MOOTS

HOPKINS vs. HOPKINS*

IN 1935 Mr. Hopkins while domiciled in Spain contracted marriage in Malta with a Spanish lady domiciled in Spain. In 1942 they established their domicile in Malta. In 1944 an action for personal separation was successfully made by the husband on account of adultery committed by his wife. The community of acquests was dissolved by the judgment. By "nota" presented by Mr. Hopkins' counsel a few days after the judgment Mr. Hopkins declared that he was renouncing to the effects of the judgment.

Mrs. Hopkins later actioned her husband for the payment of half of the "common property" according to Spanish Law i.e. the savings accumulated and the property acquired during the period running from 1935 to 1942; her share was due to her by Spanish Law in *all* cases.

Mr. Hopkins pleaded that in virtue of the "nota" he had filed in the Court of Appeal, the effects of the separation had come to an end, thus rendering the wife's action devoid of any

legal foundation. Subsidiarily, he submitted that half of the community of acquisitions was not due because separation had been pronounced by the Court of Appeal in the sense that the wife was subject to all the penalties established by the law in case of adultery and the acquisitions were in the main the result of Mr. Hopkins' industry. He stated that, since the marriage had been celebrated in Malta, the Maltese community of acquests was applicable from the very start.

The Court of first instance dismissed plaintiff's claim on the ground that once the husband had renounced to all the effects of the separation and the judgment had been in his favour on all paints, no action could arise out of the separation. The wife had the duty of cohabitation and there was no right to take any part of the community of acquests, because the community was still alive in virtue of the husband's renunciation.

Plaintiff appealed from the judgment given on first instance.

N.B. Spanish Law provides that the wife's share is due to her in all cases (inclusive of the case of personal separation).

If Spanish Law were to be applied in regard to the acquisitions made between 1935 and 1942, Mrs. Hopkins' share would amount to Lm500 more than that reckoned by Maltese Law.

Professor V. Caruana, B.Litt., LL.D.. kindly consented to hear the case.

Counsel for appellant : Mr. Joseph M. Ganado, B.A. ; Mr. Mifsud Montanaro.

Counsel for respondent: Mr. Edgar Mizzi, B.A.; Mr. George Degaetano.

The first question dealt with was raised by *Mr. Mifsud Montdnaro* as the inadmissibility of the note of renunciation filed by Mr. Hopkins : it was contended that the sentence of separa-

* Reported by Mr. Paul Mallia, B.A.

tion created a new *modus vivendi* between the parties which could not be altered except by the will of both parties. In fact, according to sec. 77 of the Civil Code, apart from the cessation of cohabitation, no other effect of a separation could cease except in virtue of a contract by a public act, and it was obvious that there could be no re-union except by mutual consent. In support of his contention appellant quoted Baudry Lacantinerie, Laurent and Italian case-law. The power to ask for personal separation was a potestative right—said Mr. Mifsud—it might or might not be exercised ; but once it was exercised by Mr. Hopkin. his wife had every right to abide by the decision given. This plea was not contested by respondent : as a matter of fact Mr. Mizzi admitted the arguing of the appellant and the matter stopped at that.

Mr. Ganado then rose to discuss the point at issue. Up to 4942, he said, the Spanish Law applied regarding the community of acquests of the spouses, i.e. the law of the matrimonial domicile. He submitted that sec. 1360 should not be interpreted strictly *ad litteram* and that for the application of the Maltase community of acquests it was necessary that Malta should have been the place of the matrimonial domicile. He referred to the second paragraph of sec. 1360 from which the spirit of the law could be derived, to the Code De Rohan and to a judgment given by the First Hall, Civil Court—Smith vs. Muscat Azzopardi 1935—*per* Harding J.

Mrs. Hopkins was therefore asking only for the payment of what was "hers" by Spanish Law. When in 1942 the parties established their domicile in Malta a new community of acquests stepped in and the first one was ideally liquidated : the half of the "common property" acquired during the period running from 1935 to 1942, which the wife was claiming, became, in virtue of such a cessation a sort of paraphernal property which could in no way be denied to the wife. In fact, Mr. Ganado continued, this share was certainly *not dotal* ; it could not fall into the community of acquests established under Maltese Law : it could not, therefore be other than paraphernal property, which, owing to the cessation of the community of acquests, belonged to the wife even as to administration.

It might be pleaded—said appellant—that section 64 gave the Court the right to direct the cessation of any community of acquests *for the future,* but, he pointed out, sec. 64 had no direct influence on the case, because that matter had been finally settled by the judgment of separation. Appellant was simply demanding the half of a community of acquests which had ceased with the change of domicile. As to the possible objection of the respondent that Mrs. Hopkins was subject to all the penalties established by the Law among which penalties was that of the loss of the right for the half of the acquisitions which, during marriage, might have been made by the industry chiefly of the other party, Mr. Ganado retorted that the penalty would obviously not be applicable to the property claimed for the reason explained in the preceding paragraph and that, in any case, penalties must be interpreted restrictively : if the Law spoke, it must be presumed that it knew what it spoke about; it referred only to the Maltese community of acquests and to no other, it was not fair to say that our legislator intended the penalties applied by him to apply to order of things brought about by a foreign legislator. It was imperative, Mr. Ganado said, that there should be a line of demarcation between that "common property" which existed up to 1942 and the "community of acquests" which came into being in 1942. *Even if one could think,* said appellant, *of some continuity* (which was not correct) between the community of property existing up to 1942 and the community of acquests established under Maltese Law, the penalty inflicted by the Law of

Malta could not apply : in the matter of the application of the *lex fori* a distinction had to be made between what concerned public policy and what was of a purely private character; were section 56 (which lays down the penalties inflicted to the party who may have given occasion to the separation) a provision of public policy it would certainly have applied to the wife's share of the "common property" existing up to 1942; it was evident, however, that this section of the Law was of a purely private character.

Mr. Mizzi then rose to defend his thesis. He upheld that as from 1935 it was the Law of Malta which regulated the community of acquests between the parties; in fact, section 1360 of the Civil Code laid down that "a marriage celebrated in these islands produces *ipso jure* between husband and wife community of acquisitions": where the law was clear—he pointed out—one should not resort to any interpretation. The law made only one distinction viz. that between marriages celebrated in these Islands and marriages celebrated abroad, and therefore any other distinction would be beyond the scope of the law. He also stated that this was also the probable intention of the legislator, as could be inferred from the reference to the Code De Rohan and to Story made by Sir Adrian Dingli in his "Notes".

The second point discussed by Mr. Mizzi was that the lass of one half of the acquistions which during marriage might have been made by the industry chiefly of the other party was an effect of separation and had nothing to do with the effects of the community of acquests. With regard to the effects of the separation—it was pointed out—there was no doubt but that the law of Malta, as the *lex fori*, applied; moreover the parties were domiciled in Malta. A doubt remained whether, if Spanish Law governed the relations between the parties during the period running from 1935 to 1942, because of their domicile in Spain, this effect of separation could affect the acquisitions made during that period. Respondent submitted that it could, firstly, because once the *lex fori* governed the effects of separation it was immaterial whether the parties were at one time domiciled in Spain or not ; secondly, because the words of the law "during marriage" covered the whole period from 1935 to the date of the judgment; thirdly because the nature of the Spanish community of acquisitions was very similar to that regulated by Maltese Law.

In answer to appellant's statement that the Spanish community, if it ever existed, had been ideally liquidated respondent suggested that no such liquidation had ever taken place and that, on the contrary, it was still in force, though relating only to the property acquired between 1935 and 1942.

Finally, the respondent raised the plea of *res judicata :* the sentence of separation was final and absolute ; the demand of the appellant was only a camouflaged means of avoiding the sentence of separation.

Mr. Ganado then rose to rebute this last-mentioned plea. The plea of res judicata, he said, could only be raised with regard to matters expressly adjudicated upon : here—it was evident—it was merely the interpretation of the first judgment that was being discussed. This view was upheld by the "judge".

Prof. Caruana, in giving judgment, upheld appellant's view that up to 1942 it was the Spanish Law, as the law of the parties domicile that applied to the community of acquests but—

he pointed out—there could be no doubt that the Law of Malta was applicable as to the effects of separation both because the law of Malta was the *lex fori* and also because it was the *lex domicilii* of the parties at the time of the action of separation. Now one of the consequences of the application of the Law of Malta was exactly that the guilty partner forfeited any right he or she might have had for the half of the acquisitions which, during marriage, might have been made by the industry chiefly of the other party (sec. 56 para. 2). The point at issue was whether this rule was to be applied to any community of acquisitions or whether it was to be limited to that community of acquests which had arisen under Maltese Law. Prof. Caruana thought that section 56 might logically be extended to *any* community of acquests existing between the parties. The reason behind sec. 56, in fact, was that the guilty partner should not derive any benefit from the acquisitions of the innocent partner. This effect of the separation was a penalty imposed against the guilty partner—it should, therefore, be extended to every community of acquests existing or which might have existed between the parties and not simply to that which arose under Maltese Law. The one half of the acquests, Prof. Caruana said, might be likened to the so-called *lucri nuziali* (nuptial gains) regarding which there was no doubt but that they had to be returned to the innocent partner. The fact that there were two different community of acquests should not be an obstacle to the application of section 56 para. 2. Under these circumstances, Prof. Caruana was of opinion that the sentence of first instance was to be confirmed, though on grounds different from those mentioned by the first Court, and the appeal rejected.

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A CONFESSION

"Lord Reading and his cases" by Walker-Smith, page 127: "It is always good tactics to confess a mistake—as long as it a miscalculation and not an ethical mistake—.....for nothing pleases a Jury more than to reflect how much better they would have handled the situation themselves."

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JUSTICE IN MOTION

"The Lord Chief Justice of England in Rex v. Hurst, 1924, 1. K;B. 256 said: "Justice should not only be done, but be manifestly and undoubtedly seem to be done."

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A DEBT

Bacon — "I hold every man a debtor to his profession."

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LAW AND LIFE

Legislation is only really successful when it is harmony with the general spirit of the age. Law and statesmen for the most part indicate and ratify, but do not create. They are like the hands of the watch which move obedient to the hidden machinery behind. - *Lecky.*