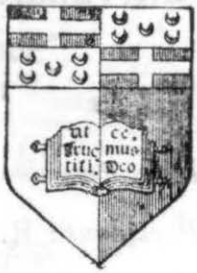
A REVIEW OF THE
UNIVERSITY STUDENTS'
LAW SOCIETY



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Correspondence on editorial matter should be addressed to the Editor, The Law Journal, c/o Royal University of Malta Union, St. Paul's Street, Valletta.

Letters, articles and book-reviews will be considered for publication, but these should be confined to comments on topics of legal interest.

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LAW JOURNAL

Vol. III No. 3

EDITORIAL

WELCOME TO NEW STUDENTS

WE welcome the new students who have this year joined the Intermediate Course of Arts and who intend to join the Course of Laws. We should like to remind these new students that the Law Society is their own society more than any other University Society and we invite them as from now to take an active interest in the society and in its activities, for it is they who in the near future will be called upon to guide the fortunes of the Law Society.

THE LAW JOURNAL

It is indeed a pity that our Journal has not seen the light of day during 1953. We cannot understand why the University authorities have remained deaf to our requests for an increased annual grant to cover the meteoric rise in printing costs. They know well enough that the Society cannot be expected to raise sufficient funds for this purpose from among its student members. Formerly, the Law Journal used to be published twice a year, then lately, owing to increased printing costs it began to be published only once a year, and unless financial help is forthcoming it looks as if it will have to be published once in every two years. This is most unsatisfactory considering that the Law Journal is still the only legal publication in Malta. We think that the University is in duty bound to see that the Law Journal is not allowed to die a slow death.

APPEAL TO LAW STUDENTS

Just as it is the duty of the University to help financially, so it s also the duty of all law students to take an active interest in the Law Society. It is regretted that during the last two years, law students have shown a marked lack of interest in the Society's activities. The Society has been further weakened by petty dissensions among its members, some of whom boycotted its activities. This attitude is foolish in the extreme and it is sincerely hoped that the new academic year will see an increased harmony

between law students and that they will unite in a common determination to give the Society renewed vitality.

THE LAW COURTS

It is indeed gratifying to see that at last the Government has seriously in mind the rebuilding of the Law Courts on their old site. The present accommodation is most inadequate. The Superior Courts have been occupying premises which are woefully inadequate and are besides urgently needed for a National Museum. The position of the Inferior Courts is even worse. It is hoped that a decision will soon be taken as to where the latter Courts are to be accommodated pending the reconstruction, so that rebuilding can start in earnest.

GRADUATE EMPLOYMENT

The true gravity of the problem was brought home to most of us during the National Congress of Students which was organised by the Students Representative Council during October-November of last year. In our opinion, the problem confronting law graduates is even more serious than that confronting other graduates. In our present state of overpopulation, it is no surprise that emphasis is being laid on emigration. People in all walks of life are going overseas to seek a livelihood in less populous countries. But law graduates have little or no opportunities open to them overseas. Little can be done until a reciprocal recognition of degrees among Commonwealth countries is agreed upon. The openings which are or may be made available in Malta to law graduates can at most offer only a partial solution to the problem. It is therefore most distressing to learn that the Chamber of Advocates does not intend to avail itself of the invitation to send representatives to a conference among Commonwealth legal associations which aims to bring about reciprocal recognition of law degrees. We hope most sincerely that the Chamber will after all decide to avail itself of this opportunity which may mean so many benefits to law graduates in the shape of opportunities abroad similar to those open to medical graduates. Such benefits will be beneficial to all law graduates but more especially to those of the younger generation and it is hoped that this will be kept in mind when the Chamber takes a final decision on the invitation.

NOTES ON CASES
I—Fenech vs. Bianchi noe

By Dr. J. M. Ganado, B.A., LL.D., Ph.D. (Lond.)

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.

II—Police vs. Gerard Caruana

By WALLACE P. GULIA, LL.D., B.A., B.Sc., M.A. (ADMIN)., D.P.A.

The legal nature of Wages Councils was examined in some detail by H.M. Court of Criminal Appeal presided over by the Hon. Mr. Justice W. Harding, B.Litt., LL.D., on the 19th September, 1953, where the invalidity of an order made by the Minister on the advice of a Wages Council was being pleaded. It was alleged that the Council had not considered the representations made to it by interested parties (2) and that the advice given to the Minister was in fact not that of the whole Council but of two members only who were not sitting as a Council at the time the decision was reached.

After an examination of the comparable issues in English Administrative Law, the Court stated that the nature of a Wages Council is not only administrative but also quasi-judicial insofar as it has the duty to *consider* the representations made before giving advice to the Minister. In terms of local case-law the Court's authority to review the discharge of such quasi-judicial functions is strictly limited. In general it cannot do anything but see : i) whether the Wages Council has exceeded its statutory powers; ii) whether the decision is bad on its face; and iii) whether the rules of Natural Justice have been complied with. The Court cannot examine the decision of the Council to see whether it is a fit and proper decision, though exceptions can arise such as where the decision is manifestly oppressive.

In the case in question the Court found that the Council *had* considered the representations made since the term "to consider" should not be interpreted in the ordinary sense of "to deliberate on" and does not imply any special procedures. It also found that in fact the decision to give advice had been arrived at by a majority of the council even though no formal vote had been taken. As no special regulations had been prescribed to the Council, it should follow such procedures as it found convenient for the transaction of business (3).

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1. H.M. Court of Appeal: 19. 9. 1953.
2. S. 7 (2), Act XI, 1952.
3. But vide G.N. 386, 1953.

This shows that Wages Councils, like other quasi-judicial bodies, have a wide field of unappealable decision. In practice, however, their authority may be a little less wide than it appears to be *prima facie*. Indeed the learned judge observed that local case-law on the subject is still to be developed and his references to English Administrative case-law point out that in appropriate cases the Malta Courts may be prepared to extend the grounds for review in the same way as English Judges, jealous for their slipping authority, gradually extended their limited powers. Thus, for example, though English Judges too have stated that they cannot substitute their own discretion for that of such bodies (4), they have nonetheless established that administrative discretion must be exercised according to law (5) and that they will review for improper purpose (6), extraneous considerations (7) and unreasonableness (8).

This case had its sequel on the 3rd October 1953 (9) when the plea of justification for not complying with a Wages Council Order was that the employee (an assistant projectionist) was not a "projectionist" but belonged to the category of "other classes" specified in the order. It was alleged that even the Wages Council had decided that an assistant projectionist formed part of the general category "other classes". The Court, however, thought otherwise and Harding J. said that even if the Wages Council had given such a definition this was not binding on the Court since, to be operative, the definitions of the Wages Council must be based on law and in the Court's opinion the expression "other classes" indicated a distinct group of people not otherwise mentioned in the schedule. This restated the point, which had never been in doubt, that the Court can review Wages Council decisions based on wrong legal definitions.

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4. *Smith v. Chorley R.C.*, (1879) 1 Q.B. 678; *Fraser (D. R.) & Co. Ltd. v. Minister of National Revenue*, (1949) A.C. 24
5. *Sharp v. Wakefield*, (1891) A.C. 173.
6. *Leeds Corporation v. Ryder*, (1907) A.C. 420; *Local Govt. Board v. Arlidge*, (1915) A.C. 120; *Roberts v. Hopgood*, (1925) A.C. 578.
7. *Associated Provincial Picture Theatres Ltd. v. Wednesbury Corporation*, (1948) 1 K.B. 223, *Roberts v. Hopgood*.
8. *R. v. Cotham* (1898) 1 Q.B. 802.
9. *Police v. Gerald Caruana*, H.M. Court of Criminal Appeal.

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Compiled by DR. JOS. SCHEMBRI, B.A., LL.D.

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Un "LAW JOURNAL" di cent'anni fa

By SIR ARTURO MERCIECA, KT., M.A., LL.D.

LA pubblicazione di periodici locali che trattino esclusivamente del Diritto e dei Tribunali deve dirsi rarissima e di assai breve durata. Ci rimane il ricordo di un isolato tentativo di riprodurre e commentare recenti sentenze risolventi quistioni di qualche rilievo e poco o nulla di più. Meritano dunque encomio gli studenti di legge succedentisi nei rinnovati corsi di Legge i quali da alcuni lustri curano la stampa, magari con intervalli di tempo ineguali, di un bene nutrito di contenuto "LAW JOURNAL", con dotti scritti sul giure e interessanti biografie dei passati luminarii del nostro banco giudiziario.

A vieppiù stimolarli nel prosieguo della loro lodevole iniziativa gioverà, non è dubbio, dare brevi cenni di un'altra simile impresa svolta più che cento anni addietro da alcuni membri volonterosi della classe legale, di cui ne rincresce di non essere stati conservati i nomi, ma che non è difficile individuare tra le varie personalità che adornarono in quell'epoca il foro maltese.

Il 4 di settembre 1846 uscì il primo numero del settimanale "Foglio Legale di Malta", per i tipi del Tip. E. Laferla di Strada Reale No. 98, vendibile anche presso il libraio G. Galdes di Strada Vescovo No. 120. Il programma era formulato nella forma ampollosa di quei tempi e descriveva il periodico come "versante "puramente sulla teoria e prattica (sic) delle leggi, corrispondente mezzo alla sociale perfettibilità, entro i limiti del Governo "costituito e le relazioni dei Governati: in una parola, quanto "possa essere soggetto alle condizioni della pubblica e privata "giustizia. Imperocchè, oltre trattando, tolto che a maggior fregio, avuto riguardo generalmente alla posizione morale dell'Isola, alla defettibilità di mezzi, all'autorità di alieni soggetti altamente famigerati ed alla voce, talvolta, di contemporanei alle "cose pubbliche dedicati, col pervertire lo scopo meditato, si traverserebbe il reale bisogno del paese. Sarà dunque assunto, a "seconda delle opportunità, di parlarne di Legislazione, della "professione ed arte legale relativa al paese — della Giurisprudenza comune e patria a cui eminentemente appartengono le "decisioni dei nostri Tribunali — di averne articoli di necessari "od utili intertenimenti (sic) e cognizioni".

Segue un breve articolo sullo "Stato presente della Legisla-

zione di Malta". Questa è definita nel suo complesso essenzialmente difettosa, vuota e disordinata e in parti ingiusta e incongruente, consistendo essa in " una confederazione di leggi senza " armonia, e ciò per l'impasto di giurisprudenza locale, straniera " e comune e la vacillante autorità dottrinale che figura nei Tri- " bunali, tutto ciò non per calcolo legislativo, ma posto in balia " della prudenza, abilità ed educazione del foro attivo ". Di ciò non si intendeva incolpare la Autorità " perchè inceppati i passi " suoi primi, la svogliarono forse da ogni impresa; ma qualun- " que elle sieno le circostanze che allentavano la idea di riforma, " cangiati al presente e tempi e menti, la patria Legislazione ed " il voto generale rispettosamente domanda ed aspetta riparo ". Il quale in effetti non tardò a sopravvenire, essendosi pochi anni dopo dato l'aire alla formazione delle leggi nostrane madiante la nomina delle altre Commissioni incaricate di riprenderne lo studio e prepararne i progetti.

Passa indi il Foglio a dare un breve sunto di alcuni processi criminali celebrati nell'agosto precedente, accompagnandolo da assennate osservazioni sui punti di rilievo sollevati e risoluti. Così, trattandosi, nel primo di quei giudizi, di attentato contro la vita del coniuge attribuito ad un tale Felice Ciangura innanzi la Corte detta allora di Speciale Commissione, presieduta dagli allora chiamati Onorabili Commssionari Sir I.G. Bonavita, K.C.M.G., presidente e Giudici Dr. F. Chapelle e G.P. Bruno assistiti dai Giurati—allora in numero di sette,—in cui ebbe particolare importanza la dichiarazione accusatrice fatta *in articulo mortis* dalla vittima, il commento notava che la causa " semplice " nella sua natura, scorgesi oltrèmodo feconda nei suoi risultati : " in quanto presentava un modello della presente giurisprudenza, diversa ahi quanto ! dalla antica tassa legale sul valore delle " evidenze, a seconda dello spirito delle leggi ". Così ancora, riportandosi il riassunto d'un altro giudizio tenuto avanti la Regia Corte Criminale—senza jury—sedente il Giudice Bruno, contro G. Palmier imputato di furto presunto, venne discusso e stabilito il principio che, passando l'oggetto furato per mani diverse finchè giunga a quella della Giustizia, la sua identità deve, in tutti i passaggi essere provata.

Nè mancava la Cronaca dei giudicati importanti dei tribunali esteri, degli atti legislativi introdotti negli altri stati, e dei provvedimenti emessi in materia legale e giudiziaria.

Nel secondo e nel terzo numero leggiamo riprodotte altre decisioni del tribunale Civile e di quello Commerciale, e delle corrispondenti Corti all'Estero, una dissertazione sul sistema ipotecario allora vigenti di cui è chiesta con urgenza la innovazione, e varie informazioni di spiccato interesse. Negli altri fascicoli, oltre al solito resoconto delle salienti liti in Malta e alle notizie di cronaca forense locale ed estera, furono tradotti e pubblicati articoli di periodici esteri, come quello "Del peso conveniente a scientifiche evidenze" tolto dal "Jurist", e "Del Diritto Pubblico in Italia al VI secolo" preso dalla "Revue de Legislation et de Jurisprudence", seguito questo da un lungo e dotto commento di uno dei redattori del periodico maltese sul Risorgimento del diritto romano in Italia e sui più illustri giureconsulti che formarono epoca al suo ristabilimento.

Sono infine da segnalare nel fascicolo del 4 novembre uno scritto sulla patria legislazione mercantile, della quale si auspica anche la riforma (effettuata nel 1857), e in quello del 20, stesso mese, "Pochi cenni sulle lettere LL.D. usate dai legali". Si ricordava ivi sul proposito che Irnerio, il primo che diede celebrità alla scuola del diritto civile in Bologna circa il 1115, sembra che sia stato solamente chiamato *Magister*, e che dopo quel tempo il titolo *Legis Doctor* si applicava ai professori di diritto civile. Quando Basiano, canonista di Bologna nel 1197, insegnò la legge civile e insieme la canonica, seguito da altri, si ebbero i *Doctores utriusque juris*. Nel 1150 T. Becket in Oxford venne nominato *Legum Doctor*. In Malta, ad imitazione di quanto usavasi in Italia, era dato il titolo di J.U.D. ma posteriormente cominciò a essere conferito quello di LL.D. Nelle Università di Oxford e Cambridge, nel 1417 LL.D. era la designazione di Dottore in Legge civile e D.D. di Dottore in Legge canonica.

Non sembra che il "Foglio Legale di Malta" sia sopravissuto oltre il suo quattordicesimo numero. Diversamente chi conservò i quattordici fascicoli, in epoca in cui era generale usanza di raccogliere e rilegare i giornali, avrebbe anche tenuto i susseguenti. Data la scarsezza degli abbonati in un ambiente limitato quale offre la nostra breve isola, circoscritto inoltre dal fatto che il periodico interessa prevalentemente il ceto legale, è difficile che simili pubblicazioni possano attecchire e fruire di una lunga esistenza, ammenocchè non si trovino sussidiati dallo Stato, a beneficio che deve ritenersi comune.

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