THE NATURE OF

THE

RIGHT OF LEGITIM

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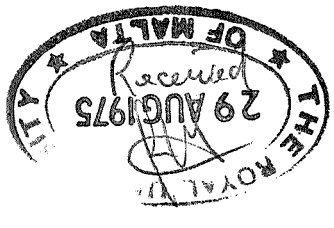

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THE NATURE OF THE RIGHT OF LEGITIM

CHAPTER 1

HISTORICAL BACKGROUND

In order to examine the real nature of the right of legitim one has to examine the origins of this institute as far back as possible and to scrutinise its evolution throughout the ages and in the different countries in order to decide whether the notion of this right has remained unchanged or whether it has put on other or different meanings throughout its existence.

In ancient Greek law, the testator who had male children could not dispose of his property by will; however if there were legitimate sons, the will would become valid, if they diedwhile still minors (1). However, the testator could still disinherit a child if there was just cause as, for example, injury he suffered, prodigality or a son's grave violation of his duties towards his father.

In ancient Roman Law, the 'decemvirale' law vested the pater familias with an unlimited power of disposing of all his estate, but by the passage of time this power was limited both by civil law and by the praetor.

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(1) A.R.W. Harrison "The Law of Athens", p. 152.

In Roman civil law, the testator was obliged to institute or disinherit his 'heredes', that is, those who fell under his immediate patria potesta' at the time he made the will. His male sons had to be instituted or disinherited in express terms (nominatim), that is, in a special or individual way (e.g. 'Be my son Titius disinherited' or 'Be my son disinherited' when there was only one son). If the testator contravened this rule by failing to institute or disinherit a son under potestas, the will was null or invalid. Other descendants under potestas, who on the testator's death would be his 'sui heredes', had also to be instituted or disinherited but here a general clause of disinherison ('inter caeteros') was sufficient (e.g. 'Be all the rest disinherited'). This applied to daughters and to the children of sons who because of the death or emancipation of their father were potential 'sui heredes' of the testator. If they were passed over in silence the will was not void, but the person omitted was let in to share along with the instituted heirs, that is, they took a rateable share in competition with 'sui heredes' instituted by the will and half of the inheritance if the person instituted was a stranger to the family ('extraneus') which would include

an emancipated son (2). Grandsons in power would take a son's share between them as representing their deceased, or emancipated father.

The rules above mentioned applied to 'heredes sui' who were alive at the time when the will was drawn up, but as for postumous children different principles applied. Initially, these could neither be instituted heirs nor disinherited, because they were considered as uncertain persons (persone incerte); but in cases the postumous person outlived the testator he effected the will in the sense that the above mentioned rule was extended to cover also children already born at the time the will was made but who came under the patria potestas of the father later.

In law one was not obliged to institute or disinherit emancipated children, because once they were no longer under the testator's patria potestas, they were no longer 'heredes sui'; however, the praetor ignored emancipation (through the edict 'unde liberi') and placed emancipated sons and their issue in the same position as 'sui heredes'. He ordered that all, without any distinction of sex, had either to be instituted or disinherited. He required all

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(2) Nov. 53 c. 6; 2; Nov. 117, c. 5.

males to be disinherited nominatim and females inter caeteros, failing which he gave them the 'bonorum possessio contra tabulas' (3). This did not render the will null, but its practical effect was to upset it and to admit to the succession not only the descendant who invoked the relief, but also all others entitled to succeed 'ab intestato' who had not been duly disinherited. Thus, even at this early stage we already feel that the idea of legitim had taken root. The instituted heir continued to be heir but only 'sine Re' and the children passed over acquired the 'bonorum possessio cum re' in conformity with the rules of intestate succession, with the obligation of satisfying the legacies and other burdens imposed on the instituted heir (4). So, the praetor made no distinction between men and women, but the Emperor Antoninus Pius (Marco Aurelio) by means of a rescript reverted to the civil law rule providing that all women, and those sons in the second degree were not to take more by 'bonorum possessio contra tabulas' than they would have taken by right of accrual at civil

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(3) Gai. II, 135; Ulp. XXII, 23; XXVIII, 2; Inst. II, 13, §3.

(4) Fr. 3, §11; fr. 8, §14; fr. 10, §1 de b.p.c.t. 37, 4.

law (5).

Therefore, in Roman Law up to the time of the Antonines : the persons who had to be instituted or disinherited were: (i) the testator's sui heredes (according to Civil Law) and also (ii) emancipated sons and their issue (according to Praetorian Law).

Justinian maintained Praetorian Law but simplified previous legislation and made it uniform both for sons and daughters as for other descendants in the male line whether actually born, or to be born in the future ordering that all such persons, whether 'sui' or 'emancipati' had to be instituted heirs or disinherited in express terms. In the absence of such the 'sui heredes' could impeach the will as wholly void; other liberi could upset it by obtaining the 'bonorum possessio contra tabulas' (6).

These rules secured that parents should not pass over their children in silence and if they chose to disinherit them they should use the appropriate form. Failing this, the children were said to be passed over

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(5) Gai. II, 126 and 135; Ulp. XXII, 23; XXVIII, 2; Inst. II, 13, 3.

(6) C. 4. Cod. de lib. praet. vel exher. 6, 28.

and might avail themselves of the remedies. Therefore, these restrictions related only to the form and did not deprive the testator of the right of excluding his children. The father or grandfather could disinherit his children but this rule did not apply to the mother's will. Therefore, except if disinherited, sons, daughters and other descendants in the male line had a right to a part of the inheritance.

However, from the end of the Republic, or the beginning of the Empire, a new and very important principle asserted itself, namely that a testator was not free to dispose of his property as he pleased and that certain near relations must be provided for (7). If the testator failed in this duty the will might be impeached and rescinded by a procedure known as the 'complaint of the undutcous will' - 'querela inofficiosi testamenti' (8) i.e. in those cases where the family's right to a portion of the deceased's estate was violated: "... a lato di quell'obbligo formale di istituire o di disereditare i figli, si stabili' a poco a poco pel testatore un nuovo

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(7) Istituzioni Di Diritto Romano, Profs. P. Bonfante (1925), p. 611.

(8) In. 2. 18.

dovere, molto piu favorevole ai suoi prossimi parenti, ai quali fu' dato pretendere che il testatore lasciasse loro una porzione del suo patrimonio (portio legitima)" (9). Therefore, under Roman Law, even under the system introduced by Novel 118, the legitim had to be left under the title of heir; Legitim was a form of testate succession having a legal cause - testate, because it had to be left by the deceased, and legal because the testator was bound by law to do so.

Buckland says: Where a will was voidable because, though satisfying all rules of form, it unjustly excludes persons whom the law regards as having a claim, the point must be raised by a special procedure to have the will set aside - the QUERELA INOFFICIOSI TESTAMENTI ... (10). Domat, basing himself on Irnerio, who had compiled the extracts of Justinian's Novels, does not think that the legitim had to be left under the title of heir "... egli (i.e. Irnerio) non fa alcuna menzione della necessita di lasciare la legittima a' figli a titolo d'istituzione ... (11), but the majority of text-writers

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(9) 'Istituzioni Di Diritto Romano', Filippo Serafini (1881) p. 466.

(10) 'A Manual of Roman Private Law', W.W. Buckland (1939), Introduction p. xxiv.

(11) Le Leggi Civili, Domat Vol. 8, p. 10.

hold the opinion held by Serafini and Buckland.

By the procedure of the 'querela inofficiosi testamenti', though the forms had been complied with, near relatives with obvious claims (the classes of those entitled having been gradually widened) might attack the will as contrary to the family's right to a portion of the deceased's estate ('inofficiosum') and get it set aside. It was an action brought against an instituted heir who had entered on the inheritance. It was tried before the court of the centumviri, like "hereditatis petitio", and took the form of a fictitious allegation that the testator was insane, and that the will was, therefore, invalid or must be set aside. But this is not logically worked out, for though the will was sometimes altogether set aside there were cases in which it remained partially good. Probably, there was a preliminary judgement on the point raised in the 'querela' according to the result of which the 'hereditatis petitio' would proceed or not. Since it reflected on the deceased, it was allowed only as a last resort. No one could bring it forward unless he was entitled on intestacy, though in later law, if the person primarily entitled refused to claim or was justly excluded, the person next entitled

might bring it for his own benefit, if he was within the classes to whom it was open. So, later, the fiction abovementioned disappeared and the querela was considered to be based upon the just reflection cast upon the person passed over or insufficiently provided for. The relations who had a right to the legitim and who could bring the 'querela', if entitled on intestacy, were in the order mentioned:

(i) Descendants, unjustly disinherited, in a man's will, or unjustly omitted in a woman's, including 'postumi'.

(ii) Ascendants unjustly omitted.

(iii) Brothers and sisters unjustly omitted if some base person (turpis persona) is preferred to them. The law seems to have been settled in this sense as early as Ulpian (12). In classical law this applied only to those of the whole blood still agnatically connected, but Justinian applied it to cases in which the agnatic tie was broken, and to half brothers by the same father.

The term 'turpes personae' (base persons) is not

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(12) Dig. 5.2.1.

precisely defined. It includes persons technically infamous (infames) and persons of bad character or low social standing. If there were no children, or none who impeached the will successfully, the querela was available to ascendants, and, in the same way, ultimately to brothers and sisters (13).

So, even at this very early stage the concept of the 'legittima', as Serafini puts it, was 'un porzione dei beni, di cui il testatore non puo privare certe persone che sarebbero eredi anche 'ab intestato', salvoche' non esista una giusta causa di diseredazione. La legittima non puo' essere domandata che nell'ordine, nel quale si e' chiamati alla successione intestata, dappoiche' in ultima analisi essa non e' che una frazione della parte, che si avrebbe ricevuta 'ab intestato' (Serafini, op. cit, 436). Although it seems that the legittima was in the nature of "pars bonorum" because of the words "legitima pars" or "portio legitima", one cannot definitely conclude that the nature of this right was that of co-ownership because it could have been

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(13) Dig. 5.2.31 pr.

pars hereditatis.

The person bringing the complaint had to show that he had received less than a fair share of the testator's estate. He need not have been instituted heir, but he has to be provided for by institution or legacy or gift mortis causa. The amount to which he was entitled was originally left to the discretion of the Court.

However, later, in classical law, total exclusion was not necessary and the 'querela' was granted to the claimant if he was to receive less than one-fourth (¼) of what he would have had on intestacy, called the 'pars legitima'. This was the portion of the estate which by the Lex Falcidia or Quarata Falcidia (which provided that a testator might not dispose in legacies of more than three-quarters of his estate, that is to say, that a fourth part of the estate was to remain with the instituted heir or heirs) the heir was allowed to retain against legatees. In connection with the querela it was known as the portio legibus debita or the legitima portio (the statutory portion) and in modern usage is termed 'the legitim'. The querela could not be brought if he had been disinherited on just grounds. To bring it, he must have no other means of attacking the will. Anything

given by the will, and 'donationes mortis causa', were reckoned in the 'pars legitima', and, in later law, 'dos', 'donatio ante nuptias' and some other gifts were to be included. Where the will gave too little but contained a provision that shares below this were to be made up, the 'querela' was not available, but there was an action called the 'actio ad supplendam legitimam', by which the increase might be recovered, the will being unaffected. Justinian applied this clause in all cases, so that, under the Institutes, the 'querela' lay only if the claimant had nothing at all towards the 'pars'. He also, in virtue of Novel 18, provided a fresh minimum for children: when the intestate portion constituted at least one fourth (¼) of the deceased's property the legitim was to be one-third (if there were 4 or less), and in other cases it was to be one-half ((½) if there were more than 4). To calculate the legitim one had to consider all the property belonging to the testator at the time of his death, subtract funeral expenses and other debts and on the remainder one can compute the legitim according to the portion destined to the legitimaries by intestate succession. The legitimary had to impute into his portion all that which he had received from the testator

as heir or by title of legacy, fidei commissum or donation causa mortis as well as anything received in dowry or donation in contemplation of marriage or for the purchase of 'un impiego venale'. Other donations inter vivos were not imputable in the legitim unless they were made with the condition that they should be imputed.

Where there was only one 'institutus' and only one person entitled to claim, a successful 'querela' avoided the will altogether. If the claim was unsuccessful, any benefits of the claimant under the will were forfeited to the Fiscus, for 'indignitas'.

If a claimant succeeded against one 'heres' but not against another and only one of the 'heredes' attacked turned out to be a 'turpis persona', the will stood partly valid. The will was 'pro parte' set aside and not 'pro parte' void.

The legitim had to be conferred without any restrictions whatsoever (14). A jurisconsult of the Middle Ages named Socinus invented a method of burdening the legitimary (cautela socini). This method consisted

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(14) C. 31, 36, 1 C. de inoff. test. 3, 28.

in bequeathing certain property and attaching burdens to this gratuitous transfer. The legitimary who accepted this gratuitous transfer would naturally bear the burdens imposed but he could chose to give up such liberal transfer in order to obtain only the legitim. The cautela socini vel gauldensis is still existant under our present law.

The adrogation (adoption) of children under puberty (who were still sui iuris), effected in the time of Gaius (by a legislative act of the comitia curiata or calata), was in early law prohibited but later permitted. The difficulty was that the child could not consent unaided, and tutors were not generally considered competent to give their authority in a matter of such grave concern as it was considered a dangerous power to put in the hands of his tutor (15). But Emperor Antonius Pius in a letter to the Pontiffs allowed the adrogation of impuberes subject to specifically careful investigation and the authorisation of the tutor or tutors, security being taken for the restoration of the property of the 'adrogatus', if he

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(15) G. 1, 102; Ulp. 8. 5; Dig. 1.7.17, 1.

died still 'impubes'. If the 'adrogatus' was emancipated while 'impubes' his property must be restored at once. If he was disinherited, it could be claimed at the death of the adrogator. In this case and if the emancipation was without cause approved by a Court, the 'adrogatus' so dealt with was also entitled to one-fourth (¼) of the property of the adrogator ('Quarta Antonina'). It was a special case of the provision for children which came to be known as the legitima portio.

If the adopting father disinherited the child, or in his lifetime emancipated him without just cause, he was ordered to leave to him one-fourth (¼) of his own estate, that is to say over and above what the adopted child brought to the adopting father on adoption or had subsequently acquired from him (16).

This special provision seems to give a two-fold aspect to the notion of the right of legitim or legitima portio depending on the circumstances of the case: firstly, as a right of credit in favour of the adopted child if the

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(16) Translation from the Institutes of Justinian Bk. I, Title XI {109.

adopting father has disinherited the child, and secondly, as a right in adopted child's favour by way of penalty against the adoptor if adrogator emancipated him without just cause.

At first, women could not be adrogated or adrogate - but a quasi-adoption by women even of a person sui iuris was permitted by Dioclotian.

At first, in case of prejudice as regards the legitim, the legittimaries only had the 'querela inofficiosi testamenti' which action produced the recission of the will and so intestate succession took place; but in time other actions were given, that is, the 'querela di inofficiosa donazione' and the 'azione suppletoria'.

The Azione d'Inofficioso Testamento was granted to the descendants or, if these could not or did not want to make use of it, it appertained to the ascendants, to whom the law granted a legitim and to the brothers and sisters if a persona turpe was instituted. Through this action the 'legitimari preteriti' could rescind the will and obtain all the intestate portion. Judicial practice, when introducing this action, based it on the reasoning that once the testator had not left anything to one of

his nearest relatives, that is, to his presumptive intestate heir, he had not made his will as a just man in his proper senses would have done ('hoc colore, quasi non sanae mentis fuerint, cum testamentum ordinarent parentes') (17). This action had something odious about it, in that the testator was presumed insane and so it was 'giudicata sfavorevolmente' and subjected to the following restrictions:

(i) It was considered as a subsidiary action and only admitted when there was no other remedy at law (18);

(ii) It was prescribed in the short period of 5 years (19);

(iii) It could not be transmitted to the heirs (if, however, the action was already introduced, or at least, prepared, it passed on to the heirs) (20). By way of exception, the testator's children who

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(17) Pr. Inst. de inoffi. test. 2, 18.

(18) Nov. 115c. 3§14; fr. 8§9, 15 de inoff. test. 5, 12.

(19) Fr. 8, §17; fr. 9 de inoff. test. 5, 2.

(20) Fr. 6, §2, fr. 7 h.t.

died 'deliberante herede scripto', transmitted the action to their descendant heirs;

(iv) The legittimary who lost the action, lost the liberality granted in the will to his favour.

The Azione Suppletoria belonged to all the legittimaries who received less than the legitim with the scope of obtaining 'il supplemento' (21).

Through the Querela D'Inofficiosa Donazione, if the testator had contravened the legitim by making excessive donations, the legittimaries could ask for the reduction of the donations 'fino alla concorrenza della legittima'(22).

In the last phase of Roman Law (A.D. 542), Justinian, through Novel 115, made great changes; he ordered that the testator could not limit himself to bequeathing to his descendants and ascendants the 'legittima portio', but nothing counted towards the 'legittima portio' unless the claimant was actually instituted 'heres' to a share: if he was, all that he

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(21) C. 30 pr. {1 de inoff. test. 3, 28.

(22) Tit. Cod. III, 29.

took 'mortis causa' counted (23). The exclusion was deemed unjust unless it specified the grounds and these fell within one of the just causes enumerated in Novel 115. (These causes are 14 for descendants and 8 for ascendants. Writers disagree on the consequences of the violation of the hereditary rights contemplated in Novel 115 and especially on how the invalidity of the heir's institution comes about and so to which judicial action one can have recourse 'per far valere la successione contra il testamento'). In case of contravention of the rules of this Novel, the legittimaries could ask for the rescission of the will and so take their part of the inheritance 'ab intestato' without effecting the other testamentary dispositions. This resulted in a will with no valid 'institutio' - which was impossible in earlier law. So Justinian abolished the old 'successione necessaria formale', but left intact the system of legitim, with the difference thatthe causes of disherison were established. But the new rules applied only to ascendants and descendants - also, brothers and sisters

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(23) Diritto Romano, Carlo Alberto Maschi, p. 204, 85.

were contemplated under the old law.

The 'Quarta Antonina' of 'adrogatus impubes' was a restriction. The patron had indefeasible rights. A widow without 'dos' was given an indefeasible right to a certain share, by legislation of A.D. 537 and 542, with a corresponding right for a widower without 'donatio propter nuptias' (24). By a 'sc. Afinianum' (25) a rule was introduced that one who adopted one of three brothers was bound to leave him a quarter ($\frac{1}{4}$) in any event. The will was unaffected, but an action lay against the heres if the rule was broken. There were various opinions as to the basis of the rule, which however was abolished by Justinian when he recasted the law of 'adoptio'.

An effective rule was provided by the 'lex Falcidia' (40 B.C.) which enacted that if legacies exceeded $\frac{3}{4}$ of the estate they could be cut down 'pro rata'. The estate was to be valued as at death, all debts, funeral expenses and the value of slaves freed by the will being deducted.

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(24) Nov. 53. 6.

(25) In. 3. 1. 14.

The calculation was made separately for each 'heres', so that it might happen where legacies were separately and disproportionately charged on specific 'heredes', though some legacies were cut down, more than a quarter of the estate might remain with the 'heredes'. In later classical law, though perhaps not at first, 'donationes mortis causa' were treated in the same way. Justinian allowed the testator to forbid the retention of a fourth, and forbade it altogether if the 'heres' did not make an inventory.

Therefore, descendants and ascendants had a right to the legitim 'per via di istituzione in eredi'. If they were instituted heirs, but by such did not receive all the legitim they could claim the balance ('il supplemento'). However, if they had received their portion of legitim, but were not instituted heirs, they could ask for a recission of the will and take the inheritance by way of intestacy ('l'eredita ab intestato') - as for the brothers and sisters 'Germani e consanguinei', these had only a right to the legitim.

If they had not received anything they could, through the 'querela inofficiosi testamenti', ask for the recission of the will and they would receive by

intestate succession; those who had not received all the legitim due to them, could ask for the balance ('il supplemento').

Although up to this stage the institute of legitim has been considered only in the light of Roman law, there is no definite indication where this institute first originated.

Now what about Maltese Law? Although Roman Law was introduced in Malta so long as 216 B.C., following the Roman occupation of the Island, its influence is still predominant today, especially in civil matters. Roman Law inspired the legal concepts and ideas and permeated our entire legislation. Roman Law, although no longer influencing the modern Criminal and Commercial laws in any high degree, still exercises a considerable influence on Civil law.

Between 500 and 870 B.C. (seizure of Malta by the Arabs) Malta must have been governed not only by the old Roman Law and by the Law laid down in the Corpus Juris of Justinian but also by the legislation of Emperor Leo the Isaurian known as Graeco - Roman Law because it was in force also in Italy. It's probably that the laws of Justinian, which had regulated Malta for over 3 centuries

continued to be observed in the acts of Civil life.

The law relating to succession remained practically the same as that of Justinian but, as may be expected, it was slightly modified under the influence of the Germanic customs which admitted the condominium of the family, the privilege of age and sex, and the different kinds of succession according to the title of property. Different from Roman Law, the laws of the time laid down that a third of the property was to be reserved to the children as legitim, whatever their number (terza filiale). With regard to the faculty of disposing by will or by donation, the few restrictions imposed by Roman Law were preserved together with some modifications derived from Germanic, French and Italian customs, according to which in certain alienations the consent of the family was required.

The civil consequences of marriage greatly differed from those under the Roman Law owing to the introduction of the system of the community of acquests and of the use of the dower. According to the system of the community of acquests, on the birth of the first child, all the property of the spouses became one and was divided by law into 3 equal parts - 1 part belonging to either spouse

and the third part to the children. This system, which was introduced by custom did not apply to feudal property. The only law which mentions it is Cap. 6 of Frederick of Aragon who reserved the dowry to wives of rebels without children; and if they had children, a a third part of the common property (Stenciled Notes, Harding, p.22).

Some contend that the institute of legitim or reserved portion together with that of the seisin of heirs, originated in Germanic custom but when passing into our Code they lost their Germanic character and put on a Roman garb, subjecting themselves to Roman principles.

Thus the reserved portion is due to certain members of the family not by virtue of the Germanic principle of the co-ownership which they might have enjoyed, but rather by virtue of the basic Roman principle that one has certain obligation toward one's family which limit the right of disposal of one's property.

The Code de Rohan, otherwise known as the 'Del Diritto Municipale di Malta', in the 4th Book contains provisions on the Law of Succession. Property in the Code de Rohan was classified into Free and Feudal, the provisions regarding the succession of free property

were mainly inspired by Roman Law. Thus the provisions prohibiting the surviving spouse who remarried from leaving to the children of the second marriage more than the children of the first marriage is derived from the Law hac. edictali Cod. de secundis nuptiis.

According to the Code de Rohanthe legitim was due to descendants and ascendants; the 'quarta uxoria', in usufructor in full ownership, according to whether there were children or not, was due to the wife; 'alla moglie povera si deve da' beni del defunto marito ricco assegnare una porzione sufficiente pel suo sostentamento, avuto riguardo alla sua condizione: ma questa prrzione non dovra' eccedere il quarto, essendovi figli superstiti'; 'rimarra tuttavia fermo il diritto, che alla moglie povera spettera' contra i figli, essendo loro madre, per aver il supplemento degli alimenti convenienti'; 'la porzione suddetta o quarta, essendovi figli del defunto marito, procreati dallo stesso matrimonio, spettera' alla moglie in solo usufrutto, ma ella potra' obbligarla anche in proprieta' per sussidio de' suoi urgenti bisogni e per le spese dell'ultima infermita', atteramento e funerali'; 'Se pero' non vi saranno i predetti figli, tale porzione o quarta spettera' in proprieta', ed usufrutto alla moglie

povera; quante volte non avra' dote, dotario, o porzione per ragione d'acquisti, che giunga all'importare di essa porzione o quarta'.'Non potra' il marito ricco con fare testamento, od altra disposizione privare la sua moglie povera dell'anzidetta porzione ossia quarta, in usufrutto od in proprietà' ' (26). Therefore, the quarta uxoria, whether in usufruct or in ownership, was of the nature of pars bonorum.

The necessary amount of maintenance was due to illegitmate children, even if born of an incestuous union.

Whoseever had no descendants, ascendants, illegitimate children or wife, could freely dispose of his inheritance. If, however, the testator had poor relatives up to the third degree, he had to bequeath to those who were nearest and most in need amongst them a third part of his property (27).

The action claiming the legitim, an inheritance, or or a legacy was barred by the lapse of 10 years.

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(26) XLI, XLII, XLIII, XLIV, XLVIII of Libro IV Capo I Del Diritto Municipale di Malta.

(27) XV of Libro IV Capo I Del Diritto Municipale di Malta.

Under our Municipal Law, under the 'societa' conjugale', children and descendants were entitled to the 'terza figliale'; and under the system of the community of Acquests to the legitim according to the 'jus commune'. Also entitled to a legitim were the ascendants, in defect of descendants and the 'parentado povero e miserabile' to the third degree inclusive, in defect of descendants.

Under the system of the 'Societa' Conjugale' the surviving spouse was entitled, if indigent, to a portion of the estate of the predeceased spouse fixed by the Court according to the circumstances of the case.

On 5 November 1831 a Commission was appointed to prepare 5 Codes of Law, and after much discussion and deliberation the Codes we have today were promulgated. By time, these were amended and the law of succession together with the other provisions relating to Civil Law were incorporated in Ord. 7 of 1868 which later in the 1942 Revised Edition of the Laws of Malta became Chapter 23 (Civil Code). Though modified the Roman system remains the broad basis of Maltese Law and a powerful source of interpretation.

CHAPTER 2

LEGITIM

In our law, the institute of Legitim is dealt with in the Civil Code (Chapter 23 of the Revised Edition of the Law of Malta, 1942) under Title III entitled "Of Successions" of Part II of Boot Second ('Of Things'). The heading of Subtitle I is "Of Testate Succession" and as a subheading to this we find provisions entitled "Of Wills" (Sections 625-632), "Of Legitim and Disherison" (Ss. 652-667), "Of the Rights of the Surviving Spouse and of Illegitimate Children" (Ss. 668-683) and "Of the Abatement of Testamentary Dispositions Exceeding the Disposable Portion" (Ss. 684-690). The most important and relevant of these sections will have to be examined in order to see what the real notion of the right of Legitim in the present Law is.

OF THE RIGHT TO DISPOSE

As a broad principle S. 651(1) deals with that property whichmay be disposed of by will by the testator and states:

"Where the testator has no descendants, ascendants, spouse (1) or illegitimate children, he may dispose by

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(1) i.e. 'wife or husband' (Ord. 7/1868, Art. 312).

universal or singular title of the whole of his estate in favour of any person capable of receiving under a will".

So, as a rule the right to dispose by will is not restricted since it is an element of the right of ownership itself which includes, besides the 'jus utendi et abutendi', also the 'jus disponendi': any person may, therefore, dispose by will or donation of the whole of his estate in favour of any person capable of receiving under a will or by donation.

LIMITATION OF THE RIGHT TO DISPOSE

However, subsection 2 of Section 651 limits the testator's right in certain cases, by providing that:

"Where the testator has descendants, ascendants, spouse or illegitimate children, the disposable portion of his estate (2) shall be that which remains after deducting such share as is due to the said descendants, ascendants, spouse or illegitimate children under any of the provisions of Sections 652 to 690".

So, the law here in Section 651(2) places all portions which in reserves in favour of the abovementioned

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(2) i.e. 'the portion of his or her disposable property (Ord. 7/1868, Art. 812).

relatives on the same footing and does not differentiate, in as much as the testator is limited in disposing in in any of those cases where such relatives live. Therefore, as a broad principle, the volition of the testator is limited by the presence of any of these relatives.

"This restriction imposed by law (Section 652(2)) on the right to dispose freely of one's property is founded on the very function of property which serves to enable the owner to fullfil his obligations. When the testator has persons who are closely related to him by consanguinity or affinity, his duty towards them is a positive and not a hypothetical one founded on social and domestic relationship: this duty is, therefore, raised by law to a legal obligation ... It is equally certain that a person is bound to provide for those to whom he owes his existence as well as for the spouse" (3).

Therefore, the deceased's estate, under these circumstances, that is, if the testator has descendants, ascendants, spouse or illegitimate children, is divided into two portions, one of which is reserved to these relatives and devolves on them by operation of law, and

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(3) Stencilled Notes, Prof. Giovanni Caruana, p. 995.

the other is the disposable portion of which the testator may freely dispose. Infact, our Court of Appeal on the 30th March 1936 in the case G. Borg v. M. Borg (4) stated:

"Is-sistema tal-ligi vigenti taghti lil kwalunkwe individwu kapaci d-dritt li jiddisponi ghal wara mewtu minn gidu liberament, sa kemm ma jilledix il-legittima jew rizerva li hija dovuta lil certi persuni determinati mill-ligi ... Ir-regel mhux obbligat ihalli lill-martu aktar mir-rizerva ... kull ma huwa jhallilha aktar mir-rizerva hija ghandha dritt tikkonsegwieh, bil-kondizzjoni, pero', li toqghod ghall-volonta' tieghu fuq il-mod u l-kwoti li huwa iddispona minn hwejgu".

Also, in another judgement delivered by the Court of Appeal on the 24th February 1930 in the names of Avvocato Vassallo vs. Mallia (5) it was stated:

"Il testatore puo percio' lasciare per testamento tutto i suoi nobili e immobili, sino alla concorrenza della disponibile, e riservare pel legittimario solo beni mobili o immobili".

Therefore, it is clear that the testator's estate, if he happens to have any of the close relatives mentioned,

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(4) Collected Cases: Volume XXIX, I, 589.

(5) Collected Cases: Volume XXVII, I, 451.

is automatically divided into two parts: the disposable portion, which is arrived at after deducting the share or shares due to the said relatives and of which the testator can freely dispose of as he deems fit, and the non-disposable portion, of which he cannot dispose and which besides being specifically reserved to these, devolves on them by operation of law.

As a matter of fact, once it is established that the testator has any of these relatives, there is a procedure by which their portion is calculated and this will thus indicate the other part of his estate which he is free to dispose.

THE LEGITIM DUE TO DESCENDANTS AND ASCENDANTS

DEFINITION OF LEGITIM AND ITS IMPLICATIONS

Before examining the real nature of the right of legitim, a vague idea or definition of the subject under discussion would help. A brief and scanty definition of the institute is this: "Legitim" is a right given by law, in testate succession, to certain members of the family to receive a portion of the estate of the decujus whether this is the will of the latter or not - this right is only lost in case of disherison (vide Vol. V, p. 605).

That the legitim is a right saved by law can be seen from the following example: if the father does

not want to leave anything from the disposable portion to one of his sons, andstates in his will that the latter is to take the legitim only, here the son takes the legitim because of the right given to him by law ('ex lege') and not because it was left to him by his father - in fact, the legittimary takes his portion of legitim from the non-disposable one.

The legitim is also only relevant in testate succession and does not play a part in successions 'ab intestato'. Thus, in Debono vs. Teuma (6) of the 28th October, 1899 it was clearly stated that:

"E' di diritto espresso che la legittima non ha luogo nella successione intestata, ma nella sola testamentaria ..." (vide also Vol. XXX, I, 240: Bartolo vs. Camilleri).

Now, coming back to the provisions of our Civil Code, the law in Section652(1) starts by giving a definition of legitim as 'a portion of the property of the deceased which is saved by law to the descendants. and on failure of descendants, to the ascendants of the deceased" (vide Volume V, p. 564).

Immediately, one notices that the 'portion'

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(6) Collected Cases: Volume XVII, II, 137.

mentioned in Section 652(1) is reserved or 'saved' by law. Therefore, the testator is not obliged to provide for it specifically in his will and if he disposes also of the non-disposable portion, the law protects the descendants or ascendants by giving them a legal remedy against the heir thus ensuring that they get the legitim.

Also, one can realise that in defining "legitim" the law has not included the surviving spouse and illegitimate children but these are protected in another way in as much as the law 'reserves' a portion of the estate to them.

Legitim, therefore, is only bestowed upon the descendants and ascendants and it forms a part, though not the whole, of the indisposable portion of the property of the deceased's estate since according to Section 651(2) the disposable portion is only obtained after deducting the share due to the descendants, ascendants, spouse or illegitimate children. Infact, it was stated by the Civil Court in Dr. Gravagna vs. D'Amico (7) of the 31st October, 1871 that:

"La legittima e' considerata quasi oes alienum", that is, it is part of the non-disposable portion which

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(7) Collected Cases, Volume V, p. 605.

portion the testator cannot alienate because it is "saved by law to the descendants and ... ascendants".

After having given a definition of legitim and explained its main characteristics, I now propose to deal firstly with the nature of the right of legitim, in the sense of whether it is 'pars bonorum' or 'portio hereditatis'. The legitim here referred to is that due to the descendants and ascendants.

THE NATURE OF THE LEGITIM DUE TO DESCENDANTS AND ASCENDANTS

From a cursory look at Section 652(1) one would conclude that the nature of the right of legitim, in the strict sense of the word, seems to be more a right of credit emanating from the deceased's duty of fulfilling his obligations towards his relatives. However, a further examination of this right is imperative.

It has been stated that "Legitim is a portion of the property of the deceased ...". So, what is the real nature of the right of Legitim (that is, of the descendants and ascendants) ?

In Bugeja Lombardo vs. Bugeja Lombardo of the 4th January 1881 (8) it was stated by the Civil Court

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(8) Collected Cases: Volume IX, p. 297.

that:

"La legittima, secondo la legge di Malta, e' una porzione dei beni del defunto, e non gia' quota di (o porzione dell') eredita, per cui non sono applicabili teorie e ragioni, che la presuppongono quota ereditaria ...".

Also in Micallef vs. Fenech the Court of Appeal on the 6th April 1910 (9) after repeating the exact words quoted in the last mentioned judgement, added:

"e quindi la personalita' giuridica del defunto viene per via di continuazione transfusa nell'erede di lui, e non gia' nel legittimario, nemmeno per una parte corrispondente alla misura della legittima".

This judgement, with apparently the same wording, was reaffirmed in the judgement Sant Fournier vs. Sant Fournier (delivered on 11th July 1932 by the Civil Court First Hall) (10) which judgement makes reference to A. Micallef vs. C. Fenech.

There were other later judgements all repeating this fundamental principle and amongst these we find two judgements between the same parties but both decided

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(9) Collected Cases: Volume XXI, I, 196.

(10) Collected Cases: Volume XXVIII, II, 251.

by the First Hall - that is, A. Zammit vs. J. Apap (11), and another decided by the Court of Appeal on the 10th June 1949 in the names of C. Farrugia vs. C. Mintoff (12).

The first two judgements stated that "il-legittma hija sehem tal-gid inholli mill-mejjet, izda mhijiex sehem tal-wirt tieghu". The other judgement reaffirmed the principle that "Il-legittimarju ma hux eredi; imma langas huwa kreditur ta' l-eredita'; huwa biss ghandu porzjoni mill-boni li halla d-decujus li hija rizervata lilu mill-ligi". Once the legitim is "a portion of the property" ('sehem tal-gid') and not a part of an inheritance ('sehem tal-wirt') one cannot but conclude that the nature of the right of legitim (that is, that due to the descendants and ascendants) partakes of 'pars bonorum' and not of 'portio hereditatis'.

There are some very important rules relating to both Legitims (i.e. that of the descendants and ascendants) which help further in the research for the nature of the right of legitim. These rules emanate from Section 652(2) and from the principle that Legitim is a right of

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(11) Collected Cases: Volume XXVIII, II, 484.

Collected Cases: Volume XXIX, II, 25.

(12) Collected Cases: Volume XXXIII, I, 472.

succession 'causa mortis'.

The first rule is that the right to the legitim arises on the death of the testator and not before. Another rule is that no person may claim the legitim before the succession of the deceased is opened. Until then, no one may impeach any act done by the decujus which is prejudicial to the legitim, notwithstanding that such acts consist of inofficious donations which have already taken effect.

Again, it is not lawful to make agreements of renunciations relating to the legitim during the lifetime of the testator, since the future succession of a living person cannot form the subject matter of an agreement or of a renunciation. This rule suffers certain exceptions where the renunciation is made in contemplation of marriage or upon the taking of religious vows (S. 1027). Donations made by the deceased in favour of a person entitled to the legitim are not only outside the operation of this rule but are considered as made on account of the legitim.

It is obvious that the person entitled to the legitim must survive the testator saving the effects of representation.

Therefore, after having seen the definition of legitim enunciated in our Civil Code and the relevant

judgements on this point, the nature of this right of this right of legitim becomes clear. In our law, legitim (that is, the right reserved in favour of descendants and ascendants) is of the nature of 'pars bonorum' ('una porzione dei beni del defunto') and not of that of 'portio hereditatis' ('quota di eredita'). Therefore, our right of legitim is different, as regards its nature, from that contemplated in Article 808 of the Italian Civil Code, 1942 - infact, as will be clearly seen in more detail when dealing with this in the last chapter, the notion of the right of legitim in Italian law is that of 'portio hereditatis' and not 'pars bonorum'.

CONSISTENCY OF LEGITIM

On examining the manner in which the legitim of descendants and ascendants is due, the real nature of this right emerges more clearly. The relevant provision, from which two very important rules arise, is Section 657.

The first rule, which is found enunciated in Section 657(1) is that:

"The legitim is due in full ownership, and it shall not be lawful to encumber it with any burden or condition". This is an exact reproduction of Art.318 of Ord. VII of 1868(13).

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(13) Art. 318 "La legittima e' dovuta in piena proprieta' e non puo' il testatore imporvi alcun peso o altra condizione".

This Section 657(1) must be considered in conjunction both with Section 657(2), which will be considered shortly, and with Section 652(1). This is the procedure followed by our Courts in the decision of cases because in this way the nature of the right of legitim emerges even more clearly.

Therefore, the right of legitim is a right of ownership of 'a portion of the property of the deceased which is saved by law' - so, the nature of legitim is that of 'pars bonorum'. It is a right given expressly by law which places the legittimary on the footing of co-owner together with the heirs who, in effect, are the owners of the disposable portion of the deceased's property. However, the co-ownership just mentioned relates only to the extent of the legitim and no further.

The law states that the legitim is to be free from burdens or conditions, because any burden diminishes the value of the property as well as the benefits accruing therefrom whilst any condition makes the right to the property uncertain.

The Court of Appeal in Cassar vs. Cassar, (14)

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(14) Collected Cases: Volume V, p. 564.

decided as early as 1871 (16 June) and which dealt with a plea for Legitim raised by Anna Cassar, decided that:

"Secondo il diritto comune (i.e. the law in force at that time, Ord. VII, 1868) ... alla madre rimasta superstite tra gli ascendenti prossimiori e' dovuta la legittima, nell'ammonto della terza parte di tutta l'eredita', ...".

Prima facie, one would think that the Court here is declaring that the nature of the right of legitim partakes of 'portio hereditatis' because it uses the words "... parte di tutta l'eredita'," but the same Court later in the judgement goes on to explain that the portion mentioned is "dell'asse ereditatrio, ossia di tutti i beni in piena proporieta', senza alcun peso o condizione dedotti bensi' i debiti e le spese funerarie". Thus, it can be clearly seen that the nature of this right is of 'pars bonorum'.

CAUTIO SOCINI VEL GAULDENSIS

However, the only exception to the rule that the legitim is due in full ownership and that the testator cannot encumber it is found in Section 658. Infact, subsection (1) of this section provides:

"Where the subject of the testamentary disposition

is a right of usufruct or a life annuity, and it appears to the persons entitled to the legitim that the value of such usufruct or life-rent surpasses the disposable portion of the estate of the testator, they shall only have the option either to abide by the testamentary disposition or to take the share due to them by way of legitim free from every charge, on abandoning in favour of the disponees of the usufruct or life-annuity the full ownership of the disposable portion". . .

Sub-section 2 further adds:

"Where any persons entitled to legitim elects in his own interest to abide by the testamentary disposition it shall, nevertheless, be lawful for any other of such persons to elect to take the legitim on abandoning, as aforesaid, the disposable portion".

Therefore, by means of Section 658 the legislator wanted to avoid any uncertainty that may arise in valuating usufructs and life annuities and therefore wanted to establish a uniform rule for all cases.

This disposition, which apparently contradicts the principle that the legitim should be unburdened, is justified because although the legitim is burdened by a uusufruct or life annuity the property comprised in it is of a larger amount then the law gives the legitimary

in ordinary cases and in either case the person entitled to the legitim is completely free not to accept such disposition and only retain the legitim on abandoning the disposable portion. This is, infact, a case where the legitim exceeds the non-disposable portion.

As was stated in Calleja vs. Cutajar (15), the words of the law:

"it appears to the persons entitled to the legitim that the value of such usufruct or life rent surpasses the disposable portion of the estate of the testator", must not be understood in the sense that "trid issir stima per mezz ta' periti biex jigi stabilit jekk ikun hemm dik l-eccedenza bejn iż-żewġ valuri", but it must be understood in the sense that the legittimaries 'jistghu jezercitaw id-dritt ta' dik l-ghazla jekk mill-kalkoli li huma jaghmlu jidhrilhom li jkun aktar vantaggjuz ghalihom li jaghmlu - kalkolu li huwa pero' mholli ghall-arbitriju taghhom(16).

However, although not all the text-writers perfectly

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(15) Collected Cases: Vol. XXXIII, II, 382: 30/3/1949, Civil Court.

(16) This was also interpreted in the same way by the Court of Appeal in the case Depiro v. Micallef delivered on the 28th November 1888 and reported in Volume XII, p.90, especially at p.94 second column.

agree with this, the great majority of them are in favour of this interpretation. Infact, Giordano (17), when commenting on Article 833 of the Civil laws of the Due Sicilie, which is substantially the same as our Section 658, after expressing the same interpretation abovementioned says:

"Quando non e' necessaria la perizia, ma possono costoro (i riservatari) valersi del beneficio dell ' articolo 833, quante volte nel calcolare i loro interessi credono piu' vantaggioso per essi di abbandonare la proprieta' della porzione disponibile, anzi che ritenerla col peso imposto" (18).

Some text-writers, especially French, say that proof that the value exceeds the disposable portion must be brought forward - a phrase that came to be interpreted as 'porzioni disponibili fl-uzufrutt'. But, in the present case, the Court argued, that even if it had to propound this theory, still there would have been no necessity for this proof, because in this case, the defendant received

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(17) Commenti sul Codice Civile Delle Due Sicilie.

(18) Pacifici - Mazzoni in the 'Commentario al Codice', Successions, Volume 4, paragraphs 103 and 104 - agrees with Giordano's interpretation.

a general usufruct on the whole of the disposable portion.

So, once the legitim of the plaintiffs was burdened by this usufruct, and once the plaintiffs, after making their calculations, think that it would be of more advantage to them to give up that property of the disposable portion than keep the same as burdened by the testator, they have the right to act in accordance with the rule established in Section 658, which section was introduced to cater for uncertainties which derive from the calculations of the value of usufructs and life annuities.

The second important rule which emanates from section 657 and which shows further the nature of the right of legitim under our law, is found in sub-section 2 which states:

"The legitim is computed on the whole estate, after deducting the debts due by the estate, and the funeral expenses".

Here, we see that the legitim is further protected by law.

This sub-section clearly indicates that the right of legitim subsists over and is a portion of each and every object comprised in the inheritance ('pars bonorum'), whether movable or immovable and that, therefore, two

consequences arise: the first is that the legitim is due in kind, and the second is that the legittimary is definitely, according to law, a co-owner with the heirs up to the extent of his legitim. Being due in kind, the legitim is not a mere debt due to the person entitled to it from the heir, nor a right of credit as it is in some foreign laws, like in Germany and Scotland, but it is a right of ownership. Thus, the law makes it perfectly clear that this institute is a right of co-ownership ('pars bonorum') and not a part of the inheritance ('pars hereditatis'). Thus, the words 'computed on the whole estate' in Section 657(2) must be read in conjunction with the definition of legitim in Section 652(1) which sub-section uses the words 'legitim is a portion of the property of the deceased ...'.

CASE LAW RELATING TO SECTION 657(1) and (2)

Our Courts have had many occasions on which to enunciate and explain further the two abovementioned fundamental rules relating to how the legitim is due and from which the nature of this right emerges more clearly.

In the judgement delivered on the 6th April, 1910: Not. Micallef vs. C. Fenech (19), the Court of Appeal, after repeating Section 657(1) and (2), added that:

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(19) Collected Cases: Volume XXI, I, p. 196.

"... la legittima e' una porzione dei boni del defunto e non gia' una porzione dell'eredita', e quindi la personalita' giuridica del defunto viene per via di continuazione, trasfusa nell'erede di lui, e non gia' nel legittimario nemmeno per una parte corrispondente alla misura della legittima". This, therefore, shows that the legittimary is not an heir (and so legitim is not of the nature of 'pars hereditatis'), and therefore, he can either be a co-owner and this is the prevailing opinion of our Courts as well as the impression which the law given when it says that the legitim is due in kind, or else a simple creditor. The latter possibility does not seem to be acceptable especially in the case when the legittimaries concerned are descendants or ascendants or the surviving spouse. Thus, the nature of legitim is not a right of credit.

In Cortis v. Dottrin delivered by the Court of Appeal on the 13th June 1879 (20) it was clearly enunciated that:

"La legittima si deve, secondo la legge, calcolare sull'intero patrimonio lasciato dal defunto e sopra

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(20) Collected Cases: Volume VIII, p. 795.

tutt' altri beni contemplati nell'articolo 318 dell' Ordinanza No. VII del 1868 (i.e. now Section 857), e nel computo di tale legittima ... non si devono calcolare a suo debito i fruitti dei beni pervenutegli sotto tale condizione". This principle was reasserted also on Appeal (21):

"Per la liquidazione di detta legittima si devono prendere in calcolo tutti i beni componenti l'asse ereditario del defunto Lorenzo Dottrin, meno quelli lasciati in legato a Teresa Dottrin nel testamento del detto Lorenzo; perche' quel legato, essendo rimuneratorio, fatto cioe' in pagamento e retribuzione di servigi, non e' compreso tra i legati a titolo gratuito contemplati nell'articolo 318 (now Section 857). This is so because when, in dealing with legitim, a question of legacy left as compensation arises, it is sufficient if there is proof of any services rendered; as for the amount of compensation, one must rely on the discretion of the testator, in lack of proof that the legacy was excessive.

Also, in H. Cavarra vs. E. Depiro (22) the Civil

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(21) Collected Cases: Volume IX, p. 270.

(22) Collected Cases: Volume XXIX, II, 913.

Court on the 31st January 1936 after repeating the principle in Section 657(2), continued by stated that "sopra tutti i beni ..." includes both movables and immovables.

Moreover, according to Section 657(1), the legitim must not be encumbered by the testator; and also, by virtue of Section 657(2), before the legitim is computed the debts due by the estate and those incurred for funeral expenses are first deducted. This was the basis of the judgement delivered by the Civil Court in the case Bugeja Lombardo vs. Bugeja Lombardo (23) of the 4th January, 1881. This latter judgement stated:

"... essa (the legitim) e' dovuta in piena proprieta' senza pesi ne' condizioni, si calcola sull'intero patrimonio, compresavi ogni specie di larizione gratuita, colla sola deduzione dei debiti e delle spese funerarie ... Le spese funerarie si deducono dall'asse del morto di preferenza anche alla legittima, per la ragione stessa che godono di privilegio generale anche rispetto ad altri creditori, ma perche' godono di quel favore della legge, la stessa le circoscrive a quelle

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(23) Collected Cases: Volume IX, 297.

che, secondo il costume ed entro i limiti della decadenza, si fanno pel trasporto e per la sepoltura del cadavere e per gli uffizi di religione".

Infact, in the present case the Court felt that the expenses incurred for high masses during certain specified days could in this case be paid out of the assets before computing the legitim.

So, in the Court's judgement such expenses were to be deducted before computing the legitim, but were these expenses too excessive, these would be reduced to the amount normally incurred in such circumstances.

Again in C. Farrugia vs. C. Mintoff (24), decided by the Court of Appeal on the 10th June, 1949, the Court repeated the principle found in many other judgements that the legittimary is neither an heir nor a creditor of the inheritance but onlyhas a right to a portion of the property left by the decujus which is reserved to him by law (25), and also stated that this legitim

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(24) Collected Cases: Volume XXXIII, I, 472.

(25) Also repeated in Volume XXIX, II, 25 (First Hall, 18th October 1934): A. Zammit vs. J.L. Apap; and in Volume XXIX, II, 1048 (First Hall, 30th March 1936): A. Micallef vs. G. Grech.

"hija dovuta fi proprieta' assoluta - 'in piena prorieta'". U t-testatur, peress li hija porzjoni indisponibili, ma jistax jimponi fuqha l-ebda piz jew l-ebda kondizzjoni; il-legittima ghandha tigi kalkolata fuq il-patrimonju intier, dedotti d-djun u l-ispejjez funerarji".

Furthermore, also in the two judgement: Dr. F. Gravagna vs. Baronessa D'Amico (26) and M. Ellul vs. F. Vella Zammit (27), the same principles in Section 657(1) and (2) were repeated by the Civil Court but in both cases the Court added " ... i figli non possono essere privati dalla legittima e alla legittima non si possono mettere gravami - tuttavia pero' nulla osta che un figlio accetti la disposizioni del padre sia espressamente, sia tacitamente, sia col non reclamare in vita come pure nulla osta che un figlio lasciasse decorrere un tempo sufficiente perche' l'azione per la legittima o suo supplemento restasse estinta". These exact words were again repeated in Appeal (28) from the judgement of the First Hall in the case Dr. Gravagna vs. D'Amico.

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(26) Collected Cases: Volume V,p.605:31 October 1871.

(27) Collected Cases: Volume XXII, II, 114: 29 October 1913.

(28) Collected Cases: Volume VII,p.316:15 February 1875.

In Dr. Vassallo vs. G. Mallia (29), delivered by the Court of Appeal on the 24th February, 1930, it was stated that:

"... nel patrimonio del decujus, poi, si deve comprendere tutto cio' di cui il testatore avesse disposto a titolo gratuito, anche in contemplazione di matrimonio ...".

Thus, when the law states that "the legitim is computed on the whole estate" of the deceased, the word "estate" includes all that which the testator has given away gratuitously, even donations in contemplation of marriage. Therefore, the nature of the right of legitim in our law, being that of 'pars bonorum', strictly speaking, the legittimary even has a part of each of the things which the testator gave up gratuitously.

CAN THE TESTATOR RESERVE TO THE LEGITTIMARY ONLY MOVABLE OR ONLY IMMOVABLE PROPERTY ?

As has already been stated, once the right of legitim is due in full ownership and is computed on the whole estate of the testator ('pars bonorum'), this means that the legittimary is a co-owner with the heirs up to the extent of the legitim and so strictly speaking

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(29) Collected Cases: Volume XXVIII, I, 451.

has a portion over each and every object, whether movable or immovable, comprised in the estate of the deceased. But, can the testator, for example, reserve to the legittimary, merely movable property, or, for that matter, only immovable property ?

This very important problem was examined and decided in the case Avv. Vassallo vs. G. Mallia (30). In this judgment the Court of Appeal on the 24th February 1930 held that:

"La legittima e' dovuta in natura, pero' il testatore ha il diritto di riservare per il legittimario una determinata specie di beni, anzicche' una quota di tutti i suoi beni (31). It testatore puo' percio' lasciare per testamento tutti i suoi mobili o immobili, sino alla

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(30) Collected Cases: Volume XXVII, I, 451.

(31) Pacifici Mazzoni in his 'Delle Successioni', Vol. IV (1875 Edition) at p. 62 agrees perfectly to this: "... il testatore ... non e' ugualmente obbligato di riservare loro la meta' o un terzo di tutti e singoli i beni compresi nel patrimonio, e neppure dei beni di tutte e singoli le specie, mobili, immobili, denaro ... Dall'altra parte la legge riserva per legittima una quota e non date specie di beni; solche' adunque il decujus non disponga di tale quota di beni, rimane nei termini della legge".

concorrenza della disponibile, e riservare pel legittimario solo beni, mobili o immobili".

This case is interesting because it firstly states that, since the legitim is due in kind, it implies that the legitim is a right existing over each and every object comprised in the inheritance, and then states that the testator can reserve to the legittimary only a determined kind of property.

In practice, such a disposition could be extremely beneficial to the heirs in as much as so long as the legitimaries do not take action the heir is tied down for a period of ten years during which period he cannot alienate any property. Infact, since the nature of the right of legitim is one of co-ownership, the heir cannot choose any property he likes in order to tender it as payment of the legitim because the person to whom it is due is entitled to a portion of each and every of the different things of which the deceased's estate is made up.

Therefore, the descendants' or ascendants' right to the legitim limits the testator's power of disposal in respect only of the amount but not of the kind of property which he owns. That is, the legitim may very well comprise, in practice, of only movables or only immovables.

The law does not bind the testator to ensure that the legitim should consist of both movable and immovable property. The only limitation imposed upon the testator is that he must put aside a non-disposable amount of property, but the law does not bind the testator to reserve a specific kind of property.

Therefore, although the right of Legitim is a right of co-ownership, that right of co-ownership can just as exist over a sum of money deposited in a Bank as much as over immovable property.

Therefore, the legitim is due in kind, but unless the testator had reserved a determined part of his estate to the legittimary by way of his right of legitim, the legitim would not have been constituted on some particular object which is certain and determined, but could be constituted over all the estate left by the deceased person. Infact, the legitim 'viene sodisfatta, dopo la liquidazione di detto patrimonio, con l'assegnazione in natura di tanti beni quanti equivalgono all'importo della legittima come liquidato, dovendorse la scelta, in assenza di comune accordo degli interessati, farsi arbitrio boni viri dalla Corte'. This was expressed by the Civil Court First Hall on the 15th November 1933

in the case Zammit vs. Apap (32).

Another important rule, not expressly found in our Civil Code provisions, was enunciated in the judgement Bugeja vs. Vella (33) delivered by the Civil Court, First Hall, on the 30th August, 1947. The Court said:

"Huwa minnu li l-legittimarju ghandu dritt ghall-legittima minn kollox, cjoe' minn dak kollu li jezisti fil-patrimonju tad-decujus; imma dan mhux possibili li jsir meta ma jkunx hemm fl-assi jew massa affarijiet jew beni bizzejjed ta' kull xorta. U ghalhekk l-assenjazzjoni tal-legittima f'kazijiet simili ssir b'mod prattiku li tipproponi l-Qorti, salv ir-rikors ghal-licitazzjoni, jekk lanqas dan ma jirnexxi". Therefore, this shows that the legitim is more related to the quantative rather than the qualitive - that is, as long as the value is paid there is no need for strict adherence to the assignment of a certain quality of property whether movable or immovable.

Furthermore, it was stated by the Civil Court, First Hall in the case Sammut vs. Refalo (34) decided

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(32) Collected Cases: Vol. XXVIII, II, 484.

(33) Collected Cases: Vol. XXXIII, II, 88.

(34) Collected Cases: Vol. XXXVIII, II, 551.

on the 30th June 1954 that:

"Id-debitur tal-legittima huwa l-eredi u ghalhekk f'kawza fejn tigi mitluba l-likwidazzjoni u l-assegnazzjoni tal-legittima, hemm bzonn li jigi verifikat minn huma l-eredi ... Is-suggeriment li l-legittima tista' tigi sodisfatta b'ammont likwidu flok in natura huwa kontra l-ligi molto piu' meta ma jirrizultax il-kunsens ta' l-interessati kollha, jew meta fost l-interessati jkun hemm xi inkapaci li ma jistax jaghti dak il-kunsens; kif lanqas ma huwa accettabili s-suggeriment li l-valur ta' l-istabili jigi stabbilit billi jigi kapitalizzat il-kera, ghax dan mhux dejjem kriterju zgur ta' valutazzjoni. U ghalhekk, ladarba l-fond ma jkunx divizibili komodament u minghajur hsara, il-fond komuni ghandu jinbiegh f'licitazzjoni, billi huwa gust li l-legittimarji jibbenefikaw mill-konkorrenza tal-barranin fil-bejgh ta' l-istess fond".

This shows that the heir, on the other hand, has no arbitrary discretion of paying off the legitim in cash so that if there is no agreement with the legitimaries on the mode of payment the property which cannot be divided will have to be sold and the proceeds will be divided accordingly. This is because, since the legitti- is a co-owner it is he who has the option of chosing to receive payment in liquid cash or in some other form.

CHAPTER 3

THE "LEGITIMA PORTIO" OF THE SURVIVING SPOUSE AND THE PORTION DUE TO THE ILLEGITIMATE CHILDREN

In defining the other types of reserved portions the law uses a separate heading entitled "The Rights of the Surviving Spouse and of Illegitimate Children", and the law does not say that their right is that of 'Legitim' as is the case with the descendants and ascendants.

"LEGITIMA PORTIO" SAVED IN FAVOUR OF THE SURVIVING SPOUSE

The term 'Legitima Portio' is only used in the marginal note of the law in Sections 672 and 673 but such headings do not have legal force and the term itself is not used any where in the actual wording of the law.

Now, in our law, this institute is based on the ground of mutual affection and especially on a humanitarian feeling for the surviving spouse where such spouse is poor and the deceased is relatively wealthy. Our provisions are also influenced by tradition, as under Roman Law a portion of the property of the deceased was saved in favour of the surviving spouse under the same condition, that is, indigence.

Under our law, the "legitima portio" is due to the surviving spouse who was validly married to the deceased, and, according to the prevailing opinion, presumably, to the spouse in good faith in the case of a putative marriage. The two conditions of indigence and of insufficiency of means are required (1). Infact, section 671, which will be examined later, establishes the manner in which the existence or otherwise of the said conditions is to be determined, and states that if the surviving spouse is not indigent or has sufficient means his or her rights are limited.

RIGHTS OF SURVIVING SPOUSE

Firstly, it must be stated that according to Section 668(1):

"Where a deceased spouse is survived by children or other descendants, legitimate or legitimated by a subsequent marriage, or by adoptive children or their descendants, the surviving spouse shall be entitled to the usufruct of one-half (2) part of the estate of the

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(1) Stencilled Notes, Prof. G. Caruana, p. 1010.

(2) Amended by Act XLVI of 1973; before 1973 the 'legittima porzio' was one-fourth in usufruct.

deceased" (3).

However, in terms of Section 670:

"On failure of children or descendants as stated in Section 668, the surviving spouse shall be entitled to one-fourth part of the estate in full ownership (4).

Thus, in G. Borg vs. M. Borg (5) delivered on the 30th March 1936, the Court of Appeal stated:

"Il-pozizzjoni tal-mara in konfront ghall-wirt ta' zewgha tista' tigi riassunta hekk:- Ir-ragel mhux obbligat ihallilha aktar mir-rizerva (Section 651), jigifieri l-uzufrutt tal-kwart (now, 'nofs') ta' gidu jekk ihalli tfal jew dixxendenti legittimi jew adottivi (section 668), jew l-istess kwart in pjena proprjeta' jekk ma jhallix minn dawn it-tfal jew dixxendenti" (Section 670).

Moreover, it was stated in Serra v. Serra (6), on the 12th October 1923, that:

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(3) Collected Cases: Vol. XXXII, II, 380, M. Grech v. Scerri, 19th June 1946, First Hall.

(4) Collected Cases: Vol. XXIX, I, 589: G. Borg v. M. Borg, 30th March 1936.

(5) Collected Cases: Vol. XXIX, I, 589.

(6) Collected Cases: Vol. XXV, II, 447.

"Sebbene al coniuge superstite, essendovi prole, non e' lecito ricevere dal coniuge supersitie piu' del quarto in proprieta', la legge non vieta che esso coniuge superstite non possa ricevere piu' del quarto (now half) in usufrutto. Pertanto il lascito in usufrutto al coniuge superstitie - essendovi prole - di piu' del quarto dell'asse del coniuge predefunto, con facolta' di alienare i beni usufruiti, e' nullo solamente in quanto alla facolta' di alienare piu' del quarto ed e' valido per tutt'altro".

So, when the testator leaves children or descendants the least which the surviving spouse can receive is one-half in usufruct of the testator's property. This means that the testator can decide to leave a greater amount of property in usufruct. In fact, it very often happens that in wills 'unica charta' the testators bequeath reciprocallyto the surviving spouse amongst them the usufruct of the whole property of the predeceased spouse.

PORTION SURVIVING SPOUSE MAY RECEIVE BY WILL WHERE DECEASED LEAVES CHILDREN OR DESCENDANTS

Moreover, the law, in the case where the testator leaves children, allows a bequest of not more than ½ in ownership. This property received in ownership does not deprive the surviving spouse from receiving

the remainder of the testator's property in usufruct.

This principle is found in Section 640 which states that:

"Where the testator leaves children or descendants ... the surviving spouse cannot receive, in ownership, more than one-fourth of the deceased's property".

A case in point was that mentioned above in the names Serra vs. Serra and this principle was also reiterated in the judgement E. Caruana vs. G. Micallef (6) (7) delivered on the 30th June 1891. Infact, the Civil Court in the latter judgement stated:

"La legge nostra attualmente vigente nel vietar al conjuge superstite, quando il testatore lascia figli e discendenti, di ricevere 'in proprieta' piu' del quarto dei beni del defunto, non vieta allo stesso conjuge di ricevere in "usufrutto" altre sostanze del defunto".

Infact, Section 640 is an exact reproduction of Section 301 of Ord. VII of 1868: "e qualunque disposizione testamentaria fatta a favore del conjuge, o

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(7) Collected Cases: Vol. XII, p. 708.

di una persona altrimenti incapace ... e' nulla in parte soltanto (Section 649), e le disposizioni testamentarie, che eccedono la porzione disponibile, sono 'riducibili' a quella porzione (Section 684)".

Furthermore, it was stated by the Civil Court on the 18th November 1920 in Not. Schembri vs. G. Morlieras (8) that:

"Non potendo quindi il conjuge superstite ricevere dal predefunto piu' del quarto in proprieta', essendovi figli, la disposizione cui e' lasciato piu' del quarto e' riducibile".

THE NATURE OF THE PORTION OF THE SURVIVING SPOUSE

In our Civil Law, the "Quarta Uxorça", that is, the right of the surviving spouse to one-fourth part of the testator's estate in full ownership, is a portion of the estate, a real right and not merely a right of credit against the heirs. That is, it partakes of the nature of 'pars bonorum' and is not a portion of the inheritance. The surviving spouse is, therefore, like a successor by singular title, and is neither entitled to the possession "de jure" of the property forming the "legitima portio", nor is he or she directly liable for the debts of the inheritance. So, the demand for the 'legitima portio' must not be in the form of payment for the

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(8) Collected Cases: Vol. XXIV, II, 308.

"riserva", but for the assignment of so much assets, in the circumstances of Section 670, or property of the inheritance which goes to make up an annual income which forms the 'reserva', in accordance with Section 668(1), or its supplement after being liquidated.

The "legitima portio" is computed after deducting the debts due by the estate, and, as it is a 'pars bonorum', it is not a mere debt claimable from the heirs of the predeceased spouse, but is due in ownership. This portion must be satisfied in kind and the heirs cannot - as in Italian Law, Article 819, satisfy it by paying a life annuity or by paying a sum of money (9).

THE "PORTION" OF ILLEGITIMATE CHILDREN

Parents are in duty-bound to provide for their children, whether legitimate (as has already been seen) or illegitimate. However, 'in order to protect society and the legitimate family', it is more expedient to meta out a different treatment to illegitimate children. In early Roman law illegitimate children could never succeed to their parents unless they were legitimated.

So, the law reserves another portion - this is due to illegitimate children acknowledged in the act of birth,

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(9) Collected Cases: Vol. XXXII, II, 380.

or legitimated by a decree of the competent authority (Court). These children are entitled to a portion of the estate of the parent who has so acknowledged them or at whose demand they have been so legitimated - Section 677(1). Such portion may be claimed both from the father and from the mother provided it results, in terms of law, that they are children of both parents. Moreover, "this right also belongs, 'jure rappresentationis' to the descendants of such children, provided that such desecendants are legitimate or have been legitimated by a subsequent marriage whenever the immediate child from whom they descend is dead, unworthy to receive or has been disinherited" (10).

In reference to the above-mentioned Section 677(1), the Civil Court in an 1891 judgement in the names of V. Pullicino v. G. Galea (11) stated:

"Le nuove leggi, intorno la successione legittima dei figli naturali ai loro genitori, si applicano in ogni caso di morte di genitori naturali avveratasi sotto il loro impero, in qualunque epoca, ed ai termini di

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(10) Stenciled Notes, Prof. G. Caruana, p. 1013.

(11) Collected Cases: Vol. XII, p. 623.

qualunque legge anteriore sia stato fatto il riconoscimento di quei figli" (12).

Section 677(1) states that "Illegitimate children ... shall be entitled to a portion of the estate of the parent ...". The operative words here are "portion of the estate" and this immediately indicates that the nature of their portion is of "pars bonorum". However, in sub-section 3 of Section 677 the law, as regards the manner in which this 'portion' can be settled, contrary to what is established in the case of descendants and ascendants and in the instance of the surviving spouse, has taken a different view - infact Section 677(3) states:

"It shall, in all cases, be lawful for the heirs to pay the share saved by law to the illegitimate children, either in cash, or in movable or immovable property of the estate, on a valuation".

Here, there is a difference from the right of legitim which is due in full ownership. The effects of this sub-section are that illegitimate children have no right to a 'pars bonorum' on the deceased's estate. Thus, their right is more in the nature of a civil debt

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(12) Gabba, lib. III, cap. XXII.

imposed on the heirs rather than of ownership. In, practice, however, until the heirs decide to pay off the portion due to the illegitimate children, this same portion can be determined and, therefore, it extends over all the property. The result is that until they are paid off they are to the amount of their portion co-owners with the heirs but this is limited up to the time when the heirs themselves decide to pay off that portion.

This sort of co-ownership above mentioned does not entitle the illegitimate children to receive payment in objects forming the subject-matter of the inheritance because the heirs can chose to pay them off in cash. It is, therefore, more in the nature of a right of credit because unlike the case of 'legitim' and 'legitima portio' of the surviving spouse, the portion of illegitimate children is not dependant for its payment on the making of a partition. As a matter of fact, 'pars bonorum' implies that each co-owner is co-owner up to his share of all things comprised in the inheritance ("pro indiviso") and co-ownership can only be terminated by partition.

On the other hand, the heirs are not tied down to the condition of effecting a partition since they

have an option of paying off the illegitimate children at any time.

The only condition imposed by law is the logical one of making a valuation before-hand and this is so in order to ensure that the property or cash handed over in payment corresponds to the full amount to which the the illegitimate children are entitled. Naturally, the heirs may choose to effect a partition and hand over to the illegitimate children property which formerly belonged to the estate of the deceased. But it is clear that such a partition is not in any way obligatory because the nature of co-ownership is not inherent in the portion due to the illegitimate children.

CHAPTER 4

LEGITIM, LEGITIMA PORTIO AND PORTION DUE TO ILLEGITIMATE CHILDREN: SIMILARITIES AND DIFFERENCES.

The Different Reserved Portions And The Nature Of Each.

At a first glance it seems that our law under the heading of Legitim also includes the portion due to the illegitimate children and that due to the surviving spouse. One will therefore have to examine whether these last mentioned portions are in reality of the same nature of the legitim due to the descendants and ascendants or whether they spring from a totally different concept. In order to arrive at some conclusion a close study of the various provisions of the Civil Code, relating to this topic, is essential.

The law in section 652(1) in defining 'legitim' has not included the surviving spouse and the illegitimate children but these are protected in another way as the law 'reserves' a portion of the estate to them. Therefore, this indicates that the portion reserved by law to the spouse and that reserved to the illegitimate children are not of the true nature of the right of legitim which is due to the descendants and ascendants, but the former two portions are of a <u>different nature.</u>

In effect, the legitim due to the descendants or ascendants when added to the rights of the surviving spouse and to those of the illegitimate children go to form that portion of the estate which the deceased cannot dispose of by will and which is usually termed the

'non-disposable' portion (and is not termed 'legitim').

Therefore, this non-disposable portion is actually divided between the proper legitim, that is, that due to the descendants and ascendants, and the portion reserved in favour of the surviving spouse and illegitimate children. So the legitim forms a part of the non-disposable portion.

Now, to indicate more clearly the difference between the legitim and the other portions, especially in relation to the different notions of these rights, one has to look at the various provisions of the law.

As already indicated, according to section 657(1), the right of 'legitim' is a right of ownership of 'a portion of the property of the deceased which is saved by law'. The legitimary is a co-owner with the heirs up to his portion. So the nature of 'legitim' partakes undoubtedly of "pars bonorum".

Again, in terms of section 657(2) the legitim is to be "computed on the whole estate ..." These words clearly show that the right of legitim (i.e. of the descendants and ascendants) subsists over each and every object comprised in the inheritance, whether movable or immovable. So, the legittimary being a co-owner, his right partakes of 'pars bonorum' and not of 'portio hereditatis'.

On the other hand, the portion due to the surviving spouse is not fixed in the sense that like the 'legitim' it must be given by title of full ownership. On the contrary, this special portion is primarily due by title of usufruct because as already stated the motive behind this institute is that the surviving spouse who is indigent should have

sufficient means of subsistence. The law itself, according to section 670, gives to the surviving spouse his or her legitima portio by title of full ownership in the exceptional case where there are no children or descendants.

Therefore, whilst as regards the children, descendants and ascendants the legitim is always due in full ownership, the title by which the portion of the surviving spouse is given depends on the presence or absence of descendants. Therefore, it is obvious that the legitim due to descendants and ascendants is hierarchically superior to the portion due to the surviving spouse. This is borne out not only by the fact that one is conditional while the other is not, but above all because the law unequivocally attributes more protection to the legitim due to descendants and ascendants, than to the portion due to the surviving spouse.

Therefore, even though both legitim and the portion are of the nature of "pars bonorum" (co-ownership), the law clearly considers legitim to be a more important claim on the estate of the deceased person. That also the legitim of the spouse partakes of 'pars bonorum' can be seen from Sections 668(1) and 670 where the law, in setting out the amounts due to the surviving spouse, uses the words 'part of the estate of the deceased' and, therefore, this "porzio" is due in kind and unencumbered and not burdened.

Where the surviving spouse receives the legittima porzio as usufruct, Section 669 provides:

"It shall be lawful for the Court to authorise the surviving spouse in order to provide for his or her maintenance, to hypothecate or alienate, wholly or in part

the portion referred to in the last preceeding section".

This provision enables the spouse to have some sort of remedy where the fruits of such usufruct are not sufficient for such spouse to live. This is also a consequence of the principle that the "legittima porzio" of the surviving spouse is based on the humanitarian aim of enabling an indigent spouse to receive adequate subsistance.

Also based on this motivating principle is Section 668(2) which subjects the "legittima porzio" to the expenses of the last illness and to the funeral expenses of the spouse who has enjoyed such portion. Again, these rights are given to the spouse since the portion is meant to provide material support and maintenance.

To further clarity the true principle on which the law reserves the "legittima porzio" and simultaneously to visualise better the true nature of the right of legitim, Section 672 ensures that if eventually the spouse ceases to possess property which had originally rendered him or her unable to claim the "porzio", on such occasion that portion is granted to the spouse:

"Nevertheless, the surviving spouse who, by reason of the property referred to in Section 671, has not received the portion of the estate saved to such spouse under Sections 668 and 670 may, if he or she, without any fault on his or her part, ceases to possess such property, demand maintenance out of such property of the predeceased spouse or may still be in the possession of the heirs of the latter, to the extent of one-half of the usufruct or, as the case may be one-fourth of the value

of such property, without prejudice to the rights of the creditors of such heirs: moreover, such property shall, in such case, be also subject to the expenses of the last illness and to the funeral expenses of the surviving spouse".

Now, in terms of Section 677(3), the heirs may pay the share saved by law to the illegitimate children, either in cash, or in movable or immovable property of the estate, after a valuation has taken place. Therefore this section deals with the manner in which the "portion" of the illegitimate children can be satisfied. As can be seen from this section the law has taken another view on the matter from that it took when dealing with the descendants and ascendants and the surviving spouse. In other words, the effect of Section 677(3) contrary to Sections 652(1), 657(1) and 657(2) (dealing with the manner in which the legitim of descendants and ascendants is due) and to Sections 668(2) and 670(relating to the way in which the legitima portio is due to the wife), is that the illegitimate children have no right to a 'pars bonorum'. The right owing to the illegitimate children is more of a civil debt which the heirs have to satisfy. However, one must point out that until the heirs satisfy their obligation towards the illegitimate children, the latter would be like co-owners with the heirs up to the amount of their share. But, still, these cannot claim that they have a right to receive their 'portio' in objects in the sense of 'pars bonorum'. Therefore, their right is more in the nature of a right of credit and so is somewhat different from the 'legitim' of the

descendants and ascendants and the 'legittima portio' of the surviving spouse.

IMPORTANT DIFFERENCE BETWEEN THE DESCENDANTS AND ASCENDANTS

Even between the proper legittimaries themselves, that is between the descendants and ascendants, the law clearly makes a further distinction because the legitim due to ascendants can never form the topic of discussion when there is the presence of descendants. Therefore, these two categories of relatives, that is, descendants and ascendants, can never compete together over the same estate for their legitim. It is either one category or the other and where there are descendants it is only these who can claim the legitim. For the purposes of the law the descendants will be totally extraneous to the picture where there is the presence of descendants. Therefore, though the law seems to indicate a priority of claim of the descendants and ascendants in Section 656(1), which states that:

"where the testator does not leave children or other descendants as stated in Sections 653 and 654, or illegitimate children legitimated or acknowledged as provided in Section 858, and is not survived by the spouse, the right of legitim shall vest in the ascendants of such testator" (1), yet in effect the priority of one over the other can never be tested in a practical case, namely because the existence of one claim presupposes the non-existance of the other.

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(1) Collected Cases: Vol. V, p.564. A. Cassar vs. P. Cassar, Court of Appeal.

Thus, while the legitim due to descendants or ascendants can be co-existant with the portion due to the surviving spouse and to the illegitimate children, the legitim due to descendants cannot, in practice, co-exist with the legitim due to ascendants. This again shows the exclusivity of the notion of legitim which the law intends to reserve in favour of descendants, and only in the absence of descendants is the legitim reserved in favour of ascendants.

IMPUTATION

It is imposed by law that the legittimaries and other persons claiming a reserved portion from the estate of the decuius must impute to their share any property which they had received from the deceased's estate during his lifetime unless the testator had, in his will, exempted such persons from the obligation of imputation. This is because the law deems that any gifts or legacies, made in favour of the various claimants, were made on account of their rights. This obligation of imputation is common to all persons having a claim over the decuius's property in order to establish whether they have infact already received the portion due to them or not. This having been settled, the various portions can be calculated and assigned.

Infact, Section 657(3) states:

"There shall be included in the estate all the property disposed of by the testator under a gratuitous title, even in contemplation of marriage, in favour of any person whomsoever, with the exception of such expenses as may have been incurred for the education

of any of the children or other discendants".

Again, the same section in sub-section (4) adds:

"The person to whom the legitim is due shall impute to it all such things as he may have received from the testator and as are subject to collation under any of the provisions of Sections 954 to 979" (2).

These two sub-sections only apply to descendants and ascendants.

Now, as regards illegitimate children, the relevant provision is Section 680. In virtue of this provision the illegitimate child shall impute to his share, besides the property bequeathed to him by will, also the property which may have been given to him by his parent during the latter's lifetime, and which is subject to collation under any of Sections 954 to 979 (2).

However, in our Civil Code, one fails to find a corresponding provision dealing with the surviving spouse. On the contrary, one comes across Section 676 which provides that any property which the testator, under any title whatsoever, had given or bequeathed to his wife, is presumed to have been given on account of her dowry and dower, unless the testator had made a declaration to the contrary.

This principle was enunciated by the Court of Appeal, on the 21st February, 1941 in the case M. Pace

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(2) Civil Code: Part II, Title III, Sub-tile III (IV: "Of Collation".

vs. G. Pace (3), in these words:

"Il-legat jew donazzjoni li jaghmel ir-ragel lil martu ghandhom jittiehdu bhala maghmula akkont tad-dota u d-dotarju, salva d-dikjarazzjoni kuntrarja".

This important rule was repeated and explained in many other earlier and later judgements (4).

Both in M. Pace vs. G.M. Pace and in C. Mintoff vs. C. Lautier (Court of Appeal, 25th May, 1942)(5), the Court went a step forward in order to define the way in which the declaration must be made. The latter judgement states:

" ... ammenoche' ma jaghmelx dikjarazzjoni espressa fit-testment f'sens kuntrarju". Therefore the declaration must be made by the deceased in his will. Also, the former judgment adds: "Biex jaghmel dina d-dikjarazzjoni t-testatur ma ghandux bzonn juza kliem sakramentali, imma bizzejjed juza kliem li juri li huwa ried imur kontra din il-prezunzjoni".

Moreover, in C. Mintoff vs. C. Lautier it was stated:

"Dina d-dikjarazzjoni hija kondizzjoni 'sine qua non'; altrimenti l-prezunzjoni hija illi r-ragel ried qabel xejn jillikwida l-obbligazzjonijiet tieghu lejn martu li jinholqu mill-kitba taz-zwieg rigward id-dota u d-dotarju". This fact was reiterated in G. Caruana vs. C. Caruana (6).

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(3) Collected Cases: Vol. XXXI, I, 31.
(4) Collected Cases: Vol. XXXI, I, 180, Vol. XXV, I,421; Vol. XXII,I,103; XXVI,II,1; XXIV,II,251.
(5) Collected Cases: Vol. XXXI, I, 180.
(6) Collected Cases: Vol. XXV,I,421:Court of Appeal: 16 April, 1923.

The two abovementioned decisions find their basis in an older judgement of the Court of Appeal decided on the 13th February, 1914 in the names of R. Debono vs. G. Debono (7) wherein it was stated: "Tale disposizione (i.e. Section 676) pero' si riferisce alle liberalita' fatte dal marito dopo la costituzione del dotario e non contemporaneamente a tale costituzione ...".

In this latter judgement the Court also stated:

".... il dotario non e' una liberalita' ma un debito del marito verso la moglie, garantito dalla legge, al pari della dote, dal vincolo dell'inalienabilita' ...".

Furthermore, in M. Zammit vs. R. Zammit (8) which case was decided by the Civil Court on the 13th October 1920, it was stated that "... se il valore del lascito, onde il marito volle gratificata la moglie, supera od anche solo uguaglia quello della dote o del dotario dovutole, essa non puo' reclamare ne' restituzione della dote, ne' il pagamento del dotario, potendo solo reclamare la differenza, quando quel lascito fosse di valore inferiore a quello complessivo della dote o del dotario, ipotesi preveduta dalla legge (i.e. a reference to Section 676), per cui il lascito si reputa fatto 'a conto' della dote e del dotario ...".

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(7) Collected Cases: Vol. XXII, I, 103.

(8) Collected Cases: Vol. XXIV, II, 251.

COMPUTATION OF LEGITIM DUE TO DESCENDANTS.

To compute the legitim due to descendants the law in section 655 gives rules for determining this. Firstly, one determines the number of children and for this purpose "children or other descendants who are incapable of receiving property by will, or who have been disinherited by the testator, or have renounced their share, shall also be taken into account in determining the number of children".

By subsection 2, except for sections 645 and 663, the portions of children or descendants who are incapable or disinherited or who renounced their share, shall devolve on the other children or descendants taking the legitim. However, a child or descendant who is instituted heir, shares the legitim with the others (subsection 4).

Now, according to section 653(1), the legitim due to legitimate children, or to children legitimated by a subsequent marriage, or to adoptive children, shall be 1/3 of the deceased's property, if such children are not more than four, or one-half, if they are five or more. The legitim is divided in equal shares among the children who participate in it but if there is only one child, he receives the whole of the aforesaid third part (subsections 2 and 3 of section 653). (9)

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(9) 'Children'used in section 653 includes"the descendants of the children in whatever degree they may stand. Nevertheless, such descendants shall only be reckoned for the child from whom they descend" (section 654).

The legitim cannot be diminished by testamentary dispositions or by acts 'inter vivos' under a gratuitious title, and is therefore computed on the whole estate as if no donations had been made.

Section 684 calls this computation a fictitious addition: "any property ..... shall then be fictitiously added."

Therefore, the global amount due as legitim to the descendants is of 1/3 or one-half depending on the number of children.

COMPUTATION OF LEGITIM DUE TO ASCENDANTS.

In the case of ascendants section 656(2) provides that the legitim consist of 1/3 of the deceased's property and is distributed thus:

(a) where both parents survive, the 1/3 is divided between them equally;

(b) where only one survives, the legitim belongs to him;

(c) where the testator is not survived by his parents, but only by paternal and maternal ascendants in equal degree, one-half of the legitim goes to the paternal ascendant or ascendants, and, the other one-half, to the maternal ascendant or ascendants;

(d) where such ascendants stand in different degrees, the legitim belongs to the nearest ascendant.

Thus, there is an obvious difference between the amount due as legitim in favour of the descendants and ascendants. In the former case the amount depends on the

number of children, while in the case of ascendants the amount is always equal to 1/3 of the estate of the deceased.

COMPUTATION OF PORTION DUE TO THE SURVIVING SPOUSE.

The amount of the portion due to the surviving spouse as has already been observed depends on the presence of descendants or otherwise, not only for the title in which the portion is received, that is, by title of usufruct or full ownership, but also for the global amount to be taken. Thus, in the absence of children, the surviving spouse is entitled to 1/4 of the estate in full ownership whilst in the presence of descendants the amount of the portion is one-half of the estate of the deceased due by title of usufruct. Therefore, here too there is a difference as regards the amounts to be received.

COMPUTATION OF THE PORTION DUE TO ILLEGITIMATE CHILDREN.

As regards the portion due to illegitimate children, if the testator leaves children or descendants, the portion is 1/3 part of the legitim to which they would have been entitled if they were legitimate; in default of such children or descendants, their portion is ½ of the said legitim (section 677(1)). So, the amount of their portion depends too on the presence or otherwise of legitimate children.

Subsection 2 adds: "In computing the legitim for the purpose of establishing the share due to each of the illegitimate children, the rule in section 655, (10), shall be observed, including also illegitimate children". (11)

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(10) "Rules for determining the number of children for regulating the legitim".

(11) Vide also Sections 678 and 679.

DISHERISON OF DESCENDANTS AND ASCENDANTS.

The persons entitled by law to a "legittima portio" may be deprived thereof by a specific declaration of the testator on any of the grounds specified in the Civil Code, to be stated in the will -- section 659.

But "Disherison" proper applies only to descendants and ascendants (i.e. those having a right to the proper 'legitim'). The descendant may be disinherited in such cases as when he unreasonably refuses maintenance to the testator, abandons totally the insane testator, unreasonably fails to release the testator from prison when he could have done so, strikes the testator or is guilty of cruelty towards him, grieviously injures him, or, if the descendant is a daughter or female descendant, she is a public prostitute without his connivance -- section 660.

Now, as regards the ascendants these may be disinherited on different grounds: like in cases when the ascendant neglects the descendant's education or refuses him maintenance, the ascendant abandons the insane descendant without providing for his care, or when the ascendant attempts to murder another ascendant or grossly outrages him -- section 661.

WHERE SURVIVING SPOUSE CANNOT CLAIM "LEGITIMA PORTIO".

As for the surviving spouse, section 671 gives three instances where his or her right to the 'portio' is limited, and these all relate to the amount of income such spouse receives from different sources. This section establishes the manner in which the existence or otherwise of the two conditions of indigence and of sufficiency of

means are to be determined. In fact, section 671 states:

"(1) Where the income of the property comprised in the portion of the community of acquests belonging to the surviving spouse, in the donations made and legacies bequeathed to such spouse by the predeceased spouse and, where the surviving spouse is the wife, in the dower, is at least equal to the usufruct mentioned in S. 668, the provisions of that section shall not apply.

(2) Where the value of the property referred to in subsection (1) of this section is at least equal to the value of the fourth part of the estate referred to in section 670, the provisions of that section shall not apply.

(3) Where in any of the cases referred to in subsections (1) or (2) of this section, the income or value of the property therein mentioned is not equal to the usufruct or the property referred to in section 668 or 670, as the case may require, the surviving spouse shall be entitled to take out of the inheritance so much as is required to make up what is due to him or her". (12)

Infact, in the case M. Grech vs. G. Scerri (13) the Civil Court argued that: "Mill-perizia .... jidher illi r-renta illi l-attrici ghandha minn beni taghha ma hijiex daqs l-uzufrutt tal-kwart (now ½), u ghalhekk hi ghandha l-jedd li tiehu mill-wirt daqs kemm ikun jongos biex tlahheq is-sehem li jmissha".

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(12) This section was substituted thus by Act XLVI of 1973 but the original rule was still retained.

(13) Collected Cases: Vol. XXXII, II, 380 (19 June 1946)

In this case plaintiff Grech, had asked for her 'legittima portio' and, infact, the Court decided that:

'Ir-rizerva tal-konjugi hija il-kwart (now 'nofs') in uzufrutt, kemm-il darba dak il-konjugi ma jkollux beni minn tieghu li jirrendu fruttat daqs kemm ikun l-uzufrutt. Jekk il-konjugi jkollu beni tieghu, imma l-fruttat taghhom ma jkunx daqs l-uzufrutt, huwa ghandu dritt ghal supplement li flinkien mar-renta tal-beni tieghu jasal sa l-uzufrutt'.

Therefore, this special portion is totally dependent on the fact whether the surviving spouse owns sufficient property or means of subsistence. If her or his means are insufficient the portion accorded to the surviving spouse shall be given in such a way as to make up the amounts reserved by law but in no case shall this amount be exceeded. In effect, the consequence of this rule renders the surviving spouse, if he or she has sufficient means, unable to claim anything more from the estate of the deceased.

Nevertheless, the surviving spouse who, because of the provision in section 671, has not received his or her 'legitima portio' saved by law, may, if he or she, without any fault on his or her part, ceases to possess such property, demand maintenance out of such property of the predeceased spouse as may still be in the possession of the heirs of the latter, to the extent of one-half of the usufruct or, as the case may be, one-fourth of the value of the property, without prejudice to the rights of the creditors of such heirs: moreover, such property shall, in such case, be also subject to the

expenses of the last illness and to the funeral expenses of the surviving spouse - section 672.

However, there are other cases where the surviving spouse cannot claim the 'portio'. These include:

(a) if, at the death of one, the spouses were judicially separated, and the surviving spouse had, according to sections 56 to 60, forfeited those rights (i.e. in sections 56 to 60);

(b) where the predeceased spouse has, by his will, on any of the grounds in section 660(a) to (e), expressly deprived the surviving spouse of the portion referred to in sections 668 and 670 and such grounds, or, where more grounds are stated, any of such grounds is proved;

(c) If, in regard to the surviving spouse, there exists any of the grounds on which such spouse would under section 642 be as unworthy, incapable of receiving by will — section 673.

RE-MARRIAGE — SURVIVING SPOUSE FORFEITS CERTAIN RIGHTS:

It must be noted that the 'legitima portio' due to the surviving spouse is limited by the law itself, and so much so, Section 674 makes it conditional on the spouse not remarrying;

'Where the surviving spouse has entered into a second or subsequent marriage, and, at the time of such marriage, there are still children or descendants of the predeceased spouse, as stated in section 668, the surviving spouse shall forfeit the ownership of all things which he or she may have received under a gratuitous

title from the predeceased spouse, including donations in contemplation of marriage, and shall only retain the usufruct thereof, unless the predeceased spouse has otherwise ordained. In such case the ownership shall vest in the said children or descendants of the predeceased spouse".

This provision is clear: it contemplates the case of remarriage of the surviving spouse. Here the surviving spouse retains only the usufruct of what she had received by any lucrative title from the predeceased spouse including donations in contemplation of marriage, and the ownership vests in the said children or descendants.

A case in point is Micallef vs Borg decided by the Civil Court, First Hall (14) on the 27th April 1898. This judgment, after repeating Art 335 of Ord. VII, 1868 (our section 674) goes further and states that:

"... tutti i figli del coniuge premorto, anche se nati da diversi matrimonii, profittano della proprietà di cui la legge priva il coniuge superstite in caso di passaggio a nuove nozze " .

Infact, in one case this was more specifically explained in the words:

'... il coniuge superstite perde la proprietà di tale lascito passando a nuove nozze, nel caso che esistessero figli del coniuge predefunto, benchè egli (i.e. the surviving spouse), non ne avesse '(15)

This shows that this provision holds good even in the case where the surviving spouse never had any children from the marriage with the predeceased spouse. It is enough that 'there are still children or descendants of

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(14) Collected Cases: Vol. XVI, II, 251.

(15) Collected Cases: Vol. XXIV, II, 309, First Hall, 8 Nov. 1920, Schembri vs G. Montieras.

the predeceased spouse, in my opinion, even if these children were born from the previous marriage of the predeceased spouse.

Again, in G. Vella vs E. Vella (16) decided on the 19th November 1935, the First Hall, after stating that in such circumstances, the remarrying surviving spouse keeps only the usufruct, states:

"Dana l-uzufrutt ma ghandux ikun ritenut li gej mill-ligi, imma li huwa effett tad-dekadenza tal-konjugi mill-proprjeta insemmija, u ghalhekk huwa suggett ghall-inventarju u kawzjoni preskritti mill-ligi, bhala obbligu ta' l-uzufruttwarju."

On several instances our Courts, have had to interpret the words 'acquistato con qualsiasi titolo lucrativo' (Arts. 529 and 335 of Ord. VII, 1868) (17) and in the majority of cases this general phrase was interpreted as 'comprensiva dei lasciti per atto di ultima volontà'. (18).

Naturally, section 674 does not apply in those cases in which the surviving spouse had not acquired anything by way of ownership through the predeceased spouse's will. Moreover this provision of the Code is not applicable to a legacy consisting of something left in usufruct.(19)

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(16) Collected cases: Vol. XXIX, II, 772.
(17) Our sec. 674 states 'may have received under a gratuitious title from the predeceased spouse.
(18) Collected Cases: Vol. XXVII, I, 56: Court of Appeal 13th February, 1928, Chapman vs E. Toglia.
(19) Collected cases: Vol. XXIV, I, 250: Court of Appeal, 12th December 1919, L. Grech vs C. Grech.

SURVIVING SPOUSE FORFEITS DOWER.

Furthermore, according to section 675, the dower ('dotarium') which the widow may have received from the predeceased husband's estate also falls within the ambit of S. 674 if all the circumstances exist. The only judgment relating to this provision was delivered by the Civil Court, First Hall, on the 14th October 1921, in the case O. Bezzina vs F. Esposito (20)'.

'Verificatasi la premorienza del marito, il dotario promesso alla moglie diviene di assoluta proprietà di costei, anche se vi sono figli ed altri discendenti ... il che si rende chiaro dalla locuzione della legge per cui il coniuge perde la proprietà del dotario, e ne ritiene l'usufrutto se passa a nuove nozze e vi sono figli discendenti ed è uno degli attributi della proprietà la sua piena disponibilità senza ingerenza estranea'.

So, the position here is clearly different from the case of legitim since the latter can in no way be conditional. Moreover, the portion reserved in favour of the surviving spouse is also conditional on the fact that such spouse does not possess adequate property enabling him or her to live decently. Infact section 671 bases this portion on the condition of the surviving spouse being indigent.

FORFEITURE OF RIGHTS BY ILLEGITIMATE CHILD.

The illegitimate child may, in the same cases and on the same grounds in and on which disherison of legitimate children may take place, be, by an express declaration of the testator, deprived of the rights saved to him --

(20) Collected cases: Vol. XXIV, II, 649.

section 681(1), (21)

Finally, section 682 states: "In case of the predecease of an illegitimate child, his children or descendants, legitimate, adopted, or legitimated by subsequent marriage, may claim the rights to which he would have been entitled under the provisions of the foregoing sections."

REPRESENTATION.

The legitim though mainly intended for children and in case there are none, in favour of ascendants, can also go in favour of descendants of those children by way of representation. The law in providing for the legitim uses the word ' descendants' but section 654 is more specific and provides that for purposes of computing the legitim, ' children', include descendants of the testator's children in whatever degree, but such descendants shall be counted for the child from whom they descend. Thus, if the testator has four children, three of whom are alive at the time of his death, whilst the fourth had predeceased him, the children of the fourth child, who is now dead, will together represent their dead father in order to compute the legitim. They are therefore computed 'per stirpes'.

Obviously representation is only applicable to descendants and does not play any part when the persons concerned are ascendants of the deceased.

This rule of representation also operates where the father being the testator's son, whether he predeceases or outlives the testator, was disinherited for any lawful cause. The children of the disinherited son shall take the

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(21) Vide also S. 681 (2)

legitim in his stead.

However, it must be remembered, that descendants of a child will not take by representation their father's legitim, if their father had renounced to the testator's succession without reserving his rights for the legitim - section 902.

Moreover, because of this renunciation, children born of a sacriligious union, are not entitled to succeed by way of representation to the legitim which their father would have got had he not entered into a monastic order - section 913.

PORTIONS DUE TO SPOUSE OR ILLEGITIMATE CHILDREN NOT CHARGEABLE TO LEGITIM.

Section 683 stipulates that the portions due to the surviving spouse and illegitimate children shall not be chargeable to the legitim but shall be a charge on the disposable portion of the estate. This seems to contradict section 651 which includes under the non-disposable portion not merely the legitim but also the rights of the spouse and of the illegitimate children. On the contrary section 683 seems to restrict the definition of 'non-disposable portion' to the legitim and considers the rights of the spouse and of the illegitimate child as a charge on the disposable portion of the estate.

In practice, one first computes the legitim due and all other rights before arriving at the amount to which the heir is entitled. Therefore, as such, the disposable portion will always be the remainder of the property after the various legal claims have been deducted. Thus, the law, is not quite clear as to whether the non-disposable portion

is soley the legitim or also the rights of the spouse and illegitimate children. In either case, one may perhaps argue that in view of this contradiction the legislator intended to afford a greater amount of protection to the legitim due to descendants and ascendants than that afforded to the rights of other persons.

One may, therefore, conclude that the estate of the deceased may be divided into 'disposable' and 'non-disposable' portion but not into 'legitim' and 'inheritance' for the latter division would exclude the portion due to the surviving spouse as well as that due to the illegitimate children.

CHAPTER 5

PRACTICAL CONSEQUENCES ARISING OUT OF THE NATURE OF THE RIGHT OF LEGITIM

Introduction

In the previous chapters it was shown how the law regards the right of legitim as pertaining to a right of co-ownership. This applies particularly to the legitim proper, that is, the right appertaining to descendants and ascendants and to the surviving spouse. One must, however, remark that the portion due to illegitimate children does not present such practical difficulties as one encounters when dealing with the legitim and the portion due to the survivng spouse. This is because the law seems to indicate that the portion due to illegitimate children need not result in co-ownership proper because this particular portion can be paid off by the heirs in any manner. However, until there is a valuation of the inheritance one cannot compute the potion due to illegitimate children.

LEGITIM AS A RIGHT OF CO-OWNERSHIP

When dealing with legitim the law first lays down that it is a right of co-ownership (sections 652/1 and 657/1 Civ. C.) but, at the same time, there is an inherent

contradiction, because whilst the right of co-ownership implies a sharing of assets and liabilities, the legitim is specifically exempted from any liabilities which mayburden the inheritance. Infact, whilst amongst the provisions dealing the co-ownership (1), we find section 527(2) which states:

"Every co-owner shall participate in the advantages and burdens of the community in proportion to his share". and also Section 529 by which:

"Each of the co-owners may compel the others to share with him the expense necessary for the preservation of the common property, saving the right of any of such other co-owners to release himself from his liability therefore by abandoning his right of co-ownership";

on the other hand, when the provisions relating to legitim were examined particular reference was made to section 657(1) which reads:

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(1) Civil Code: Book Second, Of Things, Part I, of Rights over Things, Title V: Of Community of Property, Sub-title I: Of the Nature of the Community of Property and of the Rights of the Co-owners During the Community: Sections 526 to 532.

"The legitim is due in full ownership, and it shall not be lawful for the testator to encumber it with any burden or condition", and to sub-section 2 of this section which provides that the legitim is due after the deduction of debts due by the estate and the funeral expenses.

Therefore, once the legittimary can in no way be burdened as regards his legitim it is obvious that the heir is burdened with all liabilities because he continues in the personality of the deceased, whilst the legittimary, though nominally being a co-owner together with the heir, is totally exempted from such burdens. Infact, in the case M. Attard vs. G. Meilak (2) the Civil Court stated: "... billi l-legittimarji ma humiex eredi (vide also Collected Cases: Vol. XXX, I, 363 and XXXIII, I, 472), u kwindi huma ma humiex kontinwaturi tal-persuna tal-mejjet, l-azzjoni ghall-pagament (i.e. of money owed by the decuius's estate) ghandha tigi diretta biss kontra l-eredi, minghajr in-necessita' li jkunu prezenti fil-kawza l-legittimarji;

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(2) Collected Cases: Vol. XLIII, II, 834: 14 December 1959.

b'mod li, jekk il-kreditur iharrek anki lil legittimarji, dawn ghandhom jigu liberati mill-osservanza tal-guidizzju bl-ispejjex kontra l-attur kreditur; u dan avvolja huwa jkun harrikhom ghall-interess li jista jkollhom ... Del resto l-ligi riservat l-obbligu tal-hlas tad-dejn tad-decujus fuq l-eredi tieghu" (section 980 Civ. C.). Therefore, to obtain payment of a debt due by the deceased's estate, it is not necessary to call into the suit as defendants also the legittimaries, because it is enough to sue only the heirs.

So, this practical consequence indicates that the right of legitim is not given by law by title of succession ('portio hereditatis') but it seems that it is given by way of right of credit with the difference that the creditor, who in this case is the legittimary, is a co-owner up to the extent of his claim and such co-ownership exists only over the assets of the inheritance.

The law, therefore, has made it amply clear that it intends to afford the legitim a wide degree of protection so that the legittimary is ensured of receiving what is due to him. There may be cases, infact, where it is not advisable to accept an inheritance due to the amount of debts burdening it, and so the heir renounces to the inheritance and reserves his right to the legitim thus

placing himself in the position of a legitimary rather than an heir.

Thus, although the law provides that the legitim is of the nature of the right of co-owership, in practice, the legitim is very much like a right of credit with the difference that the creditor, who in this case is the legittimary, is not to suffer for any debts existing nor is his legitim diminished by their presence. The result is that it is the disposable portion which is to bear all the debts and the non-disposable portion, of which the legitim forms a part, is not so burdened.

DIFFICULTIES ARISING FROM THE NOTION OF CO-OWNERSHIP

The legitim, being 'pars bonorum', creates various practical difficulties. It is a principle of co-ownership that until there is a partition of the property each co-owner, though knowing the amount of his share, has no exclusive right over a portion of the property co-owned; this is so because, although the law in section 528 says that "Each of the co-owners is entitled to make use of the common property", and in section 532(1) provides that "Each co-owner has the full ownership of his share and of the profits or fruits thereof", it is only natural and logical that

until the property is divided and each co-owner gets a specific amount of property equal to his share, it is practically impossible to delineate where the share of one co-owner ends and where that of another co-owner commences. The real reason for this uncertainty is because each of them is co-owner 'pro indiviso'. As a matter of fact, section 526(1) provides:

"Community of property exists where the ownership of one and the same thing, or of one and the same right, is vested 'pro indiviso' in two or more persons".

Again, in the rules relating to co-ownership we find that "the shares of the co-owners shall, unless the contrary is proved, be presumed to be equal" (Section 527/1); and when one examines the rules regulating legitim the legittimaries themselves do, in fact, divide equally the reserved portion among themselves.

POSSESSION OF THE INHERITANCE VESTED IN THE HEIR

Another important practical consequence is that the action by the legittimaries for claiming the legitim is to be directed against the heir or heirs - and against no one else. This consequence finds its basis on the principle that the legittimary, not being an heir, is not vested with possession of the decuius'

estate and the legitim being a portion of the property of the deceased must be demanded from the heir. In fact, there are several decisions given by our Courts stating that "il-legittimarju ma hux eredi". In H. Cavarra vs. E. Depiro (3), the Civil Court on the 31st January, 1936, after premising this principle, added "... u ghalhekk il-prezenza tieghu mhix mehtiega f'kawza ta' licitazzjoni. Imma il-Qorti ghanda tipprovedi biex l-interessi tieghu jigu tutelati. Il-legittimarju ma jkomplix il-personalita' giuridika tat-testatur" (vide also Micallef vs. Fenech, Court of Appeal, 6th April, 1910; and Sant Fournier utrinque, Civil Court, 11th July, 1932).

Also in F. Camilleri vs. Avukat Zammit (4) the Court of Appeal stated: "Fil-kaz ta' legittima, il-legittimarju m'hux eredi u l-interess tieghu huwa li tkun likwidata l-legittima biex din tkun tista' tigi lilu assenjata u ghalhekk id-domanda li ghandu jagħmel hija dik".

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(3) Collected Cases: Vol. XXIX, II, 913.

(4) Collected Cases: Vol. XXX, I, 363: 29th May, 1934.

This same principle was reiterated in A. Micallef vs. G. Grech (5), and here the Civil Court said that once the legittimary is not heir he is merely entitled to that portion of the deceased's property reserved to him by law - as a matter of fact the law defines legitim as "part of the property of the deceased" and not a portion of an inheritance. (Vide also A. Zammit vs. J. Apap, Vol. XXIX, II, 25 18th October, 1934; F. C. milleri vs. Avukat Zammit supra; C. Farrugia vs. C. Mintoff, Vol. XXXIII, I, 472, Court of Appeal, 10th June, 1949; H. Cavarra vs. E. Depiro supra; and Bugeja Lombardi utrinque, 4th January 1881, First Hall).

From these principles emerges the important consequence that "minn ghandu l-jedd ghall-legittima jfittex ghaliha lill-werriet li jinsab midjun f'daka s-sehem ta' gid". (This was delivered in the judgement A. Zammit vs. J. Apap supra).

Again in an 1871 judgement in the names of Dr. Gravagna vs. Baronessa D'Amico (6), the Civil Court, stated that:

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(5) Collected Cases: Vol. XXIX, II, 1048, 30th March 1936.

(6) Collected Cases: Decision 249: Vol. V, 605: 31st October 1871.

"Egli (i.e. the legittimary) intenta l'azione contro l'erede scritto e domanda conto dei frutti secondo l'indole della cose ereditarie". This is so because "quando anche il testatore non avesse chiaramente manifestato la sua volonta' intorno alla legittima, o non l'avesse in modo alcuno menzionato, e' regola che seguita la sua morte la legittima passa libera allo erede" (7).

Moreover, even the spouse must claim her portion from the heir. A case in point is M. Grech vs. G. Scerri (8) which was decided by the Civil Court on 19th June, 1946. In this judgement it was clearly stated that: "Il-konjugi li huwa intitolat ghar-rizerva ghandu jitlob il-pussess taghha lill-persuni li lilhom jinsab devolut il-bqija tal-writ".

PROBLEM IN CASE OF MINOR HEIRS

However, here a probelm arises: What if amongst the heirs there are minors who have not yet accepted the inheritance ? This query is solved by this same

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(7) Collected Cases: Decision 112: Vol. VII, 316: 15th February, 1875, Court of Appeal: Dr. Gravagna vs. Baronessa D'Amico.

(8) Collected Cases: Vol. XXXII, II, 380.

latter judgement in the words: "... dik it-talba ma tistax timxi kontra taghhom; u ma jistax jinghad li huma accettaw l-eredit'a jekk ma jkunux accettawha bil-beneficcju tal-inventarju, ghax il-minuri jistghu jaccettaw l-eredita' bil-beneficcju tal-inventarju biss. Imma dik it-talba tista' tibqa miexja kontra l-eredi l-ohra".

DIFFICULTY OF ALIENATING HEREDITARY PROPERTY

Now, if the legittimary is to be considered as a co-owner, then, until liquidation and settlement of the legitim, no sales can take place because if the heir sells, for example a house, at a time when the legitim has not yet been paid, the effect is that the heir is only selling a portion of the house, whilst the remaining fraction is not his to sell because it belongs to the legittimary. The effect is a logical one, that is, until the legitim is paid off, the heirs do not represent the entire estate. So that, in effect, one may well ask whether the legitim is also 'portio hereditatis'.

Therefore, these difficulties indicate that until the legitim is settled it is advisable for the heir, when selling immovable property, to get the legittimary to appear on the deed of sale to renounce

his rights over the property alienated whilst reserving them over the remaining part of the property. This practical problem or consequence can be often met with especially in cases where though the inheritance comprises a considerable amount of immovable property, it does not contain a sufficient amount of cash to meet in full the claims of succession duty imposed on the inheritance. Thus, in this case the heirs would find themselves hard up and, in practise, one meets with frequent cases where the heirs have to sell some property in order to pay succession duty.

If the legitim has not been settled and the heir decides to sell some property the result could be that, prospective purchasers will be discouraged from buying such property because on making the relevant researches they would find that the heir who is supposed to be the full owner of the inheritance in actual fact does not possess the full ownership of the property intended to be sold. The result is that you have an enormous amount of difficulties arising - firstly, in liquidating the inheritance in order to pay off the legitim, and then, in the meantime, the heir may have to incur the running of interests for succession duty which has not been paid within the four months (allowed

by law) from the opening of succession. This is only one example which illustrates the amount of obstacles an heir has to face.

ADDED DIFFICULTY OF TOO LONG A PERIOD ALLOWED FOR CLAIMING THE LEGITIM

Moreover, the time period given by law for lodging a claim for the legitim does not improve the position of the heir because it must be remembered that the legittimary is given 10 years in order to claim his rights. Section 885(1) states: "The action for demanding an inheritance, or a legacy, or the legitim, or the portion of property granted to illegitimate children or to the spouse, whether in testate or in intestate successions, shall lapse on the expiration of 10 years from the day of the opening of the succession" (9).

Also, it was decided by the Civil Court on the 18th October, 1934 in the case A. Zammit vs. J. Apap (10)

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(9) Vide Collected Cases: Vol. XXi, II, 525: First Hall, 30th October, 1912, C. Abdilla vs. G. Zahra.

(10) Collected Cases: Vol. XXIX, II, p. 25.

that:

"Biex wiehed jista' jati l-prescrizzjoni ta' ghaxar snin kontra talba ta' wirt jew ta' legittima, jinhtieglu li huwa ma' tul dawka l-ghaxar snin kellu f'idejh il-wirt "animo domini" u minghajr qerq jew "in good faith" (vedi Farrugia vs. Attard: 2nd December, 1910, Court of Appeal: Vol. XXI, I, 367). This judgement seems to indicate that in the absence of "good faith" the 30 year prescription would apply.

Furthermore, in the judgement C. Abdilla vs. G. Zahra it was added that the creditors of, as well as all other persons who have some interest in, the inheritance can still set up the plea of prescription even when the debtor himself has renounced to it.

Another important principle was set out in Dr. Gravagna vs. Baronessa D'Amico (supra) in the words: "La prescrizione dell'azione per domandare la legittima non corre mai, quando e fin a tanto che i beni, da cui dev'essere detratta sono posseduti dal legittimario".

Now, the action for demanding the supplement of the legitim is the same as the for demanding the legitim itself (i.e. in Section 885/1) because 'non e' questione che l'azione per il supplemento della legittima

sia della stessa natura dell'azione della legittima ...' (Civil Court, 31st October 1871, Dottor Gravagna vs. Baronessa D'Amico Vol. V pages 605-616 second column (11).

Subsection 2 of section 885 continues:

"Neverthless, with regard to minors, or persons interdicted, the said action shall not lapse except on the expiration of one year from the day on which they shall have attained majority, or the interdiction shall have ceased, as the case may be".

PROBLEMS OF VALUATION - MIFSUD VS. MIZZI

This ten year prescriptive period is, in my opinion, far too long. Too much time is given, so that, in practice difficulties become more numerous - in the

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(11) Our Section 885(1) or Article 547 of Ordinance 7 of 1868 was not taken from continental law but is based on a Bando issued by Grand Master De Rohan on 1st March 1787 which Bando had amended the law as it stood before the Code De Rohan, Book 2, Title 5, para. 1. This Bando was in corporated in Art. 243 of the 1864 Laws of Succession and later in the above mentioned Art. 547.

major part these difficulties refer to the valuation of property. A case in point is Mifsud vs. Mizzi. The facts of the case were these; Mizzi was married and had seven children. When any one of his daughters married he used to settle a dowry. In 1951, Mizzi died in a state of insolvency. As a matter of fact, his inheritance was not accepted as his wife and daughters had renounced to it and his widow, who had inherited property from her side of the family, made a will on the 24th February 1954 wherein she instituted in equal portions, as her universal heirs her unmarried daughters and also, excluded her married daughters from taking the legitim or from participating in any way in her estate because she claimed that the married daughters had already received sufficient property as dowry and that therefore their right to the legitim had been satisfied. The will in Article 3 had provided that the testatrix excluded "lill-uliedha mizzewgin mill-legittma u minn kwalunkwe partecipazzjoni fil-wirt taghha billi l-bniet uliedha mizzewgin ga gew dotati in okkazzjoni taz-zwieg taghhom ghall-ammont ta' £750 rigal, ossia £800 kollox". The testatrix, Carmelina Mizzi, died on the 2nd December 1956 and one of her married daughters Emilia Maria married Mifsud instituted an action against

her unmarried sisters (i.e. the heirs of her mother), Eleonora, Yole and Hilda Mizzi. The action was instituted after the prescriptive period of 10 years had almost elapsed (one day before the expiration of the full period) and at a time when the value of the immovable property, due to the building boom, had increased considerably.

Emilia Mifsud first claimed that the disposition in her mother's will whereby she was excluded from receiving anything (either as heir or as legittimary) because she had already received ample property as dowry, was invalid because the testatrix, could not merely for this reason, exclude her right to the legitim and disinherit her.

The defendants in this action pleaded in defence that the £750 dowry exceeded the non-disposable portion which was due to the plainftiff at the time of the opening of succession and so the testamentary disposition under discussion was not null.

The Civil Court on the 24th April 1968 decided that the money Emilia Mifsud had received (£750) could not have been given as dowry, because the constitution of dowry must be made by a public deed otherwise it is null and, moreover, could not have been a donation,

because a donation of a substantial sum must be also made by way of a public deed (Section 1847 Civil Code). However, on Appeal it was shown that infact there existed a public deed granting a donation in contemplation of marriage. So the First Hall decided: "Ghalhekk sal-gurnata tal-likwidazzjoni u hlas tal-legittima in natura l-attrici hija komproprietarja mal konvenuti fil-beni kollha ereditarji, skond il-quota lilha attribuita mill-ligi. Dana l-principju ... jidderiva mill-fatt li l-legittimarju la huwa eredi u anqas kreditur tal-eredita' huwa biss ghandu porzjoni mill-beni tad-decujus lilu riservata mill-ligi u ghalhekk is-suggeriment li l-legittima tigi sodisfatta b'ammont liquidat, flok in natura hija kontra l-ligi".

The defendants appealed and the Court of Appeal on the 21st February 1969, in line with the First Hall, decided that:

"id-dispozizzjoni (tal-testatrici) in kwistjoni mhux biss ma ghandiex ebda effikacja inquantu teskludi lill-appellata mill-legittima, imma anqas ghandha ebda efficacja inquantu tghid illi l-legittima taghha ga giet sodisfatta b'dak li hadet bhala dota u dan peress illi d-dritt, legali tal-attrici ghal legittima ma setax jigi eskluz ghar-raguni espressa fid-disposizzjoni u

l-kwistjoni jekk il-legittima dovuta lill-appellati giet sodisfatta jew le b'dak li l-appellata ga hadet tiddipendi mill-likwidazzjoni li ghad trid issir skond il-ligi".

The Court of Appeal did not pronounce itself on whether the time for the valuation of the estate of the deceased, for the purposes of the legitim, was that of the opening o succession, or otherwise.

The Appeal Court in a decree dated 3rd May 1969, appointed Dr. Herbert Ganado as a legal referee who, on this matter, stated that while he was positive that the Court of Appeal considered the above mentioned testamentary disposition as null and without any effect on the basis of the plaintiff's claim (i.e. that the testatrix could not order that the plaintiff be excluded from her right of legitim and from the inheritance and so this exclusion is null and void, and also that the above mentioned testamentary disposition is without any effect once it implies that the legitim due to the appellant must be considered as having already been satisfied by what she got as dowry, it is also logical that the testamentary disposition "ghall-finijiet ohra, jekk hu il-has,tesisti u ghandu

ikollha effikacia sakemn dawn il-finijiet ikunu kompatibbili mal-ligi". So much so that if such a disposition exists it cannot be declared non-existant (as though it was null because of some legal formality) and, once it exists, one must examine what force it has. It is a fundamental principle in the interpretation of wills that, as far as possible, wills must be interpreted in a way that they be effective and that the testator's wishes be carried out. The testamentary, disposition in question, as was rightly pointed out by the Court, "ghandha l-lokuzjoni ftit u xejn inflelici". From an objective examination of this testamentary clause one concludes that the testatrix had a double intention: Firstly, she wanted that the married daughters keep and consider their dowry as payment of the legitim, and, secondly, as a consequence to this first intention she wanted that her married daughters, once that they had already got their dowry as payment of their legitim, be excluded from any rights to a legitim and any participation in the inheritance.

Dr. K. Ganado in his report also states that while the first intention is valid at law except for the fact that if the dowry does not satisfy all the portion due as legitim, the legittimary has a right to the balance

in kind (vide Enrico Vassallo vs. Giuseppe Mallia), the second intention is null and without effect, because only the liquidation of the estate and of the legitim determines whether through the dowry, the legitim was satisfied or not.

Therefore, Dr. Ganado submitted that, for these reasons, the testamentary dispositions must be considered an assignment of dowry and as such a means of payment of the legitim due.

So the First Hall had decided that the testamentary provision was null. In my opinion, this was a wrong judgement and of very little significance because if I say that my son has already taken what he is entitled to, I am merely repeating what the law says - so, surely the Court cannot say it is null because I am repeating the law. But the Court said that there is the obligation of leaving the legitim to every child. But the legitim does not imply the legitim at the moment of the will because all donations made before go towards and are considered on account of the right of legitim. So, in my opinion, in this case, the married daughter still had to see what she received during their mother's lifetime to see whether it was enough to satisfy the legitim or not.

Therefore, it is rather unreasonable to say that such

a clause was invalid because what the mother was actually saying was that the right of legitim had already been satisfied. It is true that a subsequent valuation may show that a balance is still due and that, therefore, in actual fact the legitim has not been totally satisfied, but this does not mean that the mother intended to deprive the married daughters of their right to the legitim.

However, the real difficulty which the Court had to face in this case was that relating to the valuation of the property. Infact, Emilia Maria sive Mollie Mifsud had also asked the Court:

> "Li tigi likwidata ... il-komunjoni tal-akkwisti li kien hemm bejn [illegible] Mizzi u martu Carmelina Mizzi ... Li jigi likwidat l-assi partikolari tal-istess Carmelina armla Mizzi.
>
> Li tigi likwidata favur l-attrici l-legittima li immissa mill-wirt ta' omsha".

As mentioned previously Carmelina Mizzi died in 1957 and the action for the legitim was made in 1967 before the 10 year prescriptive period elapsed - that is, when the building boom was at its best. Infact, one plot of land which in 1957 was valued at £400 because it was let at £5 per annum was sold by the heirs for £20,000 - so the position had clearly changed.

Normally, one would not advise a person to buy property burdened with a claim for legitim, but during the boom people took risks and, as a matter of fact, the plot fetched this large sum of money even though there was such a claim. One can prevent such a sale by asking the Court to appoint a judicial sequestrator, but here the plaintiff took almost 10 years to consider whether to claim her right of legitim or not and had put in the claim precisely because the value of immovable property had increased astronomically. When in 10 years one does not decide to claim, normally it means that one has accepted the situation - but does this mean that the heirs cannot sell any property of the inheritance ?

The plaintiff claimed that the valuation should be made on the basis of the market price existing at the time of the law suit. The reason for this was the obvious increase in the value of immovable property and therefore there was a vast difference in value between the property as existing at the time of the opening of the succession and that prevailing at the time of the law suit. On the other hand, the defendants claimed that the valuation should be based on the market price existing at the opening of the succession.

VALUATION ACCORDING TO THE VALUE AT THE OPENING OF SUCCESSION

The Court decided that the valuation should be based on the market price existing at the opening of succession. If after such valuation, it is found that the legitim has not been fully satisfied, then the balance sould be computed by taking a fraction of the value at the time of the valuation (in this case the valuation was affected at the time of the lawsuit), as would be due at the opening of succession. Thus, if it results that ¼ of the legitim has not yet been paid the balance due to the legittimary would be ¼ of the value existing at the time when the claim was made and not ¼ of the value existing at the time of the opening of succession. Thus, on a house which at the time of the opening of succession was valued at £2,000, the legitti-mary, in the above example, would have a right to £500, but if at the time when the claim is made the value of the house has increased to £4,000 the legittimary would still get ¼ of the higher value, that is, £1,000. From this, it can be clearly seen that problems of valuation will be even greater the more time elapses and for this reason the period of 10 years allowed by law for claiming the legitim is far too long.

In the case Avv. Vassallo vs. G. Mallia (12) (cited also by Dr. H. Ganado in his "perizia legale" relating to Mifsud vs. Mizzi) the Court of Appeal on the 24th February, 1930 decided that:

"Ai beni lasciati al legittinario in saldo o acconto della sua legittima si deve attribuire il valore che avevano al tempo dell'apertura della successione - perche' in quel momento ebbe luogo il passagio della proprieta' dei detti titoli a favore dell' appellante, per cui in virtu' del principio "casus sentit dominus" le flattuazzioni nella quotazione del valore degli stessi in piu' o in meno, deve essere sofferto dal proprietario, cioe' l'appellante".

In this case the Court decided that the valuation ought to be carried out with reference to the estate's value at the moment of the opening of succession for the reasonthat the decuius had left all his immovable propert to the heirs and had only reserved for the legittimary his movables. The problem whether this is possible, has already been discussed in Chapter 2

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(12) Collected Cases: Vol. XXVI, I, 451.

Again, in C. Vella vs. G. Bugeja it was held by the Court of Appeal on the 10th December, 1973 that:

'Kwantu ghall-valutazzjoni tal-beni in konnessjoni mad-determinazzjoni tal-porzjoni legittima, il-Qorti tahseb li m'ghandux ikun hemm kwistjoni, ... li ghall-finijiet tal-operazzjoni preliminari ta komputa li hi r-riunjoni fittizja tal-assi ereditarju in kwantu diretta ghar-rikostruzzjoni tal-patrimonju kollu tad-decujus, ... bilfors wiehed irid jirriporta ruhu ghall-valuri fiz-zmien tal-apertura tas-successjoni tenut kont naturalment f'dan ir-rigward tad-dispozizzjonijiet rilevanti tal-ligi relativi ghall kollazzjoni. Dan il-principju jesawrixxi ruhu fil-fissazzjoni tal-kriterju li ghandu jigi segwit ghall-kalkolu tal-valur tal-assi u tal kwota tal-legittima; izda jekk il-legittima ma gietx sodisfatta u, trattando i ta' beni n-natura (mhux flus) ikkonvertit ruhha, fil-kazijiet fejn dan hu konsentit mil-ligi; fi dritt ta' kreditu fi flus, id-dritt tal-legittimarju ghandu bhala oggett "un bene reale" u l'"aestimatio rei" ghandha tkun riferita ghaz-zmien l-aktar qrib possibbli ghal pronunzja gjudizjali u tenut kont ghalhekk ta' xi sopravvenuta svalutazzjoni monetarja". (Vide Collected Cases: Vol. XXVII, I, 451 and Scicluna vs. Meli 5.6.1967).

Therefore, turning to Mifsud vs. Mizzi the judge was asked to appoint an architect to value the property at the time of the opening of succession. If, for example, the property amounted to £4,000 and there were 7 children the legitim is ½ of the property, i.e. £2,000; each child has a claim of legitim of £2,000 division by 7, i.e. almost £300. The Court said that to decide whether one has a right to the legitim one must look at the time of the opening of succession and if on the valuation of the property at that time the legittimary has been fully satisfied in his right of legitim he will not take any more. If, on the other hand, he received less, then he is entitled to the balance and it is here that difficulties arise. Thus, if the legittimary had received £1000 as donation and the legitim should have been £1,200 the legittimary has a right to receive the balance of £200. In the abovementioned case the plaintiffs said they had the right to claim 1/14 (because they were 7) i.e. ½ of 1/7 of the property in kind and the claimed that out of that 1/14 one deducts the £1,000 they had received and claim the balance. If the property had increased in value it would result that instead of the £200 balance still due they would be entitled to much more.

The defendant, on the other hand, claimed that they ought to get £200 worth of property at the moment of the opening of succession, that is, if the new value of the property has increased to, for example, £16,800 they should get 1/84 of the property.

These problems can create various difficulties. Thus, one may be faced with the case where the heirs had sold property at £800 not knowing at the time whether the legittimaries were going to put forward their claims. The legittimaries discover at a much later date, for example, 9 years after the sale, that they have a claim for legitim, and when the problem of valuatio arises it is found that the property had it not been sold, would fetch £20,000. If the legittimaries claim their legitim should be valued at the time of the judgement it would mean that the heirs will eventually have to pay the legitim out of their own pockets and there may be cases where the heirs could not have known that there was a claim of legitim such as where the legittimary had been previously absent from Malta and before 10 years elapse he puts in an appearance to claim his rights. Today, with the large number of Maltese emigrants, the possibility of such case arising is more probable.

This problem of valuation could have more obvious

repercussions due to the new rules regulating valuations which are set out in section 11 of the Death and Donation Duty Act, 1973. Here, some rules of valuation may result in a higher or lower value being given to property than was the case beforehand. Thus, where the "dominium directum" was previously valued by the capitalization of 1 year's ground rent at 5%, it is now valued at 8% (Section 11(8)(a)). These new rules can therefore very well effect the value of property which had devolved on the heirs before the Act was passed when the claim of legitim is brought after 1973 but within the 10 year period.

ABATEMENT

The legitim, as was already pointed out, is fully guaranteed by law, being a right due in full ownership, unburdened and calculated over the whole estate of the decujus after all debts and funeral expenses have been deducted. Thus, the non-disposable portion is safe-guarded in a way that the legittimary is ensured of receiving his legitim in full out of this portion. In fact, from the nature of this right emerges another important consequence whichis found established in Section 684 by which testamentary dispositions exceeding the disposable portion, are abated (viz., "ghandhom

jitnaqqsu" in the Maltese text) and limited to this portion, at the time of the opening of succession (13). Thus, in A. Micallef vs. G. Grech, of the 30th March, 1936 (14) the Civil Court stated: "Meta l-legati mhollijin mit-testatur jilledu l-legittima, hemm lok ghar-riduzzjoni taghhom fil-porzjonijiet mehtiega biex tigi sodisfatta l-legittima leza". However, it must be added here that the demand mentioned in this Section 684 must be made within 10 years from the opening of succession (Section 684 and sub-section 1 of Section 885) (15).

Therefore, if on computation it results that the property disposed of by the testator by way of donation exceeds the disposable portion, this property is added to the remaining estate: that is, it is recovered from the

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(13) Vide: Collected Cases: Vol. XXV, II, 447: V. Serra vs. R. Serra ed. First Hall: 13.10.1923, and Vol. XXIX, I, 589: G. Borg vs. M. Borg: Court of Appeal: 30.3.1936.

(14) Collected Cases: Vol. XXIX, II, 1048.

(15) Collected Cases: Vol. XXIV, II, 171: 27.4.1920: M. Cachia vs. Dr. R. Naudi.

donees and so much of it as is necessary to reinstate the legitim is given to those to whom the legitim is due. As a matter of fact, the persons to whom the legitim is due are entitled to the action for claiming the legitim or any other portion of hereditary property given by law, and to this subsequent action for abatement of testamentary dispositions exceeding the disposable portion - these actions are a means whereby the family's rights are protected.

The action for demanding the reduction above mentioned belongs to those whose right to the legitim or "legittima portio" has been set aside by donations or testamentary dispositions exceeding the disposable portion. In fact, the Civil Court on the 30th June, 1891 in the case E. Caruana vs. G. Micallef (16) stated that:

> "la riduzione della disposizioni testamentarie, eccedenti la porzione disponibile, puo' essere domandata a coloro, a profitto dei quali, la legge fa la riserva, ma quest'azione non e' loro conferita se non nella qualita' di eredi, i quali percio',

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(16) Collected Cases: Vol. XII, p. 708.

agiscono in virtu' di un diritto, che in loro nasce non appena si apre la successione".

The consequence arising from this action is that such dispositions are declared null, but only as far as they exceed the disposable portion. As a matter of fact, after Section 687 states that: "Where the value of the donations exceeds, or is equal to, the disposable portion, all testamentary dispositions shall be ineffectual", the following section adds that where such dispositions exceed either the disposable portion, or the residue thereof after deducting the value of the dontions, they shall abate proportionately without any distinction between heirs and legatees - however, where the testator has expressly declared his intention that a disposition shall be carried out in preference to the others, such preference shall occur, and such a disposition shall not abate except in the case where the value of the property included in the other dispositions are not sufficient to make up the share reserved by law (Section 689) (17).

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(17) Vide Collected Cases: Decision 181: Vol. XI p. 608, First Hall, 1st June, 1888, M. Scicluna vs. A. Cini.

The action for abatement is divisible and may, therefore, be exercised by each of the persons entitled to it for his or her share. Once this action is not a personal one, it may be exercised by the heirs, legatees or assignees of hereditary rights of the persons to whom this action is competent. It also belongs to the creditors of the said person.

This action may be exercised aginst any person who may have benefitted by the dispositions or donations made in excess of the disposable portion - such as heirs, donees or legatees.

Moreover, the action for reduction or for recovery may be brought by the person to whom it is competent, against third parties in possession of the immovable property forming part of the donations and alienated by the donees, in the same manner and in the same order as if against the donees themselves, but not until the plaintiff has first discussed the donees. But as for movables, the action may only be directed against the heir, donee or legatee, and if the property has been alienated the plaintiff may only recover its value from the said persons: no real right attributes the "droit de suite" in respect of movable property. Infact in Gravagna vs. D'Amico it was stated that: "Il legittimario

ha pure la rivendicazione delle cose ereditarie dalle mani dei terzi possessori della sua legittima".

LIQUIDATION OF ESTATE:

Whether or not the testamentary dispositions or donations exceed the disposable portion can only be deduced after the liquidation of the deceased's estate. This is a subsidiary practical consequence, (the principal one being the action for abatement itself), as one must not forget that the legitim is a portion of the said property. The estate is divided into a disposable and an non-disposable portion, and then the plaintiff's legitim is established. This preliminary enquiry is carried out in two stages:

In the first stage, the deceased's estate is reinstated and this implies that all the testator's property is formed in one bulk after deducting the debts due by the estate; then, that property disposed of by donation is fictitiously added and finally the hereditary property is valued.

It must be pointed out here that Section 686 provides for the case where the subject of the donation perishes before the donor's death. It has just been stated that the property disposed of by donation is fictitiously added, however, where the thing donated has

perished without the donee's fault, before the donor's death, it shall not be included in the bulk of the property; otherwise, it shall be included (Vide: Vol. XXIV, II, 171: 27.4.1920: M.Cachia vs. Dr. R. Naudi).

In the second stage, any property received from the testator, either by will or by donation, is imputed. Imputation means the fictitious addition of any property received during the lifetime of the decuius. It is fictitious in the sense that when computing the full value all gifts previously given are considered as part of the estate but this does not mean that they are actually returned into the estate. In simple terms, the whole estate of the decujus would be all that property which the deceased had at the time of his death plus any property which he would have had, if this had not been previously disposed of by donation.

MODE OF PAYMENT OF THE EXCESS OF THE DISPOSABLE PORTION

The action of abatement gives rise to other practical effects. The most important consequence is that the defendant must restore to the plaintiff what he received in excess of the disposable portion. Once the portion reserved by law is due in kind, so also abatement is effected inkind.

Also, according to Section 690, where the excess cannot be separated conveniently and without injury, the defendant may pay in cash the amount due.

Again if the property subject to abatement has been alienated, the heir, legatee or donee must restore its value; however, the plaintiff can still sue the third party in possession in respect of immovable property, but the latter has the benefit of discussion.

JUDICIAL COSTS ARE BORNE BY HEIR

A further practical consequence arising from the nature of the right of legitim, which right is due in full ownership, unburdened and in no way indebted, is that all judicial expenses incurred by the legittimary, when deciding whether to accept the inheritance or demand the legitim, are to be settled by the heirs. This principle, enunciated by our Courts, is based on the other important principle that the legitim is due unburdened and unencumbered. This guarantees that the legittimary receives his legitim in full without any deduction whatsoever. A case in point is Tabone vs. Dimech (18) decided on the 17th March, 1920. Here,

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(18) Collected Cases: Vol. XXIV, I, 445.

the Court of Appeal stated that:

"Le spese giudiziarie erogate dal legittimario contro gli eredi per la liquidazione dell'asse per conoscere se si debba accettare l'eredita' o ripudiarla e domandare la legittima, devono andare contro gli eredi stessi" (Vide also Camilleri vs. Sammut, 5.3.1920, Court of Appeal).

Another instance was that of a creditor of the deceased's estate who besides suing the heir sued also the legittimaries for any interest they might have. The Civil Court (19) decided that:

"Billi l-legittimarji ma humiex eredi, u kwindi huma ma humiex kontinwaturi tal-persuna tal-mejjet, l-azzjoni ghall-pagament ghandha tigi diretta biss kontra l-eredi, minghajr in-necessita' li jkunu prezenti fil-kawza l-legittimarji, b'mod li, jekk il-kreditur iharrek anki lil legittimarji, dawn ghandhom jigu liberati mill-osservanza tal-gudizzju bl-ispejjez kontra l-attur kreditur ... u ghalhekk hu biss ghandu jbati l-ispejjez taghhom".

Therefore, one can see that this rule does not

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(19) Collected Cases: Vol. XLIII, II, 834: 14.12. 1959, M. Attard vs. G. Meilak.

apply only to the heirs but at time, even creditors themselves may have to bear the judicial costs.

PERICULUM REI BEFORE ASSIGNMENT OF LEGITIM

Another practical consequence is that when the portion of legitim due to the legittimary is assigned to him, he has a right to find his portion of the property as the decujus had left it and the risk relating to this property falls on the heirs, except in the case of extraordinary damages for which he would not be liable at law (20).

A STRICT DIVISION BETWEEN THE STATUS OF HEIR AND THE STATUS OF LEGITTIMARY

Another important rule arising from the nature of the right of legitim is that the testamentary heir cannot demand the legitim instead of the inheritance, but he must first renounce to the inheritance and keep his portion of the legitim. So, when asking for the liquidation of the legitim due, if you happen to be a testamentary heir, you must prove that you have actually renounced to

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(20) Vide Collected Cases: Vol. XXXIII, I, 472 and also Mifsud vs. Mizzi supra (Court of Appeal: 14.12.1973.

the inheritance but reserved the legitim; if this is not proved, this action "li tkun imposta hazin, tibqa' intempestiva" (21).

Moreover, in another case Barron vs. Muscat (22) decided by the Civil Court on the 8th January 1935, it was decided that:

"Jekk min ghandu l-jedd ghal legittima jichad il-wirt li minnu gejja l-legittima, huwa jzomm id-donazjoni jew il-legat lilu mholli jekk ukoll dina d-donazzjoni jew dana l-legat jiswew aktar mill-legittima, sakemm b'hekka ma titmesx il-legittima li tisthoqq lill-haddiehor. Ghalhekk jista' jigi li, b'sahha ta' donazzjoni jew ta' legat, min jichad il-wirt jigi jkun ha iżjed minn min ikun laqa' l-istess wirt, u dana ta' l-ahhar ebda jedd ma jkollu li fuq hekka jitniffes sa kemm ma tkunx tnaqqset il-legittima li tisthoqqlu skond il-ligi".

Therefore, the heir who renounces to testamentary succession has to in his note of renunciation, reserve to himself the legitim or other portion of the estate

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(21) Collected Cases: Vol. XXXII, I, 423: Court of Appeal: 25th November 1946, M. Azzopardi vs. A. Mangion.

(22) Collected Cases: Vol. XXIX, II, 192.

which, by law, belongs to him. This right pertains to the legittimary only when, the heir has not accepted, whether expressly or tacitly, the inheritance which devolved on him.

> "L'accettazione e' tacita quando l'erede fa un atto che suppone necessariamente la sua volonta' di accettare l'eredita' e che non avrebbe il diritto di fare, se non nelle qualita' di erede".

Infact, in M. Ellul vs. F. Vella Zammit (23) delivered on the 29th October, 1913, the Civil Court decided that the judicial acts made by the plaintiff without any protests or conditions, constitute in themselves a clear acceptance of the testamentary dispositions made by her parents.

Moreover, in M.Ellul vs. J. Coleiro (24) it was stated by the Court of Appeal that it is now a well-established principle in our case law that in order to ask for the liquidation of an inheritance as a prior step towards its partition, it is necessary that the plaintiff be an heir, or at least a legittimary; so,

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(23) Collected Cases: Vol. XXII, II, 114.

(24) Collected Cases: Vol. XLIII, I, 197.

who has not yet decided whether to accept the inheritance, or to refute it and to accept instead of it the legitim, cannot make an action for the liquidation of the inheritance. This results from the fact that he can neither be considered an heir nor a legittimary (vide Vol. XXXI, I, 63; XXXI, II, 36; XXXII, II, 147). As for the legittimary, he cannot make the action before he has renounced to the inheritance in an express way as demanded by law (Section 901 Civil Code and vide Vols. XXXII, I, 423 and XXXVIII, I, 620.

As regards renunciation of the inheritance, it was correctly stated by the Court of Appeal in Azzopardi vs. Mangion (25) on the 25th November 1946 that:

> "Ir-rinunzja ghall-eredita' ma tistax tigi prezunta u ma tistax issir b'mod iehor hlief per mezz ta' dikjarazzjoni prezentata fir-registru tal-Qorti tal-Gurisdizzjoni Volontarja fil-Gzira fejn id-decujus kien joqghod".

Therefore, as can be seen, out of the nature of the right of legitim arise many important practical consequences which relate to different aspects of the subject.

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(25) Collected Cases: Vol. XXXII, I, 423.

CHAPTER 6

THE NATURE OF THE RIGHT OF LEGITIM IN FOREIGN LEGISLATIONS

The notion of legitim is not something exclusive to Maltese Law. There are numerous foreign Civil Codes which have analogous provisions. These are similar in the sense that they all seek to provide a certain amount of protection for persons who have the strongest claims over the estate of the decuius. It is when examining the exact nature of the right of legitim in various laws that dissimilarities may arise.

ITALY

The 1942 Italian Civil Code in Article 536 mentions the persons who are deemed to have a claim of legitim:

"Le persone a favore delle quali la legge riserva una quota di eredita' o altri diritti nella successione, sono i figli legittimi, gli ascendenti legittimi, i figli naturali e il coniuge.

Ai figli legittimi sono equiparati i legittimati e gli adottivi.

A favore dei discendenti dei figli legittimi o naturale, i quali vengono alla successione in luogo di questi, la legge riserva gli stessi diritti che sono

riservati ai figli legittimi o naturali".

Therefore, as in Maltese Law those having a right to the legitim are the legitimate children, legitimate ascendants, illegitimate children and the surviving spouse. One immediately notices that in Article 536 the Italian legislator uses the words "una quota di eredita'", that is 'a share of the inheritance'. Infact, the nature of the right of legitim in Italian law was held to be as follows: "La legittima e' quota di eredita' salva l'ipotesi dell'Art. 540" (Cass. 14 dicembre 1944, n. 481, Foro it., Rep. 1943-45, voce Successione, n. 69). Article 540 refers to the usufruct of the surviving spouse who according to the "Codice Civile Annotato con la Giurisprudenza della Corte Costituzionale della Cassazione e della Magistrature Superiori" (1) is a legatee. It is held that "Il conjuge superstite e' un legatario ex lege con usufrutto diffuso pro quota su tutto il compendio ereditario e sui tutti i singoli beni che ne fanno parte fino a quando non sia stato concentrato su beni determinati o sodisfatto o commutato".

In the Italian juridical system the main guideline on which succession occurs is the will of the deceased

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(1) A. Torrente, G. Pescatore, C. Ruperto: p. 339.

which is considered as the expression of human volition which "la successione legittima" has the function of supplementing the will where this is lacking. This "necessary" succession limits and corrects the testamentary volition in as much as it puts a limitation on the power of disposing mortis causa but it does not imply a title over the property. Therefore, the legittimary does not participate in the co-ownership of the inheritance (2). One case decided by the Corte di Cassazione (11 marzo 1966, n. 699, Giur. it., 1966, I, 1, 1492; and repeated in Cass., 11 dicembre 1971, n. 3605, Giust. civ. Mass. 1971, 1947) stated that when the decuius has distributed by way of testamentary dispositions, whether by universal or singular title, of all his property, the legittimary does not participate in the co-ownership of the inheritance ("communione ereditaria") by the simple fact of the opening of succession, because he has not been called into the succession, and the dispositions, even though impinging on the reserved portion, remain valid until such time as they are impugned by the action of abatement. The legittimary, until the action has been exhausted, can neither realise his right on the

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(2) Codice Civile Annotato, p. 337.

remaining property, nor demand a portion of the same property. Thus, it can be seen, at the very outset that the nature of this institute in Italian law is that of "portio hereditatis".

In Roman Law, in the pre-Justinian period, the amount of legitim due to descendants was fixed by law at a quarter of the deceased's estate. The Italian Code of 1865 adopted the same system, but the 1942 Code now states that one-half of the patrimony of the parent is reserved in favour of the legitimate child if there is only one child, and two-thirds if there are more than one - Art. 537 (3). Infact, in Maltese Law the portion is of one-third or one-half part of the deceased's property depending on whether the children are four or more.

Again, in Art. 538 of the Italian Civil Code the legitim in favour of ascendants, when the deceased has no children, is of one-third of the patrimony. This is similar to Section 656 of the Maltese Civil Code.

As regards the nature of the right of legitim Vittorio Polacco in his book "Delle Successioni"(4)

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(3) The Italian Civil Code: Translated by M. Betramo, G. Longo, J.M. Merryman, p. 153.

(4) Vol. 1,(1928), p. 234-235.

states:

"Nel diritto comune si agitava la questione se la legittima avesse natura di quota bonorum che non attribuisce carattere de erede al legittimario avente quasi una ragione di creditor, o se invece fosse una vera quota di eredita'. Secondo il diritto Justinianeo pare piu fondata la prima opinione, donde deriva,fra l'altro, la consequenza che l'obbligo di rispettarla si consideri solo quantivamente e non qualitativamente. Esplicita nel senso che la legittima non fosso quota ereditaria era la citata legge toscana del 15 novembre 1814 (Art 17 sotto il Titolo della legittima) benche' per verita' non tutti ne applicasse i corollari. I codici italiani preesistenti al nostro non decidevano la questione. Si leggeva bensi' nel Codice parmense (Art. 649) e nell'albertino (Art. 725) che la legittima e' dovuta in piena proprieta', ma non era detto a qual titolo, come fa invece, e nel senso diamentralmente opposta alla legge toscana, l'Art. 808 del nostro Codice (that is, the 1865 Italian Civil Code) il quale non si accontenta di dire che essa e' dovuta in piena proprieta', ma commincia dall'affermare che "la porzione legittima e' quota di eredita'". Il che e' perfettamente consentaneo

al carattere di assegnazione legale di una quota parte del patrimonio".

From the nature of the legitim being "portio hereditatis" derive many consequences amongst which are that the descendant with a right to a legitim must follow the rules of collation and imputation and the legittimary is the person obliged to pay off "pro rata" the debts of the estate. This is one of the most obvious differences between Italian and Maltese law because under the latter the legittimary is not burdened with any debts of the estate but it is only the heirs who have to bear such debts.

In Roman Law, in the Law of Justinian, the legitim was a right of succession by universal title - the deceased could only institute the person entitled to the legitim as his heir or disinherit him expressly; again, since by the law of Justinian children could no longer be excluded or disinherited without a lawful cause, the testator could not but institute them as his heirs at least in respect of the legitim. This system was followed by the 1865 Italian Civil Code wherein Art. 808 stated:

"La porzione legittima e' quota di eredita': essa

e' dovuta ai figli, discendenti o ascendenti in piena proprieta', e senza che il testatore possa impervi alcun peso o condizione"..

Under our law, on the contrary, the legitim is a "pars bonorum" and is, infact, as has already been seen, defined by Section 652 as "a portion of the property of the deceased which is saved by law to ..."(5).

Now, as regards the portion due to the surviving spouse the prevailing opinion is that it is "pars hereditatis". Article 540 of the 1942 Code states:

"A favore del coniuge e' riservato l'usufrutto di due terzi del patrimonio dell'altro coniuge ...".

The text-writer Antonio Cicu states that:

"... il coniuge, in quanto chiamato in una quota d'usufrutto, non sia da considerarsi come legatario dovendo piuttosto applicarsi le norme proprie della vocazione ereditaria. Aggiungiamo a quanto allora osservammo, che se, con la dottrina dominante lo considerassimo legatario, la rinunzia al suo diritto non dovrebbe esser fatta nelle forme prescritte per l'erede, e richiederebbe o meno l'atto scritto e transcrizione

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(5) Stenciled Notes: Prof. G. Caruana, p. 1,000.

secondo che nell'asse ereditario figurassero o meno beni immobili o ad essi assimilati. Ognun vede quanto cio' sarebbe incongruo, e quanta incertezza ne deriverebbe per i terzi circa la sussistenza o meno del diritto reale d'usufrutto del coniuge. E ci pare debba applicarsi anche al coniuge non norma per cui il legittimario che chieda la riduzione di donazioni o legati fatti a non coeredi debba accertare con beneficio d'inventario (Art. 564)"(6).

Polacco continues to state that this usufruct is not lost by the surviving spouse on remarriage, except in case of a widow remarrying before the expiration of ten months from the date when the marriage was dissolved. The same writer also states that this usufruct devolves on the surviving spouse by title of succession and that such spouse continues to enjoy it even after the children have attained majority or have been emancipated (7).

In Maltese law the portion reserved in favour of the surviving spouse is always lost on remarriage.

As for illegitimate children the Italian Civil Code

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(6) Successione Legittima E dei Legittimari, p. 117.

(7) Delle Successioni - Vol. I. (1928), pages 239-40.

in Art. 539 reserves in their favour when they are acknowledged one-third of the patrimony of the parent if he leaves only one natural child, or one-half if there are more than one natural child.

Therefore, this right of the illegitimate children together with the other reserved portions abovementioned, also partakes of the nature of "portio hereditatis", however in the case of illegitimate children, the legitimate children can pay them off in cash or in immovable property contained in the inheritance, upon a just valuation (Art. 541).

FRANCE

Under French Law the right reserved in favour of certain relatives are termed "succession a' l'encontre du testament", that is, succession against the will. According to the French Civil Code there are three categories of reserved portions and these are, firstly the portion reserved for legitimate descendants, secondly that reserved for illegitimate descendants and thirdly the portion due to legitimate ascendants. One here immediately notices that in Frech Law, contrary to our law, the surviving spouse has no right to a reserved portion:

"... la presence du conjoint, ... n'est pas encore en droit moderne un reservataire ..." (8). The reason given for such an exclusion is that since the married couple have a community of property it is deemed that the surviving spouse who has his or her share of such community is sufficiently satisfied (Le Balle, 483-4).

In French law the nature of these reserved portions is of "portio hereditatis" and Le Balle expressly states:

"la reserve moderne a' l'exemple de la reserve contumiere et a' la difference de la legitime, ne confere pas au reservataire un droit distinct de celui d'heritier ..." (Le Balle, 480). This means that the nature of the reserve is equivalent to the institution of an heir and the same author adds:

"les Articles 913 et 915 indiquent incidemment que la parte de reserve est une parte de la succession, donc une parte hereditaire; pour etre reservataire, il faut etre heritier ...". Article 917 is even more specific because it subordinates the status of a legittimary to that of an heir and that it is only in exceptional cases

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(8) Cours De Droit Civil, Licence 4e annee (1965/66), M.R. Le Balle, p. 483.

that such persons have an option. Article 917 lays down:

"Si la disposition par acte entre vifs ou par testament est d'un usufruit on d'une rente viagere dont la valeur excede la quotitc disponible, les heritiers au profit des quels la loi fait une reserve, auront l'option, ou d'executer cette disposition, ou de faire l'abandon de la propriete de la quotite disponible". This Article is equivalent to our Section 358(1) which deals with the Cautio Socinii vel Gauldensis.

The legitim, therefore, being a portion of the inheritance, makes it impossible for the legittimaries to renounce the inheritance and preserve their reserved portion. This is because the legittimary is considered as an heir (9). The position here is diametrically opposed to the situation obtaining in Malta where it is possible for the heir, even though being specifically instituted in a will, to renounce the inheritance and preserve his right of legitim.

Toullier (p. 45 para. 108) clearly defines the

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(9) Diritto Civile Francese, C.B.M. Toullier (1853), p. 44, para 106.

nature of these reserved portions in the following terms:

"E' dunque una massima certa che la riserva e' una porzione ereditaria, e che il diritto alla riserva e' un diritto ereditario, un diritto annesso alla qualita' di erede".

As regards the ascendants the question arises whether they have a reserved portion when they are not called to participate in the inheritance. This doubt arises because when establishing the portion due to ascendants in general article 915 does not exclude ascendants when the decuius has brothers and sisters or their descendants. However, these ascendants are excluded because "... i beni riservati a vantaggio degli ascendenti, perveranno loro nell'ordine con cui la legge li chiama a succedere. Dunque non perviene loro alcuna cosa se essi non sono chiamati a succedere ... Questo principio si estende anche agli ascendenti del primo grado. In fatti, i genitori non hanno alcuna riserva su' beni dei loro figli quando costoro lasciano discendenti perche' allora i genitori non sono chiamati a succedere" (Toullier, p. 48, para. 114), that is, ascendants must be in the position of heirs in order to take the reserved portion.

According to Article 913(2) of the French Code which was introduced by a law dated 25th March, 1896 the law was brought into line with jurisprudence. Before this date there was no express provision regarding illegitimate children but the Courts tended to regard such children as having a right to a reserved portion. Through this 1896 law natural children legally acknowledged are entitled to a portion of what they would have taken had they been legitimate. The portion is calculated by taking into account the proportion between the portion due to a natural child in case of intestate succession and that which he would have received in a similar case had he been legitimate (10).

GERMANY

Like most other laws, German law provides that certain near relatives of the testator are entitled to receive from the heirs certain benefits, if they have not been appointed as heirs themselves. Therefore, one immediately notices that their right is not of the nature of "pars hereditatis" as it is the heirs who are obliged, at law to meet the benefits reserved by law, to near relatives. However, this is only so, as far the relatives have not

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(10) The French Civil Code - Henry Cachard, p. 264.

been appointed heirs.

German law has adopted a different course from many other continental laws in that the relatives passed over in the testator's will do not themselves become heirs against the will of the testator. Unlike French, Swiss and Italian Law, German law does not prevent the testator from disposing by will of his entire estate. However, the descendants, parents and and spouse of the testator, provided they would be intestate successors had not the testator made a will excluding them from succession, are entitled to the Pflichtteil (compulsory portion), if in consequence of the testator's will they are excluded from participaing in the succession (11). Therefore, the nature of the legitm in German law is in the nature of a right of credit in favour of the descendants, parents and surviving spouse of the testator, and against the heir. Infact, the "Pflichtteil" is a right to demand from the heir or heirs the payment of a sum of money equal to one-half of what would have been the intestate share of the excluded relative if there had been intestate succession of the testator (Section 2303(1) of the

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(11) Manual of German Law - Cohn, Vol. 1, p. 282.

German Civil Code).

Therefore, this right gives no direct participation in any of the assets forming part of the estate, in other words, it is not in the nature of pars bonorum as is the case in Maltese law. The one entitled to this right can merely demand that the heirs pay him or her a sum of money. This is consequently one of the debts which the heir has to meet.

Descendants have a right to a compulsory portion to the extent only to which they would have been entitled to succeed "ab intestato" to the estate. Where there is no such title there is no right to a compulsory portion.

If a party is entitled to a compulsory portion but is appointed heir to a portion which is smaller than one-half of his or heir intestate share, he is entitled to a compulsory portion of an amount sufficient to make up the difference (Section 2305 German Civil Code). Also, the Code protects a person entitled to a compulsory portion who has been appointed as heir but whose share is burdened with restrictions (Section 2306).

The compulsory portion is calculated according to the value of the estate at the time of the testator's death (Section 2311). According to Section 2317(2) the

compulsory portion can be transferred both inter vivos and by way of succession. This principle is not to be found in Maltese law because with the exception of marriage contracts in which stipulations on future successions are permitted, the legitim in Maltese law is always due at the opening of succession. Perhaps a similarity can be drawn from the fact that although the legitim in our law cannot be transferred during the testator's lifetime yet the law itself in Section 657(4) states that "The person to whom the legitim is due shall impute to it all such things as he may have received from the testator ...". However, since German law looks at the whole question from the point of view of a sort of legal payment, such payment is allowed to be made at any time.

AUSTRIA

The Austrian Civil Code (12) in Article 762 under the title of "Necessary heirs", states that:

"The testator is obliged to provide in his last disposition for his children or, in case there are no children, his parents". The following article defines

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(12) Vide: The General Civil Code of Austria, Paul L. Baeck, pages 141-7.

the words 'children' as including also the grandchildren and the great-grandchildren, and 'parents' as inclusive of all the grand-parents. Furthermore, this Article 763 also adds:

"There is no distinction in this regard between ... legitimate and illegitimate, provided a defined right of intestate succession exists on behalf of such persons".

Therefore, it can be seen at the very outset that those having a right to the compulsory portion (Pflichtteil) are the legitimate children, illegitimate children and the ascendants, and there is no mention whatsoever of a portion pertaining to the surviving spouse. As a matter of fact reference to the surviving spouse is only made in the last article 796 which specifically states that:

"A spouse is <u>not entitled</u> to a compulsory portion, but as long as he or she does not remarry he or she is entitled to a decent support, unless this support is provided by his or her intestate portion or by another mode of maintenance set forth in an agreement or a last will ...".

Now, according to Art. 764 persons having a right to the compulsory portion are called with respect

thereto, the 'necessary heirs'. Moreover, these relatives are entitled to claim a 'part of the inheritance'. This all goes to show that in Austrian law, the nature of their reserved portion is that of 'pars hereditatis' because the 'necessary heirs' get their portion of legitim from the inheritance and do not have a right to a portion of the property of the deceased, as is the case in Maltese Law.

Furthermore, article 774, entitled "How the compulsory portion shall be left", conveys this idea even further when it states that:

"The compulsory portion may be left in the form of a hereditary share or a legacy without expressly designating it as the compulsory portion, but it must remain entirely free for the necessary heir". Therefore, the Austrian Civil Code even goes so far as to call the legittimary a 'necessary heir' thus leaving no space for doubt about the real nature of the right of legitim which undoubtedly partakes of portio hereditatis.

Moreover this latter article holds the same rule as Maltese law that the reserved portion is due in full ownership and unburdened: "Every limiting condition or encumbrance upon it is invalid ..." (Paul L. Baeck, 142).

Finally, in Art. 783, it is stated that in case the hereditary or compulsory portion due to a necessary heir has not been completely allotted to him, both the appointed heirs and the legatees must contribute proportionately to its complete discharge.

SCOTLAND

According to Scottish law one of the branches of succession concerns the legal rights conferred on certain survivors by law independently of the wishes of the deceased, but, in this sphere, heritable and movable property have to be considered separately. Thus, "Legitim or bairn's part is the legal right of children and more remote issue to a share in a deceased parent's moveable estate - but not heritable securities (13) or real burdens on land (14). It is exigible from the estate of each parent in turn and it does not matter which parent predeceases the other (15). The claim is of 1/3 of the whole free movable estate of the deceased if there is also a surviving spouse claiming "jus relicate vel relicti", or to ½ if there is no surviving spouse or

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(13) Titles to Land Consolidation (Sc.) Act, 1868, S.217.

(14) Conveyancing (Sc.) Act, 1874, S. 30.

(15) "Principles of Scottish Private Law," "Vol. 2, David M. Walker, page 1754.

or the obligation has already been discharged.

According to the Principles of Scottish Private Law (p. 1754), "the claim is a debt due by the entire free movables and not a burden on any part thereof more than on any other (Macdougal v. Wilson, 1858, 20 D. 658), but is postponed to the deceased parent's death, to death-bed, funeral and executry expenses and, in case of total or partial intestacy, to the claim of the surviving spouse".

Therefore, it is clear that the nature of the right of credit in Scottish law partakes of a right of credit - a debt due by the entire free movables - which claim is satisfied after the debts just mentioned have been paid off. Infact, one having a right to the legitim is not entitled to demand any particular part of the deceased's movables in satisfaction of his claim. Therefore, the nature of this right is definitely not that of "pars bonorum". As a matter of fact, in Scottish law, the movable estate of the deceased is called the 'fund' which expression when considered in combination with the fact that the estate, on the deceased's death, passes into the hands and is administered by an executor who is responsible to settle all debts including the

legitim, one cannot but conclude that the nature of this right is that of a right of credit. Thus, the value of the 'fund' has to be ascertained at the time of death.

Entitled to claim the legitim are the children of the deceased, whether legitimate, illegitimate (16), posthumous or adopted (17), and the surviving spouse. Here, it must be pointed out that the amount which the surviving spouse is entitled to receive is payable from heritage and movables in proportion to the respective amounts of those parts of the intestate estate. Therefore, the portion due to this realtive is a debt on the inheritance and therefore the nature of this portion is that of "pars hereditatis" while, as has already been pointed out, the other portions due partake more of the nature of a right of credit.

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(16) Before the Law Reform (Misc. Prov.) (Sc.) Act, 1968, S. 2, illegitimate children did not have an equal claim.

(17) Succession (Sc.) Act, 1964, S. 23(1); and also Law Reform (Misc. Prov.) (Sc.) Act, 1966, S. 5.

If those entitled are related to the deceased in the same degree the division is 'per capita', otherwise it is 'per stirpes'. Stepchildren have no claim. As this right vests in the children (besides the surviving spouse) because they outlive their parent, 'the parent can neither deprive them of it nor even apportion it among them against the equal distribution which the law enjoins" (Encyclopaedia of the Laws of Scotland, Vol. 9, p. 133, para. 305).

Again, in "Cairns v. C's Trs.11(1916,I S.L.T. 42) it was decided that an heir at law who had been disinherited was entitled to claim the legitim. This principle, which is not in conformity with the Maltese provisions, only goes to show that the nature of the Scottish institute of legitim does not partake of 'pars hereditatis'. However, this is not a reference to the surviving spouse.

Moreover, the Enceclopaedia of the Laws of Scotland (Vol. 9, p. 134, para. 307) states that: "The fund from which the legitim is payable is the whole movable estate ..." This proves further that the legitim is a debt and is due to the claimant in cash, otherwise the word "payable" would not have been used. Furthermore, the same text at para. 308 states:

"The amount of the fund from which the legitim is payable ... ".

The amount of the legitim is determined by the value of the free movable estate of the parent, to be ascertained at the date of his death. The debts deducted before the legitim is computed include provisions to spouse and children by antinuptial contract, funeral expenses, and the expenses of confirmation. However, "the party entitled cannot demand a share of the "ipsa corpora" of the deceased's estate (Encyclopaedia, p. 135 para. 309) - thus, it is not in the nature of 'pars bonorum'.

SPAIN

The Spanish Civil Code, under the heading "De las legitimas", starts off with a definition of legitim as a portion of those goods which the testator cannot dispose: "Legitima es la porcion de bienes de que el testador no puede disponer ...". Up to this point one may conclude that Spanish law firstly provides for a non-disposable portion and on the surface it seems that the law regards the legitim as "pars bonorum" because of the words "porcion de bienes". However, the same section adds: "... por haberla reservado la Ley

a determinados herederos, llamados por esto herederos forzosos" (18). This goes to show that Spanish Law undoubedly looks at the legittimaries in the light of heirs.

These necessary heirs are of three grades of relationship: There are firstly the legitimate children and descendants; in their absence, the necessary heirs would be the fathers and the legitimate ascendants; and lastly come the surviving spouse and illegitimate children lawfully acknowledged (Medina and Maranon, p. 336, para. 807).

All such legittimaries are considered as heirs and the surviving spouse, although her share of the reserve can be the usufruct of a portion, is also considered an heir.

The text-writers Medina and Maranon remark that such usufruct invests the surviving spouse "del caracter de herederos 'sui generis', similar al acreedor o legatario 'ex lege' ..." Moreover, it is also stated that: "El conyuge viudo tiene la cualidad de heredero forzoso con derechos hereditarios que son independientes

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(18) Leyes Civiles de Espana, Medina y Maranon, Vol. II (1964), p. 335, para. 806.

de su institucion como heredero en el testamento del causante". (19). There is, therefore, no doubt that even the surviving spouse is considered as an heir and thus takes his or her portion as 'pars hereditatis'.

Now, according to Article 958 the heirs can assign to the surviving spouse some life annuity or other income or capital in satisfaction of his or her usufruct and until this is done, all the property comprised in the estate will remain affected in order to bear the payment of usufruct to which the surviving spouse is entitled (Medina and Maranon, p. 348, para 839).

The legitimate children can satisfy the portion due to the illegitimate children in cash or in other property of the estate upon a just valuation. This seems to indicate that although all legittimaries are considered as heirs, the rights of some of them may be paid off just as though they were simply rights of credit.

POLAND

In the Polish law of succession, the "heredes necessarii" are the descendants, the surviving spouse and the parents of the 'de cuius' - but only if they

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(19) p. 336, para. 807, footnote (3).

would inherit "ab intestato" under the conditions prevailing at the time of the opening of succession. These relatives have their shares secured by law (Art. 145).

Zygmunt Nagorski, Sr. (20) states:

"Such a successor takes a part of the estate irrespective of whether the "de cuius" left a will or died intestate. The portion secured by the law ('zachowek'), is equal to one half of the value of what the heir would have received 'ab intestato' (Art. 151)". The wording of this provision is contradictory: the word "successor", which is here also used in conjunction with the case where the legittimary is excluded from taking a part of the inheritance, seems to indicate that the law considers the legittimary as an heir; however, the phrase which follows - "takes a part of the estate ..." points to the nature of the right of legitim as being that of 'pars bonorum". So, is the legittimary an heir or not ? The same writer later states that:

"The heres necessarius" does not take part in the distribution of the estate; he has only a claim against the acutal heirs for the payment of the value of this secured portion".

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(20) Law in Easter Europe, Vol. V, p. 194.

Therefore, the nature of the right of legitim in Polish Civil Law partakes neither of 'par bonorum' (because the legittimary does not participate in the estate's distribution), nor of 'pars hereditatis' (because the legittimaries have to direct their claim against the actual heirs and so cannot be heirs), but it is simply a right of credit (because they can claim payment of the value of their reserved portion from the heirs).

The period allowed to the legittimaries to claim their reserve is shorter thanin Maltese Law - in fact, in fact, in polish law the claim expires five years from the opening of the succession or in the case of testamentary heirs 5 years from the publication of the will (Art. 159).

The compulsory portion cannot be limited or reduced by a condition or time-limit, nor can it be charged with the payment of a bequest or implementation of an order (Art. 155 para. 1). This provision finds its counterpart in our law.

Again, in Art. 52(1) the "persons entitled to a share secured by law", and these include in particular the legittimaries, are referred to as "the creditors"

of the estate", thus indicating further that the nature of this institue in Polish Law partakes of a simple right of credit which pertains to the legittimaries and which they can exercise within the period of five years.

CZECHOSLOVAKIA

According to Czechoslovak law "the testator is required to allocate the value of specific share of his estate to certain legal heirs" ('forced heirs') (21). So, here, we find that the testator is obliged by law "to allocate the value of specific shares" and is not to leave a portion of the shares of his estate. Thus, one realises that the reserved portion, or rather, that which the testator is legally obliged to allocate, does not partake of the nature of 'pars bonorum', but, judging only from the words "to allocate the value of specific shares", the nature of this obligatory share in Czechoslovak law seems to be more of a right of credit. However, the phrase 'legal heirs' (or 'forced heirs') is enough indication that the legittimary is considered as an heir and that, therefore, the nature of the right of 'portio legitima' partakes also of 'pars hereditatis'.

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(21) Law in Eastern Europe, Vol. V: 'Poland', J. Nemec, p. 132.

Therefore, the nature of this right in Czechoslovak law, besides being a right of credit, partakes also of "portio hereditatis".

RUMANIA

What has been stated about the nature of the right of the reserved portion in Czechoslovak Law applies also to Rumanian Law.

ENGLAND

According to E. Jenks "there is now no institution in English law analogous to the 'legitim' under which a part of the property of the testator is reserved, notwithstanding any disposition of it by his testament, for the members of his family" (22). However, "English Law has tardily and to a very limited extent recognised the duty of a testator to provided for his family" (23).

There are two ways of restricting the testator's testamentary freedom. A legal system may make some overriding provisions for relatives either on the basis of a fixed entitlement (as is the case in our law), or in the discretion of the Court. This latter method is

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(22) A Digest of English Civil Law, p. 1152.

(23) Lee, p. 217.

the one adopted by the United Kingdom.

Infact, the keynotes of the Family Provision Act, 1966 are:

(a) to give the Courts a discretion;

(b) to award maintenance;

(c) for specified and insufficiently provided for dependants;

(d) out of income.

Maintenance may only be demanded after the making of an application and for this to succeed the applicant must satisfy the requisite conditions.

The wishes of the deceased are irrelevant, but the Court is empowered by Section 1(7) to "have regard to" the deceased's reasons for making the will which he made, or for not making any, or any other, provision for the applicant (24). Evidence of these reasons may be obtained from dated writings signed by the deceased or from the deceased's oral statements (25).

Those entitled to make an application include the surviving spouse, the son or daughter, mistresses, bastards and other dependants. The son must prove that

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(24) The Law of Succession, A.R. Mellows, p. 201.

(25) Re Borthwick, Borthwick v. Beauvais, (1949) Ch.395.

he is lawful, in the same way as a daughter, except that, if the parent died on or after 1 January 1970, he also has a "locus standi" (which is one of the conditions the applicant has to fulfill in his application) if he is illegitimate (26).

Maintenance, in English Law, does not mean mere subsistence. The appropriate standard is to be considered in the light of previous maintenance of the applicant (27). Wynn Parry, J. in Re Inns, Inns v. Wallace, (1947) Ch. 576, stated "what would be a reasonable provision for the widow of, for instance, a farm labourer would, in ordinary circumstances, be an unreasonable provision for the widow of a wealthy man".

SOUTH AFRICA

In South Africa, where the legitim has been abolished by statute, the Courts none the less regard the duty of educating and maintaining minor children as "a debt resting upon the estate" (28). So, here the position is similar to that in English Law with the difference that whilst according to South African Law minor children

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(26) (1955) 3 All E.R. 248.

(27) Basch v. Pepetual Trustee Co., Ltd., (1938) A.C.463.

(28) Lee, p. 41.

have a right for their education and maintenance from the assets of the estate being "a debt resting upon the estate", in English Law, the maintenance allowance granted is not due to the relatives above-mentioned by right, but it depends on the Court's discretion after an application by the relative concerned. Another difference is that whereas the English Law Family Provision Act is applicable to the surviving spouse, descendants and other descendants, the South African provisions only deal with the maintenance of minor children.

However, both the English and South African systems on this matter result in a right of credit against the estate of the deceius. However, in English Law, the allowance becomes really a right of credit when the Courts approve of it.

APPENDIX

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Mifsud v. Mizzi	14.12.1973	-	

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