# LAW JOURNAL

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# EDITORIAL

## AGE OF NOTARIES

SEC. 6 of Cap. 92 of the Revised Edition of the Laws of Malta includes, amongst the conditions required to become a notary, that of the attainment of 25 years of age. This section, which was modelled on French and Italian law, dates as far back as 1859 when it was inserted in Ordinance VIII of that year. Since then, however, the tendency of modern legislation has been to reduce this age limit. Thus in Italy it has been reduced to 24 years; the laws of Portugal require only 21 years. In Scotland, any law agent may be appointed Notary and any person who is 21 years of age and who has satisfied other conditions may be appointed law agent.

While fully realising the importance of the functions performed by a Notary as well as the public character of his office, we feel it our duty to draw the attention of Government to this prevailing tendency. Government would do well to consider whether it is advisable or not to conform our laws thereto, thus removing an unnecessary hardship to our would-be Notaries. After all, full majority in Malta is reached at the age of 21 and it is difficult to understand why a person of 21 is considered sufficiently matured to be empanelled as a juror or to enjoy the franchise but not to exercise the profession of Notary. Indeed, in the case of a barrister, there is no age minimum at all.

## HOUSING OF JURORS

It is a well known fact borne out by statistical data that the number of trials by jury is on the increase, due perhaps to the lowering of the standard of morality as an aftermath of war. It is also common knowledge that the shortage of housing accommodation is acute. New houses are snatched up the moment they are built; hotels are packed to their utmost capacity. Owing to this state of affairs, it is becoming increasingly difficult to accommodate jurors overnight in long trials by jury. It would appear therefore expedient for Government to requisition and fur-

nish a suitable house for the purpose. The housing of jurors in these abnormal circumstances is a public purpose of sufficient importance to justify a requisition. In fact, the alternative would appear to be to discharge the jury and upset the trial as it would be inadvisable in a small place like Malta to allow the jurors to disperse and come back the following day. The course suggested by us seems to be the best way to solve a problem which is continually confronting the Court authorities. It might also pave the way to an economy.

## GOVERNMENT GAZETTE

We note with pleasure that the former practice that the Supplements to the Government Gazette containing the bills proposed in or the acts enacted by the Legislative Assembly were to be purchased at the Government Printing Office has been discontinued.

This practice had caused great inconvenience to the membrs of the legal profession as well as to the general public, especially that section of the latter, which might be interested in particular laws. Government is to be congratulated for having taken a step in the right direction in having allowed persons, wishing to have supplements, to have them sent along with the Gazette.

After all, owing to the fundamental principle *ignorantia legis neminem excusat*, it is even more important that these supplements should reach the public than the Government Gazette.

We should like to draw the attention of Government to an anomaly to be found in the Government Gazette. The ordinances of the Maltese Imperial Government are being printed as an integral part of the Gazette itself. We suggest for the sake of uniformity that these ordinances be printed in supplements in the same way as the laws of the Legislative Assembly.

## MOTOR VEHICLES

A recent trial by jury in H.M.'s Criminal Court has disclosed a lacuna in our Criminal Code. The accused was charged with theft aggravated by time, it being alleged that he had stolen a car at nighttime. The evidence appeared to show that the intention of the accused was not to deprive the owner *permanently* of the car but merely to make use of it in order to re-

turn to barracks in time. *Prima facie*, it seemed that the case was one of *furtum usus* but this was ruled out by the fact that in Section 301, which envisages this offence, only *simple* theft is considered. This is tantamount to saying that if there is an aggravating circumstance (such as that of time), this section does not fall to be applied.

The presiding Judge, in his address to the jury, stated that under English Law the solution would be easy inasmuch as a special offence was created by the Road Traffic Act, 1930, consisting in taking and driving away a motor vehicle without the consent of the owner or his authority. Under Maltese Law, the only possible solution, although not a satisfactory one, was to have recourse to Section 354(d) which lays down that a person is guilty of a contravention if he commits a violaton of another person's property to the prejudice of the owner.

It should be noted, however, that this latter offence is merely a contravention and although, *rebus sic stantibus*, Section 354 (d) is the only provision which can be applied in similar cases, the punishment is not commensurate with the offence. It is therefore obvious that a new section should be drafted in our law on the lines of Section 28 of the Road Traffic Act, 1930, which makes it an offence to take and drive away any motor vehicle without having either the consent of the owner or other lawful authority. The punishment, to which the offender is liable, is, on indictment, that of imprisonment for 12 months and a fine of £100 and, on summary conviction, to imprisonment for 3 months or a fine of £50. We pass our suggestions to the Law Officers of the Crown. We may add that the presiding Judge made the same suggestion during the course of his summing up.

If our proposal becomes *lex condita*, we think that the new provision should be inserted under Sub-title II of Title IX which deals with offences relating to unlawful acquisition and possession of property.

## PRACTICAL STUDIES

When a law student finishes his seven-year course, he may be chock-full of intricate legal theories but he lacks any practical knowledge with regard to the written pleadings, forms, etc., which will embody those theories in particular cases. It is

different with medical students who, during their course, go the rounds of the hospitals and have the golden opportunity of seeing in practice what they learn in theory.

We feel sure that if some official were to be appointed, designated by the name of reader or any such appellation, whose duty it would be to take law students to the Law Courts and initiate them in the mysteries of legal acts, etc., we would see a practical application of the saying that an ounce of practice is worth a ton of theory.

## CASE LAW

It is often necessary for law students to look up the decisions given by our Courts. It is needless to point out that the study of case law is of invaluable help to law students inasmuch as it brings home to them the practical application in particular cases of the principles which they have learnt. We understand that as the several volumes of local cases-law (particularly the earlier ones) are few and far between, great difficulty is being experienced by those desirous of consulting them. It is noted with regret that a complete collection of the Law Reports is not even available at the Royal Malta Library. As we do not wish merely to voice the grievance without coming down to earth with a practical suggestion, we would propose either that the University authorities should acquire at the first opportunity a set of these volumes to be made available to students at the University Library or that the Government should reprint the earlier volumes. The possible objection that the Government Printing Press is too burdened with work might be overcome by calling for tenders for printing by private contractors as has been done in the case of the Revised Edition of the Laws of Malta and, if we are not mistaken, in the case of the Debates of the Council of Government.

## MR. JUSTICE R.F. GANADO

With deepest regret we have to record the passing away of the Honourable Mr. Justice Comm. R.F. Ganado. Born in 1875, Judge R. F. Ganado was called to the bar in 1898. He was appointed Advocate of the Poor in 1905 and Magistrate in 1918. Later, in 1925, he was raised to the Bench. Judge Ganado, notwithstanding his retirement in 1940, was a very active

member of the Criminal Code Commission and Commercial Code Comission at the time of his death.

His Holiness Pope Pius XII, by rescript of the 20th June, 1945, under His Seal, created Judge R.F. Ganado a Knight Commander of the Order of St. Gregory the Great, as a recompense for his open and fervent profession of th Christian Faith; for the highly beneficial results he had attained, in the direction of the principal religious Congregations and Sodalities of these Islands (especially that of the "Onorati"), for his prudent advice, indefatigable activity and most fervent zeal; but above all, for his exceptional integrity which constituted a brilliant example to all his fellow countrymen.

Members of the University Students' Law Society, most of whom have come in touch with the late Judge as examiner, will always remember him as one who has strongly supported and helped the Society from its very birth. The outstanding example set by him as a lawyer, as a Magistrate, and later on as a Judge, will serve to inspire future lawyers to greater efforts. We are including an appreciation of Mr. Justice R.F. Ganado elsewhere in this issue.

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**ELOQUENCE AND LEARNING**

"Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects people are slow to bring him business if he cannot make a speech. And yet there is not a more fatal error to young lawyers than relying too much on speechmaking. If anyone, upon his rare powers of speaking, shall claim an exemption from the drudgery of the law, his case is a failure in advance."

ABRAHAM LINCOLN.

# Judge Giovanni Pullicino

By Albert Ganado, B.A., LL.D.

A mirror of the highest civil and domestic virtues: a life of study, unceasing activity, dedication to duty: a spirit guided by noble ideals and fortified by Christian charity; such was Giovanni Pullicino. He stands in the forefront of Maltese jurisconsults. He was destined to make the holocaust of his life on the altar of science. He built to his own eternal memory a monument of judgements teeming with legal wisdom. Vast knowledge, faithful industry, profound thought, were embedded in his nature; a philanthropic disposition, a deep love for his family, a dignified personality, form the complete picture.

Politics did not attract him; his interests lay elsewhere. Music he regarded from the layman's point of view. He was very well versed in Latin, Italian and English and was a lover of Maltese History. Not over addicted to society, he was fond of long walks in the country with some of his intimate friends. There, in Nature's surroundings, he indulged in that fleeting peace and quiet of mind so vital to one who is labouring under the strain of continuous toil. His mission completed, having earned the respect and affection of all, he threw his shadow on the earth in his passage to another world.

Giovanni Pullicino's birth augured well for the future. It occured at Casal Żebbuġ on the 16th July 1857. His father was Judge Filippo Pullicino; his grandfather, Dr. Arcangelo, a physician. His early life was that of a young man of position and promise: every material ministration nurtured his youth. From Savona's school, at an early age, he passed on to the University where he obtained his Degree in Law in August 1877. He was one of the brightest young men of his time and was looked upon by teachers and examiners alike as a rising star that would eclipse all competitors in the legal plane. At the University he pursued his studies in law with great enthusiasm, and was one of the first in class. During his Academical Course,

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**Editor's Note:** We wish to thank Dr. J.M. Ganado B.A., for his kind cooperation. Our thanks are also due to Mr. Mitchell of the Colonial Office and Mr. Blakiston of the Public Record Office.

JUDGE PULLICINO

the following are the theses he submitted for examination at the end of each year :—

1874—Organizzazione del Consiglio di Governo in Malta.
1875—Materia del diritto delle Genti.
1876—Contratto di noleggio—quando si scoglie 'ipso iure'.
1877—Stendere un libello di lesione per parte del venditore.

Barely four years after he had left the Alma Mater, in 1881 Dr. Giovanni Pullicino recrossed its threshold as a Professor. It was Borton's Governorship and education in Malta was undergoing a profound change. On the 7th June 1880, Sigismondo Savona was appointed Director of Education, and, in the face of stiff opposition, set out to implement the reforms advocated in Keenan's Report of 1879 on the educational system of Malta. By his uncompromising attitude and unpopular policy, Savona incurred the enmity of a considerable section of the population. But, let it be said to his credit, during his directorship much progress in education was made.

In the seat of higher studies Mr. Savona carried out very substantial reforms. Since some time previous to his appointment, foreign jurists of continental fame had occupied the Chairs of Law at our University : one may mention Dr. Giacomo Sanfilippo and Dr. Nicolò Crescimanno. The latter, an Italian political exile, was Professor, in 1880, of Commercial Law, Criminal Law, Science of Law, History of Legislation, and International and Constitutional Law. He also occupied *ad interim* the Chair of Civil and Canon Law. Undoubtedly, Dr. Crescimanno discharged his multifarious duties with exceptional ability, but, in the eyes of the new Director of Education, this state of things constituted a unique monopoly of teaching which could no longer be tolerated. Thus, he immediately took steps to fill the vacancy in the field of Civil and Canon Law and his choice was a very fortunate one; it fell upon Dr. Giovanni Pullicino who was still 24 years of age. Thus the brightest hopes which his endowments and attainments had raised in his regard in his early college and University days were soon fulfilled. The new nominee had two distinct advantages over his predecessor : besides being equipped with profound legal theory, he was, unlike Dr. Crescimanno, a practising member of the Maltese Bar; morover, whilst he could not hope to outshine Dr. Crescimanno in the languages of Virgil and Dante, he was also very well acquainted with the English language. Dr.

Pullicino fully appreciated the novel responsibility which had been laid upon him, and he made it a point to impress upon all that the trust shown in him was not misplaced. He tried to infuse into his pupils the sincere love of study and the devotion to the rule of law which animated his whole being. A vast general culture, a deep learning of the law, and a sharp, intelligent brain stood him in good stead, and made his tasks seem easy and simple. With his students he associated himself with paternal affection; his characteristic affability made the cold walls of the classroom burn with the warmth of hearth and home. He enlightened his pupils as to the duties which their profession entailed: "L'avvocato dovrebbe, per così dire, immedesimarsi colla causa di cui assume il patrocinio; ed apportando nella difesa del suo cliente, il corredo di tutte le sue cognizioni ed il frutto della sua esperienza, cercare di diradare tutte le tenebre, spuntare i sofismi, abbattere gli ostacoli con cui talora con grand'apparato si voglia offuscare la verità e fare trionfare l'ingiustizia. Nella difesa dei deboli e degli inermi, deve raddoppiare la sua perseverante energia e cercare in tutti i modi di rintuzzare e rendere inani gli sforzi della prepotenza e dello arbitrio." (1)

During Dr. Giovanni Pullicino's professorship, the Royal University of Malta, as far as its administration is concerned, entered upon the brightest period of its history under British rule. To a large extent it became autonomous. In 1887, Mr. Savona no longer held the post of Director of Education. On the 26th September of that year, subsequent to the recommendation of a Government Commission, the Fundamental Statute of 1838 of the University was repealed, and a new Statute was promulgated, creating a Senate which was vested with very wide powers. Four members of the Senate were to be elected by the Special Councils of Theology, Laws, Medicine, Arts and Sciences respectively from among those forming each Special Council. Professor Giovanni Pullicino was chosen by the Faculty of Laws, and he took a most active part in the discussions and deliberations of that body.

He was probably the youngest member of the Senate, but

(1) Vide "La missione educatrice delle classi professionali". Discorso del Prof. G. Pullicino LL.D., letto nella Pubblica Biblioteca di Malta il 19 Settembre 1895 all'occasione del conferimento dei gradi accademici—p. 6.

his words carried much weight with the hearers. When the thorny language question arose in the Senate, he took a fearless stand in promoting the teaching and knowledge of English, but would not brook any attempt aiming at the suppression of Italian. In this he fully concurred with the opinion of the majority, among whom were Mons. S. Grech Delicata, Judge Luigi Ganado, Judge Paolo Debono, Dr. Oreste Grech Mifsud and Professor V. Micallef.

The powers of the newly created body were further amplified by the promulgation of Ordinance XII of 1889. Seven years later, Dr. Caruana, the Director of Education, at his final interview with the Governor, before leaving the Service, alleged that he had found it impossible, because of the Senate, to carry out his duties satisfactorily. This led to the appointment, by the Council of Government, on the 16th December, 1896, of a Select Committee to inquire and report upon the organisation of the Education Department and to report upon any necessary reforms in the law concerning same. Judge Pullicino as a member of the Senate gave his evidence before this Committee, and, together with other members of the Senate, categorically denied that the Senate had at any time impeded the action of the Director of Education; it merely was a check on that officer. The Senate always gave the Director of Education such assistance as it was in their power to give, and the action of the Senate had always been approved by the Government, except in a few instances when their resolutions were vetoed. The Director himself had always expressed his acknowledgements to the Senate for the services rendered to him, and, in some instances, in somewhat emphatic language.

But the Government had, for political reasons, taken an obstinate stand in favour of the abolition of the automonous body governing the University and, in 1897, the Draft Ordinance for its abolition became law, notwithstanding the fierce opposition of the Elected Bench. It was substituted by a General Council which had a merely consultative capacity, and the management of the University was to rest for the next fifty years in the hands of a single man, the Rector, subject only to the Governor.

Dr. Pullicino was one of the foremost advocates practising at the Maltese Bar. After finishing his studies at the University, he went abroad, to Italy, it is thought, to complete his education and, on his return, he acquired, within a few years,

an appreciable clientele, both as regards its numbers and its kind. He had a masterly way of treating the subject in dispute: no repetition, verbiage, rhetoric, but a clear exposition of carefully marshalled arguments, brief and to the point. He wended his way through the delicate intricacies of many important fideicommissa and primogeniture cases with consummate skill and rare ability: so much so that when he was elevated to the Bench, he was allowed by the Government to continue to plead before our Court of Appeal in a complicated and vital issue on Primogenitures.

He considered the profession in the noble light in which it should be regarded. He deplored the egoism of those who look upon their academic degree solely as a medium for gain, those who, in the words of Lamartine "non hanno altra religione che l'aritmetica e pongono una cifra al posto del cuore." It was the duty of the professional body to educate the masses, "ingentilendone i costumi, infondendo in esse l'amore al lavoro, la pratica della pietà, il rispetto all'ordine e frenandone le tendenze sovversive." What a sharp contrast to what we are witnessing to-day all around us, and unfortunately even in Malta! Far from inculcating into the minds of the masses the true principles of Christian Sociology, far from instilling into their hearts love of work, the practice of virtue and respect for law and order, individuals belonging to the professional classes, imbued with the malign sprit of secularism and rationalistic philosophy, are spreading the seeds of revolt among the workers, in whose minds ignorance acts as a powerful and rich fertilizer!

In 1895, unripe in years but fully mature in learning, Professor Pullicino entered upon the second and last stage of his life. He was only 38, when his virtues and merits were rewarded by the grant of a Judgeship; but, striving though he might, he could not attain the coveted treasure of the Office of Chief Justice, though, for close on two years, it lay within his grasp. His appointment, together with that of Dr. Zaccaria Roncali, was made known to the public on the 11th September 1895,

and was to have effect from the 1st of October (2). Professor Pullicino had long been designated as one of the best fitted to occupy a seat on the Judicial Bench and his nomination was unexceptionable in every respect. In this new field, his brilliant qualities stood out more conspicuously than ever, and there was not one Court — Civil, Commercial or Criminal — in which he did not shine. He sat like the great judge he was, hearing with an open mind and with trained patience the case deployed on either side, giving full opportunity to an exhaustive treatment of the point at issue, now and then interjecting a question or brief comment, searching or pregnant, which tended to bring out the relevant points of the case in dispute. A truly wonderful memory at the service of an equally great intelligence, which enabled him to grasp thoroughly and at once, even to the minutest detail, any matter brought before him; a perfect lucidity of mind which begot a corresponding lucidity of expression, coupled with an extensive and profound knowledge of every branch of law and subjects connected therewith; an intimate understanding of the workings of the human heart, and a penetrating power of observation and discrimination — they were all his. And they made him one of the brightest ornaments that adorned our Bench, which, in the words of King Edward VII, has ever been second to none in the British Empire.

All his great qualities are clearly reflected in many masterly judgements with which he has enriched our Case Law. Until 1902, when he took up his duties in the Commercial Court, he sat in the First Hall of the Civil Court. Upon the death of Judge Paolo Debono, in 1906, he succeeded him in the Criminal Court and in the highest Tribunal of these Islands, the Court of Appeal, where he sat with President Sir Giuseppe Carbone, and Judge Sir Alessandro Chappelle. As his predecessor had

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(2) Governor Freemantle in his despatch of the 22nd August 1895, to the Secretary of State, states that after having considered very carefully the claims of such lawyers as he deemed qualified to fill the vacant posts created by the retirement of Judge Sir Salvatore Naudi and Judge Agostino Naudi, and after consulting in the first place the Crown Advocate and also the Chief Justice and the Acting Chief Secretary, he decided to recommend Dr. Z. Roncali and Prof. Dr. Giovanni Pullicino for appointment as two of His Majesty's Judges. Judge Pullicino he describes, as one of the leading barristers and very well acquainted with the English language.

been before him, Judge Pullicino, though the junior member, became the life and soul of that Tribunal: most of the judgements delivered by this Court were the product of his intelligence, study and labour.

Upon the status of the Judges in Malta he had very definite ideas. A Memorandum, drawn up by him and forwarded by the Judges to the Secretary of State in 1915, makes interesting reading. This Memorandum considered the system of selection and appointment of Chief Justice in Malta, and the gist of it all is that a judge has a better title than the Crown Advocate to be nominated Chief Justice. In it His Majesty's Judges stated that "we are not aware of any instance in which the post of Crown Advocate has been offered to any of His Majesty's Judges, a circumstance which shows that the position of a Judge has never been considered inferior in importance to that of Crown Advocate." Moreover, Judges in Malta have equal duties, rights and privileges as the Chief Justice, who is "primus inter pares", and hence a judge is deemed to possess all the qualifications requisite for the office of Chief Justice. A judge is better qualified for that office also because he has experience of judicial business, whilst the Crown Advocate is almost exclusively entrusted with legislative and executive duties.

Availing themselves of this opportunity, His Majesty's Judges also brought to the notice of the Secretary of State that "Malta is the only British Possession in which, contrary to the ordinary rule, a Judge of the Supreme Court is not officially styled 'His Honour'. This omission, for which there appears to be no justification, is emphasized in certain unofficial publications, that in Malta that title is withheld from the Judge. We express our hope that, by your sanction, such disparaging exception will be removed, and that the same style which under the Colonial Regulations is accorded to Judges of the Supreme Court will be extended to us and to our successors." It was not until ten years ago that, after lengthy correspondence between the Government and the Secretary of State, the title of "The Honourable Mr. Justice" was conferred upon H.M.'s Judges in Malta.

There were other similar matters which troubled Judge Pullicino's tranquillity of mind. Both Professor Pullicino and Dr. Zaccaria Roncali had, in 1895, been appointed Judges by

one and the same Government Notice with effect from the same date: so the question of precedence between them arose. Dr. Roncali contended that the right was his, as he had received first mention in the Government Notice: Professor Pullicino retained that before his election to the Bench he had already been in the service of the Government for fourteen years, and this was enough to give him a major claim. Until the death of Judge Debono, Dr. Roncali was considered the senior of the two, in conformity with Freemantle's despatch to the Secretary of State, recommending the two nominations. But, in 1906, for some reason or other, it was Judge Pullicino who succeeded Judge Debono in the Court of Appeal.

Judge Pullicino also took up another question with the Government. Previously, it had been the practice for His Excellency the Governor to send invitations to official dinners to the Chief Justice and the two Senior Judges. Later, only the Chief Justice used to be invited. Judge Pullicino insisted that the invitation be extended, as before, to the two senior Judges, in view of the fact that the Chief Justice did not represent the Judicial Bench and that the other Judges were his equals.

On the death of Sir Joseph Carbone, towards the end of 1913, Dr. Pullicino, as the Senior Judge, was appointed Chief Justice and President of the Court of Appeal. But Fortune did not smile upon him this time: after he had occupied this exalted position for almost two years, the then Crown Advocate, Sir Vincent Frendo Azzopardi was made Chief Justice on the 15th November 1915. This was a cruel blow to Judge Pullicino's fondest hopes, and he was to feel its effects for the few remaining years of his career. In view of this appointment, Judge Pullicino asked leave to be transferred from the Supreme Court to the Commercial Court. When he returned to the Court of Appeal, it was only to act as Chief Justice during Sir Vincent Frendo Azzopardi's illness. During the war years, Judge Pullicino also sat in the Prize Court.

In the midst of his manifold and onerous duties, he found time to attend to other equally important work not connected with his judicial office, such as the Food Control Board and the Emigration Committee, of both of which he was Chairman. He organised the translation branch of the Courts Department, and the Government sent him a letter of appreciation for the

care and ability with which he had compiled (with the assistance of Mr. Achille Micallef, Acting Registrar) "The Collection of forms in use in the Malta Law Courts rendered into English with a Glossary of Italian and English technical words and phrases occurring in pleadings." In 1896, Judge Pullicino was appointed a Member of the Commission of Management of the Public Library and, in 1908, a member of the Financial Commission: for several years he was examiner in English Literature at the University. He also did much good work as a Commissioner of Charity: he was well known as an ardent and munificent protector of the Fra Diego Institute for Orphans.

In recognition of his valuable services, in connection with the International Eucharistic Congress held in Malta in 1913, Judge Pullicino was created a Knight Commander of the Order of St. Gregory: this high honour, conferred upon him by the saintly Pope Pius X, he richly deserved. Prompted by his deep Christian piety and religious zeal, he had eagerly accepted Mgr. Pace's invitation to be a member of both the General and the Executive Committees on the occasion of the Congress. His wise counsels, his energy and his ability were of the highest value in the organisation and celebration of the memorable event.

Judge Pullicino had spent most of the day, on the 3rd February 1919, at the Lieutenant Governor's Office in connection with a new Emigration Scheme. At 4.30 p.m. he returned home. Two hours later he was taken ill in his study. At 8.00 p.m. his condition had become desperate. Later he received the Last Sacraments. At 1.40 a.m. he died.

The subject of our study was one of the ablest and keenest Judges of the Maltese Bench. When the allotted span of life had run out, he passed swiftly and silently from our midst. Between the setting of the sun and night there was only the briefest twilight. It was better so. Upon the verge of eternity, with failing hand, he attempted to finish a judgement he was to deliver next day in the Courts of Justice; instead he was called before God to render the final account of his doings. In harness to the end, he left behind him an example and an inspiration to all concerned in the administration of justice.

His spirit will ever live with us!

# MR. JUSTICE R.F. GANADO

## An Appreciation

By the Hon. Mr. Justice WILLIAM HARDING,
B.Litt., LL.D.

My credentials for writing this short appreciation of the late Mr. Justice R.F. Ganado consist not only in my having practised before him when he was a Magistrate and then one of His Majesty's Judges, but also in my having had, later on, when I was raised to the Bench, the privilege of sitting with him. In age there was naturally a considerable difference, indeed he started practising the year I was born, but, as my feet are firmly set *super vias antiquas*, this only served to enable me to appreciate still more, as if from a distance, his sterling qualities.

There was one trait which, above all others, impressed me throughout. Mr. Justice Ganado was a prodigious worker. In every Court he went to, he soon swept the lists clean. There was certainly no occasion to recall Juvenal's words "Crescit multa damnosa papyro". Anyone pleading before him knew that the "law's delay", bemoaned by Hamlet, did not find favour with him, and woe to the lawyer who did not go in his Court with his brief well prepared. A keen insight into the background of the case, an unfailing intuition in getting hold of the "punctum saliens", a boundless energy in grappling with its intricacies, soon paved the way for an illuminating judgment, often drafted "currente calamo". Our case-law is all the richer for his judicial talents.

There is one other characteristic which I never failed to note. There are two types of Judges, as far as I can see. Those who, on delivering judgment, feel that "that's that" and that inevitably "Roma locuta est", and those who would like to know whether the unsuccessful litigant's lawyer has been convinced by the reasons stated in the judgment. I am inclined to think that the late Mr. Justice Ganado was of the latter category. At least, personally I always remember him looking at me for quite a long while after pronouncing some judgment in which my client had lost the case, as if seeking from me the consolation of knowing that I had now changed my view.

Of him it may be said "nihil tetigit quod non ornavit." In every Court he went to, he was brilliant, — quick, industrious, and, above all, practical. Of fairness I will not say, because that is the common heritage of Judges.

One other point. In despatching the business of the Court, he struck that happy mean — so very difficult to achieve — between sternness and kindness. A certain degree of strictness is, of course, indispensable to maintain the Court's decorum. But it must be tempered with kindness, because the lawyer is just as much a cog in the wheels of justice as the Judge. Mr. Justice Ganado struck the "via media."

As I said, the difference in our age does not entitle me to write about him from the purely personal point of view. But I knew him well and long enough to say with sincerity that he was a good, kindly man.

"O si sic omnes!"

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**THE DIGNITY OF THE BAR**

"I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end."

LORD ERSKINE.

# Bench and Bar in Malta

By Professor G. E. Degiorgio, LL.D.

THE Malta Royal Commission 1931, in its Report presented to the British Parliament in January 1932, had recommended "that the appointment of His Majesty's Judges in Malta should be made a reserved matter in the Constitution (which was to be restored to the Maltese people), and taken out of the province of the Maltese Ministry." It also suggested "that the appointments should not necessarily be confined to men educated at the University of Malta or to Maltese by birth. Although a wider field of selection might not be drawn upon, it may be desirable that it should exist, in case it should become necessary to strengthen the prestige and efficiency of the law in Malta" (p. 167).

When these recommendations were made public, the Malta Chamber of Advocates entered a strong protest against this suggestion which was uncalled for and contrary to the best traditions of the Maltese Bench and Bar. A reasoned memorandum was submitted to the Secretary of State for the Colonies who, through His Excellency the Governor, replied as follows:—

> "In the concluding sentences of the Memorandum, the Chamber of Advocates refer to the suggestion made by the Royal Commission that judicial appointments in the Island should not in the future be confined to Maltese. The Chamber will now be aware that His Majesty's Government, in accepting the recommendations of the Commissioners. have made an exception with regard to this particular proposal, and have decided **not** to adopt it.
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> "The Secretary of State wishes your Chamber to be assured in this connection that he feels complete confidence that Malta will be able to supply to the Bench in future Judges fully competent to maintain the traditions set by the gentlemen whose names are mentioned in the Memorandum."

The legal profession and its exponent and mouthpiece, the Chamber of Advocates, has always held a very important position in Malta and the opinion of the Bar has often been a weighty

element in the making of judicial appointments (though these appointments are actually made by the Government), and this all the more because judges are generally appointed from the active members of the Bar.

The opinion of the Bar may carry weight in a matter of greater importance; it may help sometimes to make the law itself. The pleading of a barrister of high standing in his profession, on some new point of law, may help to determine an important decision, which afterwards becomes a precedent and sometimes is incorporated in law.

There is also great interconnection between law and politics in Malta as there is in England; in Malta it was more so when representative institutions were denied to the Maltese Nation. The influence of lawyers in Parliament produces a legal conduct of state affairs; the lawyer has a firm grip of legal rules which not only are made but have also to be enforced. He saves Parliament from impossible laws which the pure politician, carried forward by some strong wave of popular sentiment, might seek to make and succeed in making — but not in enforcing. He prevents legislation from going beyond its bounds into the sphere of morals and taste; he prevents, for example, the passage of any sweeping measure of prohibition, which, however well intentioned, cannot be legally enforced. This was also the reason why, in the past, the Crown Advocate in Malta sought the advice and concurrence of the Maltese Bar when new legislation was to be introduced.

Again, when the Malta Letters Patent Bill 1936 was being discussed in the House of Lords and it was proposed to alter the position of Maltese judges from enjoying their full independence because it was then suggested that they should be made to hold office simply during "the King's pleasure" and "not during good behaviour (quamdiu se bene gesserint) as it was before — public opinion in Malta was greatly shocked and the Chamber of Advocates, taking once more the lead, sent another memorandum to the Secretary of State. The Malta Government was instructed by His Majesty's Government to reply to the Chamber's protest as follows:

"With reference to para 9 of your Memorandum I am to invite your attention to the assurance given by the Earl of Plymouth, with regard to the position of the Judges, in the

Debate in the House of Lords on the Second Reading of the Bill on the 5th May 1936."

On that occasion the Secretary of State gave this assurance:

"I can accordingly give Lord Askwith an assurance that similar provisions to those contained in Sec. 55 of the existing Letters Patent regarding these matters will be re-embodied in the new Letters Patent which will be issued when the Bill becomes law. I have every hope that that will satisfy my noble friend and I think Your Lordships will now be prepared to give a Second Reading to this Bill."

The independence of the Maltese Judicature is now once more established as it was since Sir Thomas Maitland had introduced his constitutional reform of the Malta Courts of Law (1814) i.e. "the enjoyment of a fixed salary reserved in the Civil List and the irremovability from office except on grounds of misbehaviour or incapacity i.e. 'quamdiu se bene gesserint'."

Maitland in an Address to the Judges, Consuls and other legal Authorities, assembled at the Palace Valletta on January 2nd. 1815, expressed an elogium "on the industry and zeal by which you (the Judges) have been actuated, infinitely greater than any words I could possibly make use of on the occasion. It becomes me then, with these feelings, to express to you generally the deep sense I entertain, as His Majesty's Representative, of the merits of your past conduct and of the advantages derived by the British Government from the exertion of your judicial talents."

"You are now fortunately no longer liable to be removed at the pleasure of the Executive local authority — you are made independent of that authority both with regard to your incomes and the permanency of your situations."

One hundred and twenty years after such elogium, Lord Askwith, the Chairman of the Malta Royal Commission of 1931, who had first-hand knowledge after having been here in Malta, declared in the House of Lords during the memorable debate of the 5th May 1936:—

"The Judges thoroughly deserved an increase of pay. They were very badly paid. They have on the whole proved themselves to be men of great ability, and I think that with the feeling for the law which there is in Malta, it would be a very serious thing if it were thought that the

position of the Judges was imperilled by the new form of Government. The position of the Judges has been often laid down. It was very much altered by the Royal Commission and there is an Ordinance of 1932, I see, which deals with their tenure, their qualifications, their remuneration, their length of office and how and when they can be turned out. There is also a similar code, not of such a drastic kind, with regard to the magistrates, from whom some of the Judges may be recruited. I should like to ask the Noble Earl, particularly in view of what was said by the Noble Viscount Lord Sankey, as late as 1932, that there was no intention of interfering with the position of the Judges, whether that would not hold good now, or whether His Majesty's Government cannot give out some hint that the Judges need not consider their position at all imperilled and that the people of Malta should not have a feeling that justice was not being adhered to."

On the first March 1946, His Honour the Chief Justice and His Majesty's Judges (Sir George Borg, and Justices Ganado, Camilleri, Montanaro Gauci, Harding, Schembri, and Gouder) were received at the Palace, Valletta, by His Excellency the Governor, Sir Edmond Schreiber, who wished to say good-bye to them on his relinquishing the Governorship of the Island. In a short address His Excellency said that he had never worried about the Judges, and he knew at all times that the administration of justice was safe in their hands. They had maintained throughout a high standard in the administration of justice. The great volume of emergency laws had imposed on the Judges a great strain, but they had discharged their duties efficiently and uncomplainingly, and had undoubtedly made a valuable contribution to the future of Malta. Besides, he had, at all times, felt that in His Majesty's Judges he had seven good friends.

When in the year 1825, the British merchants in Malta suggested the appointment of a British Judge to preside in each of the Courts of Law, the Marquis of Hastings, then Governor of Malta replied: "It was my duty to state that the conduct of the Maltese Judges has merited the confidence of the Government. Dr. Bonavia has lately been appointed one of them and in ability and integrity, it is no disparagement to any British

Judge to say that a fitter person could not be found to sit on the Bench (Despatch to the S. of S. 17th June 1825).

Maltese Judges have invariably upheld the independence and integrity of the Bench in the face of menaces and Government interference — even when the Executive power happened to be one of the parties in a case. It suffices to recall some very important judgements some of which have been upheld by the Judicial Committee of His Majesty's Privy Council. Such was the judgment delivered by the Court of Appeal on the 25th June 1930 in the case "Micallef Goggi vs. Mifsud" (presided over by Sir Arturo Mercieca) which declared null and void all the 29 Acts passed by the Maltese Parliament during the years 1929-30; the case "Strickland vs. Sammut" given by the same Court of Appeal on the 4th of March 1938 — which affirmed that the Crown of Malta had no power to legislate by Order in Council in matters which were not reserved, and that Ord. XXVII of 1936 was "ultra vires"; and the judgement delivered in the so-called 'Deportees Case' (presided over by Sir George Borg) which declared null and void the Ordinance passed by the late Council of Government in virtue of which the deportation of Maltese British subjects was enforced.

With regard to the proposed alteration in the status of His Majesty's Judges, to which reference has been made, Sir Arturo Mercieca writes: "Per contro non poteva essere ben accolta la seconda, per cui sarebbe tolta ai giudici ogni garanzia della loro indipendenza, che trovasi basata sulla loro inamovibilità. Preoccupati per questa minaccia ai nostri privilegi, ci incontrammo d'urgenza, e fu redatto un lungo memoriale con le ragioni che ci muovevano a chiedere che non si procedesse oltre con la seconda riforma. Corsi a San Antonio e lo presentai alle otto di sera al Governatore, pregandolo di telegrafare immediatamente un riassunto a Londra. L'indomani ci venne annunziato che la clausola relativa alla durata in carica dei giudici sarebbe rimasta come per l'addietro."

I may be permitted to add that the late lamented Judge Comm. Rob. F. Ganado was the driving force behind this unanimous action of His Majesty's Judges and a more befitting monument to his memory cannot be made than by recalling the important part taken in upholding the independence of the Maltese Judiciary.

# Fiducia Cum Creditore and Pactum De Retrovendendo

By George Schembri, B.A.

SINCE very early times creditors were not satisfied with the mere personal guarantee of the debtor and means were devised to obviate against the debtor's insolvency, procured fraudulently or otherwise. The first forms of security were personal, but these were later eclipsed by real securities, which safeguarded better the interests of the creditor. The creditor preferred to secure his claims by obtaining rights over a definite portion of the debtor's property to which he could resort in the event of non-payment at a future date. *Plus est cautionis in re quam in persona.*

The creation of real securities was not spontaneous. When the need of safeguarding better the creditor's rights was felt the jurisconsults sought in the law existing at the time the means to attain such an end. Thus we find that in ancient Egypt (1) the jurists resorted to the contract which now-a-days we know as sale accompanied by the right of redemption. The Egyptian creditor required his debtor to sell him something, subject to the condition that the thing would be returned back if the debt were settled. This stipulation was also made use of in Greece.

The Roman jurists resorted to the *pactum fiduciae*. The institute of *fiducia* in Roman Law was applied for many different purposes, but in general, its nature was that of an agreement added to *mancipatio* or *cessio in iure*, wherein it was generally laid down the manner in which the thing was ultimately to be disposed of. This *pactum* did not form an essential or natural part of *mancipatio* or *cessio in iure*: it was a mere *adiectum* introduced by the will of the parties.

The *pactum fiduciae* was used both in the Law of Persons and of Things. In the former it was commonly met with in *adoptio*, *emancipatio* and *tutela*, the remedy being compulsion exercised by the magistrate. In the Law of Things its various applications fell into two categories: *fiducia cum amico* and *fiducia cum creditore*, and in both cases the remedy was the *actio*

(1) Eng. Revillout: Les obligations en droit egyptien, p. 167.

*fiduciae* and an *actio contraria* for the trustee. It was *fiducia cum creditore* that the jurists adopted to create a form of real security in Roman private law.

Indeed, *fiducia cum creditore* began to be used mainly with this aim, though this was not its exclusive purpose. Whenever a creditor required a real security from his debtor, the latter had to transfer by *mancipatio* or *cessio in iure* a *res* to the creditor, on condition, however, that if the debtor, at a future date, paid back the debt and interests the *res* was to be returned to him. This condition constituted the *pactum fiduciae*: "*fiducia est cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in iure ceditur*". Isidor. Orig. 5. 25. The creditor acquired the full ownership of the thing transferred to him, but his rights of absolute owner were subject to a trust agreement.

Such trust agreement curtailed somewhat the rights of the *fiduciarius*, as the creditor in this case was designated. He could, subject to the terms of *fiducia*, deal with the thing as he pleased, but any gain he made by it until the debtor lost his right of redemption went to reduce, first, the interest and then the principal debt itself. "Quidquid creditor per fiduciarium servum quaesivit sortem debiti minuit." Paulus Sent. Rec. 2. 13. 2. As a *dominus* he necessarily had the right to sell the thing, but such right was exercised at his peril if the time reserved for redemption had not yet lapsed. After the lapse of such time the thing could be freely disposed of; indeed, any stipulation whereby the fiduciarius was deprived of such right of disposal was null. Paul. l.c. 5. But, prior to proceeding to such a sale he had to notify formally the debtor (*ter denuntiare*) and he could not sell it to himself either directly or *per interpositam personam*. If the thing was sold at a price higher than the debt due, the excess was to be forwarded to the debtor.

The remedy open to the debtor in case the *fiduciarius* contravened his obligations was the *actio fiduciae*. This was a personal action and so if the *fiduciarius* had disposed of the thing before the debt was due, the debtor could not recover it from the third party as he had no *droit de suite*; the third party had acquired validity and could not be dispossessed of the thing. In such a case the debtor had to exercise the *actio fiduciae*, condemnation in which entailed *infamia*. Gaius iv. 182. The debtor could also recover damages.

The debtor did not lose all interest in the thing while it was in the hands of the *fiduciarius*; indeed, he could even sell it. As it was a principle of Roman Law that "*venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori praetium solverit vel alio modo ei satisfecerit.* (Inst. II. i. 41), the debtor could sell the thing to a third party and hand over the price newly acquired to the fiduciarius, who would release the thing. The thing could not be sold to the creditor himself, since "*suae rei emptio non valet*".

Text-writers do not agree as to how long the right of redemption lasted. Moyle (2) opines: "It seems probable, that in the absence of agreement to the contrary he might redeem the property at any time so long as the creditor had not yet parted with it. Such contrary agreement usually took the form of a foreclosure clause (*lex commissoria*), providing that in default of punctual payment the *fiducia* should lapse, and the property vest absolutely in the creditor". Hunter (3) is of different opinion: "The *fiducia* was essentially a self-acting foreclosure; if the debtor did not pay by the day named, the pledge became the absolute property of the creditor".

A re-sale was not necessary in order that the debtor could re-acquire the ownership of the thing. But, neither was the mere payment of the debt and interest sufficient; it was essential that after such payment the debtor had to acquire the possession of the thing and retain it for a year. It was only then that he became afresh owner of the thing (*usureceptio ex fiducia* Gaius, 2. 59. 60). The creditor was also entitled to recover any expenses he incurred in improving the thing (Paul. Sent. 2. 13. 8).

*Fiducia cum creditore*, thus, served the purpose of providing a real security. Other forms of real security were gradually evolved with the passing of time, since it began to be considered a hardship for the debtor to be required to part with his property so as to obtain money on loan. With the creation of possessory interdicts by the Praetor *pignus* appeared. As it was considered that the economic interests of the debtor were not yet sufficiently protected the gradual evolution culminated in hypothec. However, notwithstanding the appearance of these new forms of se-

(2) Moyle: Imperatoris Iustiniani Institutionum, p. 327.
(3) Hunter: Roman Law, p. 265.

curities, *fiducia* continued to be used and its death knell was sounded with the disappearance of *mancipatio* and *cessio in iure* in the third century A.D.

As *mancipatio* and *cessio in iure* began to wane, a new system of transferring property took their place. The contract *emptio-venditio* accompanied by *traditio* was in popular use in the Classical period since it lacked those formalities which were peculiar to *mancipatio* and *cessio in iure*. In *emptio-venditio* the vendor sold a *res* to the buyer, but the transfer of ownership took place only on actual delivery of the thing. This consensual contract could be subjected to several conditions, one of which was the *pactum de retrovendendo*. This *pactum* stipulated that the buyer would have to return to the vendor the thing sold if the latter paid back an agreed price. The aim was that of enabling a person in need of money to obtain it by selling something, which he could later re-acquire if his financial situation improved. This aim was similar to that of *fiducia*, since they both served to help the needy person to obtain money. In both cases this aim was attained by the transfer of property. Naturally the question arises as to whether there was any relation between the *pactum de retrovendendo* and *fiducia*. It is quite certain that the *pactum de retrovendendo* was not a direct outcome of *fiducia*,, but one cannot exclude the possibility that the latter might have suggested the creation of the former

This *pactum* was one of the accessory pacts to *emptio-venditio*, and it was inserted in the contract on the express will of the vendor. The effect of this pact was to reserve to the vendor the right to re-acquire the thing sold. As to the manner in which re-acquisition took place jurists do not agree. Duranton opines that a resale was essential (4), whilst Troplong contends that no text of Roman law confirms Duranton's statement. "La legge 7 al C. *de pactis inter*, si serve di queste parole *sit res inempta*, che indicano non già una vendita ma una annullazione ipso iure della vendita originaria, come nel patto commissorio..... La l. 7 1. Dig. *de detract. pignor.*, esprime in propri termini una idea di annullazione, *emptio rescinditur*. I testi non soccorrono dunque in verun modo alla proposizione di Duranton" (5). Thus

(4) Corso di diritto Civile secondo il codice francese Ed. 1850 Vol. IX n. 389.

(5) Vendita n. 693.

Troplong holds that the pact had the effect of a resolutive condition, and continues: "Sono essi quelli che hanno creato la denominazione inesatta di *pactum de retrovendendo*. Duranton ne parla come di cosa pertinente alla lingua del diritto romano. Ma egli sbaglia. Nessuna legge del corpus iuris non ne fa menzione. Bisogna derivarla dal latino volgare nel medio evo, secondo il parere del dotto Tiraquello" (6).

The thing sold passed into the full ownership of the buyer, who could, even during the time reserved for redemption, dispose of the thing. The vendor could not re-acquire the thing from a third party and his only remedy was *in personam*. In this matter the *pactum de retrovendendo* differs considerably from its modern counterpart, which allows the vendor to obtain back the immovable even from third parties who acquired it legitimately from the buyer.

Writers disagree also about the length of the period during which the right of redemption could be exercised. Duranton writes: "La facoltà di ricomprare poteva nel diritto romano stipularsi per sempre" (7). Troplong criticizes this view in the following words: "Mi ha fatto meraviglia il vedere che lo stimabile professore Duranton abbia imputata al diritto romano questa facoltà di stipulare per sempre il patto di riscatto. Il diritto romano non ha mai avuto principi particolari intorno alla durata della azione di riscatto. Non bisogna confondere col diritto romano le opinioni più o meno capricciose di autori che hanno soltanto scritto intorno alle leggi romane" (8).

This was the *pactum de retrovendendo* of Roman Law. It had in common with *fiducia* the fact that it was a *pactum accessorium* to an agreement whereby property was alienated. In both cases, the remedy was personal. The transferors who wished to re-acquire had only a personal action, the *actio fiduciae* in *fiducia*, and an *actio in factum* or *actio praescriptis verbis* in case of *the pactum de retrovendendo*. Re-acquisition was in both a facultative right, and it took place by a resolution of the previous sale.

These *pacta*, however, differed in their very nature. In *fiducia*, the transferee was the creditor of the transferor. The

(6) loc. cit.
(7) op. cit., n. 394.
(8) op. cit., n. 708.

property so transferred had the nature of a real security, in fact, the fruits of the thing acquired by the *fiduciarius* went to reduce the interests due and the principal debt, and if the creditor sold the thing the debtor was entitled to the surplus after the settlement of the debt. The same cannot be said of the *pactum de retrovendendo*. A proper sale took place and the thing passed in ownership to the buyer as soon as *traditio* took place. All fruits acquired during the period in which redemption could be exercised, belonged to the buyer, since he was owner of the principal thing. The two parties were not in the position of creditor and debtor, and so it cannot be stated that this *pactum* constituted a real security. In evolving this pact jurists had found another means of helping the indigent to obtain money without resorting to the idea of loan safeguarded by real securities. A new *tertium quid* was originated and it existed for a time alongside *fiducia*. The latter, however, disappeared with *mancipatio* and *cessio in iure*, due to the abolition of the distinction between *res mancipi* and *res nec mancipi* and to the extention of Roman citizenship to all persons in the Empire; the former, on the other hand, survived throughout the middle ages and its concept is still found in modern law, though it is governed by different rules.

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**A 'VAGUE' BELIEF**

"There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honours are reposed in and conferred upon lawyers by the people; it appears improbable that their impression of dishonesty is very distinct and vivid."

ABRAHAM LINCOLN

# Promises of Marriage in Maltese Law

By Antoine Cachia, B.A.

IT is too well known what betrothal is to start in the hackneyed way of laying down a general definition. We must however refer to its purposes in order to realize the important place it occupies in social life and therefore also in law. The modern systems regulating the relations arising from such promises of marriage are an elaboration of what Roman Law laid down and therefore a short reference will have to be made to this source. The whole question is socially of very great consequence and for this reason particular norms regulating it were to be found everywhere and at all ages, the only exception being in those places where women were not held in high esteem and where polygamy was admitted. The importance of betrothal grew as civilization progressed, and as the attitude of society towards women became more liberal. Its purpose is to prevent ill-advised and immature unions and to secure future happiness by revealing obstancles which otherwise would only have been known too late. It constitutes a reciprocal exchange of promises which does not merely create a social relation but it definitely establishes according to the *jus comune* a juridical bond from which important consequences follow. Not all laws agree on the nature of the effects arising from this bond, and particularly the Italian Code contains an exception to the priciples of the *jus comune* of which we shall speak later on.

In Roman Law the nature of betrothal or *sponsalia*, as it was called, as well as its sanctions were clearly established. Though according to Justinian bare consent was enough, *sufficit nudus consensus ad constituenda sponsalia*, certain symboolical formalities were always adhered to. The *paterfamilias*, even in the matter of betrothal, had wide powers over his children, which were based on the ancient *jus quiritium*. As regards age the *L. Julia et Papia Poppea* laid down that the minimum age was to be ten years and that marriage was to follow within two years: *sponsam post hanc legem decenni minorem nemo habeto desponsam intra biennium domum ducito*. A valid *sponsalia* produced a juridical bond which, however, could be easily dissolved by one party even against the will of the other. In such a case

of unlawful refusal the guilty party forfeited the gifts and the *arrhae* he had given; and he had to restore the gifts and twice the *arrhae* he received. On the whole, however, the freedom of the will of the parties until marriage was closely safeguarded and any agreement on penalties in case of non-fulfilment was prohibited as detrimental to good morals.

What is important as a historical background to our laws on the subject besides Roman Law is Canon Law especially in view of the fact that up to 1834 betrothal was exclusively governed by the laws of the Church. In Canon Law we find also an adaptation of various rules of Roman Law. A great step forward was however made by establishing the freedom of the will of the parties abolishing certain contrary rules of Roman and Greek times and by issuing the Decree *Ne Temere* (1907) to provide, as we shall state later on, concrete proofs of the mutual promises.

In Malta until some time ago engagements were considered as great events and adequate celebrations were made. Abela-Ciantar in the book "*Malta Illustrata*" give a colourful description of these festivities which more than anything else evinces the social importance of betrothal. The need of some legal norm or sanction is however evident, for it is not always that affairs subsist in this ideal state, and promises are often broken. When dissensions arise one cannot decide on one's own who is in the right and who is in the wrong. The regulating influence of the law has to intervene to set things right. Now we shall examine the cases *when* the law has to intervene and *how* it sets things right.

Our law contains two landmarks from which we must take our bearings to decide questions relating to promises of marriage. The first one is the Promises of Marriage Law (Proc. VI of 1834) which is now contained in Ch. 7 of the Revised Edition and which is intended to abolish the power of the Courts to order the specific performance of promises and contracts of marriage and to provide another remedy for the breach thereof. Reference to the relevant provisions of this Ch. will be made later on when dealing with the problems which our Courts had to solve. The second landmark is Ord. XIV of 1913 which is incorporated in s. 1277 of the Civil Code (Ch. 23). This Ord. of 1913 provided that certain transactions must be expressed in a public deed or a private writing among which is included "for the purpose of the

Promises of Marriage Law (Ch. 7), any promise, contract or agreement therein referred to." So a formality is imposed in order that an engagement valid in all other respects should produce the effects contemplated in the Promises of Marriage Law. The parties have all the right to keep their betrothal private and not to draw it up in a public deed or a private writing; but then in the event of an unlawful breach the innocent party is deprived of the right to recover an indemnity by way of moral or material damages under the Promises of Marriage Law. This innovation in the law was necessary in order to provide adequate and irrebutable proofs of the reciprocal promise. It has had also the effect of lessening litigation. As it is only required for the purpose of being able to claim eventual damages in the majority of cases it is not resorted to for it evinces a blatant lack of confidence in the other party. The consequence therefore generally follows that if the reciprocal promise is broken the innocent party has no action against the guilty party. If any evidence in figures is required suffice it to say that in the period of 22 years from 1891 to 1912, 38 cases came before the Civil Court of First Instance (some being referred to the Court of Appeal) while in the same period from 1914 to 1935 there were only 6 cases.

The need for such legislation was felt in various countries a long time before 1913. The reform of Canon Law took place in 1907 and it is contained in the decree of Pope Pius X starting with the words *Ne Temere*, wherein it is laid down that "*ea tantum sponsalia habentur valida et canonicos sortuuntur effectus, quae contracta fuerint per scripturam subsignatam a partibus et vel a parocho aut a loci ordinario vel saltem a duobus testibus.*" But this reform did not affect our Civil Laws (before 1913) and an action for breach of promise could still be maintained notwithstanding the engagement was contracted only in verbal form; *Pace* v. *Cachia*, 1907. The solemn form is also required in Italy and Spain but it is not required in England and Scotland.

Our law, however, as various other continental laws, contains a provision which in many cases mitigates the effects of the Ord. of 1913. This is sec. 1074 (Civ. Code) which lays down that "every person, however, shall be liable for the damage which occurs through his fault." A breach of promise of marriage may be prejudicial to a person's property or reputation. If such promise had been drawn up in writing no difficulty would present

itself and both moral and material damages could be claimed in virtue of the Proc. of 1834. If however this formality had not been complied with the innocent party would have no right of action arising from the said Proc. which deals specifically with promises of marriage but the general principle of liability laid down in s. 1074 might well be invoked with success. This is the view upheld by our Courts in *Ruggier* v. *Zammit* (1922), *Farrugia* v. *Chircop* (1921), and in *Dalli* v. *Atkins* (1920). Probably, however, as in these cases only material damages will be granted and not also moral damages.

We have seen how also according to Canon Law a promise of marriage has to be drawn up in writing; but for the civil effects the formalities imposed by Canon Law cannot supercede those of Civil Law. A divergence between the two is to be found when one of the parties is illiterate. The question was decided in *Farrugia* v. *Said* (1917). The Court of first instance granted moral and material damages in favour of the plaintiff but the decision was reversed by the Court of Appeal. The promise of marriage was inscribed in the Parish Register, signed by the Parish Priest, by the defendant and by a witness. As the plaintiff could not write it was declared "*sponsa nescit scribere*". Such inscriptions are made in accordance with Canon Law (1) but as they do not constitute a public deed or a private writing requited by the civil Law the Court of Appeal gave judgement against plaintiff. Matters would have been different if the plaintiff had set her mark attested by the Parish Priest and in the presence of two witnesses whose signature appeared as well according to s. 634 (2) (3), Code of Org. and Civ. Proc. Naturally if both parties signed the Parish Register then it would avail as a private writing; *Runza* v. *Attard* (1919).

In those countries where no formality is necessary for the validity of the promise, it has to be proved by the circumstances attending each particular case. The judge is to use his own discretion which at times is severely taxed. Our Courts were in the same predicament before 1913. They had to see whether there was the consent of the parties of binding themselves reciprocal-

(1) "Quod si utraque vel alterutra pars scribere nesciat, id in ipsa scriptura adnotetur, et alius testis addatur qui cum parocho, aut loci ordinario, vel duobis testibus, de quibus supra, scripturam subsignet"—decree *Ne Temere*.

ly, whether there was the mutual and accepted promise of a future marriage; *Said* v. *Said* (1910). The Court adopted in this case the concept of the betrothal as understood and defined in Canon Law: *praevius contractus de futuro matrimonio inter marem et foeminam initus*. There must necessarily be a valid consent, manifested orally or in writing, determinate as regards the persons of the engaged couple, and free, i.e. not simulated or given by way of joke or deceit. In any case the promise must be conclusively proved by considering all the circumstances which taken in their complexity show beyond doubt the serious resolution of the parties of binding themselves; *Ghio* v. *Pace* (1895). The evidence of reatives was not excluded for the simple reason that they are interested parties; *Mifsud* v. *Bugeja* (1907). It is they who can best know of the facts; *Ghio* v. *Pace*.

It need hardly be noted that even before 1913 the parties could have adopted the solemn formality of a public deed or a private writing and as early as 1840 a case arose in which the promise was made in writing before a notary.

It is not enough that a promise of marriage has been made in this solemn form in order that civil effects may follow; we have yet to see whether it is lawfully made; *Farrugia* v. *Bondin* (1864). The most important question in this regard concerns the capacity of the parties. S. 3 of the Promises of Marriage Law is quite clear and it leaves no doubt as to the minimum age a person is required to have in order that an action for damages can be directed against him. He must be a person competent by law to enter into obligations, or if he is not so competent from being under paternal or other lawful authority or limitation after obtaining the consent duly granted of the person or persons in whom such authority is legally vested. In spite of this the Civil Courts seemed at one time to have some doubts in applying the provision in its entirety. In *Farrugia* v. *Bondin* (1864) defendant was a minor whose father far from having given his consent to the promise of marriage actually opposed it. The Civil Court of first instance very rightly held on these grounds that there was not a valid engagement. But the Court was not at that time very categorical in its decision: "Da tanto sembra doversi conchiudere, che i voluti celebrati sponsali da essi contendenti, non sono stati validamente contratti e quindi non producenti effetto." The Court of Appeal then reversed the judgement and as might

be expected the reasons given were not very persuasive. It was stated "secondo la legge gli sponsali sono validi, quando consti della loro contrattazione da uno maggiore di anni sette." As regards the question whether the consent of the father had to be obtained or not the Appeal Court applied a provision of the Code De Rohan (2) in preference to s. 3 of the Promises of Marriage Law. The Municipal Code required the consent of the father only in those cases when on account of the disparity in the social condition of the parties scandal might arise. This did not apply in this particular case and so though defendant's father had not given his consent the promise was valid. Then as regards the civil effects of breach of promise the Promises of Marriage Law was resorted to.

This judgement, inconsistent as it is, did not become a settled principle. The Civil Court of first instance came to another conclusion in *Bugeja* v. *Tonna* (1907) which is more conformable to the principles of reason and to the provisions of our law. S. 3 of the promises of Marriage Law was examined. It evidently applied the general principles of the capacity to contract so that reference was to be made to the relevant provisions. S. 1011 (Civ. C.) lays down that any obligation entered into by any person who has attained the age of fourteen years, but has not attained the age of eighteen years is null, if such person is subject to paternal authority, or is provided with a curator, *saving always any other provision of Law relating to marriage*. On the other hand, according to Canon Law marriage and engagement can be contracted by a person under eighteen years. So that a doubt might arise whether the saving clause of s. 1011 is intended to enforce the rule of Canon Law in preference to the general principles of capacity. But it was held that it refers only to the validity of marriage and betrothal and it cannot be extended also to the civil effects deriving from the breach of promise of marriage. The Promises of Marriage Law lays this down expressly, as we have seen, and it was manifestly intended "a sottrarre gli effetti civili derivanti da infrazioni di sponsali al dominio delle leggi Canoniche i quali effetti cosi la stessa assoggetta

(2) "Tutta sorte di promesse di sponsali che da figli si faranno senza consenso de' loro genitori, non avranno sussistenza alcuna, semprecchè effettuandosi, attesa la disparità delle condizioni, sarà per nascere grave scandalo, o ignominia alle parentele"—Bk. III, Tit. 2, 3. 16.

unicamente all'impero della legge civile giusta le norme in essa sanzionite."

The general hypothesis now is that a reciprocal promise of marriage has been made and we shall enquire into the effects that may follow. It may be laid down outright that promises of marriage like all other obligations have acquired a legal importance and merit any special consideration only in so far as they are violated. It is then that the law has to decide whether the claims made by one party against the other have any legal foundation. Promises of marriage are now considered as giving rise to a contract *sui generis* and as not subject to specific enforcement. If one party is not true to his word the other must seek some other remedy than claiming the fulfilment of that which had been promised. This is now admitted in all countries though some time ago certain laws provided that a person who unjustly refused to fulfil his promise should be compelled to do so by means of personal arrest. Our Promises of Marriage Law expressly forbade such specific performance (s. 2) but it also intoduced another remedy. We are now to deal with this remedy i.e. the granting of moral and material damages in favour of the innocent party.

This is the most debated question in this branch of law and various writers have put forth conflicting opinions on the subject. Some uphold the principle that a person can in no way be compelled to contract marriage whether directly by specific enforcement or indirectly by granting damages against him. This view is eminently held by Italian writers. Others are of opinion that damages are due because we cannot legalise acts which are definitely prejudicial to others both materially and morally. This is what our law as well as English law upholds. The opinions of French writers are divided. We shall now examine the merits of both sides of the question premising at the same time that though in accordance with our law we favour the granting of damages much can be said on both sides.

Italian Law expressly provides that no legal effects are to follow from promises of marriage. Keeping this in mind we shall inquire into the merits of such a provision in comparison with what our law lays down. We have chosen Italian Law as our point of departure because on account of this express provision Italian writers are more adamant in the principles they extol. At any rate what is said as regards their theory generally applies to

all writers possessing the same views as the reasons adduced by all are in the main of one nature. Two arguments are generally brought forward in support of their contentions which are to be found in various judgements. The first is as the Court of Appeal of Milan stated, that as the promise of marriage does not produce a legal obligation of fulfilling it, it likewise cannot produce the effect of obliging the resilent party to indemnify damages sustained by the other. The second argument is in the words of Prof. Ciccaglione that if the guilty party "fosse minacciato dal pagamento di una forte somma a titolo di danni ed interessi, potrebbe per considerazioni d'interesse, contrarre quel vincolo, da cui l'animo si rifugge".

The first argument has no immediate bearing on our law which sanctions expressly the granting of moral and material damages. The question may however arise whether our law is justified in sanctioning a principle which may be turned into an indirect enforcement of the promise of marriage. Ricci tells us that the utility of deviating from the general principle of liability is to be found in the interests of society which require that in marriage the consent of the parties must be absolutely free and which envisage an irreparable harm in those marriages in which one of the parties was in any way enforced. This, however ,is the application of the Roman Law principle that marriages are to be free and it is for this reason that it is untenable. It is based on an old prejudice and, as Toullier points out, it is highly immoral because the Roman maxim was applied principally to marriages which had already been contracted. It was meant to maintain unhampered the absolute freedom of divorce and it was applied with greater ease to promises of marriage which of course were less binding than marriage itself. In this manner Roman jurists concluded that *sponsalia* produced no civil effects and that a party thereto could as easily break off as he could ask for divorce. Experience on the other hand, Toullier adds, shows that in exonerating the guilty party from damages rather than favouring the principle of freedom in marriages we encourage bad faith, vanity, egoism and at the very least infidelity. Indeed, says Demolombe, a promise of marriage is conditional and each of the parties has the right to break off, but it cannot be asserted that each of them may play fast and loose with the other, may abandon the other at will. for a mere whim

or perhaps through inconstancy or lust. Finally, Toullier admits that promises of marriage lessen the liberty of the contracting parties. This effect is however common to all promises and obligations of doing or forbearing from doing something. In all such cases a person alienates a part of his liberty of action and in the event of unfulfilment the promise or obligation is changed into an action for damages in virtue of the general principle *nemo potest praecise cogi ad factum*. Canon Law deals expressly with this question and it lays down that an action for damages can be maintained — *non datur actio ad petendam matrimonii celebrationem sed ad reparationem damnorum si qua debeatur*.

It is interesting to note that Italian law grants an action for the reimbursement of expenses made for the projected marriage. This may give way especially in doubtful cases to arbitrariness. The whole question will always boil down to what interpretation is to be given to the word "*spese*", an interpretation which is not to be so strict as to work out injustice on the innocent party neither so wide as to fall out of the limits prescribed in the law. It seems therefore that the gulf separating our law from Italian law is not so wide as it may be made out to be as generally all material damages can be conveniently grouped under the heading "*spese*", the only difference being as regards moral damages. This was made apparent in an Italian judgement delivered in 1879 which is reported by various writers. That judgement is universally criticised but in any case it is a sure index of the need to throw off the shackles imposed by the strict provisions of Italian law which are only intended as a homage to an unfounded tradition having no basis or justification in actual life.

As it has been stated both moral and material damages are specifically provided for in our Promises of Marriage Law. We shall first deal with moral damages. Salmond calls them exemplary damages to distinguish them from compensatory damages which are measured by actual material loss and which we know by the name of material damages. "Exemplary damages," Salmond says, "are a sum of money awarded in excess of any material loss and by way of *solatium* for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of." Elsewhere he says that "exemplary damages are not allowed in actions for breach of contract save in the exceptional case of breach of promise of marriage — *Addis* v. *Gramophone Co.*". So English case-law is quite similar to the express provi-

sions of our law. The amount of moral damages is always and necessarily at the discretion of the Court, which taking into consideration the social condition of the parties and all the attending circumstances of the case adapts them accordingly. This is contained in the Promises of Marriage Law and in various judgements delivered by our Courts such as *Gerada* v. *Chetcuti* (1894), *Camenzuli* v. *Farrugia* (1905). Consequently the amount varies with the degree of unjustness in breaking off the engagement. Thus in *Pace* v. *Mizzi* (1916) defendant signified his refusal to fulfil his promise on the very day on which the marriage had to take place demanding for the celebration of the marriage a sum of money which had not been agreed upon. The Court of First Instance assessed moral damages at £10 but in view of the particular circumstances mentioned the Court of Appeal doubled the amount. In a prior case the Court of Appeal reduced the damages granted to plaintiff because she had broken certain injunctions given to her by defendant, *Mifsud* v. *Saliba* (1913).

The defendant in a suit of breach of promise has to be very cautious in the defence he adduces to justify the violation of his promise especially when his pleas concern the person (3) or the integrity of the other party. In such cases if his pleas are not admitted by the Court far from throwing a good light on his cause they will have the inevitable effect of increasing the injury and hence also the moral damages. This often happens when the defendant accuses the plaintiff of irregular conduct. If sufficient evidence is forthcoming the plea will avail as a just cause for breaking the engagement, if not the plaintiff will have a right to an increase in the moral damages, *Attard* v. *Leopardi* (1898). In *Mifsud* v. *Bugeja* (1907) moral damages amounted to £70 as the plea of illicit relations was not conclusively proved.

Once a person has been condemned to pay a sum of money by way of moral damages the judgement loses its effect when he indemnifies the injury by a serious and firm intention to contract marriage within the time-limit approved by the Court. If the abandoned party promises to marry another person or actually contracts another marriage the defendant will be still held for moral damages, *Bartolo* v. *Mulictt noe* (1892). The defendant is however freed from indemnifying moral damages when the

(3) V. judgement delivered by the Court of First Instance in *Grixti* v. *Cassingena* considered by the C.A. in 1892.

plaintiff acquiesces in the withdrawal of the promise by the defendant. Such acquiescence may be construed from the circumstances of the case. Nevertheless the defendant's obligation as regards material damages and the restitution of the gifts remains, *Schembri* v. *Zammit* (1866), *Attard* v. *Leopardi* (1898).

Tha abandoned party has also a right to material damages, the assessment of which presents no special difficulty. The Court in this case has to examine questions of fact and evidence while moral damages are calculated in proportion to the injury suffered and to the social condition of the parties. Material damages usually include all those expenses which the innocent party made in contemplation of marriage and which are rendered useless by the non-fulfilment of the promise. Two conditions have therefore to concur in order that material damages may be claimed. First of all there must be the link of casuality between the projected marriage or the non fulfilment of the promise and the expenses made. Thus those expenses necessitated by social convenience may not be claimed. Secondly the abandoned party must not reap any advantage from the expenses made because then it would be highly unjust that such party should have the right to claim reimbursement deriving so to say a double profit. These material damages may include for example sums disbursed for the renting of a house and the purchase of furniture. Naturally if the plaintiff prefers to retain the furniture there may be no claim for the reimbursement of its price. On the same lines it was held in *Pace* v. *Mizzi* (1916) that if the plaintiff preferred to retain her trousseau the expenses undergone for making it should not be included under material damages (4). These material damages sometimes take the form of those expenses which are caused through defendant's fault and which may not therefore be considered as made in view of the projected marriage. This question arises when for example the abandoned party is left with illegitimate offspring. The damages will be considerably increased and will include lying in expenses and maintenance allowances for the child, *Galea noe* v. *Aquilina* (1865), *Cristodulo* v. *Cassar* (1913). Likewise whoever opposes the marriage of another person or seeks a mandate *de non nubendo* and such action is subsequenty recognised unjust, is held to reimburse the ex-

(4) See also *Montesini* v. *Vassallo* (1894).

penses which he thereby caused to the other party in virtue of the general principle that every person is liable for the damage which occurs through his fault, *Gauci* v. *Cachia* (1898), *Debono* v. *Ciantar* (1906). There is no end to the diversity of material damages which may be claimed and to examine even the more important cases which generally are only theoretical would take us out of our subject into an examination of the general principles of liability.

Another effect of breach of promise of marriage is the restitution of the gifts which the guilty party received from the party abandoned. This is governed by s. 1899 and s. 1905 of the Civil Code. The important thing to note here is that the gifts must have been made in contemplation of marriage and as such they are to be distingished from those which are ordinarily exchanged during betrothal, *Portelli et* v. *Grech et* (1910). A tacit resolutive condition is always implied in the former so that if marriage does not take place once the purpose for which they were made is not realised they are to be returned. S. 1905 (2) adds that the donee may retain the things given if the marriage does not take place by reason of the refusal of the donor without just cause to contract such marriage. This principle underlies the general effects resulting from a breach of promise of marriage. The resilent party must restore the gifts and make good moral and material damages only if his refusal to fulfil the promise was unjust, otherwise justice and logic require that he should not bear any consequences.

The subject of our next inquiry is to see when is a party justified in withrawing his promise. It is impossible to give an exhaustive list of various hypotheses, as what is a just cause for one person is not invariably so for all others. But we may mention a few cases of a general nature to show what is the tendency of our Courts. A grave and supervening change in the health of one of the parties will always avail the other to withdraw, for example if one party contracts some illness after betrothal which prevents him or her from fulfilling conjugal duties or from earning one's living, *F.G.* v. *G.G.* (1871), *Grixti* v. *Cassingena* (1892). The Court showed that such illness must not have been known before betrothal or at least it was then not of such gravity as it later turned out to be. It is to be noted that even the person who has contracted the disease may in some

cases justly withdraw. In *Margherita Magro* v. *Pullicino* (1926) plaintiff started showing signs of chronic arthritis as a result of which she could be subject to limping. The Court decided that the plaintiff had a just cause to withdraw her promise in view of the fact that she would not be fit for farm work and both her parents and defendant were peasants. Reprehensible conduct on the part of one party showing untrustworthiness or weakness of character will also generally avail the other to withdraw. In *Concetta Gasan* v. *Bonnici* (1910) defendant justly refused to keep his promise because he resented the constant intrusion of an undesirable person. A reticence regarding the age of the bride when it later results that she is much older than her future husband entitles the latter to break off. *Gaffiero* v. *Spiteri* (1880). Threats, jealousy and a fixed intention of imposing unreasonable prohibitions during married life are also just causes to withdraw from the promise, *Camilleri* v. *Zammit* (1905).

Sometimes it happens that the defendant pleads as his justification for withdrawing his promise an impediment at Canon Law. In 1871 the Court of Appeal stated that betrothal between persons who may not enter into a valid marriage is not null if they intend to obtain the necessary dispensations, *M.C.* v. *M.D.* Since then it has been constantly upheld by our Courts that any impediment to matrimony whether diriment or impedient renders betrothal null even if the condition "*si Sancta Sedes dispensaverit*" was imposed (5). This condition is always implicit especially when the impediment is known to both parties and its actual inclusion cannot have any ulterior effect. It is important to keep in mind that in such cases as betrothal is void the abandoned party has no action *ex sponsu* but only any other action according to Law.

The Promises of Marriage Law lays down two ways in which a person is generally guilty of breach of promise and is **therefore liable to an action for damages. The first way is a wilful and unlawful refusal to fulfil the promise which leaves no** doubt as to guilt and bad faith. The second is evinced from the **non-fulfilment of the promise within a reasonable time after re-**

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(5) V. *Buttigieg* v. *Abdilla* (1873); *Azzopardi* v. *Hiscock* (1879); *Bugeja* v. *Moore* (1890); *Bugeja* v. *Grixti* (1894); *Ginnis* v. *Decelis* (1897); *Camilleri* v. *Sammut* (1897).

quest made (of the reasonableness of which time, the Court shall be the competent judge). It might seem at first tight easy to determine when a refusal is wilful and unlawful but in certain cases a careful examination of all circumstances has to be made before arriving at any conclusion. It is an inquiry into motives and intentions which at times may look very laudable and unselfish but on a deeper analysis it is discovered that they are merely the result of rashness or precipitation. Thus in certain cases defendant pleaded that he had no means whereby to contract marriage but the Court did not allow such a plea. *Muscat* v. *Dingli* (1896). *Davison* v. *Pace* (1903). *Spagnol* v. *Ghirxi* (1908). The plea of insufficiency of means is a just cause not to contract betrothal at all and it is also perhaps morally a just cause to break off but it is not a just cause according to our Civil Law. Disparity of condition in life is not a just cause for non-fulfilment, nor are the threats by defendant's father that he would demand liberation from the duty to supply maintenance (s. 34, Civil Code), or that he would disinherit defendant (s. 660 (g) Civil Code), *Abela* v. *Scicluna* (1912). Again a party is not justified in withdrawing his promise for incompatibility of character when this could have been realised before betrothal, *Camenzuli* v. *Farrugia* (1905). Another example of an unjust refusal was *Vassallo* v. *Formosa* (1882). The husband has no right to compel his wife to live with others except in cases of extreme economy. Consequently the refusal on the part of the future wife to live with others after the marriage is no just cause for the husband to withdraw his promise. In this case a condition was imposed that she was to live with her mother-in-law who was in a state of imbecility. The Court laid down a general rule in *Bartoli* v. *Pace* (1894). It was stated that any condition which is not verified and in view of which the betrothal was contracted must be a real and serious condition to avail as a just cause for the withdrawal of the promise. If betrothal subsisted after that the non-fulfilment of the condition was known it cannot be annulled later on. This is what Demolombe has to say on the subject : "Ciò che può dirsi per regola generale si è, che la promessa di matrimonio è subordinata alla condizione che lo stato delle cose sia lo stesso fino al dì della celebrazione, e che non si scoprirà o sopraggiungerà un cangiamento tale, che uno dei fidanzati abbia diritto a dire che non avrebbe accettato questo nuovo stato di

cose se avesse potuto conoscerlo''. Coppola in the *Digesto Italiano*, quoting Bianchi, gives us the norm of the reasonable man, ''in sostanza basta che i giudici di merito possan convincersi che la desistenza dal matrimonio è il risutato di una seria riflessione, non della mera incostanza o del capriccio.''

As soon as there has been a wilful and unlawful breach of promise an action for damages can be maintained. Such an action according to the Promises of Marriage Law is not to be considered irregular because it is not preceded by a demand for fixing a time-limit. This condition is not established by the law and in any case it would have been a useless formality when it is shown that the defendant has definitely broken his promise. The judge may neither in such a case exonarte defendant from the payment of damages by granting him a time-limit within which to contract marriage, *Galea* v. *Aquilina* (1865) and later judgements. It may happen however that the defendant takes a passive attitude and merely lets time pass without signifying any definite intention. The question will then arise as to what steps the other party is to take. Can it ask the Court to fix a judicial time-limit after the expiration of which an action for damages will be maintained? Case law does not seem to be well settled on this point though the Promises of Marriage Law does not leave any doubt about the matter and *Vella* v. *Xuereb* (1901) ought to have authoritatively settled it. In this case the learned judge decided that according to the letter and the spirit of the Promises of Marriage Law the judicial authority cannot fix a time limit for the celebration of marriage. As we have already stated that law provides that the action therein contemplated must be preceded either by a definite refusal or by a failure to fufil the promise after request made. Such request however cannot assume the aspect of a demand for fixing a judicial time-limit. It is to be made by one party to the other and as the Court of Appeal very aptly stated in *Busuttil* v. *Pace* (1881) the law does not lay down any way in which the promisor can be constituted in delay. It only establishes that after the request however made, the promisor must have a reasonable time to carry out his promise and it merely leaves to the Court to judge whether such a time-limit was reasonable according to the circumstances. The words of the Proclamation ''of the reasonableness of which time the Court shall be the competent judge'' leave no doubt. A judicial time-

limit would compel, at least indirectly, the difendant to give effect to his promise and it would therefore go also against the spirit of the Proclamation which was meant to divest any court of the authority "to compel, adjudge, decree or order any person specifically to perform or complete any promise of marriage made to another." It is true on the other hand that when one party defers the execution of his promise from time to time the other party may have sufficient reason to adopt certain measures to induce him to fulfil it. But such an end would not be realised satisfactorily by fixing a judicial time limit and it can be achieved more easily by an amicable settlement. It is for this reason that the Proclamation has not laid down any specific form and it leaves to the interested party the choice in establishing the other party in delay. However once there is an action for damages if the Court thinks that there was not a sufficient time-limit between the demand and the action it may still, once the action is justified, lay down that damages are not to be due unless the guilty party does not contract marriage within a certain time. Such a provision is not tantamount to fixing a time for the celebration of the marriage. It is only the exercise the faculty which the Court has of deciding of the reasonableness of the time limit which lapsed until the action was instituted.

The spouses have all the right to agree that marriage is to take place after a certain time and so the question arises whether any action can be brought before such period lapses. This was the point at issue in *Zahra* v. *Grech* (1897). The Promises of Marriage Law lays down that betrothal is governed by the rules common to all contracts. S. 1115 (Civil Code) moreover specifies that what is only due at a certain time cannot be claimed before the expiration of such time. So it would seem that in the matter of promises of marriage no action can be instituted before the prescribed time-limit has elapsed. It is only then that it can be said conclusively that one of the parties has not been true to his word. In this particular case defendant denied any obligation on his part and his good faith was placed under suspicion Though the time-limit had not yet expired the Court authorized the plaintiff to establish the existence and validity of the contract and to demand damages unless marriage followed on the prescribed date.

We have already seen how Canon Law also contains specific provisions on promises of marriage and therefore a breach of promise may constitute a violation both of Civil Law and of Canon Law. Nevertheless the actions arising therefrom are separate and distinct. The one based on Canon Law falls under the exclusive jurisdiction of Ecclesiastical Courts and it is obligatory only morally for the fulfilment of marriage. The other action is a civil one under the exclusive jurisdiction of Lay Tribunals according to the Proc. of 1834, which establishes moral and material damages. The Law expressly lays down that Ecclesiastical Courts legally established in these Islands shall have power to enforce their judgements by censures, monitions, excommunications, or other spiritual means as the laws of the Church shall prescribe and which shall not be incompatible with the public peace and good order but are devoid of temporal compulsion (Proc. V, 1828, s. 6). It is a fundamental principle of Ecclesiastical Public Law and of the Proc. of 1828 that the jurisdiction of Ecclesiastical Courts regarding spiritual matters and of Lay Tribunals regarding temporal matters are totally independent, *Camilleri* v. *Baldacchino* (1898).

Another point regarding actions arising out of breach of promise which is not settled concerns the period of prescription. To reach any solution on the matter we have first of all to decide whether such actions arise from the non-fulfilment of a contractual obligation, *culpa contractualis*, or from a tort or quasi-tort, *culpa Aquiliana*. In the first case the period of prescription is of 5 years while in the second case it is of 2 years. According to Italian Law the action for the reimbursement of expenses is prescriptible after one year. The reason for this short period is, as Coppola says, the fear that the threat of judicial proceedings may constitute an indirect enforcement of the promise of marriage. In *Borg* v. *Fenech* (1894) the Court held that the action to which the abandoned party in a breach of promise is entitled is actually an action for damages and interests arising from *dolus* or at least from the *culpa* of the resilent party. It is substantially, as Laurent says, the effect of a quasi-delict and consequently the action is prescriptible after 2 years. The Court chose the other alternative in *Simiana* v. *Fenech* (1900) and in an earlier case, *Camilleri* v. *Frendo* (1889) the Court of Appeal stated also that the prescription is that of 5 years. That prescrip-

tion, it was held, which tends to extinguish the exercise of rights by the mere passage of time is not susceptible to extensive interpretation. The action contemplated in s. 2258 (Civil Code) which is prescriptible after 2 years arises out of tort and it corresponds to that which in Roman Law was derived directly or indirectly from the Lex Aquilia. It would be an extensive interpretation not justifiable by positive law or by rational principles to extend that article to every case of damages arising from violation or non-fulfilment of contract. Coppola says: "questi (danni), sebbene dipendenti da fatti connessi alla promessa, ma non elementi necessari per costituire la promessa stessa, sono sempre una conseguenza diretta e immediata dell'inadempimento della promessa; e questo indica che è un'azione di danni derivanti da colpa contrattuale non da colpa extra-contrattuale. La Corte stessa lo rileva quando dice che, se non vi fosse inadempimento della promessa non vi sarebbe ragione di ristoro di danni." Various foreign writers do not subscribe to this view but their opinions on the subject may not be conclusive in so far as our law is concerned because according to them promises of marriage are null and therefore an action for damages can only arise in virtue of a tort or quasi-tort (Laurent, Duvergier). Demolombe, however, does not seem to be of the opinion that promises of marriage are null and he nevertheless says that any action for damages and interests does not derive from the promise validly made but from an act which causes damage. In fact, he continues, it is not the promise of marriage, purely and simply, which has caused damage but the entire conduct of the resilent party and all the circumstances which put together do not constitute an error in contract but a quasi-delict. Likewise Pacifici-Mazzoni speaking on the analogous case of the reimbursemnt of expenses says that "quell'obbligo nasce dal fatto dell'ingiusto rifiuto di mantenere la promessa, che può considerarsi come un quasi-delitto". It would seem that this is the correct solution.

The question regarding the nature of the action is also important, as Prof. Del Giudice says, in relation to the burthen of proof. If we are dealing with *culpa in contrahendo* the resilent party must prove that there has been a just cause for non-fulfilment. If one the other hand it is a case of *culpa Aquiliana* the plaintiff must prove the unlawful act of the defendant consisting in a delict or quasi-delict.

The legal significance of promises of mariage is plainly apparent in view of the various problems, intricate at times, which they give rise to. Juists and legislators from Roman and Greek times to the present day have dealt with the subject providing new legal norms to keep it in step with the development and practical needs of society. Our positive law, as we have seen, does not deal with all the questions that may arise, but the line taken by our case-law compares favourably with the highest authorities on Continental Law.

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**PURPOSE OF PUNISHMENT**

"To Englishmen the importance of arriving at definite principles on the purpose of punishment is peculiarly great: for our abolition of minimum punishments has given our Judges a range of discretion, and, therefore, of responsibility not usually entrusted to Continental tribunals."

KENNY.

**SUSPENSION OF DEATH PENALTY**

"I believe that hanging cuts down murders. Because of them I am opposed to abolish capital punishment..... If contrary to my fears, the experiment turns out to be a success no one will be more ready to admit his error than I. But I cannot feel at present, when we have this distressing wave of crime with more gangsters going about with arms than before, it is a wise moment to try the experiment."

LORD JOWITT.

# MOOT*

ON the 30th June 1947, A purchased a rare bird from B for £20 on the express understanding that the bird was a male that sang. The bird was truly a male but for a whole forthnight, it did not sing and A told B that if it did not sing by the 18th July, he would bring the bird back. B retorted that the change of place might have made the bird stop singing for a while and as to the rest he made no reply.

On the 19th July, 1947, A left the bird at B's dwelling-place with the latter's son as B was not in. Two days later the bird died and B refused to refund the £20.

It resulted from the evidence produced that the bird did sing before the sale but that it was completely dumb from the 30th June onwards. It was also clear that during the period it accidently developed a disease which finally caused its death.

On the 24th June, 1947, A filed a writ of summons demanding :—

i) the defendant's condemnation to return the price as he had accepted A's suggestion to bring the bird back in the event that it did not sing by the 18th July ;

ii) subordinately, the annulment of the sale on account of vice of consent due to a substantial error and the condemnation of the defendant to return the price.

The defendant pleaded that the disease had been contracted after the sale and that therefore the risk wieghed upon the purchaser and that, in any case, the action which should have been exercised was the 'Actio Redhibitoria or Aestimatoria' as the plaintiff was alleging the existence of a latent defect.

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

Counsel for plaintiff : Mr. A. Cachia B.A.

Counsel for defendant : Mr. S. Camilleri.

Mr. Cachia started by saying that the whole matter referred to whether the silence of the defendant meant that he consented to the rescission of the contract. He maintained that one cannot say that writers unanimously agree on the question whether tacit consent can ever amount to a contract. The

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* *Reported by A. Rutter Giappone, L.P.*

tendency of Italian and German writers, however, is that though we cannot lay down a hard and fast rule, there are cases when tacit consent gives rise to a contract. Those who condemn this theory justify their contentions by resorting to a reductio ad absurdum. Does a person to whom an offer is made, they ask, bind himself by the mere fact that he has remained silent? Naturally, this is taking things to extremes and the theory of tacit consent can only be adopted under certain conditions and in specific cases.

He submitted that the theory of tacit consent is not contrary to our law, where we find certain provisions which cannot but be based on the tacit consent of one of the parties, e.g. the tacit consent of a person who has attained majority to the continuance of the legal usufruct enjoyed by the father, the tacit renewal of lease. The law itself, moreover, says that we are to interpret the spirit and not the wording of a contract. We are to keep in mind that the letter killeth.

Pacifici-Mazzoni admits the theory of tacit consent when the party who remained silent "loqui potuit et debuit". Vivante also admits that if there exists between the parties a juridical relation then there can be tacit consent.

Mr. Cachia made reference to other Italian and German writers such as Dernburg, Windscheid and Ranelletti. Dernburg's criterion is that "il silenzio è consenso quando secondo l'opinione publica e specialmente secondo le idee delle persone della stessa professione e condizione, un uomo ragionevole ed onesto avrebbe espresso una ripulsa nel caso che non fosse stato d'accordo." This view is endorsed by Gabba, who is the principal supporter of this theory. Gabba, Mr. Cachia pointed out, requires three requisites in order to have tacit consent, namely, that (1) the party who remained silent knew of the activity of the other party; (2) there was the possibility of a reply, and (3) the activity referred to was not prohibited by any penal law. The above requisites, Mr. Cachia continued, were accepted by our Courts in re "Buhagiar vs. D'andria".

Mr. Cachia concluded by comparing the conduct of the defendant with that of a Bonus Pater Familias. He maintained that a reasonable man would certainly have returned the bird to the plaintiff and the fact that defendant did not return the bird cannot but mean the completion of the tacit agreement.

In reply to the above, Mr. Camilleri, counsel for defendant, stated that though text-writers were not in full agreement on the matter, yet the majority were of opinion that, as a general rule, silence does not constitute consent; but, the said writers maintained, there are cases when silence implied consent: it followed that such cases formed exceptions to the general rule and it rested on the plaintiff to show that, in view of the particular circumstances of the case, the defendant's silence meant consent. Indeed, Mr. Camilleri went on, the theory that silence does not amount to consent is more in accordance with our Law of Obligations. The sections of the law quoted by the plaintiff were only few and could not form the basis for a general rule. Such general rule could more properly be deduced from our Law of Obligations, according to which, one of the requisites of contract is consent which is the union of the wills of the parties. In order to have such a union the wills of both parties must be expressed.

However, Mr. Camilleri submitted, the case awaiting decision was not one of silence; as Pacifici-Mazzoni tells us, in similar cases one cannot lay down an absolute rule and apply it unfailingly. Each case must be examined in the light of the particular circumstances accompanying it. Such a view, indeed, is quite reasonable and is consonant with the general principles of law according to which the intention of the parties should be respected. In the case before us, therefore, we are to ascertain what that intention was and to give effect thereto.

He pointed out that when the defendant replied that the bird did not sing because of the change of place he clearly showed what his intention was: his reply implied that normally the bird sang and that therefore he saw no reason why the sale should not stand and consequently for accepting back the bird. The defendant's partial answer cannot but be interpreted in the sense that the defendant did not intend to accept the bird back, since he saw no reason for doing so.

Mr. Camilleri concluded by saying that the defendant retained the bird in order to verify whether the allegations of the plaintiff were true and did not mean that he accepted the bird back.

Professor V. Caruana summed up by saying that the question resolved itself into whether silence is enough to bind the

party. The conduct of the parties must be compared with that of the normal reasonable man. If a reasonable man would have in similar circumstances expressed his refusal then the silence implies consent and acceptance, silence being a part or a form of contract.

Of the various theories pointed out by the parties Professor Caruana preferred that of Dernburg.

Professor Caruana said that the question under review is to be divided into two phases: as to the first phase, that is, when the defendant did not reply, he considered that the silence did not mean that defendant accepted the rescission of the sale: defendant did not admit that the bird was not a singing bird but said that the bird did not sing because of the change of place. The silence with regard to the other part shows that defendant was not certain whether the bird did or did not sing and that he wanted to verify the allegation of the plaintiff. Professor Caruana continued that since we cannot explain in an undoubtful manner the reason for the silence we are to hold that the defendant did not accept the proposal made by the plaintiff.

With regard to the second phase, that is, when the plaintiff left the bird at B's dwelling place, Professor Caruana pointed out that there was no doubt that the defendant was aware of the fact that the bird had been returned to him. Had he taken the bird back to the plaintiff before anything had happened to it, then the action of the defendant would be equivocous but the defendant did not do anything of the sort and retained the bird notwithstanding that he knew that the plaintiff intended to annul the sale if the bird did not sing. In the opinion of Professor Caruana the above could only lead to one conclusion, namely, that the defendant had accepted the suggestion of the plaintiff and that therefore the sale had been rescinded.

Plaintiff's claim was allowed and it was, therefore, not necessary to consider his second claim.

# Law Reports*

## H.M. COURT OF APPEAL

(SIR G. BORG C.J.; GANADO J.; CAMILLERI J.)

**E. Camilleri vs. G. Vincenti.**

Judgment delivered on 9. 6. 47.

Plaintiff rented flat No. 16, Vincenti Buildings, 15, Strait Street, Valletta, at £54 per annum. On the 23rd February, 1944, the landlord, by means of a judicial letter gave notice to the tenant that he intended to increase the rent of the flat. In September 1946, the tenant applied to the Rent Regulation Board rejecting such an increase.

**Held** that plaintiff had the right to demand the rejection of the increase in rent.

The Court remarked that Section 15 (2) of the Reletting of Urban Property Ordinance (Chap. 109), did not fix any period of time within which the tenant had to file an application contesting the increase in rent. The law was silent on this point and such a period of time could not be desumed from conjectures or from arguments. The abovementioned Section of law laid down that where the rent exceeded £40 per annum the lessor who decided to increase the rent or to impose new conditions must, within the period of one calendar month before the expiration of the lease, give notice to the tenant of his such intention by means of a judicial letter. If the tenant wished to contest such increase or the imposition of such new conditions, he must apply to the Board for the rejection of such increase or new conditions; in default of such application the proposed increase or new conditions shall by deemed to have been accepted by the tenant.

Furthermore the Court pointed out that all the periods of time which referred to forfeiture of rights must be clearly laid down by an express provision of the law.

Such a rule was applied in other judgements given by His Majesty's Court of Appeal in re "Mizzi vs. Salomone", August 2, 1924, and in re "Degiorgio vs. Mizzi", June 30, 1939, and by the Rent Regulation Board in re "Caldwell vs. Attard Mon-

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* *Reported by J. A. Micallef, LL.D.*

talto", March 8, 1933. In the said judgements the Court held that once the period of time within which the tenant could contest the landlord's claim had not been fixed by the legislature it could not hence be established by mere conjecture. It could be pleaded that as the position stood, the tenant could easily evade the law and the owner's rights by simply remaining passive. There was however a remedy to such a state of affairs as the landlord could summon the tenant before the competent Court and ask that a period of time be fixed in which the tenant was to apply for the rejection of the increase in rents.

## H.M. COURT OF APPEAL

(SIR G. BORG C.J.; GANADO J.; CAMILLERI J.)

**Nicola Spiteri vs. Joseph Gasan.**

Decree delivered on 10. 3. 48.

Defendant, by means of a note filed during the sitting, asked the Court to revoke "contrario imperio" a decree ordering the marshall to produce a witness, Antonio Grech by name, and to prevent him from communicating with any other person on the ground that his evidence had not been asked for by any of the parties in the suit.

**Held** that the Court was authorised by law to issue such an order.

The Court pointed out that it was the constant practice of the tribunal to order the production of a witness whenever his evidence was considered essential. In such cases it was usual for the Court to order plaintiff or defendant to summon such witness but nothing in the law prevented the Court to summon the witnesses "ex officio". The law, in fact, empowered the Court to call any of the parties to the suit to give evidence (v. art. 564 of the Code of Civil Procedure). Besides the laws of Civil Procedure also provided that any person who was present in the Court might be called upon forthwith to give evidence.

Nothing in law prevented the Court from summoning at once a witness by means of a subpoena.

Such an order did not amount to an arrest but was intended only to compel the witness to appear immediately in Court. And once the order is issued it is also lawful for the Court of its own motion to prevent the witness from holding any communication whatever with any other witness.