# PUTATIVE MARRIAGE AND EFFECTS THEREOF

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"Matrimonium... quod bona fide et solemniter, saltem opinione conjugis unius, justa contractum inter personas jungi vetitas consistit." (Gio Nicola Erzio).

MARRIAGE is a contract resulting in a status.When the marriage contract merely gives rise to a status, the adherence to the civil formalities are enough to render a marriage valid. According to this view marriage depends on the state's consent ; so that with the state's consent it can also be dissolved.

According to the Catholic Church, marriage is not merely a contract resulting in a status, but it is also a sacrament. Marriage creates a relationship, and it is because of such relationship that marriage is indissoluble. So it can neither be terminated by the parties themselves, nor by the State. This is the Catholic idea of marriage; and this concept has such a great influence on the Maltese community that in Malta the formalities prescribed by the Catholic Church are the only ones having full legal effects. Our legislator has not estabished civil formalities preceeding marriage, yet the law itself (1) makes a reference to the rites as established by the Catholic Church. So in these Islands the solemnisation of marriage is based solely and exclusively on Canon Law (Law Reports, Vol. VIII, 173, col. 2 ; Vol. XIII, p. 87, col. 2, 247 and 526; Vol. XVI, Pt: II, p. 134; Vol. XXIV, Pt. II, p. 497-498 ;Vol. XXV, Pt, I, p. 444). The same view was held in two more recent judgements by the Court of first instance on 7. 8. 1944 (Baron Chapelle v. Dr. Gauci Maestre noe.) and on 15. 11. 1946 (Lepre v. Dr. Agius noe.)

Our law considering marriage as a sacrament follows the Church also in regard to the dissolution of marriage. Marriage only terminates by the conditions which God Himself has laid down, and the Catholic Church as God's Messenger on earth teaches us what these conditions are. It is very difficult to give a complete list of what these conditions are. However that given by Tancred (13th century) and as amended by the Council of Trent is a good one.

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Dissensus, et affinis, si clandestinus et impos,
Raptave sit mulier, loco nee reddita tuto,
Haec facienda vetant connubia, facta retractant."

If any of the conditions which are capable of nullifying marriage are known before its celebration takes place, it is natural that no marriage can be validly contracted. But in spite of such obstacles, there are cases when the parties go through the celebration of marriage. In this case the marriage is null ; so that it is considered as if it had never been performed. Nullity has always a retroactive effect so that those effects which were produced before the annulment of

(1) Section 37 of the Civil Code (Chapter 23 of the Revised Edition) and section 204 of the Criminal Code (Chapter 12 of the Revised Edition).

marriage, also come to an end. "Quod nullum est, nullum producit effectum." So those who have contracted such a marriage do not possess the status of spouses and they do not enjoy the conjugal rights ; also the children who are born of them do not possess the status of legitimacy.

There is however an exception to the rule that a marriage which has been declared null produces no effects. This is when such a marriage is contracted in good faith. Such a marriage is called putative marriage.

Our law unlike other continental codes does not establish the conditions necessary to contract marriage or the formalities which should precede its celebration ; but it considers marriage celebrated according to the precepts of the Council of Trent and according to the precepts of the decree "ne temere" of 1907, as an act solemnly made, and besides being a sacrament producing spiritual and religious effects it is also capable of producing those civil effects contemplated in our Civil Code .(Chapter 23 of the Revised Edition).

In the absence of provisions in our civil code, canon law has always been regarded in Malta as having the value of law. Some judgements upon this subject are those of the Court of first instance delivered on 3. 12. 1864 (Borg v. Zammit — Vol. III p. 214) ; on 8. 12. 1885 (Dingli v. Serra-Vol. X p, 977) ; on 2. 11. 1897 (Ginuis v. Decelis—Vol. XVI, Pt. II, p. 134) ; on 12. 11. 1913 (La Pira v. La Pira—Vol. XXII Pt. II, p. 128) ; and those of His Majesty's Court of Appeal delivered on 3. 11. 1871 (Bonanno v. Galea) ; on 4. 3. 1892 (Fleri v, Cassar) ; on 4. 4. 1892 (Wilson v. Rocco Peralta) ; and an 4. 6. 1894 (Cassar v. Scerri).

A provision showing that religious rites are sufficient to constitute a valid marriage is section 204 of the Criminal Code (Chapter 12 of the Revised Edition) where the law imposes punishment restrictive of personal liberty to anyone who contracts marriage before a parish priest or other competent minister of the Catholic Church without such marriage having been preceded and accompanied by all the solemnities and forms prescribed by the laws of the said Church.

The principle that religious rites alone are enough to constitute a valid marriage was discussed in Wolgenchaffen v. Lanzon (13. 1. 1874) in the Court of first instance. The Court held that this marriage contracted in Italy only according to the rites of the Council of Trent was legally valid even though the formalities of the Italian Civil Code were not observed.

Section 37 of the Civil Code establishes certain civil effects, arising out of the marriage contracted before the parish priest or other competent ecclesiastical minister of the Holy Catholic Church, without the rites and formalities which according to the laws of the Church should precede the marriage, unless such rites and formalities have been dispensed with by the competent authorities of that Church.

A putative marriage is that marriage which actually is null, but which both spouses or one of them had a "bona fide" belief of having validly contracted. Though on the strength of the maxim "Quom nullum est, nullum producit effectum", one is induced to believe that such a marriage produced no effects, yet the rule that a putative marriage is accompanied by legal effects is justified on various grounds : as for example, the good faith of the spouse or spouses and the consideration for the innocent children born of such marriage. Putative marriage is a legal fiction which produces certain effects. The decrees which are the sources of these effects are C. 2 (cum inter) "Qui sint filii legittimi" (Pope Alexander III, 1159-1181) ; C. 10 (Referentes nobis) by Pope Celestine III (1191-1198) ; C. 14 (Ex tenore) and C. 3 para. 1 (Cum inhibitis) "De clandestina dispositione", both by Pope innocent III (1198-1216).

## PUTATIVE MARRIAGE AND EFFECTS THEREOF

According to a traditional doctrine supported by Toullier and other French writers, the requisites of a putative marriage are good faith, the solemn form of celebration and the excusable error. But the Italian Civil Code of 1865 in section 116 shows that good faith alone is enough. However, the solemn farm of celebration and the excusable error are two constituents of good faith. This rule requiring three requisites to constitute a putative marriage is objected to by Duranton and Laurent who together with Zachariae name only one requisite viz ; good faith. This latter view is also followed by the majority of the Italian writers amongst whom Pacifici-Mazzoni, Chironi and Ricci. Giulio Venzi in his comments to Pacifici-Mazzoni's "Instituzioni di Diritto Civile Italiano" (Vol. VII Pt, II, LibroVl, Tit. I, Cap. VI, Sez. III p. 216) says :—

"Secondo una dottrina tradizionale, non del tutto forse abbandonata, le candizioni richieste, perche un matrimonio sia putativo, sono tre : la buona fede, la forma solenne di celebrazione e l'errore scusabile. Ma il testo dell'art 116 non esige che una sola condizione, la buona fede. Potrebbe invece dirsi che la forma solenne di celebrazione e l'errore scusabile sono due elementi della buona fede. Osserva assai giustamente, secondo che reputianio, il Laurent, che tale preposizione e troppo assoluta ; puo bene avvenire che un matrimonio sia celebrato in buona fede, senza avere osservato le solennita legali, e l'errore e scusabile per cio solo che gli sposi hanno ignarata la causa che faceva ostacolo alla loro unione."

Bianchi says that ignorance which is not pardonable can never be admitted as a constituent of good faith :—

"Non puo mai ammettersi la buona fede in chi allegasse, o si offrisse di provere, aver esso ignorato che fosse proibito il contrarre nuove nozze a chi sia legato in matrimonio anteriore, ovvero a chi dicesse non aver saputo che il matrimonio fosse vietato tra fratello e sorella."

But it is submitted that when there is an error, it is excusable. Venzi in support of this says, "Ma, ripeteremo col Laurent, solo che l'errore vi sia esso e scusabile." Later on he says, "che gl'interpriti del diritto francese... non esigono, almeno di rigore, la condizione che l'errore sia scusabile."

So the essence of a putative marriage lies in good faith. It consists in the wrong opinion of one or both spouses about the validity of the marriage. It is the inadvertence of the existence of an impediment to the validity of the marriage. In our law this principle of good faith is derived from canon law (1). Bartolus (I314-1355) recognised the canon rule and Baldus (1327-1400) affirmed that civil law should submit to canon law in homage to the recognised equity of the same: "naturalem aequitatem non stantem in finibus semplicis naturalis aequitatis, sed junctam ratione juris canonici, nam jus canonicum reputatur esse divinum et leges non dedignantur sacros canones imitari" (Baldus at L. l, 4 c. De incest, et inut) ; and so the civil law fully accepted the provisions of canon law.

Card. Mantica in his book "De tacitis et ambiguis" affirms "Matrimonium bona fide contractum habetur pro vero" (L. XI, t. 19, no. 20) and De Luca "Ubi etenim bonae fidei putativum sit matrimonium, illud veri omnes operatur effectus, istum praesertim legitimae prolis". (Summa de Matri. no. 65 Op. XIV p. 2). Gio Nicola Erzio then established the rule that all effects which derive from a true marriage should apply to a putative marriage.

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(l) "Matrimonium invalidum dicitur *putativum,* si in bona fide ab una saltem parte celebratum fuerit, donec utraque pars de eiusdem nullitate certa evadat". (Codex Juris Canonici, Canon 1015 para. 4).

Good faith should be interpreted in a wide sense. It is presumed every time it is not shown that both spouses or one of them has acted in bad faith. (Dr. Grima noe v. Baron Chapelle—8. 10. 1945).

There is hardly any need to mention that good faith should exist at the time of the celebration of marriage whatever the cause of nullity. In order to decide whether there exists good faith or not, the judge has to take cognisance of the conditions, the age and the sex of the spouse who alleges the good faith and all such circumstances which are necessary.

A putative marriage produced civil effects only up to the day on which nullity of the marriage is pronounced. After annulment it is similar to marriage which is inexistent and so it can produce no effects. Thus a putative marriage produces civil effects for a period before but not after it has been annulled. But although it is true that the annulment retroactively puts an end to all the civil effects of such a marriage, yet the law protects the acts which the marriage has given rise to, due to the respect it has towards the innocent children. Thus the children born or conceived before annulment are and always remain legitimate (Dr. Grima noe v. Baron Chapelle—8.10.1945). On the contrary the child conceived after the annulment by the same man and woman are illegitimate for its parents remain husband and wife no longer, and consequently any act which they perform as spouses after such annulment is made with the knowledge that they had no right to do so. The Court of first instance in Wolgenchaffen v. Lanzon (13. 1. 1874) held :—

"Che cessata pertanto la buona fede nel matrimonio putativo, per la di cui virtu si mantenevano incolumi di adulterio e d'incesto le persone congiunte, e acquistata la conoscenza dello impedimento che rendeva nulla ed illegitima la loro unione, cessa di produrre gli effetti civili—perche non vi esiste fra le parti piu matrimonio, non soppravvive piu lo stato coniugale, alla apparenza e alla finzione della legge viene sostituita la realta per cui qualunque congiunzione necessariamente diviene un adulterio, un incesto la natura dell'impedimento scoperto. Sono conservati pero pel passato tutti gli effetti civili ammessi dalla legge per un matrimonio valido—ma dopo la dichiarazione giudiziale non possono sorgere effetti nuovi."

The Court following Duranton continued :—

"Ove si tratta di un vizio di incesto o di bigamia e ne sia chiaramente addotta la prova ai coniugi, ovvero al coniuge in buona fede da parenti o amici o in qualsivoglia altro modo, debbono essi immediatamente separarsi, e se uno nol voglia deve l'altro domandare la nullita del matrimonio almeno quando possa farlo senza compromettere il suo consorte. Il buon ordine altresi lo richiede."

Putative marriage produces effects both with regard to the spouses and the children and with regard to third parties. With regard to the spouses we have to distinguish whether both or one of the spouses was in good faith or not.

In the former case patria potestas with all its rights over the person and property of the children belongs to the father.

In the latter case however, according to the Italian law, patria potestas and all its rights belong to the spouse who was in good faith, even if it were the mother, and this spouse only has the right to succeed the children. The innocent spouse only can invoke the effects of a putative marriage and so it is in the interest of such spouse to ask for the execution of marriage effects with regard to the dowry or dotarium as the case may be. The reason is that according to

the Italian Civil Code of 1865, patria potestas can be vested also to the mother. In fact section 220 of that code says :—

"Il figlio, qualunque sia la sua eta, deve onerare e rispettare i genitori.

Egli e soggetto alla podesth dei genitori sino all'eta maggiore od all'emancipazione.

Durante il matrimonio tale podesta e esercitata dal padre, e, se egli non possa esercitarla, dalla madre.

Sciolto il matrimonio, la patria podesta viene esercitata dal genitore superstite."

So we see that the Italian Civil Code of 1865 gives patria potestas also to the mother, if the father cannot exercise it, or if marriage is annulled, to the surviving parent whether it be the husband or the wife. So if we apply the words "Se un solo dei coniugi sia in buona fede, il matrimonio non produce gli effetti civili, se non sia in favore di lui e dei figli" of section 116 to this section (220) , we deduce that if the wife only is in good faith, she has the right of paternal authority.

But unlike the Italian Civil Code our code does not contain provisions whereby the wife has the right of paternal authority. In fact our law dealing with patria potestas says, "A legitimate child is subject to the authority of the father for all the effects as by law established" (1). So it is submitted that in case the husband is the only spouse in good faith, he retains patria potestas and all the rights it conveys to him over the person and property of the child. However, the father may forfeit paternal authority wholly or in part for any of the reasons mentioned in section 180 of our Civil Code.

But the problem is more difficult when we consider the case when the husband is in bad faith. The best way to solve it is by analogy to Title I, sub-title III of Bk. 1 of our Civil Code ("Of Separation from Bed and Board"). With regar to the children, the effects of a putative marriage contracted in bad faith by the husband are similar to the effects of a legal separation which was caused due to the husband's guilt, for in both cases the husband's character may be detrimental to the child's education. Also, though in the former case the marriage is annulled, and though in the latter case it still subsists, yet in both cases there always remains the bond of affinity and relationship between parents and children.

So in this case, as in the case of, separation, patria potestas is dissolved and consequently the mother who contracted the putative marriage in good faith has the right to be appointed tutrix. Thus the innocent party does not suffer the pain of being deprived of her children. Also, it is the innocent party who can present a better guarantee to the interests of the children.

A putative marriage produces civil effects even if only one spouse was in good faith. Consequently the children enjoy the status of legitimacy not only towards the parent in good faith, but also towards the other. (Dr. Grima noe v. Baron Chapelle—8. 10. 1945). So putative children assume the surname of their father even though the father contracted marriage in bad faith. They succeed the parent who contracted marriage in bad faith and the latter's parents. But the parent in bad faith does not suceed the children(1).

Pothier recognises as legitimate, children born of a putative marriage. This is of great

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(1) Section 154 of the Civil Code (Chapter 23 of the Revised Edition).

(1) Pacifici-Mazzoni, "Istituzioni di diritto civile italiano" Vol. VII, P. 1. para. 96.

the provisions of articles 201 and 202 of that code. These articles were also included in the Italian Civil Code.

The Italian Civil Code extends the favour given to children born of a putative marriage, also to children born before the celebration of marriage; because as an illegitimate child can be legitimated "per subsequens matrimonium", so also an illegitimate child can by subsequent marriage be legitimated, even though the marriage is later declared null due to an impediment which was unknown to one or both spouses at the time of the celebration of marriage.

Before the promulgation of the Italian Civil Code of 1865 this principle was already observed by the Code of Austria, by the "Codice Napoletano" (arts. 191-192), by the Sardinian Code (arts. 115 and 162) and by the "Codice Albertino". Both the jurisprudence of Italy and that of France applied the above principle. (Cochet-Bourdellat dec. No. LXIX (1807) ; Praedeaug-Baulard dec. LXXXVIII (1808) ; the Novelli case by the "Corte di Cassazione" of Naples (25. 4. 1892) and the case Cracchi-Peretti by the "Corte d'Appello di Genova" (31. 5. 1880).

Naturally the children conceived during marriage, but born after its annulment are likewise legitimate; except always the action of disavowal of paternity and the contestation of legitimacy.

This favour, extended to children born of a marriage which has been annulled, extends also in the case of donation. Thus article 1068 of the Italian Civil Code of 1865 says :—

"Qualunque donazione fatta in riguardo di futuro matrimonio e senza effetto, se il'matrimonio non segue.

Lo stesso ha luogo se il matrimonio e' annullato ; ma la donazione in quanto riguarda i figli rimane efficace nei casi espressi nell' articolo 116, e sono pur salvi i diritti acquistati dai terzi nel tempo intermedio."

Zachiariae mentions as exceptions to this rule only the children born of a conjugal union which is sacrilegious, incestuous and adulterous and the reason is that a marriage cannot legitimate the issue born of such sacrilegous, incestuous or adulterous union. This view is also supported by eminent writers as Duranton, Merlin, Aubry et Rau, Pacifici-Mazzoni, Chironi and Ricci.

It would be unreasonable if our legislator, who calls for succession children and their descendants to succeed to their father or mother without distinction of sex, wanted to exclude the children born of a putative marriage. As has already been stated putative children are considered as legitimate. Also section 847 of our Civil Code defines legitimate children as, "legitimate children, children legitimated by subsequent marriage, as well as the children of a marriage discovered to be null by reason of an impediment which, at the time of procreation of such children, was unknown to either of the parents." So both the children born of a putative marriage and those of a valid marriage have an equal right of succession.

A different view would place these children, innocent of the errors of their parents, in a conditions worse than that in which illegitimate children are put, for such illegitimate children are put, for such illegitimate children, according to the provisions established by

(2) "Idem operatur matrimonium putativum ac verum"

law, succeed their parents although the legitimate children have preference. This applies also in the case of maintenance. Section 112 of our Civil Code says :—

"Where the claims for maintenance are made at the same time both by legitimate, legitimated or adoptive children and by illegitimate children, the claims of the latter, although they be acknowledged children, shall be postponed, if the parent is unable to discharge his obligations towards all the claimants."

Thus if putative children are not allowed to claim maintenance of their parents, they would be in a position which is at a disadvantage to that in which the law places incestuous, sacrilegous and adulterous children; for though the latter can neither be legitimated, nor adopted, yet they are not excluded from enforcing their right to compel their parents to give them maintenance (sections 856, 129, 130, 135 and 107 of our Civil Code).

According to well known writers amongst whom Aubry et Rau, the judgement which proclaims the nullity of a putative marriage operates only in favour of and in relation to the spouses themselves. So it puts an end to all the obligations arising out of marriage, namely the obligations of cohabitation, assistance, fidelity and support. Because the nullity of the marriage has a retroactive effect, the dowry brought by the wife is returned and the dotarium promised by the husband comes to an end. But as has already been stated, nullity does not cancel the ties of natural affinity and the relationship of parenthood to which the legitimate union of the spouses has given rise. The judgement pronouncing the nullity breaks the tie which united the spouses, but the relationship of parenthood remains indissoluble and though the spouses do not remain husband and wife any longer, they do not cease to be the parents of the children procreated by them during the time when the marriage subsisted. Consequently because of the indissoluble bond of relationship between children and parents, there arises the reciprocal duty of maintenance.

These writers have done nothing else but adopted the principle of canon law "Idem operatur matrimonium putativum ac veruin". And as our law with reference to this subject follows the principles of canon law, so the above applies also to our law.

Finally, a putative marriage has effects also as regards third parties, similar to the effects caused by a valid marriage. So before annulment the wife will enjoy the legal hypothec on the property of the husband even though she alone were in good faith ; and she can oppose it against third parties (sections 2122 and 2123). Similarly both spouses can oppose third parties due to the lack of authorisation of the husband or the Court and declare null the contract entered into be the wife before the annulment of the marriage (section 9 and 12). But this refers only to those acts done by the wife before the annulment of the marriage ; because after such annulment it is clear that every authority of the husband over the wife ceases. So the wife can freely perform all civil acts ; for the wife's incapacity is not a natural incapacity but a legal one.

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**WALKER SMITH: LORD READING AND HIS CASES:**

"There is in the gardens and courts of the Temple an almost collegiate atmosphere which breathes the corporate spirit of an institution, that evokes loyalty rather than demands it; and that loyalty is no small thing for in the honourable and efficient conduct of the law lies the very basis and foundation stone of the structure e of a civilised society."