NOTES ON CASES
I—Fenech vs. Bianchi noe

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This case was decided by the First Hall of the Civil Court on the 26th May, 1952. The present note concerns a point which was discussed before the Court but which was left undecided, as the Court based its judgment on a preliminary issue of fact, notwithstanding that the parties had refrained by agreement from producing evidence on the point of fact adjudicated upon. The legal question involved was not mentioned in any way in the judgment, so that the present note refers not to the actual contents of the judgment but to an interesting point which, as far as is known, has never been authoritatively settled by any local Court.

The facts which concern us here are the following. X, a person residing abroad nominated defendant as his special attorney to sue plaintiff for the restitution of an amount of money paid as rent, in excess of the amount subsequently fixed by the Rent Regulation Board. Plaintiff alleged that damages had been caused to the furniture in the flat and, therefore, filed a writ of summons for the liquidation of the damages due. Furthermore, he asked for the judicial set-off between his claim for damages and any amount which might have been due as restitution of rent. The writ of summons was issued against the same person who had been nominated by X as attorney in the other case. Defendant pleaded that he had no mandate to appear in the case and that, therefore, he should not have been notified with the writ of summons. His contention was that he had no *locus standi* in the action and should be non-suited. Defendant's plea was upheld for reasons which are extraneous to the legal issue under discussion.

The main submission made by plaintiff was, that in this case defendant could not refuse to appear for X, because the present action was a form of defence against the action for restitution of rent, in vew of the demand for judicial compensation and also because there existed a legal connexion between the two actions, since they arose from the same contract.

It is well-known that *compensatio* or set-off is a means of defence, even if one were to take into account the restricted concept of a "plea" put forward by Windscheid. In fact, it aims at paralysing the claim, without denying at the same time the correctness of the *intentio*. Set-off may be legal, judicial or conventional. The first form operates *ipso iure*; the second form operates *ope iudicis*, while the third may vary in its effects, although it is binding on the Court. The first form may be put forward as a plea; the second form must be asked for by means of a writ of summons, while the third form may be availed of by action or plea, according to the circumstances of the case.

Judicial compensation or set-off is impliedly referred to in Art. 396 (b) of the Code of Civil Procedure. In fact, in the case of legal set-off which operates *ipso iure*, reconvention would not be necessary, and, therefore, it is generally held that that article refers to judicial compensation. Apart from this, the concept of judicial set-off has been authoritatively declared several times by our Courts of law. (Vide Vol. XVII. II. 4; Vol. XVI. III. 67; Vol. XVI. III. 82 of the local Law Reports).

Despite the difference between the three forms of set-off, the same concept is shared by all, set-off being essentially a *means of* defence against a particular claim. The same notion existed in Roman law.

It is quite clear that a defendant has the right to avail himself of *all* the means of defence sanctioned by the law and the fact that the plaintiff happens to be abroad cannot in any way reduce the defendant's chances of defence. Consequently, when a person is sued by the attorney of a person residing abroad, he should be able to avail himself of the same defensive measures, as if he had been sued by a person present in Malta. Otherwise, it may happen that a defendant sued by the special attorney of a person who is abroad, would not be able to ask for judicial set-off, owing to the lack of jurisdiction in the local Courts. The Code of Civil Procedure, however, envisages these possibilities and tries to avoid anomalies by means of Art. 744.

When a *procurator ad litem* is appointed, the mandator confers upon his nominee his "rappresentanza giudiziale" vis-a-vis the other party to the suit and the Court itself. (Vide Scialoja, Mandato ad litem, p. 739). Automatically, the mandator submits himself to the jurisdiction of the local Courts, *not only in regard to the demand put forward by him, but also with respect*

to all questions which may give rise to reconvention and connexion of actions. (Vide Art. 744 (1) and (2) of the Code of Civil Procedure). These effects are declared by law and arise automatically, independently of the width or narrowness of the mandate. The legislator wants to ensure that the means of defence granted to the defendant can be used not only against a person who sues personally but also against a plaintiff who happens to be abroad. That is evidently the purport of Art. 744.

It may be observed that the *locus standi* of an attorney *as defendant* is not necessarily based on the consent of his principal. After all, the person who nominates an attorney with authority *to sue* does not presumably wish to confer "authority" *to be sued*; however, the Attorney can be sued according to law on all matters connected with the case instituted by him, whether the principal gives or does not give his consent. Articles 744, 396 and 403 of the Code of Civil Procedure indicate the cases in which effect is brought about.

It is quite clear that, if the proceedings were conducted according to the *formal* mode of procedure (i.e. by libel), there could not have been any doubt about the *locus standi* of the special attorney. In such a case, the special attorney would have initiated proceedings by libel and the other party would have put forward his claim for damages by means of reconvention. Now, the rules regulating *locus standi iudicio* equally apply to both forms of procedure, and, if there is *locus standi* in the formal mode of procedure, there can hardly be any doubt that there is also the same capacity in the informal mode of procedure.

The fact that, while in the formal mode of procedure there is only one libel, there must be two writs of summons in an analogous case conducted according to the summary form of procedre, is of no importance whatsoever. In fact, as Mattirolo says (Vol. II, par. 91), it is debated whether for the purpose of reconvention, a new libel must or must not be made. For our purposes, these discussions are only of historical importance, as reconvention is not initiated by a new libel, but, independently of this, no one can doubt that the person presenting a libel has always *locus standi* for the purposes of reconvention. (Art. 744 and 400).

In the summary form of procedure, the law provides the remedy of connexion of actions which is parallel to reconvention. The defendant issues another writ of summons, but the two cases

are dealt with and decided together. This system is similar to reconvention and produces the same effects. In fact, the two methods are provided for under the same sub-heading (Art. 396-403), have the same requisites (Art. 403) and produce the same consequences (Art. 744).

It is suggested that in the case referred to above there existed both alternatives indicated in Art. 396 (403), as the two actions arose from the same contract and as there was the demand for judicial set-off. In the case under discussion, the Court did not enter into the merit of the controversy. The future will reveal whether the rule which is here being suggested will find favour with the Courts.