nullifying clauses in emphyteutical contracts made before the said date and which are still in existence, insofar as they are in violation of the Amending Act.

If it is a generally accepted principle that the effects which *necessarily* flow from title should not fall subject to a new law, it logically follows that *the title itself, grounding the acquisition of the real right, is, as in the case of any other right, regulated by the law in force when the acquisition is perfected.* This, in turn, gives rise to the following rules:

(i) Laws which determine the juridical status of things in relation to the real rights, of which they can form the object, should receive immediate application without impairing rights acquired in virtue of the old status. Therefore a law prescribing that only immovables can form the object of the right of usufruct cannot nullify rights of enjoyment over movables validly acquired under the old law.

(ii) Validity of the acquisition, and the formalities necessary to give it effect vis-à-vis third parties are regulated by the law in force at the moment of perfection of the acquisition.

(iii) A law introducing new modes of extinction of real rights should not apply to those rights constituted before its commencement. This principle has been, to an extent, violated by the 1975 (Amendment) Act, which provides that general hypothecs are extinguished if the property to which they attach passes into the hands of a third part, and that general hypothecs constituted under the old law will not remain valid after the expiration of 10 years after the commencement of the said Act.

Perpetual real rights are subject to the above principles only to the extent that the changes effected to them are not *essentially* related to their perpetual character. Insofar as laws directly affecting their perpetual nature is concerned, however, they fall under a régime of their own. They are at the complete mercy of the legislator, who is entitled to modify or even abrogate perpetual institutions as he deems appropriate in the public interest. Indeed, to say otherwise would mean that once such an institution is created by law, it must continue to exist forever; and eventually that would constantly and surely hinder the course of social progress. Gabba suggests that the complete abolition of a perpetual right, e.g. entail, should give rise to the State's obligation of granting compensation, just as in the case of expropriation.

It is now necessary to see whether the doctrine of vested rights can gain access into those branches of law which imply a direct confrontation between the individual and State authority, viz. an

administration law, fiscal law and emergency law. Most of the laws enacted in these spheres are characterized by their tendency to impose restrictions on the individual, while increasing the dose of State control. In administrative law, for example, the process of delegation by Parliament of administrative powers, viewed against the complications of State machinery and the increasing exigencies of the modern welfare State, necessarily implies an irresistible growth of State authority. Similarly the *raison d'être* of fiscal laws, e.g. laws of income taxation, is the principle of social justice which demands that the individual must actively contribute to the public good, each according to his financial capacity. Finally, emergency laws, by definition, tend to impose extraordinary restrictions upon individual action, their justification being that they are enacted in circumstances that inevitably warrant an enormous increase of State power, such as in wartime. This common characteristic of the laws under discussion shows the paramount importance of the doctrine of vested rights in those areas of law where the individual is in most manifest jeopardy. Here, the retroactive application of the new law generally implies a deterioration of individual liberty, and, therefore, the impingement upon a true vested right. Gabba's assertion that 'il rispetto dei diritti acquisiti si fonda in sostanza sul rispetto dell'individuo' is especially true in those fields, where the State and the individual continually face each other in a common arena.

Writers like Clementine and de la Grassaye believe that retroactivity is a unitary concept which receives application in ALL fields of law. Italian Courts have accepted this view when they affirmed that the principle of non-retroactivity enunciated in the Preliminary Title to the Civil Code is applicable also to 'norme amministrative e tributarie'. In Malta, the doctrine of vested rights has been explicitly declared to be applicable to fiscal and emergency law. In as early as 1902, in *Gasan vs Zammit* – where the Court was requested to determine the amount payable by plaintiff in stamp-duty – it was held that '*in materia di tassa ed imposta è principio di giustransitorio che tanto per determinare chi sia responsabile della tassa quanto per determinare l'imposto di questa, vuolsi avere riguardo alla legge vigente nel giorno in cui son posti in essere gli atti ed affari colpiti dalla tassa.*' The same principle was accepted in *Cassar Torreggiani vs Gatt.* In this case, the Court had to decide whether a new law which increased from one to ten years the pre-death period within which any donations effected could become subject to the payment of death duty was applicable retrospectively. It was held that al-

though the 1948 law was of a fiscal nature, it could not be applied retroactively because it would impair the plaintiff's vested right to pay death duty only in respect of donations made not earlier than one year period allowed under the old law. Parallel to these two decisions, there is an Italian judgment delivered by the Court of Appeal on the 7th December 1967, which established that: 'Il principio che la legge non dispone che per l'avvenire ... salvo specifica volontà contraria del legislatore sancito dall'articolo II ... vale anche nel campo del diritto tributario.' Indeed, the legislator's option to impair the doctrine of vested rights subsists all the more in fiscal matters. *Testa vs Briffa*, for example, confirms that 'è pacifico in dottrina e nella giurisprudenza che anche a leggi di Finanza si è trovato talvolta conveniente nello interesse dello Stato di dare effetto retroattivo.' From the point of view of transitory law, therefore, it can be safely concluded that, in Malta, a new fiscal law does not receive immediate application, irrespective of whether it impairs vested rights or not. The interest of the State, in fiscal legislation, is reflected in a rule of construction quite unrelated to retroactivity, which was enunciated in *Anastasi vs Camilleri* (1964): 'Il-liġijiet tributarji għandhom jinterpretaw ruħhom skond l-ispirtu u l-ittra tal-liġi ... u fid-dubju għandhom pjuttost jiġu riżoluti affermativament,'l għaliex il-kawża tad-dazju jew imposta, xi tkun, hija ta' utilità pubblika.'

Emergency laws, known in Italian law as 'leggi eccezionali', have also been dealt with by the Maltese Courts. In *Butler vs Skipwkith*, the Court of Appeal, reversing the judgment of the lower court, held that since the defendant did not specifically request the Court to determine the retroactivity or otherwise of the 1942 Regulations, it could not deal with it of its own initiative, because this would impair the procedural principle that the Court must base its decision upon such legal points as are specifically raised by the parties in the writ of summons. This approach implies that the principle of innate retroactivity of emergency laws does not exist under our law. Indeed, if such principle were applied, the Court of Appeal would have inferred retroactivity from the very nature of the regulations, thus preventing itself from having recourse to the procedural principle referred to.

In the sphere of administrative law, as it operates in normal citizen life, the doctrine of vested rights is on less stable ground. This is so because of the infinite variety of laws that can be enacted in this field. Their subject-matter can range from education and wage-regulation to imports, requisition, country planning, etc. The logical outcome is that non-retroactivity is *not* bound to

be absolute: its relativity to the particular sector of public order that is being dealt with in the individual case cannot but have a bearing upon the end result. To say that the doctrine of vested rights is of no relevance in its application to the so-called subsidiary laws made by administrative bodies would definitely run counter to justice. Of course, the fact that this latter theory has been discounted in emergency matters seems to suggest the approach of discounting it in all other areas of public administration. A case which explicitly confirms this idea is *Baldacchino vs Caruana Demajo*, where the Court decided that '*meta ma hemmx klawsola retroattiva, u meta l-kliem tal-liġi ma jkunux jimportaw retroattività, ma għandux ikun hemm effett retroattiv, lanqas jekk tkun materja ta' nteress jew ordni pubbliku.*' The issue involved in that case was whether a Legal Notice prohibiting the importation of Russian films could receive retroactive application. Relying on the principle quoted, and on the English law position, whereby all laws, except those of a procedural nature, should apply for the future, the Court decided that the Legal Notice did not apply to the plaintiffs; and this because it came into force *after* the importation of the said films had been perfected.

Defying the absoluteness with which the Caruana Demajo case established the application of the doctrine of vested right in all sectors of administrative law, however, *Fenech vs Zarb* acknowledged, in its turn, the inevitability of recognizing the natural retroactivity of laws, which are so intimately connected with public order that they transcend all possibility of judicial affirmation of the existence of vested rights. In this case, the question arose whether the amendments effected to the University Statute could be applied retrospectively to students who had already started their course before the amendments were passed. The Court said that '*biex l-emendi ma jkunux retroattivi ... hemm bżonn li jsibu ostakolu fid-dritt kweżit ta' l-istudenti, u li ma jkunx il-każ ta' liġi li tinteressa l-ordni pubbliku.*' Moreover they failed to satisfy this test, on both counts. Registration for a particular course did not create any contractual relationship between the University and the students, and as regards the argument of public order, it was held that 'il-materja ta' l-istruzzjoni hija ta' nteress pubbliku u hekk ukoll huma l-liġijiet li jikkontrollaw dik il-materja, u għalhekk ebda dritt ma jista' jiġi akkampat kontra emendi li jmissu r-regolamenti tat-tagħlim u l-istruzzjoni.' After quoting Pacifici Mazzoni, who points out that laws relating to public order are retroactive, it upheld Gabba's argument which envisages how the individual may find himself bound to submit to

the 'scopi o funzioni di pubblico interesse' with the result that he cannot acquire any vested rights, and that he must subject himself to any new law which alters the existing elements of public order. There are certain sectors of human life which have assumed the status of proper State functions, e.g. education, and public health. Any laws which regulate such sectors are in the nature of what Gabba calls 'concessioni politiche', which are revocable by the legislator at his will. What distinguishes these concessions from those 'nelle quali lo Stato apparisce datore nello stesso modo in cui lo potrebbe essere un privato' – a distinction which echoes the old tragic concept of *jure imperii – jure gestionis* – is not capable of being subjected to any *a priori* test. The view that *our Courts have accorded retroactivity to a law which pertains exclusively to public order* seems to break down under the basic uncertainty of its application. Yet it does have the merit of establishing the truth that our Courts employ a great deal of caution before deciding to exclude the doctrine of vested rights from the administrative law field. Torrente's assertion that laws of public order are retroactive only if so intended by the legislator is *not* valid because in the Caruana Demajo case, it was obvious that the legislator *did* intend retroactivity, which, however, was not granted by the Court. The only safe conclusion to arrive at is that *under our law, laws relating to public order are not essentially retroactive. The course of their operation is determined by the Courts after conducting an objective analysis of the degree of intimacy between them and the sector of public order in which they are allegedly rooted.* This precarious condition, though in itself undesirable, is the logical outcome of the immense role of public order in modern States.

The power to make retroactive subsidiary legislation is dealt with by the 1975 Interpretation Act, in *Section 9*, which provides that such power is deemed to be implied, in all parent Acts, irrespective of whether passed before or after commencement. Section 9, however, is applicable only to subsidiary legislation made *after* commencement. Accordingly, any subsidiary laws made before 1975 are still regulated by the principle upheld in *Baldacchino vs Caruana Demajo* and *Bernard vs Attard*, whereby a specific provision in the parent Act is necessary to give rise to the power of making retroactive laws under the said Act.

In connection with the theory of public order in transitory law, it is appropriate to indicate the peculiar status attributed to procedural laws and police laws by Maltese Courts. As regards police laws, the principle applicable is that enunciated in *Police vs*

Falzon, which states that 'non vi può essere diritto quesito in virtù di leggi anteriori ad escludere l'applicazione di leggi nuove.' Accordingly, police laws are intrinsically retroactive; the new law always receives immediate application, and the citizen is at all times expected to abide by it. Incidentally, the said principle refers only to police laws of a *non-penal character*, the penal ones being themselves juridically assimilated to ordinary criminal law norms.

Procedural laws tend to create a great deal of complexities in transitory law, and, as such, they must be viewed in the light of the various attitudes that can and have, in fact, been adopted towards them by different States. The general view is that once a law is classified as procedural, it must of its own nature have a retrospective effect. This is the situation under English law, which results from the erroneous attitude of treating procedural law on a purely procedural level. In *Blyth vs Blyth*, for example, L.J. Williams, while referring to the retroactivity of a procedural provision, said: 'To say that this involves the section being given retrospective effect is, I think, perhaps misleading. The true view is that the section looks forward to the conduct of trials that take place after the coming into force of this Act.' The superficiality of this argument is all too obvious. Nevertheless the English position has been invoked in *Baldacchino vs Caruana Demajo*, where the Court inferred the principle that laws relating to public order are *not* by nature retrospective from the fact established by English judges that *only* procedural laws are innately retrospective. Even more perplexing is the approach adopted in *Police vs Camilleri* (1964), where it was decided that the action impugning the validity of the Proclamation had been correctly referred to the Civil Court, First Hall, under the provisions of the *1961 Constitution*.[1]

The problem which emerges from *Police vs Camilleri* is whether Section 12(1)(e) can, if subjected to the same interpretation, have the effect of abrogating the principle of retroactivity of procedural laws, when procedural changes are effected by *repealing* Act. The truth is that Section 12(1)(e) is really dealing with laws abrogating rights of action, not laws effecting procedural changes. Indeed, having regard to the strictly narrow meaning attributed to 'repeal' by the 1975 law, it can be concluded that a repealing Act which effects procedural changes would qualify as an amending Act

[1]The logic adopted by the Court was that section 38(2)(e) of the U.K. Interpretation Act of 1889, *which corresponds to Section 12(1)(e) of our 1975 law*, gave *ultrattività* to the 1961 Constitution even in procedural matters.

under the said law. This interpretation results from Section 12(3), which provides that amendment includes also 'where *an Act* or provision thereof *is repealed and a different provision made in the place thereof*'. In line with this reasoning, changes of procedure would fall under Section 12(2), which provides that 'the Act or provision amended as well as anything done thereunder or by virtue thereof shall, unless the contrary intention appears, continue to have full effect, and shall so continue to have effect as amended, and subject to the changes made by the Amending Act.' Does this sub-section throw any new light on the position of procedural laws in the *gius transitorium*, and more especially on the judicial standing of pending proceedings vis-à-vis a new procedural law? An objective answer is reached if we first examine the present conflicting theories on the subject, themselves reflected on the equally conflicting cases: *Buttigieg vs Gatt* and *Chetcuti vs Micallef*.

In *Buttigieg vs Gatt*, a case of lease, the defendant raised the plea of incompetence on the grounds that, after the submission of the writ of summons, a new law was enacted which removed jurisdiction from the Ordinary Courts to the Rent Board. The Court accepted the plea because it held that the principle that procedural laws should not affect pending proceedings does not apply, if the legislator shows a contrary intention. In support of this argument, it said: 'Inkwantu għall-proċeduri avvjati ... il-liġi l-ġdida ma tistax tkun retroattiva, imħabba fil-prinċipju ben konoxxut *ubi judicium acceptum, ibi et finem accipere debet*, u mħabba fil-prinċipju komuni fondamentali u ġenerali l-ieħor *in subiecta materia* li l-attijiet magħmula u mmexxija ma jistgħux minn liġi ġdida jiġu kunsidrati bħala mhux magħmula sabiex ikunu mibdulin jew sostitwiti minn attijiet ġodda.' On the other hand, in *Chetcuti vs Micallef*, the Court, following Gabba, accepted the plea of incompetence on the grounds that pending proceedings are to be affected by a new procedural law as much as proceedings not yet initiated. Accordingly, it referred the case to the Land Arbitration Board. If these two cases are viewed in the light of the 1975 law, we find that the doctrinal problem is still intact: the question whether a case still pending is juridically complete still depends on the Courts' discretion, thus leaving it open to them to accept or reject the plea of incompetence.

As is too readily appreciated, this state of law is outright undesirable. In Italy, all doctrinal confusion has been abolished by Section 5 of the Code of Civil Procedure, which provides: 'la giurisdizione e la competenza si determinano con riguardo allo

stato di fatto esistente *al momento della proposizione della domanda* e non hanno rilevanza rispetto ad esse, i successivi mutamenti dello stato medesimo.' Indeed, Italian law, unlike Maltese law, has managed to emancipate itself from Gabba's influence, by way of a general provision, implying the principle that pending proceedings ought not to be affected by procedural laws newly enacted. Our law is in desperate need of such a provision, and until this position is reached the entire subject is to be regulated on the basis of continental doctrine.

The persisting influence of Gabba upon Maltese Courts is reflected in their obstinate willingness to treat the retroactivity of procedural laws as forming part of a general theory of public order. The two cases quoted above, conflicting as they are, concur in the view that changes in procedure are effected in the public interest, and are therefore retrospective. A more flexible approach is admittedly shown in criminal proceedings. In *Police vs Borg*, for example, the Court had to determine whether section 19 of the Housing Act – which dealt with the right to appoint a representative to physically incapable persons who failed to deliver the keys to the Housing Commissioner – was retroactive or not. The decision arrived at was that the right of representing the accused was not purely a procedural norm; it had certain substantive implications, because in Maltese law no judgment can be delivered *in absentia* by the Criminal Courts, and it is only upon request of the defence counsel that the right of representation can be exercised. The criteria adopted were neatly expressed in the following words: '*Il-prinċipju illi d-dispożizzjonijiet ta' proċedura japplikaw retroattivament ma hux daqshekk ġeneriku u assolut, f'materja penali ... Imma għandhom din l-applikazzjoni retroattiva dawk il-liġijiet penali ta' proċedura li huma strettament proċedurali biss, u mhux ukoll dawk li huma intimament konnessi malmerti tal-kawża. Dawn ta' l-aħħar ma għandhomx dan l-effett retroattiv.*'

In *Police vs Borg*, the Court dismissed the English law idea that procedural laws are innately retroactive, including those applicable to criminal actions. It endorsed the severe, critical comments made by Cheveau et Helie, Zuppetta and other writers, who find the English position not only unreasonable, but also unjust if applied without restrictions in the criminal law field. The Maltese situation, of course, is slightly better than the English one, but it is still in need of change. *The desirable legal course to take would be to enunciate by way of a general provision that a new procedural law will not affect pending proceedings, and further to*

guarantee in a criminal action the right of the accused to continue the proceedings in conformity with the new law, if this lies in his favour. Accordingly, the 'penale retroattiva', which will soon be dealt with, would become applicable also to a procedural penal law if the defence so requests.

Constitutional law is precisely that branch of law which presents the greatest paradox. This results from its innate quality of being the only part of public law which, paradoxically, protects the individual against the possible abuses of State authority. The general outcome is the trend of constitutional law to favour individual rights at the expense of the State. Here, in fact, we find that a new constitutional norm does *not* tend to impair vested rights, but to perfect them, or even create them, brand-new. Gabba seems to maintain that when a law does *not* impinge upon vested rights, it should receive immediate application: a principle which some writers have raised to the status of a general theory that all laws favourable to the individual should be retroactive. This view, however, has been discounted by our Courts in *Police vs Camilleri* (1964), where it was held that 'Il-kostituzzjonijiet huma soggetti għall-istess regoli ta' nterpretazzjoni bħal-liġijiet oħra, u waħda mill-aqwa fost dawn hi dik tan-nonretroattività.' Moreover, the maxim *omnis nova costitutio futuris formam imponue debet non praeterem*, was held to mean that *'il-liġi l-ġdida m'għandhiex tfixkel drittijiet akkweżiti jew vested rights, speċjalment meta si tratta ta' human rights.'* The final decision, therefore, was that the points of substantive law involved in the case – viz. the rights of freedom of expression and association – would be regulated by the *1961* Constitution, under which the causes of the original criminal action had arisen. It was of no consequence that the action impugning the validity of the 1964 Proclamation was instituted *after* the 1964 Constitution had come into force. In support of the principle that the constitutional norm was just like the ordinary legal norm creative of a vested right, the presiding Judge made reference to a case decided by the Indian Supreme Court, which concerned the question whether the Indian Constitution (which *for the first time* incorporated human rights provisions) could be applied retrospectively. Since the person accused was formerly devoid of constitutional protection, retroactivity would have the effect of acquitting him of political offences charged against him. The said Court, however, refused to apply the theory of retroactivity of favourable laws, and allowed the prosecution to maintain the action. The same position prevails in Italy. In January 1968, the Constitutional Court was faced with an administra-

tive law which had been in force prior to the commencement of the Republican Constitution, and, which although originally valid, eventually became incompatible with the provisions of the said Constitution, on their coming into force. After holding that such incompatibility grounded invalidity, the presiding Judges reached the conclusion that the effect would be to invalidate all acts performed under that law *after* the commencement of the new Constitution. Therefore, anything done under that same law *before* the Constitution came into force retained its full legal force. In Malta, even before Police vs Camilleri, the theory of favourable laws had been effectively rejected by our Courts in *Caruana Curran vs Camilleri*, where it was held that a law exempting from import duty certain specified objects, including that imported by plaintiff, was not retroactive in the absence of a special transitory provision to that effect. Accordingly, the plaintiff was condemned to pay, because he had already imported his laminated silver foil when the regulations came into force. The over-all situation is that the principle of non-retroactivity works in all directions: it gives rise to the doctrine of vested rights and vested liabilities, and as such, can protect as well as prejudice individual rights. This in fact, is the line taken by the 1975 Interpretation Act, which in section *12* provides that a repealing Act shall not efface any liability incurred under the repealed Act, and shall not affect any investigation or proceedings in respect of facts arising under the repealed Act, even if such facts warrant the infliction of some form of penalty or punishment.

In the constitutional law sphere, what is of paramount importance is *the process whereby an ordinary legal norm can, owing to its retroactive operation, find itself in conflict with some constitutional precept.* This has been emphatically pointed out by the Italian Constitutional Court in a 1957 case, where, after asserting that retroactivity is constitutionally prohibited only in the criminal law sphere, it clarified the fact that 'con ciò, non si vuole escludere che in singole materie, anche fuori di quella penale, l'emanazione di una legge retroattiva possa rivelarsi in contrasto con qualche specifico precetto costituzionale.' Therefore, outside the criminal law sphere, although retroactivity does not automatically imply constitutional invalidity, a law can be declared invalid on the grounds that its retroactive operation runs counter to some principle sanctioned by the Constitution. This is precisely what happened in 1966, when the Italian Constitutional Court declared invalid a law which retroactively imposed taxation upon persons who had alienated building sites within a specified legal period.

The reason put forward by the Court was that 'such retroactivity violated *section 53* of the Constitution (which provides that everyone is to contribute to public expenditure in proportion to his resources), because it failed to take into consideration whether the financial or economic gain derived from the alienation still remained within the patrimony of the transferor. Accordingly, it was held that a retroactive fiscal law can become invalid, if 'con l'assumere a presupposto della prestazione un fatto o una situazione passati, o con l'innovare, estendo i suoi effetti al passato, gli effetti dai quali la prestazione trae i suoi caratteri essenziali, abbia spezzato il rapporto che deve sussistere tra imposizione e capacità contributoria, ed abbia cosí violato il precetto costituzionale.'

In Criminal law, the doctrine of non-retroactivity is neatly expressed in the maxim *nullum crimen sine lege, nulla poena sine lege*. The strong political ingredient which animates the maxim is responsible for the special features which characterize the principle of non-retroactivity of the criminal law. As the Italian writer Antolisci Francesco points out, 'La massima è il palladio delle libertà politiche': it ensures that no person will be penalized for an act which does not constitute a crime at the moment of its commission. This absolute predicability on the part of the accused, that he cannot be convicted for such an act, has been sanctioned by the constitutions of most democratic countries. The Italian Constitution, in section 25(2), provides: 'Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, ne con pene che non siano da essa stabilite.' The same principle is applied by *section 40(8)* of the Maltese Constitution. In the U.K., the doctrine of non-retroactivity of the criminal law cannot operate on the constitutional law level; it is nevertheless applied by English Courts on basis of the 1889 Interpretation Act. In the case *R. vs Reah* (1968), for example, the Court of Appeal had to determine whether section 4(7) of the Criminal Justice Act, which dealt with the offence of receiving stolen property, was retroactive in effect. Its final decision was that since the said section was not procedural, it was *not* retroactive and could not apply to the defendant because its provisions came into force *after* he had committed the alleged offence. The appeal was allowed, and the defendant acquitted. By contrast, those States which do not recognise the need for such protection, e.g. Algeria, are thereby upholding their sovereign power of criminalizing such past acts as they might deem appropriate, thus impinging upon the human right to liberty, and even the right to life,

whenever the death penalty is contemplated.

The Latin maxim guarantees not merely predictability of non-conviction on the part of the accused, but also predictability of non-subjection to a higher penalty. Therefore, if the penalty for a particular offence is increased by a law enacted *after* its commission, such law cannot be applied retroactively by the Courts. This, in fact, represents the minimum content of the *nulla poena* limb of the maxim. By way of an equitable concession, the range of this principle has been enlarged, with the result of introducing an element of paradox. Many Criminal Codes, including the Maltese Code in *section 28*, have accepted the theory that *when a new law, enacted in the interval between the moment of commission of the offence and the delivery of sentence, mitigates the penalty in respect of that offence, it should be applied in preference to the old law.* This is the what Gabba calls 'penale retroattiva', i.e. the process whereby a criminal law norm created before delivery of sentence must receive retroactive application, if it favours the accused. Some writers have attempted to provide a juridical basis to this equitable principle and affirmed that what is really involved here is not really retroactivity but the notion of *non-ultrattività* i.e. the notion whereby a criminal law norm cannot continue to operate, after its repeal or amendment, if it is more severe than the repealing or amending norm. This idea has been accepted by our Courts in *Police vs Camilleri*, where they referred to the '*non-ultrattività* della legge precedente', and rejected in *Police vs Bugeja*, where they described how, by way of exception, *section 28* gives '*efficacia retroattività alla legge posteriore.*'

The readiness with which our Courts have so far applied the 'penale retroattiva' is illustrated by *Police vs Mifsud* and *Police vs Bugeja*. In the first case, it was decided that *section 28* contemplates not merely a new law which diminishes criminal punishment, but also a law which provides that an act no longer constitutes an offence. At this point, however, a doubt immediately arises, in virtue of section 12(1)(e) of the Interpretation Act, which, as already indicated, provides for the *ultrattività* of a repealed law, even if it had imposed a penalty or some other form of punishment. In other words, the repeal of such a law no longer benefits the defendant in criminal proceedings which are still pending, nor can it halt future prosecutions in respect of the offences repealed, committed while the repealed Act was still in force. This provision, of course, has drastically reduced the sphere of operation of the 'penale retroattiva', and in fact has has been denied access into that area where it had most benefited

the accused. Having regard to its far-reaching effects, therefore, it is not surprising that the interpretation of *section 28*, given in the Bugeja case, has now been overruled. Another logical outcome of the new restricted concept of 'penale retroattiva' is that the 'leggi passeggiere di polizia' no longer occupy a special place in this equitable doctrine. Prior to 1975, the Courts had always acknowledged that *ultrattività* is NOT proper to the nature of a criminal law norm, the only exception to this principle being the *transitory police laws*, i.e. those police laws which provide that, owing to essentially transitory circumstances, certain acts will constitute an offence, or that certain acts will be deemed offences for a specified period of time. Accordingly, under the old law, these were the ONLY penal laws which survived their own repeal. In *Police vs Bugeja*, for example, it was held that although an emergency law was essentially transitory in its character, it did *not* qualify as a transitory police law, and therefore, the principle of *ultrattività* could not be applied in its regard, in the absence of a specific provision to that effect in the repealing law. Similarly, in *Police vs Camilleri*, which involved the offence of selling meat at a price higher than that fixed by the Government, the Court held that a 'legge penale temporanea', in spite of its temporary character, was *not* subject to *ultrattività*, and as such its repeal extinguished all possibility of continuation of present proceedings as well as of initiation of future prosecutions. Under the 1975 law, all these safety-valves are inefficient. Indeed, *the principle of ultrattività, in all cases where an offence is altogether repealed, is now absolute.* Its application does not even require the condition that the criminal law norm concerned be of a 'temporary' or transitory nature. In this respect, it goes against *section 2* of the Italian Criminal Code, which provides that the 'penale retroattiva' is inapplicable ONLY to 'leggi eccezionali e temporanee'.

The doctrine of non-retroactivity of the criminal law, under our law, therefore, is three-dimensional:

(i) It imposes, under pain of constitutional invalidity, that a law increasing criminal punishment or creating a criminal offence cannot be retroactive.

(ii) Secondly, the 'penale retroattiva' operates in virtue of section 28 of the Criminal Code within the limits prescribed by the Interpretation Act analysed above. This, however, does not operate on the constitutional level, and the legislator is free to enact that a law mitigating criminal punishment will *not* apply to offences committed under the amended law.

(iii) The principle of *ultrattività* is *implied* in all cases where an offence – whether transitory or not – has been repealed. The legislator however is still free to enact that the repealing Act will halt all future prosecutions.

The concept of retroactivity is inseparable from that of *time*. It seeks to make as smooth as possible the periods of transition that underly the courses of social progress. It aims at creating a new future, without unravelling the facts of the past. Change remains forever its main slogan: a peaceful change that tends to respect the individual and his vested rights, in accordance with equity and justice.

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1. *Azzopardi Zammit vs Formosa*, Vol. 28, Part 3, Page 715, (1934).
2. *Mizzi vs Farrell*, Vol. 32, Part 1, Page 219, (1945).
3. *Cilia vs Farrugia*, Vol. 33, Part 1, Page 457, (1949).
4. *Borg vs Borg*, Vol. 20, Part 1, Page 68, (1907).
5. *Salamone vs Mifsud Speranza*, Vol. 29, Part 3, Page 18, (1934).
6. *Gasan vs Zammit*, Vol. 18, Part 3, Page 111, (1902).
7. *Cassar Torreggiani vs Gatt*, 12th May, 1950.
8. *Testa vs Briffa*, Vol. 14, Part 2, Page 24, (1919).
9. *Anastasi vs Camilleri*, 15th April, 1964. Part 2, Page 952.
10. *Butler vs Skipwkith*, Part 1, Page 400, (1964).
11. *Baldacchino vs Caruana Demaio*, Vol. 38, Part 1, Page 61, (1954).
12. *Fenech vs Zarb*, Vol. 36, Part 1, Page 236, (1952).
13. *Bernard vs Attard*, Vol. 32, Part 2, Page 136, (1945).
14. *Police vs Falzon*, Vol. 24, Part 4, Page 1048, (1921).
15. *Blyth vs Blyth*, Weekly law Reports, Vol. 2, Page 634, (1966).
16. *Police vs Camilleri*, 7th January, 1965, Part 2, Page 605, (1964).
17. *Section 12(1)(e) of Interpretation Act:* 'Repealing Acts passed after the commencement of the 1975 Act shall not – unless the contrary intention appears:

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

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

18. *Buttigieg vs Gatt*, Vol. 33, Part 2, Page 159, Dec. 1947.
19. *Chetcuti vs Micallef*, Vol. 38, Part 1, Page 146, (1954).
20. *Police vs Borg*, Vol. 33, Part 4, Page 957, (1949).
21. *Caruana Curran vs Camilleri*, Vol. XLIII, Part 2, Page 786, (1959).
22. 1966 case on retroactivity, delivered by Italian Courts: Judgment No. 44 of 1966: Repertorio.
23. *R. vs Reah*, Weekly Law Reports, Vol. 1, Page 1058, June, 1968.
24. *Police vs Camilleri*, Vol. 14, Part 4, Page 934, (1919).
25. *Police vs Bugeja*, Vol. 14, Part 4, Page 941, (1920).
26. *Police vs Mifsud*, Part 4, Page 931, (1922).

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BALLISTICS EVIDENCE

MAURICE E. CALLEJA

THE term 'ballistics expert' occasionally appears in the newspapers under the Court Reports' column. This is admittedly a very imposing title; however it is hardly descriptive of the demands made of this study or of the person practising it. 'Forensic ballistic expert' would be nearer the mark, but I believe that in most countries now such court experts are referred to as the 'firearms identification witness'. For several years now I have been called upon to act in this capacity in cases before the courts where the use of firearms played an important part.

Basically, my duties are to examine all evidence relating to the firearm or firearms in question and to evaluate data, and furnish an opinion based on the established facts.

The witness's duties normally begin as soon as possible after an incident involving a firearm is reported to the Magistrate on duty. It is he who appoints and empowers the witness to be present at various stages during the Magisterial Inquiry and it is thus that the witness can inspect the scene of a crime and collect the necessary evidence before anything has been touched or moved. The importance of the witness being on the spot in the early stages cannot be stressed enough and it is surprising to note what valuable information can be collected from the location of evidence.

In one particular case where shots were fired at a showroom window, the cartridges were found about 25 yards away from the showroom. From their location it was possible to establish that the shots were fired from a moving car. The direction in which the car was travelling could also be deduced as well as on which side of the road the car was. That the shots were not fired by the driver but by the passenger was an important point that could be established. The actual cartridges themselves revealed several features including the type and general description of the weapon and the fact that the same weapon had been used in another crime on a previous occasion.

The evidence with which the witness is most concerned are the firearms, cartridges and bullets, the corpse or wounded person and the clothing he was wearing. These all help to build a picture and the absence of any one of these requires the witness to make some surmises that may not be correct, and then to rely more on his technical knowledge regarding specifications and ballistic data.

Basically, firearms fall under two categories: smooth bored and rifled arms. Both these types can be subdivided into a number of varieties; however it is sufficient in the present context to state that there are single shots, revolving, semi-automatic and fully automatic weapons. The last two eject the cartridge case every time they are fired. Naturally these weapons can be further subdivided into a number of calibres.

A smooth bore is a firearm in which the bore or the inside of the barrel is perfectly smooth from end to end and therefore leaves no identifying marks on the projectile. In rifled arms the bore is cut longitudinally with a number of grooves. The grooves are parallel one to the other but are cut with a twist or spiral from breech to muzzle. The grooves are actually termed grooves and those portions of the bore which are situated in between the grooves are known as 'lands'. It is these grooves and lands which impart to a fired bullet the marks with which the witness is concerned. They are the thumb print of the firearm on a bullet and are as infallible as a finger-print. It is a fact that no two firearms, even with consecutive serial numbers, could produce identical 'striations' on a bullet.

For a firearm to be of real value as evidence, the witness must also have the fired bullet. The bullet can be related to the firearm and also to the person or object fired at, whilst a cartridge case can only be related to the firearm that fired it. In other words, if only a cartridge case is produced as evidence, the accused may well claim that although that particular cartridge case was fired from his gun, it was not his bullet that inflicted the damage to a person or property.

When a bullet or cartridge as well as the firearm are produced for examination, the witness has the task of firing test shots from the very same firearm and compare the test shots under a comparison microscope with the one or more connected with the case. This is not necessary if the specifications of the crime bullet are other than those that could be fired by the weapon under examination. It is usual for the court to accept the witness's findings but should the defence counsel contest such evidence, it is possible

to furnish photographic documentation of the comparative data. It may be worth mentioning that it is not only the barrel of the firearm which imparts its thumb-print but other parts such as the breech face, the extractor, the ejector and the lips of the magazine, if the weapon is so provided.

Since smooth bore firearms usually fire lead shot, no thumb-print is imparted to them. However, the cartridge case can usually be identified as having been fired by the weapon in question. Since lead shot spreads as the distance from the firearm increases, it is also possible to establish the distance at which a shot was fired more easily from a smooth bore than from a rifled arm. The contents of a smooth bore cartridge also help to facilitate the interpretation in this respect.

The witness must be prepared to give evidence regarding the serviceability of the firearm and he has to establish whether the firearm is liable to discharge accidentally. It is sound and safe practice to test every firearm for this possibility at the very beginning of the examination. In accidental discharge, more often than not, the weapon is found to be faulty and on occasions the gun is found to fire as it is being shut or with the slightest knock. In other cases a gun may fire at the slightest touch of the trigger, or the safety catch may be found to be ineffective.

The witness is required merely to state the results of his examinations and express his opinion on such facts. As any other expert witness he is entirely unconcerned with the guilt or innocence of the accused. The prosecutor may be pleased to hear that there was only a remote chance of the firearm discharging as it fell from the accused's hands but the defence counsel may overplay the fact that this was in fact a remote chance. As a rule, it is advisable for the witness to offer his opinion on the exact condition of the firearm quoting precise data for pressures, etc. and comparing these with the makers' specifications book regarding the firearm and ammunition.

When an accused is charged with attempted homicide in cases involving firearms' injuries, especially when a shotgun is the weapon in question, the witness is frequently asked whether that particular weapon was capable of causing death at a particular distance. The answer to this question is not the competence of the firearms expert, and should be left to the medical witness. I recall one particular case when the charge was attempted homicide and the weapon used was a shotgun. The writer was asked to give his opinion as to the possibility of the firearm causing death

at a distance of twenty-five yards. The witness felt that he was not competent to give a satisfactory answer and the medical witness was recalled. Medical evidence then quoted an example of a victim who was killed by one pellet from a shotgun fired at twenty-five yards. The pelle t had penetrated the jugular vein, which is just beneath the skin of the neck, and the victim died of severe bleeding.

In fatal cases, it is commendable that the firearms identification witness is present in the post-mortem room during the dissection. His presence there is very important to him and he helps considerably in many ways by collecting first hand information, and providing expert advice on the spot. In turn, the free exchanges with the pathologists can only be of mutual assistance and contribute substantially towards the formulation of unimpeachable scientific opinion. The evidence acquired here usually includes the direction of the shot, the distance at which the shot was fired, and various other useful information which varies from case to case. The writer recalls one particular incident when a young girl was accidentally shot with a shotgun by her equally young brother. The boy had picked up his father's shotgun after the father had returned from a morning's shooting, and fired the gun in his sister's direction believing it was unloaded. At the post-mortem examination a piece of wood was recovered from the child's wound. The witness had tested the gun with the same type of ammunition used in the incident and noted that the cartridges were extremely difficult both to insert and to extract from the gun chambers when the gun was not fired. The witness was therefore able to express the view that in all probability the father had made an effort to extract the loaded cartridges using a piece of wood and that this had probably broken inside the barrel. The remains of that same piece of wood used had been found in the wound at the post-mortem.

In the post-mortem room the witness and the medical team can also establish whether any powder marks exist on the corpse or on the clothing. If a firearm is discharged at very close range, the range varying with the type of weapon and ammunition, powder burns are liable to occur. As the range increases slightly only powder marks may instead be evident. As the range increases further there would be no evidence of either burns or powder marks. Powder marks could also leave superficial and small injuries to the skin (tatooing) which cannot be washed off, but occasionally it is only powder deposits that are left on the skin and clothing

that may be evident to the naked eye but may be washed off quite easily. In other words, the eventuality could arise where powder marks could have been evident on a corpse or his clothing but were washed off after a heavy downpour of rain. The witness is often confronted with the question of the range of shot from the gun to the victim and unless either powder burns or marks, in the case of rifled arms, exist, it is extremely difficult to establish this fact. The size of a wound resulting from a smooth bore weapon usually makes this possible since the size of the wound bears a relation to the distance.

In this short account, I have attempted to impart some basic technical knowledge without going into detail. A more elaborate approach would otherwise prejudice the aim of the presentation.

In conclusion, it ought to be said that, not unlike other expert forensic evidence, evidence relating to firearms follows a set of general rules. Starting with the careful collection of material, systematic examination is essential. The data are closely examined, and it is only then that a firm opinion can be expressed. It is this opinion clearly expressed that is of primary importance, and is what is awaited. It will be accepted if it is conveyed with honest conviction, without bias. If rejected, the satisfaction of having performed one's duty with labour and dedication outweighs the exhileration of having got one's way.

SCIENTIA JURIS AND THE SOLDIER

L.C. GREEN*

WAR crimes trials, whether conducted by tribunals established under international agreement, like that at Nuremberg,[1] or under municipal law, like that which rendered the decision regarding the *Llandovery Castle*,[2] as well as trials under national military law, like that of Lieutenant Calley,[3] inevitably raise a multitude of legal problems. Among the most important of these is the knowledge of the accused. Too often, insufficient attention is paid to this, even though the inevitable defence of superior orders and the reaction to it of the tribunal concerned[4] to a very great extent are based on this factor, since success or otherwise of the plea depends on whether or not the act ordered was palpably or manifestly illegal, which obviously depends on the accused's knowledge of what is in fact lawful. If the writer's experience on joining the British Army during the Second World War is anything to go by, the extent of the knowledge of the law of the ordinary soldier stems rather from his own resources than those of the military establishment. While he was told that, as a prisoner of war, the Geneva Convention of 1929[5] merely required him to give his name, number

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[1] The London Charter, 8 Aug. 1945, 82 UNTS 280 (Schindler & Toman, *The Laws of Armed Conflicts* (1973), 689).

[2] (1921) HMSO Cmd. 450 (Cameron, *The Peleus Trial* (1948), App. IX).

[3] *U.S.* v. *Calley* (1973) 46 C.M.R. 1131, 48 C.M.R. 19; *Calley* v. *Callaway* (1974) 382F Supp. 650, (1975) 519 Fed. Rep. (2d) 184 (Goldstein and others, *The My Lai Massacre and its Cover-Up: Beyond the Reach of Law?* (1976), 475-573).

[4] See, e.g., Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965); Green, *Superior Orders in National and International Law* (1976).

[5] Art. 5, 118 LNTS 343 (Schindler/Toman, 261).

and rank, he was never given any instruction as to the rights of enemy personnel, his duties towards them or the nature of illegal weapons or acts of war. Moreover, it would appear that in some armies the situation has probably not changed too radically. Thus, in one of the courts martial arising out of the operations of United States personnel during the Korean War it was held that even though the acts perpetrated by the accused were in keeping with the training received during basic training, this would not provide a defence if the order concerned was palpably illegal on its face.[6]

It is difficult to expect the ordinary soldier to know what orders he is permitted and required to obey, or the officer what orders he is allowed to give, without in either case running the risk of trial for breach of the law of war, if he does not know what that law is. While it may be true that most systems of criminal law postulate the maxim *ignorantia juris quod quisque tenetur scire, neminem excusat*,[7] it must not be forgotten that those who live within a national system of law may be presumed to accept the national ethic and to be aware of the nature and basic principles of their country's criminal code, or at least know where to find them. This is hardly the case in so far as international law is concerned. This is a highly sophisticated system parts of which are controversial, and this is particularly true of that part of it which relates to the law of war. After all, the soldier understands that his task is to kill his enemy, that the aim of his country is to subdue that enemy, and it may seem somewhat strange to him that while his act and the purpose for which it is done are both lawful, nevertheless he is only allowed to carry out this act in a particular way and in accordance with certain rules, which rules are often abstruse, complex in form and certainly difficult to find. It is important, therefore, to examine the extent to which states are obliged to inform their armed forces of the law of war and to refer, if possible, to the steps and methods which have been or ought to be taken to this end.

In looking at this problem it must be borne in mind that international law is made up of treaties, customary law and, nowadays to an increasing extent, judicial decisions. Also, unlike municipal law, international law is, in theory at least, universally applicable and the law of one country's courts in this field has as much

[6] *U. S.* v. *Keenan* (1969) 39 C.M.R. 108.

[7] 'Ignorance of the law, which every man is bound to know, excuses no man' (see Selden, *Table Talk* (1689), 'Law'; 4 Blackstone, *Commentaries on the Laws of England*, ch. 2, s. V (10th ed., 1787, 27).

validity as that of any other country. As it was so aptly put by Vattel:[8]

> 'Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. *Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.*'

It becomes necessary, therefore, to examine where this equally applicable law is to be found and the extent to which it imposes an obligation upon its subjects to ensure that it is made known to their nationals. With treaties the situation is relatively straightforward. All that is required is to determine which are the relevant documents and then to examine the terms of those treaties. However, to a very great extent these treaties are simply codifications of customary law and, in so far as they are not themselves law-creative, the only obligation that rests upon non-parties is to be derived from that customary law. For the most part, it has been generally said that the law of war is to be found in the Hague Conventions of 1907 as amended by the various Red Cross Geneva Conventions of 1929 and 1949.[9] However, even the Hague Conventions themselves refer to 'the laws and customs of war' and at times do not spell out in excessive detail what even the treaty law entails. Thus, all that Hague Convention IV[10] with respect to the laws and customs of war on land says about penalties for violations of the Regulations attached thereto is to be found in Article 3:

> 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

There is no provision for personal liability or for punishment of the soldier who actually commits the violation. The only basis on which such individuals can therefore be tried is either their own municipal law which would not, of course, extend to an enemy, or

[8] *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), Bk. I, Intro., s. 18 (Carnegie tr., 1916, vol. 3, p. 7 – italics added).
[9] See Schindler and Toman, *op. cit.*
[10] *Ibid.*, 57.

customary international law, just as non-military personnel who indulge in warlike acts are similarly liable as war criminals under the same customary law. In the first edition of his *International Law*[11] Oppenheim says:

> 'according to a generally recognised customary rule of International Law hostile acts on the part of private individuals are not acts of legitimate warfare, and the offenders can be treated and punished as war criminals. Even those writers who object to the term "criminals" do not deny that such hostile acts by private individuals, in contradistinction to hostile acts by members of the armed forces, may be severely punished. The controversy whether or not such acts may be styled "crimes" is again only one of terminology; materially the rule is not at all controverted.'

Although, in this passage Oppenheim apparently excludes from his concept of war crimes 'hostile acts by members of the armed forces', he points out that 'belligerents have not an unlimited right as to the means they adopt for injuring the enemy',[12] and comments[13] that:

> 'the roots of the present Laws of War are to be traced back to practices of belligerents which arose and grew gradually during the latter part of the Middle Ages. The unsparing cruelty of the war practices during the greater part of the Middle Ages began gradually to be modified through the influence of Christianity and chivalry.'

At this juncture it might be useful to draw attention to the 1474 trial of Peter of Hagenbach at Breisach.[14] As Governor for the Duke of Burgundy Hagenbach established a

> 'regime of arbitrariness and terror [which] extended to murder, rape, illegal taxation and wanton confiscation of private property, and the victims of his depradations included inhabitants of neighbouring territories as well as Swiss merchants on their way to and from the Frankfurt fair.'

After Hagenbach's capture, the Archduke of Austria, as sovereign of Breisach, set up a tribunal of 28 judges from the Allied towns,

[11] Vol. 2 (1906), 63.
[12] *Ibid.*, 114 (citing Art. 22 of Hague Regulations of 1899, Schindler/Toman, 76).
[13] *Ibid.*, 74.
[14] Schwarzenberger, *International Law*, vol. 2, *The Law of Armed Conflict* (1968) ch. 39.

and at his trial the accused pleaded that everything he had done had been on the orders of his master, but the prosecution alleged that he had 'trampled under foot the laws of God and man'. The tribunal was of opinion that to accept such a defence would be contrary to the laws of God and, since the crimes were established beyond doubt, sentenced Hagenbach to death. In many ways the charge with its reference to the laws of God and of man seems like a predecessor of the provision of the Treaty of Versailles aimed at bringing the Kaiser to trial:[15]

> 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties ...
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.'

While the Treaty called for the establishment of a specially established international tribunal, it did not specify the law which this tribunal would apply and by which the offences were to be judged. A somewhat similar hiatus is apparent in the Treaty provision[16] concerning the trial by military tribunals of 'persons accused of having committed violation of the laws and customs of war', who if found guilty are to 'be sentenced to punishments laid down by law'. While the Treaty does not indicate what law it has in mind, the Reichsgericht which delivered the *Llandovery Castle* judgment[17] was clearly aware that it was operating in accordance with international law:

> '... The firing on the boats was an offence against the law of nations ... Any violation of the law of nations in warfare is ... a punishable offence, so far as, in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the law of the State that makes war ..., only in so far as such killing is in accordance with the conditions and limitations imposed by the Law of Nations. The fact that his deed is a violation of International Law must be well known to the doer, apart from acts of carelessness, in which careless ignorance is a sufficient excuse. In examining the existence of

[15] (1919) Art. 227 (112 B.F.S.P. 1; 13 Am. J. Int'l Law (1919), Supp.).
[16] Art. 228.
[17] *Loc. cit.*, n. 2 above.

this knowledge, the ambiguity of many of the rules of International Law, as well as the actual circumstances of the case, must be borne in mind, because in wartime decisions of great importance have frequently to be made on very insufficient material. This consideration, however, cannot be applied to the case at present before the Court. The rule of International Law, which is here involved [regarding the sinking of the hospital ship and the firing on the boats of the survivors], is simple and universally known. No possible doubt can exist with regard to the question of its applicability. The Court must in this instance affirm [the commander's] guilt of killing contrary to International Law ...'

Perhaps the earliest codification of the law of war was that prepared by Professor Lieber of Columbia University, during the American Civil War and promulgated by President Lincoln in 1863.[18] This reflects what was generally understood by the European states as constituting the law at the time and clearly provides for the trial and punishment of a variety of specified offences committed by troops against the inhabitants of invaded territory, but it makes no reference to the need to ensure that members of the United States armed forces are made aware of what they may and what they may not do, although by and large the offences listed are those which would be found in any national penal code. The first call for recognition of the need to inform the armed forces of the rules of war is to be found in the *Oxford Manual* prepared by the Institute of International Law at its Oxford meeting in 1880.[19] In the Preface the Institute states why it has drawn up its statement of the laws of war on land:

'By so doing, it believes it is rendering a service to military men themselves. In fact so long as the demands of opinion remain indeterminate, belligerents are exposed to painful uncertainty and endless accusations. A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts – which battle always awakens, as much as it awakens courage and manly

[18] U.S. Adjutant General's Office, General Orders No. 100 (Schindler/Toman, 3).

[19] Institut de Droit International, *Tableau général des resolutions, 1873-1956* (1957), 180; Scott, *Resolutions of the Institute of Int'l Law* (1916) 26; Schindler/Toman, 35).

virtues, – it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity. But in order to attain this end it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known among all people, so that when a war is declared, the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command. The Institute, with a view to assisting the authorities in accomplishing this part of their task, has given its work a popular form, attaching thereto statements of the reasons therefor, from which the text of a law may be easily secured when desired.'

While the text of the *Oxford Manual* seems to satisfy the expressed desire of achieving a 'popular form', it must not be overlooked that the ordinary person, civilian or military, was unlikely to seek this document out. Furthermore, while the Institute might have been composed of the most eminent international lawyers of the day, it must not be forgotten that it was,as it is now, an unofficial learned society whose proposals possessed no binding force and could only aim at providing suggestions acceptable to governments which would carry them into law. It would appear that, despite the expressed desire of the Institute, little was done to make the contents of the *Manual* known to members of the armed forces. Even when countries started issuing *Manuals of Military Law* with sections devoted to the law of war, these manuals were not issued to the troops or even all officers, and in many cases non-officers were actively discouraged from seeking access to them.

To some extent the *voeu* of the Institute had an effect. In Hague Convention II of 1899[20] it was clearly provided in Article I that

'The High Contracting Parties shall issue instructions to their armed land forces which shall be in conformity with the "Regulations respecting the laws and customs of war on land" annexed to the present Convention.'

and the same provision was repeated in the IV Convention of 1907.[21]

The only other Hague Convention to deal with dissemination is No.X of 1907[22] for the Adaptation to Maritime Warfare of the

[20] Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 100 (Schindler/Toman, 57).
[21] *Ibid.*
[22] Art. 20, Scott, *op. cit.*, 163 (Schindler/Toman, 235).

Principles of the Geneva Convention of 1864[23] which related to the amelioration of conditions of the wounded and sick of armies in the field. In its form, however, it differed from the wording in Convention IV and appeared to lay more emphasis on the knowledge of those who were to be protected than of those whose conduct was restricted:

> 'The Signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.'

Although other Conventions agreed at the Hague dealt with such issues as the rights of neutrals and naval bombardment, the signatories apparently did not consider it necessary to include a provision seeking to ensure that the rules and prohibitions were made known to the personnel who were most directly affected and upon whose conduct it was necessary to rely to ensure compliance.

Perhaps even more surprising is the silence in this matter of the Rules regarding Air Warfare[24] drafted by the Commission of Jurists called for by the 1922 Conference of Washington. Although this goes into detail as to what may and may not be done in aerial warfare – the fact that the Rules were never adopted is irrelevant, especially as 'to a great extent, they correspond to the customary rules and general principles underlying the conventions on the law of war on land and at sea'[25] – the members of the Commission apparently did not consider it necessary for the states which might adopt these Rules to undertake any commitment to make them known to their respective air forces. Equally strange is the silence of the Draft Convention for the Protection of Civilians against New Engines of War drawn up by the International Law Association at Amsterdam in 1938.[26]

In what has now come to be described as humanitarian law in armed conflict, the International Committee of the Red Cross has consistently endeavoured to ensure that treaties relating to the wounded and sick or prisoners of war contain provisions obligating the parties to inform their personnel of the commitments involved. Article 27 of the 1929 Convention on the Amelioration of the Con-

[23] 1 Am. J. Int'l Law (1907), Supp. 90 (Schindler/Toman, 203).
[24] 1923, 17 Am. J. Int'l Law (1923), Supp. 245 (Schindler/Toman, 139).
[25] *Ibid.*, 139; see, also, 2 Oppenheim, *International Law* (7th ed., 1952), 519; Spaight, *Air Power and War Rights* (1947) 42-3.
[26] I.L.A., *Report of 40th Conference*, 40 (Schindler/Toman, 155).

dition of the Wounded and Sick in Armies in the Field[27] is reminiscent of Hague Convention X, for it reads:

> 'The High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population.'

A somewhat similar concern with the interest of those protected is to be found in the 1929 Prisoners of War Convention,[28] for by Article 84 the text of this Convention is to be posted, 'whenever possible, in the native language of the prisoners of war, in places where it may be consulted by all the prisoners'. It even has to be communicated, when so requested, to prisoners 'who are unable to inform themselves of the text posted'. Presumably, it is anticipated that those responsible for the prisoners of war will be sufficiently acquainted with the terms of the Convention by such posting – that is, if they can read the language of the prisoners – for there is no obligation on the parties to make the terms known to their own personnel.

A somewhat new departure is to be found in the revised texts of the Geneva Conventions of 1949 which resulted from the desire of the International Committee of the Red Cross to bring the 1929 texts up to date, taking into consideration the experiences learned during the Second World War. Article 47 of the Convention on Wounded and Sick in the Field,[29] and Article 48 of that on Wounded, Sick and Shipwrecked Members of Armed Forces at Sea[30] are much wider than their precursors, reflecting recognition of the fact that modern armies are frequently conscript in character and their personnel should, to the extent that that is possible, be aware of their obligations before enlistment, and certainly before the outbreak of hostilities:

> 'The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.'

[27] 5 Hudson, *International Legislation* (1936), 1 (Schindler/Toman, 247).
[28] *ibid.*, 20 (Schindler/Toman, 261).
[29] 75 UNTS 31 (Schindler/Toman, 295).
[30] *Ibid.*, 85 (323).

The 1949 Conventions on Prisoners of War[31] and the Treatment of Civilian Persons in Time of War[32] take due account of their specialist character:

> Art. 127, Ps W – 'The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.
> Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.'

The High Contracting Parties are bound to enact any legislation necessary to give penal effect to the Convention and, by Article 128,

> 'shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof.'

The 1929 provision with regard to the posting of the Convention has been extended so that all regulations and orders must be in a language that the prisoners can understand.

The first paragraph of Article 144 of the Civilians Convention is in the same terms as Article 127 of the Prisoners of War Convention, but it proceeds:

> 'Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions,'

and the same requirement respecting intercommunication of legislation appears in Article 145.

At the present time there has been some widening of the concept of non-military objectives and a treaty now exists for the Protection of Cultural Property in the Event of Armed Conflict.[33] It cannot be denied that in the past the military have not been over-

[31] *Ibid.*, 135 (345).
[32] *Ibid.*, 287 (417).
[33] 1954, 249 UNTS 240 (Schindler/Toman, 525).

scrupulous in respecting cultural property and at times occupying forces have not hesitated to destroy monuments in the territory of their enemy. Moreover, states have on occasion considered that modernisation is perhaps more important than the preservation of those national cultural monuments which might constitute part of 'the cultural heritage of every people.' Cultural property is defined as:

> '(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts; books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositaries of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
> (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b) to be known as "centres containing monuments".'

This definition is so comprehensive and yet so vague that it is clear some measures of dissemination to inform the military and others concerned will be absolutely vital if the Convention is to have any meaning. The draftsmen seem to have been aware of this need, for there are two provisions relating to dissemination which to some extent are repetitive:

> Art. 7 – 'The High Contracting Parties undertake to introduce in time of peace into their military regulations such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit for the culture and cultural property of all peoples. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with civilian authorities responsible for safeguarding it.'
> Art. 25 – 'The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as

widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.'

It is obvious that the only way such 'property of great importance to the cultural heritage of every people' can be protected without the items becoming so numerous and trivial as to be ridiculous – for every person's idea of what constitutes such property from the point of view of, for example, art is likely to be highly subjective – will be by the compilation of agreed lists that will be available to the armies in the field. Such lists are envisaged, but later experience suggests that these may perhaps not be available by the time armed conflict begins and, as became clear at the 1976 session of the Diplomatic Conference on Humanitarian Law in Armed Conflict, it can easily happen that one belligerent is so determined not to recognise its adversary, that it will not even agree to the compilation of such lists if it means that co-operation is in any way necessary with what is now known as the 'adverse party' rather than the 'enemy'.

In the years since the Second World War most of the armed conflicts which have occurred have been non-international, so that generally speaking there have been no rules of international law, with the possible exception of the minimal rules of humanity, applicable, for states have traditionally relied upon the argument that civil wars and the like are matters of domestic jurisdiction with which the rest of the world has no concern. And this principle is confirmed by Article 2(7) of the Charter of the United Nations unless there is a threat to international peace.[34] However, an early effort at bringing civil war situations within the purview of international law is to be found in the Nyon Agreement of 1937[35] aimed at suppressing unlawful submarine attacks upon merchant ships trading with ports under the control of, primarily, the Spanish

[34] 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this provision shall not prejudice the application of enforcement measures under Chapter VII [with respect to threats to the peace, breaches of the peace and acts of aggression].'

[35] 181 LNTS 137 (Schindler/Toman, 667).

Government. By Article 1:

> 'The participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.'

While it may be argued by the purist that this is not really directed at imparting rules of humanitarian behaviour to the citizens or military personnel of any contracting party, in the sense that he may need to know the law in order to defend himself, it is nevertheless an instance of an international obligation that requires states parties to the agreement to inform their personnel of the new law that has been created and which they would be required to observe and carry through.

It became clear in Korea and Vietnam that the law of war as it had been drawn up at the Hague and Geneva was now out of date. For one thing, there was no provision with regard, for example, to ambulance aircraft, and when the International Red Cross Committee drew up its draft proposals for amendments to the 1949 law to be presented to a diplomatic conference on humanitarian law in armed conflict, it decided to take the opportunity, to bring, in so far as it could, the traditional law up to date, as well as to attempt to extend at least the basic principles of humanitarian law to non-international conflicts too. This is not the place to discuss the proposals embodied in the two draft Protocols intended to be additions to the Geneva Protocols and aimed at achieving this end. We are concerned solely with the problem of dissemination and enlightenment of those likely to be called upon to give effect to the new rules, whether they be described as part of the law of wars or rules of humanitarian law. Before looking at the provisions of the draft Protocols it should be pointed out that it matters little what conventions say or require, if the states which are parties to them do not ensure that their military personnel are in fact sufficiently aware of their provisions and understand what is required of them as not to be likely to breach their provisions. The operations in Korea and Vietnam and the United States courts martial arising therefrom[36] indicate that there was something gravely lacking in the education being given to United States armed forces, and perhaps indicating that not enough emphasis was being imparted to officers to indicate that the United States

[36] See, e.g., Green, 'Superior Orders and the Reasonable Man', 8 Can. Y.B. Int'l Law (1970), 61, 96 *et seqq.*; *Superior Orders in National and International Law* (1976), 126 *et seqq.*

accepted the view expressed in Article 22 of the Hague Regulations that 'the right of belligerents to adopt means of injuring the enemy is not unlimited', even though this article is reprinted in the United States Department of the Army Field Manual on the Law of Land Warfare,[37] accompanied by the comment:

> 'The means employed [in injuring the enemy] are definitely restricted by international declarations and conventions and by the laws and usages of war.'

It is perhaps because of what happened in these two theatres that the United States military authorities thereafter issued a variety of pamphlets on the teaching of the law of war to the armed forces.[38] However inadequate these might be,[39] they show a determination to make some effort to ensure that American troops have at least some knowledge of what they may and may not do during armed conflict. As a result, where they are concerned there may now be some validity in upholding the validity of the *ignorantia juris* maxim.

Among the new departures adopted by the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, and the potential significance of which has already been made clear, is the provision in Protocol I concerning the protection of journalists.[40] This aims at giving journalists who are not accredited war correspondents some protection by means of an identity card to ensure that when captured they are treated as civilians. Obviously, members of the armed forces will have to be aware of the nature of this card and know that any attempt by them to use such an identity certificate would amount to a breach of the law of war. In fact the British Government has now ceased the practice in Northern Ireland of having soldiers in civilian clothing passing themselves off as regular journalists, thus indulging in a form of 'perfidy', while at the

[37] Dept. of the Army, FM27-10 (1956), para. 33.

[38] Dept. of the Army, 27-200, 'The Law of Land Warfare – A Self-Instructional Text' (1972); ASubjScd 27-1 (1970), 'The Geneva Conventions of 1949 and Hague Convention No. IV of 1907' (2-hour lecture course).

[39] For criticisms see Green, 'Aftermath of Vietnam: War Law and the Soldier', 4 Falk, *The Vietnam War and International Law – The Concluding Phase* (1976), 147, 168 *et seqq.*)

[40] Art. 79, see 16 Int'l Legal Materials (1977), Pr. I, 1391, Pr. II, 1442 – for discussion of these Protocols, see Green, 'The New Law of Armed Conflict', 15 Can. Y.B. I.L. (1977).

same time endangering true journalists entitled to such cards and the civilian status concomitant therewith.[41]

In so far as Protocol I relating to international armed conflicts is concerned, the Geneva Conference on Humanitarian Law accepted a number of proposals regarding dissemination:[42]

> Art. 82 – 'The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.'
>
> Art. 83 – 1(1) The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population. (2) Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

A number of points arise in connection with these proposals. In the first place, Article 82 implies that some of the officers attached to the judge advocate division of a military force should be knowledgeable in at least that part of the law of war that may be described as humanitarian law. Such a requirement would almost certainly necessitate a revision of the training afforded by the relevant military services and perhaps also the placing of a greater emphasis on the international law of war with particular reference to the principles of humanitarian law in armed conflict.[43] The reason that states are only required to 'encourage' civilian study of these principles is to be found in the constitutional difficulties confronting some federal states where education is not within the central government's competence, and also to preserve the position in

[41] See Green, letter on 'Journalists in Battle Areas', *The Times* (London) 1 Mar. 1976.

[42] *Loc. cit.*, n. 40 above.

[43] See, Green, 'The Role of Legal Advisers in the Armed Forces', 7 Israel Y.B. on Human Rights (1977).

those countries where independence is demanded by such educational authorities as universities in so far as their curricula and teaching programmes are concerned. There can be little doubt that, even if these provisions are conscientiously carried out, military commanders will have to recognise that, while their function may be to conduct hostilities with a view to the early defeat of the enemy, regulation of the conduct of the men in their command so as to ensure compliance with the law and its restrictions is a fundamental obligation, as well as a policy matter of importance to national dignity. If this occurs, there are likely to be less transgressions of the law and certainly fewer opportunities for those accused of breaches to plead ignorance in their defence. However, there is inherent in the provisions the assumption that proper educational programmes, at least of the military, conducted by properly qualified persons will be instituted. This draws attention to activities already commenced in cooperation with the International Committee of the Red Cross by the Institut Henri Dunant in Geneva. Under the direction of Professor Pictet, who is also Vice President of the International Committee of the Red Cross, the Institut has introduced a number of courses in humanitarian law in armed conflict which have already been attended by members of the armed forces from various countries, as well as by graduate students. In addition, the Institut is anxious to organise seminars for interested parties and on a regional basis, and is receiving encouragement and cooperation particularly from some of the developing countries. Where developed countries are concerned, difficulties are encountered in view of historical backgrounds and a desire to follow their own tradition.

Problems of a somewhat different kind arise concerning Protocol II which deals with non-international armed conflicts. In so far as the regular armed forces are concerned, their position is already governed by the provisions of Protocol I just referred to, although it could easily be argued that since Protocol I only deals with international conflicts, any education in relation thereto, is completely irrelevant for non-international conflicts. Specific steps must therefore be taken to ensure that no such escape from the obligation to observe humanitarian law is possible. In the event of a non-international conflict, however, one of the contestants is likely to be recruited primarily from civilians, as well as dissident members of the armed forces. If the Protocol is to have any meaning and come into operation immediately upon the conflict becoming sufficiently serious to be considered an armed conflict rather than a riot or a minor insurrection, it will be necessary for

the civilian population to be educated in the basic principles of humanitarian law as part of the country's ordinary educational programme and regardless of the likelihood of any conflict arising. However, any attempt to postulate an international obligation requiring states to educate their subjects as to their rights and duties in time of civil war or other non-international armed conflict may easily be construed as an attempt to interfere in the domestic jurisdiction of a state. Moreover, it smacks of encouragement to dissidents to resort to armed conflict, secure in the knowledge that the government is subject to restrictions on its freedom in restoring order and re-establishing its authority, having already taught those who are now opposed to the government exactly what rights they will be entitled to, and which might limit the normal operation of the criminal law, should they decide to resort to armed force. In fact, at Geneva this proposal met with opposition from some Latin American countries, where it might be thought that their past history suggests a real likelihood of non-international conflict breaking out with the resultant creation of a Protocol II situation. A further objection was raised by the Soviet Union which contended that any obligation to educate its civilian population along such lines would be contrary to the prohibition contained in the Law on the Defence of Peace[44] which forbids war propaganda in whatever form it is carried out, arguing further that such education would also be contrary to the Soviet commitment to educate for peaceful purposes. Despite these reservations, the Geneva Conference adopted at its 1976 session Articles 36 and 37 of Protocol II:[45]

> Art. 36 – 'Each Party to the conflict shall take the necessary measures to ensure the observance of this Protocol by its military and civilian agents and persons subject to its control.'
>
> Art. 37 – '(1) The High Contracting Parties undertake to disseminate the present Protocol as widely as possible in time of peace, so that it may become known to the armed forces and to the civilian population.
>
> (2) In time of armed conflict, the Parties to the conflict shall take appropriate measures to bring the provisions of the present Protocol to the knowledge of their military and civilian agents and persons subject to their control.'

This provision perhaps sounds highly reasonable, but it must be

[44] 21 Mar. 1951, c. Tunkin, *Theory of International Law* (1974), 85-6.
[45] I.C.R.C., Doc. D 1388/1 b (1976).

recognized that the anti-government forces will not be a party to the Protocol which is only intended to be open for signature or accession by parties to the Geneva Conventions, and these are, of course, states. It would mean, therefore, that unless this contestant makes a statement accepting the obligations of the Protocol, there is imposed upon the government a unilateral obligation as to its operations in re-establishing its authority and, moreover, a requirement to inform the military and the civilians supporting it of their duty to observe the provisions of the Protocol, even though their opponents are not so doing. On the other hand, it might be argued that by becoming a party a state accepts the obligations for all its citizens, so that during a non-international conflict even its opponents are, legally at least, still bound by the state's international undertakings. This one-sidedness of burdens may therefore be more apparent than real. Cynics, however, might prefer the less liberal approach. It should also be noticed that, unlike the position under Article 83 of Protocol I, there was no reference to the inclusion of the teaching of Protocol II in military curricula. The reason for this was that some countries were unwilling, in connection with a non-international conflict, to accept directions as to the precise method by which their armed forces were to be informed of their Protocol II obligation. Eventually, in Protocol II as finally adopted, these provisions were replaced by Article 20, which simply states that 'this Protocol shall be disseminated as widely as possible'.

There can be little doubt that if the states parties to the Geneva Conventions and the two amending Protocols take their obligations regarding dissemination seriously, and in fact introduce proper educational programmes, there would be more realisation by both the armed forces and the civilian population that there is in fact a real law of war carrying as much risk of punishment in the event of its breach, as is the case with national criminal law. At the same time, no member of the field forces would be able to contend, if charged with a breach of the law, that not only was he unaware of the existence of a particular rule, but that no attempt had ever been made to enlighten him. Moreover, military commanders would have to rethink their attitudes to the whole conspectus of the law of war and give it its due and proper place in military training. In so far as the civilian population is concerned, if the obligations are to be fully carried out, both as regards Protocol I and Protocol II, there would be a need for governments to rethink the nature of their educational programmes, des-

pite the possibility that schools and pacifists among the teaching staffs may offer real objections. It may well be that there would have to be some measure of cooperation between civilian education authorities and the military. Since this would almost certainly be rejected in many countries, use might have to be made of the personnel of the national Red Cross Society. But this too would often mean a rethinking of the entire approach and philosophy of such Society. For the main part, the members of the national Society are concerned with internal medical auxiliary aid programmes and the offer of assistance in the event of national and sometimes international catastrophes, but they are hardly concerned with problems of armed conflict or the law relating thereto. Perhaps, if they were able to enlist qualified persons, and this again raises the problems of cooperation with the military or at least of the legal branch, this would be reasonable. Otherwise, it must be remembered that the international law of peace and war, as well as the principles of humanitarian law, is highly technical and the terms of treaties are often ambiguous if not actually obtuse. For unqualified persons to attempt to educate others on their meaning may be just as dangerous as the absence of any education at all.

While in the past it might have been possible for any state to argue that while common sense dictated it should educate its troops in the law of war, the legal obligation so to do was somewhat nebulous and rather in the nature of a pious hope. Now, however, the obligation is clearly laid down. What may still be necessary is the establishment of some observation centre or clearing house which might be able to oversee and advise whether this is being carried into effect in a reasonable manner such that ordinary soldiers may understand, while a bare minimum may be presumed as equally accepted by all services regardless of arm or nationality. To some extent this is being attempted by the Henri Dunant Institut, while the International Committee of the Red Cross may be expected to continue to issue pamphlets outlining the basic minima of obligations in the field of humanitarian law. These educational activities, combined with the obligation to report to the International Committee which, presumably, is entitled to comment on such reports, may be the beginning of a new era of education of both the military and the civilian populations in that part of international criminal law which is concerned with breaches of the principles of international humanitarian law in time of armed conflict.

THE RESIDUAL POWERS OF THE FIRST HALL, CIVIL COURT IN MALTA

WALLACE PH. GULIA

IN recent years the residual powers of the First Hall of the Civil Court have been highlighted by s. 47 of the Constitution of the Republic of Malta, which provides that redress in respect of the enforcement of the protective provisions contained in the Constitution is to be sought from that Court and furthermore that when any question arises before any court, other than the Constitutional Court and the First Hall, Civil Court, as to the contravention of any of the aforesaid protective provisions, the court, before whom the question arises, is to refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious and its findings, subject to appeal to the Constitutional Court, are binding on any court which has so referred the matter.

The Civil Court, First Hall, in Malta, however, is not only vested with the powers which are conferred on it as is the case of the other Courts of Law in Malta. In practice it also has jurisdiction to decide where jurisdiction lies and to declare whether any particular body has acted in terms of its jurisdiction and in accordance with the provisions of the law. *Mutatis mutandis* this corresponds to the jurisdiction of the Queen's Bench Division in the U.K. to review decisions of inferior bodies to see whether they have acted within their jurisdiction. Recently the Civil Court, First Hall, clearly asserted that:

"M'hemmx dubju, kif sewwa jirrileva l-attur, li, f'każi simili, il-Qorti tagħna kostantement asserew il-jedd li jissindikaw jekk provvediment ikunx jemana mill-awtorità kompetenti u fid-debita forma." (Perici vs Busuttil noe u Buttigieg vs Busuttil, noe 22/3/1976).

This comes very close to a declaration that a decision of an inferior body may be 'bad on the face'. The power of the Queen's Bench Division in the U.K. to review decisions which were 'bad on the face' was trenchantly reaffirmed in Rex v. Northumberland

Compensation Appeal Tribunal, ex parte Shaw (1951) 1 K.B. 711) and has been consistently reiterated ever since by U.K. Courts.

A typical Maltese case which applied a similar solution, without however going into a general discussion of the problem, but which in the event certainly affirms the First Hall's power to review the findings of the inferior body, is that of *Joseph Cutajar v. Port Workers' Board* (Anthony Farrugia et noe) (24/10/1974). In that case the Civil Court declared that the Port Workers' Board had acted not only against the law, but also manifestly *ultra vires* and hence the Civil Court declared the findings of the Port Workers' Board as null and consequently revocable by itself. It is interesting to observe that the Court did not merely declare the findings null. Instead of referring the matter for the further consideration of the Port Workers' Board, the Civil Court, after finding the nullity, itself revoked the decision.

The interesting implications of the decision of an inferior jurisdiction being 'bad on the face' are manifestly important in Administrative Law, as power to review the decision of an inferior jurisdiction in practice amounts to a right of appeal where the Legislature might have failed to provide any, or where it has provided a limited right of appeal. On the other hand, it is now clear that the Legislature itself could bite into this right of review of the Civil Court, in the same way as it has bitten into the principles of the Rules of Natural Justice where decisions by administrative bodies are concerned. Where a limited right of appeal is conferred by the Legislature, it may be argued that the grounds of appeal specifically conferred by the Legislature may not be widened out by the appellate Court, *sponte sua*. As the argument went in the Police vs Leslie Freedman case (Court of Criminal Appeal, 17/3/1977). Since s. 425 of the Criminal Code had specified the cases in which the Attorney General could appeal against the decisions of the Courts of first instance, that Court should not extend the Attorney General's right of appeal on the ground that the decision of the Court of first instance was 'bad on its face'. At the same time it is to be remembered that a right of *review* although tantamount to, is not a right of, *appeal*; so that that Court could have first dealt with the matter as a question of *review* (not of appeal), and if it found the decision bad on the face, it could have declared the nullity. Having done so, that Court could then have dealt with the matter in the same way as it deals with judgments of a court of first instance which are found to be null in view of deficiencies of procedures in terms of s. 440 of the Criminal Code.

In the relevant cases of course, the right procedure would be that of seeking a declaration of nullity from the Civil Court and thereafter a reconsideration of the case by the inferior jurisdiction itself if one is not thereafter time barred. (In the appropriate case, the risk that an action may be on the way to being time barred could amount to a proper plea of urgent treatment by the Civil Court.)

CONSTRUCTIVE TRUSTS AND AGENCY

G. W. KEETON

THE extent to which agents, acting on behalf of trustees, may incur personal responsibility as constructive trustees and so become accountable to the beneficiaries, has produced an extensive case law and some interesting distinctions, often turning upon the facts of the individual case, and the nature and extent of the agent's participation in the acts which are impeached. In the leading case of *Barnes* v. *Addy*,[1] decided a century ago, a sole trustee had been appointed against the advice of a solicitor and the sole trustee misapplied the funds. Two solicitors who had prepared the deeds in the transaction in which the funds had been misapplied and who had received their costs were joined as defendants in a suit by two beneficiaries, along with the sole trustee. The Vice-Chancellor dismissed the bill against the two solicitors, and his decree was affirmed on appeal. In the course of his judgment on the appeal, Lord Selborne L.C. said:[2]

> 'Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist

[1] (1874) 9 Ch. App. 244.
[2] at pp. 251-253.

with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.'

These observations are the foundation of two paragraphs in *Halsbury's Laws of England*,[3] which have been frequently cited in cases involving the position of agents as constructive trustees. Two cases decided in 1968 illustrate the circumstances in which constructive trusteeship may be attributed to an agent. The first considered transactions in which the agents were bankers, the second considered transactions involving the solicitors of a foundation.

The first case, *Selangor United Rubber Estates Ltd.* v. *Cradock (No. 3)*[4] is notable for the full consideration by Ungoed-Thomas J. of the position of bankers who act on behalf of trustees or other fiduciaries. It was established in *Foley* v. *Hill*[5] and reaffirmed by Lord Hatherley L.C. in *Burdick* v. *Garrick*[6] that a banker is not a trustee for a customer of the amount standing to his credit in his bank account, and this has been continuously acted upon subsequently. The relationship between banker and customer, as Ungoed-Thomas J. pointed out in the instant case, is contractual, and it is founded on one contract, which normally includes the relationship of creditor and debtor with regard to the balance in the customer's bank account and the relationship of principal and agent in respect of the payment of the customer's cheques drawn on the customer's bank account. It was more extensively discussed

[3] Vol. 38, paras. 1449-1450, pp. 860-861.
[4] [1968] 1 W.L.R. 1555.
[5] (1848) 2 H.L. Cas. 28.
[6] (1870) 5 Ch. App. 233.

by Atkin L.J. in his well-known judgment in *Joachimson* v. *Swiss Bank Corporation.*[7] The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate a forgery. In addition, as both Atkins L.J. and Bankes L.J. pointed out in *Hilton* v. *Westminster Bank Ltd*,[8] it is the duty of the bank to exercise reasonable care and skill in dealing with the customer's business.

It is evident from this that there is no place for the inclusion of a constructive trust in the *ordinary* relations of banker and customer. For this to exist, there must be some additional factor, of the kind discussed by Lord Selborne in *Barnes* v. *Addy*.[9] In the *Selangor Estates Case*, Ungoed-Thomas J. pointed out that there were two very different kinds of constructive trustees, and he lucidly explained the difference between them:

> '(1) Those who, though not appointed trustees, take upon themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them. (2) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.
>
> Until the limitation provisions of the Trustee Act, 1925,[10] the first category of constructive trustees could not rely, in defence of claims against them, on statutory limitation or the analogous rules enforced by courts of equity. This was because they acted as trustees for others, and therefore held in right of those others and therefore time was held not to run in their favour against those others. But as the second category of trus-

[7] [1921] 3 K.B. 110, 126-7.
[8] (1926) 135 L.T. 358, 362. Reversed in the House of Lords, but not on this point 43 T.L.R. 124.
[9] *supra.*
[10] It would seem that Ungoed-Thomas J. is referring to the provisions of the Limitation Act, 1939, not to the Trustee Act, 1925.

tees claimed in their own right, time ran in their favour from their obtaining possession. It is largely by reason of this distinction that the first category of constructive trustee is sometimes referred to or included in the authorities under the term "express trustee" ...'

The second part of these observations is founded upon the opinions of the Privy Council, as expressed in the Canadian case of *Taylor* v. *Davies*,[11] when it was stated:

'The possession of an express trustee was treated by the Courts as the possession of his cestuis que trustent, and accordingly time did not run in his favour against them. This disability applied, not only to a trustee named as such in the instrument of trust, but to a person who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf ... These persons, though not originally trustees, had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar.'

The Privy Council went on to point out that the position of these trustees was quite different from that of constructive trustees in the narrower sense. These were the constructive trusts discussed by Lord Esher M.R. and Bowen L.J. in *Soar* v. *Ashwell*.[12] In the course of his judgment in this case Lord Esher says:

'If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.'

In the *Selangor Case* the claim by a liquidator of the company against the banks could only be made in respect of the second class of constructive trusts. The case against the two banks, the

[11] [1920] A.C. 636, 650-651.
[12] [1893] 2 Q.B. 390.

District Bank and the Bank of Nova Scotia, rested upon the extent of their participation in the operations of the directors of the Selangor company, in respect of which the directors were held accountable, as being in breach of trust. So far as the District Bank was concerned, Cradock, who bought a controlling interest in the company, had a small account at its branch in Oxford Street, and he told the manager and deputy manager of the branch that he could influence the transfer of the Selangor account to the branch, in view of his interest in the company. It was this circumstance which induced the manager, McMinn, and assistant manager, Reynolds, to arrange a Banker's draft for £195,322.5s.2d. to Contanglo which conducted banking business for Cradock, in exchange for a banker's draft from the Bank of Nova Scotia for £233,000, drawn on Selangor's account at that bank.

At a meeting on April 25 1958, Cradock explained to Reynolds that the Selangor account would be transferred to the District Bank and that Selangor would draw a cheque on District for £232,500 in favour of the Woodstock Trust (also controlled by Cradock) as a loan. This cheque would be endorsed by Woodstock as a loan by the Woodstock Trust in favour of Cradock, also as a loan. This cheque was then paid into Cradock's account at the District Bank, and Reynolds parted with the cheque for £195,000 in favour of Contanglo. By this means the Selangor account was stripped of its assets, an operation which had been facilitated by the failure of the manager and assistant manager of the District Bank to make any inquiries, either at the time when the funds were transferred, or later when 79 per cent of the Selangor stock was registered in one of the District Bank's nominee companies as nominee for Cradock.

The liquidator's claim against the District Bank was therefore that it should, as a constructive trustee, replace the £232,500 of the plaintiff's money with interest at five per cent, which had been paid in furtherance of an arrangement which gave financial assistance to Cradock for the purchase of the Selangor stock, and which was therefore not used for the purposes of the company. There was a further claim against the Bank for damages for negligence in the performance of the duty which they owed to Selangor as their customer, in honouring a cheque for £232,500 drawn on Selangor, and debiting it to the Selangor account, without making any inquiry of Cradock and his associates of the purpose for which the £232,500 was being paid to Cradock, by a cheque in favour of the Woodstock Trust, which that trust in turn endorsed to Cradock.

To decide whether this claim was entitled to succeed involved a detailed examination of the extent of the participation of the manager and assistant manager of the District Bank in the wrongful activities of Cradock and his associates, and of their knowledge and understanding of them. It will be seen that their conduct required to be measured by the standards of normal banking practice in relation to the accounts of customers, and Ungoed-Thomas J. made a full examination of the decisions on this point, and he observed:[13]

> 'The standard of that reasonable care and skill[14] is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise of reasonable care and skill again depends on circumstances. Where it is to inquire, then failure to make inquiry is not excused by the conviction that the inquiry would be futile, or that the answer would be false.'

Judged by these standards the bank was held to be liable because it paid the Woodstock cheque out of the Selangor account in circumstances known to the bank before payment and in which a reasonable banker would have concluded that the payment was to finance the purchase by Cradock of the Selangor stock – although neither McMinn nor Reynolds realised that the payment was being used for this purpose. In the judge's view the bank had failed to exercise reasonable care in what was plainly an exceptional and

[13] at p. 1608.

[14] i.e. as defined by Atkin L.J. and Bankes L.J. in *Hilton* v. *Westminster Bank Ltd. supra.*

very substantial transaction. 'For my part,' he added,[15] 'I can see no substantial difficulty in banks providing against such exceptional transactions, involving substantial amounts, as in this case, being carried through by officials completely inexperienced in such transactions and unqualified to deal with them. If a bank allows such officials to conduct such business it is asking for the kind of trouble which it has got in this case.'

The claim against the Bank of Nova Scotia arose from a distinct, but connected transaction. It was a claim against them as constructive trustees to replace £249,500 with interest at five per cent, and for damages for negligence in the performance of their duty as the bankers of Selangor United Rubber Estates Ltd. So far as the constructive trust was concerned, the claim was based, not on actual knowledge, but on knowledge which the bank would have had if it had made the inquiries which it was its duty to make. In equity, it was argued, the bank was liable to the same extent as it would have been if it had made proper inquiries and had obtained honest answers. In each case, the standard of care was that of a reasonable banker.

In this case, the claim against the Nova Scotia Bank failed as it was able to show that it had exercised such a degree of care. The Selangor Company had an account at the defendant bank, and the company's secretary and chairman, Burden and Sinclair, had a mandate to issue cheques on it, following resolutions of the company's board of directors. Very shortly after the mandate had been given, a cheque for £207,500 was drawn on the company's account, and was paid into Burden's account, and Burden drew a cheque for the same amount from his account in favour of Cradock. At an interview with an official of the bank, it was explained that the cheques were being exchanged for 'internal accounting reasons', or 'internal book-keeping reasons'. A second cheque for £42,000, also on the company's account and also in favour of Burden, was drawn shortly afterwards. Ungoed-Thomas J. held that in the light of all the circumstances, there was nothing which put the bank upon a further inquiry, and therefore the bank was not liable, either in negligence or as a constructive trustee. The difference in the position of the two banks therefore turns upon the degree of caution with which they approached these unusual transactions.

Another case in 1968, *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.*,[16] illustrates a further aspect of the relationship of

[15] at p. 1634.
[16] [1968] Ch. 540; [1970] A.C. 567 (H.L.).

banker and customer from the standpoint of the law of trusts. At a time when Rolls Razor Ltd. was in serious difficulties, and had a large overdraft with Barclays Bank Ltd., the company obtained a loan of £209,719.8s.6d from Quistclose Investments on the agreed condition that it was used only for the purpose of paying a dividend which had been declared shortly before. A cheque for the amount was received and was paid into a special No. 4 account at the bank, and a letter from the company to the bank stated that it would only be used for the purpose of paying the dividend. Before the dividend was paid, the company went into liquidation so that no dividend could be paid. Quistclose therefore brought an action, claiming that Rolls Razor Ltd. held the money on trust to pay the dividend, and that, as that trust had failed, the company held this sum on a resulting trust for Quistclose, and further that as the bank had notice of the purpose for which the money had been advanced the bank held it as a constructive trustee for Quistclose, and therefore could not use it as a set-off against the firm's overdraft. Both the Court of Appeal and the House of Lords accepted the claim of Quistclose Ltd., and held that the bank, who had received the money with knowledge of the trust, must account for it to Quistclose Ltd.

The basis of the decision in the Quistclose case was that the money had been paid to the bank for a particular purpose, and not for any other, and it was therefore impressed with a trust in the hands of the bank to carry out that purpose. A similar result followed in *Re Kayford Ltd.*,[17] a case in which the company was in process of liquidation. It was a mail order firm, which got into difficulties in 1972. At this point the company was advised by its accountants to open a separate bank account to be called the 'Customers' Trust Deposit Account', and to pay into it moneys received from the customers for goods not delivered, so that if the company went into liquidation, these moneys could be refunded to customers who had not received their goods. The company accepted this advice, but paid the money into a dormant deposit account. Megarry J. held that these moneys were impressed with a trust for the unsatisfied customers. After referring to the case of *Re Nanwa Gold Mines Ltd.*,[18] in which money was sent on the faith of a promise to keep it in a separate account, he added that there was nothing in that case, or in any other, which made the existence of a separate account essential. The advice was to

[17] [1975] 1 W.L.R. 279.
[18] [1955] 1 W.L.R. 1080.

establish a trust account at the bank, and the whole purpose of it was to ensure that the moneys remained in the beneficial ownership of those who sent them.

> 'No doubt the general rule is that if you send money to a company for goods which are not delivered, you are merely a creditor of the company unless a trust has been created. The sender may create a trust by using appropriate words when he sends the money (though I wonder how many do this, even if they are equity lawyers), or the company may do it by taking suitable steps on or before receiving the money. If either is done, the obligations in respect of the money are transformed from contract to property, from debt to trust.'

Later in his judgment, he added a general suggestion that when money is paid in advance to a company for future goods or services, it is a proper thing for the company to do to pay it into a separate account wherever there is a doubt that the company will be able to fulfil its obligations.

In another case arising at this period involving the position of an agent as constructive trustee, *Carl Zeiss Stiftung* v. *Herbert Smith & Co.*,[19] Edmund Davies L.J. in the Court of Appeal discussed the meaning of the term 'constructive trust'. He began by citing the meaning attributed to it in the American Restatement on Restitution:[20]

> 'Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.'

Continuing, he pointed out that there was no clear definition of the concept in English law, that its boundaries had been left vague, and that personal advantage was not a *sine qua non*. By way of illustration he cited *Nelson* v. *Larholt*.[21] In that case, over a period of time an executor fraudulently drew eight cheques in favour of defendant on the banking account of the testator's estate. They amounted to £135, and the executor received this sum in cash from the defendant. The beneficiaries of the estate sued the defendant for the £135, on the grounds that he was a trustee of this sum for them. The defendant had received the cheques for value, and in good faith. Denning J. held that for the

[19] [1969] 2 Ch. 276.
[20] (1st Ed., 1937) para. 160, p. 640.
[21] [1948] 1 K.B. 339.

defendant to escape liability it was necessary that he should have received the cheques without notice of the executor's want of authority, and on the evidence it appeared that he either knew or ought to have known of this. Denning J. explained the position in the following way:[22]

> 'The relevant legal principles have been much developed in the last thirty-five years. A man's money is property which is protected by law. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is "the holder" but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice – that is, if he knew of the want of authority or is to be taken to have known of it – he must repay. All the cases that occur in the books, of trustees or agents who draw cheques on the trust account or the principal's account for their own private purposes, or of directors who apply their company's cheques for their own account, fall within this one principle. The rightful owner can recover the amount from anyone who takes the money with notice, subject, of course, to the limitation that he cannot recover twice over. This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust, or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires.'

This principle was applied by Danckwerts J. in *G.L. Baker Ltd.*

[22] at pp. 342-3.

v. *Medway Building and Supplies Ltd.*,[23] in a case in which a company had entrusted to their auditor sums amounting to £80,000. The auditor paid it into his bank account, and used part of it for his own purposes, paying cheques to the defendants (of which he was a director) in breach of trust. The plaintiffs claimed that these sums were traceable in equity, since they had been wrongfully paid to them. The defendants denied that they were constructive trustees of these sums, but Danckwerts J. gave judgment for the plaintiffs, subject to the possibility that the claim might be defeated by the Limitation Act 1939. In order to defeat the claim, said the judge, the defendant company must show that they received the money in good faith and for value, and without notice of the auditor's want of authority; and this they were unable to do. There was an appeal from the judgment of Danckwerts J., but solely on questions of procedure, but Willmer L.J. pointed out in the Court of Appeal that Denning J.'s dictum was not in fact necessary for the decision of the case.

In the *Carl Zeiss Stiftung Case*, Edmund Davies L.J. pointed out that the concept of unjust enrichment was one example among the cases in which a constructive trust has been held to exist, and he added:[24]

> 'It may be objected that, even assuming the correctness of the foregoing, it provides no assistance, inasmuch as reference to "unjust enrichment," "want of probity" and "the demands of justice and good conscience" merely introduces vague concepts which are in turn incapable of definition and which therefore provide no yardstick, I do not agree. Concepts may defy definition and yet the presence in or absence from a situation of that which they denote may be beyond doubt. The concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to many authorities cited to this court. It is because of such a concept that evidence as to "good faith," "knowledge" and "notice" plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do. Not even gross negligence will suffice.'

As an illustration of the last proportion, the learned Lord

[23] [1958] 1 W.L.R. 1216.
[24] at p. 301.

Justice cited *Williams* v. *Williams*[25] and *Re Blundell*.[26]

The *Carl Zeiss Stiftung Case* was of very great importance for, as Sachs L.J. said at the beginning of his judgment:[27]

> 'A claim of the nature made in the present case is well calculated to suspend a sword of Damocles over the head of a solicitor acting for a client bona fide seeking to defend his title to property of which he is in possession and which constitutes the bulk, and perhaps the entirety, of his assets.'

The action arose out of protracted proceedings between two German foundations, an East German foundation and a West German foundation, both known as the Carl Zeiss Stiftung. The plaintiffs, the East German foundation, claimed to be the original foundation, established in Jena in East Germany, and the defendants were solicitors acting for the West German foundation at Heidenheim in Wurtemburg, after the Russians had occupied East Germany. The main action between the two foundations was initiated in October 1955, and the proceedings were still in progress. The East German foundation was claiming from the West German foundation a declaration that its entire property and business belonged to the East German foundation, and also an account of all moneys arising from all dealings with that property.

The present action was a claim against the solicitors of the West German foundation for all fees and costs paid to them, as being the money of the East German foundation, and therefore held on trust for the foundation. The plaintiffs argued that by reason of acting for the West German foundation, the defendants knew all the facts and matters in the claim against the foundation, and therefore that the money so paid belonged to the plaintiffs. On this, Sachs L.J. commented:[28]

> 'If the plaintiffs succeed in their contention the result will be that the defendant solicitors could not safely make use of any of the moneys thus received by them until there had been determined the main action by what may well be in due course a decision of the House of Lords. In this way one might say that the moneys in question would be "frozen".'

The solicitors, as the professional advisers of the West German foundation, had given value for their services, but it was arguable that, even so, if they received notice that the property was sub-

[25] (1881) 17 Ch. D. 437, 445.
[26] (1888) 40 Ch. D. 370, 381.
[27] at pp. 293-4.
[28] at p. 294.

ject to a subsisting trust, they become constructive trustees of it. Knowledge of a claim is, however, not knowledge of the existence of a trust. In the words of Danckwerts L.J.:[29]

> 'Mr. Harman's contention was that the defendant solicitors knew where the moneys that they received came from and knew that the source was trust funds. In my view this contention fails at the outset. What the defendant solicitors knew was that the moneys came from the West German foundation and they knew of the allegations contained in the proceedings brought against that foundation by the plaintiffs in which they were instructed to act as solicitors for the West German foundation. They knew that claims were being made against the West German foundation that all their property and assets belonged to the plaintiffs or were held on trust for them. But claims are not the same thing as facts. Mr. Harman contended that for the purposes of the present issue all the allegations contained in the statements of claim in both the actions must be taken as true. That will not do. What we have to deal with is the state of the defendant solicitors' knowledge (actual or imputed) at the date when they received payments of their costs and disbursements. At that date they cannot have had more than knowledge of the claims above mentioned. It was not possible for them to know whether they were well-founded or not. The claims depended upon most complicated facts still to be proved or disproved, and very difficult questions of German and English law. It is not a case where the West German foundation were holding property upon any express trust. They were denying the existence of any trust or any right of property in the assets claimed by the plaintiffs. Why should the solicitors of the West German foundation assume anything against their clients?'

At the conclusion of his judgment, Edmund Davies L.J. adopted the submissions of counsel for the defendants, derived from the numerous cases, upon the liability of an agent as a constructive trustee.[30]

> '(A). A solicitor or other agent who receives money from his principal which belongs at law or in equity to a third party is not accountable as a constructive trustee to that third party unless he has been guilty of some wrongful act in relation to that money. (B). To act "wrongfully" he must be guilty of (i) knowingly participating in a breach of trust by his principal;

[29] at p. 293.
[30] pp. 303-4.

or (ii) intermeddling with the trust property otherwise than merely as an agent and thereby becomes a trustee de son tort; or (iii) receiving or dealing with the money knowing that his principal has no right to pay it over or to instruct him to deal with it in the manner indicated; or (iv) some dishonest act relating to the money.'

The important point of general application decided in this case is that mere notice of a claim asserted by a third party is insufficient to render an agent guilty of a wrongful act in dealing with property derived from his principal in accordance with the principal's instructions, unless the agent *knows* that the third party's claim is well-founded and that the principal therefore had no authority to give the instructions; to which it should be added that if the agent is under a duty to inquire into the validity of the third party's claim, and where, although the inquiry would have established that the claim is well-founded, no inquiry is made, the agent will be liable. In the *Carl Zeiss Stiftung Case* no such duty to inquire existed, since as Danckwerts L.J. pointed out the determination whether the claim was well-founded depended upon decisions upon matters of law, which could only be made by a court.

TOWARDS NEWER SOURCES IN INTERNATIONAL LAW?

TANIA VELLA

ARTICLE 38 of the Statute of the International Court of Justice invites the Court to apply international law through the four enlisted sources which are traditionally recognised at international law, namely, treaties, custom, general principles of law accepted by civilised nations and the opinions of qualified publicists. What must be determined, however, and is the subject-matter of deep controversy, is whether and to what extent these traditional sources are being supplanted by newer sources in the international sphere. In this regard it would be pertinent to examine the role played by the resolutions of diplomatic assemblies, particularly those of the United Nations, and by the works of the International Law Commission in the codification of international law.

It must be borne in mind that the very enumeration of the sources in the Statute is indicative of the fact that a need for them to be laid down was felt at the time they were created. In the words of H.W.A. Thirlway, 'the enumeration of the source of the law is, as it were, a function of the development of the community, and there is no obstacle of theory to the alteration of that enumeration resulting, as did the original enumeration, from the requirements of that community. As a community develops, the sources of law which it recognises may change not merely in relative importance but in effective existence. New sources may be tapped and old ones cease to flow'.[1]

At the time the sources were formally enumerated in the Statute, such a course of action must have been considered to be the most exhaustive attempt at ensuring stability and certainty of the law in the international field. Time and actual practice have shown however that new sources have been 'tapped' even though the old ones have not, as yet, ceased to flow.

To those who have witnessed the unwieldy process of custom

[1] *International Customary Law and Codification.*

and the interminable conferences subjected to signature and ratification and even possibly to reservations in the making of a multilateral treaty, the idea of resolutions of the General Assembly as being of the nature of 'instant' law is probably a pleasant one. For these, the resolution provides a rapid mode of keeping up with technological and scientific developments in a fast-moving world and is no more than the modern synonym for customary international law as expressing the juridical conscience of peoples as are treaties themselves. However, the very system which hinders the law-making process provides a 'safeguard' procedure before final adoption: something which the resolution is definitely lacking in.

And there are resolutions and resolutions: one must immediately make a distinction between those resolutions made in virtue of Article 17 of the United Nations Charter[2] and those which are of a more general character, and between those resolutions which have been adopted in a unanimous as opposed to a majority form.

It is true that at the San Francisco Conference, convened to set up the Organization, the Phillipine proposal to endow the General Assembly with the power to enact rules of international law was met with much disapproval and that therefore if Charter intent is to be decisively and strictly constructed, it becomes impossible to attribute binding legal force to resolutions of the General Assembly or to consider that it is in any sense an active, potential, or partial legislative organ.

In fact, although within the four corners of the Charter, General Assembly resolutions under Article 17 are necessarily of binding legal character on all member States for they refer to the approving of the United Nations budget and to the apportioning among the members of the payment of United Nations expenses, the extent to which General Assembly resolutions of a more general nature are legally binding on members is doubtful.

As often is the case, the drive towards a legislative solution is often blunted by a very broad and abstract resolution which is operationally irrelevant. One such example can be found in the Resolution on the Permanent Sovereignty over Natural Resources, which embodies broad principles formulated in such a way as to

[2] Article 17(2) of the United Nations Charter reads as follows:

'The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies *with a view to making recommendations to the agencies concerned.*'

receive an affirmative vote from all States. No attempt is made to legislate a solution of a real dispute going on in an international society, presumably because a particular political stand on a debated issue can never hope to be approved by the conflicting ideologies of prominent Powers.

Another resolution, Resolution 1653(XVI) of November 28th, 1961, lacks Great Power consensus. Although it is ineffective in direct terms, it declares that the use of nuclear weapons would constitute 'a direct violation of the Charter of the United Nations, is contrary to the rules of international law and to the laws of humanity and that (a)ny state using nuclear and thermonuclear weapons is acting contrary to the laws of humanity and is committing a crime against mankind and civilization'. The present value of such a resolution is limited to evidence of the legal basis of the rule that an obligation exists to use nuclear weapons only, if at all, in a reprisal against a State that uses them first. At least it shows an attempt to resolve the dispute of the legality or otherwise of nuclear weapons as instruments of warfare by taking a definite stand on the controversial issue.

A resolution of a more optimistic nature is Resolution 1884 (XVIII), which calls upon all nations not to station in outer space 'any objects carrying nuclear weapons or any other kinds of weapons of mass destruction'. It enjoys the backing of the Super Powers and is considered by Government officials as one of the major steps in the area of arms control.

One must further distinguish between those resolutions which have been unanimously adopted and those which have only received a majority acceptance of States. It is easier to argue in the first instance that resolutions are a source of international law, for here the resolution is declaratory of a common stand which States have taken on a fundamental issue. Can it be said, on the other hand, that a resolution of the General Assembly which has only been adopted by a majority of members creates law for the international community as a whole, or does it only regulate the actions of adopting States? If the former is the case, a powerful State in the minority could easily amend the law by the simple process of breaking it, while if the latter proposition is more favourable, it would only lead to two rather than one international community with rules applying to adopting States and different rules applying to non-adopting States. If anything, it is those resolutions which are evidence of an international consensus which should be recognised as material sources of international law. Professor Friedmann holds that 'Without having the character

of a treaty, with all its constitutional implications, resolutions of this kind unquestionably are an important link in the continuing process of development and formulation of new principles in international law'.[3]

However, even here one runs into problems, for if one were to presume that the unanimous adoption of a General Assembly resolution had the effect of changing the law on a certain subject, then the logical extension to this argument would be that such unanimity would also have to be expressed when such resolution had to be amended or revoked in view of changing conditions. Such reasoning also bears the implication that every State, however politically insignificant, would legitimately exercise the veto at the expense of progress and even though the vesting of the 'veto' power in all would give true meaning to the sovereign equality of States as expressed in Article 2(1) of the United Nations Charter, this would hinder more than help the evolution of international law.

One could rightly ask what the position in present-day international law is. Today it would seem as though there is a growing tendency to regard resolutions not so much as synonymous with formal treaties as an expression of agreement. Even if one is not prepared to recognise the resolution as a formal source of the law, one must admit that its material effect on the international community is such that even though it does not fulfil the role of legislation as understood in the municipal sense, yet it forms the basis of an international mode of thinking aloud and is therefore, to say the least, a manifestation of an inter-State consensus.

However, some writers are of the opinion that the very authors of a resolution may go one step further and create the law of the international community, thus inferring a transition from the declaratory to the constitutive level.

Rosalyn Higgins properly emphasises the extent to which an assessment of the legal status of General Assembly resolutions is associated with the over-all character of the law-creating process applicable to customary international law:

'Resolutions of the Assembly are not "per se" binding, though those rules of general international law which they embody are binding on member States, with or without the help of the resolutions. But, the body of resolutions as a whole taken as indicative of a general customary law undoubtedly provide a rich source of

[3] *Changing Structure of International Law*

evidence."[4] Higgins also shows that the drafters of a resolution possess an inherent discretion in developing new rules of international law in the guise of declaring old ones. Thus, we witness the blurring of the demarcation between the declaratory and the constitutive element and the subsequent transition from the former to the latter level.

One thing is certain: Assembly resolutions play a crucial role independently of whether their status is to generate binding legal rules or to embody mere recommendations. The degree of authoritativeness that *a particular* resolution will acquire depends on its text, its intended and unintended objective and the distribution of power in an international society. On the other hand, the degree of authoritativeness which the *general* process of law-creating by the Assembly comes to enjoy depends on the extent to which those same particular resolutions influence action and gain notoriety in legal circles and also on the extent to which they become absorbed into an evolving framework of international law.

In the words of Friedmann: 'In some cases they (unanimous resolutions) will be preparatory to formal international covenants; in other cases, they will serve as highly authoritative statements of international law in a certain field. The appreciation of this quality of all declaratory resolutions avoids the rather futile controversy whether they are sources of law or not ... International law is developing and being nourished through a multitude of channels. While it would be absurd to equate them with formal treaties, it would be equally absurd to deny their importance in the continuing process of the articulation and evolution of international law'.[5]

In order to give a more complete picture of the changing structure of international law, it would be relevant to consider the work of the International Law Commission in the course of its evolution and to examine how it fits in with the traditional notions of the sources of international law, especially with reference to the whole procedure under Article 13(a) of the Charter.[6]

[4] *Development of International Law through the Political Organs of the United Nations.*

[5] *Changing Structure of International Law.*

[6] The General Assembly shall initiate studies and make recommendations for the purpose of:

(a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.

Despite the original atmosphere of scepticism into which the International Law Commission was born, its comparatively short life has witnessed a courageous attempt at international codification. Its field of operation can be said to be divided into those areas where the rules on the law at a given time are much in doubt and very controversial and those areas where agreed rules of law are already in existence. In the former case, codification usually takes the form of a compromise between the diverging opinions of States and therefore not altogether satisfactory. In the latter case, the Commission's role is more in the nature of elucidation and elaboration of universally accepted principles.

As recently as 1953, a former judge of the International Court of Justice[7] committed himself to the opinion that attempts to codify international law within the larger community of the United Nations constitute a clear menace to the development of international law and that 'the prospects of codification of international law on a universal plane are nil'.

Voices like these are thankfully in the minority; the codification of international law is the only way in which controversial stands as to what the law is on a particular issue can be diminished if not obliterated. In the ultimate analysis, the codifying process is the only way in which we can safeguard the very essence of international law. Professor Jennings' exhortation in 1947 is no less urgent today:

'It is surely evident that the implementing of Article 13 of the Charter is a task, the urgency and importance of which yield place to none of the other problems that face the international lawyer today'.[8]

During its relatively brief existence, the International Law Commission has been responsible for a Geneva Convention on the Law of the Sea, the 1961 Convention on Reduction of Statelessness, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, all of which are heavily based on drafts prepared by the International Law Commission and which provide very real evidence of the law at a particular moment in time.

Some tentative conclusions may be drawn. In asking ourselves whether we are in fact moving towards newer sources in interna-

(b) Charles de Visschee in *Théories et Realités en Droit International Public*

[7]Charles de Visscher in *Théories et Realités en Droit International*

[8]*Progressive Development of International Law and its Codification.*

tional law, we do not seem to have learnt our lesson. For, even though we have, through experience, learnt to deal warily with the municipal law analogy when discussing the very character of international law, it is not always realised how much the very sources of international law rest upon assumptions which emanate from municipal law practice. Thus we refer to law-making as opposed to contract treaties and to the persistent assumption that there is a great need in international law for some procedures for legislation.

It is just possible that the search for what Jennings refers to as 'the statute – substitute' has made us blind to the actual method of law-making which international practice has devised and which is taking place before our very eyes, if only we would recognise and accept it.

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A COMPARATIVE STUDY OF THE THEORY OF PRECONTRACTUAL RESPONSIBILITY

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JHERING may rightly be regarded as the founder of the theory under discussion for he it was who suggested that if for some reason or another a contract is not concluded, then the question would arise as to whether one of the parties was to blame for this during the negotiations and therefore liable to pay an indemnity to the other party.

The basis of his thesis is the tacit preliminary agreement of mutual responsibility which is intimately connected with the future contract.

Such a general theory was based on certain passages in the Digest relating to sale which is null *ab initio*, and was later extended to cases where contracts were frustrated owing to the unjustified falling out of one of the parties.

In spite of the fact that Jhering's theory of *culpa in contrahendo* is based on *culpa*, several writers point out that the passages from the Digest which he actually quoted, refer to 'bad faith'. In reality 'bad faith' lies somewhere between malice and negligence and it provided for the successful action of a plaintiff who, though unable to prove *dolus* on the part of the defendant, brought evidence to show that objectively the defendant was in bad faith.

CLASSIFICATION:

Glancing at the question of classification, Carbonnier says that when a contract has been annulled because of fraud, an action for precontractual responsibility would be classified as a contractual sanction. On the other hand, when a case arises of abrupt termination of negotiations, which means that no contract has been con-

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cluded at all, it would be regarded as delictual, for it would result from the non-performance of the legal obligation of *neminem laedere.*

Assuming the doctrine of precontractual liability to be part of Maltese law, one wonders whether it is contractual, quasi-contractual or delictual in nature. Precontractual responsibility is not deemed to be contractual, because the obligation to negotiate in accordance with the rules of good faith not only precedes the obligation that emerges from the future contract, but it subsists on its own even if the future contract remains inexistent.

Secondly, the immediate cause of a quasi-contract is the performance of a lawful and voluntary act which gives rise to a reciprocal obligation between the parties independently of the identity between their acts of volition. The quasi-contracts of *negotiorum gestio* and *indebiti solutio* have, as their essential element, the material advantage which one party procures in favour of another. On the contrary, precontractual responsibility implies that one of the parties has suffered some form of damage as a result of the other party's dishonest behaviour.

Thirdly, delict and quasi-delict are causes of obligations because a person causing damage is bound to make good such damage on the precept of natural justice, *neminem laedere.* Since the notions of delict and quasi-delict are wide enough to include any unjust act that causes harm, then the dishonest acts of a negotiating party causing harm could be classified as delictual in nature.

THE GERMAN POSITION:

The German Civil Code in article 242 states, 'The debtor is obliged to satisfy his obligation in the way that *good faith*, with respect to the usual customs, necessitates'.

Cohn[1] writes, 'the principles of contractual liability have been extended by numerous court decisions so as to cover cases in which a contract has not in fact been concluded, but where the parties have entered into legal relations with a view to concluding a contract. This is *culpa in contrahendo* first brought to light by Jhering'. He then goes on to cite a case decided by the Old Imperial Court:

Miss B. went to the department store of Messrs. C. & Co. to buy food. On the way to the food department she crossed the carpet department where, owing to the negligence of a shop assistant, a carpet fell down and injured her. Precontractual damages were awarded to Miss B. on the ground that she was 'about to contract'

[1] A Manual of German Law (Part 1) 2nd edition, p. 123.

in the food department, that is, she was in the precontractual stage.

Such a case quoted as an example of the theory is extremely weird. It would seem to be a case of tortious liability, namely whether or not the owners of the store were diligent in employing the assistant.

THE ELEMENTS OF THE DOCTRINE:

The first element that the concept of precontractual liability involves is the relationship that exists before the conclusion of the contract together with the intention to conclude such contract. Such intention is seen to be important in relation to the 'sphere of the contract'. For example, Miss B. was in the sphere of her contract when she got hurt, but where X and Y entered a shop to steal and to shelter from the rain respectively, the court said that they were not in the sphere of a contract and therefore, the first requirement of the theory was missing, disallowing them to sue for precontractual damages.

The second element is the violation of a minor obligation of the precontractual stage and we meet with the third element in article 276 of the German Civil Code which provides for the intention or negligence of the defendant.

Whereas Jhering's theory was based on honest acts, we notice here a radical departure, since article 276 specifically provides for cases of negligence. And, when we remember that article 242 of the same German Civil Code provides for good faith, we wonder whether good faith includes cases of negligence, or whether we ought to adopt a special criterion to the meaning of negligence, or whether the German legislature was not aware of the conflict arising.

THE CONCEPT OF VOLITION AND THE THEORY OF NEGATIVE INTEREST:

Stammler and Chironi held that when two persons negotiate they enter into a precontract which implies an element of volition on the part of the initiating party to such negotiations. Although this theory was originally acceptable to Windscheid, he later repudiated it on the basis that the obligation to make good damages, resulting from an abrupt and unjustifiable termination of negotiations, is not the consequence of any volition at all.

During the 'trattative precontrattuali' the parties guarantee that in all honesty and trust they would both seek to reach a beneficial conclusion. Their interest is not the positive one, of seeing a final contract executed, but a *negative* one, that their tacit pre-

contract be not violated. This so-called 'interesse negativo' propounded by Jhering and adhered to by Torrente covers the eventual loss suffered by the damaged party – a loss that he would not have suffered had he not participated in the negotiation.

The negative interest is also met with in German law where the effect of the action relating to precontractual liability is

(a) indemnification up to the limit suffered, and

(b) any other profit that could have been made during such precontractual negotiations.

A literal translation of the German text is 'interest out of the confidence in the contract' which is wide enough to tally with Cohn's words, namely, that: 'the consequence of a violation of a semi-contractual relation arising from the preparation of a contract is the duty on the part of the responsible party to compensate the other party for *any damage caused* to this party either wilfully or negligently'.

It seems fit to conclude that if the injured party is a buyer he is to be indemnified for the loss suffered for not having looked elsewhere for the necessary merchandise, while if the injured party is the vendor he should be indemnified for the loss suffered in turning down other offers.

THE FRENCH POSITION:

The French Cour de Cassation applied the theory of 'interesse negativo' in a judgement given on the 4th August 1930 on the basis of the following facts: Plaintiffs, several booksellers, had gone to the appointed place at the specified time, in accordance with an advertisement in the papers for a public auction sale of books. No sooner had they got there than the auction was cancelled. The court reimbursed them all travelling expenses and any gain these booksellers might have made if they had attended another auction sale advertised for the same day.

It will be seen that the court did not hesitate to give a wide interpretation to the negative interest.

The fact that the French civil code contains no specific provision for the application of precontractual liability has not hindered the Cour de Cassation from applying it on the basis of 'abus de droit' or 'erreur'.

ABUSE OF RIGHT:

'La jurisprudence a, au contraire, toujours reconnu qu'une faute peut-être commise dans l'exercise d'un droit et donner lieu à

l'application des articles 1382 et 1383'.[2]
Section 1382 provides: 'Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à la reparer'.
and section 1383 states: 'Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa negligence ou par son imprudence'.

Similar to the German position we notice that both malice and negligence of a defendant are grounds for abuse of right and, similarly, a basis for precontractual liability.

In a 1972 case, the Cour de Cassation calculated the damages, in a successful action for precontractual liability, on the basis of tort. Plaintiff had gone to the USA to look at machines he was interested in buying from the defendant. No sooner had he done so, after lengthy negotiations, than defendant sold them to a third party under a contract which prohibited him from selling to anybody else. The court held that this was a case of precontractual liability for no contract whatsoever had been formed, since the offer was revoked before the acceptance was communicated.

ERROR:

A claim for precontractual damages could arise when a contract is annulled because of a mistake committed by one of the parties during the negotiating stage. This side of the French view is similar to the very rigid approach taken in classical Roman Law where protection was unadequate because it only gave damages where there was some semblance of a contract, although a void one. In Justinian's time, the relevant action was the *actio ex contractu* granted in case of nullity of a contract. *Culpa* was considered to appertain to the stage of a completed contract.

The Cour de Cassation in 1972 held that plaintiff was entitled to claim precontractual damages where a contract was annulled because of a mistake committed by defendant during negotiations. A Japanese film producer and a French distributor signed a contract only to find out it was null and void because the Japanese defendant had failed to take the necessary steps regarding Japanese exchange control regulations that were required to validitate the contract.

It appears that both French and German law would benefit by the enactment of a specific provision regulating precontractual liability. What was said before about the meaning of the word *negligent* in the German Code, would apply to the French position rela-

[2] Alex Weill: Droit Civil, edition Dalloz, 1971.

ting to abuse of right and error. Offhand, it appears to be too harsh to apply precontractual damages to cases of negligence.

THE ITALIAN POSITION:

In 1942 the Italian legislature enacted article 1337, 'Le parti nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi *secondo buona fede*'.

This section has been constantly interpreted to require three elements, which are very neatly laid down in a judgment of the Corte di Cassazione of the 30th January 1976:

(a) *l'affidamento* fondato su elementi obiettivi ed inequivoci, di una delle parti nella conclusione del contratto;

(b) il *recesso* dell'atto contraente *senza giusta causa*, cioè quando sia effetto di malafede o non sia determinato dal comportamento dell'altra parte;[3]

(c) il danno risarcibile, consistente nel cosidetto *interesse negativo*, che comprende *le spese sostenute* in provisione della stipula del contratto *ed altre simili*.

There have been certain Italian judgments founding a claim for precontractual damages successfully based on the negligence of the defendant. It must be pointed out that the blanket provision article 2043 states,

'Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno'.

Taking our minds back to section 1337 we realise that in spite of the fact that there already was a section so wide as to cover cases of *dolus* and *culpa*, the Italian legislature still saw fit to introduce section 1337 based on good faith and referring specifically to precontractual responsibility.

A corollary duty is imposed under section 1338, which states that a party who knows or who is in a position to know of the existence of any cause of invalidity is bound to inform the other party of the existence of such cause. The non-performance of this obligation renders the damaging party liable for the damages which are eventually suffered as a result of such an omission. One must not reach the unfounded conclusion that this is the only case where pre-contractual liability arises. After all it is section

[3] This implies that if the hope of reaching a favourable conclusion is frustrated by supervening accidental causes, which make the obligation too onerous for one party, he would be justified in falling out of the negotiations.

1337 which caters for the concept and lays down a wide basis for the action by the words 'good faith'.

The problem of interpretation raised by the word 'negligence' was seen and provided for. It is true that the phrase 'good faith' is to be interpreted by the courts, but it is clear that the situation is more well-defined now than it was during the pre-1942 legal position.

On the 5th September, 1952, the Corte di Cassazione, stated that the obligation of negotiating in good faith implies that there is no need for the court to establish a fraudulent intention. This is in keeping with section 1338 because lack of deligence and prudence is sufficient to give rise to bad faith. However, there are certain judgements of the Italian supreme Court[4] to the effect that to the obligation of any one of the negotiating parties to disclose a cause of invalidity corresponds that obligation of the other party to exercise the necessary amount of diligence, through which he himself would have come to know of the existence of such cause of invalidity.

Glancing at the theoretical aspect of the whole matter, some writers consider that every negotiation has a contract in itself, known as the precontract. Thus as soon as we negotiate, we creare a contract, the object of which is that we bind ourselves reciprocally to collaborate and reach a fruitful conclusion. After all, the law does not enumerate the number of contracts we can enter into, and a contract *de ineundo contractu* is a contract just as well.

Other writers say that this begs the question. It extends the notion of contract far too much. If we admit that there must be a *vinculum juris* in a contract, i.e. there must be an intention to bind oneself, what one does in reality is to endeavour to see whether there is a basis for a *vinculum juris* to be created. If anything, they say that one creates a quasi-contractual situation, not in the sense of *negotiorum gestio* or *indebiti solutio*, but in the sense that one's position *seems to look like* that of a contract.

THE MALTESE POSITION:

Turning to the local scene, the problem came to the fore in 1965 in *Giuffrida v Borg Olivier*. Plaintiffs, an Italian company, had been negotiating with the Maltese Government for the grant of land

[4] Corte di Cassazione: 9 Novembre 1956
Corte di Cassazione: 30 Maggio 1959
Corte di Cassazione: 27 Marzo 1963

on emphyteusis. Defendants claimed that plaintiffs failed to comply with the terms set to them, and since the Government refused to negotiate further it withdrew its letter of intent with regard to the emphyteutical concession.

Plaintiffs wanted the court in the first place to declare that they had in fact abided by all the terms set to them and secondly to annul the withdrawal of the letter of intent made by defendants, the Maltese Government.

The First Hall of the Civil Court adopted the line that there was no contract (because neither the exact location nor the ground rent, two elements necessary for the contract of emphyteusis, had been agreed upon) and therefore it could not go into the matter.

But the Court of Appeal did not dismiss the case as speedily as the First Hall Civil Court did. It said that it could not go into the matter of executive discretion. It also said that it would not state whether the theory of precontractual responsibility was part of Maltese law or not.

The sad side of the case is that if plaintiffs had claimed precontractual damages we would have had a judgment on the position at local law. We can look on the brighter side of things by saying that at least the Court of Appeal refused to talk about it and did not ignore it as the lower court did.

Four years later, in 1969, the case of *Pullen v Matysik* arose. Plaintiff sued the Manager of the Malta Hilton for damages after the defendant told him that it would be possible for plaintiff to move into a boutique at the Hilton Hotel after Hertz, the former tenants, wanted to terminate the contract of lease. Instead of allowing Hertz to look for an alternative tenant, Matysik entered into precontractual negotiations with Pullen, who was in India at the time. On the pretext that Hertz wanted to terminate the lease, Matysik advised Pullen to come to Malta. However, no agreement was signed regarding the verbal agreement for a four year lease between Pullen and Matysik and no sooner had plaintiff come to Malta than Hertz said he did not after all want to leave the boutique unless Pullen bought the stock of clothes he had left over. After Pullen agreed to do so Hertz nevertheless decided to continue with the lease.

Therefore Pullen sued Matysik for damages and defendant asked the court to bring Hertz into the suit as well. The Court agreed to such demand.

The First Hall Civil Court said that there was no contract formed because a lease for an urban tenement of four years requires a written agreement *ad validitatem* and not merely *ad pro-*

bationem tantum.[5] Since no such agreement existed it could definitely not be a case of contractual responsibility and therefore the liability to pay compensation arises from the degree of attention that each party assumes even during the precontractual stage. There was no express mention of the doctrine by the judge, but it was clearly implied. In fact the damages that were awarded were restricted 'to the actual losses they incurred up to the time that the negotiations broke down ... *and are not to include* any profits which plaintiffs would have derived from the concession of the boutique, as in this way they would be benefitting from an obligation which never came into existence.'

It ought to be pointed out that the restricted award of damages was an implication of the theory under discussion, for in both contracts and torts the amount of damages that is awarded is unrestricted.

It is true that section 1088 of our Civil Code provides for 'the loss of actual wages *or other earnings*', which is what Pullen also demanded as the profit he would have made if he were given the four year lease of the boutique. But our law, through section 1088, caters for cases when persons are physically injured or killed and thus prevented from working according to their respective ability. It would be wrong if our courts were to apply this section to tally with the meaning of 'damages' as understood in precontractual responsibility.

The problems met with in relation to the word 'negligence' arise here too, for the Court declared both Matysik and Hertz liable equally: the former because he was negligent in not realising what legal consequence would arise if he could not eventually give Pullen the shop on lease, and the latter because he acted in bad faith when he capriciously withdrew from the negotiations and refused to terminate the lease even after Pullen agreed to buy over his stock of clothes.

At no time did the judge expressly mention that the theory of precontractual liability is part of Maltese law. But because it was implied, mainly through the amount of damages awarded, certain lawyers and students might conclude, from what the Court had to say, that negligence, as well as bad faith, would constitute the basis for the action, if ever incorporated expressly into our law.

Whether such a point of view is adopted or not, it still remains evident that the line between negligence and bad faith is a very thin one indeed. The writer suggests that the Maltese legislature

[5] Section 1277 (1)(e) Maltese Civil Code.

should follow the path chosen in 1942 by the Italian Parliament. This would not only give our courts the push they seem to need to recognise and apply the doctrine, but it would also lay down 'good faith', a very sound basis, as a guide to the criteria the courts would look to.

It seems up to now that a main reason for the lack of interest by our judiciary in the concept of *culpa in contrahendo* may be attributed to the fact that it might infringe the freedom pertaining to the parties in the 'negotiation' stage. If applied with caution, however, the theory would, on the contrary, enhance the principle of the liberty of contracting, for society must have some form of protection against dishonest traders.

INDIĊI

tad-disposizzjonijiet tal-Liġijiet

Kodiċi Proċedura (Kap 15)

ART.	NRU.
174	**7**
175	**179**
186 (3)	**7**
191	**7**
198	**4**
256	**94**
257	**157**
646	**207**
670	**52**
743	**128, 138**
793	**52**
814	**138**
829	**36**
830	**36**
831	**36**
876	**205**
893	**7**
894	**7**
964	**106**

Kodiċi Ċivili (Kap 23)

ART.	NRU.
32	**63**
360	**57**
365	**3**
380	**3**
462	**57**
463	**57**
608	**73**
1018	**59**
1143	**72**
1179	**185**
1180	**185**
1211 (1)	**18**
1274	**75**
1402	**35**
1407	**7**
1457	**165**
1475	**22**
1813	**29**
1973 (1)	**104**
1975	**104**
1982	**104**
2201	**127**
2235	**7**
2253	**121, 127, 140**
2254	**140, 186**

INDIĊI TAL-MATERJI

INDIĊIJIET TA' L-APPELLI ĊIVILI U KUMMERĊJALI 1975

(ippublikati f'Vol. VI, Id-Dritt)

APPELLI – 1975

INDIĊI TA' L-ISMIJIET

DATA	AWLA	ISMIJIET	NRU.
8.1.1975	Inf.	Lawrence Bilocca vs Francis Borg	1
"	"	Salvu Schembri vs Carmelo Cini	2
13.1.1975	Kum.	Jos. Diacono pro et ne et vs M. DeGiorgio Lowe et	3
"	"	Jos. Falzon vs Ant. Debono ne	4
20.1.1975	Civ.	Lucia Burges vs Ronald Burges	5
"	"	Jos. Criminale vs Simon Heideman	6
"	Kum.	Emilio Agius vs Jos. Agius et	7
"	"	Alb. V. Salamone ne vs Kontrollur Prop. Industr.	8
24.1.1975	Civ.	Clo Buhagiar vs Gpe. Meli	9
"	"	Clo Buhagiar vs William Borg	10
"	"	Dr. J.B. Pace vs Maria Galea et	11
"	"	Clo Mallia vs Ivan John Fonk	12
"	"	Mary Grech vs Edward Bencini	13
31.1.1975	"	Alexis Vella vs Tony Cuschieri	14
"	"	Paul Dimech vs Carmelo Dalli	15
"	"	Louis Agius vs Edward Micallef	16
"	"	Giovanni Mizzi vs Jos. Coleiro ne	17
7.2.1975	Kum.	Gius. Vella vs Maurice Ripard	18
"	"	Gius. Vella vs Maurice Ripard	19
19.2.1975	Inf.	Carmel Farrugia vs Edward Scerri	20
"	"	James Micallef vs Joseph Micallef	21
"	"	Paul Agius vs Francis Abela et	22

21.2.1975	Civ.	Domenico Brincat vs Clo. Micallef	23
"	"	Emm. Borg vs John Scicluna	24
"	"	Jos. Micallef vs Lino Portelli	25
24.2.1975	Civ.	John Galea et vs Consiglio Seychell	26
28.2.1975	Kum.	Ferd. Galea vs Cecil Pace et ne et	27
"	"	Ferd. Galea vs Cecil Pace et ne et	28
"	Civ.	John Pace vs Alfred Abela	29
"	"	Dam. Camilleri vs Saviour Camilleri	30
"	"	Direttur ta' l-Edukazzjoni vs Ant. Busuttil ne	31
"	"	Jos. Darmanin et vs Anglu Bonnici	32
"	"	Bartolomeo Xuereb vs Gius. Gauci	33
"	"	Cla. Zahra vs Dir. Xogħolijiet Pubblici	34
"	"	Maria Portelli et vs Marcel Grima	35
"	"	Avv. P. Mallia ne vs Vza. Camilleri pro et ne	36
7.3.1975	Kum.	Adrian Strickland ne vs Carmel Debono	37
12.3.1975	Inf.	Thomas V. Hughes vs Ant. Cuschieri	38
"	"	Joseph Camilleri vs Cettina Zahra et	39
"	"	Angelo Zahra vs John Galea	40
"	"	Edw. Baldacchino vs Alf. Farrugia	41
14.3.1975	Kum.	P. Busuttil ne vs Alb. W. Salomone ne	42
"	"	Vinc. Taljana et ne vs Clo. Mangion	43
"	"	Wilfred Tabone vs Godfrey Abela	44
"	Civ.	Anthony Galea vs Pio Muscat	45
"	"	Francis Spiteri ne vs Emm. Cassar	46
"	"	Albert Huber vs Lionel N.P. Halliday	47
21.3.1975	Kum.	Jos. Attard ne vs Paul Rapinett	48
"	Civ.	Paolo Borg vs Calcedonio Borg	49
"	"	Stella Aquilina vs Clo. Aquilina	50
"	"	Joseph Preca et ne vs Jos. M. Attard ne	51
24.3.1975	Kum.	Antonio Cilia vs A. Miceli Farrugia ne	52
"	"	Marion Pace vs Clo. Tabone et	53
"	"	Michele Vella vs Vinc. Camilleri et ne	54
"	"	Joseph Bugeja vs Ronald M. Demajo ne	55
24.3.1975	Civ.	Francesca Camilleri vs Ang. Montebello	56
"	"	Francis Apap vs Michael Galea	57

7.4.1975	"	Giovanna Mifsud et vs Emm. Bonnici	58
9.4.1975	Inf.	Nazz. Farrugia vs Philip Mizzi	59
11.4.1975	Civ.	Frances Coleiro vs Anthony Stellini	60
"	"	Gius. Cutajar et vs Angiolina Fenech et	61
"	"	Jos. F. Spiteri vs Gerolamo Calleja	62
"	"	Helen Burke vs Anthony Burke	63
"	"	Bernarda Grima vs Jos. Zammit	64
14.4.1975	Civ.	Jos. Gatt vs Jos. Galea	65
"	"	Zammit Endrich vs Dir. Xogħolijiet Pubblici	66
"	"	Gius. Mangion vs F.X. Aquilina	67
18.4.1975	Kum.	Saver Frendo vs Clo. Borg	68
"	"	Ralph Tabone ne vs Ph. O. Gatt et ne	69
"	Civ.	Louis Abdilla vs Jos. Spiteri	70
"	"	Jos. Cauchi vs Carmelo Sant	71
25.4.1975	Kum.	A.L.C.M. Captur vs Salv. Spiteri	72
"	Civ.	George Azzopardi vs Franc. Baldacchino et	73
"	"	Edwin Vella vs Dr Jos. Brincat ne	74
"	"	Maria Debono et vs Filippo Debono et	75
"	"	A. Scicluna vs John Caruana	76
30.4.1975	Inf.	Alf. Petroni ne vs Angiolina Attard	77
"	"	Eleonora Mizzi vs Paul Suda	78
"	"	Alf. Formosa ne vs A.L.C. W. Caruana Montalto	79
"	"	Salvu Falzon vs Emm. Vella	80
"	"	Gius. Schembri vs Salvu Azzopardi	81
"	"	Paul Richardson vs John Galea	82
2.5.1975	Kum.	Charles Micallef vs John De Purple ne	83
5.5.1975	Kost.	Harold Scorey vs. Jos. Avellino	84
"	"	Joseph Spiteri vs Jos. Avellino ne	85
"	Civ.	Harold Scorey vs Jos. Avellino	86
"	"	Joseph Spiteri vs Jos. Avellino ne	87
"	"	Gius. Schembri vs Ant. Briffa et	88
"	"	Giuseppe Mifsud vs Ant. Briffa et	89
21.5.1975	Inf.	Giov. Spiteri vs Gius. Spiteri	90
"	"	M.R. Agius vs Gius. Camilleri et	91

QORTI TAL-APPELL KRIMINALI
APPELLI MINN ĠURIJIET
SENTENZI MOGĦTIJA FL-1975

Seduta tal-10 ta' Jannar, 1975

No. 1 Il-Maesta Tagħha r-Reġina kontra Gwido Chircop

B'sentenza tat-18 t'April, 1974, Gwido Chircop kien ġie misjub ħati flimkien ma' ieħor, b'seba' voti kontra tnejn, ta' tentativ ta' serq ikkwalifikat bil-mezz, bil-valur, bil-lok u bil-ħin, ta' ħwejjeġ li jiswew aktar minn ħames mitt lira. Il-ġurati rrakkmandawh għall-klemenza tal-Qorti. Il-Qorti Kriminali kienet ikkundannatu għall-piena tal-lavori forzati għal żmien tletin xahar, u ordnat illi jintbagħat quddiem il-Qorti Inferjuri dwar il-ksur ta' probation għattenur ta' l-artikolu 10(b) tal-Att XII tal-1957.

Chircop, għad-differenza tal-ko-akkużat l-ieħor, appella minn din is-sentenza. L-aggravju tiegħu hu li nstab ħati ħażin fuq il-fatti. Fil-fehma tad-Difiża, kien hemm xi ċirkostanzi li setgħu jixħtu dubju fuq l-intenzjoni kriminuża.

L-appellant u l-ko-akkużat l-ieħor inqabdu waqt li kienu mistoħbija fid-dlam wara xi ġebel fil-kampnar tal-Knisja tal-Karmnu fejn, bla ebda jedd, telgħu wara li sfurzaw u għawweġu bieb provviżorju (minħabba li kienu qegħdin isiru xogħlijiet ta' kostruzzjoni) magħluq b'katnazz u katina u billi użaw taraġ li minnu kien hemm aċċess għall-Knisja fejn dak il-ħin (fil-lejl tal-festa wara li spiċċat il-purċissjoni) kien hemm l-istatwa tal-Madonna tal-Karmnu armata b'ħafna u ben magħrufa ġojjelli prezzjużi.

Il-Qorti tal-Appell kienet tal-fehma li fil-każ preżenti l-Ġurija – li għamlu wkoll aċċess fuq il-post biex iqisu aħjar iċ-ċirkostanzi kollha rilevanti – kellhom biżżejjed provi quddiemhom biex fuqhom setgħu raġonevolment jaslu għall-konklużżjoni li għaliha waslu.

Għall-motivi premessi l-Qorti ċaħdet l-appell.

Seduta tal-10 ta' Jannar, 1975

No. 2 Il-Maesta Tagħha r-Reġina kontra Carmelo Farrugia

B'sentenza tas-16 ta' Mejju, 1974, il-Qorti Kriminali kkundannat

lill-appellant għall-piena tal-lavori forzati għal żmien sitt snin wara li ġie misjub ħati mill-Ġurija ta' tentativ t'omiċidju volontarju, jiġifieri talli dolożament, bil-ħsieb li joqtol lil Pawlu Farrugia jew li jqegħidlu ħajtu f'perikolu ċar, sparalu tir b'senter ikkargat minn distanza ta' max-il pied għal-livell ta' sidru u, stante l-moviment tal-imsemmi Pawlu Farrugia, minflok ma laqtu f'xi organu vitali, laqtu fin-naħa ta' wara ta' spalltu u kkaġunalu feriti ta' natura gravi minħabba li ġieblu marda tal-ġisem li damet għal tletin ġurnata u għal daqshekk żmien żammet lill-ferut milli jmur għax-xogħol tiegħu.

L-aggravju prinċipali tal-appellant huwa li l-Imħallef tal-ewwel grad naqas milli juri lill-Ġurati d-differenza li tgħaddi bejn l-intenzjoni speċifiku li toqtol jew li tpoġġi l-ħajja ta' ħaddieħor f'perikolu ċar u l-intenzjoni li tferi jew li tbeżża', li hi l-bażi tad-difiża mressqa mill-akkużat.

Il-Qorti tal-Appell kienet tal-fehma li verament jirriżulta li din in-nota karatteristika differenzjali bejn it-tentativ ta' omiċidju volontarju u l-offiża volontarja, konsistenti fl-element intenzjonali, ma ġietx imqiegħda kif kellha tkun imqiegħda quddiem il-Ġurati. B'hekk it-teżi tad-Difiża f'dan ir-rigward ma jistax jingħad li tqiegħdet kif imiss u kif kellha titqiegħed lill-Ġurati.

Il-Qorti tal-Appell kompliet tgħid li sfortunatament mhux biss dan l-element intenzjonali ma ġiex mogħti l-importanza distintiva tiegħu fl-isfond tat-teżi tad-difiża, iżda jidher li seta' ġie wkoll xi ftit offuskat b'ċerta konċentrazzjoni impreċiża fuq l-element materjali bħal meta fl-indirizz intqal li "jekk għal mument wieħed biss ikun hemm perikolu li l-persuna setgħet tilfet ħajjitha, ikun hemm il-figura tat-tentativ ta' omiċidju".

Fil-fehma tal-Qorti, dawn id-difetti kienu tali li setgħu kellhom effett, sfavorevolment għall-appellant, fuq il-verdett kif ingħata, u bħala tali jiġġustifika – għat-termini tal-artikolu 508 E(2) tal-Kodiċi Kriminali – t-tħassir tad-dikjarazzjoni ta' ħtija *kif attwalment magħmula.*

L-artikolu 508 E(2) jiddisponi li: "Meta l-appellant ikun ġie misjub ħati ta' reat u l-ġuri seta' fuq l-att ta' akkuża sabu ħati ta' xi reat ieħor, u fuq il-bażi tad-deċiżjoni tal-ġuri jidher lill-Qorti ta' l-Appell Kriminali illi l-ġuri kien effettivament sodisfatt dwar il-fatti li kienu jippruvawh ħati ta' dak ir-reat l-ieħor, il-Qorti tista', minflok ma tilqa' jew tiċħad l-appell, tissostitwixxi għall-verdett mogħti minn ġuri verdett ta' ħtija ta' dak ir-reat l-ieħor, u tagħti dik is-sentenza minflok is-sentenza mogħtija fil-kawża kif ikun ġustifikat bil-liġi għal dak ir-reat l-ieħor, li ma tkunx senten-

za aktar gravi". Fuq il-bażi tad-direzzjoni tal-ġurija l-Qorti ma jidhrilhiex li fiċ-ċirkostanzi jista' jingħad illi l-ġurija "must have been satisfied of facts which proved him (the appellant) guilty" ta' offiża volontarja *ta' natura gravi*.

Il-Qorti tal-Appell ħasset li, kif ammettiet ukoll id-difiża, l-appellant żgur seta' jinstab ħati ta' offiża volontarja ta' natura lievi kommessa b'arma proprja. Dan hu reat minuri kompriż u involut li tiegħu seta' jinstab ħati l-appellant fuq l-istess att ta' akkuża. Għalhekk f'dan ir-rigward kien hemm lok għall-applikazzjoni tal-artikolu 508 E(2).

Kwantu għall-aggravji l-oħra subordinati dwar provokazzjoni u aċċess ta' leġittima difiża dovut għal biża u twerwir, il-Qorti kienet tal-fehma li dawn ma kienux sostenuti.

Għalhekk il-Qorti pprovdiet fuq l-appell billi ssostitwiet għall-verdett tal-ġurati verdett ta' ħtija ta' offiża volontarja lievi fuq il-persuna kommessa b'arma proprja, u kkundannat lill-appellant għall-piena tal-priġunerija għal żmien sena.

Seduta tas-27 ta' Jannar, 1975

No. 3 Il-Maesta Tagħha r-Reġina vs Albert Mizzi

Wara li kienu ġew nominati mill-Qorti Kriminali tliet periti psikjatri biex jeżaminaw u jirrelataw dwar l-akkużat Albert Mizzi, b'deċiżjoni tagħha tad-9 ta' Lulju, 1974, l-istess Qorti ddikjarat il-perizja psikjatrika nulla, fuq eċċezzjoni tad-difiża, peress illi l-imsemmija periti semgħu x-xhieda mhux fil-preżenza tal-akkużat u/jew id-difensuri tiegħu. L-avukat Ġenerali tal-Kuruna appella minn din id-deċiżjoni.

Fil-waqt li l-prinċipju tal-preżenza tal-akkużat fil-proċess kriminali kontra tiegħu hu bażilari fl-ordinament proċesswali tagħna, kif għandu jkun, il-Qorti tal-Appell ħasset li f'dan il-każ forsi ma ġiex intiż kif imiss id-dispost tal-artikolu 649(3) tal-Kodiċi Kriminali li hu dak li hu partikolarment rilevanti għall-każ u li jaqra hekk: "Jekk matul ix-xogħol tagħhom il-periti jkunu ħadu informazzjonijiet mingħand persuni oħra fuq ċirkostanzi ta' fatt, dawn il-persuni għandhom jissemmew fir-rapport, u għandhom jiġu mismugħin fil-Qorti bħal kull xhud ieħor". Il-vera pożizzjoni hi li fl-istadju tal-preparazzjoni tar-rapport ("pre-report stage") minn periti nominati mill-Qorti Kriminali, il-"persuni" (għax f'dan l-istadju preliminari jkunu għadhom m'humiex "xhieda") li jkunu talvolta tawhom "informazzjonijiet" (għax f'dan l-istadju ma jkunx għad hemm kwistjoni ta' "depożizzjonijiet" dwar fatti (u l-kwistjoni

tad-demenza *hija* waħda ta' fatt) m'għandhomx fl-ewwel lok jinstemgħu bil-ġurament, b'dan però li l-periti huma obbligati li jsemmuhom fir-rapport tagħhom u mbagħad fl-istadju li jmiss, meta l-kwistjoni tad-demenza tingieb quddiem il-ġurati għad-deċiżjoni tagħhom fil-Qorti Kriminali, jiġu eżaminati f'dik il-Qorti bl-istess mod bħal kwalunkwe "xhud" ieħor (għax *allura* jkunu xhieda) – dak li f'dan l-istadju neċessarjament jimporta l-presenza tal-akkużat.

Fil-każ preżenti, fl-istadju tal-preparazzjoni tar-rapport peritali si tratta biss ta' otteniment ta' x'informazzjonijiet ta' fatt minn persuni li *wara* mbagħad iridu jagħtu d-depożizzjoni tagħhom bil-ġurament bħala xhieda in pjena u pubblika udjenza quddiem l-akkużat u l-ġurati, bid-dritt sħiħ ta' kontroeżami da parti tal-istess akkużat fuq il-bażi tar-riżultanzi tar-rapport innifsu, reż għal kollox pubbliku u aċċessibbli għall-akkużat u fejn il-periti stess ikunu sottoposti għall-eżami "viva voce" fil-pubbliku u taħt ġurament da parti tal-akkużat stess, tal-prosekuzzjoni, tal-ġurati u tal-Qorti, f'dan l-istadju preliminari tar-rapport innifsu ("pre-report stage") m'hemmx kwistjoni ta' *xhieda u depożizzjonijiet* u għalhekk il-presenza tal-akkużat f'dan l-istadju partikolari ta' preparazzjoni tar-rapport m'hijiex essenzjali, għalkemm naturalment dik il-presenza ssir imbagħad għal kollox essenzjali *wara* meta, kif ingħad, tkun verament kwistjoni ta' xhieda u depożizzjonijiet.

Għall-motivi premessi l-Qorti laqgħet l-appell tal-Avukat Ġenerali tal-Kuruna, irrevokat id-deċiżjoni appellata, ċaħdet l-eċċezzjoni tal-akkużat mogħtija quddiem l-ewwel Qorti u ordnat il-kontinwazzjoni tal-proċedura skond il-liġi.

Seduta tat-12 ta' Frar, 1975

No. 4 Il-Maesta Tagħha r-Reġina vs Emanuel Formosa

Formosa kien ġie akkużat bl-omiċidju volontarju ta' martu, iżda l-ġurija bi tmien voti kontra wieħed sabitu mhux ħati skond l-att ta' akkuża iżda ħati talli kkaġuna fuq martu offiża ta' natura gravi li ġabitilha l-mewt fi żmien erbgħin ġurnata. Il-Qorti Kriminali, b'sentenza tagħha tat-13 ta' Lulju, 1974 ikkundannatu għall-piena tal-lavuri forzati għal disa' snin.

L-imsemmi Formosa appella minn din is-sentenza għaliex, huwa qal, saret irregolarità fil-kors tal-proċedura li setgħet kellha effett fuq il-verdett tal-ġurati, u anke għaliex meta u jekk titwarrab issitt dikjarazzjoni tiegħu lill-Pulizija, huwa instab ħati ħażin fuq il-fatti.

Il-każ hu wieħed li fih mart l-appellant tilfet ħajjitha b'esplo-

joni meta, waqt li kienet qiegħda tonxor, qabdet b'idejha bomba magħmula minn ġelatina li kienet mgħottija b'maktur. Waqt l-investigazzjonijiet l-appellant kien ċaħad ripetutament li kien hu li poġġa l-bomba, iżda mbagħad – wara li kien hemm xi diskors mas-Surġent Mangion – għamel konfessjoni fejn ammetta li kien hu iżda li dan għamlu mhux biex joqtol lil martu imma biss biex jimmankaha billi din kienet ser titilqu u kellha wiċċ ħaddieħor, u hu kien jippreferixxi li jgawdiha mmankata hu milli jaraha ma' ħaddieħor.

Fil-kors tal-ġuri l-appellant ċaħad kull konnessjoni mal-bomba u xehed li l-imsemmija dikjarazzjoni għamilha billi s-Surġent Mangion kien qallu meta kienu weħidhom li, jgħid x'igħid, xorta kien se jitressaq il-Qorti, u żied igħidlu biex jisma' minnu. Barra minn dan, Mangion qallu li ma jmurx aktar minn ħames snin ħabs li minnhom terz jinħafer u l-kumplament igħaddihom l-Ingieret u G'Mangia mħabba mard, u allura hu beda jgħidlu kollox iva. Is-Surġent Mangion xehed li kien l-appellant innifsu li semma l-ħames snin, u hu kien irrispondieh li jekk jeħel ħames snin, jagħmel minnhom tliet snin u nofs (stanti l-magħrufa riduzzjoni ta' terz għal "good conduct").

Id-difiża ssottomettiet li l-Imħallef ta' l-ewwel grad fl-indirizz tiegħu lill-ġurati għamel "misdirection" billi ta lill-ġurati x'jifhmu li l-verżjoni ta' l-appellant dwar kif saret din il-konfessjoni, anke jekk emnuta, setgħet ma tammontax għal wegħda jew twebbil ta' vantaġġ. Dan bilfors influenza lill-ġurati billi l-istatement li sar mill-appellant wara d-diskors li kellu mas-Surġent Mangion kien fil-fatt il-pern tal-akkuża kontra tiegħu.

Huwa fatt illi l-Imħallef ta' l-ewwel grad qal ripetutament lill-ġurati bħala materja ta' *dritt* illi jekk konfessjoni tirriżulta li ġiet prokurata b'xi wegħda jew twebbil ta' vantaġġ, kellha tiġi skartata. Kwantu mbagħad għall-kwistjoni jekk bħala *fatt* fil-każ presenti (i) kellux jitwemmen l-istess akkużat jew is-Surgent Mangion dwar id-diskors ta' bejniethom qabel l-imsemmija konfessjoni, u (ii) jekk jitwemmen l-akkużat – dak li, skond hu, qallu s-Surġent Mangion jammontax jew le għal wegħda jew twebbil ta' vantaġġ, din hi kwistjoni ta' fatt rimessa lill-ġurati (ara Koll. XXXIII.IV.541). Anke dan, l-Imħallef tal-ewwel grad qalu ċar ukoll. Barra dan, imkien ma qalet il-Qorti li kliem dwar il-ħames snin ħabs ma kienx fil-fatt jammonta għal wegħda jew twebbil ta' vantaġġ. Anzi avvertiet lill-ġurati biex jaraw jekk is-Surġent Mangion kienx konsistenti jew kontraddett mill-Ispettur. Il-Qorti żiedet tgħidilhom li jridu jaraw jekk il-kliem tas-Surġent Mangion hux qed iwebblu għal xi vantaġġ. Ripetutament il-Qorti qalet lill-ġurati li dan kien punt

ta' fatt li kien rimess interament għalihom. Għalhekk il-Qorti ma qablitx mad-difiża li saret irregolarità waqt il-proċeduri li setgħet kellha effett fuq il-verdett tal-ġurati.

Rigward il-motiv l-ieħor ta' l-appell, illi meta u jekk titwarrab is-sitt dikjarazzjoni (u ċioè dik hawn fuq imsemmija) l-istess akkużat instab ħati ħażin fuq il-fatti, il-Qorti tal-Appell kienet talfehma illi, bħala kwistjoni ta' *fatt*, anki kieku l-imsemmija konfessjoni kellha titwarrab, xorta kien hemm biżżejjed provi quddiem il-ġurati biex fuqhom setgħu raġonevolment jaslu għall-konklużjoni li għaliha fil-fatt waslu. Dan ingħad għaliex l-għada kien reġa' stqarr li kien hu li ħadem il-bomba. L-intervall taż-żmien u l-"caution" mogħtija mis-Superintendent Mifsud Tommasi kienu tali li ddisipaw l-effett ta' l-allegat "inducement". (Ara sentenza tal-Qorti tal-Appell Kriminali fil-każ Reġina vs John Gatt, 22 ta' Novembru, 1974).

Għall-motivi premessi l-Qorti ċaħdet l-appell.

Seduta tat-12 ta' Frar, 1975

No. 5 Il-Maesta Tagħha r-Reġina kontra Ġanni Attard

Ġanni Attard ġie akkużat talli dolożament, bil-ħsieb li joqtol lil missieru jew li jqegħidlu ħajtu f'periklu ċar, ikkaġunalu l-mewt. Meta l-kawża ġiet quddiem il-Qorti Kriminali, l-imsemmi Attard eċċepixxa preliminarment in-nullità ta' l-Att ta' Akkuża billi dan sar wara kumpilazzjoni li l-atti tagħha huma nulli għaliex l-eżami tal-imputat ma kienx iffirmat mill-Maġistrat kif rikjest mill-artikolu 407 tal-Kodiċi Kriminali.

B'deċiżjoni tat-22 ta' Novembru, 1974, il-Qorti Kriminali ddikjarat nulla l-kumpilazzjoni tal-attijiet għaliex l-eżami tal-imputat ma ġiex kontro-firmat mill-Maġistrat kif titlob il-liġi, b'mod li jiġi li ma hemm firma xejn u kwindi ma hemm eżami xejn. Dik il-Qorti għamlet riferenza għad-deċiżjoni tagħha tal-istess data fl-ismijiet Reġina vs Carmelo Refalo.

Il-Prosekuzzjoni appellat minn din id-deċiżjoni, liema appell ġie milqugħ. Il-Qorti tal-Appell żiedet tgħid li jkun biżżejjed li tagħmel riferenza għall-imsemmija sentenza tagħha ta' dakinhar stess fl-ismijiet Reġina vs Carmelo Refalo u tadotta l-istess motivi sa fejn jirrigwardaw l-istess kwistjoni.

Seduta tat-12 ta' Frar, 1975

No. 6 Il-Maesta Tagħha r-Reġina kontra Carmelo Refalo

Carmelo Refalo ġie akkużat talli għamel falsifikazzjoni ta' do-

kumenti (kif riferiti fl-Att tal-Akkuża); talli xjentement għamel użu minn dokument falsifikat; talli għamel qliegħ bi ħsara ta' ħaddieħor f'ammont li jaqbeż £M5 iżda ma jaqbiżx £M10; u talli naqas li jirraporta lid-Direttur tas-Servizzi Soċjali kukl tibdil taċ-ċirkostanzi li jġib tibdil fl-ammont jew fl-għamla tal-għoti ta' dik l-għajnuna.

Fis-smiegħ tal-kawża quddiem l-ewwel Qorti, dik il-Qorti stess issollevat "ex officio" l-eċċezzjoni tan-nullità tal-proċeduri peress illi t-tieni eżami tal-imputat magħmul mill-Maġistrat mhuwiex iffirmat skond il-liġi. L-imputat eċċepixxa wkoll in-nullità tal-Att ta' Akkuża minħabba n-nuqqas ta' l-eżami tiegħu fil-kumpilazzjoni.

B'deċiżjoni tat-28 ta' Ottubru, 1974, il-Qorti Kriminali ddikjarat nulla l-kumpilazzjoni tal-attijiet u għaldaqstant null ukoll l-Att ta' Akkuża, u ordnat illi l-akkużat jitqiegħed fl-istess stat bħal qabel ma ġie preżentat l-Att ta' Akkuża.

Il-Prosekuzzjoni appellat kontra din id-deċiżjoni u talbet illi din tiġi revokata billi jiġi dikjarat illi l-imsemmi Att ta' Akkuża huwa perfettament validu.

Il-Qorti ta' l-Appell eżaminat it-teżi tad-difiża li l-firma tal-Maġistrat tinsab mhux, kif titlob il-liġi, in kalċe, iżda fuq nett tal-folji fejn hemm it-tieni eżami tal-imputat, u għaldaqstant ma jistax jingħad li l-Maġistrat verament attesta bil-firma tiegħu l-fatt importanti li l-eżami sar.

Il-Qorti osservat illi, apparti l-fatt li l-prosekuzzjoni għamlet riferenza għal diversi każijiet speċifiċi fejn il-firma ma jidhrilhiex li dan waħdu għandu raġonevolment iwassal għas-sanzjoni estrema tan-nullità.

Il-Qorti rriferiet għal każijiet Reġina vs Antonio Sammut (Koll. Vol. XXXVII.IV.955) u Reġina vs George Pulò (Koll. Vol. XXXVII. IV.957) fejn ġie ritenut illi n-nuqqas ta' firma fuq l-eżami ta' l-imputat hija ekwiparabbli għan-nuqqas tal-eżami stess.

Il-Qorti ma ħassitx illi fiċ-ċirkustanzi tista' tiġġustifika t-teżi tad-difiża illi l-firma tal-Maġistrat fuq nett u mhux in kalċe tal-folji għandha wkoll tiġi ekwiparata għan-nuqqas tal-eżami stess, mingħajr ma thoss li qegħda taqa' f-formaliżmu eċċessiv. Hija ma kenitx tal-fehma illi l-fatt li l-firma saret fuq nett minflok in kalċe għandu jattira s-sanzjoni estrema tan-nullità daqskemm kieku ma hemm firma xejn u kwindi daqskemm kieku ma hemm eżami xejn.

Għall-motivi premessi l-Qorti laqgħet l-appell u rrevokat d-deżiċjoni appellata.

Seduta tas-7 ta' Marzu, 1975

No. 7 Il-Maesta Tagħha r-Reġina kontra George Vella, Arthur Vella u Rosario sive Louis Galea

B'sentenza tas-27 ta' Frar, 1975, il-Qorti Kriminali kkundannat lit-tliet imputati għall-piena tal-lavuri forzati għal tlettax il-xahar wara li nstabu ħatjin li kkommettew serq, kwalifikat bil-vjolenza (tan-numru), mezz (skalata u ksur), valur, persuna u ħin, ta' oġġetti li jiswew aktar minn £M50 iżda mhux iżjed minn £M500.

L-appell ta' kull wieħed mill-imsemmijin akkużati kien limitat biss għall-piena. Ġie sottomess quddiem il-Qorti li, kif jidher mill-fedina penali tagħhom, huma m'humiex xi "hardened criminals", u għaldaqstant tista' tiġi evitata l-piena karċerarja.

Il-Qorti ta' l-Appell qalet li m'hemmx dubju li l-każ hu ta' ċerta gravità, mhux biss riferibilment għall-valur tar-refurtiva, imma anki għall-mod kif ġie ppjanat u esegwit id-delitt.

Il-Qorti kkonfermat li l-apprezzament li fis-"sentencing process" in kwistjoni wassal lill-Qorti Kriminali biex ma tapplikax il-"probation" bħala forma ta' trattament adattat fil-każ preżenti, ma kienx "wrong in principle", u għalhekk il-piena karċerarja inflitta fil-"bare minimum" applikabbli għall-każ m'hemmx lok li tiġi disturbata.

Għal dawn il-motivi l-Qorti ċaħdet l-appell ta' kull wieħed mill-appellanti.

Seduta tad-9 ta' April, 1975

No. 8 Il-Maesta Tagħha r-Reġina vs Mary Borg

B'sentenza tas-27 ta' Ġunju, 1974 il-Qorti Kriminali kkundannat lil Mary Borg għall-piena tal-lavuri forzati għal ħmistax il-xahar talli bil-ħsieb li testorċi flus, heddet li tagħmel denunzja kontra persuna oħra u li tagħtiha malafama bħala ħatja ta' reat u ta' fatt li jtellef il-ġieħ; talli għamlet qliegħ b'qerq bi ħsara ta' ħaddieħor b'dan li l-ammont tal-ħsara jeċċedi £M10 iżda ma jeċċedix £M50; u talli kkommettiet serq, ikkwalifikat bil-mezz, bil-valur, bil-persuna u bil-lok, ta' somma ta' flus ta' iżjed minn £M50 u mhux iżjed minn £M500.

Fil-verdett il-ġurati talbu l-klemenza tal-Qorti minħabba l-età tenera tagħha u ċ-ċirkostanzi tal-każ.

L-appell ta' Mary Borg kien limitat biss għall-piena.

Din id-deċiżjoni għandha valur speċjali minħabba l-istħarriġ li għamlet il-Qorti tal-Appell fil-personalità u l-"background" tal-

appellanti. Din kienet għaddiet minn perijodu li fih ġiet influenzata minn xi rġiel ta' kondotta ħażina li wżawha għall-iskopijiet tagħhom. Imma wara li żbaljat, hi wriet li tassew riedet tirriforma ruħha u taqbad triq tajba ta' ħajja onesta. Il-Qorti ħadet in konsiderazzjoni wkoll l-fatt li ħu l-appellanti kien sar patri u qaddes u kien qed ikun aktar regolarment fl-istess dar, kif ukoll il-fatt li l-appellanti kienet qed tkellem ġuvni li jidher serju u għandu prospetti tajba.

Għal dawn ir-raġunijiet il-Qorti ħasset li miżura "non-custodial" tkun aktar adattata. Għaldaqstant irriformat is-sentenza appellata fis-sens li, minflok il-piena karċerarja lilha nflitta, ordnat li titqiegħed taħt is-sorveljanza tal-Probation Officer għal żmien tlett snin, bil-kundizzjoni li matul dan iż-żmien ma tikkommettix reat ieħor għat-tenur tal-artikolu 5 tal-Att Nru. XII tal-1957.

Seduta tad-9 ta' April, 1975

No. 9 Ir-Repubblika ta' Malta kontra Mario Grech, Antonio sive Twanny Grech u Jacob sive Jimmy Grech

B'sentenza tas-6 ta' Frar, 1975 il-Qorti Kriminali kkundannat lill-imsemmi Mario Grech għad-diversi reati li tagħhom instab ħati, fosthom kompliċità f'serq aggravat, għall-piena tal-lavori forzati għal żmien sitt snin u ordnat li jiġi skwalifikat li jkollu jew jottjeni liċenzja tas-sewqan għal tnax il-xahar. Ikkundannat ukoll lill-Anthony sive Twanny Grech għal tmien snin lavori forzati u ordnat l-istess skwalifika; u lil Jacob sive Jimmy Grech għal tliet snin u nofs lavori forzati.

L-appell kien limitat għall-piena.

Il-Qorti tal-Appell ċaħdet l-appell minħabba l-gravità tar-reati, il-perikolożità tal-appellanti kif manifestata fl-operat tagħhom, il-kondotta preċedenti, il-valur tar-refurtiva u l-fatt li l-biċċa l-kbira tagħha ma nstabitx.

Seduta tat-28 ta' April, 1975

No. 10 Repubblika kontra Sebastian Chircop

B'sentenza tat-18 ta' Marzu, 1975 Chircop ġie kkundannat għall-piena tal-lavori forzati għal żmien tmien xhur u penali ta' £M25 talli għex xjentement għal kollox jew in parti minn fuq qliegħ talprostituzzjoni ta' Joyce Barber sive Goldengray, u talli kellu "contraceptives" li fuqhom ma kienx tħallas dazju.

L-appell kien jirrigwarda insuffiċjenza ta' provi u li l-appellant ġie misjub ħati ħażin fuq il-fatti.

Il-Qorti kienet tal-fehma li ċerti deposizzjonijiet u ċirkostanzi m'għandhomx biżżejjed forza probatorja biex fuqhom biss il-ġurati setgħu raġonevolment jikkonkludu li Barber kienet fiż-żmien rilevanti teżerċita l-prostituzzjoni. Minn dan isegwi li ma kienx hemm provi suffiċjenti li l-appellant xjentement għex minn fuq il-qliegħ tal-prostituzzjoni tal-imsemmija Barber. L-opinjoni tal-Qorti kienet imsaħħa mill-fatt li Barber li kienet xhud prinċipali rrifjutat li tixhed għalkemm hi xhud sew kompetenti kemm "compellable". Dan il-fatt wassal lill-Qorti biex tiddikjara li kien ġustifikat anke l-aggravju li nstab ħati ħażin fuq il-fatti.

Għal dawn il-motivi l-Qorti laqgħet l-appell, ħassret id-dikjarazzjoni ta' ħtija u lliberatu.

Seduta tat-28 ta' Mejju, 1976

No. 11 Il-Maesta Tagħha r-Reġina kontra Pawlu Calleja

B'sentenza tal-21 ta' Diċembru 1974 il-Qorti Kriminali kkundannat lil Calleja bħala reċidiv f'delitt għall-piena tal-lavori forzati għal żmien seba' snin. L-appell kien limitat għall-piena.

Mill-fedina penali tal-appellant irriżulta li dan diġa nstab ħati ta' serq, konsumat jew tentat, f'sitt okkazzjonijiet differenti, barra milli nstab ħati wkoll ta' feriti ta' natura ħafifa – x'uħud b'arma – theddid u storbju bil-ġlied f'diversi okkażżjonijiet. L-attitudini anti-soċjali tal-appellant tidher evidenti mill-istess fedina penali u persistenza tiegħu, partikolarment fis-serq.

Biex jintlaħaq l-iskop riformativ f'każijiet bħal dawn, il-piena trid tkun ta' ċertu tul. Barra minn hekk, il-Qorti ma jidhrilhiex li l-piena inflitta hija "wrong in principle".

Għall-motivi premessi l-Qorti ċaħdet l-appell.

Seduta tat-28 ta' Mejju, 1975

No. 12 Repubblika vs Salvu Bartolo

B'sentenza tal-Qorti Kriminali tas-6 ta' Frar, 1975 Bartolo ġie kkundannat għall-piena tal-lavori forzati għal żmien tliet snin wara li ġie misjub ħati ta' kompliċità f'serq aggravat bil-vjolenza, mezz, lok u valur ta' flus u oġġetti li jiswew 'l fuq minn £M500. L-appell kien sew mid-dikjarazzjoni ta' ħtija kemm mill-piena.

L-appellant issottometta li rriżulta li s-serqa kienet ġiet maħsuba u esegwita mit-tliet aħwa Grech (ko-akkużati) u hu kien biss preżenti magħhom fil-karozza meta sar is-serq, iżda din il-preżenza kien spjegaha billi qal li l-aħwa Grech qalulu li kienu sejrin għand id-derubata "to have a good time" u hu kien baqa' jistennihom. L-

appellant sostna li ma ħa l-ebda parti fid-delitt.

Il-Qorti kienet tal-fehma li, meqjusa r-riżultanzi kollha proċesswali dwar il-fatti immedjatament qabel u wara u konkomotanti mas-serqa in kwistjoni, il-ġurati kellhom biżżejjed provi quddiemhom biex fuqhom setgħu raġonevolment jaslu għall-konklużjoni li għaliha waslu.

Dwar il-piena, il-Qorti ma dehrilhiex li fiċ-ċirkostanzi kollha seta' jingħad li l-piena hija "wrong in principle".

Għalhekk il-Qorti ċaħdet l-appell.

Seduta tat-28 ta' Mejju, 1975

No. 13 Il-Maesta Tagħha r-Reġina vs Emanuel Scerri u Vincent Spiteri

L-appellanti ġew akkużati, fl-ewwel kap, ta' serq aggravat u, fit-tieni kap (*kap alternattiv*) ta' riċettazzjoni. L-akkużati kienu kkontestaw l-ewwel kap filwaqt li ammettew it-tieni. Il-Prosekuzzjoni kienet insistiet li l-Qorti għandha tibqa' miexja dwar l-ewwel kap nonostante l-ammissjoni dwar it-tieni kap li huwa alternattiv. Min-naħa tagħha, id-Difiża kienet insistiet li ġaladarba hemm l-ammissjoni ta' reità dwar il-kap alternattiv ta' riċetazzjoni l-Qorti għandha tipprovdi fuq dik l-ammissjoni. L-ewwel Qorti ordnat li l-proċess jibqa' miexi dwar l-ewwel kap ta' serq. L-akkużati talbu r-revoka ta' dan id-digriet.

L-argument imressaq mid-Difiża hu li la l-Prosekuzzjoni għażlet li fl-att tal-akkuża tinkludi żewġ kapi (t-tieni wieħed alternattiv) u la l-akkużati ammettew ir-reità dwar il-kap alternativ ta' reċitazzjoni, il-proċess ma jistax jitkompla fuq l-akkuża ta' serq. Dan għaliex iż-żewġ kapi huma konfliġġenti u inkonċiljabbli u jekk, wara li huwa ammetta r-riċetazzjoni, il-ġurija ssib lill-akkużati ħatjin ta' serq, il-ħtija tagħhom fuq iż-żewġ akkużi tkun ġuridikament insostenibbli. Barra minn hekk, skond l-artikolu 465 tal-Kodiċi Kriminali, meta l-akkużat jibqa' jinsisti li hu ħati, il-Qorti – wara twissija – għandha tgħaddi biex tagħti s-sentenza, b'eċċezzjoni ta' każ wieħed, ċioè meta l-Qorti tiddubita jekk ir-reat *in genere* sarx jew jekk l-akkużat hux ħati tiegħu, fejn allura l-proċess jitkompla.

Il-Qorti tal-Appell irrilevat illi għalkemm is-sistema tal-proċedura penali tagħna huwa liberalment favur l-akkużat, l-għażla ta' l-akkuża tappartjeni lill-Prosekuzzjoni u mhux lid-Difiża. Għalhekk il-Prosekuzzjoni għandha dejjem dritt tottjeni l-verdett tal-ġurija fuq id-delitt prinċipali. L-akkużat ma jistax jagħlaq hu l-proċess

bil-giljottina ta' l-ammissjoni fuq kap alternattiv u sekondarju, għax il-Prosekutur għandu dritt – f'isem is-soċjetà – li jkun jaf x'inhu l-verdett tal-ġurati fuq il-każ prinċipali.

Filwaqt li l-ġurisprudenza anterjuri kienet fis-sens li f'każijiet ta' serq il-ġurati setgħu jsibu l-akkużat ħati ta' riċetazzjoni bħala reat minuri kompriż u involut fl-att tal-akkuża taħt l-artikolu 478(4) tal-Kodiċi Kriminali, l-ġurisprudenza ta' dawn l-aħħar snin – li qalbet dik ta' qabilha – tirritjeni li r-riċetazzjoni hu reat awtonomu mis-serq. B'hekk daħlet l-użanza, rikavata mill-prattika Ingliża, ta' l-inklużjoni ta' kap alternattiv ta' riċetazzjoni fejn jidhirlu l-Avukat Ġenerali.

Il-Qorti mxiet fuq is-sentenza Ingliża mogħtija minn Lord Parker, C.J. fil-każ *Reġina vs Cole* (1965) (ara Archbold 368a) fejn intqal: "if the defendant is acquitted of the armed robbery (il-kap prinċipali), then he can be sentenced on the count to which he has pleaded guilty. If, on the other hand, he is convicted of the armed robbery, then the proper course for the judge is to allow the count on which he has pleaded guilty to remain on the file and not to proceed to sentence him."

Għal dawn il-motivi l-Qorti ċaħdet l-appell.

Seduta tat-28 ta' Mejju, 1975

No. 14 Il-Maesta Tagħha r-Reġina vs Joseph sive Gino Calleja u Anthony Azzilla

B'sentenza tal-Qorti Kriminali tal-5 ta' Novembru, 1974 kull wieħed miż-żewġ akkużati ġie misjub ħati mill-ġurija taħt iż-żewġ kapi, ċioè ta' serq ta' flus u oġġetti tal-valur ta' iżjed minn £M50 u mhux iżjed minn £M500, kwalifikat bil-vjolenza, mezz, valur u ħin, u ta' ħsara volontarja fuq ħwejjeġ ħaddieħor (it-Teatru Alhambra) fl-ammont li jissupera l-£M500. Huma ġew ikkundannati għal piena tal-lavori forzati għal żmien tletin xahar kull wieħed.

L-aggravju kien li ġew misjuba ħatja ħażin fuq il-fatti u li kien hemm ukoll interpretazzjoni ħażina tal-liġi, u, bla preġudizzju għall-premess, li l-valur tad-danni taħt it-tieni kap ma kienx jeċċedi l-£M500, u għalhekk kien hemm lok li tiġi riformata l-piena.

Il-Prosekuzzjoni kienet ibbażat biss fuq ix-xhieda ta' Silvio Attard u Pawlu Caruana. Ix-xhud Silvio Attard kien ġie proċessat waħdu u misjub ħati b'sentenza tal-Qorti Kriminali tas-7 ta' Novembru, 1973, ta' l-istess żewġ reati. Waqt li fil-kompilazzjoni kien implika direttament miegħu liż-żewġ appellanti fil-kommissjoni tar-reati, waqt il-ġuri kien giddeb lilu nnifsu u baqa' jsostni

li r-reati wettaqhom waħdu. Iżda, xorta waħda, kemm il-Prosekuzzjoni kif ukoll l-Imħallef kienu widdbu lill-ġurija biex jinjoraw iddeposizzjoni ta' Attard għax ma kenitx korroborata kif titlob illiġi, peress illi Attard kien kompartecipi.

Kwantu għax-xhieda ta' Pawlu Caruana, għal ċertu ħin, dan ix-xhud kien biddel il-verżjoni li kien ta quddiem il-Maġistrat billi qal li dik kien ivvintaha minn rajh biex jagħmel vendikazzjoni lill-appellanti talli kienu ħadulu tfajla. Iżda wara huwa kien ikkonferma l-ewwel verżjoni tiegħu. Però l-Imħallef kien preċiż meta qal lill-ġurija li għalkemm kellhom jiddeċiedu huma jemmnuhx jew le, ried ifakkarhom li x-xhud tad-Difiża Seychell kien xehed li fil-ħabs Caruana kien qal li ried jagħmel l-allegata vendikazzjoni lill-appellanti, u jekk joqgħodu fuq Seychell kellhom allura jilliberaw lill-akkużati. Il-ġurati kienu għażlu li joqgħodu fuq Caruana, u ma jistax jingħad li ma kienx hemm provi biżżejjed biex fuqhom il-ġurati setgħu raġonevolment jaslu għall-konklużżjoni li waslu għaliha.

L-appellanti ssottomettew ukoll li d-dikjarazzjoni taż-żewġ appellanti mismugħa minn Caruana ma setgħetx tammonta għal konfessjoni għax mhux magħmula lil persuna fl-awtorità, iżda l-liġi ma toffri ebda fondament għal dan il-kriterju. Konfessjoni, sakemm tkun volontarja, hija ammissibbli magħmula lil min magħmula.

Kwantu għall-aggravju li l-valur tad-danni taħt it-tieni kap ma kienx jeċċedi l-£M500, il-Qorti kienet tal-fehma li d-dannu attwalment soffert mill-proprjetarju tat-teatru żgur li kien jammonta għall-valur imsemmi għax daqshekk swewlu l-biljetti lill-proprjetarju, indipendentement mill-ammont ta' l-indenniz, eventwalment risarcibbli ċivilment.

Għal dawn ir-raġunijiet il-Qorti ċaħdet l-appell ta' kull wieħed mill-akkużati.

Seduta tas-6 ta' Ġunju, 1975

No. 15 Il-Maesta Tagħha r-Reġina vs Salvu Axiaq

L-imsemmi Salvu Axiaq ġie misjub ħati ta' tentativ ta' omiċidju volontarju u talli, bla liċenzja tal-Kummissarju tal-Pulizija, żamm f'fond u kellu fuqu, barra, arma tan-nar. Il-Qorti Kriminali, b'sentenza tat-8 ta' April, 1975, ikkundannatu għall-piena tal-lavori forzati għal żmien sitt snin.

Il-fatti fil-qosor kienu illi, billi kellu xi jgħid ma' ġar, l-appellant għodwa waħda sparalu tir mill-qrib u ma laqtux għax il-ġar induna u tbaxxa u mbagħad telaq jiġri.

L-aggravju kien li l-Imħallef li ppresjeda l-ġuri bl-ebda mod ma ddifferenzja fl-indirizz tiegħu bejn l-intenzjoni speċifika li l-liġi teżiġi għad-delitt ta' tentattiv ta' omiċidju volontarju, u dik meħtieġa għad-delitt minuri ta' tentativ ta' offiża volontarja fuq il-persuna (gravi jew lievi). Tabilħaqq, fuq din id-differenza tant importanti wieħed verament fl-indirizz ma jsib xejn. Minn imkien ma jidher li ingħad lill-ġurati illi jekk il-Prosekuzzjoni ma tippruvax li l-appellant kellu l-intenzjoni li joqtol – assolutament essenzjali għall-akkuża kif dedotta – allura kellhom jaraw jekk tirriżultax l-intenzjoni li setgħet twassal għall-ipotesijiet ta' tentativ ta' offiża gravi jew lievi prospettati mid-Difiża.

Kollox meqjus u in bażi għal dan id-difett li ma tqiegħdet assolutament xejn it-teżi prinċipali tad-Difiża quddiem il-ġurati, il-Qorti thossha ġustifikata – għat-tenur ta' l-artikolu 508E(2) tal-Kodiċi Kriminali – li tgħaddi għat-thassir tad-dikjarazzjoni ta' ħtija kif magħmula u s-sostituzzjoni tagħha b'verdett ta' ħtija tad-delitt ta' tentativ ta' offiża volontarja fuq il-persuna ta' natura gravi (kommessa b'armа proprja) skond l-artikolu 232(1) (a) u (b) tal-Kodiċi Kriminali.

Għaldaqstant il-Qorti ssostitwiet il-verdett kif spjegat fuq u, wara li qieset l-età avanzata u l-kondotta preċedenti tal-appellant, kif ukoll ir-rakkomandazzjoni tal-ġurati għall-klemenza tal-Qorti minħabba l-istat ta' saħħa ta' l-appellant, ikkundannatu għall-piena tal-priġunerija għal żmien sena u nofs.

Seduta tat-30 ta' Ġunju, 1975

No. 16 Il-Maesta Tagħha r-Reġina vs Tarcisio Borg

B'sentenza tal-Qorti Kriminali tal-14 ta' Mejju, 1974 Tarcisio Borg ġie kkundannat għall-piena tal-lavuri forzati għal żmien erba' snin wara li nstab ħati ta' serq aggravat. Huwa appella sew minn din id-dikjarazzjoni ta' ħtija, sew mill-piena.

L-aggravji tal-appellant huma b'riferenza għall-art. 508D tal-Kodiċi Kriminali, interpretazzjoni u applikazzjoni skorretta talliġi, u li l-appellant instab ħati ħażin fuq il-fatti.

Dwar ta' l-aħħar, il-Qorti kienet kjarament tal-fehma li kien hemm quddiem il-ġurati biżżejjed provi biex fuqhom dawn setgħu raġonevolment jaslu għall-konklużżjoni li għaliha waslu.

L-aggravju relattiv għall-interpretazzjoni u applikazzjoni skorretta tal-liġi hu bażat fuq il-fatt li, fl-indirizz, l-Imħallef tal-ewwel grad kien impreċiż meta qal li "jekk (l-akkużat) iġib il-prova (tal-alibi) u ma jirnexxilux jippruvaha, intom tridu tiddeċiedu kontra l-

akkużat". L-impressjoni kienet illi l-kelma "jippruvaha" hija ekwivoka. (Dwar id-dottrina tal-provi fl-alibi, il-Qorti għamlet riferenza għas-sentenzi tagħha Reġina vs Alfred Muscat, 20 ta' Awissu, 1968 u Reġina vs Hallet, 22 ta' Marzu, 1971.)

Il-Qorti ta' l-Appell qalet illi wieħed irid iħares lejn il-kuntest kollu. Bla dubju l-Imħallef ta' l-ewwel grad kien insista fuq il-ħtieġa li l-prosekuzzjoni tipprova l-każ tagħha bla dubju raġonevoli (anzi kif intqal f'mument minnhom, "bla dubju ta' xein"; waqt li f'mument ieħor intqal ukoll li l-ġurati iridu jkunu "żguri"). F'dan id-dawl għalhekk il-Qorti ma ħasbitx li dawn l-interpretazzjonijiet, għal kemm naturalment kien ikun ħafna aħjar kieku ġew evitati, għandhom, kif ippretendiet id-difiża, iwasslu li jinfiċjaw il-verdett.

Kwantu għall-piena l-Qorti kienet għal kollox konvinta li din ma kinitx eċċessiva fiċ-ċirkostanzi tal-każ.

Għal dawn ir-raġunijiet il-Qorti ċaħdet l-appell.

Seduta tat-2 ta' Lulju, 1975

No. 17 Il-Maesta Tagħha r-Reġina vs Ġeraldu Cassar, Pawlu Tedesco, Emanuel Camilleri u Vincent Spiteri

Dawn l-erbgħa ġew akkużati talli bil-ħsieb li jestorċu flus jew xi ħaġa oħra jew li jagħmlu xi qliegħ, heddu li jagħmlu denunzja kontra persuna oħra jew li jagħtuha malafama bħala ħatja ta' reat jew ta' fatt li jtellef il-ġieh, b'dan li b'dan it-theddid waslu fil-ħsieb tagħhom (tlieta minnhom reċidivi f'delitt). Fl-istadju tal-eċċezzjonijiet preliminari, l-akkużati eċċepew li r-reat lilhom addebitat imur lura 'l hemm minn ħames snin miċ-ċitazzjoni u allura huwa preskritt. Il-Qorti Kriminali b'sentenza tat-30 ta' April, 1974 laqgħet dik l-eċċezzjoni, iddikjarat estinta l-azzjoni kriminali kontra tagħhom u ordnat li jiġu liberati, wara li kkunsidrat illi:

(i) Id-Difiża u l-Prosekuzzjoni qablu li l-preskrizzjoni applikabbli f'dan il-każ hija ta' ħames snin mill-ġurnata tal-kommissjoni tar-reat u li m'għandux jitqies l-awment fil-piena applikabbli minħabba r-riċediva ta' akkużat jew akkużati.

(ii) Il-preskrizzjoni f'materja kriminali tiddiferixxi mill-preskrizzjoni f'materja ċivili u għandha bħala bażi tagħha l-lass taż-żmien li jneħħi n-neċessità u l-espedjenza li tiġi mogħtija piena. Minn dan il-prinċipju jitnisslu żewġ konklużżjonijiet: (a) illi l-kommissjoni tar-reat ma tkunx magħrufa, u (b) illi l-ħati ma jkunx magħruf jew għax ikun inħeba jew ħalla l-Gżira jew imħabba impediment legali għall-eserċizzju ta' l-istess azzjoni kriminali. Għal dana l-prinċipju l-Kodiċi tagħha għamel eċċezzjoni billi fl-artikolu

687 stabilixxa illi dwar id-delitt il-perijodu tal-preskrizzjoni ma jibdiex igħaddi meta l-ħati ma jkunx magħruf.

(iii) Ġie kommentat illi l-kelmiet "mhux magħruf" għandhom jammontaw għal injoranza totali u assoluta ta' l-identità tal-ħati u mhux għal xi diffikoltà li l-persuna raġonevolment sospetta bħala ħatja tiġi fil-fatt misjuba ħatja tar-reat, u dana skond is-sentenza ta' dik il-Qorti tas-26 ta' Ottubru, 1906 f'"Rex vs Giovanni Buhagiar".

(iv) M'hemm ebda dubju illi fil-każ preżenti ż-żmien tal-preskrizzjoni għandu jitqies li beda jgħaddi mill-ġurnata li ġie kommess ir-reat nonostante l-fatt li l-Pulizija ma kellha ebda tagħrif li kien sar l-allegat delitt ta' rikatt.

Il-Qorti tal-Appell kienet tal-fehma illi r-reat de quo huwa reat ikkunsmat u instantaneju u mhux attentat ta' reat, jew reat kontinwat, jew reat permanenti. Ġie stabbilit fis-sentenza mogħtija mill-Qorti Kriminali sedenti bħala Qorti tal-Appell Kriminali Inferjuri fil-kawża "Il-Pulizija vs Baldacchino" fis-6 ta' Diċembru, 1948, illi "hija massima ġuridika li għall-finijiet ta' preskrizzjoni wieħed ma għandux jikkonfondi r-reat mal-konsegwenzi tiegħu."

Il-Qorti ma ħassitx li seta' kellha ebda dubju dwar l-ewwel żewġ akkużati Cassar u Tedesco peress li l-allegat rikatt minnhom kommess ġie magħmul aktar minn ħames snin ilu.

Dwar Camilleri, ir-reat ġara aktar minn ħames snin qabel u l-perijodu ta' preskrizzjoni beda jgħaddi minn dik id-data.

L-Avukat Ġenerali appella kontra l-imsemmija sentenza taħt l-art. 508 B(1) tal-Kodiċi Kriminali. L-aggravju mressaq mill-Avukat Ġenerali jikkonsisti filli l-ewwel Qorti rriteniet illi r-reat tar-rikatt kien konsumat 'il fuq minn ħames snin qabel ma bdew il-proċeduri kriminali u, bħala reat instantaneju allura kien preskritt.

Il-Qorti tal-Appell qablet ma' dak li ġie ritenut mill-ewwel Qorti fis-sens li r-reat ta' rikatt aggravat (ċioè, meta r-rikattant jirnexxilu, b'dan it-theddid, jottjeni dak li jrid) hu reat istantaneju u mhux permanenti, għalkemm jippresta ruħu ħafna għar-ripetizzjoni jew għall-forma kontinwa (skond is-solita regola jekk l-attijiet sussegwenti jkunux l-effett ta' riżoluzzjoni ġdida kull darba jew tar-riżoluzzjoni oriġinali u unika).

Il-Qorti kkonfermat il-prinċipju li l-eċċezzjoni għandha tiġi deċiża in bażi għal dak li jingħad fl-Att tal-Akkuża, u mhux fid-dawl tal-provi istruwiti, li jkun għad jistgħu jvarjaw waqt is-smiegħ orali u d-dibattitu.

Rigward Spiteri, l-att li tiegħu kellu jirrispondi kien sar biss fl-1972. Dan il-fatt żgur ma kienx preskritt bil-preskrizzjoni ta' ħa-

mes snin meta l-akkużat ġie ppreżentat bl-arrest f'Mejju ta' dik issena.

Il-Qorti tal-Appell ikkonkludiet hekk:

1. Dwar Ġeraldu Cassar, l-atti attribwiti lilu saru fl-1963 u allura dawn huma ċertament preskritti.
2. Il-posizzjoni dwar Tedesco hi identika għal dik ta' Cassar.
3. u 4. Dwar Camilleri u Spiteri, il-posizzjoni hi għal kollox differenti. L-Att tal-Akkuża jgħid li Camilleri kkommetta ċerti atti ta' rikatt matul l-aħħar snin, u Spiteri matul l-aħħar tnax-il xahar qabel l-Att ta' Akkuża. L-atti ta' Spiteri huma deskritti bħala kommessi bi prekonċert ma' Camilleri, waqt li dan hu akkużat li kkommetta ċerti atti oħra waħdu. L-ebda wieħed mill-atti addebitati lil dawn it-tnejn ma hu preskritt.

Għal dawn ir-raġunijiet il-Qorti, wara li rat l-artikolu 508 B(6) tal-Kodiċi Kriminali, ċaħdet l-appell ta' l-Avukat Ġenerali fir-rigward ta' l-akkużati Cassar u Tedesco, iżda laqgħet l-istess appell fir-rigward ta' l-akkużati Camilleri u Spiteri, billi ddikjarat li l-azzjoni kriminali kontra tagħhom mhix estinta bil-preskrizzjoni u ordnat li jerġgħu jitqiegħdu taħt l-istess Att tal-Akkuża, u ordnat il-kontinwazzjoni tal-proċess kontra tagħhom.

Is-sentenza kkommentat, fost ħwejjeġ oħra, li dak li jintqal mixxhieda waqt il-kompilazzjoni ma jorbotx, għax ix-xhieda għandhom jixhdu *viva voce* quddiem il-ġurati, u jkunu għadhom dejjem jistgħu jixhdu b'mod differenti minn dak li ġià xehdu. Dan hu prinċipju importanti tal-Law of Evidence.

Seduta ta' l-14 ta' Awissu, 1975

No. 18 Repubblika vs Joseph Gauci

Joseph Gauci ġie akkużat talli b'diversi azzjonijiet magħmulin fi żminijiet differenti b'risoluzzjoni waħda u bi ksur tal-istess disposizzjoni tal-liġi, bħala uffiċjal pubbliku, minħabba l-kariga u l-impieg tiegħu, għamel u ta dikjarazzjoni falza u ċertifikat falz, u dan skond l-artikolu 193(1) tal-Kodiċi Kriminali.

L-imsemmi Gauci eċċepixxa "in linea preliminari" illi, la darba fit-test Malti tal-imsemmija disposizzjoni kien hemm vers maqbuż (sussegwentement emendat bl-Att XXXVIII tal-1973), (a) minħabba l-Kostituzzjoni tal-1936 ma kien jeżisti ebda test, lanqas bl-Ingliż, ta' dak l-artikolu, stante li l-Kostituzzjoni tal-1936 kienet timponi li liġi għandha tiġi pubblikata fiż-żewġ testi, u la dan ma sarx fil-każ ta' l-artikolu 193, dak l-artikolu ġuridikament ma jeżistix, u (b) la darba l-Kostituzzjoni preżenti tgħid li jekk hemm konflitt

bejn iż-żewġ testi jirbaħ it-test Malti, ir-reat dedott ma jirriżultax mill-kelma miktuba tal-liġi.

Id-difensur għamel ukoll nota li fiha ta l-interpretazzjoni tiegħu tal-artikolu 75 tal-Kostituzzjoni.

Bid-deċiżjoni tagħha tal-31 ta' Lulju, 1975 l-ewwel Qorti ċaħdet iż-żewġ eċċezzjonijiet sollevati mid-Difiża u ordnat li titkompla l-kawża. Minn din id-deċiżjoni sar il-preżenti appell lil din il-Qorti.

Għalkemm il-kwistjoni seta' kellha ċerti risonanzi fil-kamp tad-Drittijiet Fondamentali, ma ġiet sollevata ebda kwistjoni li, bil-proċedura kontra l-akkużat, ġiet jew qegħda tiġi jew aktarx ser tiġi miksura b'riferenza għall-istess akkużat xi waħda mid-disposizzjonijiet ta' l-artikolu 34 sa 46 (inklużi) tal-istess Kostituzzjoni (f'liema każ l-ewwel Qorti kienet tkun trid, salv dak li jingħad fl-artikolu 47(3), tirriferixxi l-kwistjoni lill-Prim'Awla tal-Qorti Ċivili.

Il-Qorti ħasset li għandha tissolleva "ex officio" l-eċċezzjoni tal-inkompetenza tagħha in bażi għall-artikolu 96(2) (d) u (e) tal-Kostituzzjoni, li ġiet ittrattata sew mid-difiża kemm mill-prosekuzzjoni.

Kwantu għall-ewwel eċċezzjoni dwar l-allegata inesistenza tal-artikolu 193 tal-Kodiċi Kriminali, din hi essenzjalment kwistjoni ta' validità ta' liġi għall-finijiet tal-artikolu 96(1) (e) tal-preżenti Kostituzzjoni.

Kwantu għat-tieni eċċezzjoni, din tistrieħ għal kollox fuq l-interpretazzjoni li tat id-Difiża tal-artikolu 75 tal-preżenti Kostituzzjoni.

Id-deċiżjoni impunjata li ttrattat dawn iż-żewġ eċċezzjonijiet għalhekk tikkomprendi in bażi għal dak li ġie formalment eċċepit mill-istess akkużat, deċiżjoni ta': (a) kwistjoni dwar il-validità ta' liġi għat-termini tal-artikolu 96(2) (e) tal-istess Kostituzzjoni, u (b) kwistjoni dwar interpretazzjoni tal-istess Kostituzzjoni għat-termini tal-artikolu 96(2) (d) tal-istess Kostituzzjoni. Appell minn deċiżżjonijiet simili jispetta skond l-artikolu 96(2) (d) u (e) tal-istess Kostituzzjoni lill-Qorti Kostituzzjonali u għalhekk il-Qorti tal-Appell kienet inkompetenti li tieħu konjizzjoni tiegħu.

Għall-motivi premessi l-Qorti ddikjarat ruħha nkompetenti li tieħu konjizzjoni tal-appell magħmul lilha.

Seduta tal-14 ta' Awissu, 1975

No. 19 Repubblika vs Alfred Vella

Alfred Vella ġie akkużat quddiem il-Qorti Kriminali talli, bħala uffiċjal pubbliku, għal xi vantaġġ privat tiegħu, għamel użu ħażin

minn ħwejjeġ mobili illi kienu ġew fdati lilu mħabba l-kariga jew impieg tiegħu u seraq l-istess oġġetti.

L-akkużat eċċepixxa illi d-dokument "N" esibit fil-proċess jiġi sfilzat u dan in vista tal-fatt li ma jammontax għal konfessjoni kif trid il-liġi iżda biss għal notamenti ta' l-Ispettur Abela li jista' jirriferixxi għalihom jekk ikollu bżonn sabiex igħinuh jiftakar.

L-Avukat Ġenerali kkontesta dik l-eċċezzjoni u allura l-Ewwel Qorti ordnat it-trattazzjoni orali u wara tat id-deċiżjoni tagħha li, in forza tagħha, ġie ordnat l-isfilz tal-istess dokument – salv id-dritt tal-Ispettur Abela u P.S.Cassar li jixhdu fuq il-fatti msemmija fid-dokument sfilzat.

L-Avukat Ġenerali ta avviż ta' appell u l-Ewwel Qorti allura ssospendiet il-proċedura u ordnat illi l-kawża tiġi differita sine die.

Meta ttieħed id-Depot tal-Pulizija, Alfred Vella kien qal illi l-oġġetti kienu mixtrija u l-Ispettur Abela kien ħa notament ta' dan. Vella ma riedx jikkummenta fuq il-kontenut u rrifjuta li jiffirma statements.

L-Avukat Ġenerali sostna li d-dokument ma kienx ġie esibit biex jipprova l-fatti li hemm imsemmija fih. L-iskop kien li juri eżattament x'inqara lill-akkużat mill-Ispettur Abela, sabiex wieħed jiddeċiedi (i) jekk l-akkużat għandux ikun mistenni li jagħti xi spjegazzjoni, u (ii) jekk dina l-ispjegazzjoni tahiex. Għal dawn ir-raġunijiet, il-Prosekuzzjoni sostniet li d-dokument "N" in kwestjoni huwa produċibbli mal-provi, u għaldaqstant talbet li d-deċiżjoni tal-Ewwel Qorti tiġi annullata.

Il-Qorti tal-Appell l-ewwelnett ikkummentat illi l-kontenut tad-dokument in kwistjoni jirrappreżenta propjament rendikont narrativ ta' okkorrenzi marbuta mal-investigazzjoni u ċertament jaqa' fit-termini ta' "kitba" (writing) trattata fl-artikolu 582 tal-Kodiċi tal-Proċedura Ċivili (res applikabbli għall-Qorti ta' Ġustizzja Kriminali bl-artikolu 641 tal-Kodiċi Kriminali).

L-artikolu 582 tal-Proċedura jgħid hekk:

"A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing; but in such case, the writing must be produced and may be seen by the opposite party".

Il-Qorti tal-Appell kompliet tgħid li l-Ispettur Abela kien esibixxa dan id-dokument fil-kompilazzjoni mhux taħt id-disposizzjoni ta' dan l-artikolu, *iżda* kif qal fix-xhieda tiegħu bħala "notament ta' kull ma kien ġara".

Dwar l-argument illi dan id-dokument, peress li ġie moqri lill-akkużat waqt l-investigazzjoni, huwa l-aħjar prova ta' dak li bih hu ġie rinfaċċat għall-finijiet tar-reazzjoni tiegħu, il-Qorti taħseb li jkun perikoluż ħafna kieku l-Pulizija kellha tagħmel speċi ta' "procès-verbal" ta' l-okkorrenzi tal-investigazzjoni, taqrah lill-persuna arrestata u mbagħad tipproduċih bħala prova dokumentali fil-kompilazzjoni għall-prova tar-reazzjoni tiegħu. Kieku kellu jiġi ammess dokument bħal dan, jista' jittieħed mill-ġurati bħala "statement" ta' l-akkużat u hekk possibilment jivvjola l-"fairness" tal-proċeduri.

Għall-motivi premessi u bir-riżerva tad-dispożizzjoni ta' l-artikolu 582 (dwar l-użu ta' notamenti bħala "pro-memoria") il-Qorti tal-Appell ċaħdet l-appell.

Seduta tal-10 ta' Novembru, 1975

No. 20 Reġina vs Carmelo Refalo

Wara li l-Prosekuzzjoni talbet biex tinqara x-xhieda ta' l-Ispettur Emanuel Buttigieg minħabba li dan ix-xhud ma setax jattendi l-Qorti skond ċertifikat mediku tat-Tabib Attard kif konfermat bil-ġurament, u d-Difiża opponiet għaliex seta' jinstema' permezz ta' mħallef Supplenti fid-dar tiegħu meta jkun jista' u talbet li jiġu nominati tliet periti mediċi sabiex igħidu jistax ix-xhud jinstema' f'daru mingħajr preġudizzju għal saħħtu, u dawn – wara li ġew hekk nominati – ikkonfermaw illi qabel żmien tliet xhur l-istat mediku tax-xhud ma jippermettilux li jixhed imqar id-dar tiegħu quddiem Imħallef Supplenti, l-Ewwel Qorti ordnat li d-depożizzjoni miktuba ta' l-Ispettur tinqara waqt it-trattazzjoni tal-kawża lill-ġurati.

Id-difiża appellat minn din id-deċiżjoni u sostniet illi, a bażi tal-prinċipju tas-smigħ tax-xhud "viva voce" u b'riferenza għall-artikolu 642 tal-Kodiċi Kriminali li jirrikjedi raġuni t'impossibilità u mhux sempliċi impediment momentaneju, peress li l-indispożizzjoni tax-xhud hija relativament qasira, id-difiża m'għandhiex tkun privata mid-dritt tal-kontroeżami ta' xhud importanti.

Il-Qorti tal-Appell dehrilha li l-Ewwel Qorti ġiet svijata fis-sens li indirizzat l-eżami tagħha għall-kwistjoni jekk u meta x-xhud ikun jista' jinstema' minn Imħallef Supplenti f'daru ġewwa Għawdex (ħaġa li fiċ-ċirkostanzi ma tistax issir peress li skond l-artikolu 643 tal-Kod. Krim., *limitatament għall-Qorti Kriminali*, Imħallef Supplenti jista' jiġi maħtur biss biex jisma' xhud fil-"*Gżirata' Malta*") pjuttost milli jekk u meta x-xhud ikun jista' jixhed quddiemha, li kienet propjament il-kwistjoni riferita lilha għad-deċiżjoni. Għalhekk l-Ewwel Qorti ma kellha qatt għalfejn torjenta r-

riċerka tagħha kollha, kif deher li għamlet, lejn din l-eventwalità li jiġi maħtur Imħallef Supplenti, li fil-fatt ma kienitx legalment possibbli.

Imbagħad il-Qorti tal-Appell għaddiet biex tiddiskuti l-prinċipji li jirregolaw il-materja tal-qari tad-depożizzjoni ġà mogħtija fil-kompilazzjoni ta' xhud li ma jkunx jista' jidher il-Qorti għax marid.

L-ewwelnett il-bażi tal-prinċipju tal-"viva voce" hija: (1) li tassigura l-opportunità tal-kontroeżami; (2) li dderri lill-Imħallef, il-ġurati, il-prosekuzzjoni u d-difiża li josservaw id-"demeanour" taxxhud. Fost l-eċċezzjonijiet għal din ir-regola hemm l-artikolu 642 (2) (b) li jgħid li din ix-xhieda tista' tingieb bħala prova jekk:

"fiż-żmien tal-kawża, ix-xhud ikun mejjet jew barra minn dawn il-Gżejjer *jew għal xi raġuni oħra ma jkunx jista' jidher il-Qorti biex jixhed* jew ikun ġie mwarrab b'xi mezz jew maniġġ tal-parti li kontra tagħha dik ix-xhieda tkun sejra tingieb bħala prova".

Il-Qorti għamlet riferenza għas-sentenza fil-kawża "*Rex vs Pacifico Vella*", 12 ta' Settembru, 1906 fejn intqal illi l-kliem korsiv fl-artikolu fuq ċitat għandu jiġi miftiehem bħala "una inabilità permanente e perpetua del testo di comparire in Corte". Iżda l-Qorti ta' l-Appell ħasbet illi din is-sentenza kienet kategorika iżżejjed. Hija kienet tal-fehma illi hu aktar floku li l-kliem tal-liġi jiftiehem bħala relativ għall-marda li tiġi klassifikata, fuq opinjoni medika, bħala ta' durata li l-Qorti fiċ-ċirkostanzi tqis irragonevoli.

Għall-motivi premessi, u sabiex tkun l-Ewwel Qorti li teżerċita d-diskrezzjoni li l-liġi propjament u oriġinarjament fdat lilha, il-Qorti tal-Appell annullat id-deċiżjoni tal-Ewwel Qorti u rrinvijat l-atti lill-istess Qorti għad-deċiżjoni mill-ġdid tal-kwistjoni fid-dawl tal-fuq espost.

Seduta tal-14 ta' Novembru, 1975

No. 21 Repubblika vs Victor Kent

Victor Kent, li kien jinsab akkużat quddiem il-Qorti Kriminali, eċċepixxa fl-istadju opportun illi l-Att ta' Akkuża ma sarx skond dak li hemm dispost fl-artikolu 582 tal-Kodiċi Kriminali u hu konsegwentement null. Huwa sostna li l-imsemmi artikolu jirrikjedi li l-Att ta' Akkuża għandu jkun "handwritten" u mhux "typewritten" kif fil-fatt kien. L-artikolu 582 jgħid hekk:

"Fil-każijiet ta' reati ta' kompetenza tal-Qorti Kriminali l-Att ta' Akkuża għandu jiġi magħmul *bil-miktub* u għandu jiġi ffirmat mill-Attorney-General".

L-Ewwel Qorti rriferiet għall-Att VII tal-1975 fejn intqal li, fost affarijiet oħra, il-kelma "writing" tfisser wkoll "typewriting", u għalhekk ċaħdet it-teżi tad-difiża.

Il-Qorti tal-Appell ma qablitx ma' din il-motivazzjoni mħabba l-fatt li d-definizzjoni ta' "kitba" fl-imsemmi Att VII hija espressament ristretta għal dak l-Att stess u liġijiet oħra li jsiru *warajh*. Il-Qorti però irriteniet illi, la darba ma jidhirx mod ieħor mill-kuntest li fih ġiet użata l-kelma, il-kelma "kitba" għandu jkollha tifsira ġenerali. Il-Qorti rriferiet għal Black's "Law Dictionary" (1951) fejn intqal li "in the most general sense of the word, 'writing' denotes a document, whether manuscript or printed, as opposed to mere spoken words". Huwa veru li xi drabi il-kelma "writing" tidher mill-istess kuntest bħala opposta għal "printing", iżda fil-kuntest preżenti l-Qorti ma tara xejn li neċessarjament jorbot dan il-kliem ma' kitba bl-id.

Intqal mill-appellant illi la darba l-leġislatur ħass il-bżonn li jemenda l-artikolu 176 tal-Kodiċi tal-Proċedura Ċivili iżda ma deherlux li kellu jemenda wkoll l-artikolu 582 tal-Kodiċi Kriminali, u reċentement inħass ukoll il-bżonn li tingħata definizzjoni statutorja ta' "kitba" għal liġijiet li jistgħu jinħarġu 'l quddiem, ma jistax l-imsemmi artikolu 582 tal-Kodiċi Kriminali jiġi hekk estiż bi speċi ta' digriet tal-Attorney-General. Dwar dan l-argument il-Qorti qalet li, kwantu għall-Att VII tal-1975, dan jaqdi prinċipalment "funzjoni ta' konvenjenza" u l-ebda argument ma jista' jingħibed minn dan il-fatt. Infatti l-kelma "writing" fl-Ingilterra dejjem kellha tifsira ġenerali anke qabel l-Interpretation Act Ingliża ta' l-1889. Kwantu għall-emenda li saret għall-artikolu 176 tal-Kodiċi tal-Proċedura Ċivili, il-Qorti kienet tal-fehma li f'dan il-każ il-leġislatur set a' kien preokkupat bit-tifsira ta' kuntest, li ma kienx il-każ dwar l-artikolu 582 tal-Kodiċi Kriminali. Hu ta' rilevanza, kif qalet il-Qorti, li fit-test Ingliż ta' dik id-disposizzjoni anterjuri għall-Edizzjoni Riveduta kien jingħad "drawn out ... in a clear *hand*".

Għal dawn il-motivi u fis-sens tal-konsiderazzjonijiet premessi, il-Qorti ċaħdet l-appell.

Seduta tal-21 ta' Novembru, 1975

No. 22 Il-Maesta Tagħha r-Reġina vs Emanuel Camilleri

Emanuel Camilleri kien ġie akkużat, fl-ewwel kap, b'serq ikkwalifikat bil-mezz, valur u ħin, ta' oġġetti u flus li jiswew aktar minn £M500; u fit-tieni kap (alternattiv) b'riċettazzjoni. Huwa ġie misjub ħati ta' kompliċità f'serq kwalifikat bil-mezz, valur u ħin, kif fuq ingħad, u liberat mit-tieni akkuża ta' riċettazzjoni. Il-Qorti Krimi-

nali kkundannatu għall-piena ta' tliet snin lavuri forzati.

Dan il-każ jirrigwarda serq ta' "safe" kontenenti bolli u postal orders tal-valur ta' £M2,480. L-appell sar kontra d-deċiżjoni ta' ħtija.

Fil-fehma tal-Qorti tal-Appell kien hemm biżżejjed provi biex fuqhom il-ġurati setgħu raġonevolment jaslu għall-konklużjoni li għaliha waslu, u għalhekk ma kienx il-każ li l-verdett jiġi disturbat, u għaldaqstant ċaħdet l-appell.

L-ebda punt ta' liġi ma ġie trattat f'dan l-appell.

Seduta tal-11 ta' Diċembru, 1975

No. 23 Repubblika vs Carmelo Mangion, Dominic Mifsud, Angelo Galea u Joseph Galea

Bl-Att ta' Akkuża nru. 31 tal-1975, Carmelo Mangion, Dominic Mifsud, Angelo Galea u Joseph Galea ġew akkużati ta' omiċidju volontarju ta' persuna u ta' tentativ ta' omiċidju ta' persuna oħra.

Wara li fit-2 ta' Diċembru, 1975, data li għaliha kienet iffissata l-kawża, l-erba' akkużati wieġbu li ma humiex ħatjin tad-delitt miġjub kontra tagħhom fl-Att tal-Akkuża, l-akkużat Mangion permezz ta' nota eċċepixxa l-inammissibilità tax-xhieda Rita u Fredu Orsini, Mario Scicluna u Maurice Mallia. L-akkużati l-oħra assoċjaw ruħhom ma' din l-eċċezzjoni.

Kien jidher mill-imsemmija xhieda li l-akkużat Mangion kien lest li jieħu fuqu l-oneru li jasal anke biex joqtol lil ħaddieħor, però fi żmien utili kien induna li dan il-ħaddieħor kien bniedem minn tagħna u allura waqaf. Il-Qorti Kriminali qablet mat-teżi tad-difiża illi din l-istqarrija mhi ta' l-ebda rilevanza għall-każ preżenti u għalhekk laqgħet l-eċċezzjoni ta' l-inammissibilità ta' l-imsemmija erba' xhieda.

Il-prosekuzzjoni appellat minn din id-deċiżjoni u talbet illi tiġi revokata billi jiġi ordnat illi l-imsemmijin erba' xhieda jiġu ammessi mal-provi l-oħra tal-proċess. Ġie sottomess mill-prosekuzzjoni illi huwa veru li provi ta' din ix-xorta jistgħu jservu sempliċement biex juru tendenza kriminuża f'akkużat u għalhekk taħt dan l-aspett jiġu eskluži mill-Qorti; iżda l-fatt li dawn il-provi huma rilevanti sabiex jippruvaw intenzjoni u sabiex idejjfu d-difiża tal-akkużat illi l-intenzjoni omiċida ma seta' qatt kellu, jiġġustifika li jiġu ammessi anke jekk fl-istess waqt juru t-tendenza kriminuża. Dak li riedet issostni l-prosekuzzjoni huwa l-fatt illi bl-ammissjoni ta' dawn il-provi, il-forza indizzjarja tagħhom hija ferm superjuri għall-preġudizju illi jista' jiġi arrekat lill-akkużat.

Id-difiża fir-risposta tagħha għar-rikors tal-appell, minbarra li baqgħet tinsisti fuq l-irrelevanza tal-proposti xhieda għall-każ preżenti, issollevat il-preġudizzjali tal-irritwalità tas-smiegħ ta' dan l-appell *f'dan l-istadju* billi l-prosekuzzjoni ma appellatx mid-digriet tal-Ewwel Qorti li bih fid-diskrezzjoni tagħha ordnat li l-proċeduri jitkomplew.

Il-Qorti tal-Appell kienet tal-fehma li ma hemm *xejn* li jipprekludiha milli tieħu konjizzjoni tal-appell interpost fil-kors ordinarju anke f'dan l-istadju, u dana indipendentement mill-kwistjoni jekk f'dan il-każ l-Ewwel Qorti setgħetx jew kellhiex għat-terminu tal-artikolu 508B(3) tal-Kodiċi Kriminali tordna li l-proċeduri jitkomplew u indipendentement ukoll mill-kwistjoni l-oħra tal-mankanza ta' appell (jekk possibbli) da parti tal-prosekuzzjoni minn din l-ordni.

Kwantu għall-meritu nnifsu tal-eċċezzjoni, il-Qorti tal-Appell irriferiet għall-każ Ingliż *Makin v. Attorney-General for New South Wales* (1894) A.C. 57 fejn Lord Herschell qal hekk: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being treated. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused". Il-Qorti ikkwotat ukoll lil Phipson fejn fil-ktieb tiegħu "*On Evidence*" qal li r-riferenza għal "other crimes" fil-każ ta' *Makin* fuq ċitat, għandha tiftiehem ukoll bħala "any bad conduct or wrong behaviour whether amounting to a crime or civil wrong or neither".

Il-Qorti però, wara li kkwotat il-każ ta' *Harris v. Director of Public Prosecutions* (1952) A.C. 694, qalet li bħala regola ta' prattika ġudizzjarja, anke meta evidenza ta' din ix-xorta tkun strettament ammissibbli, l-Imħallef jista' fid-diskrezzjoni tiegħu jeskludiha jekk l-effett preġudizzjevoli tagħha fil-konfront tal-akkużat ikun għal kollox sproporzjonat għall-valur evidenzjali tagħha. A bażi ta' dan l-argument, il-Qorti kienet tal-fehma li l-prova proposta m'għandhiex, fi kliem Viscount Simon fil-każ ta' *Harris*, "a really material bearing" fuq l-issue li għandha tiġi deċiża, ossija,

il-ħtija o meno tal-akkużat tad-delitti lilu addebitati. Jiġifieri anke kieku din l-evidenza kellha tiġi kkunsidrata bħala "strictly admissible", il-preġudizzju għall-akkużat in relazzjoni għal kull valur probatorju tagħha kien ukoll fil-kompless jiġġustifika l-esklużżjoni tagħha.

Għal dawn il-motivi u fis-sens tal-konsiderazzjonijiet premessi, il-Qorti ċaħdet l-appell.